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# University Regulation of Students: An Uncompleted Exercise in Constitutional Law

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# UNIVERSITY REGULATION OF STUDENTS: AN UNCOMPLETED EXERCISE IN CONSTITUTIONAL LAW

Florida State University allows only those student organizations recognized by the University to use University buildings for meetings and other non-University sponsored activities. A student organization[1] which had been denied recognition occupied a university building for the purpose of protesting this regulation. Upon application by the University, an *ex parte* restraining order was secured[2] and served on the students after occupation had begun.

Two issues were raised at the contempt proceedings which were held for the students who defied the court order. First, the sufficiency of the showing of irreparable injury necessary for the issuance of a restraining order was questioned. Secondly, the denial of the use of the University building was said to constitute an infringement of the students' freedom of speech. The trial court[3] held for the University. The Florida Supreme Court[4] *held,* affirmed: It is within the domain of the University to regulate the use of its buildings by student organizations. *Lieberman v. Marshall,* 236 So.2d 120 (Fla. 1970).

The instant case presents a situation in which the Florida Supreme Court, in reviewing an interlocutory appeal, has upheld a contempt conviction after the defendants had violated an *ex parte* restraining order. The defendants, by moving to dissolve the restraining order, preserved the issue of the validity of the order for appellate review. The validity of the contempt conviction, therefore, rested on the legality of the *ex parte* restraining order. If the restraining order was invalid, either because the order infringed constitutional guarantees or because the order was not issued in compliance with the Florida Rules of Civil Procedure[5] the defendant's motion to dissolve the order should have been granted.

The situation presented for appellate review was therefore different from that in *Walker v. City of Birmingham.*[6] In *Walker,* the defendants had been the subject of an *ex parte* order restraining the holding of mass

1. The unrecognized organization in question was the campus chapter of Students for a Democratic Society, the S.D.S.

2. J. Stanley Marshall as Acting President of the University secured the order.

3. Circuit Court of Leon County.

4. The action was an interlocutory appeal first taken to the First District Court of Appeal, but transferred on appellees' motion, because constitutional questions involving the first and fourteenth amendments to the United States Constitution and sections five and nine of article I, Declaration of Rights of the Florida Constitution were involved. A final judgment would be directly appealable to the Florida Supreme Court, and jurisdiction of the interlocutory appeal was therefore accepted. *See* Dade County v. Kelly, 149 So.2d 382 (Fla. 3d Dist. 1963).

> No temporary injunction shall be granted except after notice to the adverse party unless it is manifest from the allegations of a verified complaint or supporting affidavits that the injury will be done if an immediate remedy is not afforded . . . .

Fla. R. Civ. Pro. 1.610(b).

6. 388 U.S. 307 (1967).

street parades. The defendants violated the order without first seeking judicial review of the order's validity. The parades staged in violation of the *ex parte* order were held to be in violation of that order and the contempt citations issued by the lower court were upheld. The four dissenting members of the Court in the *Walker* decision argued that an *ex parte* order is a flagrant misuse of judicial procedure where first amendment freedom of speech rights are involved.[7]

The restraining order in the instant case was read to the students during their occupation of the University building. All students who continued to occupy the building after notice of the restraining order were cited for contempt. Therefore, the legality of the *ex parte* restraining order and the contempt citations may be determined by comparing the facts in the instant case with the facts in the decision of the United States Supreme Court in *Carroll v. President and Commissioners of Princess Anne*.[8] In *Carroll*, an *ex parte* restraining order was issued prohibiting members of the defendant "white supremacy" organization from holding an outdoor meeting that had been scheduled for the day in question. The court held the *ex parte* order invalid on the grounds that there had been no formal or informal notice to the petitioners. An *ex parte* order is not proper where no showing has been made that it was impossible to serve or notify the opposing parties and to give them an opportunity to participate in an adversary proceeding.

In the instant case, however, there was a showing by the University that the restraining order was secured *after* occupation had begun, and consequently no adversary hearing would have been possible. Regardless of how the procedural issue could or should have been resolved, the *Lieberman* decision judicially sanctions the restraint which was placed upon the defendants in the particular factual context in which the case arose. The legality of that restraint must therefore be considered.

If this restraint violates the constitutional rights of the students the restraining order would be invalid regardless of the fact that procedurally it was properly obtained. The facts of the instant case indicate that the Board of Regents of the University System of Florida and Florida State University adopted the regulation requiring administrative recognition of a student organization prior to the organization being permitted the use of University buildings for rallies and other non-University sponsored functions.[9] On its face, the regulation falls within permissible constitutional limits. The state (or an agent of the state) is justified in the limited, reasonable regulation of a fundamental freedom[10] where the reg-

7. Walker v. City of Birmingham, 388 U.S. 307, 324 (1967).

8. 393 U.S. 175 (1968).

9. Lieberman v. Marshall, 236 So.2d 120, 124 (Fla. 1970).

10. *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969). *See also* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), which invalidated a school regulation forbidding the wearing of buttons, while in Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), the court held valid a school regulation on the same point.

ulation protects a valid state interest.[11] In this respect, the orderly maintenance of an atmosphere conducive to the educational goals of a University has been recognized as a valid state interest.[12]

On the other hand, while the state is under no duty to make school buildings available for public meetings, if it elects to do so, it cannot arbitrarily prevent any member of the public from holding such meetings. Further, the state cannot make the privilege of holding meetings dependent on conditions that would deprive any members of the public of their constitutional rights. Thus, a state is without power to impose an unconstitutional requirement as a condition to granting a privilege, even though the privilege—here the use of state property—is one subject to state regulation.[13]

Thus, the question is whether the students' constitutional rights have been abridged. This determination depends upon the validity of the power vested in the University administration to deny recognition to an organization and to deny the use of facilities to organizations which previously have been denied recognition.

The facts in the instant case indicate that the student organization was denied recognition by the Acting President. The occupation of the University building was in direct protest to that denial. There are no facts in the opinion of the court or the briefs of the parties that indicate the existence of a standard which was used as a basis for evaluating any organization as to its fitness or unfitness for recognition.

One of the earliest cases dealing with a similar problem, but in a different factual setting, was *Hague v. C.I.O.*[14] That case concerned an ordinance which forbade assembly in the streets or parks of the city without a permit from the Director of Safety. The director could refuse such a permit upon his determination that the refusal would prevent riots, disturbances, or disorderly assemblage. The ordinance was held void upon its face. In the three decades which have elapsed since the *Hague* decision was handed down, the United States Supreme Court has established an impressive array of decisions which hold that a regulation (statute, ordinance, or administrative rule) subjecting the exercise of first amendment freedoms to a prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.[15]

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The difference in the decisions was a showing of disorder in the school operations. "The cases appear to hold that reasonable regulations will be upheld if the actual facts show the need for such regulations to preserve discipline and order." Lieberman v. Marshall, 236 So.2d 120, 129 (Fla. 1970).

11. Adams v. Sutton, 212 So.2d 1 (Fla. 1968); Smith v. Ervin, 64 So.2d 166 (Fla. 1953); State *ex rel.* Nicholas v. Headley, 48 So.2d 80 (Fla. 1950).

12. *See* Wright, *supra* note 10.

13. Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946).

14. 307 U.S. 496 (1939).

15. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Cox v. Louisiana, 379 U.S. 536 (1965); Staub v. Baxley, 355 U.S.

The facts in *Lieberman* also raise the question of whether the students' constitutional right of procedural due process, as guaranteed by the United States Constitution[16] and the Florida Constitution,[17] was abridged. The requirement of recognition by the University is nothing more than a requirement that a permit or license be obtained to use the University facilities. The absence of any ascertainable standard in this determination is a prima facie violation of due process in permitting a prior restraint on first amendment freedoms. The reason for this conclusion is that an unlimited and unclear discretionary power is vested in the granting authority, be it the Acting President as in *Lieberman* or some other body representing the administration, in the absence of a narrow, objective, definite standard to guide the granting authority.

It is conceivable that the analysis of the instant case should conclude at this point. There are, however, several reasons to continue. First, the existence of a standard guiding the granting authority has not been disproven.[18] Second, a full analysis of all considerations must be given in the interest of future situations which may arise in the troublesome area of administrative regulation of student activity.

Assuming arguendo that there exists a constitutionally acceptable standard to guide the granting authority, the next consideration would be the validity of the Acting President's action in denying recognition, without providing a hearing for the student organization. There is no indication in the case or briefs that the student organization received a hearing *before* being denied recognition by the Acting President. The holding in *Carroll*[19] implies that a hearing must be required before any state official can make a decision where a "prior restraint" is exercised on a first amendment freedom. The procedure enunciated by the United States Supreme Court in the obscenity cases,[20] requiring an adversary hearing

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313 (1958); Superior Films Inc. v. Department of Educ., 346 U.S. 587 (1954); Gelling v. Texas, 343 U.S. 960 (1952); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1950); Saia v. New York, 334 U.S. 558 (1948); Tucker v. Texas, 326 U.S. 517 (1946); Marsh v. Alabama, 326 U.S. 501 (1946); Jones v. Opelika, 316 U.S. 584, 600 (Stone, C.J., dissenting), 611 (Murphy, J., dissenting), *vacated and previous dissenting opinions adopted per curiam,* 319 U.S. 103 (1943); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

16. U.S. CONST. amend. XIV.

17. FLA. CONST. DECL. OF RIGHTS art I, § 4.

18. *See* 1970/71 STUDENT HANDBOOK, FLORIDA STATE UNIVERSITY §§ 7.41(A), 7.42 which provide that, "[a]n officially recognized organization must not have as a purpose, either in name or in fact, the advocacy of the overthrow of the government by force or other unlawful means." The preceding represents the only guideline which the investigation of the writer has disclosed. Some other standard may exist, but there was no such indication either by the court in its opinion, or by the parties in their briefs.

19. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968).

20. Marcus v. Search Warrants, 367 U.S. 717 (1961); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Kingsly v. Brown, 354 U.S. 436, 445 (1957). *See also* Ginsberg v. New York, 390 U.S. 629 (1968) (statutory provisions create a constitutionally acceptable standard for minors where no hearing is required before restraint).

prior to the restraint of any allegedly obscene material, is analogous to the restraints discussed herein. A first amendment freedom cannot be restrained without procedural due process which requires fair notice and a hearing. If speech is restrained by the state without a hearing to the party being restrained, then the constitutional rights of that party are violated.[21] This violation alone would be sufficient to support the position of the restrained party, regardless of the reasonableness of the restraint.[22]

There remains one final consideration which relates to the restraining order in *Lieberman*. Was the court's order valid even though it denied the defendants access to public property? Florida State University is a state supported University whose physical plant is public property. The administrators of the University serve in their capacity as public officials. The defendants, as students, have undeniable first amendment rights which are exercisable on the University campus.[23] In order to restrain the exercise of first amendment rights in such a situation, the state interest justifying the restraint should be clearly defined and the conduct which transgresses that interest should be explicitly proscribed.

Several decisions of the United States Supreme Court have established guidelines pertaining to the prohibition of first amendment rights on public property. Among these guidelines is the determination that the use of public property to advocate unpopular ideas is not sufficient to prohibit the activity of the advocate.[24] Nor may activity which stirs people to anger be validly prohibited.[25] A "belief" by a state officer that violence will occur is not enough to justify restraining the use of public property.[26] The expression of grievances by a group without violence or threat of violence by group members or onlookers is not sufficient to justify restraint.[27] In *Edwards v. South Carolina*,[28] where grievances were expressed without violence or threat of violence on the grounds of the state capital, police intervention was held to be an illegal restraint. However, in *Adderley v. Florida*,[29] similar activity was held legally prohibited when a demonstration occurred on a county jailhouse driveway, thereby inhibiting the normal functioning of the public jail. The activities of the defendants in the instant case would appear to fall under the rationale of the *Edwards* decision. The "belief" of the Acting President that the disruption created by the confrontation would result in disruption to the

21. *But see* Brandenburg v. Ohio, 395 U.S. 444 (1969) (justification for restraint without a hearing is acceptable and permissible where there is a showing of an immediate threat of violence).

22. The reasonableness of the restraint is a consideration of substantive due process and separate from procedural matters.

23. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

24. Bachellar v. Maryland, 397 U.S. 564 (1970).

25. Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

26. Terminiello v. Chicago, 337 U.S. 1 (1949).

27. Edwards v. South Carolina, 372 U.S. 229 (1963).

28. *Id.*

29. 385 U.S. 39 (1966).

University and would cause "irreparable injury"[30] appears to fall within the scope of the decision in *Sellers v. Johnson*.[31] A substantial argument can also be made that the holding in *Adderley* should be extended to include the University buildings. In sum, therefore, the decisions are split as to whether the restraining order in question, denying access to public property to the defendants, would be invalid in the absence of an immediate threat of destructive action.[32]

The foregoing analysis indicates that the defendants failed to overturn the contempt convictions because the proper constitutional questions were not brought into issue. The allegations that the restraining order was insufficient and that it violated the defendants' constitutional rights were stated too broadly. The briefs presented on behalf of the defendants failed to indicate the specific constitutional questions presented herein. If these questions had been presented, the results in *Lieberman* should have been different.

Furthermore, the court did not clarify the proper constitutional questions. To a great extent, the opinion avoided the constitutional questions which were broadly implied but not specifically raised. The case stands for the proposition that the restraining order enforced a constitutionally permissible restraint on a first amendment freedom. This writer disagrees. Based on the considerations raised in this writing and the law presented, *Lieberman* does not provide an adequate precedent for future controversies arising from university regulation of students. The problem of student regulation by administrative authorities is current, potent, and highly volatile. Solutions to the problem are difficult, and *Lieberman* is not a step toward an acceptable and constitutional solution.[33]

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30. Lieberman v. Marshall, 236 So.2d 120, 124 (Fla. 1970).

31. 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948). *See* note 25 *supra*, and accompanying text.

32. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). This decision represented the culmination in a trend which has modified beyond recognition the clear and present danger test as the determinant for injunctive relief. The language of the *Brandenburg* Court indicated that it is now necessary to show that the activity sought to be enjoined would incite violence; moreover, the activity would have to be the precursor of *immediate destructive action.*

33. At the time of this writing, action is pending in the Florida courts to make permanent the temporary restraining order upheld in the instant case. Subsequent to the submission of this note, the Second Circuit decided *Healy v. James*, 40 U.S.L.W. 2071 (2d Cir. July 15, 1971), which dealt directly with the procedural due process requirements mentioned in this note but not discussed by the court in *Lieberman.*

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