

Governance of the University: Rules, Rights, and Responsibilities

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THE REGULATION and control of the behavior of the members of the university community through the exercise of administrative rule-making authority is beset with unusual difficulties that seem to inhere in the nature of the institution. The characteristic individualism and cherished independence of the faculty combined with the assertiveness, exuberance, and idealism of large numbers of students eager to challenge the contemporary adult world make up a population of high and unpredictable volatility. Although the history of higher education both here and abroad is filled with illustrative examples of conflict between town and gown that reach back to the middle ages,¹ every new occasion is greeted by the nonuniversity world with fresh surprise, dismay, and insistent demands that the university's administrative officials take prompt action to suppress not only the more traditional outbreaks of student rowdiness but also the demonstrations, parades, and sit-ins which have proven to be so effective today in expressing campus protest and dissent.

Responsive to these demands as any public university administrator might like to be, however, and as unsympathetic as he may feel about the objectives and conduct of his academic charges there are limitations upon his legal authority to act. He has a plain duty to protect academic freedom² from the pressures and influences of partisan or political groups.

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¹ For some interesting accounts of the violent proclivities of both students and townsmen in medieval universities, see 3 RASEDALL, *UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* 96 (new ed. 1936). In his description of town and gown warfare at Oxford in the 14th century, the author writes: "There is probably not a single yard of ground in any part of the classic High Street that lies between S. Martin's and S. Mary's which has not, at one time or other, been stained with blood. There are historic battlefields on which less has been spilt." See also *id.* at 427-35. Nor are disturbances new at Berkeley. The headlines of the *San Francisco Bulletin* for March 23, 1904, p. 1, read: "Riot at the University"; "Twelve rushers taken in hand by State University and booked for expulsion"; "Handcuffed on hill by Professor Cory"; "Two hundred strong, classmen lined up for battle but were fought back by school faculty and the police." According to the *Bulletin*, the situation was still precarious on the next day: "Rushers used pistols at Berkeley"; "Five shots fired at Policeman Smith when surprised." *San Francisco Bulletin*, March 24, 1904, p. 1, col. 5.

² "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly

and organizations; his exercise of academic disciplinary authority is subject to restrictions that are very much the same as the traditional restraints upon governmental exercise of police powers. In short, academic discipline must not be arbitrary,³ it should conform to reasonable standards of due process,⁴ and its scope is subject to conventional jurisdictional boundaries.⁵

It should be remembered too that illegal conduct, either on or off campus, is primarily the responsibility of local law enforcement agencies.

is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

³ *Slochow v. Board of Educ.*, 350 U.S. 551 (1956); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961); *Gleason v. University of Minn.*, 104 Minn. 359, 116 N.W. 650 (1908). *Dixon* is noted in 14 ALA. L. REV. 126 (1961). The court in *Dixon* pointed out that even those cases which have sustained disciplinary action against students invariably concede that such measures must be based upon some reasonable grounds. The concession, however, may be insubstantial. Thus the court, in *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 491, 231 N.Y. Supp. 435, 440 (1928), held that although the university must have a reason for discipline, it need not give one! In *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909), the court held that Negro students may not be excluded arbitrarily from college but the court could find no legal means to enforce the obligations of a private corporation. For a comprehensive description of legal lip service to the rule of reason in cases involving student discipline, see Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963).

⁴ *Dixon*, *supra* note 3, and its small progeny; *Gleason*, *supra* note 3; and an ancient predecessor, *Commonwealth ex rel. Hill v. McCauley*, 2 Pa. County Ct. 459 (1886), 3 Pa. County Ct. 77 (1887), stand almost alone in their insistence on strict compliance with the requirement for fair procedures.

⁵ "Jurisdiction is of three kinds: (a) Of the subject-matter; (b) of the person; and (c) to render the particular judgment which was given." *City of Phoenix v. Greer*, 43 Ariz. 214, 217, 29 P.2d 1062, 1064 (1934). "Jurisdiction is the power to hear and determine the subject-matter in controversy . . ." *State v. Smith*, 29 R.I. 513, 522, 72 Atl. 710, 714 (1909). "It is a general rule of criminal law that the crime must be committed within the territorial jurisdiction of the sovereignty seeking to try the offense in order to give that sovereign jurisdiction." *Yenkichi Ito v. United States*, 64 F.2d 73, 75 (9th Cir. 1933); *Beale, The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923). There are exceptions, of course, based upon conduct directly affecting the sovereign although committed outside of its territorial boundaries or upon the citizenship of the offender without regard to the locus of the crime. See EHRENZWEIG & LOUISELL, JURISDICTION IN A NUTSHELL 103-06 (1964). The provisions of article IX, § 9 of the California constitution confer the power of organization and government of the University of California upon a public corporation known as "The Regents of the University of California." The Regents are granted broad powers over the management and disposition of University property, gifts, and donations and also "all the powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued, to use a seal and to delegate to its committees or to the faculty of the University, or to others, such authority or functions as it may deem wise . . ."

This is obvious and well understood in the case of the lawbreaker who engages in criminal conduct on campus but is not a member of the university community; he is beyond the reach of any academic sanction. If the offender, however, is a student or a member of the faculty, the existence of limitations upon the exercise of campus authority, whether the act has been committed on or off campus, is not always readily discernible and appears to be generally unrecognized. This is particularly true in times of crises. Public indignation, generated by expressions of protest and dissent by students and faculty members which run counter to popular public feeling, stimulates the urge to punish and suppress by any means readily at hand. And what means are more convenient, swift, and effective than the simple expedient of throwing the ungrateful rascals out?⁶

When the university fails to accede to such requests for instant justice a new cause for indignation and alarm arises, there are fresh re-creminations from the adherents of all concerned, and the crisis becomes infused with new life.

In large part, the confusion and misunderstanding between town and gown in the context of contemporary student activist movements may be attributed to a widely-held impression that the admission of a student is a matter of grace or of privilege that, once extended, can be recalled or revoked upon simple grounds of what appears to be "best" for the university, of failure to conform to matters of custom or of deportment, or for engaging in conduct "unbecoming a student." It cannot be gain-said that there is a fair amount of legal authority that may be cited in support of the proposition that the discretion of the school authorities to

⁶ The treasurer of the State of California is reported as having made the following remarks in a public address in Los Angeles: "I have no sympathy with the Vietnam sit-ins, or teach-ins," Betts declared in remarks prepared for a Town Hall meeting. Noting student demonstrations against the Vietnam war at the University of California's Berkeley campus, he added: "I see no reason for allowing these students to remain in school. They should have been, and should be in the future, expelled . . . I see no reason for the faculty members involved to be retained . . ." *San Francisco Chronicle*, Dec. 8, 1965, p. 8, col. 3.

Some sixty-two years earlier a San Francisco editor wrote: "[T]here is little doubt that Practice and Precedent do give the Faculty very definite jurisdiction over student conduct, even outside of college. Only last week a Senior at Yale was dropped from the roll for conduct which was stated to have brought discredit on his college, and there have been scores of such cases at Cornell, Harvard, Pennsylvania and other of the larger universities [in the] East. We know of a certain large university in the West which has expelled a man for insulting a telephone operator, and another for being drunk and disorderly in public. A large university appears to be conducted in a manner very similar to that of a club. It reserves the right to drop those of its members who do not reach certain standards of gentlemanly conduct. From all this it would seem that a student affairs committee *has the power* to make and enforce such rules as it sees fit, that it has a right not only to exercise jurisdiction over student conduct locally, but also over matters beyond the limits of the Campus." Leslie M. Turner, *Rushing*, 44 *THE OCCIDENT* 298-99 (1903).

invoke even the most extreme academic sanctions is limited only by such undefinable standards.⁷ For the most part, however, these decisions have failed to make any distinction between private and public institutions, they have been based upon theories of express or implied contract, and they have either antedated or ignored the flowering of the concept of due process. There is good reason now to expect that the trend of judicial decision will reject the notion that a citizen surrenders his civil rights upon enrollment as a student in the university.⁸

Equally to be rejected is the notion that the status of student or teacher carries with it more rights and more immunities than those possessed by members of the general community. There is no basis in law

⁷ The classic case is *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928), in which the court upheld the discipline of a student because she was not thought to be "a typical Syracuse girl." See also *Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924) (the rules of this private university require observation of the "conventions and proprieties of refined society"; and proof of any overt act is not required); *Robinson v. University of Miami*, 100 So. 2d 442 (Dist. Ct. App. Fla. 1958) (student compelled to withdraw from teacher training course because of his "fanatical atheism"); *North v. Board of Trustees of the Univ. of Ill.*, 137 Ill. 296, 27 N.E. 54 (1891) (compulsory chapel); *White v. Portia Law School*, 274 Mass. 162, 174 N.E. 187 (1931) (exclusion held justified because of student's failure to pay for goods obtained on credit; her conduct held subversive of school discipline, hence there was no requirement for notice and hearing); *Woods v. Simpson*, 146 Md. 547, 126 Atl. 882 (1924) (student was unwilling or unable to answer questions concerning the source of a false news story; held, exclusion from the University of Maryland must not be arbitrary but here there were other "difficulties"); *People ex rel. Goldenkoff v. Albany Law School*, 198 App. Div. 460, 191 N.Y. Supp. 349 (1921) (student held expellable because he made a socialistic, seditious statement); *Samson v. Trustees of Columbia Univ.*, 101 Misc. 146, 167 N.Y. Supp. 202 (Sup. Ct. 1917) (the plaintiff in this action was not permitted to register for his senior year because of antiwar and antidraft speeches; the court held that the student's conduct was "culpable and cowardly"; he must not be permitted to inculcate "impressionable young men" with "the poison of his disloyalty"); *Barker v. Bryn Mawr College*, 278 Pa. 121, 122 Atl. 220 (1923) (contractual right of private school to exclude "undesirable" students; hence discipline does not require notice or hearing).

⁸ See, e.g., *McLaurin v. Oklahoma State Legislature*, 339 U.S. 637 (1949); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). In contrast to the uncertain academic security of the student, members of the faculty customarily enjoy the protections of tenure and academic freedom. The Standing Orders of the Regents of the University of California provide: "All appointments to the position of Professor and Associate Professor and to positions of equivalent rank . . . are continuous in tenure until terminated by retirement, demotion or dismissal. The termination of a continuous tenure appointment or the termination of the appointment of any other member of the faculty before the expiration of his contract, shall be only for good cause after the opportunity for a hearing before the properly constituted advisory committee of the the Academic Senate. (Standing Orders of the Regents, Chapter VI, Section 3(j).)" *Handbook for Faculty Members of the University of California* 58, Rev. Feb. 1963. "The Academic Senate, by concurrent action of its Northern and Southern Sections in May, 1962, and supplemented by administrative action by the President, affirmed the right of all persons with academic appointments, *except registered students*, to make public the results of their research, whether orally or in writing, free from direct or indirect restraint or censorship by any representative of the University." *Id.* at 29. (Emphasis added.)

or logic for any such preferred position.⁹ Nor should preoccupation with the problems of securing the recognition of rights wherever such problems may exist obscure the fact that the exercise of rights involves concomitant obligations and that the discharge of those obligations imposes responsibilities upon every member of the community whether within or without the university. Unlike rights, however, responsibilities are not characterized by equality; on the contrary they differ in an infinite variation of degrees and in innumerable kinds, they apply to some with greater force than others, and they are shaped and determined by the multitude of environments in which the members of society live. Important among these is the environment of the university.

Broadly stated, the mission of the university is to impart learning and to advance the boundaries of knowledge.¹⁰ This carries with it administrative responsibility to control and regulate whatever conduct and behavior of the members of the university family impedes, obstructs, or threatens the achievement of its educational goals.¹¹ In turn, it is the responsibility of students and faculty to refrain from conduct that obstructs or interferes with the educational and research objectives of the university, which impairs the full development of the mutual process of teaching and learning, or which imposes restraints upon the advancement of knowledge. In part, these mutual responsibilities are reflected in rules and regulations ordinarily accepted as a matter of course, but which are now the target of intense reaction that goes almost to the point of rejecting the authority of the university to make any rules at all. To be sure, the point of the attack on the university's substantive rule-making power is almost entirely directed against those rules and regulations which affect political speech and assemblage on campus and which open the door to the imposition of academic sanctions for off-campus activity, more particularly of course, for participation in so-called

⁹ The comment of Mr. Justice Fortas, concurring in *Shuttlesworth v. City of Birmingham*, 382 U.S. 211, 218 (1965), is in point: "Civil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. Their cause confers no privilege to break or disregard the law."

¹⁰ "A great university has four responsibilities in America today: first, developing the intellectual, social and moral character of its undergraduates—what has traditionally been called liberal education; second, training recruits for the professions and keeping their knowledge up to date; third, providing consultants, reports and specialized services to agriculture, industry, commerce and government; fourth, conducting advanced research in every field of knowledge, both pure and applied." Byrne, Report on the University of California and Recommendations to the Special Committee of the Regents of the University of California 2, May 7, 1965 [hereinafter cited as Byrne Report].

¹¹ "The Free Speech Movement recognizes the necessity for regulations ensuring that political activity and speech do not interfere with the formal educational functions of the University." *Position of the Free Speech Movement on Speech and Political Activity*, The California Monthly, Feb. 1965, p. 80.

civil disobedience demonstrations. To question the rule-making authority of the university in one aspect, however, necessarily brings into question a basic problem of jurisdiction: What kind of student or faculty misconduct impinges upon the fulfillment of the goals of the university?

Two important subsidiary questions also require consideration: the relevance of the time and place of such misconduct and the significance of the fact that such misconduct may or may not be in violation of the criminal law. The answers to these questions bear directly upon the legal and moral justification for the imposition of academic sanctions for the behavior of members of the university community.

The determination of the scope and boundaries of jurisdiction, no matter how acceptably it may be resolved, leaves other issues of equal rank to be considered: How are the rules to be made and promulgated and what are the requirements of procedural fairness for the administration of the university's rules, for fact determination, and for the imposition of sanctions? If this issue requires emphasis, it might be pointed out that much of the decisional law arising from the imposition of academic discipline appears to assume the existence of a conclusive presumption of the validity of university regulations and has shown a surprising lack of awareness of the necessity for procedural barriers against the exercise of arbitrary power. Bemused by the hoary *in loco parentis* shibboleth, decision after decision has not only expressed a toleration for arbitrary action but has approved it.¹² Fortunately, increasing awareness of the age¹³ of today's student population and the impact of even the mildest

¹² E.g., *Dehaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1957); *Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913); *People ex rel. Bluett v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 Pac. 433, *cert. denied*, 277 U.S. 591, *error dismissed*, 278 U.S. 661 (1928). "Several legal theories compete for acceptance as explanations of the source of college authority to discipline students; each theory suggests built-in limitations on college power which may have important influence on the scope of judicial review. That the teacher stands in place of the parent—*in loco parentis*—with the same power to control and punish, is one of the oldest and most common explanations of disciplinary authority. . . . The *in loco parentis* concept is used by courts today to state the prerogatives of the institution, as well as the teacher; the university, as well as the primary school. It involves expulsion, as well as physical punishment" Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1367-68 (1963).

¹³ "Finally, there is the factual demise of *in loco parentis* as an adequate basis for relegating university students to a condition of second-class citizenship. In earlier decades, the concept had some superficial appeal, if only because the vast majority of college students were quite young and generally below the age of eighteen. Today, in contrast, there are more students between the ages of thirty and thirty-five in our universities than there are of those under eighteen, and the latter group accounts for only 7% of total college enrollment." Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1, 17 (1965). (Citing U.S.

of academic disciplinary measures on the individuals directly affected appears to be leading the courts away from the idea that the university is a vicarious, all-wise parent and toward an appreciation of the realities of the university-student relationship.

I

THE PROBLEM OF JURISDICTION¹⁴

The exercise of the university's rule-making authority and the imposition of sanctions for breaches of its regulations are plainly within its jurisdiction when the rules relate to the performance of academic duties and compliance with its standards of scholarship. Disqualification because of deficiencies in these areas or because of dishonesty or fraud in meeting requirements present no jurisdictional problems, but there may be problems of fact determination and the assessment of proper penalties filled with difficulty. Similarly, conduct disruptive of good order in the classroom, the library, or in other campus facilities, which results in the damaging or defacing of property, or which endangers the health or safety of others on campus may properly lead to disciplinary action. When on-campus behavior of this sort is of such a degree, however, that it constitutes a violation of the criminal law, a jurisdictional choice may present itself in which the guidelines for decision may be most unclear. As a matter of law, since the conduct is an offense against university regulation as well as an offense against the state, both have jurisdiction to impose appropriate penalties. As a matter of prudence and discretion, however, wisdom may well dictate that in some such cases, action by one jurisdiction is enough. Certainly, a student charged with a relatively minor offense whose prior record was exemplary might well be saved from public disgrace yet effectively disciplined if the matter went no further than the dean's office. On the other hand, the nature of the case and the probable disposition of it by the civil authorities may suggest that university action would be without practical effect or serve no useful purpose.¹⁵

BUREAU OF THE CENSUS, DEPT OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, No. 110, at 12 (1961.) Student registration figures for the University of California at Berkeley for the fall semester 1965 were Undergraduate 16,610; Graduate 10,224; Total 26,834. University Bulletin, University of California, Nov. 1, 1965, p. 81.

¹⁴ Jurisdiction is here considered insofar as it extends to the imposition of academic sanctions. Express authority may be given to university administrators by statute to make and enforce regulations with respect to protection of property, traffic control, and the like, e.g., CAL. VEH. CODE § 21113 (traffic regulation); CAL. EDUC. CODE § 23501 (University of California police); CAL. EDUC. CODE § 23604.1 (violations of state college trustees' rules concerning buildings and grounds are misdemeanors).

¹⁵ "The University distinguishes its responsibility for student conduct from the control

It is not possible to make any convenient classification of the kinds or types of cases in which choice of jurisdiction decisions will appear. Generally they will present themselves in situations in which neither the interest of the university nor the interest of the community (and the victim of the offense, if any) has been seriously affected and where the application of sanctions by one of the jurisdictions concerned will serve as an adequate corrective and rehabilitative measure.

The jurisdiction of the university to make and enforce rules in the foregoing on-campus situations is so closely related to its academic interests that it seldom becomes a matter for question or comment either within or without the university community. Similarly, off-campus misconduct or misbehavior which is not the product of group action, which is not allied to political causes, or which is not related to movements for social or economic change seldom become a matter of public interest. As a matter of fact, off-campus misconduct rarely impinges upon the interests of the university. Ordinarily it will engage the attention of the university administrator only in those cases where the behavior in question becomes a matter of scandal or notoriety. The big problems occur when students or faculty, whether on or off campus, become involved as members of the university community in political advocacy, demonstrations of protest against social and economic conditions, and other group action designed to express criticism and disapproval by highly visible and provocative means. Subjects of protest range all the way from the administration of campus affairs to the conduct of national policy.

The exercise of university authority to make rules and regulations in these areas requires the drawing of fine lines of demarcation between matters which involve legitimate university interests and matters which directly involve constitutionally protected rights. The existence of these rights in a public educational institution is not delimited by campus boundaries, they are not lost by affiliation with it, and they require very much the same kind of recognition on campus as elsewhere. Like all other state governmental functions and institutions, "the state university is governed by the Constitution."¹⁶ Just as the proper exercise of constitu-

functions of the wider community. When a student has been apprehended for the violation of a law of the community, the state, or the nation, the University will not request or agree to special consideration for the student because of his status as a student. The University will cooperate fully, however, with law enforcement agencies, and with other agencies in any program for the rehabilitation of the student. Ordinarily, the University will not impose further sanctions after law enforcement agencies or the courts have disposed of a case." University of Oregon Student Code of Student Conduct A.2; see Linde, *Campus Law: Berkeley Viewed from Eugene*, in this issue.

¹⁶ Committee on Academic Freedom, Berkeley Div. of the Academic Senate, Report 3,

tional rights in the general community must be respected, so must it be recognized within the campus community. As general propositions these observations are unexceptional; in the context of specific behavior, however, misunderstanding and emphatic disagreement about the "proper" exercise of constitutionally protected rights strain the limits of forbearance and discretion when university authorities attempt to solve the problems of regulation and control.

Legal precedent directly in point is scanty but there is, nonetheless, a body of decisional law which indicates with reasonable clarity where the margins of jurisdiction must be drawn. For the most part, these are decisions in cases arising out of the attempts of local government to regulate or prohibit speeches, assemblage, or political activity in parks, streets, or other publicly owned facilities.¹⁷ While it is true that the university, because of its educational and academic interests, may be more restrictive than a municipality in controlling these kinds of conduct and activity, the basic constitutional limitation to narrowly drawn regulations with respect to time, place, and manner is a clearly applicable principle. The rights to freedom of assemblage and freedom of expression must not be exercised in such a way as to interfere with the operations of classrooms and laboratories, with the availability and use of libraries and other facilities, or with the conduct of the university's administrative responsibilities. Reasonable regulation to prevent such interference is clearly within the rule-making jurisdiction of the university.¹⁸

A second principle requires that permissible regulation must not be applied in a discriminatory manner. Facilities for speech and assemblage may not be withheld or restricted in such a way as to confer monopolistic use or to impede equal access.¹⁹ This seems obvious enough and provokes

Dec. 15, 1964. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The University of California "is a constitutional department or function of the state government." *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 257 (1934).

¹⁷ See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951); *Thomas v. Collins*, 323 U.S. 516 (1945); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁸ Cf., e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (municipal regulation of use of sound trucks).

¹⁹ "The state is under no duty to make school buildings available for public meetings If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. . . . Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property." *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 545-46, 171 P.2d 885, 891 (1946). "[W]hat the state cannot do directly it may not do indirectly. Since there is no power in the state to

no dissent when the principle of equality is spoken of in terms of race, creed, political affiliation, and the like.²⁰ Unfortunately, there are many who advocate a new standard by which exclusion from the public forum is justified on the grounds that the speaker, the group, or the topic to be considered is "controversial."²¹ Neither the public university nor any other branch of government may lawfully apply such a test; the unpopular cause and the popular cause stand before the Constitution with equal credentials.

The third important principle requires that no restriction, prohibition, or censorship of the content of speech or advocacy be imposed unless there are extraordinarily compelling reasons; such controls must be limited to situations where clear and present dangers to vital interests of the university present themselves and where it is not possible to resort to the general law.²² Such situations, however, are more theoretical than real and there is little, if any, evidence that the possibility of their occurrence requires expression in campus rules and regulations.

University rules and regulations conforming to these principles are properly within the scope of the university's rule-making authority and jurisdiction. Their administration and enforcement will not trespass on the freedoms of the campus community, they will insure the protection and maintenance of an orderly environment and facilitate the achievement of the educational goals of the institution.

II

THE PROBLEM OF RULE ENACTMENT

Fundamental authority for the making of rules and responsibility for their enforcement in the public university is derived from the governmental authority of the state itself and is normally delegated to a board which in California consists of a mixed group of public officers *ex officio* and citizens.²³ Although this primary delegation of "full powers of

stifle minority opinion directly by forbidding its expression, it may not accomplish this same purpose by allowing its facilities to be used by proponents of majority opinion while denying them to dissenters." *Buckley v. Meng*, 35 Misc. 2d 467, 475-76, 238 N.Y.S.2d 924, 934 (Sup. Ct. 1962) (citing *Danskin*).

²⁰ See, e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

²¹ "If . . . one of the criteria for the use of Hunter College's facilities is whether or not the proposed program presents a popular, non-controversial point of view—one which is not 'opposed by substantial parts of the public,' to quote the President's words—it would follow that the standard for the use of the facilities is indeed clear. It would also follow, however, that this clear standard is itself unconstitutional because it discriminates against the expression of unpopular, minority opinion." *Buckley v. Meng*, 35 Misc. 2d 467, 473, 230 N.Y.S.2d 924, 932 (Sup. Ct. 1962).

²² Cf. *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

²³ CAL. CONST. art. IX, § 9. Other states follow a similar pattern. E.g., ALA. CODE, tit. 52,

organization and government" may be in plenary terms,²⁴ it is obvious that the board must and should discharge its regulatory and rule-making authority in conjunction with the advice and counsel of its administrators and its faculty.²⁵ The techniques and skills necessary for the proper administration of an educational institution are hardly matters of common knowledge. In this area much reliance must be placed on the administrative staff for the content of the rules and much authority must be delegated to the staff for the operational necessities of rule enforcement. To an even greater degree, the faculty of the university must be granted a wide discretion for enacting and administering academic regulations, defining academic standards, and prescribing the content of the curricula.²⁶ But what of the university's third estate, the students? This group is the one most affected by the exercise of the rule-making power on campus and the one with the greatest stake in the fair administration of campus law. Should these members of the campus community have any voice in the definition of rules and regulations and in the establishment and administration of enforcement procedures?

The last part of the question can be quickly answered: Students can and commonly do participate in the enforcement of university rules.²⁷

§ 493 (1958); ARIZ. CONST. art. XI, § 5; HAWAII REV. LAWS § 44-2 (Supp. 1963); IDAHO CODE ANN. § 33-102 (Supp. 1965); LA. REV. STAT. § 17:1453 (1963); ME. REV. STAT. ANN. tit. 20, § 2251 (1964); MONT. REV. CODES ANN. § 75-101 (1947); 24 PA. STAT. ANN. tit. 24, § 2536 (1962); 5 UTAH CODE ANN. § 53-31-7 (1953); WIS. STAT. ANN. § 36.02 (1957).

²⁴ "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'the Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds." CAL. CONST. art. IX, § 9.

²⁵ "The framers of the Constitution expected the Regents to employ their power to delegate as the well-being of the University requires, to the executive officers of the University, to the Academic Senate in matters of admissions, curriculum, and degrees, and to any other appropriate individuals or groups. The Constitutional conception of the Regents, in other words, was not that they should be the government of the University, but that they should make provision for the government of the University." Byrne Report 11-12.

²⁶ "Freedom, too, is needed to maintain a great university. Experience has shown that in order to attract the best students and faculty, they must be given a large measure of control, either direct or indirect, over their own affairs." Byrne Report 5.

²⁷ The University of Oregon Student Code of Conduct, A.5, provides: "Students shall have an opportunity to participate fully in the formulation of all policies and rules pertaining to student conduct and in the enforcement of all such rules." The Chancellor of the Berkeley Campus of the University of California established a Campus Rules Committee, December 13, 1965, of which five of its ten members were elected student representatives. San Francisco Chronicle, Dec. 14, 1965, p. 44, col. 6.

"We submit that the events of the fall at Berkeley show, among other things, that a really effective student government, responsive to student opinion, could well have been a funnel for the grievances that existed and might have averted or at least ameliorated the conflict that developed. University regulations should encourage the students to actively participate in the student government . . ." Byrne Report 71-72.

Such participation may include the exercise of complete enforcement responsibility, shared responsibility with members of the faculty or administrative officers, or be limited to an advisory role where sanctions are of such a serious nature that the administration of disciplinary measures is explicitly restricted to high administrative officers.²⁸ But limited or unlimited, there are no substantive obstacles to student participation as such in the administration of the rules. When it comes to formulation of the rules and to the definition of policies relating to campus conduct, however, the practical problems arising from the transient nature of the student body, and from the formulae by which the legislature or the state constitution has delegated authority to the governing board, stand as very real impediments to meaningful student participation. Obviously, the population flux which characterizes the student population of the campus makes it impossible for each year's entering classes to have participated in the formulation of the rules which prevail when a semester opens and the corresponding loss of those who have been graduated deprives the university of a substantial amount of student ability in the field of rule-making as it does in the field of athletic endeavor. But just as football success may survive the loss of graduating seniors, so may the university count on a continuing inflow of student population interested in and equipped to share an important part of the burden of rule legislation and the formulation of policy for student behavior.

If this appears to be a radically optimistic and utterly impractical concept of the administration of university government, let it be borne in mind that the slogan "consent of the governed" describes a primary value in the technique of personnel administration. If those who are bound by the regulations have had some significant voice in shaping them, the task of the administrator is eased immeasurably. This is not to be understood as a disguised plea either for the so-called "free university" or for tolerated student anarchy on campus. It is rather a plea for the establishment of procedures which will give those who are most concerned with the impact of university rule and regulation an opportunity to make themselves heard, a chance to offer suggestion and, above all, to be considered in something more than theory, as responsible, inte-

²⁸ The University of Oregon Student Code of Conduct authorizes a student court, which is composed of five students and two faculty members, to impose the sanctions of suspension or expulsion by a two-thirds vote of the members of the court. Code of Student Conduct A.10.e.1. On the other hand, the University of California Statement of Policy relating to student conduct and student organizations effective July 1, 1965, restricts the imposition of disciplinary sanctions to the Chancellors except that expulsion requires approval by the President. University of California, Policies Relating to Students and Student Organizations, Use of Facilities, and Non-Discrimination 8, July 1, 1965 (Part E. Student Discipline, b. 1).

gral sharers of the whole life of the academic community. Given this kind of identification with the mission of the university, students will be strongly motivated to act as responsible members of a scholarly community and largely freed from compulsions to act like children because of a conviction that they are treated as children.

If the validity of these generalizations may be granted, it is necessary to explore how this population-in-transition known as the student body may effectively be given a voice in the formulation of the rules and the definition of policy with respect to student behavior. There are four aspects of the administration of campus rules and regulations in which student involvement can be helpful and significant, that is, in the consideration of their repeal, in the consideration of their amendment, in the contemplation of enacting new legislation, and in the review and re-determination of policy. As to each of these continuing administrative functions, formal procedures ought to exist through which notice of impending or proposed change is given to the campus community, through which consultation with representatives of the students is encouraged, and through which counter-suggestion, approval, or objection may be voiced. There are many ways in which these objectives can be implemented and their potential for rewarding contributions on the part of students toward high standards of conduct be increased but none will be effective unless student (and faculty) participation is honestly welcomed, thoughtfully considered, and finally resolved in a common spirit of trust and respect.

It is, of course, easier to suggest such ideal goals than it is to accomplish them. In many educational institutions they will come, if at all, only after a substantial amount of abrasive controversy. But come they must unless the notion prevails that students must be prepared to submit with docility to the paternalistic functioning of a rule-making process in which they may take no part. The acceptance of the idea of a university committed to such a philosophy is not tolerable in a society whose very existence is dependent upon a never-failing supply of competent young people trained in and oriented toward participation in self-government.²⁹

²⁹ "The development of the character and intellect of university students cannot be viewed as a one-way process, in which the university gives and the students take whatever is given. It is a two-way process, in which the students give their time, their energy and their loyalty, and the other members of the academic community give in return. University education, in other words, is not simply a privilege provided by society to those of its children who can benefit from it. University education is a set of mutual obligations, in which society provides the student with certain privileges and opportunities, and he in turn commits a part of himself to society's purposes. His commitment is as important as society's, and must receive equal weight in the thinking of both educators and statesmen." Byrne Report 3.

III

DUE PROCESS STANDARDS FOR RULE ENFORCEMENT

Given a rule and regulation structure for the university community consonant with the university's interest in achieving its high objectives in an orderly environment but cognizant of the proper limits of the restraints which it may properly impose on the members of its society, fair procedures must be provided for enforcement of the rules. Where these do not exist or where they are flouted the rule-making authority becomes an instrument for arbitrary action, it does not command the respect of those subject to its power, and ultimately it becomes destructive of the very values which it is designed to protect. The moral position of the university administrator as he discharges his obligation to enforce the rules, like the moral position of any law enforcement officer or agency, must not be compromised. The principles of fairness embodied in the law's definition of due process, if not more important in the governance of the state university than in other areas of governmental concern, unquestionably burn more deeply today in the consciousness of students and faculty than in the minds of the community at large. They are quick to sense injustice, real or imagined, and articulate in protest. Even if more fundamental reasons did not exist, the wise university administrator, in the exercise of sound discretion, will always be conscious of the necessity for fair and even-handed enforcement of the rules.

Public acceptance of due process principles, particularly in their application to the administration of criminal justice, is almost completely free from dissent. To be sure, there are controversies and disagreements about specific details or about what does or does not constitute due process but no one argues that due process of law ought to be abolished. Why is it then that so many otherwise reasonably informed persons appear to think that the public university should be free to impose disciplinary sanctions for what is considered to be student misconduct without let or hindrance and without according the suspected offender "the protection given to a pickpocket"?³⁰

Perhaps this attitude follows from a lack of understanding of the meaning and effect of the imposition of such penalties and a failure to understand that in a very real sense, the university's rules of conduct constitute the criminal law of the campus.³¹ Beyond that, it is a law whose penalties may have an impact upon a student's career, livelihood, or reputation of far more disastrous proportions than conviction for

³⁰ Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

³¹ Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1364 (1963).

crime. The stigma of expulsion or suspension and even the effect of so minimal a penalty as a recorded reprimand may become a lifelong handicap.³² So understood, it should be clear that the student is entitled to and, in many cases, probably much more in need of guarantees of procedural fairness than the professional lawbreaker.

This is not meant to suggest, however, that these guarantees must be secured by the traditional machinery of the criminal law. Within the community of scholars, responsibility for misconduct can be justly assessed and the appropriate sanction imposed by methods only minimally adversary in character, informal in administration and compatible with non-punitive objectives. The procedural requirements necessary for the fair administration of campus justice have been identified in judicial decision³³ and have been the subject of thoughtful consideration elsewhere.³⁴ They need no elaboration here. It is enough to note that the rules should be written with reasonable precision and without ambiguity as to the kind of conduct to which they relate and they must receive sufficient publication to insure that their existence and content is brought to the attention of all who may be affected by them.³⁵ Enforcement proceedings should be preceded by notice in the form of a statement of charges and the grounds for disciplinary action together with information about the procedures open to the accused should he desire to contest the charges.

A prompt hearing should be accorded the accused and where fact determination is required, he should have the opportunity to question the witnesses against him and to call witnesses in his own behalf. His right to counsel, should the matter appear to him to be of sufficient gravity to make legal assistance desirable, should receive ungrudging recognition and an accurate record should be kept to show compliance with all of the requirements of the process and to preserve the testimony

³² Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. REV. 368, 375 (1963).

³³ See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). At the conclusion of the main opinion the court expressed its views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. In essence, the requirements are: a specific statement of charges and the grounds for disciplinary action; a hearing containing the "rudiments" of an adversary proceeding; disclosure of the names of the witnesses and a resumé of the testimony of each; an opportunity to defend by witnesses or affidavits; and disclosure to the student concerned of the findings of the hearing officer. *Id.* at 158-59.

³⁴ See Van Alstyne, *supra* note 32; 10 STAN. L. REV. 746 (1958).

³⁵ One of the most persistent problems for both students and administrators on the campus of the University of California at Berkeley during the fall semester 1964 was that of ascertaining what the prevailing rules and regulations were. "Various stopgap attempts to meet this deficiency have been made by the University in faculty and student handbooks, but these publications, while good for their purpose, are neither definitive nor official. They constantly refer to University regulations which are difficult or impossible to find." Byrne Report 14.

of witnesses. The findings and recommendations of the hearing board or officer should be in writing. A copy should be furnished to the accused and in any case in which serious disciplinary action is recommended, a full review of the record by a high administrative officer should follow as a matter of course or, at least, upon the request of the individual concerned.

There are subsidiary details which bear on the fairness of any procedural code that may be adopted. These will include provisions for prompt hearings, according adequate opportunity to prepare for the defense, and assuring the impartiality of the hearing board or officer. In short, procedural fairness must not be left to chance or to *ad hoc* extemporization but must be considered as a fundamental part of the exercise of the university's disciplinary authority and receive the same careful consideration that is required in the enactment of substantive rules and regulations.

CONCLUSION

The behavior of the members of the university community can be counted upon to arouse the wrath of the public whenever that conduct is socially unacceptable or where it consists of activist protest against political, social, or economic conditions. In many instances public resentment is quite justifiable. Conduct involving rowdiness, rioting, the destruction of property, or the reckless and unjustifiable disturbance of the public order on or off campus is indefensible whether it is incident to an athletic event; the advent of spring; or devotion, however sincere, to some cause or ideal. Those who engage in such behavior have no right either to immunity or special consideration because of their affiliation with the university. Ordinarily they are subject to the normal controls of the criminal law and in situations in which such misbehavior also trenches upon the academic interests of the university, academic disciplinary measures may properly be taken.

Academic sanctions, however, when used as a means of controlling, discouraging, or suppressing the exercise of constitutionally protected rights, whether on or off campus, is beyond the university's rightful jurisdiction. Assuming that conduct of this nature does not impair or impede the university's primary function of imparting and expanding the boundaries of knowledge, attempts to control it because it arouses public condemnation is to treat the university community as a sub-class having no right to enjoy the equal protection of the law. It also degrades the university and perverts its purpose through its implicit denial of the right to dissent.

This is obviously not the proper function of university rules and

regulations. They serve the university and, in turn, the world beyond the university not as protectors of the university's image, not as guarantors of campus conformity, and not as restraints upon the expression of unpalatable ideas but only as shields to be lifted against the acts of those, who unfaithful to the traditions of scholarship, are destructive of the ideals of learning and the means by which they may be attained.