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Healy v. James: Official Campus Recognition for Student Groups

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Official Campus Recognition for Student Groups

ON JUNE 26, 1972, THE SUPREME COURT OF THE UNITED STATES handed down its decision in the case of *Healy v. James*,[1] a decision which will have great effect in the administrative review by a college or university official of a petition by a student group for recognition as a full-fledged campus organization. The Court declared that such a petition carries with it the associational rights of the group as protected by the first amendment, which can not be subjected to the prior restraint of denial without a constitutionally valid cause; placed the burden of proving such cause on the official; and gave specific examples for the criteria to be used in the decisional process.

Facts

In September, 1969, a group of students at Central Connecticut State College (hereafter abbreviated as CCSC), a state-supported institution, started procedures to organize a local chapter of the Students for a Democratic Society (hereafter abbreviated as SDS) and petitioned the Student Affairs Committee of the College for official recognition, according to the College regulations. The request included the following statement of purpose for the group:

1. To provide a forum of discussion and self-education for students developing an analysis of American society;
2. To serve as an agency for integrating thought with action so as to bring about constructive changes; and
3. To endeavor to provide a coordinating body for relating the problems of leftist students with other interested students and groups on campus and in the community.[2]

The committee, during two meetings with the organizers, questioned whether the group would be closely affiliated with the National SDS, and whether the local group espoused all of the National's policies, including the known policy of campus disruption. Both of these issues were answered in the negative by the group's organizers, and based on this claim of local independence, the committee voted six to two to recommend that the petition and application be granted by the President of the College, Dr. James. President James rejected the application, stating that he could not recognize a group with

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[1] 408 U.S. 169 (1972).

[2] *Id.* at 172. The full statement of purposes is given in the dissenting opinion to the Second Circuit decision, 445 F.2d 1122, 1136-37 (2d Cir. 1971).

policies (whether local or national) contrary to the approved College policies, especially since the question of the group's national affiliation was to him unclear.[3]

The effects of nonrecognition were felt in the restriction of the group from the use of campus facilities for meetings and informational channels; because of these, the petitioning group filed suit in the United States District Court for Connecticut, which found a denial of procedural due process and granted a hearing.[4] Issues of the independence from the national organization, and the disruptive policies advocated and followed by the National SDS, were discussed at the hearing, and President James for a second time denied official recognition to the CCSC-SDS. The case, returning to the district court,[5] was ordered dismissed on the grounds that procedural due process had been met, that the group had failed to meet the burden of showing non-affiliation with the National organization, and that possible associational rights had not been violated by the College's denial of recognition to a group "likely to cause violent acts of disruption."[6] The case was appealed to the Second Circuit Court of Appeals,[7] which affirmed the district court, two-to-one, on the same line of reasoning, and certiorari was granted[8] by the Supreme Court to decide a novel factual presentation based on established first amendment principles.

Right of Association

The Court in *Healy* found that it was apparent that campus organizations and activities at state-supported schools were included in the realm of constitutionally protected rights under the first amendment, and that the denial of such rights was the first fundamental error made by the lower courts. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] This concept of protected first amendment rights as applied to state-supported schools[10] is one reiterated and stressed because the

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[3] The statement is quoted in full in 408 U.S. at 174-75 n. 4.

[4] Healy v. James, 311 F.Supp. 1275 (D.Conn. 1970).

[5] Healy v. James, 319 F.Supp. 114 (D.Conn. 1970). *See* Baldwin, *Methods of Social Control of Academic Activists Within the University Setting*, 14 ST. LOUIS L.J. 429, 456 (1970), relating to administrative review procedures and techniques.

[6] Healy v. James, 319 F.Supp. 113, 116 (D.Conn. 1970).

[7] Healy v. James, 445 F.2d 1122 (2d Cir. 1971).

[8] Healy v. James, 404 U.S. 983 (1971).

[9] Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1960), *quoted in* Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 506 (1969).

[10] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See generally*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Schwartz, *The Student, the University, and the First Amendment*, 31 OHIO ST. L.J. 635, 646 (1970); Wright, *The Constitution Comes to the Campus*, 22 VAND.L.REV. 1027 (1969).

campus needs and requires academic freedom to remain the "marketplace of ideas";[11] by its very purpose, a college or university is (or should be) a melting pot of differing and conflicting ideas molded into an education.

The first amendment rights here in question include the freedoms of speech, assembly, and petition, and the implicit right of association, to further and enhance personal and group beliefs.[12] There is also a right to receive information and ideas;[13] "[t]his is not surprising when one considers what value the right to free speech would have if the right to hear such speech could be foreclosed."[14]

Of course, these rights must be balanced against the needs of the college administration to keep and maintain an orderly campus,[15] and the rights of students, faculty, and other persons (townspeople, etc.) who do not advocate the ideals or methods of the group in question. In *Tinker v. Des Moines Independent Community School District*,[16] these needs were stressed, as the Court recognized

> . . . the need for affirming the comprehensive authority of the States and of the school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.[17]

College officials have a wide discretionary range in the operation and management of the school,[18] including reasonable rules and regulations,[19] but such regulation must be related to educational

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[11] Healy v. James, 408 U.S. 169, 180 (1972); *see* Shelton v. Tucker, 364 U.S. 479 (1960).

[12] Healy v. James, 408 U.S. 169, 181 (1972), *citing* Baird v. State Bar of Arizona, 401 U.S. 1 (1970), *and* Louisiana *ex. rel.* Gremillion v. NAACP, 366 U.S. 293 (1961). Associational rights were officially recognized by the Supreme Court in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); *see* NAACP v. Button, 371 U.S. 415 (1963); Hanover Twp. Fed. Tchrs. Local 1954 v. Hanover Comm. School Corp., 457 F.2d 456 (7th Cir. 1972).

[13] Stanley v. Georgia, 394 U.S. 557 (1969).

[14] American Civil Liberties Union of Va., Inc. v. Radford College, 315 F.Supp. 893, 896 (W.D. Va. 1970).

[15] This has been called an inherent right of administrative officials in their official capacities. *See* Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969); Speake v. Grantham, 317 F.Supp. 1253 (S.D.Miss. 1970); Barker v. Hardway, 283 F.Supp. 228 (S.D.W.Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F.Supp. 747 (W.D.La. 1968); Buttny v. Smiley, 281 F.Supp. 280 (D. Colo. 1968); Hammond v. South Carolina State College, 272 F.Supp. 947 (D.S.C. 1967); Hanger v. State Univ. of N.Y. at Binghamton, 39 App. Div. 2d 253, 333 N.Y.S. 2d 571 (1972).

[16] 393 U.S. 503 (1969).

[17] *Id.* at 507.

[18] Norton v. Discipline Committee of E. Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969); Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969); Clemson Univ. Vietnam Moritorium Comm. v. Clemson Univ., 306 F.Supp. 129 (D.S.C. 1969).

[19] Center for Participant Educ. v. Marshall, 337 F.Supp. 126 (N.D. Fla. 1972). For example, at the University of Tennessee at Knoxville, a campus regulation required *all* persons, whether students, non-students, faculty, staff, or invitee, to carry a valid identification card

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objectives,[20] and must not abridge constitutional right or be arbitrary or capricious.[21]

There is a concept ancillary to the student organization-administration dichotomy which evolves from the purpose of a college or university. "The freedoms of speech and assembly, while occupying a 'preferred position' among constitutional liberties, may not be exercised on public property without regard to its primary usage."[22] That education is the primary role of a university is granted and conceded by all sides; the debate is how this education is to be presented and taught, and in what medium or form. In other words, what ammunition is to be included in the arsenal of academics?[23] Although the state has the "power to preserve the property under its control for the use to which it is lawfully dedicated,"[24] there may be some forms of academics on campus which an administration may not in any circumstances prohibit. This would, however, appear to be an equal protection argument: once certain non-academic or non-scholastic activities (in a strictly traditional sense) are permitted on campus, any other such activities must also be permitted to function on campus, subject to reasonable restraints governed by the application of first amendment safeguards.[25] However, a distinction may be drawn between local groups petitioning for use of campus facilities for local students, and a group bring-

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necessary for admission to any campus facility. The regulation was held valid as a reasonable regulation, related to the necessity of the maintenance of order on campus. *See* Smith v. Ellington, 334 F.Supp. 90 (E.D. Tenn. 1971); *see also* Bayless v. Martine, 430 F.2d 873 (5th Cir. 1970).

[20] American Civil Liberties Union of Va., Inc. v. Radford College, 315 F.Supp. 893, 896 (W.D.Va. 1970); Dickey v. Alabama State Bd. of Educ., 273 F.Supp. 613, 618 (M.D.Ala. 1967); *Student Discipline in Tax Supported Institutions*, 45 F.R.D. 133, 137 (W.D. Mo. 1968).

[21] Barker v. Hardway, 283 F.Supp. 228, (S.D.W.Va. 1968); Connelly v. University of Vt. & State Agric. College, 244 F.Supp. 156 (D.Vt. 1965).

[22] Stacy v. Williams, 306 F.Supp. 963 (N.D. Miss. 1969).

[23] *See, e.g.*, in regard to the teaching of evolution theory, Epperson v. Arkansas, 393 U.S. 97 (1968). In regard to oaths of allegiance and inquiry as to membership in subversive and similar activities and organizations, the Court in Keyishian v. Board of Regents, 385 U.S. 589 (1967), stated at 603: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." In regard to prior review by school administrators of school-sponsored literary magazines and pamphlets, *see* Stanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972); Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Koppell v. Levine, 347 F.Supp. 456 (E.D. N.Y. 1972); Egner v. Texas City Indep. School Dist., 338 F.Supp. 931 (S.D. Tex. 1972).

[24] Adderley v. Florida, 385 U.S. 39, 47 (1966).

[25] American Civil Liberties Union of Va., Inc. v. Radford College, 315 F.Supp. 893, 896 (W.D.Va. 1970); Stacy v. Williams, 306 F.Supp. 963, 971 (N.D. Miss. 1969).

ing in a number of persons from outside the local campus, with an increased threat of disruption.[26]

The actual instances in *Healy* abridging fundamental rights included the denial of the use of campus bulletin boards and the campus newspaper for informational purposes, the denial of the use of campus facilities for meetings,[27] and the denial of "the administrative seal of official college respectability."[28] The Court was able to give these instances of denial of rights great weight because the "Constitution's protection is not limited to direct interference with fundamental rights,"[29] and because such indirect action (subtle government interference) with the effect of curtailment or prohibition of protected rights was impermissible. The fact that the group could function off-campus to some degree was not controlling, because it is the "character of the right, not the limitation" which is important,[30] and this limitation was such to deny rights to the group. The lack of meeting space and communication channels in the College would undoubtedly impede the right to the group to effectively carry on many of its purposes, and the lack of official approval would certainly affect membership and interaction with recognized campus groups.[31]

Having established that a fundamental, constitutionally protected right was involved and was invaded, the Court moved to the

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[26] Clemson Univ. Vietnam Moratorium Comm. v. Clemson Univ., 306 F.Supp. 129 (D.S.C. 1969).

[27] For example, a meeting in the campus coffee shop was disbanded by the college officials after president James' official rejection on November 6 because "CCSC-SDS is not a duly recognized college organization." Healy v. James, 408 U.S. 169, 176-77 (1972). In *Lieberman v. Marshall*, 236 So.2d 120 (Fla. 1970) the Florida Supreme Court affirmed an injunction prohibiting a student group denied official campus recognition from using campus facilities, stating that under the facts, no first amendment rights were denied. *See also* National Strike Info. Cntr. v. Brandeis Univ., 315 F.Supp. 928 (D. Mass. 1970).

[28] Healy v. James, 408 U.S. 169, 182 (1972), *citing* the second district court opinion, 319 F.Supp. 113, 116 (D.Conn. 1970).

[29] Healy v. James, 408 U.S. 169, 183 (1972).

[30] American Civil Liberties Union of Va., Inc. v. Radford College, 315 F.Supp. 893, 898 (W.D.Va. 1970), *citing* Thomas v. Collins, 323 U.S. 516, 530 (1945).

[31] Healy v. James, 408 U.S. 169, 176 (1972). The result of such a denial of recognition by an administrative procedure may well have a chilling effect upon the expression of politically motivated fundamental rights. *See* Houston Peace Coalition v. Houston City Council, 310 F.Supp. 457 (E.D. Tex. 1970). There are very real sanctions involved, including academic probation and expulsion from the university. Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969). These sanctions could very well be sufficient under the edicts of *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Since there is a great "likelihood" that on-campus recruitment of members or other activities will bring sanctions, this "[c]hilling may justify the relaxation of rules which inhibit the mitigation of constitutional claims in the federal courts." Davis v. Ichord, 442 F.2d 1207, 1214 (D.C. Cir. 1970). Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 809 (1969).

regulation and enforcement process of this right in relation to the action taken by the College.[32]

Burden of Proof

The second fundamental error of the lower court decisions was related to the burden of proving that the proposed CCSC-SDS was an acceptable organization entitled to recognition by the College.

After wending its way through the administrative functions and hearings at the college, the application for recognition was denied by President James on the grounds that since the local group was allied to the National SDS, whose policies were abhorrent to the College and its policies, the local chapter had to prove with sufficient evidence that they would not follow the national policy of campus disruption.[33] Having failed to so prove, the students' application was rejected. In essence, President James and the lower courts placed on the petitioning group the burden of proving that they were an acceptable organization for official recognition by the College. This, the Court declared, was not the proper procedure: ". . . once petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of rejection."[34] By so placing the burden of proof, the College administration had to show valid and cognizable reasons for rejecting the group,[35] and since the rights of the group were of fundamental first amendment weight, a constitutionally-recognized basis was needed to deny such rights.

The reason for this shift was that the rejection of the application for recognition was found to be a prior restraint of a fundamental right of the petitioners.[36] A prior restraint is the decision by an official to withhold or prohibit activities protected by the constitution before their actual happening, based on the actions of affiliated or similar bodies, or on mere speculation that the actions

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[32] In *Healy*, applicants did not question the procedural or substantive application requirements for official recognition. Healy v. James, 408 U.S. 169, 183-84 n. 11, 193 (1972). However, it is implicit that procedural due process be met, to allow a full and fair application process. While the process may be valid without granting a hearing, as in *Merkey v. Board of Regents*, 344 F.Supp. 1296, 1304 (N.D. Fla. 1972), an application scheme must be made public, must include an unbiased and impartial decision maker per *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972), and *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967), and must be applied equally to all applicants.

[33] Healy v. James, 408 U.S. 169, 183-84 (1972).

[34] *Id.* at 184, *citing* Law Students Civil Rights Research Council v. Wadmond, 401 U.E. 154 (1971), *and* United States v. O'Brien, 391 U.S. 367 (1968).

[35] "[W]hen the constitutional right to speak is sought to be deterred . . . due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." Speiser v. Randall, 357 U.S. 513, 528-29 (1958).

[36] Hammond v. South Carolina State College, 272 F.Supp. 947 (D.S.C. 1967). *See generally* Comment, *Withholding Official College Recognition from Radical Student Groups: A Denial of First Amendment Rights*, 57 IOWA L. REV. 937, 945-48 (1972).

will be disruptive, or that the goals or policies are not compatible with the norms of the larger or controlling group. The concept of prior restraint, as applied to state action in *Near v. Minnesota,*[37] encompasses the entire first amendment, including the right to associate, and certain tests and indicia have evolved to evaluate the effect of the prior restraint.

> . . . [I]n order to withstand constitutional attack, prior restraints must be narrowly drafted so as to suppress only that [action] which presents a "clear and present danger" of resulting in serious substantive evil which a university has a right to prevent.[38]

This is the classic test given in *Schenck v. United States,*[39] formulated in an opinion by Mr. Justice Holmes. In a review of the "clear and present danger" doctrine, Mr. Justice Douglas, concurring in *Brandenburg v. Ohio,*[40] reaffirmed the basic tenets of the *Schenck* test, in holding that more than mere advocacy must be necessary for restraint or punishment of the exercise of protected first amendment rights; there must be action in furtherance of the advocated position or objective. This advocacy includes abstract ideas as well as political action and only loses its first amendment protection when some overt act is caused by and is inseparable from the advocacy,[41] which act "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[42]

The activities in question in *Healy* were found to be constitutionally protected. Therefore, while the college had "a legitimate interest in preventing disruption on the campus,"[43] and could under certain circumstances restrain such activities by denying official recognition, the Court stated that "a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."[44] This burden was not met.

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[37] 283 U.S. 697 (1931).

[38] Stacy v. Williams, 306 F.Supp. 963, 971 (N.D.Miss. 1969); *see* Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970); Stacy, *Mississippi's Campus Speaker Ban: Constitutional Considerations and the Academic Freedom of Students,* 38 MISS.L.J. 488 (1967).

[39] 249 U.S. 47 (1919); *see* Dennis v. United States, 341 U.S. 494 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[40] 395 U.S. 444, 450-57 (1969).

[41] *Id.* at 456-57.

[42] Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966), *cited in* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969).

[43] Healy v. James, 408 U.S. 169, 184 (1972).

[44] *Id.* at 184; *see* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713-16 (1931); Poxon v. Board of Educ., 341 F.Supp. 256 (E.D. Calif. 1971).

In sum, the reasons for the reversal of the lower court decisions in *Healy* were that the courts made fundamental errors in "discounting the existence of a cognizable first amendment interest and misplacing the burden of proof."[45] However, the Court examined in detail the possible grounds for the denial of recognition to the CCSC-SDS, and based the order of remand on one of the four grounds discussed. The balance of this comment deals with the *Healy* bases of denial together with rationales of related cases.

Justifications for Non-Recognition

Affiliation

The first justification for non-recognition presented to the Court in *Healy* regarded the affiliation ties of the local group to the National SDS organization.[46] President James concluded that the ties of the local group to the National, with no proof to the contrary, would impart the National's unsavory reputation of instigating and associating with disruptive campus activity, notwithstanding denials by the local group as to any dependence on the National SDS for either ideological or organizational backing.[47] The local group insisted they merely wanted to use the name of SDS for its recognition factor as a well-known "leftist organization" in its drive for members.[48] The answer to such "guilt by association" was clear to the Court: ". . . the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization,"[49] when used as a basis for the denial of first amendment rights. "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims,"[50] which is the burden of disproving a prior restraint; this President James failed to accomplish. Affiliation in *Healy* was not a sufficient ground of denial of recognition.

Philosophy

The second justification for denial of recognition given by President James in *Healy* was based on the theory that since the local group was affiliated with the National SDS, the National philosophy must necessarily be included in the local SDS philosophy. President James found the National philosophy to be understandably abhor-

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[45] Healy v. James, 408 U.S. 169, 184-85 (1972).

[46] *Id.* at 185-86.

[47] *Id.* at 186-87.

[48] *Id.* at 173 n. 3.

[49] *Id.* at 185-86, *citing* United States v. Robel, 389 U.S. 258 (1967).

[50] Healy v. James, 408 U.S. 169, 186 (1972).

rent and ". . . counter to the official policy of the college";[51] he could not ". . . sanction an organization that openly advocates the destruction of the very ideals and freedoms upon which the academic life is founded."[52] The Court found that the state, acting through the College, could not restrict the expression of such philosophy ". . . simply because it finds the views expressed by any group to be abhorrent."[53] Quoting Mr. Justice Black:

> I do not believe that it can be too often repeated that the freedoms of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.[54]

Thus the Court found that not only must the mere advocacy of views unpopular or contra to the mainstream of thought in our society be tolerated, but that any denials of advocacy of such views themselves must be restricted and repealed, so as to ensure the freedoms of following popular advocates.

Disruptive Influence

The third basis for non-recognition detected by the Court in President James' action was ". . . that he based rejection on a conclusion that this particular group would be a 'disruptive influence at CCSC'."[55] However, for the rejection to be valid under this conclusion the facts of the case must be put through an examination designed to indicate whether there is possible disruption in magnitude outweighing the protection of first amendment rights, so as to permit a prior restraint. The test is the distinction ". . . between mere advocacy and advocacy directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,"[56] or, in other words, between verbal (philosophical) advocacy and advocacy plus imminent disruptive (physical) action.[57]

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[51] *Id.* at 187.

[52] *Id.* at 187.

[53] *Id.* at 187-88.

[54] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961).

[55] Healy v. James, 408 U.S. 169, 188 (1972).

[56] *Id.* at 188, *quoting* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). It is not the "volume" of the advocacy, but the quality; ". . . abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." NAACP v. Button, 371 U.S. 415, 429 (1963).

[57] To determine the distinction, one must differentiate ". . . the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence; [it] is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding [such advocacy], and to justify that

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> Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.[58]

Not only must the existence of a disruptive factor be shown to validate the state interest, but the action taken to regulate the disruptive factor must be reasonably related to the interests sought to be protected, and the first amendment restrictions applied in the minimal amount necessary to further the state interest.[59]

The Court in *Healy* found no facts from which it could adduce that there was a danger of disruption of the college.[60] When asked if he would disrupt a class, a committee member of the CCSC-SDS replied: "Our action would have to be dependent on each issue . . . Impossible for me to say."[61] Other answers to violence-oriented questions were equally vague, evasive, or unresponsive, depending on the vantage-point of the observer. Even the Dean of Student Affairs, during the court-ordered hearings, admitted that there was no question raised as to the intimation of the contemplation of illegal or disruptive practices.[62] The local SDS group, while fostering unpopular and "abhorrent" ideas, was only in the verbal advocacy stage, and therefore was protected by the first amendment in the associational right.

Prior Affirmation of Reasonable University Rules

The fourth rationale for the denial of recognition given in *Healy* was that of ". . . unwillingness to be bound by reasonable school rules governing conduct,"[63] or where a "group . . . reserves

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such a call to violence may fairly be imputed to the [organization] as a whole, and not merely to some narrow segment of it." Noto v. United States, 367 U.S. 290, 297-98 (1961). But the converse is not necessarily true; although a large national organization may advocate violent action, a local affiliate need not, and to impart such a connotation on the purpose of a local organization may be grossly unfair, especially in light of the protected rights involved.

[58] Healy v. James, 408 U.S. 169, 189 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969).

[59] Healy v. James, 408 U.S. 169, 189-90 n. 20 (1972); *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968).

[60] *Contrast* Merkey v. Board of Regents, 344 F.Supp. 1296 (N.D. Fla. 1972), wherein university officials denied recognition to a proposed Young Socialist Alliance student group. Unlike *Healy,* the court found a valid denial from a proper form of review and proper standards, as there were sufficient facts showing ". . . an imminently present threat of material disruption to the maintenance of the orderly education processes of the university." *Id.* at 1306. Besides advocating disruptive practices, the applicants in Merkey had already ". . . been involved in disruptive activities both on and off the university campus." *Id.* at 1307.

[61] Healy v. James, 408 U.S. 169, 173 (1972).

[62] *Id.* at 190.

[63] *Id.* at 191.

the right to violate any . . . campus rules with which it disagrees."[64] Central Connecticut State College had adopted a "Student Bill of Rights," including a section carefully following the *Brandenburg* standards delineating verbal advocacy from advocacy coupled with the dangers of action.[65] The Court held that reasonable regulations of first amendment rights, "[j]ust as in the community at large . . . , [including] . . . the time, the place, and the manner in which student groups conduct their speech-related activities, must be respected."[66] One such restriction might be that prospective groups seeking official college recognition affirm in advance that the group intends to comply with and abide by reasonable campus regulations and conform to reasonable standards regarding conduct.[67] Failing to find in the record any such rule in CCSC recognition procedures and regulations, and finding ambiguity on the part of the petitioning group to so affirm, the Court remanded the case for further reconsideration of this point.

It does not appear that the Court is making prior affirmation a mandatory part of the recognition process, in that if there is no such regulation in the college administrative function, the petitioning group need not so affirm. However, this could be one avenue for denial of recognition in the future, and could open a new door to other similar "reasonable" regulations for the grant of official college recognition.

Equal Protection

An equal protection basis was utilized in *American Civil Liberties Union of Virginia, Inc. v. Radford College*[68] as the determinative criteria for the official recognition of a student group.

> To say that the "role and purpose" of the Young Republican and Young Democrative Club is within the "scope and objectives" [of the college] and in the next breath say that

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[64] *Id.* at 194.

[65] The entire "Student Bill of Rights" is set out in an Appendix to the majority opinion of the circuit court, *Healy v. James*, 445 F.2d 1122, 1135-39 (2d Cir. 1971). Part V, Section E contains the pertinent regulation: "College students and student organizations shall have the right to examine and discuss all questions of interest to them, . . . and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition. Students do not have the right to deprive others of the opportunity to speak or be heard, to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operations of the college, or to interfere with the rights of others."

[66] Healy v. James, 408 U.S. 169, 192-93 (1972).

[67] *Id.* at 193. The standards must not be vague or overbroad. *See also* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Snyder v. Board of Trustees, 286 F.Supp. 927 (N.D. Ill. 1968).

[68] 315 F.Supp. 893 (W.D.Va. 1970).

> the ACLU is without does not seem to treat with equality the petition of the ACLU Students.[69]

The court based its reasoning on the fact that the university may not arbitrarily exclude certain organization "when such facilities have been made previously available to outside organizations."[70]

Once approval has been granted to certain political groups, approval of equal magnitude must be given to all, and denial based on the views held by the group would be blatant political censorship.[71] Although the court stressed that the university has wide discretion in administering and regulating the school, the students also had a right to be recognized absent some compelling reason, in the nature of disruptive influences, not to be so recognized. Finding no such constitutionally permissible ground for the exclusion of the ACLU, the court allowed Radford College leave to comply with the order.

Litigious Organization

An off-shoot of the third *Healy* rationale, that of disruptive practices by campus organizations, was discussed in *University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union v. University of Southern Mississippi.*[72] In this case, the Fifth Circuit recognized and applied the *Tinker* standards to a local American Civil Liberties Union group which was denied official recognition as a student organization, which "meant that the Chapter could neither participate in University-approved student activities nor conduct student activities on campus on its own initiative.[73] Although the University had declined to issue a statement of reasons for the denial, the district court found that the only reason with "barely tenable" merit was the threat of litigation, and the history of the National organization to bring litigation. The only type of litigation which could meet the *Tinker* standards of disruption would be litigation conducted in bad faith, vexatious and frivolous litigation harrassing school or state officials or functions. There was no showing of such types of litigation, and the decision of the University was reversed. The court stressed that:

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[69] American Civil Liberties Union of Va., Inc., v. Radford College, 315 F.Supp. 893, 898 (W.D.Va. 1970). "The actual issue is whether a state institution such as Radford can deny recognized status and whatever privileges and rights flow from that status to the A.C.L.U. when it has accorded that status to other organizations which have complied with the prescribed procedures." *Id.* at 897.

[70] American Civil Liberties Union of Va., Inc., v. Radford College, 315 F.Supp. 893, 896 W.D. Va. 1970).

[71] Brooks v. Auburn Univ., 296 F.Supp. 188, 196 (M.D. Ala.), *aff'd*, 412 F.2d 1171 (5th Cir. 1969).

[72] 452 F.2d 564 (5th Cir. 1971).

[73] *Id.* at 565-66.

> [s]erious, bona fide litigation carried on by a minority group as a peaceful means of guaranteeing its rights in a larger community is a form of expression and association protected by the First and Fourteenth Amendments.[74]

Disciplinary Action

What would the effect of later disruptive practices have on the official college recognition of a student organization? The Court hinted as to the effect in *Healy*: disciplinary action, in that "recognition, once accorded, may be withdrawn or suspended if petitioners fail to respect campus law."[75] The power to suspend an organization from university approval is implicit in the *Healy* concept of prior affirmation of campus rules in that this affirmance is one of the prerequisites for a group to include in its rules before official recognition is granted. Campus disruption which violates campus law would be a breach of the agreement made by a group to the college and would be a constitutionally valid basis for denial of official recognition to a campus group.

This view was taken in *American Civil Liberties Union of Virginia v. Radford College*,[76] wherein the court stated that while the student group has a right to be recognized, "[i]f their conduct as a campus organization is unduly disruptive of the orderly functioning of the institution, this court will be the first to reconsider its decision."[77]

The type of disruption necessary is shown by the standards in *Tinker*: ". . . conduct which materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ,"[78] or where there is some adverse *action* coupled with the advocacy of an "abhorrent" philosophy.[79]

Examples of disruptive behavior run on a continuum from insignificant, to necessarily sufficient cause for disciplinary action. An act classified as insubordination of a student to a college rule found

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[74] *Id.* at 567, *citing* NAACP v. Button, 371 U.S. 415 (1963).

[75] Healy v. James, 408 U.S. 169, 194 n.24 (1972).

[76] 315 F.Supp. 893 (W.D.Va. 1970).

[77] *Id.* at 899; *cited affirmatively in the concurring opinion of Judge Coleman in* University of So. Miss. Chapter, Miss. Civil Liberties Union v. University of So. Miss., 452 F.2d 564, 568 (5th Cir. 1971).

[78] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969).

[79] The action must be of the "lawless" type: ". . . [t]he Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

unreasonable and violative of expression rights[80] is clearly insufficient to remove the official recognition from a group. Student organizations may not be restrained when there is insufficient evidence to show unauthorized and disruptive activities.[81] The wearing of armbands[82] or buttons[83] by a group is not in itself disruptive, and additional facts must be shown to prove that school functions were hampered or interfered with, by such expression.[84] The distribution of inflammatory literature "calculated to cause disturbance and disruption of school activities" is not protected speech and may be the basis for a repeal of recognition.[85] A demonstration disrupting a football game and invading the rights of many patrons, including the president of the university, may be a disruptive activity which could cause the removal of recognition.[86] The question is, of course, what degree of action is violent and what action is necessary to disrupt a university; these issues, affecting first amendment rights, must be decided on a case-by-case analysis of facts and circumstances.[87]

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[80] Dickey v. Alabama State Bd. of Educ., 273 F.Supp. 613 (M.D.Ala. 1967), *vacated as moot sub nom.*, Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968). *Dickey* overruled the *"Adams* rule," which stated that no criticism of state or college officials could be made, and that violation of the rule was insubordination, subject to dismissal. Dickey, *supra*, 273 F.Supp. at 616, 618. ". . . [A] state may not foreclose exercise of constitutional rights by mere labels." NAACP v. Button, 371 U.S. 415 (1963).

[81] University of So. Miss. Chapter, Miss. Civil Liberties Union v. University of So. Miss., 452 F.2d 564 (5th Cir. 1971); Scoggin v. Lincoln Univ., 291 F.Supp. 161 (W.D.Mo. 1968); Hammond v. South Carolina State College, 272 F.Supp. 947 (D.S.C. 1967).

[82] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). This right has been held to include teachers as well as students. James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972).

[83] Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[84] Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), where a high degree of commotion was caused by the distribution and wearing of the buttons; *see also* Guzich v. Drebus, 305 F.Supp. 472 (N.D. Ohio 1969).

[85] Norton v. Discipline Committee of E. Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969); *see* Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971), discussing overbroad and deficient administrative policy statement.

[86] Barker v. Hardway, 283 F.Supp. 228 (S.D.W.Va. 1968); *see also* Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969); civil protest during an alumni dinner, resulting in disciplinary measures to students, was the subject of *Lowery v. Adams*, 344 F.Supp. 466 (W.D. Ky. 1972). In *Stacy v. Williams*, 306 F.Supp. 963, 973 (N.D. Miss. 1969), a list of forbidden subjects for guest speakers, but also applicable to removal of recognition, is given:

> 1. . . .
>
> 2. willful destruction or seizure of the institution's buildings or other property;
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> 3. disruption or impairment, by force, of the institution's regularly scheduled classes or other educational functions;
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> 4. physical harm, coercion, intimidation, or other invasion of lawful rights of the institution's officials, faculty members, or students; or
>
> 5. other campus disorders of violent nature.

These standards are based on the restriction in *Thomas v. Collins*, 323 U.S. 516, 530 (1945): "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

[87] Dennis v. United States, 341 U.S. 494, 508 (1951); *see* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966), for such an analysis in the environment of a public high school.

If a recognized organization does violate its agreement to affirm rules or is disruptive in a form thought by college officials to be subject to discipline, procedural due process[88] must be granted the group before its recognition may be removed. "In that event, the recognition granted the [group] could be challenged and withdrawn in a fair proceeding based upon evidence of actual, and not vaguely predictive, misconduct."[89] The requirements of procedural due process in this matter would be adequate notice and a fair and impartial opportunity to be heard.[90]

Conclusion

It would appear that the import of *Healy* may be stated as an affirmation of the protection of first amendment rights on the campus, the establishment of guidelines for decisions made in the process of official recognition of new campus organizations, and approval or disapproval of restrictions which may be imposed by a college or university on a student group. These guidelines could be expanded in application to any administrative body granting privileges to a proposed organization. Non-compliance with the affirmed rule would be a sole basis for withdrawal of the privilege. The "prior affirmation of college rules and regulations" concept, as put forth by the Court, would appear to be merely an additional procedure in the recognition process and an additional ground for the removal of recognized status from a group; a violation of such rules would be "prosecuted" whether or not the group affirmed the rules prior to recognition, and in any event procedural due process must be met in the removal process, and the burden of proof remains on the persons questioning the protection of the first amendment (in this case, the college).

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[88] For a description of procedural due process in a university setting, *see* Norton v. Discipline Committee of E. Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969); Due v. Florida A. & M. Univ., 233 F.Supp. 396, 402 (N.D.Fla. 1963).

[89] University of So. Miss. Chapter, Miss. Civil Liberties Union v. University of So. Miss., 452 F.2d 564, 567 (5th Cir. 1971).

[90] Dixon v. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); *see* Knight v. State Bd. of Educ., 200 F.Supp. 174 (M.D. Tenn. 1961).

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