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Legislative State Action and Indiana Private Universities

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LEGISLATIVE STATE ACTION AND INDIANA PRIVATE UNIVERSITIES

INTRODUCTION

An absence of state action renders courts incapable of applying the due process requirements of the fourteenth amendment to private individuals or private institutions. A demonstrable proclivity upon the part of courts to include seemingly private actions within the protective realm of the fourteenth amendment has, however, been evidenced by court decisions during the last quarter of a century. Early Supreme Court pronouncements of the state action requirement have not been diluted; the Harlan analysis,

1. See, e.g., Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) (privately-owned shopping center held to be within ambit of the fourteenth amendment since it constituted private property serving a public function); Reitman v. Mulkey, 387 U.S. 369 (1966) (state laws which permit private violations of constitutional rights are state action); Evans v. Newton, 382 U.S. 296 (1966) (private park sufficiently public in function to carry the application of fourteenth amendment guarantees); Burton v. Wilmington Parking Authority, 365 U.S. 714 (1961) (lease for garage which contains covenant to uphold state law was state action); Monroe v. Pape, 365 U.S. 167 (1961) (Chicago police liable under 42 U.S.C. § 1983); Barrows v. Jackson, 346 U.S. 249 (1953) (judicial enforcement of a suit based upon restrictive private covenant was invalid); Terry v. Adams, 345 U.S. 461 (1953) (private pre-primary was state action); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of private covenant was state action); Marsh v. Alabama, 326 U.S. 501 (1946) (company town action was state action because town fulfilled a public function); Screws v. United States, 325 U.S. 91 (1945) (the actions of Georgia peace officers held to be state action); Smith v. Allwright, 321 U.S. 649 (1944) (party primaries regulated by law were state action); Brown v. Pennsylvania, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968) (court substitution of private trustees for city officials to administer trust establishing racially restrictive trust constituted state action); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943) (inaction by a state official held to constitute state action).

2. Civil Rights Cases, 109 U.S. 3 (1883). The majority of the Supreme Court based their position upon the contention that private individuals are inherently incapable of denying the constitutional rights of other private citizens. Private wrongs were viewed as mere assaults. It was argued that such assaults might deter exercise of a right but that they could not deny the right itself. Some recent leading cases [by lower courts] involving private universities [following the Civil Rights Cases] include Blouin v. Loyola University, 506 F.2d 20 (5th Cir. 1975) (teacher refused contract renewal allegedly due to first amendment activity; court found no state action); Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974) (no state action found, where balancing test was employed); Grafton v. Brooklyn Law School, 478 F.2d 1187 (2d Cir. 1973) (expulsion in retaliation for first amend-
which rejected the state action theory, has never been revived.\textsuperscript{3} Yet, while the Court will not acknowledge purely private action as a mandate for the fourteenth amendment’s constitutional safeguards, the spirit of Justice Harlan’s position nevertheless permeates contemporary interpretations of the state action doctrine.\textsuperscript{4}

\textsuperscript{3} See supra, note 2, infra. This fear is no longer a primary influence in state action inquiries. Contemporary theorists base their hesitancy to expand the state action doctrine upon a balancing of state interest and the significance of the constitutional right in jeopardy. Leading scholarly opinion on “state action” can be found in Black, \textit{Forward: State Action, Equal Protection and California's Proposition 14}, 81 Harv. L. Rev. 69 (1967) (courts ought to find state action as a matter of course and limit its effects through other doctrines or interests); Henkin, \textit{Shelley v. Kraemer: Notes for a Revised Opinion}, 110 U. Pa. L. Rev. 473 (1962) (a balancing test must be utilized, weighing the discriminating party’s property rights, right of association, right to privacy, and right to liberty of action, against the interests of the victim in not having the state support discrimination against him); Horowitz, \textit{The Misleading Search for State Action Under the Fourteenth Amendment}, 30 So. Cal. L. Rev. 208 (1957); Karst and Horowitz, \textit{Reitman v. Mulkey: A Telephase of Substantive Equal Protection}, 1967 Sup. Ct. Rev. 39; Silard, \textit{A Constitutional Forecast: Demise of the State Action Limit on the Equal Protection Clause}, 66 Colum. L. Rev. 855 (1966) (the state’s ostensible obligation to apply fourteenth amendment guarantees to private action may be dissolved by other constitutional provisions, e.g., the free exercise clause); Williams, \textit{The Twilight of State Action}, 41 Tex. L. Rev. 347 (1963) (courts must weigh private interest in particular discrimination against public interest in the elimination of the discriminatory activity).
The egalitarian notion that all invasions of constitutionally protected liberties should be eradicated has received court approval. Recent constructions of state action requirements approach Justice Harlan's goal of reaching all private invasions of constitutionally protected liberties.

Certain private wrongs, however, remain outside the reach of the fourteenth amendment. If the state involvement does not directly attach to the acts which violate protected rights, courts are left with no basis upon which to declare those acts unconstitutional;

5. See note 1 supra.
6. Id. But see notes 7-8 infra and accompanying text.
7. Recent adjudication on the part of the Burger Court has caused some commentators to conclude that state action theory has been altered in such a way as to narrow the scope of its application. (See Note, State Action and the Burger Court, 60 Va. L. Rev. 840, 872 (1974), concluding that the Nixon Court "has called a halt" to the "almost limitless expansion" of "state action.") The major decisions which have caused this concern are Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Gilmore v. City of Montgomery, 417 U.S. 556 (1974); and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

It is crucial to understand that while the Burger Court may have evidenced a hesitancy to utilize the fourteenth amendment in peculiar fact situations, the conceptual analysis of the state action inquiry proposed by the Warren Court still receives adherence. In each of these cases, the majority has employed the previously articulated standard that the state involvement must go directly to the allegedly unconstitutional private activity and not simply attach to the private activity involved.

This approach is not a retreat from such decisions as Burton v. Wilmington Parking Authority, 365 U.S. 714 (1961), or such authoritative lower court opinions as Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). In Jackson, supra at 351, the majority held, "the inquiry must be whether there is sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be treated as that of the state itself." In Gilmore, supra at 573, the majority did not decide the state action question; but in remanding it, the Court applied the Burton test and suggested that state action was probably present. In Moose Lodge, supra at 173, the majority simply held that mere licensing of the private entity did not constitute the requisite nexus to the objectionable private activity.

If in fact the Burger Court has diluted the Warren analysis, it has forced plaintiffs to prove that there is a significant link between the state activity and the private action which is alleged to be unconstitutional. The facts of Jackson, Gilmore, and Moose Lodge only established that state action was linked to the existence of the private entities; they did not establish that the state activities reached the constitutional deprivations. However, the Indiana State Legislature has linked itself directly to unconstitutional actions of Indiana private university officials. Confronting the issue of university discipline policies, the legislature has encouraged private university officials to use a free hand (see IND. CODE § 35-19-4-1 (1969)).
the private acts are not encompassed by the necessary state-private relationship. Any study of the historical development of the state action doctrine reveals the continued expansion of the fourteenth amendment's ambit. Current standards demand only that constitutional violations be attributed to a state-private partnership; the state contribution to the partnership need not constitute as much as the private contribution. When private actions are permitted by state statute, the requisite partnership should be established. Specific Indiana legislation regarding Indiana's private universities should be construed as sufficient state action to implant all disciplinary acts by private university officials in Indiana within the scope of fourteenth amendment protection. Verification of this position is provided by an analysis of state action norms, as well as case law which is analogous to the Indiana situation.

STANDARDS FOR PROOF OF STATE ACTION

It is impossible to formulate an acceptable definition of state action. The Supreme Court has emphasized that ultimate determinations of whether or not a peculiar set of circumstances meet the state action test require a case-by-case inquiry. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."

While one inclusive standard does not exist, it is not difficult to establish several guidelines which are relevant to ultimate determinations of state action in all circumstances. Actions of any state agent or agency will constitute state action. It is not necessary that the state action precede the acts of the private individuals

Importantly, the Burger Court repeatedly limits its holding to the fact situation at hand. It is at best a misdescription to characterize the peculiar applications of an established constitutional doctrine to specific fact situations by a temporary and slender majority as new limitations on that doctrine.

8. See notes 1 and 7 supra.
10. It is imperative that the scope of the state action doctrine be understood as continually evolving. In Reitman v. Mulkey, 387 U.S. 369 (1966), the very capability of a state to remain neutral in the face of private constitutional violations is brought into question. See generally C. Black, State Action, Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69 (1967).
or private institutions. The state action does not have to be the
direct cause of those private actions which infringe upon individual
rights. The particular state involvement must, however, relate
directly to the specific constitutional violations.

Each of the three divisions of government is sufficiently
representative of the state to constitute the requisite participant
in a violation of the fourteenth amendment. Supreme Court in-
quiries during the past century have led inexorably to this con-
clusion. All distinctions between the executive, legislative and
judiciary lack importance within the state action inquiry; each
branch is equally accountable through the constitution of the state
itself.

Actions which are initiated by private individuals can clearly
be transformed into state action by subsequent intervention by a
state agent or agency. "Nor is the amendment ineffective simply
because the particular pattern of discrimination, which the state
has enforced, was defined initially by the terms of a private agree-
ment." When the private acts precede state involvement, any evi-
dence of reassurance given to the private party, due to the state's
participation, is significant. Such reassurance demonstrates that
the state activity relates directly to the deprivation of constitutional
guarantees.

Since the sequence in which the joint actions occur should
not be conclusive of the state action inquiry, it becomes apparent
that there is no need to establish causation between the action of
the state and the ultimate deprivation of constitutional rights.
Private action which is the overwhelming and direct cause of the

13. Although action initiated by private individuals can clearly be
transformed into state action by subsequent intervention by a state agent
or agency, proof of a private response to an act by the state constitutes a
stronger argument for implementation of the state action doctrine. See
Kraemer, 334 U.S. 1 (1948); Coleman v. Wagner College, 429 F.2d 1120
(2d Cir. 1970).
14. Since the private and state acts need not comply to any requisite
order, causation does not seem to be required.
15. See note 7 supra and accompanying text.
16. See Ex parte Virginia, 100 U.S. 339 (1880).
17. There is no rationale which would favor one branch of government
over another. Nevertheless, Supreme Court determination that each branch's
actions constituted state action required waiting for facts constituting state
involvement by each of the separate branches. See notes 1 and 12 supra.
unconstitutional deprivations of freedom may, nevertheless, constitute state action if the state has merely "elected to place its power, property, and prestige behind" the violative acts.\(^{20}\) The Supreme Court will invoke the state action doctrine upon proof of the existence of a form of partnership between the state and the private actor.\(^{21}\)

It is very possible that a state may be involved in a type of partnership with an individual which is not connected to the individual’s conduct. The partnership itself must bear directly upon the private conduct which is violative of the constitutional rights of others. Mere authorization of a private entity which commits unconstitutional acts is insufficient in itself. The participation by the state, in the partnership, must authorize or encourage the private wrongs which violate the constitution.

Any analysis of potential state action problems will be facilitated by recognition of these standards. Constant reference to these guidelines will ensure clarity in approach to the Indiana problem discussed below.\(^{22}\) It is imperative, however, that one retain the understanding that all state action standards exist as elements of a continually evolving doctrine. There is no complete set of state action requirements; rather, the trend is toward expansion of the doctrine.\(^{23}\)

**INDIANA STATUTE**

Discipline on college campuses became a significant problem during the 1960’s. Indiana traditionally did not restrict the disciplinarian role of private university officials. Problems of vandalism and disrespect for educational facilities prompted the

\(^{20}\) The majority opinion in Reitman v. Mulkey, 387 U.S. 360 (1966) stated:

> Although the state neither commanded nor expressly authorized or encouraged the discrimination, the state had elected to place its power, property, and prestige behind the admitted discrimination and . . . has made itself a partner to the refusal of service. . . .

*Id.* at 380.


\(^{22}\) See note 61 *infra*.

\(^{23}\) A glance at the state action doctrine’s history reveals the continual expansion of the vicissitudes of the fourteenth amendment. In the absence of a clear definition of state action and a Supreme Court pronouncement on its applicability to this note’s subject matter, a constant recognition of this doctrine’s growth strengthens one’s perception of the possibilities of the doctrine’s applicability to the private university setting. *See* notes 1 and 7 *supra*. 

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Indiana legislature to join in a mutual effort with public university officials to rid the campuses of menacing students. Not only did the legislature elect to define particular offenses of trespass and their corresponding penalties (for public university students), it chose to authorize complete discretion by private university officials in all private university disciplinary actions. This final provision places the state of Indiana and private universities in a partnership which encompasses all disciplinary action within the private institutions. The law provides:

Nothing in this act shall be interpreted as affecting the right of any person to engage in conduct not in violation of this act or any rule or regulation of any such institution, or of any institution established for the purpose of education of students to discharge any employee, or expel, suspend or otherwise punish any student, in accordance with its procedures for any conduct which may be a violation

24. See note 55 infra. The statutes state:

IND. CODE § 35-19-4-1 (1969). It shall be a misdemeanor for any person intentionally to damage any property, real or personal, of any institution established for the purpose of the education of students enrolled therein.

IND. CODE § 35-19-4-2 (1969). It shall be a misdemeanor for any person to go upon or remain upon any part of the real property of any institution established for the purpose of the education of students enrolled therein in violation of any rule or regulation of such institution for the purpose of interfering with the lawful use of such property by others or in such manner as to have the effect of denying or interfering with the lawful use of such property by others.

IND. CODE § 35-19-4-4 (1969). It shall be a misdemeanor for any person to go upon or remain within a public building for the purpose of interfering with the lawful use of such building by other persons or in such manner as to have the effect of denying to others the lawful use of such building.

IND. CODE § 35-19-4-5 (1969). A person who commits a misdemeanor defined in this act shall be punished, upon conviction, by a fine not to exceed five hundred dollars or by imprisonment for not to exceed six months, or by both fine and imprisonment.

The above provisions apply only to public institutions by title. The final provision, by its language, includes all institutions:

IND. CODE § 35-19-4-6 (1969). Nothing in this act shall be interpreted as affecting the right of any person to engage in conduct not in violation of this act or any rule or regulation of any such institution, or of any institution, established for the purpose of education of students to discharge any employee, or expel, suspend or otherwise punish any student, in accordance with its procedures for any conduct which may be a violation of any such rule or regulation of any such institution or rendered unlawful by this act or may otherwise be deemed a crime or misdemeanor (emphasis added).
of any such rule or regulation of any such institution or rendered unlawful by this act or may otherwise be deemed a crime or misdemeanor.\textsuperscript{25}

The statute grants state authority to private university officials to take all actions which they deem appropriate; conformity to the United States Constitution is not required.\textsuperscript{26}

Robert O'Neil, professor of law at the University of California at Berkeley, has previously observed with regard to this statute that:

The situation in Indiana is far less clear. . . . The last clause may give the case away. There is ample precedent for the view that Indiana has now made Notre Dame's enforcement of student conduct rules reviewable in the federal courts for this reason if no other. When a state has merely "encouraged" or "authorized" private action that may infringe individual liberties, the Fourteenth Amendment arguably applies. This much Indiana quite clearly if unwittingly seems to have done here.\textsuperscript{27}

Mr. O'Neil concluded that it is arguable that IND. CODE § 35-19-4-6 establishes state action in the disciplinary measures taken by private university officials. A more extensive analysis of the statute and case law establishes that the enactment in fact meets the requirements of state action. The state has granted a statutory right to private university officials to use uninhibited discretion in the disciplining of students. The statute formulates the kind of partnership which is sought by the courts in state action inquiries.\textsuperscript{28}

\textsuperscript{25} IND. CODE § 35-19-4-6 (1969).

\textsuperscript{26} It is arguable that the statute's final clause is a mere formalization of the legislature's intent not to alter the status quo re private institutions. However, the specificity of the clause and the intent of the legislature to usurp the private sector's authority to pronounce itself outside of the statute's scope is significant. The legislators intended to ensure that private university officials were encouraged to discipline students without the threat of constitutional procedures. It is not the intent of the legislature with regard to the viability of the fourteenth amendment in the private sphere which is salient. Rather, the intent of the legislature to actively authorize or encourage private acts which are in violation of the constitution is crucial to the state action inquiry.


\textsuperscript{28} See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1971). The statute can be read to find that the state and private university are "joint venturers" in the discretionary control of student activism. Id. at 177. The majority found "state action" with respect to the liquor control board regulation which
An analogous state action problem has been reviewed by the Supreme Court. Unbridled discretion placed by a state legislature in the hands of private individuals was determined to be state action. The rigors of the fourteenth amendment were available to redress the unconstitutional acts of private parties which exercised such state-authorized discretion.

**The Race Case Analogy**

California enacted a constitutional amendment which granted all landowners the right to use uninhibited discretion in renting and/or selling their land. A black man was denied an opportunity to purchase a specific piece of land solely because he was black. The prospective buyer brought suit, invoking the equal protection clause of the fourteenth amendment, in an attempt to force the seller to complete the sales transaction. This case, *Reitman v. Mulkey*, reached the Supreme Court in 1966. Justice White, writing the majority opinion, held that the legislative efforts were sufficient state action for utilization of fourteenth amendment equal protection standards. The Court held that the amendment announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. . . . Private discrimination in housing . . . now enjoyed a far different status. . . . The right to discriminate on racial grounds, was now embodied in the state's basic charter. . . . Those practicing racial discrimination need no longer rely solely on their personal choice. They could now invoke express constitutional authority. . . .

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required that every club adhere to its constitution and by-laws, since that regulation put the authoritative power of the state behind the continued practice of discrimination embodied in the Moose Lodge documents. The Court's choice of remedy was injunctive relief. Such a remedy would not be appropriate to the sort of private wrong considered here.

29. In *Reitman v. Mulkey*, 387 U.S. 369 (1966), the Supreme Court reviewed a constitutional amendment enacted by the state of California. The amendment, like the Indiana statute, permitted private discretion—even when it violated the constitutional rights of other private individuals.

30. CALIF. CONST. art. 1, § 26. The section reads:
Neither the State nor any subdivision thereof shall deny, limit or abridge, directly or indirectly the right of any person, who is willing or desires to sell, lease or rent such property to such person or persons as he in his absolute discretion chooses.


32. *Id.* at 377.
The majority opinion observed that while the constitutional amendment did not command or even expressly authorize discrimination on racial grounds, the state had nevertheless so commingled its action with the private discriminatory act that the application of the fourteenth amendment was mandated. The commingling of the state authorization with the private act of discrimination created state action. Reitman stands for the proposition that state legislative authorization of private discretion renders the private exercise of such discretion the same as if it had been exercised by the state itself. The importance of Reitman to an understanding of the effect of the Indiana statute is illuminated by an examination of the similarities and distinctions between the California and Indiana legislative acts.

Similarities

It is not difficult to locate significant similarities between the California amendment considered in Reitman and the Indiana statute governing university disciplinary policies. It is submitted that each enactment created a state authorized right of individuals to commit private acts violative of the constitutional rights of others. The Indiana statute illustrates the legislature's belief that private university officials are free, by constitutional authority, to pursue any noncriminal disciplinary actions. Although a case for state action cannot be based upon the Indiana constitution, the Indiana statute invoked precisely the same legislative authority to act as did the California constitutional amendment. Indiana, as well as California, authorized private violations of the United States Constitution. Each state government implemented such


34. C. Black, State Action, Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 84 (1967). In this article, Professor Black emphasizes that legislation satisfies the state action requirements if nothing else does. In cases involving legislation, the inquiry shifts from the issue of state action per se to the substance of the particular enactment in question. 35. Ind. Code § 35-19-4-6 (1969) states:

Nothing in this act shall be interpreted as affecting the right of any person... (emphasis added).

36. The ultimate consideration in determining state action is one of effect rather than form. A constitutional amendment is the clearest method of creating a right of citizens. Yet, the mere manifestation of a legislature's belief that their citizens possess a peculiar right is all that the state action problem requires.
authorization by granting what they believed to be a right to commit such unconstitutional acts to private citizens and/or private institutions.

The extremely general language contained in each of the enactments comprises the second important similarity. An exceedingly broad authority is given to private individuals in each instance. Although it has been argued that specific state requirements are essential to a finding of state action within legislation, Justice White rejected any such need in Reitman. The right of private individuals to exercise complete discretion creates innumerable possibilities of infringements upon constitutionally protected liberties. Express commands from the state to private citizens which force constitutional violations are inherently limited in their effects. Although, in such cases, some unconstitutional acts are certain to follow, the state does not leave the scope of the violations to the creativity of its populace. State permission for complete discretion is far more dangerous. The potential violations which find protection in the Indiana statute are left only to the inclinations of private university officials. The general terms employed by the Indiana legislature fashion the type of threat which the Court chose to eradicate in Reitman.

Distinctions

Distinctions can be drawn between the California amendment and the Indiana statute. The most compelling difference between the two goes to their very substance. The California amendment opened the door for racial discrimination, whereas the Indiana statute permits abuse of procedural due process. Those who adhere to the historical reasoning of the Slaughter-House Cases may be unwilling to expand the application of the fourteenth amendment into the realm of nonracial questions.

A contemporary hesitancy to treat race-related cases and cases not related to questions of race alike, for the purposes of invoking

37. Neither enactment limits the discretion granted to private individuals and/or institutions. Each enactment authorizes uninhibited discretion. See notes 24 and 29 supra.

38. See note 20 supra.

39. Slaughter-House Cases, 83 U.S. 36 (1873). The majority argued that the fourteenth amendment could only be read within its historical context. Having identified the intent of the amendment's framers as limiting the amendment to the attainment of complete equality (by law) of the black race, the justices claimed that they were forced to limit the effect of the amendment to cases of racial discrimination.
the standards of the fourteenth amendment, has been reflected in
-case law as well as in scholarly law review articles.40 Although the
issue is not settled, the Seventh Circuit recently manifested this
hesitancy. The majority opinion in Bright v. Isenbarger41 stated:

The district court reasoned that the state action doctrine
was developed in response to efforts to eliminate private
racial discrimination. . . . It thought there might be a
less demanding standard of what constitutes sufficient
state involvement than where there are allegations of
racial discrimination. We find it unnecessary to decide
whether state action cases not involving attacks on racial
discrimination require a more demanding standard of what
constitutes state involvement.42

A reluctance to use a lenient standard for defining requisite state
activity in cases unrelated to issues of racial discrimination was
pinpointed in Professor Charles Black’s approach to Reitman.43

I limit this generalization [that generalization which can
be adduced from the Reitman decision] to the racial ques-
tion on the assumption that the Fourteenth Amendment
marks racial groups—Negroes primarily but other racial
groups within the clear equity of the statute—as groups
against whose interest and immunity from discrimination
no state measures of any kind may be justified on a bal-

40. See generally Coleman v. Wagner, 429 F.2d 1127 (2d Cir. 1970);
Bright v. Isenbarger, 314 F. Supp. 1382, 1394 (N.D. Ind.) rev’d, 445 F.2d
412, 413 (7th Cir. 1971); FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE
PUBLIC/PRIVATE PENUMBRA 26 (1968); C. Black, State Action, Equal Protec-
tion, and California’s Proposition 14, 81 HARV. L. REV. 69 (1967); Van
41. 445 F.2d 412 (7th Cir. 1971).
42. Id. at 413. But see Coleman v. Wagner, 429 F.2d 1127 (2d Cir.
1970):

It is arguable—indeed, I have argued—that racial discrimination is
so peculiarly offensive and was so much the prime target of the
fourteenth amendment that a lesser degree of involvement may con-
stitute “state action” with respect to it than would be required in
other contexts. . . . Actually the historical meaning could be more
usefully viewed as creating protections for any identifiable class or
group against treatment as second class citizens or slaves. Certainly
students constitute such an identifiable group and arguably the denial
of due process rights for them relegates them to a status easily within
the contemplated reach of the Reconstruction Amendments.
43. C. Black, State Action, Equal Protection, and California’s Proposi-
tion 14, 81 HARV. L. REV. 69 (1967).
ance of convenience, or on local assessment of the worthiness of competing interests.\textsuperscript{44}

Black's reasoning lends sophistication to the \textit{Slaughter-House Cases} reservations in cases not related to race issues. Whereas the analysis of the Court in the \textit{Slaughter-House Cases} was permeated by a fear of excessive federal power in our constitutional scheme, Black's view approaches the substance of each state action inquiry. Black's hesitancy to apply fourteenth amendment standards liberally is not founded upon the history of the amendment. Black's position is predicated upon the assumption that states are more likely to have over-riding interests to justify intrusions upon individual rights in cases not involving race discrimination than in cases which do relate to discrimination issues. Justifications for discrimination by race are unimaginable due to the significance of the problem of racism itself. Courts are determined to place minority races within a specially protected class.\textsuperscript{45}

Crucially, Black and others have challenged the traditional notion that prior to utilization of the fourteenth amendment's due process clause, there must be a determination that there is: (1) requisite state involvement; and (2) an absence of state interest which overrides the harm of excessive state intrusion into the constitutionally protected zone. Black's position is that the requisite state action fluctuates according to the state interest involved. Since no state interest justifies racism, less state involvement will mandate use of the fourteenth amendment's due process clause in race-related cases than in other contexts. The role of the court becomes one of balancing the need for a state intrusion with the

\textsuperscript{44} \textit{Id.} at 82.

\textsuperscript{45} Race has become a suspect classification. Such classifications, within a statute, are justified only when a compelling state interest for the classification has been proven. Professor Black's rule for \textit{Reitman} is as follows: Where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want.

\textit{Id.} at 82. Black is saying two things: 1) the test for state action will be different (less demanding) for private activity involving race; and 2) the state must produce a greater interest, a more compelling interest to justify any state action involving racial discrimination. \textit{See generally} San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
significance of the deprivation of constitutional rights. Consequently, policy considerations are given a quasidoctrinal status similar to the varying standards employed for use of the equal protection clause.\(^\text{46}\)

Those who would require more state action in the private university context than in the race-related cases place themselves in a dilemma. They are forced to defend a position which affords Indiana's public university students fourteenth amendment guarantees, while students in Indiana's private universities must remain outside of the fourteenth amendment protection. Successful rationalization of Indiana's involvement in private university discipline policy requires proof of a state interest which overrides the significance of the denial of fourteenth amendment protection to Indiana's private university students. If the state does not benefit from the lack of due process afforded students in private schools, that state can claim no such overriding state interest. The state must demonstrate that public students receiving the protection of the fourteenth amendment's due process clause thereby lose educational opportunities, whereas private students do not. It could then be contended that the state has an interest in maintaining private students' rights to these opportunities.

Surely the state cannot claim an economic benefit from the denial of rights in the private sector. All costs of institutionalizing due process guarantees would be the burden of the private sector—hence, most likely, of the students themselves. If benefits to Indiana resulting from the lack of due process in private educational institutions cannot be clearly demonstrated, the state interest test cannot be met. Ultimately, the private university setting cannot be substantially different from the race cases.

A second distinction between the California amendment and the Indiana law is that the California predicament in *Reitman* required

\(^{46}\) If one assumes, *arguendo*, that the interest test can be met, the fourteenth amendment standards may still be applicable. It could be contended that education is so fundamental that there must be compelling state interest prior to expelling students without first affording them due process. Although San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) did not determine that education is a fundamental right, an absolute deprivation of education, after one has been assured of receiving it, may require a different conclusion. People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (D. Ct. Nassau County, New York 1968) states:

The price of a modern education is not the waiver or surrender of constitutional privileges. One does not salvage a democratic society by adopting undemocratic techniques.

https://scholar.valpo.edu/vulr/vol9/iss3/6
use of the fourteenth amendment's equal protection clause,\textsuperscript{47} whereas the private university situation could only be rectified by use of the due process clause.\textsuperscript{46} The racial discrimination in California necessitated litigation to ensure equal treatment for blacks, whereas the deprivation of rights of students mandates a suit to secure procedural protection in the university disciplinary systems. There is no basis for the view that relaxed standards exist for use of the equal protection clause which do not exist for the due process clause. Professor Black acknowledged this lack of significantly differing standards.

One should emphasize here that the equal protection clause, even in wording, may furnish a basis for especially ample latitude with respect to the finding of significant 'state action' or 'inaction.' But for the purposes of an overview the picture does not change very much if one considers the 'state action' doctrine as a whole, in its application to other constitutional guarantees.\textsuperscript{49}

The final significant distinction is one of form. Whereas California wrote its enactment into the state's constitution, Indiana merely enacted a statute. It is the effect of the state's action rather than the form of the state's action which is salient. The requisite partnership between the state and private parties can be determined by the private parties' perception of the state's act.\textsuperscript{50} Many acts by representatives of states, of far less magnitude than either a constitutional amendment or a statute, have been held to be state action. Mere proclamations of policy by town mayors suffice to create state action.\textsuperscript{51} A majority of the Supreme Court concluded in Lombard v. Louisiana\textsuperscript{52} that the mayoral pronouncement, "I have today directed the superintendent of police that no additional sit-in demonstrations . . . will be permitted . . . ,"\textsuperscript{53} was

\begin{itemize}
\item 47. U.S. Const. amend. XIV, § 1. This section states in part: 
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
48. Id.
52. Id.
53. Id. at 271.
\end{itemize}
state action. The effects of California's amendment and Indiana's statute are identical for the purpose of a state action inquiry. Each state, through its legislative branch, manifested support for private discretion. Neither state chose to limit its support to discretion exercised only within the confines of the United States Constitution.

The effect of Reitman and the other race-related cases upon the private university situation in Indiana is significant. Reitman clarified the guidelines for proof of state action. The Indiana legislation is analogous to the California enactment contemplated in Reitman. It is crucial that the state action principle established in Reitman is in its initial stage. Some courts are freely utilizing the principle in contexts other than the area of racial discrimination. State action in discipline procedures within private universities has received judicial review.

**The Theory as Applied to Private Universities**

Traditionally, private educational institutions have enjoyed complete isolation from the strictures of state government. However, just as the problems of rising costs for facilities and faculties have forced the private schools to accept state and/or federal education aid, the need to maintain an atmosphere conducive to the education of the student population has caused the states to intervene in the disciplinary functions of private educational institutions. Certain state legislatures have legislated guidelines for private university discipline. Although the legislative state action doctrine has been utilized predominantly within other contexts, recent decisions indicate that it may be appropriate to the private university. New York enacted a statute requiring that private university disciplinary procedure be written and registered with the state.

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55. It has been made apparent that legislation need not dictate that private citizens act according to specified procedures in order that there be state action when private individuals, acting pursuant to the legislation, violate the freedom of others. Significantly, the precise action taken by the private individuals need not be defined or described in the statute itself. See Reitman v. Mulkey, 387 U.S. 369 (1966).
56. N.Y. Educ. Law § 6450 (McKinney 1969). The statute reads: The trustees or other governing board of every college chartered by the regents or incorporated by special act of the legislature shall adopt rules and regulations for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof. Such rules and regulations shall govern the conduct of students, faculty
Public and private university officials were required to publish their own sets of rules. The substance of these rules was left to the official's discretion. Acting upon the legislature's enactment, Wagner College, a private New York school, registered its published rules and regulations with the state. Twenty-four black students were later expelled by Wagner College without first receiving fourteenth amendment procedural due process guarantees. The students contended that they possessed the right to prior notice of their specific violations of university regulations. Additionally, the students claimed the right to a fair hearing prior to any expulsions. The district court dismissed the students' complaint for failing to state a cause of action. The Second Circuit determined that the district court had been "too hasty" in its dismissal of the students' complaint. The case was remanded to the district court for an evidentiary hearing; at such time, plaintiffs could introduce evidence to establish that the New York law constituted a state intrusion into the disciplinary policies of private universi-

and other staff as well as visitors on such campuses and property. The penalties for violations of such rules and regulations shall be clearly set forth therein, and shall include provisions for the ejection of a violator from such campus and property, and in case of a student or faculty his suspension, expulsion or other appropriate disciplinary action. Such rules and regulations shall be filed with the regents and the commissioner of education not later than ninety days after the effective date of this act. All amendments to such rules and regulations shall be filed with the regents and the commissioner of education not later than 10 days after their adoption. 2. If the trustees or other governing board of a college fails to file the rules and regulations within the time required by this section such college shall not be eligible to receive any state aid or assistance until such rules and regulations are duly filed. 3. Nothing contained in this section is intended nor shall it be construed to limit or restrict the freedom of speech or peaceful assembly.

57. Although the black students contended that they were discriminated against due to their race, the issue of procedural due process is divorced from consideration of the race discrimination issue.

58. All of the students were expelled without being notified of their specific violation of university regulations. The expulsions were made effective prior to any hearing. See Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

59. In Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970), the majority viewed the lower court's unwillingness to search for the legislature's intent beyond the face of the statute as an inadequate approach to the state action question.
ties. The court’s effort to determine the applicability of the statutory state action theory to this private college circumstance focused upon the criteria established in the race-related decisions.

In considering the applicability of state action, the majority in Coleman v. Wagner College expressed a desire to discover the intention of the legislators when they passed the legislation in question.

The statute may have been intended, or may be applied, to mean more than it purports to say. More specifically, section 6450 may be intended or applied as a command to the colleges of the state to adopt a new, more severe attitude toward campus disruption and to impose harsh actions on unruly students.

The court determined that the intent of the statute is important to the ultimate determination of state action. If the state of New York intended that private university officials pursue standards of conduct which would suppress "unruly students," the university policies would be cloaked with state action.

IND. CODE § 35-19-4-6 clearly meets the test established in Coleman. It was intended to suppress the activities of "unruly students." The legislature of Indiana wished to ensure that trespasses upon public university property would be severely punished. It is crucial that the statute conferred a greater variety and scope of powers upon the officials of universities than merely those associated with trespass; the law allows all private disciplinary

60. Id. at 1125.
62. 429 F.2d 1120 (2d Cir. 1970).
63. Id. at 1124.
64. See note 55 supra.
65. Interview with Representative Bray, member of the Indiana House of Representatives, in Indianapolis, January 23, 1975. After reviewing records of the committee hearings and of the floor debate, Assemblyman Bray stated, in regard to IND. CODE § 35-19-4-6 that "the legislature was obviously responding to riots on college campuses."
action chosen by private university officials. The Indiana statute was promulgated with intentions which meet the test of Coleman.

An effective examination of the Indiana statute must recall that Judge Friendly, in his concurring opinion in Coleman, postulated that a state statute drafted with an intent to suppress disruptions within private university communities effectively transforms all discipline procedures from private into state acts.66 This transformation occurs whether or not the private acts were initiated prior to the legislation.67 The transformation is complete where the specific action is left to the discretion of private university officials.68

It can thus be forcefully argued, a private college in promulgating rules and regulations for the maintenance of order on campus is exercising a power emanating from the legislature even though it could have acted on its own, as many in fact had done.69

Judge Friendly's analysis logically would place all disciplinary action taken by private universities in Indiana within the purview of the general language of IND. CODE § 35-19-4-6. By authorizing or encouraging private university officials to utilize complete discretion in formulating university conduct policies, the state became a partner in such policies.

Although the Coleman decision provides the private university case law which is most analogous to the Reitman decision, the state of Indiana itself has case law involving state action and private educational institutions. In one case, Bright v. Isenbarger,70 a private high school in Fort Wayne had expelled two students for wandering across the street to the grounds of a public high school. The pupils' nefarious conduct occurred during the private institution's regular schoolday hours. The Seventh Circuit determined that the disciplinary action of the school was not state action. Although the school was chartered with the state, it was not prohibited from functioning without such a charter. It is

68. In Reitman v. Mulkey, 387 U.S. 369 (1967), the Court found California's amendment which allowed discretion in renting to be state action when a property owner refused to rent to a black man.
70. 445 F.2d 412 (7th Cir. 1971).
crucial, however, that the court manifested extreme interest in the Coleman decision. The implication of the court's opinion is that a statute would have constituted sufficient state involvement. The majority in Bright carefully noted that the fact situation which they confronted was unlike that which was confronted by the Second Circuit in Coleman. The Seventh Circuit emphasized that the plaintiffs never alleged statutory state action. The court's reference to the Coleman decision notwithstanding the failure of plaintiff's counsel to bring the Coleman case to the court's attention, underscores a manifest willingness on the part of the Seventh Circuit to scrutinize the Coleman doctrine. Citing the Coleman decision, the court in Bright stated:

The college had adopted public order rules and regulations. The case was remanded to determine if the statute represents a meaningful intrusion into the disciplinary policies of private colleges and universities. No such intrusion has been alleged here.72

The court maintained that there was an absence of Indiana statutory interference with secondary school discipline: "No Indiana statute authorized Central Catholic High School to expel these plaintiffs. . . ."73 Bright infers that the existence of such a statute would have placed state action behind the dismissal of the plaintiffs. The court failed to consider the effect of IND. CODE § 35-19-4-6. Not only did the plaintiffs fail to draw the court's attention to this or any other statute,74 but IND. CODE § 35-19-4-6 was not located within any of the code provisions which related to the topical area of education, since it is a criminal statute.75

Court adoption of the Coleman state action theory would have far reaching effects upon the disciplinary procedures within private universities in the state of Indiana. A brief analysis of the disciplinary codes now being used at four of Indiana's private universities demonstrates that the impact could be considerable.76

71. Id. at 414.
72. Id.
73. Id. at 415.
75. It is highly unlikely that the court even sought applicable statutes. Since legislative state action was not an issue, the court had no reason to locate such a statute. Any search under the heading of education would have been futile.
76. The random selection of Butler University, DePauw University, University of Notre Dame, and Valparaiso University should not be construed
Disciplinary codes which fall within the purview of the fourteenth amendment must have clarity. Specific standards of clarity are required by the incorporation of the first amendment into the fourteenth amendment. The Supreme Court ruled that unless regulations may be understood by men of reasonable intelligence, they are void. The Court declared in Baggett v. Bullitt."

The statute therefore fell within the compass of those decisions of the court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law."

It is submitted that Butler University Handbook regulations are unconstitutionally vague. The student handbook provides:

In addition to compliance with the rules herein, students are expected to maintain high standards of conduct. . . . Students who are in violation of either the specific rules or high standards should expect disciplinary penalties, including expulsion, if deemed appropriate by Butler University."

The clause "high standards of conduct" as well as the clause "disciplinary penalties, . . . deemed appropriate by Butler University," fails the objective test of Baggett. Reasonable men would differ upon their subjective understandings of these clauses. Critically, the ambiguity permeates both the substance of the offenses and the corresponding penalties. One of Butler's specific rules challenges the latitude of Baggett:

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78. Id. at 367. The Washington statute required that no subversive person could be eligible for state employment. The term "subversive person" was found to be unconstitutionally vague. Significantly the statute did not include criminal penalties. The absence of criminal penalties within private university regulations is, therefore, not salient.
81. It is unclear as to whether or not Baggett v. Bullitt, 377 U.S. 360 (1963), requires that both the substance of the offense as well as the corresponding penalty be vague. A holding that both must be vague is, however, seemingly highly unlikely.
An individual or a group involved in mob activity which results in injury, destruction of property, or the obstructing of the normal functioning of the university will be subject to appropriate disciplinary action.\(^\text{62}\)

"Mob activity" is descriptive of something which possesses emotional overtones. The requisite number of persons, as well as the essential iniquitous activities, is left to educated guessing. The rules and regulations of DePauw,\(^\text{83}\) Notre Dame,\(^\text{84}\) and Valparaiso\(^\text{85}\) adhere to the Butler pattern of vagueness. Students are not notified of what specific conduct is prohibited by these universities. Students are, instead, informed that their school will punish and/or expel students when, in the school's judgment, a student or group of students must be so punished. The purpose of the vagueness doctrine is to avoid circumstances in which persons are not placed in prior notice of what specific actions are not permitted. Clearly, many of the regulations of these four universities provide no such notice.

It has been established that due process of law prohibits state educational institutions from expelling students without first notifying them of their specific charges; the students must also be afforded an opportunity for a fair hearing.\(^\text{86}\) The Supreme Court has provided guidelines for these required proceedings. One must

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83. Rules and Regulations DePauw University 1, 18 (1974). The DePauw Pamphlet reads:

Social regulations are not static. They are, rather, in a state of continuing evolution.*** There is general agreement that any organized community requires standards of safety, orderliness, and means by which the total community can best implement its goals.*** The board delegates broad responsibilities to the President. The university cannot tolerate disruptive behavior on the part of any student and maintain what it holds to be acceptable standards of conduct in guiding students toward becoming well educated, considerate, moral, and dedicated citizens.

84. Du Lac Notre Dame 26 (1974). This discipline handbook states:

The University traditionally reserves the right to deny the privilege of enrollment to any student whose conduct or attitude is believed to be detrimental to the welfare of the University.

85. Valparaiso University 20 (1974). This university handbook provides:

The University reserves the right to terminate a student's enrollment whenever, in its opinion, his conduct is prejudicial to the best interests of the University.


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be allowed the right to confront and cross-examine witnesses, the right to counsel, and the right to an impartial decision maker. The ultimate determination of guilt or innocence "must rely solely upon the legal rules and evidence adduced at the hearing." It cannot be postulated with certainty that the Supreme Court would require that the safeguards in the university setting be identical to those prescribed in cases of welfare termination. The greater the threatened loss is to an individual, the greater his procedural due process safeguards will be. It could be persuasively contended that the loss of welfare benefits is a greater loss than the loss of an educational opportunity. Nevertheless, Goldberg v. Kelly enlightens one as to the genre of appropriate standards of fairness.

The Goldberg standards of procedural due process guarantees require protective standards which cannot be found within many of Indiana's private universities. Interestingly, while each school grants hearings, none of the hearings are ultimately determinative of a student's guilt or innocence, or of the concomitant sanctions. Final determination of a student's liability for sanctions is left to the discretion of university officials. Those officials who possess this ultimate power need not attend the hearings, or even base their conclusions upon the hearings. Additionally, the prescribed regimentation of the hearings themselves is unconstitutional in the case of each school.

CONCLUSION

Although the state of Indiana has adopted the burden of freeing private educational institutions from the unwanted influence of disruptive students, it has failed to accept the responsibilities of its new role.

If the state wishes the benefits of such deterrence in private colleges, must it not accept responsibility for


88. Id.

89. Du Lac Notre Dame 28, 29 (1974); Student Handbook Butler University 19 (1973); Rules and Regulations DePauw University (1974); Valparaiso University (1974). Notre Dame permits the Dean of Students to summarily suspend or expel students. A hearing is eventually convened to review the Dean's decision. However, any directive from the office of the Dean of Students has the force of a university regulation. If the Dean, for
preventing over deterrence by excessive sanctions and lack of fair procedure for enforcement?\textsuperscript{10}

The legislature of Indiana sought to promote tranquility upon all college and university campuses within the state. The method which the legislature chose was the promulgation of IND. CODE § 35-19-4-6. In their attempt to respond to student misconduct, the legislators have granted private university officials a right to exercise unbounded discretion. The duty to protect citizens from threatening conduct upon college campuses includes the responsibility to protect the rights of those accused of threatening the safety of their fellow citizens. The legislature has authorized private university officials to do as they choose in disciplining students. The state has not proceeded to ensure that the university officials do not violate the constitutional guarantees of their students. Constitutional safeguards must accompany the exercise of the state-authorized power to discipline. The failure of Indiana to ensure that such rights are protected has allowed systems of discipline devoid of constitutional guarantees to flourish. Courts of law should reconcile the conspicuous absence of due process upon Indiana's private university campuses.

\textsuperscript{10} Coleman v. Wagner, 429 F.2d 1120 (2d Cir. 1970) (Friendly, J. concurring).