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THE STUDENT AS UNIVERSITY RESIDENT

BY WILLIAM W. VAN ALSTYNE*

I. A PRELIMINARY DISTINCTION THAT FAILS

THE articles in this symposium move through a series of topics each of which considers a different aspect of the relationship between the student and the university. This division of topics, distinguishing the student as a university resident from the student as a private citizen, virtually implies that useful legal distinctions can be drawn according to the capacity in which a student may act and the place within which the university presumes to assert its authority. Thus, it may be suggested, while the student remains as a resident within the campus, he is subject to the plenary authority of the university which may appropriately restrict academic residency to those agreeable to its rules. Accordingly, on-campus conduct not in conformity with the rules may forfeit the student's residency. On the other hand, once the student moves away from the campus he acts as a private citizen bound only by laws applicable to citizens in general. Like other unattached citizens, however, he is no longer subject to any extraterritorial claims of the university whose jurisdiction is confined to its own precinct, the campus.

The resident-citizen distinction appears to be fair to the student and fair to the university as well. It releases the student off the campus from worry that he is less free than other citizens, and it releases the university from concern that it is less free than other property owners. If one readily accepts the campus relationship as one of ownership and tenancy, moreover, the university's claim of plenary on-campus authority seems to be entirely reasonable and wholly straightforward. The essential core of property ownership consists of the power to exclude and the concomitant authority to expel those who seek to remain in defiance of the owner's rules or wishes. Where the property is placed in the hands of trustees who are given legal authority by the state or a private benefactor to promulgate rules for the general governance of the institution, it is utterly unremarkable that those who are admitted as academic residents should expect to abide by all campus rules which condition their residency. No significant legal problem would appear to arise so long as the rules are confined to the campus itself and so long

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as they offend no state law or public policy otherwise applicable to landholders and educational institutions in general. The university does not attempt to force anyone to attend, and, unlike the situation in secondary education, the student is not compelled by law to matriculate. As a free agent who voluntarily applies and may just as readily abandon the university whenever he feels like it, the student resident must reasonably expect to conform to the trustees' regulations while he is on university property.

If the residential relationship of the student is viewed as one of contract, involving private agreements respecting access to and use of campus services and facilities, again we seem to reach the same result. Indeed, the free market contract model of comparison is especially attractive because it also provides an answer to those who would criticize the fairness, and not merely the legality, of campus rules. Within the free market contract model, for instance, diversity among colleges and their differing sets of rules is expectable and desirable. Competition of colleges offering different academic life styles maximizes consumer satisfaction by providing a broad range of alternatives capable of responding to the differing preferences of the students. A given college rule — whether it requires all students to dress alike, whether it forbids social fraternities, or something else again — requires no special defense; the success or failure of the college to attract and to hold students against the competition of the colleges offering different academic life styles is itself the best and the only secure measure of the wisdom of its rules. Certainly this seems eminently sensible, at least where the college formulates its rules only in terms of on-campus conduct and does not attempt to extort contractual concessions to rules affecting the off-campus citizenship prerogatives of those who enroll with it. So long as the legal requisites of a contract are satisfied (*e.g.*, contractual capacity, mutual assent, conscionability of specific terms), there would seem to be little basis for a lawyer to reproach the rules regime of any given college.¹ Were it not primarily for

¹ Yet, while there may be some merit still remaining in treating the legal student-college relation as one of contract (*e.g.*, where in fact the student could select any of several different kinds of colleges and where the rules or general conditions of each are well known to him in advance), this view needs far greater judicial supervision than it has received thus far. Typical student cases involving private colleges have manifested a shocking indifference to a number of considerations which have tempered the law of contracts even in more commercial fields such as insurance and sales. *See, e.g.*, *University of Miami v. Militana*, 184 So. 2d 701 (Dist. Ct. App. Fla. 1966); *Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1925); *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913); *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962); *Anthony v. Syracuse Univ.*, 224 App. Div. 487,

certain constitutional protections applicable to students as citizens, moreover, there would be little amiss were a college to bind its students contractually to fulfill any number of promises respecting their off-campus conduct as well.

In both respects — the property analogy and the contract analogy — the public as well as private universities would thus appear to possess plenary authority on campus. As Mr. Justice Holmes observed in rejecting the complaint of a person refused a permit to speak in the Boston Common and who sought to argue that the mayor had accordingly violated his freedom of speech:

For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.²

231 N.Y.S. 435 (1928); *Barker v. Trustees of Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923).

The rules which a student "contracts" to observe are altogether nonnegotiable, and there is in fact an absence of bargaining. The majority of "sellers" uniformly employ a self-serving clause reserving the right to terminate the relation at will according to standards they unilaterally determine pursuant to a vague "good conduct" rule. Thus, the nonnegotiability of terms is compounded by the real lack of shopping alternatives, the inequality of the parties in fixing terms, parallel practices among sellers, and the impotency of individual applicants to affect terms. The contracts are purely on a take-it-or-leave-it basis. Frequently, the student has little idea of the terms of his contract in advance of matriculating, as he more often than not becomes enrolled before being presented with any sort of handbook which states the conditions of his attendance. Occasionally, he does not receive the handbook at all. Its provisions are typically subject to change at the sole pleasure of the college. Moreover, the student may be a minor when he enrolls, and while he may thus avoid the contract based on his own incapacity, he may also be unable to enforce it until he becomes of age.

One might expect, as a consequence, that the courts would be more inclined than they have been to interpret vague rules against the university as the draftsman and stronger party and void those rules which appear to be unconscionable. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Willard Van Dyke Productions, Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963). *See also*, Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964); Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731 (1943); Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939). *Compare* UNIFORM COMMERCIAL CODE § 2-302.

There are still other considerations which strain the private contract model of student-college relations, even from the college's perspective. Thus, the "consideration" furnished by the student in the form of tuition and fees frequently defrays less than one-half of the (average) cost of educating him — a fact which simply underscores the larger fact that colleges are not commercial, profit-seeking undertakings which deal with students at arm's length. Rather, they may be heavily subsidized charitable corporations established primarily for the benefit of the students and administered by trustees. Such a difference in the basic view of the student-college relationship should incline the courts to look again at the rules structure to review the decisions of the trustees and their subordinates against a high standard of fiduciary obligation to the beneficiaries, and not in terms of permissible clauses in an arm's-length contract. *See* Goldman, *The University and the Liberty of Its Students — A Fiduciary Theory*, 54 KY. L.J. 643 (1966); Seavy, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957).

² *Commonwealth v. Davis*, 162 Mass. 510, 511, 39 N.E. 113 (1895), *aff'd*, 167 U.S. 43 (1897).

Similarly, when the state undertakes to establish a college, it may be seen to operate in the capacity of a proprietor who is subject only to the usual rules of law respecting the use of his own property and not subject to constitutional norms which affect him only when he, acting in a governmental rather than a proprietary capacity, attempts to regulate private conduct removed from his property.

For all of its hoary tradition, however, the on-campus/off-campus distinction is unsound, and the property or contract analogies are very insecure as a matter of law.³ Issues of constitutional law to one side, the appropriateness of certain rules in an institution presuming to call itself "academic" would still be open to discussion; surely it is proper to suggest that truly academic institutions serve special, vital, and limited functions which may be undermined and disserved by rules which inhibit either academic or nonacademic freedom either on campus or off campus — rules which are, incidentally, wholly inessential to the orderly operation of a university. In contemplation of evolved constitutional law, moreover, all such models are subordinate to constitutional norms whenever the institution is so significantly aided by government that its rulemaking authority partakes of governmental power.⁴ Mr. Justice Holmes' distinction between the state acting in a governmental capacity and the state acting in a proprietary capacity has been substantially aban-

³ See note 1 *supra*.

⁴ *Green v. Howard Univ.*, 271 F. Supp. 609 (D.C. Cir. 1967); *Commonwealth v. Brown*, 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968); *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La. 1962), *vacated in part*, 212 F. Supp. 674 (E.D. La. 1962). Compare *University of Miami v. Militana*, 184 So. 2d 701 (Dist. Ct. App. Fla. 1966), with *Parsons College v. North Cent. Ass'n*, 271 F. Supp. 65 (N.D. Ill. 1967). See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (Privately operated restaurant under arm's-length lease with public parking authority subject to equal protection clause. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."); *American Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950) ("When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."); *Marsh v. Alabama*, 326 U.S. 501, 505 (1946) (Privately owned company town subject to fourteenth amendment. "We do not agree that the corporation's property interests settle the question The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."); *Eaton v. Grubb*, 329 F.2d 710 (4th Cir. 1964) (private hospital receiving federal aid and performing "public function" subject to fourteenth amendment). See generally A. MILLER, *RACIAL DISCRIMINATION AND PRIVATE EDUCATION* (1957); Dorsen, *Racial Discrimination in "Private" Schools*, 9 WM. & MARY L. REV. 39 (1967); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 28-36 (1961); Note, *Private Government on the Campus — Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963).

done.⁵ Under either of these models — the university as an academic institution and the university as an instrumentality of government subject to constitutional restrictions on behalf of personal liberty — the 100 percent on-campus/off-campus description of university jurisdiction will not stand up.

Specific illustrations of constitutional control of the publicly supported college as landholder, trustee, or contractual promisee are readily available. A private property holder need not grant permission that his land or buildings be available to students or to anyone else as a place to hold meetings for discussing public issues, hearing guest speakers, or assembling to express some grievance (least of all against the property holder himself), whether or not such assemblies were orderly, whether or not such meetings did not conflict with anything else the property holder intended to do at the time, and whether or not the property holder sometimes allowed such meetings to be held on his property by people whose ideas or backgrounds he happened to favor. If he elected to lease the property to a group of persons, moreover, he could readily evict them in the event they breached a covenant not to hold such meetings.

If the property holder is placed in a position of power through an exercise of public largess (as through the expenditure of tax revenue in the operation of a college or university), however, his authority is hedged by constitutional restraints which protect "the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances," and which forbid him to deny equal protection of such

⁵ See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) ("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961). For discussions of this subject see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1965); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

rights.⁶ Accordingly, on-campus bans against guest speakers have been enjoined where the rule supporting the ban was so vague as to reserve *carte blanche* censorship to the administration⁷ and where the university classified speakers as acceptable or unacceptable in terms of their political affiliations,⁸ their unrelated conduct before congressional committees,⁹ or their having been subject to an unadjudicated criminal charge — even one of murder or homosexual soliciting.¹⁰ Where no physical disorder is imminent, where there is no substantial basis for supposing that the speaker will himself violate the law or incite others to a violation in the course of his remarks, where the facilities are otherwise available and other guest speakers are generally allowed on campus, the student residents interested in hearing a given speaker on campus may not be denied. Moreover, peaceful political expression or orderly and nondisruptive assemblies on campus by students meeting to express some felt grievance against the college itself is a protected form

⁶ See authorities cited notes 4, 5 *supra*. Once it is clear that the property owner's operation is sufficiently pervaded with governmental presence as to make the Constitution apply, it is appropriate to suggest that one can no more rely on the right-privilege distinction than can the government itself.

⁷ *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968) ("known member of the Communist Party," "known to advocate the overthrow of government" held void for vagueness). The current speaker regulation in force at the University of Mississippi is probably vulnerable on the same basis, (see Note, *Mississippi's Campus Speaker Ban: Constitutional Considerations and the Academic Freedom of Students*, 38 Miss. L.J. 488 (1967)), as is the Louisiana statute (see 42 TUL. L. REV. 394 (1968)). An anti-demonstration rule in South Carolina was also recently held void for vagueness, prior restraint, and inadequate standards, in *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967). It is clear that special first amendment concerns require a degree of clarity, precision, standards, and specificity in this area considerably in excess of what may be demanded of other types of rules as a matter of due process. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (and cases cited therein); *Ashton v. Kentucky*, 384 U.S. 195 (1966). For other discussions of constitutional limitations on speaker control see Pollitt, *Campus Censorship: Statute Barring Speakers from State Educational Institutions*, 42 N.C.L. REV. 179 (1963); Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963).

⁸ *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946); *Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962). See also *United States v. Robel*, 389 U.S. 258 (1967); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

⁹ *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968) (special regulation of any speaker having utilized his privilege against self-incrimination before a state or federal investigating committee, held invalid as an unconstitutional condition upon the use of the privilege).

¹⁰ *Student Liberal Fed'n v. Louisiana State Univ.*, Civil No. 68-300 (E.D. La., Feb. 13, 1968); *Stacy v. Williams*, Civil No. WC 6725 (N.D. Miss., June 30, 1967) (involving a temporary restraining order to enable the speaker to appear, but evidently on the basis that his contract antedated the speaker's rule rather than on a free speech or equal protection basis).

of expression.¹¹ Nor may the college mute criticism of itself by forbidding critical student comment in the campus newspaper.¹² In all of these respects, university government is subject to a substantial degree of constraint similar to that which limits the civil government from which the university derives its powers. As a campus constituent of that university government, the student does not forfeit his freedom of speech and cannot be made to barter it away as a condition of being admitted or of remaining.¹³

Additional illustrations might be provided to make the point that a student cannot be made to leave his rights as a citizen outside the college's doors. Virtually all colleges today provide at least some on-campus lodgings for students. Unlike the situation respecting the private landlord who may contractually reserve a right to enter and inspect the premises at any time and for reasons satisfactory only to himself, however, it is exceedingly likely that the fourth amendment's interdiction of "unreasonable searches and seizures" restricts colleges receiving substantial public support from imposing such sweeping conditions upon a student's privacy as those which may be reserved by contract to a private landlord. Random fishing expeditions without warrant and without an excusable emergency, resulting in the seizure of things subsequently introduced in a disciplinary hearing to provide a basis for expelling the student, are probably

¹¹ *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967). See *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) (classroom wearing of "Freedom" buttons protected by first amendment). See also *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tinker v. Des Moines Independent Community School Dist.*, 383 F.2d 988 (8th Cir. 1967), *cert. granted*, 390 U.S. 942 (1968).

But distractingly raucous demonstrations or other modes of expression which directly disrupt or obstruct authorized activities on campus may appropriately be punished. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966); *Barker v. Hardway*, 283 F. Supp. 288 (S.D.W. Va. 1968); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Jones v. Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); *in re Bacon*, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966). And certain facilities may probably be closed altogether to demonstrations, without regard to whether the demonstration would have been orderly. See *Cameron v. Johnson*, 390 U.S. 611 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965).

¹² See *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *final decision postponed on appeal*, 394 F.2d 490 (5th Cir. 1968). See also *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), holding that a teacher may not be fired because of partially false statements critical of the trustees which appeared in a letter to the editor published in a regular newspaper and which concerned an issue of general public interest.

¹³ See authorities cited note 5 *supra*. See also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613, 618 (M.D. Ala. 1967) ("A state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state-supported institution.").

forbidden.¹⁴ The fact that the premises, and perhaps the very rooms themselves, may be owned by the state does not displace the fourth amendment or eliminate a student-citizen's right to due process respecting the manner in which evidence used against him has been seized. The fourteenth amendment makes no broad distinction between "governmental" and "proprietary" state action, and a state university must continue to observe standards of constitutional fairness even when acting as a proprietor.¹⁵ Indeed, in the broader context of social trends, it should shock us to suppose that the right of privacy might not extend to governmentally owned or operated residences. Given the trend in housing generally, with an ever larger fraction of living places either owned by government (as in public housing) or underwritten by government (as through VA, FHA, and FNMA), any view which would limit the constitutional right of privacy to privately owned dwellings would effectively shrink the right itself, removing it from an ever larger percentage of the whole population, and seriously subordinating them to the risks so explicit in George Orwell's 1984. Because of the trend toward developing ever more on-campus living units for students, we should be even more concerned as academicians not to act in ways which unintentionally teach our students that we ourselves are the intruding Big Brother.

Finally, norms of constitutional law have been applied with increasing frequency to the *procedure*, even more than to the substance, of college discipline. Because this subject has been more thoroughly explored elsewhere than any other subject,¹⁶ I shall consider it only briefly — but well enough to reiterate the essential point respecting the inadequacy of contractual and property analogies.

In ordering the reinstatement of university students dismissed

¹⁴ *People v. Overton*, 51 Misc. 2d 140, 273 N.Y.S.2d 143 (1966) (fourth amendment's ban against unreasonable search extends to student's school locker, and vice principal may not grant consent to police search); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968) (fourth amendment applied to student's on-campus room, search upheld on "reasonable" cause, dicta imply that fishing expedition search would taint evidence seized pursuant thereto). See also *Camara v. Municipal Ct.*, 387 U.S. 523 (1967) (housing code regulation providing for warrantless administrative searches struck down); *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (welfare payments cannot be conditioned on consent to submit to warrantless searches). See generally Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521 (1968).

¹⁵ See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1458-64 (1968).

¹⁶ The following text on procedural due process is substantially reproduced from my own article, Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968), where references to other writings on the same subject are provided. (See also Selected Bibliography on Student Rights, appendix to this article.) I regret the duplication, but could scarcely see any way of avoiding it.

without hearing for alleged participation in off-campus demonstrations, a federal court of appeals observed in 1961:

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.¹⁷

In view of the importance of the students' interest which was placed in jeopardy by the threat to dismiss them, the court required that such action must not be taken without the observance of certain minimal procedural safeguards which would lessen the likelihood of errors and prejudice. Subsequent cases have made clear that the degree of quasi-judicial formality in college disciplinary proceedings need only be proportioned to the gravity of the offense, and that no college need fear that every alleged infraction, no matter how minor the penalty, must be determined in a cumbersome and divisive adversary proceeding.¹⁸ When the consequences attached to the alleged misconduct are very serious to the student's future, however, an increasing number of procedural requirements must correspondingly be observed. In the gravest cases (*e.g.*, those involving expulsion, long-term suspension, widely available recordation of offenses carrying a high degree of popular stigma), the college must probably proceed with at least as much care as is now required of a juvenile court — especially as so many of its students are not juveniles and not at all subject to the fading rationale of *in loco parentis*.

The proposition that even minors cannot be disciplined in a manner affecting substantial interests without the observance of procedural due process was specifically affirmed by the Supreme Court only last year. In prospectively requiring juvenile courts to improve the judicial nature of their proceedings, the Court declared:

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the

¹⁷ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *See also* *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961).

¹⁸ *Compare* *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961), *with* *Greene v. McElroy*, 360 U.S. 474 (1959). *See also* *In re Gault*, 387 U.S. 1 (1967); *Hannah v. Larche*, 363 U.S. 420 (1959); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

rights of the individual and delimits the powers which the state may exercise.

....

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.¹⁹

The jettisoning of *in loco parentis* was, it may be suggested, long overdue in any case. For one thing, the mean age of American college students is more than 21 years, and there are, in fact, more students over the age of 30 than younger than the age of 18.²⁰ Even in Blackstone's time, the doctrine did not apply to persons over 21.²¹ For another thing, it is unrealistic to assume that relatively impersonal and large-scale institutions can act in each case with the same degree of solicitous concern as a parent reflects in the intimacy of his own home. The parent is doubtless restrained in tempering discipline with love and concern which one expects of a father or mother, while the institution cannot hope to reflect the same intense degree of emotional identification with those in attendance, no matter how well it may intend to do so. The institution is also subject to different practical concerns — to keep its eye on reaction by the local press, disgruntlement among alumni, dissatisfaction among benefactors, and others whose practical influence combine to bring about an administrative perspective less loving and more divided than a mother has for her own son or daughter. It simply blinks at reality to treat the mother and the college as one and the same in drawing legal analogies, no matter how frequently one refers to his *alma mater* for other purposes. Finally, there is this to be said: a parent's disciplinary authority does not extend to the power literally to expel a dependent minor from his own home, but to lesser penalties only. Yet, the typical sanction imposed by the alleged surrogate parent, a college, is the sanction of expulsion itself — with all of the serious consequences to the student's future already noted above. As the analogy of *in loco parentis* is in many ways false in fact, we need not be surprised nor alarmed that it is now being discarded.²² Large-scale collegiate operations, the hetero-

¹⁹ *In re Gault*, 387 U.S. 1, 19-20, 27-28 (1967).

²⁰ U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 110, POPULATION CHARACTERISTICS 12 (1961).

²¹ W. BLACKSTONE, COMMENTARIES *453.

²² See, e.g., *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) ("We agree with the students that the doctrine of 'In Loco Parentis' is no longer tenable in a university community."); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 469 (1967) ("For constitutional purposes, the better approach, as indicated in *Dixon*, recognizes that state universities should no longer stand in loco parentis in relation to their students.").

geneity of their student bodies, the varying ages of their students, the irreducible impersonality of their operation, and the grave consequences of their disciplinary proceedings, all support the heightened requirements of greater procedural fairplay in their treatment of alleged violators of their rules. The immediate, practical, and constitutional result of these phenomena is this: colleges and universities may no longer enforce their rules through sanctions seriously jeopardizing a student's career in the absence of procedures which are fundamentally fair. The essential elements of fair procedure include (but may not be limited to) the following requirements:

(1) Serious disciplinary action may not be taken in the absence of published rules which:

(a) are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application",²³ and

²³ *Dickson v. Sitterson*, 280 F. Supp. 486, 498 (M.D.N.C. 1968). See also *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967); *Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962); *Soglin v. Kauffman*, Opinion and Order No. 67-C-141 (W.D. Wis., Dec. 11, 1967) (General "misconduct" rule as applied to demonstrations acknowledged to raise grave first amendment question, although temporary restraining order withheld pending fuller hearing. "The constitutional requirement of reasonable specificity and narrowness in rule-making in the First Amendment area has not as yet been suspended in non-university society.").

At the same time, a number of recent federal decisions have not demanded even ordinary clarity in rules, and some have upheld student suspensions based merely on a wholly undefined "inherent power." See, e.g., *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965); *Barker v. Hardway*, 283 F. Supp. 228 (S.D.W. Va. 1968); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); *Morris v. Nowotny*, 323 S.W.2d 301 (Tex. Civ. App. 1959).

Despite the opinions in these cases, I cannot believe that they are soundly reasoned. They are, as Professor William Cohen suggested, highly reminiscent of A. P. Herbert's hearty spoof in *Rex v. Haddock*, in which the accused had jumped into the Thames purely for fun, and in which the Court of Criminal Appeal affirmed his conviction in spite of the fact that no one could find any statute which he had violated. The court stated:

Citizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognized categories of crimes and offences, for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable It is not for me to say what offence the appellant has committed, but I am satisfied that he has committed *some* offence, for which he has been most properly punished.

A. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 31, 33, 36-37 (4th ed. 1928). (The concurring judge "said that in his opinion, the appellant had done his trousers no good and the offence was damage to property.")

More seriously, vagueness and ambulatory administrative discretion as well as lack of notice of rules are constitutionally vicious, even aside from whether or not an individual had reason to suppose that he might subsequently be punished for his proposed conduct. The general problem is very well reviewed in Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty — An Appraisal*, 40 CORNELL L.Q. 195 (1955).

(b) do not depend upon the unqualified discretion of a particular administrator for their application.²⁴

(2) Where the rules are reasonably clear and their application does not depend upon uncontrolled discretion, a student still may not be seriously disciplined (as by suspension) unless:

(a) the student charged with an infraction has been furnished with a written statement of the charge adequately in advance of a hearing to enable him to prepare (*e.g.*, 10 days);²⁵

(b) the student thus charged "shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing";²⁶

(c) the student is "permitted to have counsel present at the hearing to advise [him]";²⁷

(d) the student is "permitted to hear the evidence presented against [him]," or at least the student should be given

²⁴ Applied in *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967). See also cases cited note 23 *supra*.

As a practical guide, colleges should be most clear and confined, and provide for the least general administrative discretion with respect to rules applied to first amendment interests (*i.e.*, speech, assembly, petitioning, or association). Vague, overly broad, or standardless rules in this area are regarded as unconstitutional *per se* due to their chilling effect on these preferred freedoms. See, *e.g.*, *Zwickler v. Koota*, 389 U.S. 241 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04, 608-10 (1966); *Elfbrandt v. Russell*, 378 U.S. 127 (1964); *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968). Specificity and notice of the rules may also be demanded under circumstances where the rule requires those subject to it to take some affirmative act, or to avoid conduct which they might reasonably suppose not to be wrongful. See, *e.g.*, *Lambert v. California*, 355 U.S. 225 (1957). That is, the more peculiar the rule in terms of the ordinary expectations of those bound by it, the more necessary are clarity and notice. For the rest, greater flexibility is doubtless constitutionally permissible. Compare *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), and *Connally v. General Construction Co.*, 269 U.S. 385 (1926), with *Nash v. United States*, 229 U.S. 373 (1913), and *United States v. Petrillo*, 332 U.S. 1 (1946). A recent attempt to provide a reasonably clear list of basic regulations at the University of California is described in 17 AMER. COUNCIL ON EDUC. BULL. No. 8 (1968).

²⁵ *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967); *Schiff v. Hannah*, 282 F. Supp. 381 (W.D. Mich. 1966) (en banc); *Woody v. Burns*, 188 So. 2d 56 (Fla. Ct. App. 1960). But see *Jones v. Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968) (upholding expulsions based on two days notice); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963) (required only that charges be read to students at the beginning of the disciplinary hearing).

²⁶ *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

²⁷ *Id.* See also *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968); *Goldwyn v. Allen*, 281 N.Y.S.2d 899 (Sup. Ct. 1967); *Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D.N.Y. 1967), *rev'd*, 386 F.2d 778 (2d Cir. 1967) (on grounds that the hearing was not essentially disciplinary or penal, but more in the nature of counselling to determine the appropriate school in which petitioner should be located), *cert. denied*, 390 U.S. 1028 (1968). But see *Wasson v. Trowbridge*, 382 F.2d 807 (1967) (Merchant Marine Academy); *Dunmars v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965) (military academy); *Barker v. Hardway*, 283 F. Supp. 228 (S.D.W. Va. 1968) (suspension upheld, notwithstanding refusal to permit students to be represented by counsel). See *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968) (counsel permitted); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968) (counsel permitted); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967) (counsel permitted — entire hearing procedure unusually comprehensive).

the names of the witnesses against him and an oral or written report on the facts to which each witness testifies;²⁸

(e) the student or his attorney may question at the hearing any witness who gives evidence against him;²⁹

(f) those who hear the case "shall determine the facts of each case solely on the evidence presented at the hearing";³⁰

(g) "the results and findings of the hearing should be presented in a report open to the student's inspection";³¹

(h) "either side may, at its own expense, make a record of the events at the hearing."³²

²⁸ *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967). See *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). See also *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968); *Schiff v. Hannah*, 282 F. Supp. 381 (W.D. Mich. 1966).

²⁹ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) indicated that cross-examination may not be required: "This is not to imply that a full dress hearing, with the right to cross-examine witnesses, is required." *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967) held that a student, but not his counsel, has the right to cross-examine. Yet, in most recent cases, disciplinary boards permitted cross-examination by student or counsel. See, e.g., *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Jones v. Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967); *Goldberg v. Regents of Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). There appears to be little reason to forbid so customary a function of counsel, reserving to the hearing board substantial discretion to limit counsel's participation to avoid unreasonable delay, harassment, or simple grandstanding. None of the cases suggest that formal rules of evidence need be observed nor is any such requirement suggested by customary practice in adjudicative administrative hearings.

³⁰ *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 652 (W.D. Mo. 1967). But see *Jones v. Board of Educ.*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968), which heavily qualifies this view and, notwithstanding its cautionary language, accepts what is both a questionable and unnecessary practice. "There is no violation of procedural due process when a member of a disciplinary body at a university sits on a case after he has shared with other members information concerning the facts of a particular incident. . . . This limited combination by a school administrative body of prosecutorial and adjudicatory functions is not fundamentally unfair in the absence of a showing of other circumstances, such as malice or personal interest in the outcome of a case." It would appear that there may implicitly exist a "personal interest" in the outcome under such circumstances, as well as an unfair disadvantage to the student in not knowing what alleged information may thus be privately circulated within the hearing board.

³¹ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967); *Woody v. Burns*, 188 So. 2d 56 (Fla. Ct. App. 1960).

³² *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 652 (W.D. Mo. 1967). The better practice in terms of fairness and economy, at many institutions, is to have a simple tape recording of the entire proceedings from which a typed transcript can be prepared if necessary. In addition to the cases previously cited, for illustrations of the varying degree of procedural due process required by other courts see *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964), and the marginal due process held to be sufficient in *Wright v. Texas Southern Univ.*, 277 F. Supp. 110 (S.D. Tex. 1967), *aff'd*, 392 F.2d 728 (5th Cir. 1968); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963). Essentially no procedural due process was required in *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967), on the theory that the university was private and not subject to the fifth or fourteenth amendments. The case is almost surely in error; even before hearing an appeal on the merits, the court of appeals ordered temporary reinstatement of the students. Civil No. 1949-67 (D.C. Cir., Sept. 8, 1967).

These procedural safeguards roughly parallel some of the standards required by criminal courts in their disposition of offenses punishable by fine or short term imprisonment. The comparison is not fortuitous because it is now evident that expulsion or exclusion from college may, in the long run, disadvantage an individual at least as much as a single infraction of a criminal statute. There should be no surprise, therefore, that students are entitled at least to a similar degree of due process as a suspected pickpocket. Indeed, the requisites of due process still evolving from federal decisions are substantially less than standards already recommended by professional educational associations. The Association of American Colleges (representing administrations of nearly 900 colleges), the American Association of University Professors (representing about 86,000 full-time faculty at accredited institutions), the National Student Association, the National Association of Student Personnel Administrators, the National Association of Women Deans and Counsellors, and the American Association of Higher Education have recently approved a *Joint Statement on Rights and Freedoms of Students* which goes considerably beyond the requirements suggested in court decisions. In respect to procedural due process, the *Joint Statement* provides:

B. Investigation of Student Conduct

1. Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained. For premises such as residence halls controlled by the institution, an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for lawful search should be followed.

2. Students detected or arrested in the course of serious violations of institutional regulations, or infractions of ordinary law, should be informed of their rights. No form of harassment should be used by institutional representatives to coerce admissions of guilt or information about conduct of other suspected persons.

C. Status of Student Pending Final Action

Pending action on the charges, the status of a student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property.

D. Hearing Committee Procedures

When the misconduct may result in serious penalties and if the student questions the fairness of disciplinary action taken against him, he should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements

of procedural due process in situations requiring a high degree of formality:

1. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.

2. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to insure opportunity to prepare for the hearing.

3. The student appearing before the hearing committee should have the right to be assisted in his defense by an adviser of his choice.

4. The burden of proof should rest upon the officials bringing the charge.

5. The student should be given an opportunity to testify and to present evidence and witnesses. He should have an opportunity to hear and question adverse witnesses. In no case should the committee consider statements against him unless he has been advised of their content and of the names of those who made them, and unless he has been given an opportunity to rebut unfavorable inferences which might otherwise be drawn.

6. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.

7. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.

8. The decision of the hearing committee should be final, subject only to the student's right of appeal to the President or ultimately to the governing board of the institution.³³

The late (and judicially conservative) Mr. Justice Frankfurter once observed that "the history of liberty has largely been the history of observance of procedural safeguards."³⁴ So it is with students, as with others.

Somewhat anticlimactically, however, it is necessary to note a few additional matters in rendering our treatment of student procedural due process with complete accuracy:

- (1) The federal cases involving procedural due process for students have been disposed of by courts below the level of the United States Supreme Court, and thus their utterances on this subject are not necessarily the last word. Indeed, a number of federal courts disagree among themselves respecting the requisite degree of college due process.³⁵

³³ *Joint Statement on Rights and Freedoms of Students*, 53 A.A.U.P. BULL. 365, 368 (1967). See also A.C.L.U., *ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES* (rev. ed. 1965) (This is an earlier ACLU statement to which the *Joint Statement* is indebted.). Comprehensive reports on student rights and freedoms have also recently been completed at the University of California, Michigan State University, Cornell University, Brown University, University of Wisconsin, and Swarthmore College.

³⁴ *McNabb v. United States*, 318 U.S. 332, 347 (1943). See also Frankfurter's paraphrasing of the same point in *Malinski v. New York*, 324 U.S. 401, 414 (1945).

³⁵ See notes 25-32 *supra*.

(2) On the other hand, it is reasonable to expect that additional safeguards may be posed by the courts if it appears that complete fairness is still not being observed. For instance, it is foreseeable that random and unannounced searching of student rooms may be forbidden, that students may not be coerced into admissions of misdeeds, and that some greater degree of cross-sectional representation on hearing boards may eventually be required.³⁶

(3) A clear distinction will probably continue to be made, however, respecting campus offenses carrying such relatively insubstantial penalties (*e.g.*, social probation, minor fines, loss of auto privileges) that formal due process is not demanded and may well be dispensed with in the interest of administrative convenience.

(4) A distinction will probably continue to be made as well in instances where students face the prospect of being dropped due to inadequate grades. It is true, of course, that dismissal for academic deficiency may be as serious to the student's educational career as dismissal for disciplinary reasons, but quasi-judicial procedures are generally inadequate as a means of determining whether, for instance, an essay examination should have been graded as a C rather than a D. A lay panel may ordinarily lack the competence of second-guessing grades. Only where the student's complaint alleges egregious and almost willfully biased grading may the college be required to provide some means of review, and even then the review would presumably involve a panel of professors familiar with the subject matter of the examination and who would follow a different procedure than in a disciplinary case.³⁷

(5) Finally, disciplinary proceedings are different from counseling proceedings where the student does not stand in jeopardy of a penalty. So long as the counsellor is required to respect the confidentiality of his relationship and acts without power to impose punishment, no reason exists to import an adversary or quasi-judicial procedure which would undermine the counsellor's essential functions.³⁸

The ultimate legality of a college rule, then, clearly cannot be measured merely by the geography within which it has to operate. And it is well that this is so, for it also means, of course, that rules which are otherwise reasonable do not become unreasonable merely because they may sometimes circumscribe conduct which occurs outside the campus itself. A rule appropriately forbidding plagiarism, for instance, obviously does not become inappropriate as applied to

³⁶ On the particular point of random searches see text accompanying note 14 *supra*.

³⁷ See, *e.g.*, *Connelly v. University of Vt.*, 244 F. Supp. 156 (D. Vt. 1965). Compare *Woody v. Burns*, 188 So. 2d 56 (Fla. Ct. App. 1966).

³⁸ See, *e.g.*, *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967); *Cosme v. Board of Educ.*, 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966).

a student who copies his paper from a reference work in his own home away from campus. A rule restricting student organizations from representing that their demonstrations carry the endorsement of the college itself does not become invalid when applied to a demonstration held downtown; indeed, the more off campus the location where such a representation might be made, the more legitimate the rule, due to the greater necessity that the institution shall not needlessly suffer from some public misunderstanding. The constitutional emphasis, then, turns not upon distinctions between students as "citizens" and students as "residents"; it turns, rather, upon the larger reasonableness of each rule, and the parameters of "reasonableness" are several, not singular.

II. DUAL RESIDENCY AND DOUBLE JEOPARDY

Despite what I have said earlier in this article, for certain significant purposes a student does reside in several communities at once and is made answerable for his conduct to the law of each community in turn. His dormitory may have rules affecting his conduct as a dormitory resident, his college has overlapping rules which affect him as a resident of the college, the city laws may overlap both college regulations and dormitory rules, and so on right on through some federal statutes. A single act of misconduct may accordingly subject a student to a multiplicity of trials and punishments, exactly to the extent that the laws of these several jurisdictions happen to overlap. Thus, a student who rifles the drawer of a roommate and steals a postal money order may:

(1) be tried by a dormitory council, and if found guilty of violating a rule forbidding theft in the dormitory, he may then be fined or expelled from the dormitory as otherwise provided by the dormitory rule;

(2) be tried by the college judicial board, and if found guilty of violating a rule forbidding theft, he may then be fined, suspended, expelled, or otherwise disciplined as provided in the college rules;

(3) be tried in the municipal court for theft, and if convicted he may then be fined or jailed (or both) pursuant to local ordinance;

(4) be tried in the superior court for theft, and if convicted he may then be fined or jailed (or both) pursuant to state statute;

(5) be tried in federal court for theft, and if convicted he may then be fined or jailed (or both) pursuant to federal statutes applicable to postal money orders.

We accept this scheme of multiple trials and multiple punishments for a single offense in spite of the constitutional provision that no person shall "be twice put in jeopardy...for the

same offense." Our understanding is, rather, that there were five different offenses in this one event and the student was tried and punished only once for each offense, even allowing that he performed but a single act and endured an accumulation of five trials and five punishments.³⁹ Since each community has a separate legislative capacity of its own over its own territory, the aggregation of trials and punishments results without constitutional objection because the student was, while living in one place, a resident of five communities with each overlapping all the lesser ones within it.

Yet, as we look again at this situation, some parts of the arrangement may lead us to conclude that we have sacrificed the substance of the double jeopardy clause to the mere form of manipulable laws. As between the municipal and state prosecutions for theft under identically worded laws (except that the municipal law applies only to theft committed within the town whereas the state law applies whether or not the theft was committed within a town), for instance, why do we permit more than one trial to be held? (Note, of course, that the defendant might first have been acquitted in the state trial and then convicted in the municipal trial or vice versa.) What purpose is served, assuming the defendant is convicted in each trial, by allowing multiple sentences to be imposed and even consecutively (rather than concurrently) served? Should we have had even another trial and another prison sentence consecutively added, had the county board of supervisors also adopted a countywide theft ordinance?

We recoil from such an endless proliferation of cruel and pointless trials and punishments, I think, instinctively recognizing an essential unfairness to any person haplessly packed from court to court.⁴⁰ We would tend to say, rather, that more than a single trial and punishment ought not befall a man for a single act unless:

(1) there are clear and distinct interests peculiar to each com-

³⁹ Overlapping and consecutive state and federal prosecutions have been upheld by the Supreme Court. *See, e.g.,* *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Lanza*, 260 U.S. 377 (1922). Overlapping and consecutive state and municipal prosecutions have also been upheld by a number of state supreme and inferior federal courts. *See, e.g.,* *Louisiana ex rel. Ladd v. Middlebrooks*, 270 F. Supp. 295 (E.D. La. 1967); *State v. Tucker*, 137 Wash. 162, 242 P. 363 (1926).

⁴⁰ The problem of multiple state and substate prosecutions for a single act is comprehensively reviewed and smartly challenged in Comment, *Constitutional Law: Successive Municipal and State Prosecutions Found Permissible Despite Assumed Application of Double Jeopardy Clause*, 1968 DUKE L.J. 362. The footnotes to that Comment collect so much of the professional writing and cases that further documentation is dispensed with here. The author argues that consecutive state and local prosecutions within a single state for a single act may violate the double jeopardy clause — a proposition which arguably might extend to penalties imposed by state universities assuming, however, that the proceeding is in fact quasi-criminal and seeks only to vindicate public interests already wholly vindicated in some prior state or municipal penal action.

munity which seeks separately to impose its own jurisdiction over the alleged offender; and

(2) these distinctive interests have not in fact been adequately fulfilled in the trial and punishment process of any of the other communities previously asserting jurisdiction over the alleged offender.

In our postal money order theft, for instance, it is difficult to see any distinctive interest held by the city which is not held equally by the county, and any held by the county not held equally by the state. It would seem better that a single prosecution be held under either the ordinance or the state theft statute (but not under both), therefore, and that the common interests of these three overlapping communities in the safety of their residents and protection of their property be composed in that one proceeding. Similarly, while the federal government might originally have had in theory a distinctive interest of its own in protecting postal services as a federal instrumentality, wholly apart from any concern for the safety of persons or property in any given state, a fair trial has incidentally discharged the function of the federal statute as well. An additional federal prosecution would now seem purely cumulative and vindictive, violating the spirit if not the technical form of double jeopardy.⁴¹

So, indeed, it may be in the relation of parietal college rules and state laws, especially where the college has a purely duplicative rule that quite literally presumes to make an academic offense of anything forbidden by any local, state, or federal law. Assuming that a student drives too fast on the interstate highway, for instance, the hazards for which he is responsible by his conduct are already policed by the general speeding law he has violated; to the extent that the college would discourage speedy driving for the *very same* reasons, *e.g.*, to protect the lives and safety of others, it has no interests sufficiently different from those already reflected in the general speeding law so to warrant its piling on a separate prosecution and punishment. Indeed, where the reckless driving occurred away from campus, the college itself has no separate community interest of its own any more than the town has a proper basis for

⁴¹ I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment

. . . .
... Looked at from the standpoint of the individual who is being prosecuted, this notion [of multiple sovereignty] is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone.

Bartkus v. Illinois, 359 U.S. 121, 150-51, 155 (1959) (Black, J., dissenting).

assuming criminal jurisdiction under municipal ordinances for reckless driving offenses occurring beyond municipal limits. Where the reckless driving occurs within campus precincts, moreover, all appropriate college concerns may still be adequately fulfilled in the treatment of the alleged offender in the course of his trial in the municipal court. Thus, application of a college rule to offenses committed on campus might appropriately await the determination of the municipal court proceedings.

What I mean to propose by this suggestion is a serious, three-step reevaluation of the very great number of college rules which overlap local, state, and federal laws; rules, for instance, broadly punishing vandalism, theft, assault, drug use, and alcohol abuse. The first step requires a review of the college rules to determine whether they are, in their subject matter and scope of application, justified in terms of a clearly discernible college purpose not already composed in other laws applicable to the conduct in question; or whether, to the contrary, the college rule merely duplicates what may certainly be appropriate police interests, but interests already covered in general law. (In this connection, the locus of the offense may be important. Vandalism of the college library, for instance, specifically affecting college property, does a kind of damage distinct to the college itself apart from the shared community concern to deter criminal behavior.⁴² Vandalism of a downtown shop does not directly injure the college, and the wrongfulness of the act as an offense to the community is readily punishable under existing local or state law.)

The second step is to determine whether a college rule which has an *a priori* basis to protect the college itself nonetheless ought not be applied to a given infraction because an overlapping local or state law has already been applied in such a fashion that the functions of the college rule have been discharged in the regular, off-campus proceeding. For instance, the student who allegedly vandalized the college library may have been arrested, tried, and acquitted or convicted and punished. If he were acquitted, the college should surely think carefully about the wisdom of trying him again. If he were convicted, the college should surely consider carefully whether the punishment imposed was sufficient even in terms of

⁴² Arguably, however, the damage "distinct" to the college is civil rather than criminal, since the criminal aspect is already fully reflected in the general criminal law which makes vandalism a punishable offense. Thus, the college might appropriately confine itself to seeking compensation in the same manner as anyone else, through a common law tort action. Even when the criminal mischief is against the college's own property, therefore, it is arguable that the college should not necessarily utilize its own quasi-criminal processes to duplicate those already brought to bear by the municipal or state court.

the college's own interests — making it inappropriate to pursue the matter further.⁴³

As to this second step, many colleges have operated in an utterly different fashion; where college rules and state laws have overlapped, a number of colleges have established working relations with the downtown police so that the alleged offender is released to the college and favored in this regard over nonstudents arrested under identical circumstances. This, of course, is the seemingly benevolent edge of *in loco parentis*, the college acting to favor its students, shielding them from responsibilities unequally borne by nonstudents less favored than they. (The benevolence may sometimes be only a "seeming" one, however, for the college, seeking to maintain the goodwill of the police, may in fact then discipline the student far more severely than would the court downtown — as by expelling him and terminating his educational career, rather than by imposing the fine or brief term in jail that he would have received downtown.) These arrangements seem to be so doubtful, both in terms of their legal correctness and in terms of their educational wisdom, however, that they should now be reconsidered. They are legally doubtful to the extent that the police, by such arrangements, unequally favor those who are fortunate enough to be students. They are educationally doubtful, for some students may acquire an "elitest" notion of themselves, placing themselves above other citizens, while others may feel that they are made whipping boys within the college in order that the college may preserve its good standing with the town. On both accounts, the practice should be seriously reviewed.

This does not mean that the college should take *no* interest in its students involved with the courts; the fact that the student may be far from home, in need of counsel, and practically disadvantaged in comparison with a local resident may of course make it perfectly appropriate for the college to assist him in his difficulty — short of buying off the police by promising suitably stringent treatment of its own.

There is, however, a third step in this review. Some off-campus offenses, not themselves more detrimental to the college than to the larger community which polices them, may nonetheless raise appropriate questions for independent review within the college — questions respecting the continuing safety of the college itself. The crime of selling narcotics is sometimes committed by persons who are themselves addicted and who engage in proselytizing others to

⁴³ Since a fine paid into court is neither measured by the damage done nor paid over to the college, however, I do not mean to imply that the college ought not seek compensation from the student on the same terms that it might seek compensation from anyone else similarly doing damage. See note 42 *supra*.

secure funds to meet their own needs as well as, in some cases, to lessen their own feelings of guilt by providing themselves with reassurance that others will also use narcotics. A person tried and convicted in a regular court of law may, as a youthful first offender, be given a suspended sentence and then be free to return at once to college. Yet, the college may need to satisfy itself that the young man's return to campus will not carry an unreasonable risk to other students, and the college might therefore wish to make an independent inquiry to determine the safety of allowing the student to remain on campus. In short, since the municipal court's exercise of judicial discretion in the treatment of a given offender need not have given special attention to distinct college interests, the commission by a student of certain types of crimes may make it appropriate that the college review the circumstances to determine whether separate protective measures of its own would be warranted.

The shift in emphasis, however, is both real and important. Colleges would no longer undertake to duplicate general law by taking their own pound of flesh through expelling every student convicted of a criminal offense, nor would they seek to undermine the accountability of their residents to regular law by providing them an academic sanctuary for offenses committed in the larger community. Rather, they would leave the policing of municipal concerns to the municipal authorities, assisting their students only to insure their fair and equal treatment in the regular courts, and utilizing such information as they otherwise receive about criminal law violations only to determine whether, in the nature of the student's conduct and the delay or result reached in the regular courts, there is some substantial need of the college requiring separate action by the college to secure its own safety.

III. SOCIAL REGULATION OF DRESS AND DECORUM

An increasing number of campus controversies are now astir which scholars may feel to be too foolish for serious consideration, disputes where the complaint of the students seems trivial and the concern of the college seems petty. Where the issue is thus one of determining whether the triviality of the complaint outweighs the pettiness of the rule, no one is likely to secure anything in which he can take much pride. Yet, the controversy will not go away, and even the examination of a small matter may yield principles capable of more important uses. Thus, it may be worth our time briefly to take stock of seemingly prankish students who increasingly affront social regulations on campus by getting out of step: boys with long hair, girls with short skirts, and other departures of questioned taste. Cases have been litigated in state and federal courts

where students, suspended until they conform, have fielded solemn principles of the Constitution in defense of an inch or two more of hair or an inch or two less of skirt. Some have tied their beards to the first amendment, claiming that their hair length expresses a point of view about society, that it constitutes hirsute advocacy of more individuality, less conformity, and is, as such, a manifestation of free speech as much protected from censorship as conventional political discussion. Others anchor their claim in a larger freedom of personality, a right to be let alone and to be as one wants to be, free of regulation which serves no discernible important purpose and reduces the individual to another conforming cardboard cutout jiggling up and down in a tacky college.⁴⁴

Those issues litigated with respect to high school students have generally been resolved against the students,⁴⁵ although a few recent successes⁴⁶ in the courts are doubtless being watched somewhat nervously with the understandable anxiety that there seems to be no stopping point for the ubiquitous judiciary. Generally, they have lost in court as a practical matter probably because the courts have felt that student obstinacy on such slight matters was itself an unreasonable and pertinacious challenge to authority. A federal district court, it might be said, surely has more important things to do than consume its time in behalf of beatniks and mods. In defending these cases, the colleges have likewise fielded high principles, including the following:

(1) Social regulations are designed to contribute affirmatively to the atmosphere of serious study and contemplation appropriate to an institution of higher learning. Each institution is itself the best judge of the environment most conducive to its educational undertakings, and its expertise on the inappropriateness of certain offensive practices surely ought not be second-guessed by judges having little idea of a given campus situation.

(2) Were courts to intervene against the institution's own best

⁴⁴ These and other arguments are enthusiastically developed in student writing: Comment, *A Student's Right to Govern His Personal Appearance*, 17 J. PUB. L. 151 (1968); Comment, *The Personal Appearance of Students — The Abuse of a Protected Freedom*, 20 ALA. L. REV. 104 (1967). See also 19 MERCER L. REV. 252 (1968); 37 U. COLO. L. REV. 492 (1965).

⁴⁵ For cases upholding the school's position, even when there has been virtually no evidence that the offending style in fact caused disruption to the educational routine see *Ferrell v. Dallas Independent School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir. 1968); *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967); *Mitchell v. McCall*, 273 Ala. 604, 143 So. 2d 629 (1962); *Leonard v. School Comm. of Attleboro*, 349 Mass. 704, 212 N.E.2d 468 (1965).

⁴⁶ The most important case involves reinstatement of a public school teacher transferred out of the school because he continued to sport a well-trimmed beard in defiance of the principal's ban. As the court noted, as an aside, the successful teacher was teaching at John Muir High School which had been named after the well-bearded naturalist. *Finot v. Pasadena City Bd. of Educ.*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967). See also *Zachry v. Brown*, Civil No. 66-719 (N.D. Ala., June 30, 1967).

judgment, moreover, the implied rebuke to the college would itself undermine the degree of respect which teachers and administrators must maintain if they are to function effectively on campus.

(3) Certain modes of dress, like certain modes of speech, are forbidden simply because they detract from minimum good manners which even a liberal college may surely expect as a part of its academic life style. Sometimes it is even clear that a student assumes some weird appearance simply to see how much he can get away with. Under such circumstances, a failure to recognize what is genuinely involved may undermine the institution and inadvertently lead students to a destructive emulation of campus vagrants or beatniks, impressing them with the audacity of persons who express contempt for education and leading them into a similarly contemptuous view of life. Just as the high school tough may mislead a great number of other youngsters by humiliating a teacher with a crude epithet or two, so can a college be undermined, it may be feared, by the appearance as well as the actuality of free-wheeling sex and vagrancy on campus.

As a lawyer, I expect that the courts generally will continue to keep hands off in this area, even though the sanction a college may employ to enforce its social regulations continues to be the tough sanction of suspension until the student alters his offending style. Though the penalty may seem to hurt a matter of great importance to the student—his ability to complete his education—the fact that it can be so easily avoided by yielding on so trivial a matter as visiting a barber makes it difficult to foresee serious constitutional injunctions issuing from the federal courts.

As an educator, however, I think we may badly misconstrue the impact of rules which do not so much cultivate a high academic life style as they frankly communicate to our students a degree of peevishness, thin-skinned intolerance, and staid prejudice enforced by supererogatory regulations. There is not only a generation gap, but a far more disturbing educational gap; the teaching of John Stuart Mill in the classroom but the preachments of Anthony Comstock in our rules. Students are quick to note what we sometimes prefer to deny even to ourselves, because its frank admission would be so disturbing: it is more usually the case that restrictions such as those on long hair for men and miniskirts on girls exist because such styles are merely unsettling to *us* and not in the least disruptive to the school; they offend *our* taste, challenge *our own* cultural conventions of manliness or, with the girls, lead to stray thoughts of which we (or at least some of us) were taught to be ashamed. Indeed, the adamant attitude of a college in pressing so small a matter so very hard itself creates the confrontation which

sponsors the only real commotion,⁴⁷ which frequently martyrs the nonconforming student and alienates others who are warranted in resenting institutional police practices. Unless adventures in campus caparisons reach such exaggerated proportions and unless material evidence is forthcoming that freakish fashions are actually disrupting classes or otherwise directly interfering with the academic program (conditions I do not know to have obtained anywhere as yet), we may indeed presume too far on the private lives of our students by regimenting their tastes. The student may reside on campus, of course, but when was it ever well argued that a community — much less a free and scholarly one — could properly regiment the dress of its residents?

IV. "CRIME AND PUNISHMENT"

"My object all sublime
I shall achieve in time
To make the punishment fit the crime
The punishment fit the crime."

— *The Mikado*

We have known for a long time that the sanctions employed by our regular criminal law — usually fine or jail — are frequently unimaginative and unduly inflexible. Yet, our general scheme of sanctions in our colleges is less imaginative by far, as it traditionally has tended indiscriminately to employ an academic death penalty as the preferred sanction for offenses which may have little or nothing in common with each other or with academic fitness. The "death penalty" in this sense is, of course, expulsion. Its necessary effect is to terminate the individual's academic status, even though the offense to which the sanction is tied represents neither academic failure nor academic misconduct on the student's part.

If the student has failed to perform minimally acceptable academic work, or if he has violated fundamental standards respecting the integrity of *that* work (as by plagiarism or cheating), it may not be inappropriate for the college to reconsider his fitness as a scholar. If his misbehavior is more essentially in the abuse of some privilege he entertains as a resident or citizen on campus, however, surely it may be better to fashion deterrent or corrective sanctions which adequately respond to that variety of misconduct but which do not terminate his academic status. Suppose, for instance, that the college maintains a bowling alley in the student union, and that

⁴⁷ See 3 HARV. LEGAL COMM. 1 (1966).

a given student badly abuses the equipment. Is it really appropriate to regard this as so far reflecting on his scholarship that one should seriously consider suspending him — action which keeps him not merely from the recreational facility he has abused but from the classroom from which he may need further benefit and where he has not misconducted himself? Shouldn't a suspension of his bowling privileges, rather than his educational interests, be more responsive? If the misconduct is aggravated, wouldn't it still be better to require either that he make monetary restitution for the damage he has done or, if he lacks funds, that he be obliged to work off the cost of the repair than to suspend or expel him from the college with all the crippling effects that these penalties may have?

The suggestion for a more discriminating treatment of disciplinary sanctions, reserving the academic sanction only for academic offenses except in the extraordinary case of residential misbehavior which is so repeated that its repetition finally requires removal of the student, can be readily expanded. The student determined to have violated a rule respecting drinking in the dormitories may surely be adequately rebuked and others adequately deterred by the temporary suspension of significant social privileges. One might even be so enlightened as to suggest some counselling — even to require it if drinking appears to be a regular problem for the student. Whatever his offense to the rules and mores of the dormitory, however, it is difficult to see the wisdom of suspending him with its necessary effect of withdrawing educational opportunities.

Even in the aggravated "residential" case, *e.g.*, the case of a student chronically raucous in a dormitory, the offense is more accurately to others in the dormitory and it may, at most, be more responsive to evict him merely from that facility than to evict him from the classrooms as well, where he has committed no offense. To be sure, the student may endure a degree of hardship in finding lodgings elsewhere — but not so much as though the university gave him no opportunity to try as by expelling him.

There is no point in proliferating examples or illustrating still further varieties of disciplinary responses beyond the tired, harsh, and inessential preference for suspension or expulsion, but there may be some point in bringing the matter back to our subject of the student as *resident*. To the very extent that a student's offense is *dehors* the academic process and is indeed an offense only against the nonacademic, social, residential aspects of the college com-

munity, a response not needlessly jeopardizing the student's academic career should surely be found.⁴⁸

V. CAMPUS DISORDERS

The anticipated conclusion to this article was interrupted as a result of a massive student vigil which developed in support of a strike by the nonacademic employees at Duke University. The ensuing month was wholly occupied by efforts to resolve the dispute, and the manuscript remained unfinished at the time this symposium was held in Denver. In the course of the symposium itself, it became even clearer that student interests had expanded well beyond conventional concerns for student freedom and that a growing number of universities were more urgently concerned with developing ways and means to cope with extralegal and illegal direct student action aimed at two newer objectives: first, modification of programs within the university itself; second, use of the university as an instrumentality of social change in the outside community.

Major confrontations at a number of universities within the past 3 years and similar conflicts that must realistically be anticipated elsewhere in the immediate future, surely suggest that some effort should be made in this symposium to treat these new dimensions of student power. While this issue is not one where a law professor has any special claim (especially since neither the student mode of action nor the accommodations they seek are typically grounded in any legal claim), still something useful might be offered even by way of amateur observation. In lieu of the ordinary conclusion, and drawing from significantly related sources such as the *Report of the National Advisory Commission on Civil Disorders*, as well as from reports made within a number of the universities thus far involved in these confrontations, I would offer the following suggestions.

The accommodation of extralegal crises on campus seems to me to involve three stages of concern of which the most important (and the most neglected) is the first stage: (1) the avoidance of extralegal conflict; (2) the response to unavoidable conflict; and (3) provision for the immediate and long term aftermath. Much as the *Report of the National Advisory Commission on Civil Dis-*

⁴⁸ The point is further developed in UNIVERSITY OF KENTUCKY, REPORT OF THE SENATE ADVISORY COMMITTEE ON STUDENT AFFAIRS 5 (Dec. 9, 1966) (mimeographed): "In formulating the recommendations which follow, the Committee first identified five separate areas of student-university contract: 1) the student as a scholar, 2) the student as a tenant, 3) the student as a member of a student organization, 4) the student as an employee, and 5) the student as a customer for goods and services. Only in the first of these areas can the University appropriately apply its distinctive disciplinary punishments (such as suspensions and expulsion)" See also Goldman, *The University and The Liberty Of Its Students — A Fiduciary Theory*, 54 KY. L.J. 643 (1966).

orders concludes that urban rioting resulted almost predictably from the neglect of persistent community conditions, it also now appears that a number of riotous student demonstrations might equally never have materialized but for the neglect of certain institutional conditions. As a matter of enlightened self-interest, large-scale institutions might at least consider a number of steps open to them, both for their own merits as well as for the defusing of radical movements.

(1) *Careful, systematic, and joint student-administrative-faculty review of basic institutional practices, policies, and structures, with immediate attention to any matters which have been the subject of persistent rumor or complaint.* There is doubtless some real basis for the student view that our large-scale institutions have grown without any particular direction or philosophy. The absence of any readily available, responsive, working, representative, and respected group with influence and concern has surely contributed to the felt need for dramatic direct action. There is reason to believe that the special appointment of representative ad hoc bodies granted special influence may be necessary at least for the short term.

(2) *Revitalizing of established means influentially to express grievances and effect recommendations.* Student governments may have failed in the main because they are correctly perceived as "jock-strap" governments, play parliaments which lack authority, which are identified by impotence, which turn off the socially estranged student, and which therefore cannot be expected to serve as a steam valve which students will use harmlessly to ventilate their concerns. For student government to "work" it must almost certainly be granted nontrivial responsibility. A profile of its representatives need to be included in regular university decisionmaking bodies, both for the positive inputs they can provide and for the value of their own informal feedback to the student body.

(3) *Revitalization of faculty participation.* Faculty senates or councils must themselves be restored to influential authority with full participating membership on all major university committees. Such schemes already exist as a matter of form at many institutions, of course, and a great deal of the difficulty here is not one of structure but incentive. It is currently unrealistic to expect significant faculty service in the policy and planning aspects of large-scale institutions to the extent that such service proceeds on the faculty member's own time, receives no tangible recognition, distracts from publication or teaching, and thus confronts each faculty member purely as a "sacrifice." In short, incentives must simply be reordered to include institutional service if essential, competent, and responsible faculty participation is to be secured.

(4) *Revision of clear and defensible rules on matters of substance and procedure.* The typical lack of college rules clearly and fairly defining permissible and impermissible forms of action, the use of draconian "good conduct" rules, and the lack of fair and respected disciplinary procedures doubtless engender some contempt, a great deal of confusion, and a complete inability to cope with real conflict when it does arise. The inertia of colleges systematically to review their rules systems is, in my opinion, more responsible than any other single factor for the trend toward judicial intervention in student-college relations.

Urgent attention to long-neglected problems, improved communication to identify problems, to dispel rumors, and to benefit from inputs and feedbacks, the increased sharing of nontrivial responsibility with a reordering of incentives to make faculty participation useful, and the reformulation of rules to achieve fairness and credibility are minimal steps easily within the capacity of most universities to pursue at once. Because of the always present likelihood that an unforeseen confrontation may develop in spite of these measures, the college should of course make provision for emergency meetings with student, faculty, administrative, trustee, and employee organizations on very short notice. Otherwise, misinformation is bound to spread and dramatic direct action is more likely to materialize to fill the vacuum.

The second level of concern is with the crisis that occurs in spite of one's best efforts to alleviate grievances and provide orderly means of change. The management of such crises becomes a matter of strategy, of course, but fairness and credibility are themselves the most critical elements of a strategy determined to minimize the conflict.

(1) *Cautious and Firm Initial Reaction.* Gross overreaction to trivial rules' violations has generally resulted in an enlargement of the crisis by submerging the original issue beneath a newer issue of brutality and unfairness. An announced willingness promptly to review the issue sponsored by the ad hoc group, with a request that it be placed in those decision-sharing bodies regularly established (as suggested *supra*), plus firm reference to the need for deliberate review rather than unconsidered action based solely on unilateral pressure, and a reference to the consequences of anarchy both in terms of its inherent inconsistency with the academic process and its seriousness under fair rules established with participation by the student body, may give the demonstration pause or at least isolate it and deprive it of means to secure broad support. Firmness in the use of principled sanctions must be maintained, however, if the basic and wholly defensible request for minimum order is to achieve

respect and credibility. While reasonable persons may disagree, I have seen little evidence that abusive force can be let go without the use of sanctions credible enough to indicate that the commitment to basic order is itself strongly felt and will not be set aside simply to avoid unpleasantness. Where possible, infractions of the rules should be noticed and cases processed through established procedures, without more. A sensible rules system will, however, also provide for interim suspension (subject always to orderly review) when, in the judgment of the highest administrative officer, the safety of others or the maintenance of minimum order requires it. If the personnel resources of the institution are manifestly insufficient to cope with those who would clearly paralyze the institution unless removed, then it may be reasonable as a last recourse that the students answer to the law, as may any other citizen, through the use of an *ex parte* injunction and requests for assistance from the police, with a credible followthrough willingness to sign complaints and attend the civil courts.

The third stage, the aftermath, may itself fall into three parts. The first of these is the followthrough with respect to alleged rules' violations and infractions of law to determine the appropriate treatment of each participant and the conditions under which he may resume his academic career. The second is to review the subject of the crisis itself, both in terms of the possible merit of the grievance it sought to dramatize and what it may indicate in terms of a larger structural inadequacy that gave rise to such disorderly action. And the third is to review the institution's overall situation in light of stresses or weaknesses uncovered in the confrontation which has just transpired. The last is doubtless as important as anything else, if an unfortunate history is not to repeat itself.

APPENDIX

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