Book Reviews

THE AMERICAN STUDENT'S FREEDOM OF EXPRESSION: A RESEARCH APPRAISAL. By E. G. Williamson and John L. Cowan. Minneapolis, Minnesota: University of Minnesota Press. 1966. Pp. 193. $5.50.

One way to tell whether the patient has cancer is to perform an exploratory operation. The authors have, and the patient does.

The patient is the American institution of higher learning. The cancer is repression of political speech and action. The exploration was a three-year survey of 1,000 colleges and universities to determine the extent to which political freedom is professed and permitted.

I

The study was undertaken by the National Association of Student Personnel Administrators—the national organization of deans of students. The schools surveyed included large and small, public and private, secular and sectarian, North and South, black and white. The survey asked presidents, deans, chairmen of faculty committees on student affairs, student body presidents and student newspaper editors to rate their campus tolerance level in four areas: freedom to advocate controversial views; freedom to invite speakers to address students; freedom to organize peaceable protest action; and, participation by students in campus decision-making. Respondents were also asked if student clamor had increased of late, and whether their institutions subscribed to the general principle:

> [A]n *essential part* of the education of *each student* is the freedom to hear, critically examine, and express viewpoints on *a range* of positions held and advocated regarding issues that divide our society.[1]

[1]WILLIAMSON & COWAN, THE AMERICAN STUDENT'S FREEDOM OF EXPRESSION: A RESEARCH APPRAISAL 28 (1966) (emphasis in original) [hereinafter cited as Williamson & Cowan].

This latter statement, platitudinous though it be when judged by current constitutional standards,[2] evoked unqualified agreement from only 64 per cent of the college presidents and 72 per cent of the deans. "Qualified agreement" took in another 12 per cent of the presidents and 11 per cent of the deans.[3]

The respondents were also asked whether student clamor had increased during the period September 1961 through April 1964. The evidence indicates that the answer is yes,[4] and one must bear in mind that the affirmative might have been more emphatic had the survey included the fall of 1964, when the Berkeley Free Speech Movement was a-borning.

Given the fairly large number of schools reporting increased student clamor, and the reasonably respectable number of administrators who expressed agreement with a general philosophy of student academic freedom, it is disappointing, though not surprising, that administrators are so illiberal when the clamor for freedom loses the pale cast of thought and threatens to gain the name of action. Student academic freedom is in a parlous state indeed.

In about three-fifths of American schools, a student communist organization would not be permitted; in one-third, the Fair Play for Cuba Committee and the Young Socialist Alliance would be barred. A ban on Young Republicans or Young Democrats would be enforced at only two per cent of schools, while the figures for the Student Peace Union, Young Americans for Freedom, and the Americans for Democratic Action, are acceptable at all but 3 to 7 per cent of schools.[5]

Not only is there a pattern of discouraging or forbidding student participation in highly controversial political groups, but the survey indicated extensive administration control over the formation and functioning of student groups, by such means as regulating organizational constitutions and bylaws, and compulsory use of a faculty advisor appointed by the administration.[6]

Student discussion of controversial issues was similarly surveyed, fourteen issues of the 1961-64 period being chosen: aboli-

[2]*E.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957): "Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

[3]Williamson & Cowan 28-36.

[4]*Id.* at 24-25.

[5]*Id.* at 45-46.

[6]*Id.* at 48-49.

tion of interracial marriage laws, abolition by Catholics of the index of forbidden books, United States dissemination of birth control information, one Bible for all Christians, jail for conscientious objectors, abolition of the HCUA, abolition of prayers in public schools, local fair housing legislation, public library censorship, admission of China to the United Nations, federal aid to Yugoslavia, disarmament, the World Court, and sale of farm products to the USSR.[7]

Asked whether student organizations could publicly express views on these fourteen questions, only one-half of the schools responded that students were free to discuss all fourteen issues. This statistic is heavily conditioned by the religious character of some of the issues, which produced a response from many Catholic colleges and universities indicating that student discussion of doctrinal matters rending the Church is disfavored. For example, only 32 per cent of the Catholic colleges reported that students would be permitted to take positions on United States dissemination of birth control information.

Interracial marriage also evoked uneven response, with only 49 per cent of Southern schools reporting that student groups could discuss the issue. Allowing for the sensitivity of some institutions to some issues, we note that ten or more of the issues could be publicly discussed at 79 per cent of the schools.

Student invitation of speakers was similarly surveyed, producing a range of responses for the 17 "test" speakers. The "would be permitted to speak" imprimatur was given the speakers in ascending order of responsibility, ranging from 21 per cent for the late George Lincoln Rockwell, through 30 per cent for the late Malcolm X, through 51 per cent for James Hoffa, up to 92 per cent for Barry Goldwater and 94 per cent for Chief Justice Earl Warren.[8]

The study also concerned itself with freedom of students to organize and conduct protest actions. The mildest sort of protests, such as petitioning the government, running editorials in the student newspaper, political campaigning, and student government resolutions accompanied by a campus-wide referendum, were permitted in more than 80 per cent of the schools. However, only 49 per cent of the schools would tolerate picketing, and 44 per cent a peaceable sit-in.[9]

[7]The data are reported *id.* at 50-60.

[8]*Id.* at ch. 4.

[9]*Id.* at ch. 5.

Moving to the role of the student leader, the study confirmed that student newspaper editors are often interfered with by direct or indirect censorship,[10] and that students really have little voice in shaping the educational and other decisions which order the life of the campus and therefore their own lives.[11]

As one would expect, the measure of freedom enjoyed by students varied according to the type of institution. Thus private universities were most free, followed by large public universities. Lesser rations of freedom are enjoyed in sectarian institutions and smaller schools.[12]

II

Two conclusions flow from reading the statistical material ably presented by the authors. The first is a suspicion that the age of the data relied upon makes the book somewhat misleading. Since August 1964, when collection of responses ended, the Berkeley free speech controversy may well have led many administrators into a more wholesome view of student freedom. One wonders, on the other hand, how much the outcry of those who would suppress dissent on the issue of the Vietnam War has operated to counter the pressure toward freedom generated by the Free Speech Movement. As the voices of protest have grown more militant—from despair, alienation and conviction—and at the same time as dissent seems to have been widespread enough to have some effect, the forces of suppression have increased their attack. Even ground thought safely won to the cause of free expression has been lost quite unexpectedly. This review is no place to undertake an assessment, but certain it is that in times of strife and change, statistics grow cold.

The second impression is one of dismay that so many institutions of higher learning, despite pressures for change, continue such repressive policies. After all, the survey asked only whether students could discuss certain issues, be members of certain organizations, listen to certain named speakers, and engage in described types of peaceable assembly. All of these forms of expression are fairly mild,[13] not to mention protected by several centuries of con-

[10] *Id.* at 124-34.

[11] *Id.* at 134-49.

[12] *Id.* at ch. 8.

[13] The peaceable sit-in at a lunch counter is the only form of possibly illegal social protest on which attitudes were elicited. The survey did not ask whether

stitutional history. In this context, the administrative repressiveness is particularly ominous.

It is an ironic juxtaposition: most adults left of center think the young intellectuals are going to save the world, while the incipient young intellectuals are busily being taught the manner, if not the habit, of servility.

The authors did not conceive it their function to comment in detail upon the pervading lack of freedom they found to exist. Nor did they attempt an analysis of legal issues. Future work on the first of these tasks will profit from the study under review.

The second task—comment on legal issues—is the subject of a growing body of legal literature, some of the best of it written by Professor William Van Alstyne of Duke University.[14] The largely unexplored problem is how to translate this body of opinion into rules guaranteeing freedom of expression to university students. The book under review provides some insights.

The study reveals that most administrators share—or like others to think they share—the basic values of academic freedom. Profession of faith has often indicated receptiveness to discussions of increasing student freedom.

We need to go much beyond discussion, however. The *in terrorem* effect of the Free Speech Movement upon administrators who fear a sequel on their campuses has by now partially dissipated, but it still has some persuasive force.

We confront several sizable unfinished tasks. First, we need to pay much more attention to problems of freedom in private schools. This development should take place along two lines: (1) broadening the reach of constitutional guarantees through new concepts of state action and through analytical devices de-

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the respondents' attitude would differ depending on the type of sit-in. The questionnaire was, of course, drawn before the Supreme Court in Brown v. Louisiana, 383 U.S. 131 (1966), and Adderley v. Florida, 385 U.S. 39 (1966), considered other types of sit-ins. See the excellent comment, Kipperman, *Civil Rights at Armageddon—The Supreme Court Steps Back: Adderley v. Florida,* 3 LAW IN TRANS. Q. 219 (1966). Compare Black, J., concurring in NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 76 (1964), for an indication that *Adderley* may not have set the right to petition entirely to rest.

[14]Citation of material is superfluous, given the thoroughly researched and perceptively annotated bibliography on student rights at 54 CALIF. L. REV. 175, 177 (1966). Some material appearing since then is collected in Professor Van Alstyne's article, *Student Rights and University Authority,* 2 THE COLLEGE COUNSEL 44 (1967).

signed to emphasize the "company town" or "private government" aspect of many campuses;[15] (2) redefining concepts of contract law to increase protection of students by creating a special fiduciary-type relationship between the students and the institution[16] and by recognizing the great inequality of bargaining power between the student and the institution. The latter means—which would draw upon the literature of adhesion contracts—would perhaps create a doctrine of "unconscionable conditions" to fill, in the context of student-private university contract, the same function as is filled by the doctrine of unconstitutional conditions in student-public university relations.[17]

Second, we need to carry the fight for student academic freedom into the heart of the university's administrative machinery. Students pressing for reform and lawyers who advise them have in the past displayed a child-like and entirely unwarranted faith in the courts as ready to correct abuses by university administrators. We are learning, painfully but surely, that courts in fact give universities a great deal of discretion and leeway, and may be rather intolerant of student demands for academic freedom.[18] Even the landmark decision in *Dixon* bespeaks a view of judicial power which can only set minima, leaving the details to university admin-

[15]See O'Neil, *Reflections on the Academic Senate Resolution*, 54 CALIF. L. REV. 88, 96-97 (1966), and Comment, 54 CALIF. L. REV. 132, 157-73 (1966), for an analysis of the "title" concept as a bar to free speech activity on nominally private premises which are in fact subject to extensive and continual public use. See also the discussion of direct action in the context of fair employment practices controversy, Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729, 763-768 (1965), citing many cases and other authorities. See generally *Symposium*: *Student Rights and Campus Rules*, 54 CALIF. L. REV. 1 (1966).

[16]See, *e.g.*, Van Alstyne, *supra* note 14 at 63, nn. 8-9, and authorities there cited.

[17]*Ibid.* Professor Albert Ehrenzweig introduces his discussion of adhesion contracts in the conflict of laws with an authoritative and provocative analysis of the legal literature. EHRENZWEIG, CONFLICT OF LAWS § 172 (1962).

[18]*E.g.*, Goldberg v. Regents of the University of California, 248 Adv. Cal. App. 1015 (1967). Administrators, beware of a too-trusting reliance upon such cases as *Goldberg*. In order to make a claim for judicial deference, there must be something to which to defer. An administrative system which robs students of basic administrative due process will be given short shrift. See, *e.g.*, Dixon v. Alabama, State Bd. of Educ., 294 F. 2d 150 (5th Cir.); *cert. denied*, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F. Supp. 174(M.D. Tenn. 1961), O'Neil, *supra* note 15, at 100-101 nn. 30-31; Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961).

istrators.[19] We ought to have expected this turn of events, but whether we did or not, it means that students must have good legal advice and top quality representation at every stage of university disciplinary proceedings, in order to preserve every possible point. More important, it means that lawyers who represent students in disciplinary proceedings must place great emphasis on winning the case within the institution. They must tie their efforts to the pressures within the institutions which are in favor of maximizing student freedom. We have reached the point where the university is usually not cowed by being told it will be hauled into court. Instead the lawyer must be assiduous to cultivate an understanding of the goals and values of a university. He must attempt to underscore by reference to these values the need for universities to develop higher and better kinds of freedom than those which courts are willing to vouchsafe to society at large and to order administrators to provide.[20] This technique finds some support in the work under review, for, as mentioned above, most administrators like to think they are in favor of freedom.

Too, the lawyer should recognize that some of his traditional instincts for legality may have to be tempered in the university setting. This sentiment deserves some elucidation. The students at Berkeley in 1964 and 1965 were actively pressing to have the courts decide questions of student academic freedom. The treatment which the students received at the hands of the court when they were brought to trial as the result of the December 1964 sit-in demolished their faith in the judicial system as such. But it is also true that law—in the sense of orderly, fair procedures and conscious attention to individual freedom—has not come to the university campus. Most administrators are still by turns paternalistic and despotic; it is not so much a case of "power corrupts" as one of power conducing to a kind of arrogance.

Thus, the student client will have a well-justified skepticism about judicial protection of his rights (or if he hasn't, one should be cultivated by the lawyer). He will be unwilling to proceed on

[19]Dixon, *supra* note 18, at 155-59, sets out a flexible standard of review which is quite generous to the university.

[20]Newman, *The Berkeley Crisis*, 54 CALIF. L. REV. 118, 122 (1966); Monypenny, *Toward a Standard for Student Academic Freedom*, 28 LAW & CONTEMP. PROB. 625, 628 (1963) ("we must not be misled into assuming that where there are no legal rights there is no obligation to observe restraints on institutional authority.").

the assumption that the university's disciplinary machinery is fair. Both of these deficiencies which students perceive must be remedied, and constructive work by lawyers can help. Pressing the issue in particular cases is one way to spur reform. But students will feel, and quite rightly, that legal action has utility only in the context of a political attack on repressive practices, and perhaps then only defensively.

The lawyer cannot expect, and it is not fair to his client for him to expect, that his task is confined to justification of particular conduct before whatever tribunal hears a given case of alleged student misconduct. The lawyer's defense will be only one small part of a larger fight for greater freedom, and the tactical decisions in the larger fight will not be his to make.

The lawyer called on to the campus is therefore in much the same position as the lawyer for political and social outcasts in any context, and his conduct must be that of the lawyer in political cases generally. He cannot run the movement, but he must have a basic understanding of its aims.[21]

What I have said implies that good lawyering can and will have a marked impact upon the quality of student freedom. If any university attorneys are reading this review, it goes without saying that they also ought to try and appreciate the values which a university is designed to foster, instead of trotting out forty year old cases to justify unconscionable and freedom-destroying conduct by their institutions. Lawyers can have a powerful influence in shaping policy for the institution, and most of them should not wait to be dragged by main force into this "decade of newly-honed freedoms."[22] The courts have not entirely given up protecting academic freedom.

A third area fruitful for endeavor is suggested by the revelation that students are largely powerless in the running of their institutions. I have tried elsewhere to suggest that the refusal of administrators even to listen to student suggestions violates fundamental canons of administrative fairness.[23] In many states, administrative

[21]See 1 CIVIL RIGHTS & LIBERTIES HANDBOOK: PLEADINGS & PRACTICE 9, 44a (Ginger ed. 1963).

[22]Newman, *supra* note 20, at 122.

[23]Tigar, Student Participation in Academic Governance, paper prepared for 21st National Conference on Higher Education, Chicago, March 15, 1966, abstracted in 1966 CURRENT ISSUES IN HIGHER EDUCATION 169. This paper collects authorities on rulemaking procedure and suggests their application to the campus.

procedure acts ensure that regulations which touch lives of tavern-keepers (and all others affected by rule-making) cannot be passed without prior notice and an opportunity for the affected group to be heard. By contrast, students, hailed by sententious commencement speakers as "future leaders," are without voice in the decisions that affect their lives. If administrators can be brought to concede the validity of proper administrative rule-making procedures in their institutions, perhaps the sharing with students of power and responsibility will lead to wiser rules governing freedom of expression.

III

Every once in a while we need to find out just how bad things are. The authors of this book have told us, which is the task they set out to accomplish. The achievement of change is a task for others, including hopefully the readers of this review.

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