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Constitutional Law—Nontenured State University Professor Not Entitled to Protection of Procedural Due Process Upon Nonrenewal of Contract.

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conceivably might institute some type of review under a "clear and present danger" theory. Certainly, any school may take steps to deal with an emergency situation.[65] It would seem that even the student in *Fujishima* who distributed literature during a fire drill might have been punished on the grounds of improper conduct during the drill, unless it could be shown that other students distributing nonpolitical literature were not so reprimanded.

In order to preserve first amendment rights in such situations, and to clarify the parameters of school authority, definite standards are needed to avoid the implementation of ad hoc regulations which might develop. The court in *Fujishima* might have directed educational authorities to define the conditions which would give a school sufficient cause to implement a regulated system of prior review. The ideal standard would have both administrators and students aware of the extent of school authority and student responsibility.

Since controversial literature to which school officials may object is often more symptomatic than causative of discontent, stifling the outlets for such dissatisfaction can result in problems more serious than any controversy initiated by the expression of opinions. The school's policy should be to foster bilateral debate and responsible criticism. Only where the atmosphere warrants particular caution is a system of prior review a justifiable means of maintaining order.

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CONSTITUTIONAL LAW—NONTENURED STATE UNIVERSITY PROFESSOR NOT ENTITLED TO PROTECTION OF PROCEDURAL DUE PROCESS UPON NONRENEWAL OF CONTRACT.

In January 1969, David E. Roth, a nontenured assistant professor at a state university was notified that he would not be rehired after his one-year contract expired. No reasons were given, and no hearing was offered concerning his nonrenewal. He brought suit in a United States district court, alleging that the university's action deprived him of both substantive and procedural rights under the fourteenth amendment.[1] The plaintiff claimed that the decision was in retaliation for

65. *See* Sullivan v. Houston Ind. School Dist., 333 F. Supp. 1149, 1170 (S.D. Tex. 1971).

1. Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis. 1970).

his criticism of the university administration, thus violating his right to freedom of speech. He also alleged that the failure of the university to advise him of the reasons for his nonretention and to provide a hearing violated his right to procedural due process. The district court granted summary judgment for the plaintiff on the procedural issue, ordering the university officials to furnish him with a statement of the reasons for their failure to retain him and to provide him with a hearing. The Court of Appeals for the Seventh Circuit affirmed,[2] but on appeal this decision was reversed by the Supreme Court. *Held*: in the absence of any charges against him, stigma, or disability foreclosing other employment opportunities, the respondent was not denied "liberty," and the terms of his employment did not accord him any "property" interest in continued employment. Therefore, his nonretention did not deprive him of any interests protected by procedural due process. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).[3]

Although the Supreme Court has "consistently recognized that . . . the interest of a government employee in retaining his job, can be summarily denied,"[4] there are important exceptions to this rule. A teacher may not be terminated or refused employment in violation of basic constitutional rights, such as the right of free speech,[5] freedom of association,[6] or the privilege against self-incrimination.[7] The Court has also held that the government may not exclude a person from employment for reasons that are patently arbitrary.[8] Simi-

2. Roth v. Board of Regents of State Colleges, 446 F.2d 806 (7th Cir. 1971).

3. Hereinafter cited as instant case.

4. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 896-97 (1961), *citing* Vitarelli v. Seaton, 359 U.S. 535, 539 (1959). In *Vitarelli*, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, 5 U.S.C. § 7532 (1970), "could have been summarily discharged by the Secretary at any time without the giving of a reason . . . ." *Id. See also* Taylor v. Beckham, 178 U.S. 548, 577 (1900); Crenshaw v. United States, 134 U.S. 99, 104 (1890).

5. Pickering v. Board of Educ., 391 U.S. 563 (1968).

6. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

7. Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

8. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 898 (1961). At one time, the courts were able to use the so-called right-privilege distinction to hold that because public employment was a privilege, not a right, a person had to accept it under the conditions offered—even if those conditions infringed upon his constitutional rights. This ruling was undermined over the years, and in 1971 the Supreme Court "rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374 (1971). *See generally*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

larly, a state may not foreclose a range of employment possibilities to a person[9] or injure his reputation by its actions.[10]

In addition to liberty interests, the fourteenth amendment also extends to the protection of property interests. Thus, the government may not arbitrarily terminate employment at will where statutes, rules, or contractual agreements specify grounds for dismissal or nonrenewal or require certain procedures to be followed. Under this reasoning courts have protected a public college professor's interest in employment as defined by tenure provisions,[11] a nontenured noncontracted teacher's clearly implied promise of continued employment,[12] and a welfare recipient's interest in continued receipt of benefits.[13] However, while public employees have been given substantive protection of constitutional rights, pretermination procedural due process has not been accorded to protect these substantive rights. Since the government has not been required to state the grounds for dismissal or nonretention, it has been difficult for plaintiffs to establish that the reasons were constitutionally impermissible. This anomaly led Mr. Justice Brennan to state:

> Such a result in effect nullifies the substantive right—not to be arbitrarily injured by government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection?[14]

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9. The Court has held that a "State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957), *citing* Dent v. State of West Virginia, 129 U.S. 114 (1889). *Cf.* Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952). In a similar case the Supreme Court held that a state could not withhold a license to practice law without providing the applicant with a full prior hearing. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963).

10. The Supreme Court established that

> certainly where the State attaches "a badge of infamy" to the citizen, due process comes into play.
>
> . . . .
>
> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), *citing* Wieman v. Updegraff, 344 U.S. 183, 191 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

11. Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

12. Connell v. Higginbotham, 403 U.S. 207 (1971).

13. Goldberg v. Kelly, 397 U.S. 254 (1970).

14. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 900 (1961) (dissenting opinion).

The balancing process is the traditional due process test which has been utilized by the Supreme Court. Thus, the Court has attempted to weigh the private interest affected by governmental action against the countervailing governmental interest to determine what form of due process, if any, the private individual was entitled to in a specific case.[15] This balancing process was employed in light of the realization that

> "[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations to be taken into account.[16]

In *Cafeteria Workers Local 473 v. McElroy*,[17] the Supreme Court utilized the balancing process to determine the form of procedural due process an individual was entitled to before the actions of the government deprived that individual of government employment. In this case the government's revocation of the security clearance of a short order cook resulted in her loss of employment on a military installation. The Court indicated the need for balancing when it stated that

> [c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.[18]

The private interest involved was the denial of "the opportunity to work at one isolated and specific military installation."[19] The government had a proprietary interest in managing an important federal military installation.[20] The Court found that since there was no damage to the employee's reputation, and since the government action would not foreclose other employment opportunities, the governmental interest outweighed the private interest. Therefore, the

15. *Id.* at 895.
16. Hannah v. Larche, 363 U.S. 420, 442 (1960). *See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).
17. 367 U.S. 886 (1961).
18. *Id.* at 895.
19. *Id.* at 896.
20. *Id.*

Court held that the individual was not entitled to procedural protection.[21]

Three years prior to *Cafeteria Workers,* in a case which also involved removal of a security clearance, the Court indicated that the employee was entitled to the due process protection of notification of the reasons for dismissal and a hearing.[22] There, however, the effect was to foreclose a range of employment opportunities, since most of the jobs in his profession were within military installations. The private interest was held to outweigh the same proprietary interest of the government in managing a military establishment.[23]

In deciding whether a nontenured teacher has a right to a statement of reasons or a hearing upon nonrenewal of his contract, the circuit courts have come to varying conclusions. Several recent decisions have indicated that neither procedural safeguard is required.[24] The Eighth Circuit has held that as long as a teacher has not shown that his nonrenewal is based on a constitutionally impermissible infringement of his rights, then absent any statutory or contractual provision, "[t]he board [of education] has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all."[25] The Fifth Circuit has indicated that both procedural safeguards are required only if the teacher can show that he had an expectancy of continued employment.[26]

In *Drown v. Portsmouth School District,*[27] which involved the nonrenewal of a probationary teacher's contract, the First Circuit

21. *Id.* at 898-99.

22. Greene v. McElroy, 360 U.S. 474 (1959).

23. *Id.* Concerning the methodology of the Supreme Court in procedural due process cases, one writer has commented as follows:

> The formulation of degrees of pretermination due process immediately responsive to the very particular facts of each case does . . . accurately reflect the Supreme Court's method of constitutional analysis of such matters.
>
> [T]he degree of pretermination procedural due process to which a public employee is entitled is most heavily influenced by the degree of total hardship which may ensue as a consequence of that termination.

Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 DUKE L.J. 841, 874, 866 (1970). In 1970, the Court reaffirmed the use of the balancing process in holding that all welfare recipients were entitled to procedural protection prior to termination of benefits. Goldberg v. Kelly, 397 U.S. 254 (1970).

24. Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 115 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969).

25. Freeman v. Gould Special School Dist., 405 F.2d 1153, 1158 (8th Cir. 1969), *quoting* 47 AM. JUR. *Schools* § 114 (1943).

26. Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

27. 435 F.2d 1182 (1st Cir. 1970), *cert. denied,* 402 U.S. 972 (1971).

adopted a balancing test and concluded that the teacher had a right to a list of reasons, but not to a hearing.[28] The court found that the interests of the teacher included the opportunity to protect a personal and financial investment in preparation, correct false information, improve personal deficiencies, and minimize any negative effect on future employment opportunities.[29] On the other hand, the court determined that the school board had an interest in retaining its ability to insure the quality of the school system by employing teachers for a probationary period.[30] The court concluded that requiring the school board to state its reasons for not rehiring a nontenured teacher would not impose a significant administrative burden, nor would it significantly inhibit the ability of the school board to rid itself of incompetent teachers.[31] However, the court was unwilling to go so far as to require a hearing for nontenured probationary teachers, holding that such a procedure would place an excessive burden upon the school board.[32]

The district court and the court of appeals in the instant case felt compelled to follow the balancing process of *Cafeteria Workers*.[33] The state university's interest was in retaining its ability to assemble the best possible faculty.[34] The university felt that unfettered discretion was necessary to attain this objective.[35] Balanced against this was Roth's interest in eliminating the adverse effect nonretention was likely to have on his career.[36] The lower courts indicated that, in balance, Roth was entitled to procedural protections which were designed to safeguard his right against arbitrary dismissal.[37] The district court considered the decision to be consistent with the demise of the concept that public employment was a privilege.[38] The court of ap-

28. *Id.* In addition the teacher was accorded access to administrative evaluations of his performance.

29. *Id.* at 1184.

30. *Id.*

31. *Id.* at 1185. The court noted that statutes already require this in several states, citing, *e.g.*, WASH. REV. CODE ANN. § 28.67.070 (1964).

32. *Id.*

33. Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 977, 979 (W.D. Wis. 1970); Roth v. Board of Regents of State Colleges, 446 F.2d 806, 808-09 (7th Cir. 1971). The Supreme Court's opinion in the instant case is primarily compared and contrasted herein with that of the lower courts. The writer felt that it would be more valuable than a comparison with the dissenting opinions in the instant case. While the dissenting opinions contain most of the relevant arguments, it was felt that the lower courts presented them in a manner which lent them more readily to this analysis.

34. 310 F. Supp. at 975; 446 F.2d at 809.

35. *Id.*

36. 446 F.2d at 809.

37. 310 F. Supp. at 979-80.

38. *Id.* at 979.

peals noted that in cases such as *Roth,* involving "a background of controversy and unwelcome expressions of opinion,"[39] the requirement of prior notice and a hearing serves as a prophylactic against violations of a teacher's constitutional rights.

The Supreme Court indicated that a weighing process is correctly utilized in determining the *form* of procedural due process required in particular situations.[40] But whether or not *any* due process is required depends upon "the *nature* of the interest at stake."[41] That is, the interest must be "encompassed within the Fourteenth Amendment's protection of liberty and property."[42] Following a discussion of previous cases, the Court held that the state had not made any charges against Roth which placed his " 'good name, reputation, honor or integrity at stake.' "[43] They further reasoned that the state's decision not to rehire him did not place a liberty interest in jeopardy.[44] The Court found that Roth did not have a property interest at stake because the terms of his one-year appointment, which defined his property interest, were not violated.[45] Thus, the majority concluded that Roth was not entitled to *any* form of procedural protection.

Neither of the two dissenting opinions disputed the Court's method of analysis, but they did differ with the majority's definitions of liberty and property interests. Mr. Justice Marshall, for example, would have gone much further in defining those interests.[46] He con-

39. 446 F.2d at 810. Mr. Justice Douglas, in his dissent, indicated that he also would require a statement of reasons and a hearing upon an allegation that first amendment rights were violated. Instant case at 582.

40. The Court cited past decisions to indicate that a person has been granted due process protection of "liberty interests" when a state has done the following: made charges that might seriously damage a person's standing in the community; placed a person's good name, reputation, or honor at stake because of what it is doing; and imposed a stigma or other disability on a person, thereby foreclosing a range of opportunities. The Court also cited past decisions to indicate that the many forms of property include: the interest in continued receipt of welfare benefits; the interest in continued public employment held under tenure provisions; and even the interest created by a clearly implied promise of continued employment. Instant case at 573-77.

The Court further indicated that property interests are "created and their dimensions are defined by existing rules of understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Instant case at 577.

41. *Id.* at 570-71, *citing* Morrissey v. Brewer, 408 U.S. 471 (1972).

42. Instant case at 569.

43. *Id.* at 573.

44. *Id.* at 573-75.

45. *Id.* at 578.

46. Instant case at 588. Mr. Justice Brennan has indicated that he agrees in part with Mr. Justice Marshall's *Roth* dissent. Perry v. Sindermann, 408 U.S. 593, 604 (1972) (Brennan, J., dissenting).

sidered "liberty" to be "the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment."[47] In his view, the "property" right protected by the fourteenth amendment dictates that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment."[48] Mr. Justice Douglas noted that "[n]onrenewal of a teacher's contract is tantamount in effect to a dismissal," and that this was an adverse action contemplated against Roth which entitled him to prior notice and hearing.[49] After a brief listing of some important interests of citizens which have been afforded procedural protection (including disqualification for unemployment insurance, denial of a tax exemption, and withdrawal of welfare benefits), Mr. Justice Douglas concluded that "[w]e should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity."[50]

The lower courts felt that Roth had an interest at stake,[51] which would appear to fit the Supreme Court's description of "protected liberty interests." However, the majority rejected this contention on the grounds that the lower courts made an "assumption" that the nonrenewal decision had damaged, or would damage Roth, in his academic career.[52] Thus, the Court required that the plaintiff show that he was actually harmed,[53] while the lower courts merely required that there exist a substantial probability that he was, or would be, seriously harmed.[54] The holding of the lower courts is consistent with the Supreme Court's recent decision in *Goldberg v. Kelly*,[55] in which all welfare recipients were held to be entitled to a hearing prior to termination of benefits, because they *might* have an interest

47. Instant case at 589.
48. *Id.* at 588.
49. *Id.* at 585.
50. *Id.* at 584.
51. The district court indicated what the private individual's interest in this case was:

> There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him *probably* will be serious and prolonged and possibly will be severe and permanent.

310 F. Supp. at 979 (emphasis added).

The court of appeals, in affirming, indicated that the private interest was "the substantial adverse effect non-retention is *likely* to have upon the career interests of an individual professor . . . ." 446 F.2d at 809 (emphasis added).

52. Instant case at 574 n.13.
53. *Id.*
54. *See supra* note 51.
55. 397 U.S. 254 (1970).

at stake. In emphasizing the nature rather than the weight of Roth's interest, the *Roth* Court cited *Morrissey* v. *Brewer*,[56] decided the same day. Further, the majority cited *Cafeteria Workers* in support of its statement that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[57] However, in this earlier case the Court found a private interest which it balanced against the government's interest.[58] Thus, a close analysis of the majority opinion reveals that its conclusion was based primarily upon a policy decision, rather than persuasive precedent.

As a practical matter, the thrust of the majority's holding was much more traditional than that of the lower courts. The immediate result of the holding is to maintain the status quo in regard to procedural due process rights of government employees. Thus, the Court applied a conventional method of constitutional analysis—formulating the necessary degree of procedural due process on an ad hoc basis.[59] A consequence of the decision is to delegate responsibility for protecting the rights of nontenured teachers to state legislatures, school boards and teacher unions. The holding also has the effect of retaining unfettered discretion in school boards with respect to the retention or nonretention of nontenured teachers. The majority's approach avoided the necessity of discussing the impact that the demise of the right-privilege distinction is to have on public employees. On a related issue, the holding reaffirmed the Court's pre-existing view that procedural due process is not required to protect the individual government employee's substantive right not to be arbitrarily harmed by the state.

Even if it were not the intent of the Court, the holding in the instant case appears to provide the lower courts with an alternative to the traditional balancing process. If a particular liberty or property interest in a future case does not fall into one of the categories discussed in *Roth*, a court may merely indicate that no protected interest is at stake, and therefore no procedural protection is required. Thus, the *Roth* decision may, in effect, void the holding of the First Circuit in *Drown v. Portsmouth School District*.[60] In that decision, in-

56. 408 U.S. 471 (1972).
57. Instant case at 575.
58. 367 U.S. at 896.
59. Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 874 (1970).
60. 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

volving the nonretention of a nontenured teacher, a number of interests requiring procedural protection were found to exist. The courts within the First Circuit may now have an option to continue to recognize those interests or to conclude that they are no longer protected. Another result which is implicit in the Court's holding may be to provide easier access to the courts for some nontenured teachers who were not rehired in other teaching jobs. For example, in view of *Roth,* a federal judge in Chicago ruled against a school board motion to dismiss a suit brought by two nonrenewed teachers, in order to provide them with an opportunity to show that their lack of success in obtaining another teaching position was a result of the nonrenewal decision.[61]

Although it may be the Court's prerogative, it seems incorrect for it to avoid the traditional balancing process by attempting to establish a restrictive definition of protected interests. It also seems incorrect to require a person to show that he in fact has been deprived of an interest before a court must balance to determine his procedural rights. Since it is unconstitutional for the state university to base a nonrenewal decision on arbitrary grounds, no grounds, or on grounds that infringe upon specific constitutional rights, it logically follows that there must be fair and reasonable grounds for the decision. In balance, it would hardly impose a great burden on the state university to be required to communicate those reasons to the person who is not to be retained.[62] While the burden upon the state of providing a hearing for a nonrenewed teacher would be somewhat heavier than that of providing notice of the reasons, the requirement of a hearing is important. It has been argued that a formal hearing before a school board which was determined to deny a continuance of employment would be of no value, whereas an informal hearing could be obtained from a board which was acting in good faith.[63] The counterarguments are that such a hearing could lead to discovery and correction of innocent errors,[64] and might aid a speedy resolution of disputes.[65] The procedural protection formulated by the district

61. NEA Reporter, Oct. 1972 (No. 7) at 4.

62. Instant case at 591 (Marshall, J., dissenting); Drown v. Portsmouth Special School Dist., 435 F.2d 1182, 1184-85 (1st Cir. 1970).

63. 85 HARV. L. REV. 1327, 1334-35 (1972). *See* instant case at 591 (Marshall, J., dissenting); *Comment, Constitutional Problems In The Nonretention of Probationary Teachers,* 1971 U. ILL. L.F. 508, 513 (1971).

64. Instant case at 591 (Marshall, J., dissenting).

65. 85 HARV. L. REV., *supra* note 63, at 1333.

court[66] would place the burden of proof on the teacher and would respect nonrenewal decisions based upon minimal factual support and subtle reasoning. As such, these procedures would not eliminate the distinction between tenured and nontenured teachers, and would not significantly hinder the school board in its efforts to maintain a competent faculty.

Concerning the question of whether a protected interest is at stake, it seems elementary that the nonretention of a professor will have an adverse effect on his career. It also seems apparent from a reading of the fourteenth amendment and past cases that *all* liberty and property interests, no matter how minimal, are entitled to *some* form of procedural due process protection. The balancing process is utilized to determine what form of protection is required in each case, and it is in this balancing that the degree of actual or probable harm should be considered.

The majority requires that a teacher show, on a case-by-case basis, that he has in fact been adversely affected by a nonretention decision. Such a requirement will deny the educator his right to due process protection *prior* to a deprivation of liberty or property in many situations, because to show an adverse effect usually will require one to wait until retention actually fails to occur. The procedural protection formulated by the district court would have eliminated an area of constitutional uncertainty by guaranteeing prior due process in all teacher nonretention situations. This formulation should have been adopted by the Supreme Court.

RUSSELL W. PETIT

CONSTITUTIONAL LAW—RIGHT OF MARRIED HIGH SCHOOL STUDENTS TO ENGAGE IN EXTRACURRICULAR ACTIVITIES.

In March 1970, the Board of Education of the Fremont City Schools unanimously adopted a regulation, later amended and included in its Policy Handbook, which permitted married students to attend class but forbade them participation in school-sponsored extracurricular activities. On January 22, 1972, Albert Davis, age 18, married a 16-year-old girl who was allegedly carrying his child. Pursuant to the adopted rule, Davis, an honor student, was removed from the eligibility list for varsity baseball. Davis brought suit in United

66. 310 F. Supp. at 980.