

## THE LEGALIZATION OF THE STUDENT/ INSTITUTIONAL RELATIONSHIP IN THE SECOND HALF OF THE TWENTIETH CENTURY

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When the editors of the *Stetson Law Review* invited me to write an article on the legalization of the college student to college relationship, a quick review of major statutes, cases, and historical trends during the last half century prompted me to write this piece as a personal memoir. In retrospect, my professional career as a legally-trained college administrator has encompassed a quarter century in which the relationship of colleges to their students became legalized in ways hardly imaginable only a few years ago. To illustrate, let us return to 1958.

1958

I entered Duke University as a freshman in the fall of 1958. While the United States Supreme Court had outlawed K-12 *de jure* school segregation in 1954,<sup>1</sup> few cases had dealt with the admission of black students to college. At that time, college students had few legal rights, and the reported cases involving college students were limited to disciplinary matters. One typical case, decided in 1924, is almost piquant in its charm. A young woman was disciplined for riding around in a roadster with the top down, while sitting on the lap of a young man.<sup>2</sup> This case, like virtually all other cases dealing

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1. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that segregation of white and black children in public schools pursuant to state statutes violated the Fourteenth Amendment's guarantee of equal protection, regardless of the fact that the school facilities provided to black children were equal to those provided to white children).

2. See *Tanton v. McKenney*, 197 N.W. 510 (Mich. 1924).

with similar issues, held that college authorities were *in loco parentis*,<sup>3</sup> drawing a parallel between family and school behavior.<sup>4</sup>

So, in 1958, I entered a Duke University that was fully in the grip of *in loco parentis*. Duke had not yet faced the great social movements that would shake it — and all other colleges and universities — in the next decade. The two Duke deans of men and women were powerful, near mythic, figures. Both deans were exceptional individuals, and both were supported by an intelligence network of dormitory maids who kept close tabs on student contraband and illicit activity.

Reportedly, the records compiled by the maids were preserved until the mid-1960s, when reporters seeking background information on Richard M. Nixon's alleged unsuccessful penetration of a faculty office to find out his grade in a law course led to the destruction of all such records!<sup>5</sup> One student couple, engaged to be married, received a one-term suspension for necking in a parking lot. And a student newspaper editor, later a distinguished award-winning journalist and writer, was dismissed from the editor's post for running a three-part series in December, which in passing suggested Jesus was conceived during a sexual assault committed by a Roman soldier.

The center of the Duke campus was its most architecturally significant building — a gray stone chapel in the grand European cathedral style. While attending Sunday chapel was not required, it was encouraged.

Male and female freshman were housed, fed, and to some extent, educated on separate campuses a mile apart. Women students had their own campus, known as the Women's College. The women students also had their own dean, library, dining hall, classrooms, gym, and student government. Male freshmen were supposed to wear small, ill-fitting caps, in Duke blue and white, until the Carolina football game. And female freshmen were given a copy of *The Duke Duchess*, a handbook explaining parietal rules, including — so it was said — the proper wearing of gloves.

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3. *In loco parentis* is a latin phrase meaning "in the place of a parent." See BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

4. See *Tanton*, 197 N.W. at 512.

5. Mr. Nixon is rumored to have stood on a chair in a hallway in an effort to see through an open transom to a professor's desk.

All of us, with a few exceptions, were under the age of twenty-one. Almost none had ever voted in a local, state, or national election, and most would not be eligible to vote for another three years.

My 700 or so classmates in Trinity College (the male liberal arts college) were all male, all white, and primarily from the South. Most were at least nominal Christians. Born in 1940, on the backside of the Depression and on the frontside of World War II, many were among the first in our families to attend and graduate from college.

### 1997

For students, student-affairs staff, faculty, and administrators, the world of higher education is a far, far different place in 1997 than it was nearly forty years ago when I entered Duke.

When my oldest daughter entered the University of Virginia in the Fall of 1996, college students had come to benefit from a significant body of federal and state statutes, cases, and regulations. Hundreds of cases had been handed down on the issue of student discipline alone,<sup>6</sup> and many cases on student issues had been published each year.<sup>7</sup>

College deans were no longer *in loco parentis*. There were few deans of men and women. A dean of students typically administered a judicial system, a significant feature of which was often a student-run honor system.

As a consequence of various court rulings during the last forty years, a number of southern states are under a federal desegregation order with respect to their public college and university systems.<sup>8</sup> In my daughter's residence-hall suite of ten women lived students who were black, brown, yellow, red, and white.

My daughter was able to apply to Virginia as a consequence of Title IX,<sup>9</sup> and a court case implementing Title IX,<sup>10</sup> which brought

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6. Search of WESTLAW, Genfed Library, ALLFEDS File (July 1, 1997).

7. *See, e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

8. *See, e.g.*, *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989); *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983).

9. *See* 20 U.S.C. § 1681 (1994). The thrust of Title IX is to prohibit universities receiving federal financial assistance from discriminating on the basis of gender. *See id.*

10. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979) (holding that a fe-

women students into the institution. Unlike me, she was educated with, fed with, and lived in a residence hall with both men and women.

In stark contrast to the study of Duke etiquette and protocol outlined in the *The Duke Duchess*, my daughter was given extensive briefings on personal safety, provided statistical data on campus crime, informed of crime reporting procedures and sexual assault protocols, and attended HIV lectures. In addition to living with students of every color, and virtually every major world religion, she attended an honors colloquium on the civil rights movement. The faculty member was a distinguished national figure in that movement — still young at age fifty.

During my daughter's first year, the University lost its appeal in *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>11</sup> thereby making public university student activity-fee funds available to sectarian religious groups.<sup>12</sup> At the end of her first year, she was invited to join a freshman academic honorary. According to one dean, the honorary had left the Virginia campus when women were admitted. When the national organization changed its “male only” status some twenty years later, the honorary was invited to return. During her second year, at age nineteen, my daughter voted in her first presidential election.

#### ADMISSIONS: STUDENT DISCIPLINE

By my 1962 graduation from Duke, the winds of change had begun to blow across the South. In a few cases, African-Americans had sought — and sometimes won — admission to segregated law schools.<sup>13</sup> And it was African-American students across the South whose lunch counter sit-ins, leading to their suspension from col-

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male applicant denied admission at two private universities had a private cause of action for sex discrimination against each university under Title IX of the Education Amendments of 1972).

11. 115 S. Ct. 2510 (1995) (holding that denying university funds to a student organization that published a newspaper with a Christian editorial viewpoint constituted discrimination and offended the First Amendment, and ruling that providing funds did not violate the Establishment Clause because the program was neutral toward religion).

12. *See id.* at 2524–25. *But see infra* note 43 and accompanying text (indicating that the federal statute at issue in *Rosenberger* was recently deemed unconstitutional).

13. *See, e.g., Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938); *Florida ex rel. Hawkins v. Board of Control*, 93 So. 2d 354 (Fla. 1957).

lege, resulted in the landmark decision of *Dixon v. Alabama State Board of Education*.<sup>14</sup> Several of the first sit-ins were close-by in Greensboro and Durham.

*Dixon* established the principle that the Due Process Clause of the United States Constitution<sup>15</sup> applied to a dismissal decision of a public college official through the doctrine of “state action.”<sup>16</sup> *Dixon* began to define the minimum requirements of due process for a public college disciplinary hearing resulting in dismissal from the institution.

The *Dixon* decision was frequently cited over the next decade as student unrest mounted; and since the holding, many federal cases have been decided across all federal jurisdictions spelling out the federal due process rights of public college students.<sup>17</sup>

#### THE PUBLIC/PRIVATE DISTINCTION

The line of cases flowing from *Dixon* has made it clear that there is a significant difference between public and private higher education, as regards the reach of the United States Constitution. While public colleges are held to a federal constitutional standard — perhaps to include personal liability for a public college administrator's violation of a student's clearly defined civil rights under § 1983 of the Civil Rights Act of 1866<sup>18</sup> — private schools are held only to a “contract of enrollment” standard.<sup>19</sup> The “contract of enrollment” is created by the school catalogue, student handbook, and related written or published materials.<sup>20</sup> By definition, private schools are not “state actors” under the Fourteenth Amendment's

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14. 294 F.2d 150 (5th Cir. 1961) (ruling that tax-supported colleges must provide notice and some opportunity to be heard before students could be expelled for misconduct).

15. See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment prohibits states from depriving “any person of life, liberty, or property, without due process of law.” *Id.*

16. See *Dixon*, 294 F.2d at 158.

17. See, e.g., *Board of Curators v. Horowitz*, 435 U.S. 78, 87 (1978); *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

18. See 42 U.S.C. § 1983 (1994). Section 1983 was promulgated to provide a right of redress for any person deprived of any right, privilege, or immunity secured by the constitution or laws of the United States when such deprivation is caused by a state official acting under color of state law. See *id.*

19. See, e.g., *Haugh v. Bullis Sch., Inc.*, Civ. A. No. HAR 88-1172, 1989 U.S. Dist. LEXIS 4648 (D. Md. Apr. 25, 1989).

20. See *id.* at \*\*3-4.

state action doctrine.<sup>21</sup> Private schools can be reached only through alleged failure to comply with the terms of the "contract of enrollment," or the failure to comply with federal statutes, regulations, or notices of investigative guidance applicable to all colleges receiving federal funds.<sup>22</sup>

### FREE SPEECH/ANTI-WAR

A second major social movement, which was largely built on strategies and tactics developed during the civil rights movement (which were first popularized by Mahatma Ghandi's nonviolent resistance movement in India), was the free speech/anti-war movement. From the mid-1960s until the end of the Vietnam War in the 1970s, student protests against the war, and against a variety of college parietal rules (such as dormitory room visitation by members of the opposite sex), created a considerable body of case law. The issues of free speech, freedom of assembly, freedom of association, and freedom of the press were litigated in a variety of jurisdictions, with the same outcome as the student discipline cases.<sup>23</sup> The federal courts almost uniformly held that public college students had federally guaranteed rights of free speech, assembly, association, and of the press,<sup>24</sup> while private college students typically had no such federal rights.<sup>25</sup> In some instances, however, private college students were held to have such rights under state constitutions.<sup>26</sup>

This period was characterized by: the creation of graduate-level classes on the law of higher education; the initiation of a variety of training programs on legal issues for college staff; the first publication of monographs and other publications on college law; the employment of attorneys as full-time counsel by institutions; and the

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21. *See, e.g.*, *Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996); *Williams v. Discovery Day Sch.*, 924 F. Supp. 41 (E.D. Pa. 1996).

22. *Haugh*, 1989 U.S. Dist. LEXIS 4648, at \*\*3-4.

23. *See, e.g.*, *Hammond v. South Carolina State College*, 272 F. Supp. 947, 950 (D.S.C. 1967).

24. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 180 (1972); *Korn v. Elkins*, 317 F. Supp. 138, 143 (D. Md. 1970); *Hammond*, 272 F. Supp. at 950.

25. *See, e.g.*, *ACLU v. Radford College*, 315 F. Supp. 893, 896 (W.D. Va. 1970); *State v. Schmid*, 423 A.2d 615, 619 (N.J. 1980).

26. *See, e.g.*, *Commonwealth v. Tate*, 432 A.2d 1382, 1387 (Pa. 1981); *Schmid*, 423 A.2d at 628.

accelerated growth of a professional association of attorneys with colleges and universities as major clients.

### *REMOVAL OF NON-AGE DISABILITIES*

A third major social movement was the “old enough to die (in Vietnam), then old enough to vote” effort. The exercise of the rights of speech, assembly, and association led inevitably to a broadly supported effort to assure what some considered the ultimate rights — voting and holding title to property.

During much of history, the legal age of majority had been twenty-one, when voting and other rights were granted. However, the age of draft eligibility for military service was eighteen. A national movement to amend both the federal and state constitutions met with quick success, giving adult rights to eighteen-year-olds.<sup>27</sup> Such rights included the right to vote, the right to hold property, and the right to legally access alcohol. Ultimately, the right to alcohol was relatively short-lived, as state legislatures responded to advocates for drunk driving controls by raising the age for alcohol consumption.<sup>28</sup>

### *TITLE IX, § 504: FERPA<sup>29</sup>*

During the early 1970s, a series of federal statutes further fundamentally altered the student-institutional relationship. The adoption of Title IX of the Higher Education Act<sup>30</sup> sought to assure gender equity in both public and private colleges. The adoption of § 504 of the Rehabilitation Act of 1973<sup>31</sup> created rights for the disabled on college campuses — both public and private — and set college campuses up as the laboratory for the testing of principles set forth two decades later in the Americans with Disabilities Act.<sup>32</sup> Also, the Family Educational Rights and Privacy Act<sup>33</sup> created a federally

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27. U.S. CONST. amend. 6.

28. See Sharon E. Conaway, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 404 n.13 (1988).

29. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1994).

30. Higher Education Act of 1965, 20 U.S.C. §§ 1001–1146a (1994).

31. Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797b (1994).

32. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994).

33. See 20 U.S.C. § 123g (1994).

protected right to student record privacy and accuracy.

### RELIGION

The Supreme Court's ban of official prayers in the public schools,<sup>34</sup> together with concerns about issues such as abortion (a right created in the early 1970s through the Court's holding in *Roe v. Wade*<sup>35</sup>), fueled a political movement involving church-related political activists.

Some administrators were concerned about the issue of religious practices in facilities on public campuses, and the extent to which the school prayer cases applied to higher education. *Widmar v. Vincent*<sup>36</sup> determined that a public college did not violate the Establishment Clause by recognizing a student group with an avowed sectarian purpose, and that such a group had the same rights — to meet, use space, etc. — as other student organizations.<sup>37</sup> The issue of the expenditure of student funds for sectarian religious purposes was not decided until 1995. In *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>38</sup> the United States Supreme Court held that student activity-fee support could be made available to student sectarian groups.<sup>39</sup>

*Rosenberger*<sup>40</sup> reflected the federal public policy basis of the Religious Freedom Restoration Act.<sup>41</sup> This Act seemingly opened K-12 schools for religious practices by students under the Free Exercise Clause, and led to litigation in many areas — to include zoning controls on churches! — where civil authority was said to unduly burden religion.<sup>42</sup> However, on June 25, 1997, the Supreme Court held that the Religious Freedom Restoration Act is unconstitutional because it exceeds Congress's enforcement power under section 5 of the Fourteenth Amendment.<sup>43</sup>

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34. *See Engel v. Vitale*, 370 U.S. 421 (1962).

35. 410 U.S. 113 (1973).

36. 454 U.S. 263 (1981).

37. *See id.* at 278.

38. 115 S. Ct. 2510 (1995).

39. *See id.* at 2522.

40. 115 S. Ct. 2510 (1995).

41. *See* 42 U.S.C. §§ 2000bb–2000bb4 (1994).

42. *See id.*

43. *See City of Boerne v. Flores*, No. 95-2074, 1997 WL 345322, at \*16 (U.S. June 25, 1997).

### *POLITICS*

The student activity-fee cases also raised the issue of whether student activity fees could be used by politically-partisan student groups, such as those opposing abortion rights, supporting legalization of controlled substances, or supporting partisan candidates.<sup>44</sup> These issues remain undecided.

### *RACE, GENDER, EQUITY: CAMPUS CRIME*

The late 1980s and the 1990s saw schools revisiting issues related to race and gender equity, with campus conduct codes broadened to sanction behavior adverse to the educational progress of women and minorities. The codes quickly became the subject of federal litigation on free speech grounds.<sup>45</sup> This litigation, together with increased national awareness about serious crime, and an apparent increase in sexual harassment and hate crimes against women and minorities, led to federal legislation on campus crime and hate crime.<sup>46</sup>

Concern about the harassment of women and minorities on college campuses led the Office of Civil Rights, of the United States Department of Education, to draft and publish guidelines relative to reviews of allegations of racial or sexual harassment.<sup>47</sup> Separate “notices of investigative guidance” were issued. These notices covered racial harassment and sexual harassment of students-by-students, and of students-by-employees of a school.

### *AFFIRMATIVE ACTION*

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44. *See, e.g.*, *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982).

45. *See, e.g.*, *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991).

46. *See* 20 U.S.C.A. §§ 7133, 7141 (1997).

47. *See* *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448 (1994); *Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (1997).

By 1996, the issue of racial equity appeared to have come full circle. The California electorate, by a margin of more than 700,000 votes,<sup>48</sup> adopted Proposition 209,<sup>49</sup> a state constitutional amendment intended to terminate race-based or gender-based discrimination in the receipt of public services, which included college admission and college financial assistance.

Of particular significance was the United States Court of Appeals for the Fifth Circuit's holding in *Hopwood v. University of Texas*,<sup>50</sup> in which the court ruled that an admissions policy for the University of Texas Law School must be neutral, regarding a candidate's race or ethnic background.<sup>51</sup> This decision was stayed by the Fifth Circuit pending an appeal to the United States Supreme Court.<sup>52</sup> Two members of the Court reviewed the petition in June 1996, and concluded the University's adoption of a race-neutral admissions policy made the issue moot.<sup>53</sup> But the public policy debate generated by this issue continued.<sup>54</sup> Much doubt remains on the continuing viability, under the equal protection doctrine, of race-, sex-, or ethnically-based affirmative action.

### SUMMARY

So, how do I summarize legal developments affecting college student life during the nearly forty years since I entered Duke? It is clear colleges no longer stand *in loco parentis*, but neither are they held to a K-12 standard of care. College students are legally adults, and are expected in many areas of student life to meet adult standards of deportment, credit worthiness, and compliance with the law and college policy. But, as the hundreds of court cases reported annually on student life attest, this adult standard is not met on every

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48. See Lyle Denniston, *Calif. Affirmative Action Ban Sets Precedent*, BALTIMORE SUN, Nov. 7, 1996, at 17A.

49. See 1995 Cal. Ballot Measure No. 6, 1995-96 Regular Session. Proposition 209 was approved by voters on December 15, 1996. The popular name for Proposition 209 is the "California Civil Rights Initiative" or the "CCRI." See *id.*

50. 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

51. See *id.* at 962.

52. See Terrence Stutz, *UT, A&M to Drop Race Factor*, DALLAS MORNING NEWS, July 2, 1996, at 1A.

53. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

54. See, e.g., Lani Guinier, *The Real Bias in Higher Education*, N.Y. TIMES, June 24, 1997, at A19.

occasion. And, in areas such as student discipline, sexual and racial harassment, crime control, student speech, assembly, association, and race and gender equity, colleges are held to a standard of care quite different than that which prevailed in 1958.

The student-institutional relationship has taken on an entirely different meaning in the intervening forty years. College administrators now must have some knowledge and experience in the law. A number of publications serve this need,<sup>55</sup> as do a number of symposia, conferences, and meetings.

For nearly twenty years, Stetson University College of Law has made a significant and exemplary contribution to the enhancement of the legal knowledge and skills of lawyers and administrators in this country and abroad.<sup>56</sup> Stetson's annual conference<sup>57</sup> on the law of higher education is generally considered to be the most useful and effective training ground available for administrators and lawyers in the college and university communities. It is to those colleges and universities, and the students they serve, that this issue of the *Stetson Law Review* is dedicated.

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55. *The Journal of College and University Law*, co-published by the University of Notre Dame Law School, is a leading publication in this field.

56. In 1997, Stetson was recognized by the ALI-ABA for its exemplary leadership in the field of higher education continuing legal education.

57. For information on Stetson's annual conference on the law of higher education contact: Stetson University College of Law, Continuing Legal Education Department, 1401-61st Street South, St. Petersburg, FL 33707, or telephone Stetson's Continuing Legal Education Department at (813) 562-7830.