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Constitutional Law--Colleges and Universities--Denial of Recognition to Homosexual Group Abridges Freedom of Association--Gay Lib v. University of Missouri

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change in 1975. The Rules Committee must have been aware of the cases which deemed requests admitted without regard to the propriety of their scope.[24] Because the rule was not amended to say that only proper requests may be deemed admitted in default of denial or objection, the Committee undoubtedly agreed with the result of the earlier cases.

In light of the general unavailability of the Reporter's Notes, the scarcity of Missouri case law on requests for admissions, and the fact that Missouri often emulates the federal rules, the *Linde* decision is not surprising. Until the issue of the proper scope of requests for admissions is raised by an objection at the trial level to a request for the admission of a matter of application of law to fact, the state of the law in Missouri will remain uncertain.

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CONSTITUTIONAL LAW— COLLEGES AND UNIVERSITIES— DENIAL OF RECOGNITION TO HOMOSEXUAL GROUP ABRIDGES FREEDOM OF ASSOCIATION

Gay Lib v. University of Missouri [1]

In 1971, an organization calling itself Gay Lib was formed in Columbia, Missouri, for the avowed purpose of providing a forum for the exchange of ideas about homosexuality.[2] The group applied for recognition as a campus organization at the University of Missouri-Columbia in February of 1971. Benefits of recognition would have included access to university facilities and the right to petition for funds from the student governing body.

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24. The *Hudson, Kraehe, Manpower,* and *Zykan* cases antedated the rule change of 1975.

1. 558 F.2d 848 (8th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3268 (U.S. Sept. 20, 1977) (No. 77-447).

2. The original statement of purpose of the group read, in part:

> The purpose of the organization Gay Lib shall be:
> (a) To provide a dialogue between the homosexual and heterosexual members of the university community.
> (b) To dispel the lack of information and develop an understanding of the homosexual at the University of Missouri. . . .

Gay Lib v. University of Mo., 416 F. Supp. 1350, 1354 (W.D. Mo. 1976).

After a committee of the student government initially approved the petition to be recognized, the request was rejected by the Dean for Student Affairs. Successive appeals were taken to the Chancellor of the Columbia campus, the university President, and the Board of Curators. In each instance the denial was affirmed. The decision of the Board of Curators was based on a report from a Board-appointed attorney presiding at a formal hearing held in August, 1973.[3] At the hearing, expert medical testimony was offered by both sides of the dispute. The recommended findings of fact, adopted by the Board of Curators, included the opinion that recognition of the homosexual group would "tend to expand homosexual behavior which will cause increased violations of section 563.230 of the Revised Statutes of Missouri"[4] (the sodomy law).[5]

Gay Lib and individual members brought suit in federal district court,[6] alleging that their first amendment freedom of association was infringed by the university's refusal to acknowledge them. The trial judge upheld the right of the university to deny recognition. The Eighth Circuit reversed, holding that the school had not shown an interest of sufficient import to justify restriction of the group's constitutional rights.

In *Tinker v. Des Moines Independent Community School District*[7] the Supreme Court established the principle that students of state schools retain their constitutional rights in dealing with the institutions.[8] The Court noted that nowhere is the protection of first amendment freedoms more vital than in the schools. However, first amendment rights must be "applied in light of the special characteristics of the school environment."[9] The state has a significant interest in preserving disciplined and orderly educational processes. Therefore, courts will not intervene to resolve conflicts which arise in the daily operation of state schools unless basic constitutional rights are implicated.

Another established principle is that refusal to give official status to campus groups can be an infringement on first amendment freedoms.[10] In

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3. Gay Lib v. University of Mo., 558 F.2d 848, 850 (8th Cir. 1977).

4. *Id.* at 851 n.7.

5. The Supreme Court recently has upheld, without opinion, the constitutionality of a Virginia sodomy law much like Missouri's. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

6. Gay Lib v. University of Mo., 416 F. Supp. 1350 (W.D. Mo. 1976).

7. 393 U.S. 503 (1969).

8. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Although *Tinker* involved a municipal high school system, it generally has been accepted as applicable to all levels of public education. *See, e.g.,* Papish v. Board of Curators, 410 U.S. 667 (1973) ("indecent speech" rules on college campus); *see generally* Wright, *The Constitution on the Campus,* 22 VAND. L. REV. 1027 (1969).

9. 393 U.S. at 506.

10. Gay Lib v. University of Mo., 416 F. Supp. 1350, 1368 (W.D. Mo. 1976); *see* Note, *Freedom of Political Association on the Campus: The Right to Official Recognition,* 46 N.Y.U.L. REV. 1149 (1971).

the seminal case of *Healy v. James* [11] a chapter of Students for a Democratic Society was denied recognition by Central Connecticut State College. Although the Supreme Court remanded the case to the district court for determination of whether the college's action was constitutional, the Court noted that "denial of official recognition, without justification, to college organizations burdens or abridges . . . [their] associational right." [12]

The Eighth Circuit in *Gay Lib* considered the university's actions analogous to a prior restraint on first amendment rights, traditionally disfavored by the courts.[13] A consistent line of cases has established that when a prior restraint is sought to be imposed, the state bears a heavy burden of showing the necessity of the restraint for the protection of a legitimate state interest.[14] In *Gay Lib* the university relied on the somewhat novel tactic of using expert medical opinion [15] to show the negative effects on the university community of recognition of a homosexual group.[16] The court of appeals, however, said that "[e]ven accepting the opinions of defendants' experts at face value, we find it insufficient to justify [the denial of recognition]." [17]

Although the Supreme Court has said that only the likelihood of "grave and irreparable damage" is sufficient to justify a prior restraint on publication,[18] the standard for justifying a prior restraint on associational

11. 408 U.S. 169 (1972).

12. *Id.* at 181. The fact that the group still was free to meet and conduct activities off campus did not "ameliorate significantly the disabilities imposed by the college's action." *Id.* at 183; *see also* Mississippi Civil Liberties Union v. University of S. Miss., 452 F.2d 564 (5th Cir. 1971).

13. The Supreme Court first announced this holding in Near v. Minnesota, 283 U.S. 697 (1931), but the principle is much older. Blackstone said, "The liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151 (21st ed. 1858).

14. *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (performance of rock musical *Hair* prohibited in city theater); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973) (principal of school required prior approval of literature distributed by students).

15. The university's tactic is a logical extension of previous cases dealing with similar matters. In McConnell v. Anderson, 316 F. Supp. 809, 812 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972), the trial judge lamented that no medical or other expert witnesses were called to comment on the habits or attitudes of homosexuals, and the court was "left with but the dictionary definition of the term." In a case involving a homosexual teacher three years later, extensive medical testimony was presented, but it only was sufficient to prompt the judge to note that the danger the school feared was not "illusory." Acanfora v. Board of Educ., 359 F. Supp. 843, 849 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

16. The university marshalled experts with impressive credentials in the field of the psychiatric study of homosexuality who indicated that recognizing Gay Lib would in fact cause an increase in the number of criminal homosexual acts. 416 F. Supp. at 1368-69.

17. 558 F.2d at 855.

18. New York Times Co. v. United States, 403 U.S. 713, 732 (1971).

rights is unclear. The primary contention of the University of Missouri was that recognition of Gay Lib would lead to increased violations of the Missouri sodomy statute, and that prevention of such violations is a substantial state interest justifying prior restriction of constitutional freedoms.[19] This claim was based on the "clear and present danger" cases,[20] which held that a showing of imminent lawless activity could justify subsequent criminal liability for otherwise constitutionally protected conduct. The currently accepted restatement of this principle was expressed in *Brandenburg v. Ohio:*[21] constitutionally safeguarded conduct may be punished when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[22]

The trial judge in *Gay Lib* apparently accepted the university's argument that the *Brandenburg* test also is appropriate to support a denial of recognition which affects associational rights. Citing *Brandenburg,* the trial court found that recognition of the homosexual organization would "likely" lead to violations of Missouri's felony sodomy statute, and that the university was justified in refusing the requested recognition.[23] The Eighth Circuit disagreed, concluding that "the restriction of First Amendment rights . . . may be justified only by a far greater showing of the likelihood of imminent lawless action than that presented here."[24]

The appeals court holding neither mandated the "grave and irreparable damage" standard nor expressly disapproved the more lenient "imminent lawless action" test. Although several cases demonstrating insufficient grounds for the imposition of a prior restraint were cited,[25] no clear indication was given of when prior restrictions on freedom of association will be justified. It is obvious that the test is stringent and that instances in which a

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19. An allusion to this proposition appeared in a recent Fourth Circuit opinion involving similar circumstances. "If . . . VCU's concern is with a possible rise in the incidence of actual homosexual conduct between students, then a different problem is presented. We have little doubt that the University could constitutionally regulate such conduct. . . . But denial of registration is overkill." Gay Alliance of Students v. Matthews, 544 F.2d 162, 164 (4th Cir. 1976).

20. Dennis v. United States, 341 U.S. 494 (1951) (balancing gravity of the evil and its probability of occurring against the interest of protecting first amendment freedoms); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919) (in which Justice Holmes originated the "clear and present danger" test). *See generally* Linde, *Clear and Present Danger Reexamined: Dissonance in the Brandenburg Concerto,* 22 STAN. L. REV. 1163 (1970).

21. 395 U.S. 444 (1969). Although the *per curiam* opinion did not mention the clear and present danger test, Justices Black and Douglas disapproved it in concurring opinions. Justice Douglas remarked, "Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace." *Id.* at 452.

22. *Id.* at 447.

23. 416 F. Supp. at 1369-70.

24. 558 F.2d at 854-55.

25. *Id.* at 855 nn.14, 15.

university may abridge the associational rights of students based on fear of unlawful conduct will be rare.[26]

The court in *Gay Lib* noted that the trial court blurred the constitutional line drawn in *Brandenburg* between mere advocacy and advocacy directed to inciting or producing imminent lawless action.[27] The district court made no finding that Gay Lib intended to incite lawless action, or that their advocacy was directed to that end. It would seem that the mere likelihood of unlawful activity, as found in *Gay Lib,* is not sufficient to justify banning the activity. The *Brandenburg* test also requires some showing of an intent to promote such activities.

The second argument of the university was that recognition of Gay Lib would lead to disruption of normal campus functions and the educational process. Under *Tinker,* proof that recognition would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"[28] would justify the university's action.[29] The Board of Curators had been presented evidence that such disruption might occur when they rendered their decision denying recognition to Gay Lib. Provisional recognition had been granted to the Gay People's Union on the Kansas City Campus of the University of Missouri. Police officers testified at the hearing that, following recognition of the group, homosexual activity (including solicitation) increased markedly on the Kansas City campus, resulting in numerous complaints from students and faculty.[30] However, the trial judge excluded consideration of these issues as irrelevant to occurrences at the Columbia campus. The university therefore was unable to make the requisite showing.

Nevertheless, this approach provides the strongest basis for denying recognition to homosexual organizations because it focuses on the substantial state interest in orderly educational processes. The University of Missouri might have met with more success if it had been able to establish that

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26. In the only analogous case found in which a prior restraint was allowed, an anti-war group wanted to use a campus building to hold a draft protest. Sellers v. Regents of Univ. of Cal., 432 F.2d 493 (9th Cir. 1970), *cert. denied,* 401 U.S. 981 (1971). Upon the advice of counsel that violations of the Selective Service laws would result, the administrators refused the group access to school grounds. The Regents were upheld by the Ninth Circuit in a 2-1 decision with a strong dissenting opinion.

27. *Id.* at 856.

28. 393 U.S. at 505, *quoting* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

29. *See, e.g.,* Augustus v. School Bd., 507 F.2d 152 (5th Cir. 1975) ("Rebel" nickname prohibited in racially troubled high school); Norton v. Discipline Comm., 419 F.2d 195 (6th Cir. 1969), *cert. denied,* 399 U.S. 906 (1970) (prohibition of distribution of pamphlets upheld); Merkey v. Board of Regents, 344 F. Supp. 1296 (N.D. Fla. 1972), *vacated as moot,* 493 F.2d 790 (5th Cir. 1974) (Yippie group advocating violence denied recognition). *See generally* Ladd, *Allegedly Disruptive Student Behavior and the Legal Authority of School Officials,* 19 J. PUB. L. 209 (1970).

30. Transcript of Hearing, Gay People's Union v. University of Missouri-Kansas City (August 15, 1973) (Coil, Hearing Officer).

the likelihood of imminent lawless activity alone threatened to disrupt the school environment within the meaning of *Tinker*.

It is important to note that recognition does not preclude the university from regulating the conduct of Gay Lib. To the extent that the homosexual organization's activities include use of public property, the university may impose reasonable regulations on the time, place, and manner of the group's activities.[31] Some decisions have suggested that the extent of permissible regulation is related to the nature of the public property on which the activity is to be conducted.[32] For example, "street corner" demonstrations might have to be allowed under conditions where similar conduct inside a university building could be prohibited. Therefore, if the school could show that a given organization was likely to violate reasonable restrictions on the uses of particular buildings or facilities, it might be able to restrict the group's activities to less sensitive areas of the campus.

The university administration may not regulate arbitrarily or discriminatorily.[33] In *Gay Students Organization v. Bonner*[34] a college had recognized a homosexual organization and extended normal privileges to them. After a widely publicized gay dance sponsored by the group, the college administration attempted to ban such social affairs. The First Circuit held that the restriction was not constitutionally permissible because it was "content-related."[35] The state may not suppress the expression of views merely because it finds them socially abhorrent.[36]

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31. Sword v. Fox, 446 F.2d 1091 (4th Cir.), *cert. denied*, 404 U.S. 994 (1971) (demonstrations not allowed inside campus buildings); Esteban v. Central Mo. St. College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (participation in demonstrations in violation of administration directives).

32. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939) (per curiam). *See also* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). *Cf.* Grayned v. City of Rockford, 408 U.S. 104 (1972) (ordinance prohibiting disturbance on public grounds adjacent to school upheld).

33. It should be observed that the message imparted is not totally irrelevant. Where the speech or conduct is of such an inflammatory nature that disruptive response will certainly ensue, the state may restrict the speech to prevent the disturbance before it occurs. *See, e.g.,* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968) ("[T]here are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantees of the First Amendment."). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words likely to provoke the average person to retaliation); Cantwell v. Connecticut, 310 U.S. 296 (1940).

34. 509 F.2d 652 (1st Cir. 1974).

35. *Id.* at 661. The governor of New Hampshire had threatened to oppose "the expenditure of one more cent of taxpayers' money for your institutions" if the university did not act "to rid ... [the] campuses of socially abhorrent activities." *Id.* at 654.

36. Police Dep't v. Mosely, 408 U.S. 92, 95 (1972). *See also* Papish v. Board of Curators, 410 U.S. 667 (1973) (per curiam). *But cf.* Young v. American Mini

It also should be noted that failure to obey reasonable and non-discriminatory rules may justify university *withdrawal* of recognition to homosexual organizations.[37] This provides university administrators with an effective check on the excessive conduct they purport to fear.[38] However, this argument is a weak basis for denying initial recognition because homosexual organizations easily can deny any intention to break university regulations.[39]

The *Gay Lib* decision firmly establishes the constitutional principle that student homosexual organizations are entitled to recognition by state colleges and universities.[40] Because denial of recognition is a form of prior restraint on freedom of association, the courts will continue to support recognition in all but the most extreme cases. Future litigation, therefore, will focus on the degree to which the activities of homosexual organizations can be regulated by school administrators once recognition has been granted.

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Theaters, Inc., 427 U.S. 50 (1976), in which the Supreme Court seemed to retreat from a hard line "content neutrality" stance and allowed restrictive zoning of adult movie theaters and similar operations (they were not allowed, for instance, to be established within 1000 feet of each other). Query whether a school in the situation of the University of Missouri similarly could allow the existence of the putative social evil, but restrict its operations to prevent its flourishing.

37. "[R]ecognition, once accorded, may be withdrawn or suspended if petitioners fail to respect campus law." Healy v. James, 408 U.S. 169, 194 n.24 (1972).

38. *See, e.g.*, Jenkins v. Louisiana St. Bd. of Educ., 506 F.2d 992 (5th Cir. 1975) (students suspended for organizing boycotts of classes and demonstrations after being warned of violations of college rules); Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) (suspension of students for violation of regulation prohibiting disturbance in assembly); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (rule against wearing of provocative buttons upheld when accompanied by disruption in school).

39. The statement of purpose of a homosexual group is easily structured to import no intention contrary to school policies. Gay Lib v. University of Mo., 558 F.2d 848, 850 (8th Cir. 1977); Gay Alliance of Students v. Matthews, 544 F.2d 162, 163 (4th Cir. 1976); Gay Students Org. v. Bonner, 509 F.2d 652, 654 n.1 (1st Cir. 1974).

40. Although the holding of the case stands for the clear legal principle mentioned, the polemic nature of the issues involved indicates that challenges may be frequent and spirited. On petition for rehearing, the appeals court split 4-4 with a rare and powerful dissenting opinion by the Chief Judge. In addition, the interest of the Supreme Court is signalled by its order to Gay Lib to file a reply to the university's petition for *certiorari*.