[1965]

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

PAUL M. SCHIFF

Plaintiff,

-vs-

JOHN A. HANNAH, President of MICHIGAN STATE UNIVERSITY, JOHN A. FUZAK, Vice President of MICHIGAN STATE UNIVERSITY, and BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY,

Defendants.

File No. 5147

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, MICHIGAN STATE UNIVERSITY CHAPTER, AS AMICUS CURIAE

This brief is being filed by the officers of the Michigan State University chapter of the American Association of University Professors on behalf of the members of the chapter, pursuant to instructions given by the membership at a meeting of the chapter held on December 13, 1965. The vote at that meeting was unanimous.

The American Association of University Professors is a national, non-profit, professional organization, with a membership of 72,000 faculty members in every rank and discipline, and organized into 900 local chapters on college and university campuses in fifty states. Founded in 1915 by a group of distinguished scholars to advance the ideals and standards of the academic profession, the Association is the only national organization in the United States that serves exclusively the interests of all teachers and research scholars at institutions of higher learning. As such, the Association has come to be recognized as the authoritative voice of the profession.

While the Association is an organization composed exclusively of faculty members, it has not refused to concern itself with those student problems which are related to the teaching process. For this reason, in its Bulletin for Autumn, 1964, Committee S of the Association published a

statement under the title "Faculty Responsibility for the Academic Freedom of Students" in which a certain number of general recommendations were made in the area of student activity. The desire, therefore, of the Michigan State University chapter to associate itself with an action in which the plaintiff is not a faculty member, but a student, is entirely consistent with the interests and previous activities of the Association.

The Michigan State University Chapter of the Association of American University Professors comprises more than 300 members, and has an enviable record of cooperation with the university administration. The chapter's officers counsel periodically with high-ranking administration officials to help make the university an outstanding center for teaching, research, and public service, and to enhance still further the university's fine reputation in the academic world. Indeed, it is the opinion the chapter's officers, and of the overwhelming majority of the faculty, that the Board of Trustees and the university's top administrators, particularly President John A. Hannah, have assiduously and conscientiously endeavored to make the Michigan State University campus a place of free inquiry and free expression of opinion. In the view of the chapter's officers, the university's record in preserving and respecting the academic freedom of both faculty and students is, by and large, excellent.

Traditionally a university occupies a special position within the larger organization of society of which it is a part. This special position, accorded in the past by custom and in the present by a variety of legal safeguards, stems primarily from the recognition by society of the particular role which it is the purpose of universities to play: to provide an institution where truth and knowledge may be pursued unhampered by external pressure and where the young citizens of the community may be trained in accordance with the highest intellectual principles.

The people of the State of Michigan, when their universities were created, saw the necessity and the wisdom of preserving this special position and placed the universities in the control of boards free from legislative control and safely embedded in the constitution. Although the Constitution of Michigan has been amended and, more recently, entirely rewritten,

contemporary judgment has not seen fit to change this principle, and the universities of the State are today guaranteed their freedom from the winds of the moment. In addition, Michigan statutes, tradition, and common convention have always held that the educational processes of universities should be the exclusive province of the university faculties. See e.g., Section 14, Act 269 of the Public Acts of 1909 (C.L. 1948, Sec. 390.114.)

Educational processes are diverse in character. In a broad way, everything which occurs on a university campus is part of the process of education, but certain elements of this activity, such as the maintenance of physical plant, do not substantially differ from similar activities in non-educational institutions, and have fallen in consequence to the concern of specialists whose educational qualifications are less significant than their technical skills. But that aspect of the educational process which is directly involved in teaching, research, and the supervision of programs of study, cannot be divorced from the students for whose benefit it is conceived. Freedom from external pressure with respect to professors and curricula must be matched by a similar freedom with respect to students. The business of a university is integral and indivisible.

The special position which a university occupies, like all special positions, implies special responsibility. While many students are mature in years, many are not, and it has long been the strong desire on the part of the people of the State, whose children attend universities supported by tax dollars, that such universities should in general exercise, to a greater or lesser extent, a kind of control which is often referred to as standing "in loco parentis." While this point of view is not fully accepted by everyone connected with the field of higher education, there is overwhelming consensus that universities have both the right and obligation to regulate student behavior, supervise student morals, and promulgate rules designed to prevent disorder and chaos. In short, to assure a framework of "ordered liberty," a university has the unchallenged authority to make reasonable rules to protect the health, safety, and morals of its academic citizens.

It is here that a particular problem emerges, for the

student is at once two persons, a "political" citizen and an "academic" citizen. University regulations of student behavior do not necessarily have, nor should they have, the force of statutory law, but in the interests of education an orderly community would expect that such regulations should be obeyed. However, even though university regulations, not having the force of statutory law, protect in their nature the student from criminal conviction in case they are violated, they none the less may not, in our view, go beyond the constitutional limits of statutory law. In short, although a student may in this sense have a greater obligation than an ordinary citizen, he may not for that reason have less protection.

Whether one accepts the doctrine of "in loco parentis" or not, the principle is best illustrated by problems which arise in the control of the family. A child may be subjected to discipline by his parents, and it is absurd to contend that such discipline may be inflicted only after the parents have provided a full hearing and have given the child a bill of particulars in writing. But the child may not be subjected to discipline which itself violates certain of his inherent freedoms, such as that of being protected against undue cruelty, violence or the withdrawal of shelter, clothing or food. In such instances the community, through its courts, would not hesitate to accept jurisdiction, nor would the community be deterred from accepting jurisdiction on the ground that such an action would open every home to court control and erode the special position which parents have with respect to their children.

The faculty of a university bears to the student body a relationship similar to that which parents bear to their children, and so long as students are on campus, the faculty must bear what is in effect "parental" responsibility. When the faculty acts, therefore, it is acting both for itself and for the parents who have ceded to it, for a limited time and for a limited purpose, not only their powers, but their responsibilities. The necessary right of the faculty, and its need, to assume these responsibilities rests upon the care with which it acts. A cloud upon a faculty action with respect to its control of student behavior is a cloud upon an entire relationship, and failure to dispel such a cloud, in a clear and

unequivocal way, can have the most deleterious effects upon the ability of the faculty in the future to perform its necessary task. Such a failure would undermine the confidence of the citizens in the ability of the men and women to whom the citizens have entrusted so heavy a responsibility.

The interest of the faculty in the instant case is therefore a serious one which transcends the substantive issues. It would be a grievous blow to the faculty-student relationship, a relationship built on mutual trust and confidence, if, for any reason, it should appear that a student has been denied, in a faculty action, those constitutional rights which he would have unquestionably enjoyed in any American community, i.e., the privileges and immunities of American citizenship. And with respect to the character of the charges made by the Administration of Michigan State University against the plaintiff in the instant case, certain of these rights appear to have in fact been denied.

The First Amendment to the Constitution of the United States broadly protects citizens from punishment, harassment and restriction for their views. To be sure, all societies must regulate the actions of their citizens, and certain actions, deemed by a society to present a danger to the orderly processes of social living, may properly be prohibited. Consequently, the First Amendment recognizes, by implication, that a distinction must be made between an act and a belief. If punishment has been meted out on the basis of belief, such punishment is clearly in violation of the First Amendment; if the punishment has been meted out for an action, it would be in violation if the statute allegedly violated was itself designed to regulate belief; if the question of the regulation of belief occurs in neither context, there would be no constitutional issue with respect to the First Amendment alone.

In the statement of charges offered by Vice President Fuzak in response to the Court's recommendation to make such a statement and to furnish same to plaintiff, only one act is cited: "Said petitioner has openly and defiantly refused to abide by a regulation of said University, approved and adopted at the request of students living in dormitories on the campus, prohibiting door-to-door distribution of publications within said dormitories." (Charge No. 1) Neither the time nor place

of the alleged violation is given, nor the name or number of the rule violated, nor the name or identification of the body which adopted the rule, nor the conduct on the part of the plaintiff which was alleged to constitute the violation of the rule. In the place of this essential information, only the opinion of the defendants concerning the necessity for such regulation and a vague statement of motives for its alleged adoption, are given.[1]

The balance of the charges rests upon what is clearly the opinion of the defendants concerning the actions of the plaintiff, an opinion of so emotional an order as to raise the serious question of the possibility that the punishment was not for any action but for its quality in the view of the defendants. The plaintiff is accused of "ridiculing" the regulation; he is accused of having a "defiant" attitude; he is accused of encouraging others to indulge in "like conduct," which apparently means to indulge in having a "defiant" attitude; he is accused of encouraging, by allegedly disobeying a regulation, other students to disobey the regulation, a point of view which has validity only in an existentialist universe, not in a serious court of law;[2] he is accused of acting

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[1] The lack of essential information in the charge was demonstrated when the plaintiff in his reply stated that the distribution rule did not become effective until after the time of the alleged violation. However, at the hearing, the suggestion was made by members of the faculty committee in questions to witness Anderson that possibly plaintiff had violated the old distribution rule rather than the new one. Since defendants never denied that the new rule became effective after the date of the distribution, apparently the faculty committee found plaintiff guilty of violating the old rule, which in fact contained no prohibition of distribution of literature in the dormatory halls. Thus, plaintiff was misled by the vagueness of the charge to defend against an alleged violation of one rule, while the committee apparently found him guilty of violating an entirely different rule.

[2] In connection with plaintiff's distribution of Logos which allegedly urged students to violate university regulation, Justice Oliver Wendell Holmes' comment is in point: "It is said that this manifesto is more than a theory, that it was an incitement. Every idea is a incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration." (Gitlow v. People of New York, 268 U.S. 652,672(1924))

as he did "deliberately;" he is accused of acting with a "purpose," and this "purpose" is, in the minds of the defendants, that of "discrediting" the university; in addition this "purpose" is alleged by the defendants to be "obvious." Although we are certain that these charges represent a true account of the reasons for which the plaintiff was denied readmission on two occasions, we submit that they are matters of subjective opinion and reflect a decision on the part of the defendants to punish the plaintiff for the nature of his views, not for any acts as such.

It is this distinction between speech and action, between belief and deed, between attitude and conduct, which lies at the core of this litigation. It raises the central question, in spite of the Faculty Committee's refusal to make any ruling thereon, of whether the plaintiff had indeed been deprived of his constitutional rights. As for the test to be applied in safeguarding constitutionally protected speech, belief, opinion and attitude, the classic statement by Mr. Justice Brandeis provides an unmistakable guideline:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate, that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Consititution so that free speech and assembly should be guaranteed.

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the evil to be prevented is a serious one....
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> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion is the command of the Constitution."
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> (Concurring Opinion by Mr. Justice Brandeis in Whitney v. California, 274 U.S. 357 (1927), at 375-77)

It would be hard to argue that plaintiff's utterances and manifestos, whatever the "falsehood and fallacies" contained in them, were about to produce an "imminent" evil. It would be hard to prove that "enforced silence" was, under the circumstances, a more efficacious remedy than "more speech." It would be hard to establish that "repression" of the plaintiff was the only method by which "authority [could] be reconciled with freedom."

One of the charges, however, raises in addition another point. The Board of Trustees of Michigan State University and its administrative officers, after consultation with members of the faculty, agreed some years ago upon a set of principles to govern the participation of faculty members in political activity. The university administration and the faculty both recognized that while any faculty member, as a citizen, has the unquestioned right to participate in political parties and to run for office, a faculty member is not an ordinary citizen but, whether he wants to be or not, a representative of an institution responsible to all of the people of the state. It follows that when a faculty member speaks in public he has the special obligation to make it clear that he does not speak for

the university and the further obligation of conducting himself with extreme tact. It was therefore agreed that any faculty member could participate as he chose in politics on a level lower than the county level, could offer himself as a candidate for any non-partisan office and could hold office in a political party without special permission, but that participation on a level higher than the county, or election as a partisan candidate for an office would require leave from his teaching duties. These agreements have consistently been honored, without exception, and with the greatest willingness, by faculty members and the Administration, and as a result some of the special talents of faculty members have been made available to the political community at large. A faculty member, therefore, who offers himself for public office, does so with the consent and, in a sense, the blessing of the University, so long as he separates his political office from his faculty one. He may not ask for special consideration from the voters because he is a faculty member, nor may he protect himself from the slings and arrows of public office by surrounding his person, or his forum, with his cap and gown. We submit that the charge which accuses the plaintiff of having subjected a member of the faculty to public ridicule, if in fact this is what the plaintiff did, should be changed to read that he subjected the Mayor of East Lansing to public ridicule, hardly an acceptable reason for refusing readmission.

In addition to these substantive matters, there are issues which touch the question of procedural due process. Roscoe Pound, for many years the distinguished Dean of the Harvard Law School, articulated the procedural due process issue under the Bill of Rights as follows:

> "Whatever 'liberty' may mean today, the liberty guaranteed by our bills of rights is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from authority of those who are designated or chosen in a politically organized society to adjust relations and order conduct, and so are able to apply the force of that society to individuals. Liberty under law implies a systematic and orderly application of that force so that it is uniform, equal, and predictable, and proceeds from reason and upon understood grounds rather than from caprice or impulse or without full and fair hearing of all affected and understanding of the facts on which official action is taken." (Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY, 1957, p. 1)

Arbitrary & unreasonable exercise of the power and

The record in the instant case contains evidence that plaintiff was not accorded "reasonable expectations" of "freedom from arbitrary and unreasonable" exercise of the university's power to enforce regulations. Further, the application of the university's power with respect to the plaintiff was not "uniform, equal, and predictable," nor did it proceed "from reason and upon understood grounds rather than from caprice or impulse." To illustrate, the university's rule governing the distribution of literature--a rule which plaintiff was accused of violating--was so vague and indefinite, both as to content and date of promulgation, and apparently so little known by the students who were expected to obey it, that more than 160 days after plaintiff's alleged violation, i.e. on October 15, 1965, Mr. Richard O. Bernitt, the university's Director of Public Safety, felt obliged to clarify it in the Michigan State News, under the heading "Bernitt Clarifies Rule," and to state that it was the intention of the campus police to "take enforcement action." The rule cited by Mr. Bernitt in this article, enforcement of which was promised, is Section 30.02 of the Michigan State Ordinance, which prohibits the erection of posters or the distribution of handbills which "advertises [sic] or otherwise calls [sic] attention to any product, service, or activity." Since this rule covers the use or distribution of advertising material inside and outside university buildings, Mr. Bernitt goes on to say that as far as his police force was concerned, only violations inside buildings would be enforced. It should be recalled at this point that the material plaintiff was accused of having distributed was a magazine or journal containing no advertising and not calling attention to "any product, service, or activity."

Three days later, on October 18, 1965, another article appeared in the Michigan State News entitled "Distribution Policy Gets New Rule." The first paragraph of this article reads "The long confused University rule took a new twist Friday when CSR was given permission to distribute 'Logos' on campus." The article goes on to say that Mr. Bernitt, the Manager of the Union, Mr. Dmochochowski, and university officials had agreed to this, and that the Traffic Safety Department had the responsibility "in distribution matters."

It seems evident that neither the form nor the content of the rule, nor the University policy with respect to its interpretation or enforcement, nor the penalties which violation would incur, nor the agency responsible for its enforcement, was sufficiently clear at the time of plaintiff's alleged illegal act to sustain the grave and serious punishment which the University imposed upon him on this count.

The plaintiff was also charged with having acted on behalf of a "student organization which was not recognized by the University," and of having refused to "abide by a regulation of the University requiring student organizations to secure recognition from the University before functioning on the campus." The charges do not make it clear, with respect to the second act, if plaintiff in fact "refused" to do something which he had the obligation to do in propria persona or whether he merely failed to do something. In any case, the charges are based upon the assumption that since CSR, an organization to which plaintiff belonged, had not received legal permission to function on campus, it was in some fashion an "illegal" organization, with all the implications that such a term carries, and that plaintiff, to whatever extent he was responsible for the presence on campus of this "illegal" organization, was doing such harm to the university that his readmission would be a disservice to the university community. There is evidence, however, that while CSR may have been technically illegal, the university itself did not consider it as more than that, and did not refuse to offer to CSR those privileges and de facto recognition which it customarily offers to organizations which have registered. Thus the organization was given a room on campus, in South Case Hall, when it met to hear an address by Professor James B. McKee, a member of the Faculty Committee on Student Affairs, within a week of the hearing at which this committee unanimously upheld the charge that plaintiff failed to register this organization. In addition, as the article "Distribution Policy Gets New Rule" (supra) indicates, members of CSR were invited to discuss the rule with university officials and were directly given the new interpretation by Mr. Bernitt, the Director of Public Safety. It is our submission that the University saw no cause not to meet with, treat with, and consider CSR as an organization whose illegality, if any,

was purely technical, and that the University acted with respect to this organization no differently than plaintiff, with the exception that plaintiff acted "on behalf" of the organization and the University, of course, acted only on its own behalf. These incidents are only illustrative of the arbitrary, capricious, inconsistent, and discriminatory procedures to which plaintiff has been subjected.

One further procedural factum is relevant in interpreting the record. The faculty committee which gave plaintiff a hearing in accordance with this Court's order was not, in our submission, capable of providing a fair hearing--not because any of its members was prejudiced or unfair, but because of previous involvement in the case. The original decision to refuse readmission to the plaintiff, although taken by Vice President Fuzak, was endorsed by the committee in June, 1965, at which time the committee had before it for consideration sufficient evidence of one sort or another to justify, in its view, its concordance with Vice President Fuzak's decision. In the hearing held in compliance with the order of this Court, the same persons reviewed the same evidence, with the exception that since the committee had refused a hearing to the plaintiff in June, it now had, because of the court order, an opportunity to hear statements from the plaintiff. It is difficult to understand how impartial any body can be which is reviewing its own decision on the same evidence, with the one exception, that it had before. It seems unlikely that the same men who acquiesced in Vice President Fuzak's decision to bar plaintiff should on another occasion see any reason to change their minds. A fairer hearing would have been had if the committee members had seen fit to disqualify themselves, and if the task had been assigned to another committee which could examine the evidence de novo.

Finally, we should like to call the attention of the court to certain other matters which bear upon our interest in the case. A day or two after the instant case had been filed, the University was, to the best of our information and belief, not unwilling to readmit the plaintiff,[1] but as soon as the

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[1] See Memorandum by Professor Benjamin B. Hickok, dated November 29, 1965, which was circulated to the faculty and later became the subject of a sworn deposition in this case.

University discovered, through service of the papers, that the case had in fact been filed, it decided that it would not readmit the plaintiff. The conclusion is inescapable (1) that the nature of the charges against the plaintiff did not constitute in the University's opinion a sufficient reason to deny readmission in and for themselves and (2) that the denial upon which the University proceeded to insist was motivated in part by a desire to punish the plaintiff for the mere act of having gone into court at all. While it is not possible to make any certain statements concerning the origin or nature of such an action, it would appear to rest upon a fear on the part of the University of court action, per se, as a means of settling any dispute of this order. Such a fear, in the light of the character of our judiciary, is difficult to understand, but a clue to it may be found in the substance of remarks made by President Hannah before a meeting of the Academic Senate on December 1st, 1965, in which the instant case was a major item for discussion. President Hannah indicated his belief that an unfavorable decision to the defendant in the instant case would, within slightly more than a fortnight, open the doors of all American universities to any and all persons who wished to enter, under the threat of court action, irrespective of their educational qualifications--so that, in defending this case, the University was in effect defending all American universities from invasion.

We submit that it is a disservice to the courts and to the University to suggest that the mere raising of a Federal question and that the mere act of seeking redress in a Federal court for an injury real or imagined, can or would by itself open the gates of all universities to the free and unregulated entrance of hordes of unqualified citizens. To suggest this is not only to distort the stated cause of action in this case but to bring a most unfortunate pressure upon interested citizens to refrain from availing themselves of the judicial machinery provided for the adjudication and enforcement of their rights. We dissociate ourselves completely from this point of view and find it inappropriate to the philosophy of our society.

To recapitulate, we contend:

1. That it is essential to the processes of education for universities to be free from external pressures and from capricious interference;

2. That universities must, in order properly to function, promulgate and enforce reasonable rules designed to protect the health, safety, and morals of their academic citizens, and by maintaining an environment of "ordered liberty" to further the pursuit of their educational purposes;

3. That their special position, however, does not authorize universities to promulgate regulations which in themselves violate constitutional guarantees nor to enforce regulations in such manner as to withhold from students their constitutional rights;

4. That it is in the professional interests of the faculty of a university to protect itself and its university from any loss of public confidence which may result from the denial to students of their constitutional rights, and thus to help preserve the necessary autonomy without which no university can properly discharge its obligations to the citizenry.

In the light of these reasons, the Michigan State University Chapter of the American Association of University Professors respectfully urges the Court to declare that the University's failure to readmit plaintiff constituted a deprivation of his rights under the First Amendment.

Respectfully submitted,

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