COMMENT

Vagueness and Overbreadth in University Regulations

The terms *vagueness* and *overbreadth* appear frequently in recent student rights cases, and the two ideas they symbolize are fundamentally important in the developing field of campus law. What follows is an examination of vagueness and overbreadth as applied to university rules. In this regard a distinction will, if possible, be made between their meanings, and the two separate bases of constitutional infirmity expressed by the two words will be identified and differentiated. The opinions in recent student rights cases will be examined to see which term the court has utilized in each, and which of the two infirmities furnished the theory for attacking the rule.

Vagueness is more easily defined than overbreadth. In general use vagueness means the quality of being indefinite, imprecise, uncertain, indeterminate, roving. A statute is fatally defective if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."[1] Terms must be "susceptible of objective measurement"[2] so that they inform as to what is commanded or forbidden, and they must provide "an ascertainable standard of conduct,"[3] else they will be struck down as unconstitutionally vague.

The requirement that a regulation must not be vague is part of the law's insistence on fair play. One should not have to guess as to the legal consequences of an action. Fairness demands that notice be given as to the law's import.[4] If there is such vagueness that meaning is not clear, notice is lacking.[5]

Overbreadth does not necessarily carry the meaning of absence of

1. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).
2. Cramp v. Board of Pub. Instruction, 368 U.S. 278, 286 (1961).
3. Baggett v. Bullitt, 377 U.S. 360, 372 (1964).
4. Even academic requirements afflicted with excessive vagueness or ambiguity may give rise to lawsuits. Beaney, *Students, Higher Education, and the Law*, 45 DENVER L.J. 511, 519-20 (1968).
5. Note, *Uncertainty in College Disciplinary Regulations*, 29 OHIO ST. L.J. 1023 (1968), points out that matters involving a relatively high degree of culpability require less definiteness. *Malum in se* (something inherently wrong) is already known to be wrong; one does not have to be told so clearly and with such precision as he does in the instance of *malum prohibitum* (something that is wrong because the statute says it is wrong). Also supporting the necessity for preciseness in statutory language is the doctrine of separation of powers. It is for the legislature to determine what conduct is permitted, required, or prohibited; if the courts supply meaning omitted by the legislature there is judicial legislation, *ex post facto*.

boundaries. The boundaries of a statute or regulation may be clearly marked and yet the rule may be invalid because the precisely limited area is too large.[6] Legitimate goals must be sought with laws narrowly drawn to cover only prohibitable conduct, not with "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[7] Nonstudent cases dealing with overbreadth speak of a statute's sweeping within its broad scope activities that are constitutionally protected.[8] A too-broad statute covers too much. Attempting to proscribe something within the regulatory power of the governmental unit, the regulation reaches harmless or protected conduct.

Overbreadth is offensive because of the threat to protected liberties. The existence of an overly broad statute inhibits the free exercise of the freedoms of religion, speech, press, peaceable assembly, or petition for redress, guaranteed by the first amendment, made applicable to the states through the fourteenth amendment.[9]

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6. "A statute might . . . clearly [demarcate] the proscribable conduct, and yet still be overbroad because the classification clearly made permits punishment of constitutionally protected activity." Comment, *The University and the Public: The Right of Access by Nonstudents to University Property,* 54 CALIF. L. REV. 132, 149 n.77 (1966).

7. Elfbrandt v. Russell, 384 U.S. 11, 18 (1966). In the area of first amendment freedoms, "government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." Lamont v. Postmaster General, 381 U.S. 301, 310 (1965).

See Comment, *Student as University Resident,* 45 DENVER L.J. 622, 630 (1968).

8. Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940).

9. For instance, a state antipicketing law unconstitutionally interfered with freedom of speech and press. Thornhill v. Alabama, 310 U.S. 88 (1940). The state's power to control a foreign corporation's doing business within its borders was held to "sweep unnecessarily broadly and thereby invade the area of protected freedoms," namely, the NAACP's freedom of association for advancement of beliefs and ideas. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964). The broad sweep of a city ordinance prohibiting distribution of "literature of any kind" without prior permission of a city official violated freedom of press. Lovell v. City of Griffin, 303 U.S. 444 (1938). The common law crime of breach of the peace was unconstitutionally applied to a group of nonviolent Negro students, marching in protest against discrimination, in exercise of these freedoms in their most pristine and classic form. Edwards v. South Carolina, 372 U.S. 229 (1963). Oregon's criminal syndicalism statute, as applied in conviction of a man charged with assisting in the conduct of a meeting called under Communist Party auspices, was impermissibly broad in its reach. De Jonge v. Oregon, 299 U.S. 353 (1937). A motion picture licensing statute was struck down as an infringement of free speech and press, in its application to a certain film the censor thought sacrilegious under a broad and all-inclusive definition of the term, "far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952). Freedom of association was unwarrantedly restricted by a statute requiring every teacher to file an annual affidavit listing every organization he belonged to or contributed to; the comprehensive interference went beyond the state's justifiable legitimate inquiry into fitness and competency; the end could have been more narrowly achieved. Shelton v. Tucker, 364 U.S. 479 (1960). Virginia's legitimate

The urge to order and to classify suggests the logic of using the term *vagueness* to refer to procedural due process deficiency—the failure of notice; and of using the term *overbreadth* to refer to substantive due process deficiency—the chilling, inhibiting effect on first amendment freedoms. The two main ideas run through the due process cases: The fifth and the fourteenth amendments demand procedural due process, including fairness, notice, and hearing. The first amendment, made applicable to the states through the fourteenth amendment, demands substantive due process as exemplified by the free exercise of the preferred freedoms. But the effort to find uniformity of application of the one word *vagueness* to matters of procedure and the one word *overbreadth* to matters of substance breaks itself against the wall of the following words of the United States Supreme Court: "unconstitutionally vague in its overly broad scope."[10] Analysis of the two doctrines of vagueness and overbreadth cannot settle, then, into a neat categorization of two mutually exclusive ideas.

The Supreme Court has extended the notice and narrowness requirements from the civil and criminal statute area into the field of administrative law.[11] Disciplinary proceedings in state-supported colleges and universities are administrative in nature, subject to constitutional limitations on state action. However, the necessity of specificity and narrowness has not been imported unchallenged and unchanged from civil, criminal, and general administrative law into campus law. Until recently, the courts left even state-supported schools

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interest in regulating the legal profession did not justify restraints so broad that they interfered with political expression in the form of litigation-related activities of the NAACP legal department. NAACP v. Button, 371 U.S. 415 (1963). Finally, within the penumbra of the first amendment guarantees and other Bill of Rights provisions was found the right to privacy, which was adversely affected by the unnecessarily broad statute prohibiting the use of contraceptives; though the state held an interest in discouraging illicit relations, the Court found no justification for sweeping married persons into the scope of the statute. Griswold v. Connecticut, 381 U.S. 479 (1965).

10. Cox v. Louisiana, 379 U.S. 536, 551 (1965), reversing a conviction of demonstrators under a statute forbidding congregating under such circumstances that breach of peace might be occasioned. Since the Court was concerned that such a statute would enable the state to punish someone merely for expressing an unpopular view, it appears that the constitutional infirmity was the substantive one of the two.

11. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (organizations could not constitutionally be designated as communist on attorney general's list without notice and chance to meet undisclosed evidence; "subversive" so flexible it could "vary with the mood or political philosophy of the prosecutor" and could "be made as sharp or as blunt as the occasion requires"). *Id.* at 176 (concurring opinion). Aptheker v. Secretary of State, 378 U.S. 500 (1964) (federal statute making it a felony for member of communist organization to apply for or try to use a passport held unconstitutional on its face; too broadly restricted fifth amendment [substantive due process?] right to travel; too broad because able to reach non-active members, travel to spots not security-sensitive, for innocent purpose; less drastic means available).

alone in setting standards for conduct and academic performance. When student rights cases began to come before the courts with increasing frequency, for reasons fully covered by other writers,[12] there was no general agreement, by any means, as to whether it is essential for a university even to have written rules for discipline. Most of the decisions have expressed views reminiscent of an old holding[13] that students should avoid expulsion by consulting the Golden Rule rather than a definite list of specific rules.

In varying degrees, the attitude has been adopted that a university has a general, inherent power to discipline a student without regard to the existence of an explicit rule or any rule at all. For example, in *Carr v. St. John's University,*[14] the New York Court of Appeals approved a private school's disciplinary dismissal of students, two for having been married in a civil ceremony and one for having witnessed the ceremony. The school was operated by an order of Roman Catholic priests; the students were Catholic. The university regulation read: "In conformity with the ideals of Christian education and conduct, the University reserves the right to dismiss a student at any time on whatever grounds the University judges advisable." The supreme court below had found that this rule was so vague and indefinite that it did not mandate a course of conduct;[15] this court was using vagueness language in the sense of lack of notice, the procedural due process infirmity. Reversing the lower court, the appellate division rejected the vagueness argument because the Catholic students knew that their church considered it sinful to be married by other than a priest, and there was an implied term in the contract between student and university that the student would not engage in misconduct.[16] The appellate division and the court of appeals, by upholding the university's exercise of discretion under a regulation incapable of precise definition and variable in its meaning, seemed in effect to dispense with the necessity for a rule at all if the students' conduct was in fact contrary to Catholic teaching and if the students did in fact know beforehand that such conduct would be so contrary.

A similar rationale was applied by the California Court of Appeals in *Goldberg v. Regents of University of California.*[17] The case involved a student protest in which vulgar words were used on signs, over

12. *E.g.*, Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1 (1965).
13. Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. (n.s.) 144, 11 Ohio C. Dec. 515 (1901).
14. 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).
15. 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. 1962).
16. 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962).
17. 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (Dist. Ct. App. 1967).

loudspeakers, and at assemblies. The students were dismissed pursuant to a regulation requiring adherence to "acceptable standards of personal conduct" and "good taste." As in *Carr*, the students' argument that the regulation was unconstitutionally vague went to a question of notice, but this was rejected. In fact, the court found it unnecessary to decide the question of the regulation's vagueness, for a university has "inherent general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well being."[18] This holding was followed in *Jones v. State Board of Education*,[19] on facts very similar to *Goldberg*. The district court in *Jones* refused to hold university regulations to the same requirements of specificity as a state statute; the very nature of an educational institution, its goals, and its purposes demand that the university be able to maintain order, for fulfilling its function of imparting knowledge. Here too, then, was a court not concerned with vagueness in the sense of uncertain meaning, because the university could discipline without a rule at all, if it needed to.

Overbreadth was not raised in any of the three cases just discussed. Freedom of religion was not an issue in *Carr*, since a private school is permitted to pursue religious goals. The potential reach of the *Jones* and *Goldberg* regulations into protected areas of first amendment freedoms was not considered, because the courts were convinced that the conduct being punished in the cases before them was in fact not protected speech, press, or assembly.

Both vagueness and overbreadth were raised as defenses in *Grossner v. Trustees of Columbia University*.[20] The federal district court considered the students' charges of vagueness and overbreadth of a university regulation that provided for canceling registration at any time on any grounds deemed advisable. Recognizing that the regulation was

18. 57 Cal. Rptr. at 473. Note, *Uncertainty in College Disciplinary Regulations*, 29 OHIO ST. L.J. 1023 (1968) questions inherent power answer to vagueness challenge; a state has inherent police power but nevertheless is subject to specificity requirement.

19. 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970). The Supreme Court had granted certiorari, 396 U.S. 817 (1969), but the writ was dismissed as improvidently granted when it was discovered on oral argument that Jones had been suspended indefinitely, in part because he lied at the University hearing on the charges against him.

> This fact sufficiently clouds the record to render the case an inappropriate vehicle for this Court's first decision on the extent of First Amendment restrictions upon the power of state universities to expel or indefinitely suspend students for the expression of views alleged to be disruptive of the good order of the campus. 397 U.S. at 32.

20. 287 F. Supp. 535 (S.D.N.Y. 1968). The constitutional arguments were considered even though the court was not at all sure it had jurisdiction, since there is probably not enough connection between the state and the private university to amount to state action.

indeed sweeping, the court parried the attack by pointing out that this was not the rule used against the students. They were charged under a rule which forbade picketing or demonstrating inside a university building. Further weakening the students' complaint of vagueness was their own inconsistent argument elsewhere in their brief that university regulations prescribed in great detail how a student was to lead his daily life. The students claimed that the university's unlimited power to cancel registration deprived them of substantive due process, apparently using both terms (vagueness and overbreadth) in the sense of stifling the exercise of first amendment rights. However, since they attacked a rule not used against them, issue was not joined. The court noted in passing[21] that nothing said on the subject was intended to suggest that a school, public or private, must proceed upon written rules before imposing discipline; the "comparatively interesting question" had not been raised as to penalty for alleged misbehavior in the absence of "any rules or intelligible rules." The opinion can therefore probably be counted as one not finding a written rule indispensable. This is another instance in which the court was not troubled by possible first amendment problems; obstructive and destructive conduct was being punished; the fact that such conduct has a speech element, in that it is intended to express an opinion, does not give it free speech protection.[22]

The outcome of *Esteban v. Central Missouri State College*[23] seems to be the most questionable of all the student rights cases in which university discipline has been upheld though apparently limiting first amendment guarantees. In addition to regulations calling for highest standards of integrity and morality, conformity to accepted social

21. *Id.* at 552 n.25, citing *Buttny*, discussed note 22 *infra*, and also citing Barker v. Hardway, 283 F. Supp. 228 (S.D.W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), which upheld a rule requiring decorous, sober and upright conduct, respect for good order, moral actions, personal integrity, rights of others, and care of property, and like *Goldberg* affirmed administrators' "inherent general power to maintain order and exclude those who are detrimental to the student body and institution's well-being, so long as they exercise sound discretion and do not act arbitrarily or capriciously." 283 F. Supp. at 235.

22. *See also* Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968), a case involving students physically blocking the entrance to the placement office, where a recruiter from the Central Intelligence Agency sought to interview other students. In addition to regulations requiring students to obey national, state, and local laws, a hazing rule prohibited students from interfering with the personal liberty of others or interfering in any manner with the public or private rights of citizens. Citing *Goldberg*, the opinion reiterated the inherent general power rule and held that a university does not have to provide a negative type of behavioral code typical of criminal laws. The hazing rule was considered clear enough to let a student know to what standard he was held. The overbreadth argument does not seem to have been understood by the court. At any rate, it failed to discuss the possible chilling effect of such a rule and merely answered the first amendment argument by pointing out that the students were punished for aggressive action, not for speech.

customs, obedience to law, and conduct reflecting favorably on student and institution, there were rules that, if a breach involved a mixed group, all members would be held responsible equally, and that participation in mass gatherings which might be considered as unruly or unlawful could result in immediate dismissal. Two students who were already on probation were suspended for being spectators of an unruly student demonstration that resulted in some property damage, noisy disturbance, and blocking of traffic on the streets adjacent to the campus. One of the young men also vaguely threatened a dormitory assistant and cursed a faculty member who directed him to go back into his dormitory. In resorting to the federal district court the students raised questions as to the rules' vagueness and overbreadth, both in the procedural notice aspect and in the substantive chilling effect aspect. In addition, they made a slightly different broadness argument to the effect that the mass gathering rule went beyond the college's power, in that it forbade conduct that was not illegal under state, federal, or municipal regulation. The court seized on this latter overbreadth argument to expound its view that university regulations do not have to equal criminal statutes, because of the differences in goals, processes, and circumstances, between campus discipline and the criminal law.[24] As to the usual overbreadth argument, with respect to potential for inhibiting free exercise of preferred freedoms, the college was thought not to be endeavoring to deprive the students of their first amendment rights,[25] the court apparently excusing a possibly overbroad sweep if not purposefully attempted. Vagueness was dismissed in a treatment similar to that in the foregoing cases: detailed codes of prohibited conduct are provocative; general affirmative statements of what is expected are preferable; rules need not always be written.[26] The youths were held to have notice both

23. 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

24. *Accord*, Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195, 200 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970). "It was not necessary to have a specific regulation. . . . The University had inherent authority to maintain order and discipline students. We do not believe that there is a good analogy between student discipline and criminal procedure."

25. 290 F. Supp. 622, 629.

26. The same court entered a General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968), *en banc*, along the same lines as the holding in *Esteban*, including the following:

> The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally vague does not, in the absence of exceptional circumstances, apply to standards of student conduct. The validity of the form of standards of student conduct, relevant to the lawful missions of higher education, ordinarily should be determined by recognized educational standards. *Id.* at 146-47.

The court's statement just quoted is somewhat circular, however, for the General Order had already

from the regulations and from common sense that they were not living up to college standards; as reasonable persons they should have known their conduct would be violative.[27]

On appeal, the court of appeals affirmed, approving the operative points of the district court's decision. The sarcastic tone of the appellate opinion fails to conceal a certain uneasiness about stringent disciplinary measures against students who had not personally engaged in destructive behavior. The college authorities themselves had considered one of the students to have been only a spectator, not a participant. The other student was punished for "defiance"—refusing to obey an order to return to his dormitory room, though there was not a regulation against being out of his room at the time. Is it sound to suspend a student for not yielding to a faculty member's command if the student reasonably doubts the authority behind the order? The students' objections to the rules' vagueness and overbreadth impressed the court of appeals even less than they had the district court, the appellate court viewing the disciplinary action as based on destruction, disruption, and defiance, rather than on violation of a regulation. The court of appeals saw no attempted restraint of peaceful assembly or speech. One of the three circuit judges disagreed, however, as to the constitutionality of disciplining the student who was only a spectator at the demonstration. The risk of a spectator's being punished if the active demonstrators' conduct should become unruly seemed to the dissenting judge to amount to prior restraint on the right to gather for peaceful petition.[28]

The viewpoint of the inherent power advocates—that school officials may discipline regardless of the existence of a rule—has not entirely carried the day. In a college case decided at the district court level,[29] a school rule prohibiting indoor demonstrations of any kind was struck down. If school authorities promulgate such a rule, it is their duty to show

> that a considered judgment has been made between the values of competing interests and uses, and that, due consideration having been given to lesser limitations, the State officials have been led to a belief,

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said, at 145, that it is not a lawful mission to prohibit the exercise of a guaranteed right and, at 143, that a federal court can intervene if, *inter alia*, a student has been deprived of a federal right.

27. "Is a published (oral or written) standard necessary to advise a student he cannot cheat on exams, keep other students out of their classroom, strike a professor, talk loudly in class during the recitation of others, come to class in a bathing suit, curse his professor in the classroom, engage in disruptive mob action?" 290 F. Supp. 622, 630 n.8.

28. 415 F.2d 1077, 1094-96 (Lay, C.J., dissenting).

29. Sword v. Fox, 317 F. Supp. 1055 (W.D. Va. 1970).

> based on fact, that only a total ban can prevent disruptions of the institution's function.[30]

The court found that no such showing had been made in this case.

Two 1969 decisions at the sub-college level upheld students' rights and prohibited the enforcement of school rules that were not at all vague or overbroad in the sense of undefined limits, but were unconstitutionally broad in the sense of infringing on the protected interests of individuals. In *Breen v. Kahl,*[31] a case involving a high school dress code, the court held the section of the code relating to hairstyles to be not overbroad but nonetheless unconstitutional. Forcing compliance would interfere with the students' freedom of expression, if the hairstyle was meant as an expression of cultural revolt.[32] Like the right to privacy[33] emanating from the totality of the constitutional scheme, there is a right to individual taste, human dignity, personality, and identity. The importance of the case is its determination that school children have constitutional freedoms equal to those of adults; that if hairstyle is a form of expression its regulation under a conduct rule can be sustained only if the governmental interest is weighty enough to justify incidental infringement on first amendment freedoms. The school's interest in maintaining order cannot work as a bootstrap. The school cannot be heard to argue that disobeying the rule caused disorder, for if the rule is unconstitutional there is no duty to obey it. Turning from the older notion that discipline is part of education, the court saw no excuse for the exercise of authority for its own sake.[34]

The other 1969 secondary school case is *Tinker v. Des Moines*

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30. *Id.* at 1065.

31. 296 F. Supp. 702 (W.D. Wis.), *aff'd,* 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

32. Sherry, *Governance of the University: Rules, Rights, and Responsibilities,* 54 CALIF. L. REV. 23, 32 (1966), suggests there be no university attempt to restrict content of speech or advocacy unless there are extraordinarily compelling reasons;

> [s]uch controls must be limited to situations where clear and present dangers to vital interests of the university present themselves and where it is not possible to resort to the general law. Such situations, however, are more theoretical than real and there is little, if any, evidence that the possibility of their occurrence requires expression in campus rules . . . .

To paraphrase, *if* the situation justified regulation of speech content, a written regulation would not be needed to cover it.

33. Griswold v. Connecticut, 381 U.S. 479 (1965).

34. Judicial opinion is divided regarding the holding in *Breen* that hairstyle is a form of expression protected by the first amendment. *See, e.g.,* Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970). Here the court said that long hair on male students in violation of a high school dress code did not involve first amendment problems of free expression. In addition, *Griswold v. Connecticut* was specifically held inapplicable to such a case as this.

Independent Community School District,[35] one of the very few student discipline cases taken by the United States Supreme Court. The decision touched but tangentially on the subject of vagueness and overbreadth. However, the decision shows that the high court does recognize the applicability of constitutional guarantees to school children.[36] A clear, definite, narrowly drawn administrative regulation forbade students to wear armbands; it was not vague or overbroad; the limits were plainly marked and understood. Yet the children could not be punished under it for passively expressing their protest against war, because it invaded their right to expressive conduct "closely akin to 'pure speech.' "[37]

Perhaps the climactic case with regard to vagueness and overbreadth in the area of student rights is *Soglin v. Kauffman*.[38] The attack on university regulations was based on both vagueness and overbreadth. The opinion dealt with both prongs of the attack and distinguished between the two ideas, the two constitutional infirmities, expressed by the two words. Significantly, the decision takes a positive stand against the *Esteban*-type of attitude that the university has inherent power to discipline, regardless of rules. The holding in *Soglin* was that the standards of vagueness and overbreadth do apply to university regulations, at least in some measure. The court sided with the American Association of University Professors' recommendation that student codes should be phrased in definite terms, published, and made available to students,[39] in opposition to the *Esteban* view that general affirmative statements of desirable conduct are preferable. The *Soglin* court recognized the need for rules as a basis for discipline, and therefore it could meaningfully apply the tests of vagueness and overbreadth. The events causing the university to institute disciplinary proceedings grew out of student opposition to the Dow Chemical Company's placement

35. 393 U.S. 503 (1969).

36. The Supreme Court had earlier held in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), in a movie-licensing case, that the vices of vagueness are the same whether the restrictions are for the benefit of adults or of minors.

37. 393 U.S. 503, 505. Similarly, requiring the college president's approval before students parade, celebrate, or demonstrate is an unconstitutional prior restraint. Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967).

38. 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). Notice that this is the same federal district court that decided Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969), the high school hairstyle case.

39. 51 AAUP BULL. 447, 449 (1965). Linde, *Campus Law: Berkeley Viewed from Eugene*, 54 CALIF. L. REV. 40, 63 (1966), advocates *nulla poena sine lege*.

> It is a fiction that no university code can adequately inform students of all rules duly adopted that carry disciplinary sanctions, and limit all discipline to infractions of rules so adopted and stated, without including some very general catchall rule of good conduct to cover a myriad of unanticipated forms of bad behavior.

interviews on campus. Some students, by obstructing doorways and halls, blocked entrance into the building where the interviews were scheduled and they refused to move on request. Discipline was based on two university grounds; the federal district court found both bases deficient because vague and overbroad and enjoined the university's future proceedings against students under them.[40] The university had enacted a regulation affirming student freedom of expression, assembly, and association, but the fatal flaw was in the words, "[students] may support causes by lawful means which do not disrupt the operations of the University." The meaning was not clear. The words could mean that students could not use lawful means which do disrupt, or that students could not use unlawful means that disrupt. Indication of what would be regarded as disruptive was lacking. No mention was made of intention, proximity of cause and effect, or substantiality. No distinctions were made among the various categories of university operations. Hence, there was vagueness, absence of notice. Furthermore, the regulation was too broad, because of the possibility of sweeping in the protected free speech and assembly rights of students. The court envisioned a hypothetical situation in which students legitimately holding a mass meeting for peaceful protest would "disrupt" university activities by failing to attend class. The other charge against the students was for "misconduct," a catch-all found among most universities' regulations.[41] It is so grossly vague that men would necessarily guess as to its meaning and differ as to its application; the court could not ignore possible involvement of first amendment rights.[42] The discussion of vagueness, then, spilled over from the notice area into the substantive area of overbreadth; the standard of "misconduct" is so vague that it is overbroad, lacking boundaries. Going to a slightly different kind of overbreadth, the court found "misconduct" overbroad in the sense of sweeping within its scope activities that are constitutionally protected, when the end could be more narrowly achieved. The university's interest in order is not weighty enough to subordinate all disruption. This last

40. The university was given a reasonable time, however, for rewriting its code; during the grace period it could temporarily use the "misconduct" standard, the court reserving the power to hear each case as it comes up.

41. *E.g.*, "misconduct which may lead to disciplinary action includes, but is not limited to, the following. . . . Any act of such a nature as to be reasonably calculated to be harmful or detrimental to the student, other students, or to the University." TEXAS TECH UNIVERSITY, CODE OF STUDENT AFFAIRS AND RULES AND REGULATIONS 1969-1970, at 17, 19.

42. The court cites Ashton v. Kentucky, 384 U.S. 195, 200 (1966), for the proposition that when first amendment rights are involved care must be taken lest "under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

part of the decision's handling of the overbreadth question resembles the *Tinker* and *Breen* holdings that even a narrowly drawn rule may be too broad because it goes farther than the regulating agency needs to go to reach its legitimate goals.

In handling the vagueness attack on the "misconduct" standard, the court delivered the coup de grace to any effort to separate vagueness-procedural-due-process from overbreadth-substantive-due-process: "Moreover, the *vagueness* doctrine is not to be conceived as being limited solely to the concept of *fair notice* as an element of *substantive* due process."[43]

Though the *Soglin* decision adopted the vagueness and overbreadth standards for application to campus law, its embrace was not necessarily total. The court recognized that it might not be necessary to apply the doctrines so stringently to the university situation as in the field of criminal law, and that within the university itself perhaps not all activities and functions require uniform specificity and narrowness.[44]

The most arresting aspect of the case concerns standing. Students were heard to contest the validity of an overbroad regulation on the basis that it could be applied in a hypothetical situation to punish protected freedoms; yet it can hardly be doubted that the students making the attack were not in fact exercising constitutionally protected rights. Their conduct disrupted legitimate university functions and interfered with the rights of others to come and go about their business. The facts would indicate that the incidental speech element of their conduct would not be sufficient to shield their actions. Still, the court applied a constitutional

43. 295 F. Supp. 978, 985 (emphasis added).

44. *See also* Sullivan v. Houston I.S.D., 307 F. Supp. 1328 (S.D. Tex. 1969). The case involved suspension of high school students for production and distribution of an underground newspaper containing criticism of school officials. The parties stipulated that the only written rule concerning student distribution of written material was that "the principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any lawful command." No other rules had been made or announced with regard to printing and distributing student publications before the time when the facts of this case arose. Therefore, the rule just quoted was held to be "the only standard available to students by which they could guide their conduct." *Id.* at 1345. In truth, this rule imposes no standard at all on the conduct of the students.

The rule was held void on the grounds of both vagueness and overbreadth, the court citing with approval the decision in *Soglin*. In discussing the relevance of criminal statutory requirements to school rules the court observed:

> School rules probably do not need to be as narrow as criminal statutes but if school officials contemplate severe punishment they must do so on the basis of a rule which is drawn so as to reasonably inform the student what specific conduct is prescribed. Basic notions of justice and fair play require that no person shall be made to suffer for a breach unless standards of behavior have first been announced, for who is to decide what has been breached? *Id.* at 1345-46.

law doctrine that one may challenge an overly broad prohibition of activities protected under the first amendment, if possible applications would be invalid, even though the challenger's conduct would not itself be protected by a valid application to his own situation.[45]

In affirming the case, the Seventh Circuit termed as "scholarly" the opinion of the district court. Relying on *Dombrowski v. Pfister*,[46] the appellate court agreed that since the university regulation in *Soglin* swept overly broad into the area of first amendment freedoms plaintiffs could challenge it without a showing that the conduct in which they had engaged could not be prohibited even if the regulation had been more narrowly drawn. The defendants contended that this exception to the usual requirements of standing applied only to criminal statutes. The court, however, rejected this, reasoning that although *Dombrowski* did involve a penal statute school regulations as well as criminal statutes could impose chilling effects on first amendment freedoms.

The university also argued that the term *misconduct* in the regulation under which plaintiffs were disciplined did not constitute a standard of conduct to which students were held. Instead, *misconduct* allegedly stood for the university's inherent power to discipline students, without a rule if need be. These contentions were rejected on the grounds that the vagueness and overbreadth doctrines require a preexisting rule containing standards of discipline before students may be punished. Additionally, these rules must be embodied in regulations which have been properly promulgated. The court expressly declined to follow the *Esteban* case to the extent it "refuses to apply standards of vagueness and overbreadth required of universities by the Fourteenth Amendment."

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45. Citing NAACP v. Button, 371 U.S. 415, 432 (1963), and Thornhill v. Alabama, 310 U.S. 88 (1940). Similar cases on the question of standing are Aptheker v. Secretary of State, 378 U.S. 500 (1964), and De Jonge v. Oregon, 299 U.S. 353 (1937). *But see* Dennis v. United States, 341 U.S. 494 (1951). Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969), applauds *Soglin's* vagueness holding but is loath to see the overbreadth doctrine imported to the campus to permit one to defend his own "hard-core misconduct" by pointing out that the rule purports to reach hypothetically innocent conduct of an imaginary party: "The 'overbreadth' concept is seemingly firmly established in constitutional jurisprudence, but I think it is not required either by fairness or reasonableness . . . ." *Id.* at 1066-67.

46. 380 U.S. 479, 486 (1965).

CONCLUSION

The present state of public campus law with regard to vagueness and overbreadth of regulations may be black-lettered as follows:

(1) Most courts do not require that a regulation aimed at conduct be specific or precise, in order to give fair notice.

The predominant judicial attitude toward a complaint about vagueness is that students have a rather clear idea of what is expected of them in a given place at a given time. A vague prohibition of "misconduct" does not do much good, but it does not do any harm. Just as a citizen in adult society has a feeling for what is criminal, without ever having consulted the penal code, a student is thought likely to be aware of what he will be punished for, if he is caught. Most judges, victims of the generation gap, find it incomprehensible that students are deliberately disruptive for the conscious purpose of discomfiting the establishment, and then claim they had no notice that what they did was forbidden.[47]

(2) A university regulation flagrantly attempting to limit freedom of pure speech, symbolic speech, or peaceable assembly on campus will bring a court to a student's aid.

The campus constitutes such a large fraction of the students' total environment that it is comparable to the city of residence of nonstudents; it is the natural and logical place for him to exercise his freedoms of expression. A great many university students now are chronological adults whose political rights may not be encroached on as a condition of education. The Supreme Court has given even minors the right to be heard as well as seen.

(3) Most courts today will not strike down as unconstitutional on its face a regulation, aimed at conduct, that could conceivably be used as a basis for disciplinary action against a student innocently exercising his first amendment freedoms.

Overbreadth is, so far, rarely a successful basis for attack. The generally permissive intellectual atmosphere of campuses, the traditionally recognized value of encouraging lively exchange of ideas as an indispensable part of education, and the reliance of town upon gown for stimulating new ideas and experiments are probably thought by the

47. "[P]rotestations of young and injured innocence have a hollow ring." Esteban v. Central Mo. State College, 415 F.2d 1077, 1088 (8th Cir. 1969).

courts to be a basic general protection against the possible chilling effect of an imprecise rule. If the rule is in fact used for charging a student with conduct that has a significant speech element, a court can then determine (on an ad hoc basis) whether as applied in his case the rule's infringement on personal freedoms is justified by a compelling, subordinating university interest.

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