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I. INTRODUCTION

ONE FACET of the social upheaval rampaging across American society within the last decade has been the challenge to the expansive power wielded by large private and quasi-public organizations over their members and over other individuals and groups.[1] There has been an increasingly vocal demand that this power be exercised in a fair manner to achieve justifiable ends. Although men may quarrel over the propriety of means and the definitions of ends, the significance of this development lies in the questioning of existing structures and goals, and more particularly in the challenging of the assumption that organizations outside the formal structure of government should be largely free of legal restraints.[2] Yet this freedom has been checked where forces have organized in defense of those subject to organizational control. For example, we are familiar with the struggle waged by the labor movement in America against the corporate powers of the capitalists. But in the field of education, especially at the university level, little internal resistance has been manifested, at least until recently. Public and private universities traditionally have sustained the more or less unbridled ex-

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[1] *See Developments in the Law — Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 987, 989 (1963) [hereinafter cited as *Developments*]. *See also* Latham, *The Commonwealth of the Corporation*, 55 NW. U.L. REV. 25 (1960); Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U.L. REV. 4 (1960).

[2] Early in this century, one school of political thought, the Pluralists, evaluated the role of private organizations in modern society and concluded that their autonomy from state interference was essential in achieving "the common good" for society and its individuals. *See, e.g.*, J. FIGGIS, CHURCHES IN THE MODERN STATE 18-22, 32-39 (2d ed. 1914); H. LASKI, STUDIES IN LAW AND POLITICS 249-50, 259 (reprinted ed. 1968); Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 424-26 (1916). *See generally Developments*, *supra* note 1, at 986-87.

ercise of their disciplinary authority under the rubric of *in loco parentis*, accepting as correct and desirable their roles as parents to those under their control.[3] But the growth and increasing impersonality of large-scale organizations, coupled with the increasing recognition of the helplessness of those governed by these organizations, have led to protests, sometimes of violent magnitude, and to a myriad of proposals for imposing legal and other practical controls over the way power is assigned, organized, and exercised.

Today there is a growing and sustained debate about both the procedures and the ultimate ends and values of social and economic institutions, which finds a counterpart in recent American history only in the years of the Great Depression.[4] Other industrialized democratic nations are experiencing the same phenomenon — a massive challenge to the styles and goals of private and quasi-public institutions and their exercise of power over the individual. One of the key objectives in this challenge is the restoration of the ancient philosophical goals of equality and justice to a central place in modern society.[5] The search for justice may be viewed as requiring a reexamination of means and ends. Such a reexamination is clearly taking place in our system of criminal law and procedure. In recent years many changes have been made, ranging from the institution of greater controls over pretrial police practices to the adoption of less retributive and more rehabilitative measures for dealing with convicted criminals.

Within the context of higher education, the challenge has been directed toward the traditional relationship between the student and the institution. American universities and colleges, both public and private, have until quite recently assumed a parental attitude toward students.[6] This was especially true of the residential institutions, which, unlike most of their European counterparts, bore a variety of responsibilities toward students, including inculcating proper moral and social attitudes, sheltering them from various dangers, and ministering to their physical and spiritual needs — in short, behaving as a surrogate parent. In return for this, the student was expected

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[3] *See* authorities cited note 6 *infra*.

[4] *See* J. HICKS, G. MOWRY & R. BURKE, THE AMERICAN NATION 540-44 (4th ed. 1965).

[5] *Cf.* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970).

[6] *See* Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923) (per curiam); Note, *Reasonable Rules, Reasonably Enforced — Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 310-12 (1968).

to show respect, if not indeed gratitude, to mind the rules, and to confess errors when caught violating them. With rare exceptions, the mood was paternalistic, though the governing attitudes and behavioral patterns ranged from the stern authoritarianism of the sectarian institutions to the more lenient and permissive "boys will be boys" attitude of many larger colleges and universities. In both kinds of institutions, however, there was apt to be little concern for the form or inherent fairness of disciplinary proceedings, and even less thought given to the purposes of punishment. The stern parent wanted the offender to pay. There was Jovian anger in the more primitive institutions if a student dared to write an offensive article in the school paper, criticize the competence of instructors, offend the curfew regulations, drink alcoholic beverages on campus, or behave in a disorderly manner in public. Tolerant institutions, however, allowed drinking in rooms, imposed generous curfew rules, if any, and allowed minor offenses to go largely unnoticed.

With the abandonment of the *in loco parentis* model, there has been a search underway to find more acceptable principles of governance within the academic community in light of contemporary changes in student-institutional relations.[7] For the student, the culmination of this endeavor is the formulation of rules of greater specificity and the adoption of fairer disciplinary procedural schemes. It is with this latter topic that this article is chiefly concerned, although the problems that arise in formulating procedures have an obvious relationship to answers given to larger questions concerning the goals and the governance of the university.

The legal system is relevant to the problem of developing fair disciplinary proceedings in two obvious ways. First, a plethora of court decisions in recent years has firmly implanted the constitutional requirement of procedural due process on the university campus. Second, in fashioning new procedural schemes many institutions have transplanted some of the elements that due process imposes on judicial and formal administrative hearings. The result is that university disciplinary proceedings now have the aura of adversary hearings.

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[7] In a previous article, one of the authors noted that reorientation of student-institutional relations has been manifested by the students' demands for greater participation in the decision making processes and for an elevation in status as members of the academic community. Beaney, *Students, Higher Education, and the Law*, 45 DEN. L.J. 511, 512 n.5 (1968).

II. COURT-DEFINED STANDARDS

There is now available a sufficiently revealing body of judicial decisions to permit generalizations concerning the courts' role in reviewing disciplinary actions. In general, the courts have addressed themselves to two aspects of due process at the university level.

The first issue frequently explored by the courts is whether the language of a rule of conduct is overly broad. It has been held that due process requires that a rule be sufficiently specific to enable the student to reasonably understand what is proscribed.[8] Hence, a rule prohibiting and penalizing "misconduct" is deficient insofar as it leaves university administrators complete discretion in defining the term, without giving students the slightest hint of what is forbidden. But on the whole, courts have generally declined to subject university rules to the same critical analysis to which criminal statutes are subjected.

The second and more prevalent issue litigated in the courts is whether the disciplinary procedures comport with the requirements of due process. Practically all courts agree that for serious charges, carrying a penalty of probation, suspension, or expulsion, the student should be given notice of the charges and a hearing at which the university is required to present evidence of the violation and the student is given an opportunity to refute the evidence or justify his conduct.[9] Whether other elements associated with a criminal proceeding are required, such as right to counsel, right to a public hearing, right to confrontation and cross-examination, right to introduce favorable testimony, privilege against self-incrimination, right to a transcript, and right to appeal, has not been unanimously settled by the courts.[10] Some courts simply refuse to rely on the adversarial elements of a criminal trial as a model for a university hearing.[11] The underlying rationale is usually a policy consideration: The educational process should remain relatively free from judicial interference and from the imposition of adversarial procedures which diminish the cooperative relationship between institution and student.

[8] Soglin v. Kauffman, 418 F.2d 163, 167-68 (7th Cir. 1969), *aff'g* 295 F. Supp. 978 (W.D. Wis. 1968). *Contra,* Norton v. Discipline Comm., 419 F.2d 195, 200 (6th Cir. 1969), *cert. denied,* 399 U.S. 906 (1970); Esteban v. Central Mo. State College, 290 F. Supp. 622, 630 (W.D. Mo. 1968), *aff'd,* 415 F.2d 1077 (8th Cir. 1969), *cert. denied,* 398 U.S. 965 (1970).

[9] *E.g.,* Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 419 (W.D. Wis. 1969); Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961).

[10] *See* Note, *Procedural Due Process and Campus Disorder: A Comparison of Law and Practice,* 1970 DUKE L.J. 763.

[11] *See* Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970).

Other courts, although acknowledging the policy against incorporation of criminal procedures, have tested their applicability in terms of what due process requires in each university context.

An example of the latter judicial involvement is the case of *French v. Bashful*,[12] in which a federal district court examined the student's right to counsel under a due process analysis. The court outlined the due process test as follows: "[D]etermine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand."[13] Applying this analytical framework to the case, the court found that the students should have been allowed counsel, notwithstanding authority to the contrary.[14] The court reasoned that the valuable nature of the right to education and the relative seriousness of the possible punishment — probation, suspension, or expulsion — warranted greater procedural safeguards. The presence of counsel would add much greater reliability to the guilt-determining process. In addition, there apparently was no overriding governmental interest involved in *French* that would militate against the imposition of the counsel requirement. Finally, the circumstances of that case were unique in that a law student had conducted the prosecution of the case at the university hearing. Thus, it was only fair to allow the students also to be represented by someone with legal training.

Despite the lack of unanimity among courts on what procedures due process specifically requires, the thrust of the decisions is against clearly arbitrary or one-sided actions by the institution in response to an alleged violation of a university rule.[15] But as yet the courts have not considered all the aspects of a disciplinary hearing. For instance, they have not delved into the fairness and consistency of the university's decision to initiate a hearing. Nor has the nature, number, or neutrality of the triers of fact received judicial scrutiny. Whether a student is entitled to discovery of the facts against him prior to the hearing also remains unanswered. Even where the courts have spoken, they have not fully explored some of the issues in great de-

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[12] 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed per curiam*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941 (1970).

[13] *Id.* at 1338, *quoting* Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967).

[14] *See* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

[15] *See, e.g.*, Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

tail. Although the right to a hearing is universally acknowledged,[16] whether the form of the proceedings should be adversarial, administrative, or inquisitorial is left to the discretion of the university as are the rules governing the conduct of the hearing.

From the existing body of decisions certain questions arise concerning the courts' role in reviewing disciplinary proceedings. For instance, why have courts up to this point shown an indisposition toward close scrutiny of all facets of the disciplinary process? And an equally appropriate question is why the courts have chosen to intervene to the extent that they have already? One can perhaps answer both questions by pointing first to other areas where the courts initially adhered to a policy of abstention. A classic example is the evolution of judicial supervision over pretrial activities of the police. Courts initially took a modest view of their supervisory powers, excluding obviously coerced confessions[17] or evidence seized in clear violation of the 14th amendment's due process clause.[18] But as the frequency and seriousness of police misconduct was revealed, the judiciary pushed further into the thicket of police behavior, expanding the scope and meaning of due process. From the requirements of *Miranda* warnings[19] and the presence of counsel at lineups[20] to the body of search and seizure rules,[21] the upshot has been a wide range of procedural formalities engrafted upon the administration of criminal justice. Yet having gone so far, the courts still refrain from a realistic examination of the plea bargaining process, which obviates the need for trials in 85 percent of the cases. Here the courts call a halt, perhaps in order to save their own system from complete collapse and demise.

In other areas the courts have been reluctant to intervene because of the complexity of the issues and the difficulty of fashioning effective remedies, as in intraunion labor disputes.[22] Frequently, the courts' hands-off policy reflects a conscious decision that the legisla-

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[16] *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[17] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

[18] *See* Rochin v. California, 342 U.S. 165 (1952).

[19] Miranda v. Arizona, 384 U.S. 436 (1966).

[20] United States v. Wade, 388 U.S. 218 (1961); Gilbert v. California, 388 U.S. 263 (1967).

[21] Summaries of the Supreme Court search and seizure cases of the past decade are collected in THE CRIMINAL LAW REVOLUTION 1960-1969 (Eds. of *The Criminal Law Reporter* 1969).

[22] *See* Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1050-51 (1951).

ture is the better equipped and more appropriate branch for resolving societal conflict, as in problems arising within employer-employee relationships.[23] In still other areas, courts remain aloof because of the desirability of maintaining large segments of economic and social life free from external restraint and control. This last reason in large part explains why the universities have historically been free from close judicial scrutiny. Courts may fear that a university's authority and autonomy would erode if they, without hesitancy, reviewed the decisions of school officials.[24] By the same token, the courts have accepted on faith the expertise and infallibility of educators in formulating essential regulations that are reasonably related to the educational process.[25]

There is, of course, no guarantee that the courts will continue to be satisfied with only minimal due process safeguards in university disciplinary proceedings. But there is reason to believe that judges would hardly welcome the flood of litigation that would follow a clearly signaled determination to impose a full scale adversarial model on the university.

Even if we grant that courts should remain alert to infringements of first amendment rights, it can be argued that intensive judicial scrutiny of university disciplinary procedures is probably not a wise objective.[26] The judicial proceeding places the parties in adversary positions, pitting university against student. A feeling of support and joint participation, which ought to pervade the relationship between university and student, is thus displaced by a feeling of hostility. And after the court has ruled, there is the risk that this hostility will accompany the parties as they return to the campus. Once adapted to the adversarial atmosphere of the courtroom, the university is likely to be more hardnose and less sympathetic to the student who has imposed on it the burden and expense of litigation. Where the student is victorious in court and the university is perhaps grudgingly saddled with yet one more procedural requirement, the possibility of rapprochment becomes far removed. All in

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[23] *See* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), *overruled*, Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970); Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 258 (1970) (Black, J., dissenting).

[24] *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1151-52 (1968).

[25] *See, e.g.*, Leonard v. School Comm., 349 Mass. 704, 709-11, 212 N.E.2d 468, 472-73 (1965).

[26] *See, e.g.*, Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *vacated and remanded*, 402 F.2d 515 (5th Cir. 1968); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967).

all, the very act of going to court, regardless of the legal outcome, seems to indelibly taint student-university relations.

A second problem of judicial interference is that the court offers only a limited, "win-or-lose" resolution of the problem. A decision is generally open and shut in the sense that it either affirms or reverses the suspension. Rarely are any alternatives offered or any new guidelines laid down. Indeed, this may be the greatest disadvantage of judicial review. In the case of affirmance, the university feels that if its procedures have withstood judicial review they are adequate to guarantee a fair and impartial hearing. In the case of reversal, where can the university go to improve its procedures? Unfortunately, courts cannot offer much help to the university seeking to establish adequate due process standards.

Part of the reason why the courts cannot blueprint comprehensive disciplinary procedures that accommodate and protect the interests of university and student alike is that they are too far removed from campus life to offer any real help or understanding; they lack information necessary for resolving the shortcomings in university procedures. Furthermore, the university itself is a more efficient forum for resolving these problems in terms of resources and interest. Coupled with the judiciary's lack of expertise in this area is a conceptual problem: The student-institutional relationship has successfully defied legal classification. The courts were comfortable with *in loco parentis*, and the fact remains that some schools still are, and want to be, surrogate parents. Other universities feel exactly the opposite. This baffles the courts to some extent as to what legal standards should be applied.

Equally as difficult is the judisdictional problem created by the private universities. In applying constitutional standards to the state university, the federal courts have had little difficulty in finding the requisite state action.[27] The private university, however, is a jurisdictional "no man's land."[28] Thus, it is understandable that the courts are reluctant to pitch themselves into this undefinable, uncharted area. Nevertheless, the same problems occur in private and

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[27] *See, e.g.*, Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969).

[28] *Compare* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858 (E.D. La. 1962) (Wright, J.), *with* Powe v. Miles, 407 F.2d 73, 80-83 (2d Cir. 1968) (Friendly, J.), *aff'g* 294 F. Supp. 1269 (W.D.N.Y.). *See* Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970). *See also* Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct.), *rev'd on other grounds*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).

public institutions. Students are expelled on hazy grounds, rules are vague, and proceedings are less than adequate.

Aside from the ill feelings engendered by a trip to the courthouse and the limitations, both theoretical and practical, that pervade judicial intervention, there still remains a question concerning the due process analysis used by many courts. Despite repeated statements that they are against imposing an adversarial model on university proceedings, courts cannot help but look to the elements of criminal procedure for direction. In addition, in arguing for greater reliability in the factfinding process, attorneys representing students will naturally try to analogize the university procedure to formal criminal procedure. Thus, the courts' energies are spent on determining whether a particular procedural guarantee should be carried over to the university. The result is twofold. First, with each incorporation, the university proceeding becomes more adversarial. The university and student begin to think and act as participants in a criminal proceeding. Sacrificed in the process is a sense of academic community, and in its place is substituted a feeling of hostility and alienation. The squaring-off of administration and student also places the faculty in an awkward position. As the disciplinary hearings become more adversarial, the faculty is forced to choose sides. The faculty members become mere witnesses in support of either the university or the student. Ideally, however, the faculty should not have to make such a decision; rather it should be free to contribute its own ideas and advice in equitably resolving the conflict. A second effect of the incorporation of criminal procedure is a smothering of creative efforts by the university to design procedures that enhance the factfinding process and at the same time perserve a conciliatory and rehabilitative relationship between school and student. There is a danger that universities will settle on providing only the minimum requirements of due process. Conditioned by the courts to think in terms of what criminal law requires, they will be less inclined to formulate innovative procedural models which could be both nonadversarial and fair to the individual.

Admittedly, the *French v. Bashful*[29] court, in analyzing the right to counsel in terms of due process, fairly balanced the more tangible interests involved. It adequately protected both the student's interest in a reliable factfinding process and the university's

[29] 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed per curiam*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941 (1970) (discussed in text accompanying notes 12-14 *supra*).

interest in minimizing the burden and cost of the disciplinary process. But as the preceding discussion noted, due process often cannot adequately protect that intangible interest that both student and institution share: the sense of academic community. Although certain circumstances may justify the carryover of an element of criminal procedure, the inevitable result is a move one step closer to a formal adversary proceeding. The sense of community among members of a university is a fragile item. As the disciplinary proceedings become more adversarial, there is the great risk that it will be shattered. Instead of the university's being concerned with what is best for both itself and the student, it will primarily be concerned with "convicting" the student.

III. The Barriers to University-Defined Procedures

If the solution to the problem of fair disciplinary proceedings cannot be satisfactorily resolved by the courts, it will be necessary either to resort to an adjudicative body apart from both the courts and the universities or to seek a better solution from the university itself. It is not difficult to conceive of an extra-university body that would hear and dispose of university disciplinary cases. We are all well aware, for example, of the great success of arbitration in resolving disputes in the commercial world. In cases where university-student relations have become embittered, or where mutual confidence is lacking, it may be wise to recognize that there is an inadequate basis of trust and good will for constructing satisfactory procedures within the university. A suggested alternative is the formation of a three-man board, composed of a student representative, a representative of the faculty and administration, and a third individual selected by the other two. This board would hear all university complaints bearing a designated degree of penalty and decide the cases within a specified time. Members would serve for a designated term with salaries paid equally by student fees and the university. The same model could be adopted by both private and public universities. A virtue of this approach, apart from insuring a reasonably impartial proceeding, is that it would mitigate the tensions engendered where the university officials serve both as chief prosecutor and principal trier of facts.

For a number of reasons, however, educational institutions will probably not choose to adopt such a scheme. First of all, it can be interpreted as a confession of an institution's failure to win its students' confidence. Next, it will add to costs, although this factor

seems least significant. There may also be serious difficulty in convincing qualified persons to accept board positions. And because the proceeding would be out of university control, it would seemingly afford little opportunity for effective resoulution of a matter short of a final decision. Finally, this board proposal will probably be rejected simply because it is a solution contrary to historical and current views of the educational enterprise — that is, that a university's responsibility to a student extends beyond mere education.

We are left then with the university as the principal guarantor of fairness in disciplinary proceedings. From the student viewpoint, there are reasons for doubting whether any large scale improvement in the university's performance of this role is possible. By and large, most universities have indicated that they are not instituting the necessary procedural safeguards to give the student his "due process." Part of the reason for this failure lies in the rapid evolution of new roles for the university and the student in today's society.

Universities have changed in size, shape, number, and importance. Similarly, the student population has substantially increased in number, mobility, age, interest, and affluence. The modern university has the growth pattern and the massive impersonality of a large scale organization. As a result it has assumed many of the characteristics of big business, resulting in a loss of a parental concern for the student as an individual. Today the university is simply not a surrogate parent. It cannot afford to completely supply its students with housing and food. It cannot monitor their hours, morals, or personal problems. The modern university has neither the time, the money, the skilled personnel, nor the desire to undertake such tasks. Moreover, students today are more mature, more independent, more self-supporting and participate more fully in society than in past years. Thus, to a large degree, both the university and the student have outgrown the traditional relationship of parent and child.

The university's changing role is further evidenced by the fact that today education is very much a business.[30] The university must grapple with the problems of raising revenue, and its survival depends largely upon shrewd investments in stock and real estate and securing government loans and research grants. To a large extent,

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[30] *Cf.* Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 302 F. Supp. 459, 465-66 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

the business of running a university is as important as the education the university furnishes. Consequently, attention is more often focused on the financial end of the educational process than on providing procedural safeguards. Procedures for financing are much better planned and thought out than procedures for handling disciplinary problems. Callous though it sounds, the economic impact of losing a student or two is considerably less than losing a grant or two.

Thus, establishing procedural fairness falls low on the list of university priorities. Many existing rules are codifications of preformulated, nonspecific, and often wholly unrealistic standards. When conflict involving student dissenters arises, the university often feels confronted by disloyal subjects who, if not disposed of quickly and effectively, will mushroom into a force capable of jeopardizing the smooth operation of the institution. Its natural reaction is to exercise its disciplinary authority in summary fashion, with emphasis on swiftness.

The university's handling of the whole student discipline area is directly contrary to its traditional image. Rarely does any institution in the scheme of American ideals find itself in as favorable a position in dealing with its members as the university in its initial relations with students. There is a preconceived notion that the university is a source of truth and justice, striving for fairness in all that it does. Where the university demonstrates that that initial preconception comports with reality, the whole educational process is enhanced. But the university has too often endangered its position in the eyes of the students through its inattention to principles of justice and fair play. It may well be that unless it fashions procedural safeguards to insure fundamental justice, the university will soon lose its favorable presumption.

The essential question is: Can the university by a reorientation of its structure provide a disciplinary process that is both effective and fair, one that protects legitimate interests of the institution while serving as a model for a just resolution of a disputed question? The authors suggest an affirmative answer. Some of the ways of achieving this objective are set forth below.

IV. The Shaping of a Fair Proceeding

If, as concluded above, we cannot rely on judicially determined criteria of due process to ensure fair disciplinary proceedings, how

should educational institutions proceed in developing procedures that promise substantial justice?

A number of assumptions should underlie any search for justice through disciplinary proceedings. First, there should be a warm and cooperative attitude toward students on the part of faculty and administrative officials. Students, of course, would have to reciprocate. Next, it must be remembered that a university's principal function is education. The stimulation of the desire to learn and the inculcation of desired mental traits and skills in its students, many of whom will be the intellectual, political, and economic leaders of their generation, necessarily has a significant place within this aspect of the university's design. Thus, the disciplinary procedure, like any other facet of academic life, must be judged in light of its tendency to advance or retard achievement of these educational goals. The involvement of students, faculty, and administration in determining the justice and efficacy of jointly adopted procedures offers a lesson in both the meaning and realization of justice. In addition, such a combined effort can favorably influence the participants' reaction to the totality of university goals and norms of behavior. It would be a supreme irony if institutions were to construe the hands-off attitude of courts as an invitation to observe only the rudiments of justice and largely ignore its substance.

The formal elements of a disciplinary procedure founded upon a set of ideas, values, and normative principles reflect the way the institution views its mission. They also reflect the relationship among all the active participants in the university. The extent to which these rules, codes, and regulations result from a consensus of both senior and junior partners, as opposed to a body of strictures imposed by the former upon the latter, will greatly increase the likelihood of fair proceedings in practice.

If there is a basic feeling of partnership and mutual trust among university participants, the number of commandments directed against the students will be fewer. Instead, alternative means of enforcement may be developed, such as student enforcement of dormitory regulations. It could also be made clear to students that the laws of the surrounding community will apply; violations of narcotics laws, for instance, would be handled by formal legal proceedings. Where an institution seeks to develop and maintain trust within its ranks, it can safely reexamine the need for rules at any time. Whenever appropriate, it can declare itself free of the rule-imposing function.

Where rules are promulgated, however, they should be reasonably explicit. Thus far only a few courts have invalidated university regulations on the ground of vagueness.[31] A basic notion of justice is that rules must be set forth as clearly as possible so that conduct may be shaped accordingly. But rules do not have to be so tightly drawn that their effectiveness is limited. We have the ancient legal offenses of "disorderly conduct" and "breach of peace" precisely because it is impossible to define the almost infinite variety of disorderly human behavior. The dangers of using overly general regulations against harmless, albeit unconventional, behavior, however, has become increasingly evident where public school officials have moved to punish students for such things as their clothing or their hair styles.[32]

One way of making rules sufficiently explicit is to specify examples of disorderly conduct, particularly conduct which clearly inhibits the educational process. A few examples are disobeying a lawful order of a university official or officer of the law, disrupting classrooms or study halls, or making unreasonable noise that prevents carrying out the university's educational functions. Similarly, a university is entitled to lay down reasonable conditions covering the time, place, and manner of student demonstrations. These would include standards of cause for invoking disciplinary actions against any serious violation. And once rules are adopted, a good deal of attention should be directed toward establishing an effective system for informing all students of the rules, particularly those rules governing activities in which students are most likely to engage unwittingly.

In short, the argument here is based on the desirability of evolving a body of written rules and regulations, by a joint effort of all university citizens, which would provide as much specificity as possible. Interpretations by authorized university officials should flesh out the bare bones of the rules with the goal of achieving reasonable regulations that will give adequate notice to potentially affected persons. These rules and regulations should be reexamined periodically and amended whenever desirable or necessary. Changes in the

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[31] *E.g.*, Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), *aff'g* 295 F. Supp. 978 (W.D. Wis. 1968).

[32] *See, e.g.*, Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970) (school regulation that clothing and grooming are not to be of "extreme style and fashion" held unconstitutionally vague); Myers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (Dist. Ct. App. 1969) (high school dress policy stating that extremes of hair styles were not acceptable held unconstitutional).

substantive rules should be made through a process of negotiation or arbitration.

The next important consideration is the factors surrounding the decision to invoke a disciplinary proceeding. First of all, there must be a consensus on a philosophy and method for setting in motion whatever disciplinary procedures are to be used — the equivalent of filing charges in a criminal proceeding. The designation of those empowered to invoke the process will depend upon the seriousness of the offense and the extent to which the disciplinary function has been delegated to students and other nonadministrative personnel. We are already familiar with honor code violations where students invoke the procedure and with dormitory judicial councils in which students play a similar role. Where mixed disciplinary boards or committees are adopted, a member of the administration, typically a dean of students, usually initiates the action. At that point the following questions should be considered: What are the proper concerns of an officer of the university in this role? Should he be concerned with public opinion or how the alumni will react? Is deterence of others the primary consideration? Is it relevant that the alleged offense has outraged the faculty? Are other students endangered by this breach of rules? Are there well considered gradations of administrative action short of filing a charge against a student? It is easy to conclude that a system of disciplinary action based on the mutual interests of the institution and the student is the only system that deserves support. But in the real world, these are not always the only interests involved; instead, broader interests, as suggested above, might well influence the university's decisions respecting disciplinary actions.

Assuming that the process will be invoked on certain occasions, the question of how prosecutional discretion is to be exercised becomes critical, and no categorical answer is available. It is suggested that no single officer should be solely responsible for working out the policy, and that the actual administration of declared policy should be reviewed from time to time. The individual responsible for bringing charges should have a series of graded options open to him. If an alleged violator's continued presence in the university community poses no danger to himself or others, a reprimand or warning may be sufficient; depending on the facts and circumstances, administrative penalties such as a fine, restitution, or withdrawal of a privilege may be more appropriate. Where an offense is repeated, formal disciplinary proceedings may be appropriate.

Where the offense is serious, the first two options might be bypassed and a formal hearing immediately convened. The important point is that the decision to discipline should not be made on an arbitrary basis. Rather, it should reflect a reasoned policy that those who have violated a significant rule should be charged.

Moving beyond the decision to charge, there is the question of the appropriate hearing mechanism for matters not handled through a purely administrative process. Although it is not wise to insist on a fixed structure for this board or on any one set of procedural rules, a few suggestions seem relevant.

First, the factfinding should be kept distinct from the sanctioning process. This would protect the student from the problem created where the two functions are merged: the imposition of punishment by a person qualified to find facts but lacking the necessary wisdom for disposing of the case. One possible solution is a bifurcated hearing, but this seems excessively awkward and time-consuming. At the very least, however, the board should be indoctrinated as to the absolute necessity of maintaining a separation between factfinding and sanctioning.

Additional considerations are the kind of person needed to fill the important position of chairman of the board, and the question of the chairman's duties. It is suggested that the chairman be a well-qualified, nonuniversity person, possibly selected by agreement between the students and the administration. Such a chairman need not be a practicing attorney; he might be an experienced negotiator or arbitrator. As the presiding officer, he would have the responsibility of laying out the ground rules in each proceeding, of extensively questioning the witnesses, of protecting the witnesses against unfair treatment, and of making a summary record of the proceedings. In short, he would be charged with fully developing all the facts of the case.

Another consideration is what place, if any, is there in the hearing for representatives of the institution and the person charged? If a competent and independent hearing officer presides, there is no need for a prosecutor or defense counsel. But if the institution has a designated representative, the alleged offender should have equally capable assistance. The undesirable situation that often prevails is that the institution typically has a more or less experienced spokesman, while the student has none. If each side has a special representative, each representative should perform his functions under the direction of the presiding officer. It should be made clear to each

that his purpose is to assist in developing the truth and reaching a fair disposition of the case.

There are a number of other considerations involved in the hearing. Legal rules of evidence need not be followed, but there ought to be an orderly process for developing the facts, with variations permitted to facilitate a just result. For example, if a statement by a security officer is germane to the resolution of the issue, he should give his version in the presence of the alleged offender and then should be subject to cross-examination. Similarly, where witnesses are needed to assist the defense, the board should assume responsibility for insuring their presence. The test with respect to adopting any procedural device is whether it is essential to a fair hearing and disposition of the matter. It is on these grounds that the alleged offender should always be given adequate notice of charges in sufficient detail to enable him to prepare his defense and to present mitigating factors. The student might well be given the option of a hearing open to the university community, with the proviso that any spectators must remain orderly.

Finally there should be an appeal channel for a review of both the facts and the sanctions. The appellate tribunal, however, would not have authority to impose or increase a penalty contrary to the conclusions of the hearing board. And effective review would require that the record be sufficient to determine whether there was prejudicial error, such as insufficient proof.

The emphasis at the hearing should be on achieving justice for those against whom an institution finds it necessary to bring charges in order to vindicate a principle or a rule designed to protect all those who participate in its activities. The procedures should reflect an acceptance of principles associated with the concept of justice, though not necessarily those attached to the concept of an adversary proceeding. Justice to the individual and to the institution is more likely to result from a well-conducted, nonadversary proceeding, where the emphasis is not only on obtaining full information, but also on meting out penalties with the compassion that most university offenders merit. In certain cases, justice may require the ultimate penalty — severance from the academic community. But the philosophy behind the proceeding should be one that concentrates on educating and warning the offender, and convincing him that being a good university citizen is in itself a worthwhile ideal.

V. CONCLUSION

Amid the current challenges directed against institutional power and the demands that that power be exercised in a fair manner, it is an appropriate time for universities to reassess their policies and procedures respecting student discipline. Although the university may feel a sense of security in adopting procedural requirements prescribed by the courts, reliance on judicially prescribed procedures alone may not insure that the optimal interests of the student and the university are served in disciplinary actions, for the reasons discussed above. As an alternative to adopting minimal court-defined standards, however, universities might look beyond judicial requirements and under the guidelines suggested herein, establish disciplinary policies and procedures which will more adequately serve the interests of all parties involved. Admittedly, the latter approach to student discipline may not be attainable in larger universities where, amid the "big business" of education, the total fairness and objectives of disciplinary actions have been irretrievably relegated to secondary importance. It is still possible, however, for the many universities which are not completely absorbed in operational exigencies to take affirmative steps to insure that their disciplinary policies and procedures are attuned with their ultimate goal — the education of students, who are, indeed, the universities' most precious commodity.