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Article 6

Admissibility of Testimony Coerced by a University

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NOTES

ADMISSIBILITY OF TESTIMONY COERCED BY A UNIVERSITY

In *Furutani v. Ewigleben*[1] five students at the College of San Mateo, a California state junior college, were charged with unlawful conduct during a campus demonstration and were suspended pending determination of the charges. Subsequently, criminal charges based upon the same acts were brought against the students in the state courts. Since the college disciplinary proceedings were to be conducted prior to the criminal trials, the students moved for injunctive relief in the form of an order postponing the college proceedings until the trials had been completed. They argued that they might be forced to testify at the college hearings under threat of expulsion, and that the testimony so obtained would then be introduced in the criminal trials in violation of their fifth amendment privilege against self-incrimination.[2]

Students' fears in this regard are well-founded. For example, if a student were forced to admit to a college disciplinary board that he had carried an unregistered firearm during a demonstration, and if this evidence were admissible in a criminal trial, the prosecutor would have only to call the members of the disciplinary board in order to assure a conviction.

Whether testimony given under threat of expulsion is admissible in a criminal trial must be considered in two contexts. Students in public universities are protected by the fourteenth amendment.[3] Stu-

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1 297 F. Supp. 1163 (N.D. Cal. 1969).

2 *Id.* at 1164-65. The court denied the motion for an injunction, stating that the students could invoke Garrity v. New Jersey, 385 U.S. 493 (1967), to exclude such testimony from a criminal trial. For a discussion of *Garrity* see note 7 *infra.*

3 The federal courts are unanimous in finding state action in the activities of public universities: Powe v. Miles, 407 F.2d 73, 82-83 (2d Cir. 1968) (regulation of discipline by Dean of Students in New York State College of Ceramics held to constitute state action); Wright v. Texas Southern Univ., 392 F.2d 728, 729 (5th Cir. 1968) (due process requirements satisfied where students given opportunity to make defense and to have such a hearing as would do justice by both the students and the university); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961) (due process held to require notice and some opportunity for hearing before students at Alabama State College could be expelled for misconduct); Esteban v. Central Missouri State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967) (due process held to require that in a disciplinary hearing students be permitted to have the assistance of counsel, be furnished with written charges, have the right to be heard, and have the right to cross-examine); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 402 (N.D. Fla. 1963) (disciplinary procedures that gave students notice, explanation of charges, and an opportunity to be heard held consistent with due process requirements).

dents in private universities[4] are not adequately protected by the state action approach, but a more fundamental principle may bar admission of their coerced statements.

I

THE FOURTEENTH AMENDMENT AND THE PRIVATE UNIVERSITY

A. *Coercion in Non-Criminal Proceedings*

The protection granted by the fifth amendment is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[5] The term "penalty" is not restricted to imprisonment or fine, but includes any sanction that makes the assertion of the privilege "costly."[6] Thus threats of job forfeiture[7] and of disbarment[8] have been held unconstitutional forms of compulsion. The threat of expulsion from a college or university is also a powerful form of compulsion. As the Fifth Circuit said, "no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value."[9]

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4 For the distinction between public and private universities, see pages 437-38 *infra*.

5 Malloy v. Hogan, 378 U.S. 1, 8 (1964).

6 Spevack v. Klein, 385 U.S. 511, 515 (1967), *quoting* Griffin v. California, 380 U.S. 609, 614 (1965).

7 Garrity v. New Jersey, 385 U.S. 493 (1967). Police officers under investigation for alleged fixing of traffic tickets were informed of their right to remain silent but were warned that they would be subject to dismissal if they did. The officers answered the questions put to them. Over the officers' objections, the answers were then used to convict them of conspiring to obstruct the administration of the traffic laws. The Supreme Court reversed the convictions, holding that the choice between job forfeiture and self-incrimination was an unconstitutional form of compulsion.

8 Spevack v. Klein, 385 U.S. 511 (1967). In this case, the Court stated that the privilege against self-incrimination is to be widely applied. It pointed out that the privilege had always been given a "liberal construction" and added that there was "no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." *Id.* at 516.

9 Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961). Although the court was concerned with a public institution, the considerations it deemed important (the difficulty that a student expelled from one university would have completing his education at that or any other university, and the consequences that this would have for his later life) are equally applicable to private universities. In Sogliu v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), the court took notice that

> in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtainiug academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding.

Id. at 988

Coercion of testimony in a non-criminal proceeding has been held a violation of the fifth amendment privilege where the testimony so obtained might be damaging in a subsequent criminal action.[10] In *Blau v. United States*[11] appellant, a witness before a federal grand jury, was held in contempt following her refusal to answer certain questions concerning the Communist Party of Colorado. Reversing the conviction, the Supreme Court held that it was immaterial whether the answers to these questions would, by themselves, have supported a criminal conviction under the Smith Act. The important consideration was that the admissions "would have furnished a link in the chain of evidence needed in a prosecution . . . ."[12] Thus it is not necessary that the person claiming the fifth amendment privilege be under indictment or even be asked questions which, if answered, would be sufficient to sustain a conviction; the only requirement is that the answers could be part of the evidence against the person being questioned in a subsequent criminal action.

B. *The Requirement of State Action*

It is well established that the fourteenth amendment—the link between the fifth amendment and the states[13]—applies to tax-supported state colleges and universities.[14] These institutions have their origin in the legislature and are supported by taxes and controlled by the state.[15] This control, which is often exercised by a board of regents elected by the voters of the state, extends to every facet of university activity.[16] Campus disorders are not limited to public institutions, however, and it is thus important to consider whether the state action concept applies to private universities. Since these institutions are generally

10 Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (administrative hearing); Emspak v. United States, 349 U.S. 190 (1955) (legislative investigation); Quinn v. United States, 349 U.S. 155 (1955) (legislative investigation); Rogers v. United States, 340 U.S. 367 (1951) (grand jury); Blau v. United States, 340 U.S. 159 (1950) (grand jury). *See also* the recent Supreme Court rulings that prosecutions under various registration and tax statutes are barred when compliance with the statute would subject the defendant to the risk of self-incrimination: Leary v. United States, 395 U.S. 6 (1969) (marijuana tax and registration statute); Haynes v. United States, 390 U.S. 85 (1968) (firearms taxation and registration statute); Grosso v. United States, 390 U.S. 62 (1968) (wagering excise tax statute); Marchetti v. United States, 390 U.S. 39 (1968) (wagering tax and registration statute).

11 340 U.S. 159 (1950).

12 *Id.* at 161.

13 Malloy v. Hogan, 378 U.S. 1 (1964).

14 Note 3 *supra.*

15 *See, e.g.*, N.Y. EDUC. LAW § 352 (McKinney 1969).

16 *See, e.g., id.* §§ 353-55(a).

not controlled and supported wholly by the state,[17] a finding of state action must rest on other factors.

There are three principal arguments for the contention that state action is present in the activities of private educational institutions: governments regulate standards of education even in private universities; private universities have direct financial and other ties with government; and education is a public function, making the administrators of all universities subject to the fourteenth amendment.

1. *Regulation of Education Standards*

Whether government regulation of educational standards makes acts of the school acts of the state was considered recently by the Second Circuit in *Powe v. Miles*.[18] There, four Alfred University students participated in a demonstration on the football field during a ROTC ceremony.[19] Having refused to obey an order by the Dean of Students to cease their activities, the students were suspended for two semesters.[20] The students then brought an action in federal district court. Alleging violations of the Civil Rights Act, they invoked the court's jurisdiction under 28 U.S.C. § 1343(3)[21] and demanded temporary and final injunctions compelling the University to reinstate them.

17 *See, e.g.*, the Bylaws and 1967-68 financial report of Cornell University. In the fiscal year covered, public appropriation constituted only 6/10 of 1% of the total income for the privately endowed colleges. In addition, of the 39 voting members of the Board of Trustees, only five are appointed by the state. For a general discussion of the legal distinctions between public and private universities, see 15 AM. JUR. 2d *Colleges & Universities* §§ 16, 17 (1964).

18 407 F.2d 73 (2d Cir. 1968).

19 Alfred University is a private institution with four colleges: the Liberal Arts College, the School of Nursing, the Graduate School, and the New York State College of Ceramics. The four students were enrolled in the Liberal Arts College, which was treated as a private institution. Three other students were also involved in the demonstration, but they were enrolled in the State College of Ceramics, which was treated as a public institution. For information on the status of the State College of Ceramics as a "contract college," see N.Y. EDUC. LAW §§ 350(3), 352(3), 355(1), 357 (McKinney 1969). *See also* Powe v. Miles, 407 F.2d 73, 75 (2d Cir. 1968).

20 Initially, the students were brought before a faculty-student review board which recommended that they be separated from the University. This was later modified by the University President to the two-semester suspension. Powe v. Miles, 407 F.2d 73, 79 (2d Cir. 1968).

21 This section provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. § 1343 (1964).

In support of their contention that the disciplinary proceedings involved state action, the students pointed out that New York regulates educational standards in private colleges and universities.[22] The court replied that, in order for state action to be present,

> the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. . . . [T]he state action, not the private action, must be the subject of complaint.[23]

Although seemingly persuasive, this argument is problematic. In *Cooper v. Aaron*[24] the Supreme Court was concerned with the actions of state officials in Little Rock, Arkansas. After a troubled school year following the *Brown v. Board of Education*[25] decision, officials suspended the city's desegregation plan for two and one-half years. In

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22 *See, e.g.*, N.Y. EDUC. LAW § 207 (McKinney 1969) (power of State Regents to make rules in order to carry out educational policy of the state); *id.* § 214 (powers of Regents extend over all secondary and higher educational institutions now in existence or to be incorporated in the state); *id.* § 215 (power of Regents to require reports demonstrating compliance with such rules); *id.* § 216 (power of Regents to regulate incorporation of educational institutions); *id.* § 305 (supervisory power of the Commissioner of Education).

23 407 F.2d at 81. This point was also made in Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). There, students involved in disturbances at Columbia University sought, under 28 U.S.C. §§ 1343(3), (4) (1964) and 42 U.S.C. § 1983 (1964), to enjoin university disciplinary proceedings. In alleging that federal jurisdiction was present, the students argued that the University's connections with various agencies of the federal government were sufficient to render the disciplinary proceedings state action. The court, however, pointed out that in cases such as Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), "the critical 'involvement' was in the very 'discriminatory action' under constitutional attack." 287 F. Supp. at 548, *citing* 365 U.S. at 724. The *Grossner* court found no indication that the state was involved as a participant in the disciplinary proceedings that the plaintiffs sought to enjoin, and therefore rejected this basis for finding state action. For other arguments considered by the court, see notes 38 & 49 *infra*. Although New York had not acted in the field of college disciplinary proceedings at the time of the *Powe* decision, it has since done so. In February 1969 the legislature enacted a law requiring governing boards of colleges and universities to adopt rules and regulations for the maintenance of public order on college property devoted to educational uses. Penalties for violations of these rules, which are to govern the conduct of students, faculty, and other staff, are to be clearly set forth and are required to include provisions for the suspension or expulsion of the faculty or student violator. Failure to file such a scheme within 90 days of the passage of the law renders the college in question ineligible for any state aid or assistance until the rules and regulations are filed. N.Y. EDUC. LAW art. 129-A; Assembly Bill 6610-A. (Feb. 18, 1969). Since it is the college or university that must promulgate and enforce the regulations, it is unclear whether this legislation will justify a finding of state action in college disciplinary proceedings under the requirement of direct involvement. However, the enactment of this law is a significant step by the state toward regulation of disciplinary matters in both public and private universities.

24 358 U.S. 1 (1958).

25 347 U.S. 483 (1954).

holding that the Negro children's rights could not be sacrificed because of past violence,[26] the Court declared that state responsibility under the fourteenth amendment followed upon "support of segregated schools through any arrangement, management, funds, or property . . . ."[27]

This point was reiterated in the more recent case of *United States v. Guest*.[28] Six defendants were indicted for criminally conspiring to deprive Negroes of their right under the fourteenth amendment to equal utilization of public facilities.[29] The defendants argued that the fourteenth amendment was inapplicable because the action in question was purely private. The Court, however, found otherwise, and in so doing addressed itself to the issue of direct and indirect state involvement:

> This is not to say . . . that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.[30]

Thus the Second Circuit's holding that mere regulation of educational standards is insufficient to justify a finding of state action is questionable.[31] *Cooper* and *Guest* indicate that the state need only be indirectly involved with the private institution.[32]

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26 358 U.S. at 16.

27 *Id.* at 19.

28 383 U.S. 745 (1966).

29 18 U.S.C. § 241 (1964), *as amended*, 18 U.S.C. § 241 (Supp. IV, 1969) provided in relevant part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
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> . . . .
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> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

See United States v. Guest, 383 U.S. 745, 747 (1966).

30 383 U.S. at 755-56.

31 While the requirement of direct involvement seems inconsistent with cases such as *Cooper*, *Guest* and *Burton*, in which the state's participation has been indirect, it should be pointed out that the argument that state regulation of educational standards justifies a finding of state action has questionable ramifications. For example, the actions of private industry have not been held subject to fourteenth amendment restrictions, yet there is extensive government regulation in areas of private industry such as wages, working hours, and safety standards. Government regulation extends to almost every private activity in some form. Thus to argue that regulation of standards of education justifies a finding of state action in university disciplinary proceedings may be to argue that almost all forms of private activity are subject to the fourteenth amendment.

32 A more particular problem with the Second Circuit's narrow holding in *Powe* is

2. *Direct Government Involvement with Private Institutions*

In *Guillory v. Administrators of Tulane University of Louisiana,*[33] Tulane University refused to admit Negroes solely because of their race. The district court considered three particular ties that the University had with the state: state officials were members of the Tulane Board; state property had been transferred to the Board; and this property, together with all immunities and powers granted, would revert to the state if the Board did not fulfill its function of developing and maintaining the University of Louisiana.[34]

The primary consideration was whether these connections were such that the state exercised control over the Board. Since only three

raised by Reitman v. Mulkey, 387 U.S. 369 (1967). In that case California, in a referendum, enacted a measure that nullified existing laws prohibiting racial discrimination in the sale or rental of private housing. The California court held the measure unconstitutional as a denial of equal protection. In affirming, the Supreme Court adopted the state court's conclusion that "a prohibited state involvement could be found 'even where the state can be charged with only encouraging,' rather than commanding discrimination." *Id.* at 375.

The encouragement concept probably is not applicable to college disciplinary proceedings where the state merely regulates standards of education. Educational standards are quite separate from the matter of discipline, and approval of one does not constitute even tacit approval or encouragement of the other. The point at which there would be state action, however, is not clear. It is impossible to define just how peripheral the state's participation can be and still justify a holding that it has condoned or encouraged some other aspect of the institution's behavior. For example, most private universities receive financial aid from state governments. These contributions might be construed as encouragement of all university policies, including disciplinary procedures. The courts, however, have refused to find state action on the basis of financial contributions by the government.

[33] 203 F. Supp. 855 (E.D. La.), *judgment vacated and new trial ordered,* 207 F. Supp. 554 (E.D. La.), *aff'd per curiam,* 306 F.2d 489 (5th Cir.), *rev'd on retrial,* 212 F. Supp. 674 (1962).

[34] 212 F. Supp. at 683-85. In 1882 Paul Tulane established a fund to promote higher education. In 1884 the administrators of this fund took over the already existing University of Louisiana and received all of its properties, powers, privileges, franchises, and immunities to develop and maintain the University of Louisiana. If they failed to do so, all powers, privileges, property, and immunities would revert to the state. The University was to be operated according to the terms of Paul Tulane's donation, and its name was to be chauged to Tulane University of Louisiana. The administrators of the Tulane Educational Fund remained a private corporation throughout these changes, and in the circumstances the court considered the use of the terms "public" and "private" an oversimplification. 212 F. Supp. at 676-81. It therefore considered specific ties between the University and the state.

In addition to the factors mentioned in the text, the court considered the exemption of the Board's property and income from tax. The exemption had originally been granted because the Board was fulfilling a public function, but by the time of the trial, the exemption was a simple tax immunity comparable to that granted an orphanage in order to foster charitable purposes. The court considered this to be a form of grant of state funds to a private institution which, as it had held earlier, did not constitute state action per se. *Id.* at 684-85.

of seventeen members of the Board were state officials, and since these three failed to attend meetings and disavowed any desire to influence Board policy, the court held that their presence did not constitute state action.[35] The court also found that the amount of property transferred to the University and subject to reversion was insufficient to justify a finding of state action.[36]

The matter of government financial involvement was also dealt with in *Powe v. Miles*;[37] there the amount of state and federal aid received was even less than that involved in *Guillory*.[38] It was thus clear in both the *Guillory* and the *Powe* cases that government aid was not so dominant as to constitute state action, but it may be impossible to formulate a rule as to what percentage of a school's budget must come from government in order to establish state action.[39]

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35 *Id.* at 683.

36 *Id.* at 684. By the court's calculations, the value of property donated by the state comprised approximately 12.6% of the book value and 7.7% of the estimated market value of the Tulane Board's property. *Id.* With regard to the reversion of powers, the court pointed out that the corporate charter to the Tulane Board gave it the power to operate a university. Since the administrators of the Tulane Educational Fund were incorporated for this purpose, a revocation by the state would in no way affect the operation of the university. *Id.* at 685-86.

37 407 F.2d 73 (2d Cir. 1968).

38 State and federal aid comprised approximately 3% of the total budget. *Id.* at 81. One court has indicated that the amount of state and federal aid is immaterial if there is no significant government involvement in another form. In Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968), government funds amounted to approximately 44% of the University's total revenue in 1966-67; the court nevertheless held that "receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." *Id.* at 547-48.

The *Grossner* court also pointed out that even if the receipt of government funds was enough to justify a finding that the University was an instrumentality of the government, a distinction had to be drawn between funds received from the state government and those received from the federal government. Here, 80% of the government funds received by the University was from the federal government; the jurisdiction that plaintiffs sought to invoke, however, required state, not federal, action. Thus the court, in dicta, concluded that it could not have exercised jurisdiction regardless of the effect of receipt of money from the state. In cases where governmental action complained of involves the federal government, however, an allegation based upon the Bill of Rights rather than the fourteenth amendment would be sufficient.

39 In holding that there was no state action, both the *Powe* and *Guillory* courts considered two cases: Kerr v. Enoch Pratt Free Library of Baltimore, 149 F.2d 212 (4th Cir. 1945), and Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In the *Kerr* case, a Negro was denied admission to the library's training program and brought an action alleging violations of the equal protection clause of the fourteenth amendment and of the Civil Rights Act. The most important factor in the court's determination that the library was an agent of the state was the fact that recently approximately 99% of the library's income was received from and disbursed by the city. 149 F.2d at 216.

In the *Burton* case, the Wilmington Parking Authority, an agency of the State of

3. *Education as a Public Function*

The third argument advanced for finding state action in private university activities is that education is a public function. This argument was well stated by Judge Skelley Wright in the first trial of *Guillory v. Administators of Tulane University of Louisiana,*[40] where he suggested that *Brown v. Board of Education*[41] and other Supreme Court decisions[42] have recoguized education, whether by public or private institutions, as a matter of great public importance.[43] The administrators of private universities are therefore performing a public function, and since they do the work of the state, they are subject to the same restraints of the fourteenth amendment as is the state itself.[44]

This argument was considered in *Powe v. Miles.*[45] The court there pointed out that where a private entity's public function has been considered state action, the property in question has been put to public

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Delaware, owned and operated an off-street parking building. The Authority leased space to the Eagle Coffee Shoppe, Inc. for use as a restaurant, in which a Negro was subsequently refused service. The Court held state action to be present, but only because the state had placed its prestige, power, and property behind the discrimination. 365 U.S. at 725. The government's financial involvement, on the other hand, was found to be persuasive against a finding of state action. *Id.* at 723. There were two relevant figures: only 15% of the total cost of construction was paid from public funds, and anticipated revenue from parking (the only public activity associated with the building) was only 30% of the total expected income. *Id.* at 722-23.

The *Burton* majority indicated the difficulty of attempting to formulate a broad rule by cautioning that the holding in that case was of limited applicability even in the area of government leasing agreements:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested.

Id. at 725.

40 203 F. Supp. 855, 858-59 (E.D. La. 1962).

41 347 U.S. 483 (1954).

42 Everson v. Board of Educ., 330 U.S. 1 (1947); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930).

43 The importance of education at the university level has also been recognized. Mr. Justice Frankfurter has pointed to "[t]he need for higher education and the duty of the state to provide it as part of . . . the democratic faith of most of our states." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 656 (1943) (dissenting opinion).

44 Private groups performing public functions have been held subject to the fourteenth amendment. Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (picketing in public parking lot of shopping center protected by first amendment); Terry v. Adams, 345 U.S. 461 (1953) (private political party primary could not deny Negroes their fifteenth amendment right to participate in the electoral process); Marsh v. Alabama, 326 U.S. 501 (1946) (corporation owning company town could not curtail exercise of constitutional rights on town sidewalk because of its public nature).

45 407 F.2d 73, 80 (2d Cir. 1968).

use; the owner, therefore, could not exclude members of the public who wished to exercise their constitutional rights in a manner consistent with the public character of the property. On this ground the court distinguished the Alfred University football field; it was open only to persons connected with the University or licensed by it to participate in or attend events held there.[46]

This is not, however, a satisfactory answer to Judge Wright's argument. Conceding that the Alfred football field has not been dedicated to a public use, it is education, and not the football field, that, as a public function, constitutes a source of state action.

The *Powe* court rebutted another line of authority establishing state action where the activities of private groups, such as private political clubs holding primary elections, were essentially governmental in nature.[47] The court pointed out that this was not true of education, that the field of education has never been a government monopoly in the same sense as are elections.[48] The situation of the university was therefore held to be distinguishable.

Education may not be a governmental activity in the same sense as are elections, but it is an activity affected with a great deal of public interest. That it has not been a government monopoly does not preclude its being subject to the fourteenth amendment; the activities considered in several landmark state action cases could not be characterized as government monopolies, yet state action was found.[49]

However, it remains unclear whether courts will consider disciplinary sanctions by private universities state action. The degree to which the government must be involved with the private institution in question has not been established, nor is it clear whether the require-

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[46] *Id.*

[47] *Id. See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944). *See also* Evans v. Newton, 382 U.S. 296 (1966) (maintenance of park by a private association held to be state action).

[48] 407 F.2d at 80.

[49] Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946).

The argument that education is a public function was also considered and rejected in Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 546-49 (S.D.N.Y. 1968) (*see* notes 23 & 38 *supra*). The court argued that cases such as *Marsh* dealt only with property used by the public in general, and that those such as Terry v. Adams, 345 U.S. 461 (1953), applied only to functions governmental in character. 287 F. Supp. at 549. The disciplinary action taken by Columbia University was held to be outside both classes of cases. *Id. See also* the treatment given these arguments in the second *Guillory* trial, wherein the court held that activities derived their constitutional character from their source of power and control. 212 F. Supp. at 683.

ment that the state be directly involved with the injurious activity is valid. In addition, Judge Wright's argument that education is a public function has not received adequate treatment. The difficulty of applying the state action concept makes it necessary to consider an alternative approach to the problem of the admissibility of testimony coerced by a private college or university.[50]

II

RE-EXAMINATION OF CRITERIA FOR ADMISSIBILITY OF COERCED STATEMENTS

In *Furutani v. Ewigleben*[51] the district court considered students' rights in terms of the concept of state action. Arguably, this issue need not have been reached since there is a more basic question of the admissibility of any coerced testimony. Resolution of this issue makes it unnecessary to consider whether the disciplinary activities of private universities are subject to the fourteenth amendment.

Although recent decisions have been concerned primarily with the constitutional problems posed by coerced confessions,[52] the inherent unreliability[53] of these statements has continued to be recoguized as an important factor.[54] The nature of the problem is explained well by Professor Wigmore:

> [E]nough [untrue confessions] have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This pospossibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgement of guilt is at the time

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50 The uncertainty in the state action approach is further demonstrated by an issue raised in the *Powe* case. There, the Second Circuit stated that "[w]hether this [holding that there is no basis for a finding of state action] would be true if Alfred were to adopt discriminatory admission policies . . . is a different question we need not here decide." 407 F.2d at 81 (citations omitted). In the court's view, whether state action is present depends not only on the amount and placement of aid from the government, but also on what constitutional rights are involved. It is questionable whether this position reflects equal protection under the fourteenth amendment.

51 297 F. Supp. 1163 (N.D. Cal. 1969). *See* note 1 *supra* and accompanying text.

52 *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

53 Wong Sun v. United States, 371 U.S. 471, 488-89 (1963); Opper v. United States, 348 U.S. 84, 90-91 (1954); 2 B. JONES, THE LAW OF EVIDENCE, CIVIL AND CRIMINAL § 400 (5th ed. 1958); RICHARDSON, EVIDENCE § 340 (9th ed. 1964); 3 J. WIGMORE, EVIDENCE § 822 (3d ed. 1940).

54 Wong Sun v. United States, 371 U.S. 471, 488-89 (1963); Rogers v. Richmond, 365 U.S. 534, 541 (1961); Rochin v. California, 342 U.S. 165, 173 (1952).

> the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.[55]

It thus appears that statements are equally unreliable whether they are coerced by public officials or by private individuals. The important point is not that coercion was effected by a police officer rather than by a private university; it is that coercion was present.[56] In both cases the element of coercion renders the admission obtained unreliable. It should therefore be inadmissible.

In addition, admitting coerced statements into evidence deprives the accused of his due process right to a fair trial. In *Brown v. Mississippi*[57] the Supreme Court reversed murder convictions based upon confessions obtained through physical torture. Justice Hughes, speaking for the Court, emphasized that the use of these confessions as the basis for conviction was a denial of due process because it denied the defendants their right to a fair trial.[58]

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55 WIGMORE, *supra* note 53. Although Wigmore was concerned in the quoted passage only with confessions, it is clear that this category includes the kind of testimony under consideration here. A confession is defined as *"an acknowledgment in express words,* by the accused in a criminal case, *of the truth of the guilty fact charged* or *of some essential part of it." Id.* § 821 (emphasis in original). In addition, the Snpreme Court has indicated that the considerations of reliability relevant in the field of confessions are also applicable to admissions. Wong Sun v. United States, 371 U.S. 471, 488-89 (1963); Opper v. United States, 348 U.S. 84, 90-91 (1954).

56 With regard to reliability, coerced statements differ from evidence obtained in an illegal search or seizure. The latter is reliable and is admissible when obtained by a private person. People v. Horman, 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968) and cases cited therein at 22 N.Y.2d 382. The distinction between evidence obtained through an illegal search and seizure by a public official and that similarly obtained by a private individual is based on the primary purpose of the exclusionary rule in such situations: to deter public officials from illegal searches and seizures. Mapp v. Ohio, 367 U.S. 643 (1961). This deterrence argument is not relevant in the case of private individuals, however, because they are not primarily interested in obtaining convictions.

The deterrence policy is also present with regard to statements coerced by public officials. Watts v. Indiana, 338 U.S. 49 (1949). Because it would not apply to coercion by private individuals, it might be argued by analogy to illegal search and seizure evidence that statements coerced by private individuals should be admissible. In the case of coerced statements, however, the accused's right to a fair trial is impaired if any coerced statements are admitted. (Pages 447-48 *infra*) Thus statements coerced by a private individual are to be treated differently from evidence obtained by a private individual in an illegal search or seizure.

57 297 U.S. 278 (1936).

58 *Id.* at 285-86. Although the *Brown* court dealt only with confessions, the more recent, broader holding in Miranda v. Arizona, 384 U.S. 436 (1966), indicates that the constitutional considerations that apply to confessions also apply to admissions. Speaking

While the *Brown* case involved coercion by state officials, recent decisions indicate that the considerations deemed important there are also controlling in the situation in which statements are coerced by private individuals. In *People v. Frank*[59] a New York court considered the admissibility of statements made to department store security guards by an employee suspected of theft. The test held to govern admissibility was whether the admissions were made voluntarily; no distinction was drawn between admissions made to private individuals and those made to public officials.[60] In either case, a preliminary hearing on the issue of voluntariness was necessary.[61]

The policies behind this decision were well articulated in *People v. Berve*,[62] wherein a confession had been coerced by threatened mob violence. In holding the confession inadmissible,[63] the California Supreme Court pointed out that

> [n]o valid grounds for distinction are to be found in the fact that the coercion in this case was inflicted by civilians, and not the police. . . . The prohibition which bars the use of involuntary confessions is not only designed as a regnlation of the conduct of police officers, but also to insure that an accused's right to a fair trial is protected. . . . The absence of volition condemns an enforced confession. Due process requires that it be given voluntarily and without promise of immunity or reward.[64]

Thus admission of any coerced statement denies the accused his right to a fair trial. It is irrelevant that the statements are coerced by private individuals rather than by public officials; in either case, admission of the statement constitutes a denial of due process. This rule is applicable to admissions coerced by a private university and sought to be introduced in a subsequent criminal proceeding. A finding of state

for the Court in *Miranda*, Justice Warren stated that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444.

59 52 Misc. 2d 266, 275 N.Y.S.2d 570 (Sup. Ct. 1966).

60 *Id.* at 267. That this is the law in New York is clear from People v. Harden, 17 N.Y.2d 470, 214 N.E.2d 159, 266 N.Y.S.2d 978 (1965). The decisions of four other jurisdictions are in accord with this holding: People v. Berve, 51 Cal. 2d 286, 332 P.2d 97 (1958) (confession coerced by mob violence); Louette v. State, 152 Fla. 495, 12 So. 2d 168 (1943) (dicta); Agee v. State, 185 So. 2d 671 (Miss. 1966) (defendant's confession induced by former professor's offer of leniency); Schaumberg v. State, 83 Nev. 372, 432 P.2d 500 (1967) (admissions of repairman to supervisors held voluntary and thus admissible).

61 52 Misc. 2d at 268, 275 N.Y.S.2d at 573.

62 51 Cal. 2d 286, 332 P.2d 97 (1958).

63 *Id.* at 293, 332 P.2d at 101.

64 *Id.* (citations omitted).

action on the part of the university is unnecessary, since it is the court that has the power to admit the statements and, by so doing, to deny the student his right to a fair trial.[65]

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65 Shelley v. Kraemer, 334 U.S. 1 (1948), makes clear that actions of state courts are subject to constitutional restrictions. In holding that judicial enforcement of a racially restrictive covenant constituted a violation of the equal protection clause of the fourteenth amendment, Justice Vinson made it clear that an act of the state judiciary is state action within the scope of the fourteenth amendment:

> In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. . . . Convictions obtained by coerced confessions, by the use of perjured testimony known by the prosecution to be such, or without the effective assistance of counsel, have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

Id. at 16-17 (citations and footnotes omitted).