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PROFESSOR William Van Alstyne's paper usefully describes some of the developing law relevant to university relationships with students and, quite properly, reveals his own values. I say "quite properly" because, though we are in the area of courts, judges, and laws, our personal values as university administrators and teachers, and the policy decisions we make, are major ingredients in the legal outcomes. I am sympathetic with many of Professor Van Alstyne's values and much of the counsel he gives. Many campus social codes *are* trivial and foolish, and intellectually and politically unworthy of the time bestowed on enforcing and resisting them. I confess to little patience with those who believe that decency and morality depend upon short hair and long skirts, and I have no more patience with those who claim that liberty hangs in the balance when a school administrator moves to enforce such codes. The condition of this world in the last third of the 20th century and, more parochially, that of the American university confront us with more important problems.

I agree, too, with most of what Professor Van Alstyne says on the subject of procedural safeguards in student disciplinary cases. Not only is the law becoming increasingly clear as to the minimum due process requirements that must be met when a student faces the severe sanction of suspension or expulsion, but a student in residence is similarly, and in my judgment, properly protected by a concept of privacy that in part derives from the fourth amendment. Two points come to mind on this matter — the first a warning, the second a wistful hope. As Professor Van Alstyne notes, the United States Supreme Court has not yet passed on a student conduct case. If it ever does, the case may well be a "bad" one from the standpoint of university administrators — a case, for example, in which state courts have affirmed the expulsion of a student editor from a university for a political editorial excoriating the state legislature. Such a case could well lead to a broad Supreme Court opinion announcing constitutional constraints applicable to all universities in much the same way that the law of the criminally accused has been significantly influenced by criminal cases involving Negroes in Southern courts in which the abuses of justice were flagrant. Universities anxious to avoid excessively detailed, court imposed legal overlays on their

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disciplinary procedures would be well advised to initiate a process of self-reform.

My second point may strike some as churlish, but I am serious. Colleges and universities which act in procedurally fair ways and seek to respect the privacy of their students will be in a stronger position, both morally and tactically, to isolate those student radicals who refuse to respect the privacy and the person of deans and presidents. If fourth amendment considerations apply to students, they presumably apply also to the correspondence and sherry of Grayson Kirk. It may be premature to ask the American Association of University Professors and the American Civil Liberties Union to draft a Bill of Rights for deans and presidents, but colleges and universities which respect the privacy and the individual dignity of their students will find it easier to demand the same for their administrators and professors.

Despite my agreement with some of Professor Van Alstyne's recommendations, I find myself in rather fundamental disagreement with what I take to be his complete rejection of the private property and, particularly, the contractual view of the university's relationship to its students. To be sure, "the 100 percent on-campus/off-campus description of university jurisdiction will not stand up."[1] But perhaps if we reduce the percentage to, say, 60 percent, it will. I wholly agree that universities (and for the sake of convenience we can bracket the private with the public ones despite certain differences) are subject to certain constitutional requirements. They must observe procedural fairness in disciplinary cases that may lead to potentially severe sanctions; they must respect first amendment freedoms; and they must not act in racially discriminatory ways. Yet, ultimately, the university provides an intellectually enriching service for its students on something approaching a contractual basis. It tells the student something like this: if your credentials meet certain standards we will admit you; if you then satisfactorily complete 32 courses during a residency period of four years, two or three of them in university dormitories subject to certain explicit social rules, we will give you a baccalaureate degree. The contract is subject to legal and constitutional limitations, but its contractual features nevertheless remain. Just as the university must preserve its authority to set academic standards, so too must it retain ultimate authority to deny use of its facilities — academic, cultural, and residential — to those who, having been clearly and explicitly warned, reject its basic rules.

Admittedly, a comprehensive contract theory of the student-university relationship in a strictly legal sense is untenable. Prospective students do not bargain with an institution they may wish to

[1] Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 586 (1968).

attend over a whole spectrum of mutually enforceable terms. Moreover, it is difficult for students to compel a university to deliver the general educational promises contained in its catalog, though universities which, as a matter of explicit institutional policy, promise to observe specified procedural safeguards in disciplinary cases can very probably be legally compelled to observe such procedures. Presumably, too, a student who completed a university's degree requirements and was then arbitrarily denied his degree — because of the color of his eyes or his skin, or because he verbally attacked the university president as an establishment scoundrel —would have an actionable case in the courts. What seems to me to be relevant is that, in a *broad* sense, a contractual relationship exists between students and their universities. To be sure, the university is a disproportionately "strong" partner in the contract, but this is a natural consequence of the fact that admission to a university is not an inherent, automatic right open to any person. Undergraduate students are junior colleagues, not coequal partners, in the educational venture. These comments may seem abstract, but they are directly relevant to those student disciplinary cases that arise when students challenge established university policies through physical obstruction.

My basic position is that, notwithstanding the many rights that the students ought to be accorded, a *qualified* contractual view of the student's relationship to the institution provides a reasonable description of what is involved. The commonsense view was summed up well in a recent *New York Times* editorial commenting favorably on the firm actions taken by the administrations at the University of Chicago, the University of Denver, and Roosevelt University during the spring of 1968 to counter lawless trespass by protesting students:

> The right to attend a university is a privilege. Those who abuse that privilege by striking at the freedom of the university have no just cause for complaint if their misconduct leads to actual or threatened expulsion from the community whose rules they refuse to accept.[2]

Professor Van Alstyne and I agree that many conflicts over dress and coiffure are foolish, but I wonder if the sartorial examples he has chosen really go to the heart of the issue. He comments, "Unless adventures in campus caparisons reach such exaggerated proportions and unless material evidence is forthcoming that freakish fashions are actually disrupting classes or otherwise directly interfering with the academic program . . . we may indeed presume too far on the private lives of our students by regimenting their tastes."[3] It is possible, of course, to take the attitude of the aristocratic English lady who said that she did not care what people did, so long as they did

[2] N.Y. Times, May 18, 1968, at 32, col. 2.

[3] Van Alstyne, *supra* note 1, at 606.

not do it in the streets and frighten the horses. But where does this leave universities that hope to prevent students from performing acts of sexual intimacy in the residential units or from smoking marijuana or consuming alcohol in their rooms? Professor Van Alstyne, speaking as a lawyer, concedes that universities may legally extract sartorial conformity from students. Therefore, I assume he would agree that universities can, subject to explicit rules and procedurally fair disciplinary proceedings, attempt to regulate in the area of drugs, liquor, and sexual relations. Such regulations often follow the legal codes of municipalities and states, though it is worth noting that the precise meaning of the legal code is not always clear. Professor Van Alstyne is generally unsympathetic to subjecting students to multiple disciplinary sanctions for violating on-campus rules that duplicate the regulations of public governments. He admits, however, that certain public rules may also serve certain legitimate interests of the university. Once again, I share his desire to qualify as much as possible the double or multiple jeopardy situations. I am afraid, however, that his rejection of the distinction between the student as resident and the student as citizen and of the qualified contractual analogy may lead to more difficult problems than the ones he hopes to solve.

If the university cannot function in a contractual relationship to its students, especially with regard to their *on-campus* behavior, and if public laws on such matters as drugs, liquor, and sexual relationships are to be enforced by the police, is this not likely to create an academically and socially unhealthy atmosphere on the campuses? The problems raised by the issue of undercover police and police informers on some campuses in recent months suggests the difficulties. While I too am annoyed at the granting of special dispensations to students fortunate enough to be in college (and this, in my judgment, is much more common than their suffering from allegedly cruel double jeopardy situations), I think it essential to insist that, to a limited but nevertheless significant extent, the university and its premises are a sanctuary. It is, if you will, an ivory tower that ought normally to be offlimits to both political pressures and police intrusions. This policy can only be implemented if universities respect the general public laws by moving, for example, against students who illegally possess and consume marijuana. As a matter of fact, it seems to me that a university can function both realistically and humanely in situations of this kind. When, for example, a student appears to be a ringleader in *selling* the substance for gain, the police authorities can be invited to undertake an investigation that will lead to criminal prosecution; this need not be done in a manner that violates the presumed offender's constitutional rights. When a student

is caught *experimenting* with the substance, it may be far more appropriate to invoke the university's milder disciplinary machinery, or perhaps even to attempt counselling for a minor first offender.

Finally, let me turn briefly to Professor Van Alstyne's comments on the subject of crime and punishment. He describes expulsion from the university as "an academic death penalty" equivalent to the death penalty in the criminal law.[4] I find this analogy unpersuasive. Admittedly, it deprives the penalized student of something valuable. It is, moreover, a last resort and must not be sought except for the most serious violation of major university rules. However, it is not any more a death penalty than expulsion for failing to meet academic standards. Suspension for one or two semesters, with a procedure by which a student may reapply for admission by presenting evidence of his new maturity and his heightened sense of community responsibilities, is, I believe, the most appropriate sanction in most serious disciplinary violations. Suspension is a lesser part of expulsion, and the latter is the only sanction that makes all others effective.

Professor Van Alstyne's comment about "unimaginative" university sanctions may be less a reflection on the intellectual qualities of administrators than on certain practical realities. The hard truth is that there are scarcely any sanctions available short of the Draconian ones of suspension or expulsion, and my experience is that they are so severe that they are rarely used. I do not see the denial of bowling alley privileges at a student union, the imposition of a physical chore, or the "campusing" of students as very useful alternatives. These proposed sanctions are either impractical or meaningless, as in the recent attempt to punish Linda LeClair of Barnard College fame by denying her access to a school cafeteria. Campusing students or denying them social privileges in large and irreducibly impersonal universities could only be made effective by an army of enforcers. I fear that the ensuing climate and the constant checking on the restricted students would indeed be a step toward the *1984* atmosphere that Professor Van Alstyne abhors.

Further, I do not see much promise in his other punishment alternatives. Certainly, universities must rely heavily on counselling students who abuse their bodies — whether with drugs, with liquor, or sexually — but to require it, as Van Alstyne suggests, would be disastrous. In the first place, persons do not respond positively to compulsory counselling; the individual must first want it and thus be receptive to the counsel. Secondly, turning university counselling services into an arm of the disciplinary system would severely compromise the integrity of the medical and psychiatric staff, who cannot function effectively if students perceive them as dependent

[4] *Id.*

adjuncts of a dean's office. There is more to be said for demanding monetary restitution of students who damage property, though it is often hard to assign responsibility, and the sanction has little effect on wealthy students. Requiring students to work off damages (or perhaps even other offenses) seems appealing, but many university offices do not like to use what they call "slave labor." Furthermore, how does one measure the quality of such work performed under compulsion? Expulsion from a dormitory may be a viable sanction in certain situations; yet it is tantamount to allowing a student who refuses to accept legitimate university rules to be freed of them. I am not sure that this is the way to develop a sense of responsibility for the rights of others. In any event, I dissent strongly from Professor Van Alstyne's view that suspension or expulsion is "tired, harsh, and inessential."[5] It *is* harsh (especially expulsion), and it should be used cautiously; but, it *is* essential, both legally and practically.

I want to end on a more positive note by sketching, very briefly, another view of the university's legal status. University property is technically either public or private, but in either instance it performs essentially public functions. It does so, with regard to students, on a contractual basis, but that contract is subject to legal and constitutional limitations. Universities, if they are to function as centers of independent criticism and unregimented teaching and learning, must be accorded the broad privileges of academic freedom; their "privateness," in other words, must be secure. Most analogies dealing with human institutions must be used carefully, for the institutions that are analogized usually have differing histories and operate within unique contexts. Nonetheless, used with care, an analogy can quicken understanding, serving as a sort of intellectual shorthand for the detailed inquiry that should follow. In my view, universities in their legal and political capacity are best understood as public service corporations with special privileges and special responsibilities. In their relationships to students, particularly on-campus, they exercise quasi-governmental powers, subject to basic constitutional limitations and to the laws of the jurisdictions in which they are situated. They must seek to engender respect for the laws which the public communities cherish, particularly when those laws have relevance to the special academic purposes of the residential university. In return, the university is privileged to enjoy the benefits of academic freedom for its scholars, teachers, and students.

[5] *Id.* at 607.