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William M. Beaney

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BY WILLIAM M. BEANEY*

"Law never *is,* but is always about to be."

—*Cardozo*[1]

"[C]ertainty generally is illusion, and repose is not the destiny of man. . . . We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."

—*Holmes*[2]

AMERICAN colleges and universities are clearly not exempt from the currents of thought and action now generally affecting our political and social institutions. Traditional values and customary relationships are being reexamined and frequently attacked, and private and public organizations are being compelled to take a fresh look at existing practices and accepted purposes. The one certainty is that significant changes in the internal and external relations of institutions of higher learning will continue to take place.[3] The tasks confronting those who share responsibility for the viability and improvement of higher education are to winnow constructive proposals from potentially harmful ones, to provide realistic definitions of the roles and functions of all participants in the life of universities, and to create an internal ordering and spirit which furthers the achievement of agreed goals.

The specific purpose of this article is to describe some of the ways in which present and emerging legal principles and procedures may affect the internal ordering of colleges and universities, focusing on those elements relevant to the range of problems presented by the claims of undergraduate and graduate students to a larger and, in some respects, different role in the academic and social life of these institutions. Student claims thus far advanced have at least these main objectives: to gain a greater share in the making of decisions involving goals, programs, and academic style; to win a much larger, perhaps even dominant, share in decisions involving policies, rules, and regulations governing students' lives and social activities both

* Professor of Politics, Princeton University; A.B., Harvard University, 1940; LL.B. 1947, Ph.D. 1951, University of Michigan. Visiting Professor of Law, University of Denver College of Law, 1968-69.

[1] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 126 (1921).

[2] Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 466 (1897).

[3] The larger implications of student involvement in political affairs are examined in STUDENT POLITICS (S. Lipset ed. 1967).

on and off campuses; to achieve virtually unlimited freedom to express ideas and advocate or oppose various causes; and finally, to secure improved disciplinary procedures in which students play a larger role.[4]

The following brief survey of leading concepts and principles of law relevant to the resolution of these claims should not be misconstrued. While courts have spoken with respect to some of the problems arising from student-institutional relationships, they have in the past shown great deference to university decisions. At least one claim, perhaps the most critical of the pressing issues, seems ill-suited for judicial resolution. That claim is to a greater share in university decisionmaking and will, of course, engage the attention of faculties, state legislatures, and trustees of private institutions, but it is unlikely to be resolved by the courts. Yet, it is clear that to the extent that courts evolve and apply doctrines which improve the status of students and provide greater recognition and protection for their rights, their claim to participate in decisionmaking is enhanced.[5] It is also clear that most institutions, frequently in response to student requests, will redefine students' rights and responsibilities without regard for the existing or emerging requirements of the formal legal system. Most will seek to improve relations between students, faculty, and administration in order to better achieve their educational objectives, without pedantic attention to the relatively few limitations on their wide discretion in determining control of university affairs imposed by the formal legal order. This and other conference papers examine some of the critical issues that may be presented to the courts and legislatures, particularly if the universities fail to evolve satisfactory solutions of their own. To the extent that reasonable solutions are provided by the universities, however, the occasions for successful judicial intervention will diminish.

The possible value of law, in helping to shape solutions and in providing useful lessons drawn from experiences in parallel social situations, arises from its agelong concern with the defining of relationships in a wide variety of individual and associative contexts, its adaption to changes through the redefining of relationships, its handling of troublesome cases, and its concern for both the maintenance and proper exercise of legitimate authority. It must be recognized, however, that law in itself contains no panaceas; it offers

[4] Obviously, more extreme claims have been, and are being, advanced by student spokesmen. However, the listed claims seem to me to be the principal ones that receive support from the most substantial number of students.

[5] Participation in decisionmaking is clearly the students' main objective, but the elevation in status as a member of the university community implicit in that goal is furthered by judicial or administration actions recognizing free speech, privacy, and other student claims.

more or less effective solutions to human problems, depending on the skill and judgment of those who shape it.[6] Neither legislatures nor courts are competent to run universities. Yet, if our educational institutions become distressed and pressures for solutions become severe, legislatures may intervene. Although unskilled in university administration, even courts, which are specialists in determining justice between men, may in proper cases act to ensure that justice between students and institutions is done. The correct conclusion to be drawn is that the universities should establish an internal order that takes into account the legitimate claims of students. That order should embody a spirit of justice and fairness, resulting from a recognition that rights and obligations of students should be defined after long and thoughtful consultations and deliberation. It would be a disastrous mistake if student claims were to be casually dismissed simply because the law at present provides no compulsion to act differently, and because the student has been traditionally regarded as the innocent ward of a beneficent, all-wise, and all-powerful parent.

I. *In Loco Parentis* AND RELATED DOCTRINES

Institutions of higher learning owe their existence and their powers to the decision by politically organized society that they fulfill one or more vital social functions. Public institutions are creations of state legislatures; those regarded as private institutions are also recipients of grants from the legislature in the form of charters. For understandable reasons, these delegations of power by legislatures are general; they set forth the educational objectives, establish a governing board, and state the principal powers that the institution may exercise. For the most part, these grants or charters show little or no concern with the relations between students and their mentors. Whatever the traditions of medieval European universities or the traditions and practices in other parts of the world, American institutions have assumed that their power — administered through governing boards and officers acting under their authority — to control the academic program is unlimited, and that there are few if any limits on their power to control the noncurricular activities of students. The relatively small body of caselaw involving student

[6] Some scholars consider law a value-neutral technique of social control. *See* W. HARVEY, LAW AND SOCIAL CHANGE IN GHANA (1966). The positivists regard morals and law as wholly separate, while the sociological school is concerned largely with the social interests advanced or protected by law. Others feel that law and moral considerations are necessarily intertwined. L. FULLER, THE MORALITY OF LAW (1964). All would agree, however, that the quality of law and its effectiveness depends on intelligent decisions as to what law can and cannot accomplish, careful attention in formulating its substance, and appropriate choice of procedures for carrying it into effect.

challenges to expulsions or to refusals to grant degrees represents a very small number of isolated attacks on the system by offended individuals. The prevailing social attitudes in the United States seem clearly to have reinforced the conceptions of the university-student relationships held by most institutions — one in which the student has few privileges, even fewer rights, and substantial obligations. The university, by contrast, is seen as a benevolent, dominating master, free to dictate the terms and conditions governing the lives of students during their period of residence.

Courts have used various legal formulae in justifying an essentially "hands-off" policy toward institutions of higher learning, both public and private. The basic attitude has been a compound of deference to the expertise of the educator, fear that judicial interference in behalf of students might pose dangers to the well-being of institutions, and perhaps a subconscious feeling of aversion towards students and parents who failed to conform.

The doctrine of *in loco parentis* developed from the judicial reaction in the 19th century to criminal and civil actions by parents against private tutors and teachers who were responsible for the imposition of physical punishment on their students.[7] Just as the parent could punish his children, said the courts, so also could the surrogate parent — the tutor or schoolmaster. Much later, the *Restatement of Torts (1934)* referred to the *in loco parentis* power of private schools as being delegated by the parents, but quite unrealistically described it as limited by the specific terms in each parent's delegation of this power.[8] In public schools and colleges, the *in loco parentis* power was described by courts as analogous to that of parents, but with a foundation in law independent of specific parental instructions.[9] While *Gott v. Berea College*[10] is frequently cited as the authority for *in loco parentis,* cases of earlier vintage can be found, and the doctrine and variants have served courts into the present era. Supplemented by a 1934 decision of the United States Supreme Court, holding that attendance at public universities was a privilege and not a right,[11] the judicial attitude has clearly been opposed to intensive review of institutional decisions.

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[7] *See* references in Note, *Private Government on the Campus — Judicial Review of University Expulsions,* 72 YALE L.J. 1362, 1368 (1963). This is a valuable, well-reasoned article whose scope is much broader than the title suggests. The most recent effort at a comprehensive legal analysis is a section *Academic Freedom of Students* in *Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045, 1128-59 (1968).

[8] Note, *Private Government on the Campus — Judicial Review of University Expulsions,* 72 YALE L.J. 1362, 1368 & n.24 (1963).

[9] *Id.*

[10] 156 Ky. 376, 161 S.W. 204 (1913).

[11] Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

Many courts have chosen not to rely on *in loco parentis,* recognizing that this legal relic of an earlier and simpler era provides an inadequate foundation for describing the rights and duties of participants in increasingly complex university affairs. Admittedly, no single legal concept can provide answers to a myriad of specific issues, but the effort to formulate a general principle underlying student-institutional relations may have great significance in shaping the attitudes of institutional officers or students and, more importantly, will tend to influence the style and process of actual governance. Some courts have relied upon the existence of a contract, express or implied, between a student and the institution. This contract incorporates the rules and other provisions in the catalogs and various other school documents, including the catchall right proclaimed in some regulations "to expel a student for any reason deemed sufficient," which reason need not be revealed.[12] Other courts have attributed a large and virtually unrestrained institutional power over students either to custom or to legislative or charter provisions, or simply to the functional needs of the institution.[13] Whatever the legal formula relied on by the courts, the result has been, with a few recent exceptions, to uphold institutional authority and to regard the power to discipline the student, including the drastic act of expulsion, as largely beyond judicial control.

Several related developments have contributed to, and will continue to shape, a changing, more receptive attitude of the courts toward those challenging institutional treatment of students. One is the pervasive thrust in our society to achieve equal rights for all disadvantaged groups. Increasingly, the courts have been forced to examine the realities of a variety of real-life social situations. A second development is a wider acceptance of the right of dissenters and advocates of various causes to a fuller freedom of expression under the first amendment. A third is a tendency to examine more critically the behavior of powerful private associations whose actions may adversely affect their own members and the wider society.[14] The public-private distinction, while it remains one of great significance in law, is less readily resorted to as a shorthand answer to those who accuse private associations of wrongdoing. Finally, there is an upsurge in the demand for wider sharing and participation in

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[12] Note, *supra* note 8, at 1377-79.

[13] *Id.* at 1368-69.

[14] *See Developments in the Law — Judicial Control of Actions of Private Associations,* 76 HARV. L. REV. 983 (1963), which should be compared in its findings with the earlier seminal analysis by Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993 (1930). The growth of judicial intervention has been substantial.

the processes of decisionmaking, and a readiness to challenge existing allocations of power.

Two recent cases may be cited to illustrate the changing attitudes of courts. Both involve public institutions, but their lessons are no less significant for private universities. *Dixon v. Alabama,*[15] a federal court case, involved the dismissal from a state college of several Negro students who had participated in racial protest demonstrations. The specific ground for holding the expulsions unlawful was a denial of due process of law resulting from the failure to give the students notice of the charges and a hearing. In reversing the lower court, the court of appeals judge commented that it was not enough to say, as had the district court, that "[t]he right to attend a public college or university is not in and of itself a constitutional right."[16] In a recent state case, *Goldberg v. Regents of the University of California,*[17] the court upheld the dismissal from a state university of students charged with the deliberate public use of foul language. The court severely attacked the *in loco parentis* doctrine and the notion that attendance at a public institution was a privilege, not a right. "Rather," said the court, "attendance at publicly financed institutions of higher education should be regarded [as] a benefit somewhat analogous to that of public employment."[18]

In *Goldberg,* the university's disciplinary action was viewed as "a proper exercise of its inherent general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well being . . . ."[19] The court held it reasonable for the institution to enforce a rule essential to order and propriety as a necessary condition for carrying out the functions of the university. While neither of these decisions reflects an eagerness by the judiciary to undertake a sustained scrutiny of the internal order of universities, they do suggest that institutions should examine their rules and regulations to determine if they are relevant to the achievement of legitimate educational purposes. They also imply a willingness on the part of the courts to intervene when an institution acts arbitrarily.

While prophecy in law as in other matters is risky, one can anticipate a gradual reformulation in law of the relationship of the university to its students. A recent suggestion is that the institution

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[15] 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

[16] Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945, 950 (M.D. Ala. 1960).

[17] 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

[18] 57 Cal. Rptr. at 470. "[T]he better approach," said the court, is "that state universities should no longer stand in loco parentis in relation to their students." (Footnote omitted). *Id.* At one time the courts, regarding public employment as a privilege, permitted dismissals for any cause. This is no longer permitted. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.13 (Supp. 1965).

[19] 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 473 (1967).

should be regarded as a fiduciary in its relation with students.[20] Another suggestion is that a differently ordered set of principles arising from implied contract principles might be set forth by the courts with greater emphasis on the rights of students.[21] Whatever the form of legal resolution, it is probably true that the realities of student-institutional relations worked out within the academic community will greatly influence the attitude of the judges. While it is impossible to eliminate the odd or unforeseen case, reasonable rules affecting students that appear appropriate and necessary for achieving the purposes of the institution, particularly those devised with some form of student consultation and participation which are applied through fair procedures, are unlikely to appear arbitrary to the courts.

II. The Standards of Equality and Fairness

In many of the specific controversies arising from the imposition of disciplinary penalties, it may be claimed that the individual was denied due process of law or the equal protection of the laws. In both the fifth and fourteenth amendments of the United States Constitution, due process guaranties appear, the former a limitation on actions of the national government, the latter directed at the states. Originating in English law as an historic admonition that citizens were to be dealt with according to "the law of the land" or "due process of law," these clauses have had a wondrous history in American law. They were used at times by the courts to invalidate social legislation, but in recent decades they serve as an important limitation on all governmental procedures by which any person may suffer a loss or serious disadvantage.[22] In addition, the due process clause in the fourteenth amendment has been interpreted over the years by the United States Supreme Court to impose virtually all of the rights and guaranties of the Bill of Rights as limitations on the states. With the abandonment of the principle that attendance at an institution of higher learning is a privilege and not a right, it now

[20] Goldman, *The University and the Liberty of its Students — A Fiduciary Theory,* 54 Ky. L.J. 643 (1966). "All the elements of a fiduciary relation are present in the student-university relationship," he concludes. "It is no small trust — no small display of confidence to place oneself under the educational mentorship of a particular university." *Id.* at 671. While a fiduciary theory would protect against arbitrary acts of suspension or expulsion, it hardly fits student demands for sharing in university decisions. The latter type of issue, however, is unlikely to get into courts, and will have to be resolved at each institution in the way that most political issues are settled — by discussion and negotiation.

[21] *Developments in the Law — Academic Freedom,* 81 Harv. L. Rev. 1045, 1145-47 (1968).

[22] For a general survey of the growth of due process see E. Corwin, Liberty Against Government (1948). The march of due process and equal protection doctrines in the United States Supreme Court is recorded in the volumes of the *Annual Survey of American Law* and the annual November issues of the *Harvard Law Review.* The volume of relevant literature is overwhelming.

serves as a barrier against arbitrary institutional actions which impose penalties on students.

The equal protection clause is found only in the fourteenth amendment and is ostensibly a limitation on state acts that discriminate or use classifications that have no rational basis. The most dramatic employment of the clause is seen in the series of cases outlawing discrimination in schools, libraries, and other public facilities. We should note the special emphasis on the central importance of education in our society in the leading case, *Brown v. Board of Education,*[23] as a clue to the potential application of the equal protection clause to higher education.

Although both guaranties appear to be directed solely at governmental action, some recent decisions reveal a judicial willingness to regard certain forms of private activities as sufficiently affected by, or related to, public action to be treated as governmental action in law.[24] It is by no means clear that private colleges and universities will be included by the courts in its quasi-public category. Except for those private institutions with an announced religious or other special orientation, however, inclusion of private educational institutions that receive various public benefits and have a number of ties with state authority would be consistent with visible tendencies in the law.[25]

A second source of potential expansion exists in the very recent agreement of a majority of the Supreme Court to give meaning to the enforcement clause of the fourteenth amendment, which empowers Congress to implement the positive provisions of the amendment.[26] Thus Congress, under pressure from constituents, might progressively enlarge the meaning of both due process and equal protection through legislation outlawing educational practices viewed as discriminatory or unfair. Again, it would appear that there is a sufficient nexus between "private" institutions and public relationships (benefits, support, etc.) to justify their inclusion in such legislation.

Whether or not the courts choose to treat private institutions as public, it is conceivable that due process and equal protection conceptions may be read into the contractual or status relationships of student and university. Even if the courts treat private institutions

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[23] 347 U.S. 483 (1954). Note that the Court relied on the fifth amendment due process clause in forbidding segregation in the District of Columbia schools. Bolling v. Sharpe, 347 U.S. 497 (1954).

[24] Evans v. Newton, 382 U.S. 296 (1966), is the latest of the leading cases holding that "private" action may under certain circumstances be viewed as state action, thus making the equal protection clause (and the due process clause) applicable.

[25] *See Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045, 1056-64 (1968), for an analysis of this possibility.

[26] United States v. Guest, 383 U.S. 745 (1966).

as largely exempt from the application of these guaranties, it is hardly realistic to assume that private institutions would be willing to provide rules and procedures that meet substantially lower standards of equality and fairness in dealing with students than those required of public institutions. For all these reasons, it seems desirable to make no distinction between private and public institutions, with the notable exception of any school relying on its announced religious orientation to justify a special admission policy and rules and regulations that reflect its sectarian concerns.

What are the possible applications of due process and equal protection to the relations of students and universities? Clearly, equal protection could be applied to prevent any demonstrable discrimination in admissions or declinations that lacked a rational basis. Racially motivated policies are clearly outlawed, and any form of discrimination based on nonrational characteristics are suspect.

Rules pertaining to academic and noncurricular matters must be reasonably related to institutional objectives. They must to the fullest possible extent provide meaningful standards to guide students in their academic and other activities and should be enforced through clearly stated and fairly administered procedures. Admittedly, this is a readily declared principle, but serious problems arise in its real-life application. While this is not the place to deal with the range of specific issues which are the concern of other conference papers, the relevance of due process and equal protection conceptions to the formulation and application of academic and other rules should be made as clear as possible. Courts are unlikely to welcome challenges to the content or enforcement of rules directly concerned with academic matters for the obvious reason that universities are far more qualified than courts to determine appropriate academic standards and to apply them to students. In addition, the courts would certainly recognize the *in terrorem* effect of the mere possibility of lawsuits on the teaching process, as well as the terrible burden a plethora of cases brought by disgruntled students would place on the courts. When one moves from issues arising solely from judgments regarding the quality of student academic performance to those involving judgments and penalties for failure to comply with academic requirements which have a factually determinable basis, the potentiality of eventual court review is somewhat stronger. Lack of clearly defined consequences for lateness of submitting work and failure to clarify rules concerning the attribution of sources on student papers might cause difficulties. Lack of consistency in rulings of expulsion for failure to make normal academic progress might also provide opportunities for judicial review. It is the excessive vagueness or ambiguity of the rules concerning academic require-

ments, or the obvious inconsistency in their application, that may give rise to lawsuits. Greater attention to these problems by faculty and administrators should largely eliminate any danger of judicial interference.

The more difficult questions arise from institutional rules and regulations governing noncurricular activities, both on and off the campus. An especially vulnerable type of rule is the overly general catchall, such as "failure to behave as a gentleman," or "as an X Institution student is expected to behave," or "as a responsible member of the university community," or the ultimate in arbitrary rule-making, permitting severance for any reason, which need not be revealed. Clearly, rules to be valid must bear a reasonable relation to the educational purposes of the institution.[27] Interferences with a student's right to enjoy first amendment and other constitutional guaranties can, of course, be challenged by direct invocation of the relevant constitutional provision. Punishment for participation in lawful though unpopular activities, or for expression of unorthodox ideas, clearly denies constitutional rights. An educational institution obviously must create and maintain conditions conducive to the achievement of its educational goals, but query whether many institutions may have assumed an excessively large responsibility for the ordering of the personal lives of students in the light of drastically changed social attitudes and values.

The significance of due process and equal protection is made most clear with respect to the procedures used in imposing sanctions on students for violation of rules and regulations.[28] On this subject, judges may well conclude that they, not the educators, are the experts. Due process and equal protection require adequate notice and a fair hearing. Courts recognize, however, that just as a formal administrative hearing of a governmental agency does not call for all the specific safeguards of the criminal trial, notice and hearing in student disciplinary matters may not necessarily require all of the features of a formal administrative hearing. At the least, the student must be informed of the charge against him in sufficient time to prepare adequately for the hearing. He should have an opportunity to present witnesses on his behalf and to question witnesses against him. It has been recommended that a student should have the assistance of at least an advisor, if not counsel.[29] There should

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[27] That seems to be one of the commands derived from the *Goldberg* case. Admittedly it is a very general standard, but it can be used to nullify unnecessary rules.

[28] For a good, brief survey including the latest decisions see *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1134-43 (1968).

[29] *Joint Statement on Rights and Freedoms of Students*, 53 A.A.U.P. BULL. 365 (1967). One may well speculate on whether the use of "advisors" will meet due process requirements.

be a summary record and an opportunity for appeal. Obviously, the spirit with which these procedures are used are of vital importance; a mere formal observance is insufficient. An institution, large or small, which insists on using highly truncated and informal methods in dealing with serious disciplinary problems is inviting judicial intervention. The obvious thrust of legal developments in recent decades has been toward increased judicial scrutiny of procedures used in reaching decisions that adversely affect vital interests of individuals and groups. Government and its instrumentalities, and, in ever greater degree, private associations as well, are compelled to observe the rules of reasonableness and fairness in the procedures they employ.

A very recent decision of the United States Supreme Court expresses vividly the changed attitude of courts toward the importance of procedural guarantees. In the case of *In re Gault,*[30] the Court declared unconstitutional several procedures (or lack thereof) characteristic of juvenile proceedings in all our states. In effect, the Court is unwilling to see young offenders deprived of safeguards regarded as essential in adult criminal proceedings. The justification for informal procedures and lack of procedural safeguards — that the interests of juveniles would be adequately protected by the juvenile court judge and other officials, and that the purpose of helping, not punishing, offenders would be advanced thereby — proved illusory in practice.[31]

III. The Right to Privacy

In 1890, two Boston attorneys, Louis S. Brandeis and his partner Samuel Warren, argued in a law review article that a private legal remedy should be available to those injured by newspapers and others who intrude into the personal lives of Americans.[32] As a Supreme Court Associate Justice, Brandeis urged in vain that the fourth amendment guarantee should be extended to new forms of invasion of the home — wiretapping in this case — because the framers of the Constitution had sought through the amendment "to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[33] To accomplish this protection, the framers had conferred "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."[34] Although this seemed

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[30] 387 U.S. 1 (1967).

[31] The justification frequently offered for highly informal, irregular institutional disciplinary procedures is the desire to help, not punish, students, and therefore any semblance of an adversary proceeding should be avoided.

[32] Brandeis & Warren, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

[33] Olmstead v. United States, 277 U.S. 438, 478 (1928).

[34] *Id.*

mere rhetoric at the time, the law has hesitatingly, but inevitably, moved in the direction Brandeis proposed. Privacy is recognized in many states as a private right protected by suit, and the fourth amendment provides increasing protection against intrusive actions by both state and federal governments. The right to privacy was held to be guaranteed by the Constitution in a 1965 Supreme Court decision invalidating a Connecticut anticontraceptive law.[35] Essentially, it is a broad and expanding protection to the dignity and personality of individuals and groups against various forms of unreasonable intrusive behavior.[36]

The relevance of this legal right to student-institutional relations should be obvious. As a citizen, a student enjoys the constitutional right to privacy. As a student, he may be asked to give essential information relevant to his educational program, but he should not be subjected to intrusive queries about personal affairs, nor should he be used as a subject in surveys or experiments without his informed consent. While residing in university dormitory facilities, a student may be required to submit to periodic fire and health inspections of his quarters, and to have them entered to prevent harm to persons or property, or when necessary to maintain order, but students should be able to enjoy security from casual and prying entries. Similarly, the right to privacy requires each institution to maintain the confidentiality of student records from unjustified queries. There may be administrative difficulties to overcome in making information available to a student's prospective employer and others with a legitimate interest in his qualifications while denying them to those with no such interest, but the task is hardly insuperable, and the gain both to student privacy and to mutual confidence in student-instutional relationships is substantial.

IV. FIRST AMENDMENT FREEDOMS

The first amendment guaranties of freedom of speech, religion, press, assembly, and that prohibiting an establishment of religion have assumed ever greater significance in the past 30 years. When the United States Supreme Court in 1937 abandoned its previous role as a censor of social and economic legislation and implementing administrative action, it assumed a new set of functions by protecting dissenting individuals and groups expressing unpopular causes against repressive official action.[37] Many of the most important

[35] Griswold v. Connecticut, 381 U.S. 479 (1965).

[36] *See* A. WESTIN, PRIVACY AND FREEDOM (1967), for a full account of the development of this right.

[37] *See* H. ABRAHAM, FREEDOM AND THE COURT (1967), for a survey of post 1937 judicial decisions.

recent cases have involved demonstrations, sit-ins, and other forms of protest by those seeking desegregated public and private facilities of various kinds. Both state and national governmental actions are limited by first amendment guaranties. In the light of the discussion above, it is unlikely that private institutions would be permitted to deny or improperly limit the first amendment rights of students, except to the extent that colleges and universities with a sectarian religious orientation may impose special requirements with respect to religious matters.

The courts have stated on many occasions that the first amendment rights are not unlimited. Government representatives may set reasonable conditions for the time, place, and manner of exercising these rights, and a university is similarly justified in setting reasonable regulations to protect academic objectives and to maintain order on campus.[38] Nevertheless, students would seem to have a right to form associations on campus for any lawful purpose.[39] Since students enjoy all the constitutional rights of other citizens, it is difficult to see how a university can restrict off-campus student activities involving the lawful exercise of apparent first amendment rights. The unpopularity or irrationality of student expression provides no justification for suppression or penalty. On the other hand, active participation in causes will not justify a student's failure to discharge his academic objectives.

It would be extremely unfortunate if institutions of higher learning, having successfully fought so many battles with legislatures and trustees in the name of academic freedom for the faculty, should fail to recognize that freedom for students to express ideas without fear of penalty is also essential to a free academic community. Obviously, students may not always exhibit a full sense of responsibility in their zeal to express ideas, but that is hardly a sufficient reason to stifle their expression.

CONCLUSION

The changing and often painful relations between students and institutions of higher learning suggest that some lessons may be drawn from the experience of the legal system in dealing with problems that arise in defining other social relationships. It is also suggested that, although the courts are moving cautiously in rede-

[38] The rules must provide reasonably clear guidance and must not be applied in such a way that innocent speech is inhibited. Cox v. Louisiana, 379 U.S. 536 (1965).

[39] This should be qualified by adding that formal university "sanction" or "approval" might be withheld from some dangerous or undesirable associations that had a lawful purpose. Nevertheless, the right to associate seems to have a firm constitutional basis. NAACP v. Alabama, 357 U.S. 449 (1958). In Bates v. Little Rock, 361 U.S. 516 (1960), the Supreme Court protected against the compelled disclosure of the membership list of an unpopular association.

fining the status of students, reliance on the doctrine of *in loco parentis* is no longer tenable. Similarly, courts in the future will be less willing to use express or implied contract principles to justify virtually unlimited control over students, including the ultimate sanction — expulsion. It is suggested that both public and private institutions should take into account this changing attitude of courts, although in practice many have already recognized a substantially changed status of students and have adopted policies and procedures constituting a new internal ordering of university life.

Rules spelling out student academic and noncurricular obligations should be as precise and informative as possible. Due process of law and equal protection of law standards, which indicate the desirability of this precision, also require reasonable consistency in the interpretation and application of rules. Given the heightened concern of courts for procedural rights and regularity, it is imperative that institutions adopt procedures calculated to give adequate notice and afford a fair hearing in all disciplinary cases, for, apart from the intrinsic worth of proper procedural safeguards, omissions or ill-conceived steps are likely to invite judicial scrutiny. It has been noted that the use of procedures in juvenile proceedings that failed to meet the Constitutional standards required for adults charged with criminal offences has met with disapproval by the courts.

The emergence of a right to privacy, a legal concept of great potentiality, suggests the wisdom of a reexamination of administrative practices that may offend the dignity and invade the privacy of students. Finally, the expansion of first amendment rights by the courts in the past 30 years, and the attention which the courts are willing to give to claims of minorities and dissident individuals, should warn colleges and universities to avoid policies and practices that overtly or indirectly curtail students' exercise of first amendment rights of speech, press, and assembly.