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THE STUDENT AS A STUDENT

BY PHILLIP MONYPENNY*

UNDER the rubric of the "student as a student" is included a multitude of topics which arise in the academic relationship between the student and the institution, especially those which have to do with his presence as a student enrolled for a degree. This necessarily begins with his admission and continues through the general specification of requirements for a degree, the setting of levels of performance in individual courses, the evaluation of specific projects such as theses and field work, the determination of levels of performance required for continuance, and maintenance of a record system by which his progress may be checked. It includes the question of whether his work in a specified period meets the standards set for the awarding of a degree. It includes rules about the transfer of credit from or to other institutions, recommendations to support applications to graduate or professional schools, certificates necessary for professional licensure, and the awarding or denial of financial assistance.

In what follows, I rely heavily on those who have inquired into the general relationship between the student and the university before me. M. M. Chambers, who edited a little journal called *Educational Law and Administration*¹ 30 years ago, compiled and reviewed some basic cases. He expanded these articles into a series of volumes appearing periodically called *The Colleges and the Courts*,² the last of which covered decisions through 1963. An early article by Zechariah Chafee on the determination of individual rights by private associations and the subsequent articles by Warren Seavey, Alvin Goldman, Clark Byse, and William Van Alstyne, cited by Van Alstyne in his article for this conference, provide a necessary starting

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¹ 1-6 EDUCATIONAL LAW AND ADMINISTRATION (M. Chambers ed. 1932-1939).

² M. CHAMBERS & E. ELLIOTT, THE COLLEGES AND THE COURTS, JUDICIAL DECISIONS CONCERNING HIGHER EDUCATION IN THE UNITED STATES (1936); M. CHAMBERS, THE COLLEGES AND THE COURTS, 1936-40, JUDICIAL DECISIONS CONCERNING HIGHER EDUCATION IN THE UNITED STATES (1941); M. CHAMBERS, THE COLLEGES AND THE COURTS, 1941-45, JUDICIAL DECISIONS CONCERNING HIGHER EDUCATION IN THE UNITED STATES (1946); M. CHAMBERS, THE COLLEGES AND THE COURTS, 1946-50, JUDICIAL DECISIONS CONCERNING HIGHER EDUCATION IN THE UNITED STATES (1952); M. CHAMBERS, THE COLLEGES AND THE COURTS SINCE 1950 (1964). These are compilations of decisions in all aspects of law affecting colleges and universities, but do regularly review cases on the legal aspects of student-university relationships.

point, even though they deal primarily with the question of dismissal, which is not the direct topic of this article.³

However, the principles which govern this section are not different from those sketched earlier in Van Alstyne's article, *The Student as University Resident*. Although the sections on Colleges and Universities in *Corpus Juris Secundum* and in *American Jurisprudence 2nd* list pages of references indicating an unlimited discretion for private colleges and universities in admitting students, setting up standards for awarding degrees, and dismissing students for failure to meet these standards, and almost as unlimited a discretion for public universities (checked largely by procedural requirements), there are a variety of legal principles on the basis of which legal limitations on university discretion have been successfully urged.⁴

The variety of approaches to the limitation of discretion has been set out in four classes by Alvin Goldman. They are constitutional theories, *in loco parentis* theories, contract theories, and a trust or fiduciary theory which is his own.⁵ Constitutional limitations have so far been found only to apply to public institutions, although some authors argue that the public-private distinction is untenable in this field.⁶ The *in loco parentis* theory provides for Goldman the elements of a status or fiduciary theory, even though as a literal justification for college regulation of student nonacademic affairs it is being abandoned. The contract theory has provided both a justification for unlimited discretion and a basis for finding an obligation to respect certain student rights. The fiduciary theory which Goldman propounds has yet to find a positive affirmation in any court decision affecting the relationships between the student and the university.

However, if we stay only within the established doctrines which apply to universities and colleges in general, without reference to their public or private status, there is still ground to assert that colleges and universities have legal obligations to their students which cannot be obliterated simply by reference to the discretion and presumed good faith and judgment of institutional authorities. Nor can

³ See Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582 (1968), listing the principal references. Much use has been made of the Note, *Private Government on the Campus — Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963).

⁴ 15 AM. JUR. 2d *Colleges and Universities* §§ 16-28 (1964); 14 C.J.S. *Colleges and Universities* §§ 8-29 (1939). These summaries are very firm in asserting the very large discretion of all schools, particularly the virtually unlimited discretion of private schools, although the classic cases to the contrary are also cited.

⁵ See Goldman, *The University and the Liberty of Its Students — A Fiduciary Theory*, 54 KY. L.J. 643 (1966).

⁶ Parker, *Evans v. Newton and the Racially Restricted Charitable Trust*, 13 HOW. L.J. 223 (1967). The distinction between public and private is explored and its significance for the assertion of certain constitutional rights minimized by Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 347-65. See also Comment, *Procedural Limitations on the Expulsion of College and University Students*, 10 ST. LOUIS U.L.J. 542, 547 (1966).

these obligations be obliterated by the retention of an unlimited discretion as a part of the body of institutional regulations which the student presumably accepts as part of his contract of admission and attendance.

In recognizing that the acceptance of a student as a student creates a mutual obligation which cannot be wholly defined by a unilateral and wholly discretionary act of institutional authority, the courts have placed explicit or implicit stress on the value to the individual and to society of the opportunity to gain an education. Although for some purposes attendance at either a public or a private institution may be defined as a privilege rather than a right, it is still a valuable privilege, having for certain purposes almost the status of a property right.⁷ Privileges may be made subject to a reasonable, but not an arbitrary, discretion, and reasonableness implies the possibility of judicial intervention where the limits of reasonableness are passed, and this in turn implies ultimate judicial determination of whether a particular act or rule is reasonable. The consequences of given acts or rules to the individual student who complains of them will have to be weighed against the normally valid institutional claim of expertise and discretion.

This weighing process is easy to reach, since the privileged position of public and private institutions, their status as perpetual trusts in the case of private institutions, the tax exemption they normally enjoy, and the restraints on political authorities in regulating their affairs, all rest on the great benefit of their services to the general society.⁸ In order to protect against entirely arbitrary or discriminatory decisionmaking by those institutions having control over the disposition of many beneficial services to others, their conduct cannot be relieved of the possibility of legal review; however, many decisions in individual cases may hold that they acted within the limits of their discretion and within their fields of presumptive competence.

Even the contract theory, which has often been used to justify unlimited discretion in individual cases, implies obligations which cannot be determined entirely by the unilateral decision of the institution. The university or college has been held obliged to provide

⁷ *Berea College v. Commonwealth*, 211 U.S. 45, 58 (1908) (dissenting opinion by Harlan, J.). This case arose out of the attempt to enforce a state law requiring segregation in all institutions of education. Justice Harlan asserted a liberty which could not be breached by state regulation. That the value of an education to the individual creates a most important right which can be limited only by due process requirements is strongly asserted in *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

⁸ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This classic case and others, asserting the right to offer and receive an education which cannot be abrogated by state law, are reviewed by Constanzo, *Wholesome Neutrality: Law and Education*, 43 N.D.L. Rev. 605, 615 (1967). See also Parker, *supra* note 6, at 265-68, for an argument on the parallelism of private and public activity in education and welfare as creating the basis for the assertion of constitutional rights as against private authority.

that which is stated or implied in the contract, including an opportunity to study, receive credit, and whatever degree or other certificate is normally given at the end of successful work. Schools have also been held to an orderly and accustomed procedure in determining what is successful work. The reserved power of dismissal which is often asserted as part of the contract between the school and the student, being set out in bulletins or rules, does not warrant the university in arbitrarily refusing readmission after a period of attendance, or refusing to grant a degree once stated conditions have been complied with.⁹ One may speculate on whether the contract doctrine, so cherished by administrators, might justify an inquiry as to whether the institution is in fact offering what it purports to offer by way of educational programs, supporting facilities, safe dormitories, edible food, adequate provision for medical emergencies, and perhaps even a Christian atmosphere.¹⁰

The fiduciary principle which Goldman proposes to substitute for the contract principle as the major basis for determining legal relationships between the student and the institution draws in part from the *in loco parentis* principle. That doctrine asserted not only an authority over the student but an obligation to him; it was justified by the need to protect him against his own immaturity. It is a status conception, an obligation inhering in a relationship not derived from, nor more than partially modifiable by, the specific terms of a contract. A university or college which acts against a student's

⁹ The basic cases on the right to a degree are summarized in *Legal Right of a Student to a Diploma or Degree*, in 4 EDUCATIONAL LAW AND ADMINISTRATION 7 (M. Chambers ed. 1936). Among the more striking cases holding against unqualified discretion are *Baltimore Univ. v. Colton*, 98 Md. 623, 57 A. 14 (1904); *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 116 N.W. 294 (1908); *People ex rel. Cecil v. Bellevue Hosp. Medical College*, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct. 1891). Cases asserting that discretion was not abused in refusing to grant graduate degrees are *Moore v. Lory*, 94 Colo. 595, 31 P.2d 1112 (1934); *Edde v. Columbia Univ.*, 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Ct. 1957), *aff'd*, 6 App. Div. 2d 782, 175 N.Y.S.2d 556 (1958). For an interesting discussion suggesting limits on handling student records see Strahan, *Should Colleges Release Grades of College Students to Draft Boards?* 43 N.D.L. Rev. 721 (1967).

Recent cases indicating limits on public institutions to arbitrarily limit the admission of students are *Woody v. Burns*, 188 So. 2d 56 (Fla. 1966) (improper exclusion of a student from a school of architecture, who, while not conforming to regulations, had acted in accordance with the advice of an advisor); *Kolbeck v. Kramer*, 46 N.J. 46, 214 A.2d 408 (1965) (requirement of vaccination may not be imposed on a student whose religion is contrary to it, if no showing is made of a danger to the health of others).

On the right to judicial review of the question of whether discretion was exercised arbitrarily in excluding students because of a change of academic standards after their initial enrollment see *Schoppelrei v. Franklin Univ.*, 11 Ohio App. 2d 60, 228 N.E.2d 334 (1967) (overruling a demurrer sustained in the trial court). On the right to a degree where an institutional authority had waived an ordinarily imposed continuous enrollment requirement see *Blank v. Board of Higher Educ.*, 51 Misc. 2d 724, 273 N.Y.S.2d 796 (Sup. Ct. 1966).

¹⁰ On the liability to an injured student see *Jay v. Walla Walla College*, 53 Wash. 2d 590, 335 P.2d 458 (1959) (the defense of implied assumption of the risk in the student's contract with the university was denied, as it has been in similar cases).

interests without an offsetting necessity rooted in the university or college purpose and a reasonable means for achievement of that purpose clearly departs from the obligation to protect the interests of the students entrusted to its care. It would be rash to say that the student's interest might never be protected by the courts.¹¹

What has made these principles so far a matter of logical assertion rather than of law is that, except in a few deviant cases, the courts have chosen not to review in detail the university or college's use of discretionary authority in relation to students. This does not mean that obligations and limits on discretion are not recognized in the very process of entertaining cases for decision; rather, the opinions suggest that the situations, at least as presented in the formal proceedings, have not seemed to the judges to be such a departure from a reasonable use of discretion that intervention was justified.¹² Some of the cases seem to have taken the rights of the students rather lightly, but as the completion of some phase of education beyond high school becomes more of an absolute condition for success in achieving gainful employment and a respected position in the world, the value given to the student's interest in remaining in school and in earning whatever formal credits or degrees his work justifies should rise, and the reasonability of a given rule or decision is likely to be more closely scrutinized.¹³

In the fields of institutional authority covered by this article, most decisions are provisional and intermediate. Except for denial of admission, or expulsion, the decisions made about a student's fate are cumulative. For example, his admissibility or nonadmissibility to various curricula, and the degree which he seeks, depend on many factors, including all his grades, the completion or noncompletion of a variety of courses and tasks prescribed for a degree, and the cumulation of the nonpayment of library fines or dormitory bills. Given the disposition of the courts not to interfere in the details of any complicated enterprise, especially a private one, and to avoid judgment until final questions are presented, it is not likely that any adverse decision other than the critical and final one can be brought

¹¹ See Goldman, *supra* note 5; Byse, *Procedures in Student Dismissal Proceedings*, in *THE COLLEGE AND THE STUDENT* 305 (L. Dennis & J. Kaufman eds. 1966). The classic decisions holding due process necessary in the dismissal of a student by a private institution, because of state support received, include *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. County Ct. 77 (1887).

¹² See *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943); *Wright v. Texas Southern Univ.*, 277 F. Supp. 110 (S.D. Tex. 1967), *aff'd*, 392 F.2d 728 (5th Cir. 1968). In an earlier case of dismissal in a state court, *People ex rel. Bluett v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956), due process was found satisfied, although the plaintiff was only informed of the charge and not the evidence against her and could only make an unsupported statement in rebuttal.

¹³ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *But see* *Woody v. Burns*, 188 So. 2d 56 (Fla. 1966); *Schoppelrei v. Franklin Univ.*, 11 Ohio App. 2d 60, 228 N.E.2d 334 (1967).

successfully into court. Also, if deference to the wisdom and good faith of faculty and administrators continues in academic and disciplinary matters, even final judgments are not likely to be overturned unless they appear on their face to be arbitrary.¹⁴ A general analogy to the relationships between the courts and the public bureaucracies would seem to be in order here. The existence of an appropriate procedure for defining issues, for gathering data with respect to them, and for making a decision after due consideration of relevant circumstances is likely to minimize the chances of an independent decision by the courts on the merits of the case. If the procedure stands, the administrative decision might also stand.¹⁵ There is a corollary, moreover, from the field of administrative regulation — if the courts take on too many institutional decisions because they appear to be bad, they may develop confidence in their own expertise and routinely set aside decisions in apparently technical fields. The experience of the Federal Communications Commission in the federal courts seems to support this point.¹⁶

The application of constitutional limitations to student rights in general rests on the continued tenability of the distinction between public and private institutions. The recent cases overturning decisions of dismissal for asserting the civil liberties of faculty and students have all arisen at public institutions. They have rested on the view that the fourteenth amendment applies to the campus as to other areas of state governmental action, and that neither attendance nor employment can be made to rest on a waiver of fourteenth amendment rights. When the institution involved is a public one, there is ample precedent for going into court over a denial of civil liberties rights, including the right to procedural due process. The due process and equal protection conceptions presumably also include the question of whether regulations are reasonable, fair in relation to various situations and parties, and whether their application in a given instance rests on some kind of evidence.

The undecided question is the extent to which private institutions may ignore the standards of the fourteenth amendment, especially its due process and equal protection standards, in the government of their campuses and the regulation of their student's

¹⁴ *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943); *Wright v. Texas Southern Univ.*, 277 F. Supp. 110 (S.D. Tex. 1967), *aff'd*, 392 F.2d 728 (5th Cir. 1968); *People ex rel. Bluett v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956).

¹⁵ *RCA v. United States*, 341 U.S. 412 (1951).

¹⁶ *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). Here, the Court apparently reacted to a sloppy justification of an FCC decision.

academic and nonacademic lives.¹⁷ It has been argued that they cannot ignore them.¹⁸

One basis for such a conclusion is a reexamination of the public-private distinction. Under what circumstances is a private agency or institution sufficiently associated with government to come under legal restraints which apply to government itself? A key case representing a shift in the thinking of the federal courts is *Shelley v. Kraemer*,¹⁹ in which a private freedom of contract was not denied but the right to its judicial enforcement was. In the much cited case of *Marsh v. Alabama*,²⁰ a company town, admittedly the private property in every respect of a private corporation, was found to be bound to the standards of the fourteenth amendment in respecting freedom of expression (the distribution by Jehovah's Witnesses of their characteristic tracts), because it acted in lieu of a government. There are other cases where seemingly "private discrimination" has been held violative of the fourteenth amendment because of the public function being served.²¹

The special relationship of educational and other eleemosynary corporations to government has long been recognized. As noted above, their purposes have been held to justify exemption from taxation and tort liability.²² The grant of public money to educational institutions and hospitals operated by religious bodies has been upheld because of the public value of their services.²³ The right to

¹⁷ Equal protection now provides a constitutional guarantee not only against racial discrimination or legislative malapportionment but also against various unreasonable classifications as in welfare policy, *Smith v. Reynolds*, 277 F. Supp. 65 (E.D. Pa. 1967); *Smith v. King*, 277 F. Supp. 31 (M.D. Ala. 1967); the violation of religious freedom in the setting of requirements for the receipt of unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 (1963); and the prohibition of a fair housing act by state constitutional amendment, *Reitman v. Mulkey*, 387 U.S. 369 (1967). Problems of classification are central to the question of the reasonableness of the decisions by college authorities on such questions as admission, the grant of scholarship assistance, and of whether reasonable standards of scholarship are being met by degree candidates.

¹⁸ See Note, *supra* note 3, and Goldman, *supra* note 5.

¹⁹ 334 U.S. 1 (1948).

²⁰ 326 U.S. 501 (1946).

²¹ For a carefully detailed discussion see Parker, *supra* note 6. Cases finding apparent private action sufficiently governmental to require conformance to the standards of governments include *Evans v. Newton*, 382 U.S. 296 (1966), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The refusal to admit a doctor to the staff of a private hospital has been found contrary to due process. *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 192 A.2d 817 (1963). This case contains a careful and persuasive discussion of the limits of the distinction between public and private when an important individual "right" is being decided by an institution which, though "private," provides an important public service and is heavily dependent on tax exemptions and government subsidies.

²² M. CHAMBERS, *THE COLLEGES AND THE COURTS, JUDICIAL DECISIONS CONCERNING HIGHER EDUCATION IN THE UNITED STATES* (1936). This work has an extensive discussion on the doctrine of tort immunity for charitable trusts, a doctrine whose modifications toward the imposition of full tort liability is noted in successive editions.

²³ *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966), *noted in* 43 N.D.L. Rev. 659 (1967).

operate independent religious schools, despite a state act forbidding them, has been asserted because of the general interest in providing education through whatever available type of organization or institution.²⁴ That these exemptions and benefits depend on the public service provided is underlined by a recent Maryland decision denying the right of the state to spend money on buildings for schools which have a clearly religious content to their curriculum and educational purposes.²⁵ Increasingly, the activities of private eleemosynary institutions, including educational institutions, are parallel to the much larger operations of government, and they operate in part with direct or indirect governmental funding. How long can their existence depend on a privileged legal status and their relationships with faculty and students be regulated by a rather far-out view of the law of contract?

A second approach to the question of the applicability of general constitutional guarantees to private schools is to ask under what circumstances private power, whether over employment or over such benefits as admission to and continuance in private institutions of higher education, can be conditioned upon a waiver of what are otherwise constitutional rights? Contracts which require a waiver of constitutional rights may be unlawful.²⁶ It has been decided that unions may not require a waiver of a legal or a constitutional right as a condition of continued membership, that employers must provide meeting places for their employees attempting to organize and obtain bargaining recognition for a union, and that the state itself may not attach unconstitutional conditions to a contract of employment.²⁷ Similarly, academic freedom has been cited as a freedom which may not be breached by attaching a condition to an employment contract.²⁸

The great weight of decided cases favors a virtually unrestricted freedom of private institutions to determine the conditions of student attendance, to set up regulations to govern them in nonacademic as well as academic matters, and to discipline them for breaches of regulations, including the ultimate penalty of expulsion. Only

²⁴ See Constanzo, *supra* note 8.

²⁵ *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966).

²⁶ On the failure of loyalty oaths as proper conditions attached to employment see *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

²⁷ *Affeldt & Seney, Group Sanctions and Personal Rights — Professions, Occupations and Labor Law* (pts. 1-2), 11, 12 *St. Louis U.L.J.* 382, 179 (1967), *citing Mitchell v. International Ass'n of Machinists*, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (1961). The tenor of the article with respect to labor unions applies, and is also intended to apply to other social institutions who are able to exercise coercive power over their members.

²⁸ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

recently have public universities been restricted, and these restrictions arise largely in the areas of free speech and free expression. If universities and colleges have this freedom where extreme penalties are involved, the restraints on them in less final actions taken in the general course of university administration are clearly even less extensive. The questions raised in the preceding pages arise because there are counter tendencies or postulates which might be taken to justify the existence of rights on the part of students and far more vigorous judicial intervention in their defense than has occurred. Perhaps it is not at all likely to occur, despite isolated decisions. However, there are parallels in other fields which should make us cautious about denying all such possibilities.

The thoroughgoing judicial pursuit of racial equality in all of the areas where some use of public authority seems to impose or buttress inequality; the equally thorough pursuit of enforcement of the rights of defendants in criminal cases; the explosion of litigation enforcing the rights of Indians in long-disregarded tribal claims; the relentless application of equal protection principles to the question of representation in state and local government; the discovery of a right of travel which cannot be wholly restricted at the discretion of the State Department; and the extensive intervention in deportation cases, all show a sensitivity of the courts to the claims of the disadvantaged which would have been hard to predict from decisions of a quarter of a century ago, and a present willingness to take on burdens from which earlier generations of judges flinched. Given the dramatic intensity of interest in all phases of higher education at the present time, the courts may well be provoked to take a new interest in the problem of just relationships on the campus. The new activism of the courts in cases affecting civil liberties may be a forewarning.

Apart from what the courts may do, there are sound educational reasons for asserting that explicit standards of justice and equal treatment should enter into all of the regulatory phases of the relationship between an educational institution and its students. The achievement of an atmosphere of free inquiry to which the faculty, students, and administrative officers of higher education have committed themselves through their approval of the *Joint Statement on Rights and Freedoms of Students* also requires an atmosphere in which justice is not only done but seen to be done.²⁹ The world of educational administration, like the world of politics, is a world of negotiations, of adjustment and accommodation of interests, and of

²⁹ Monypenny, *University Purpose, Discipline and Due Process*, 43 N.D.L. REV. 739 (1967); Monypenny, *Toward A Standard for Student Academic Freedom*, 28 LAW & CONTEMP. PROB. 625 (1963).

high-minded deals and payoffs. It is a world of insiders, despite the structure of participation by the rank and file faculty and student body. Like politics, however, it must be conducted within an overarching framework of just principle if those who are not directly parties to the negotiation, but are affected by them, are to accept the outcomes and have confidence in those who conduct them. It is to questions of just principle rather than to questions of the permissible legal limits of authority that the attention of those who govern institutions should be turned. The cautions of this article are directed to that end, rather than an assertion of a clear body of legal principles defining and binding institutional discretion. If the agencies of education act justly, and seem to act justly, the courts will find very few occasions to impose a judicially developed view of justice on them.

In closing, I want to reflect for a moment on the planning session which preceded this meeting. It seems to me that some of the technical discussion we have engaged in today about the defensibility or indefensibility of various kinds of legal formulas for defining the university's control over students could have been avoided if we reflected again on the purpose for which the doctrines of contract, status, *in loco parentis*, and the equal protection of the laws were brought into the discussion.

One of the implicit assumptions which seems to be part of many administratively oriented discussions about the college or university relation to students draws on the legal tradition which, as summarized in the most available sources, indicates a very large and apparently unreviewable discretion not only to make rules but to decide whether they have been transgressed. The conclusion in these discussions is that, legally, the ground is open and you could do as you pleased. Such a conclusion seems to have been behind the institutional handling of a great many disciplinary as well as academic matters. From a legal standpoint, there is no difference between the two fields.

One of the purposes of this conference was to discover whether there were some rather impersonal sets of rules derived from legal principles which had application to student-university relationships, which indicated appropriate restraints on institutional powers, and which also had implications for institutional responses to crises and provocations. An indication that such restraints exist, *i.e.*, that discretion is not absolute or unreviewable, is one of the conclusions of all of the principal speakers at this conference, although none of them has provided an absolutely firm conclusion of law applicable in very specific situations, unless the fourteenth amendment restraints on the public colleges and universities are regarded as having a

very specific content. What the articles, including mine, are saying is rather, "Gentlemen, you don't have a completely free hand in dealing with students. There are some legal doctrines which imply restraints applicable to you if you transgress a set of limits, not too well defined to be sure, but limits all the same."

The issue is not what these restraints are, but how to use the recognition of legal restraints as a caution, that is, the student's place in the institution, and his recognizable rights and privileges as a part of that institution are matters about which we need to do some rather hard thinking, free of the clichés which the law so readily provides. Obviously, whatever the applicable law, we should think about such concerns for their own sake, or at least we should do so because of the realistic prospect of being punished in court as a consequence of not having thought hard and well before we acted in a difficult situation. Of course we may be in trouble, whether inside or outside of the courts, no matter how hard or well we think, but that does not justify a lack of effort. It therefore seems to me that what I and others have had to say on various legal topics is less important than the extent to which our discussion, which has been remarkably thoughtful and intense, will have an impact on how we operate in our various fields of responsibility on the campus.

Having paid my respects to the framework of the discussion, I would like to comment on the question of how we regard the structure of the university, a matter which has not been dealt with squarely by the articles in this symposium, with the exception of Mr. Lunsford's discussion of this particular topic as being a question of community. For this purpose I would like to introduce a distinction between authority and power.

In talking about legal restraints, one talks about something which I will roughly define as power, that is, one is talking about *where* the legal capacity to determine certain questions lies, and what *limits*, if any, there are on that capacity. Most of the law on the topic of university or college power conforms to this usage.

Power is an attribute of the university or college as a corporation. Our earlier discussion was fascinating, because the university was referred to as though it was something which did not include the students, the faculty, most of the administrative officers, or the nonacademic staff. To be sure, it controlled them, but it was not them. It was spoken of as something independent of the particular personalities and defined internal roles, which are its corporeal manifestation, an impersonal being which comes to conclusions and acts on them. This is the appropriate legal view of a corporation as

a fictitious personality which cannot be subsumed in the individual personalities who may at any time man the various offices within it.³⁰

If an individual is summoned to court as the president or a member of the board of trustees of X university, that is in some ways an impersonal matter. The individual is represented by counsel who actually appears in court, and the president or trustee is not likely to be personally fined or jailed. However, in the operating life of the institution in which the acts of legal consequence arose, it was not this impersonal abstraction which was working. As Mr. Lunsford has pointed out so eloquently, the university is an internal and differentiated structure with various roles and various responsibilities, a structure in which whatever legal powers exist cannot readily be exercised in a simple and direct way from any single point. The internal process of decisionmaking is a very diffuse one, as the politically responsible administrators know, much to their occasional distress.³¹ The important question in understanding or prescribing for the academic institution is not that of power but of authority — who does what, who shares in the decision, even if only by inaction rather than action, and who eventually writes the signature which commits the institution. The question of authority is far more diffuse than the question of power, because various people enter into the decisionmaking process who cannot be said in any formal sense to be a part of the institutional power structure, if one uses power as meaning that which has direct legal effect.

In the spirit of the old public law employee-officer dichotomy, I note in browsing through the law books some reference to the faculty as having the status essentially of employees, not as officers of the corporation. This is undoubtedly an accurate statement. On the other hand, in the normal conventions of academic institutions, the faculty members operate as persons who have independent areas of decision — one might say independent jurisdictions — or who make independent contributions to the decisionmaking process, since most of these processes are collaborative and not in any simple sense hierarchical. In this sense of defined areas of competence and independence of action within those areas, they are much more like a common law officer than a common law employee, even though their legal relationship to the institution is governed by contract. In this, as in so many other areas of institutional life, the law on

³⁰ The reference is to the discussion by von Gierke of the evolution of views concerning the character of associations and corporations in the fifteenth and sixteenth centuries when this was a central issue. O VON GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY*, 1500 TO 1800, ch. 1, § 5, at 62 *et seq.* (E. Barker transl. 1957).

³¹ Politically responsible administrators are those who must account to the outside public for the conduct of the institution, whether the institution is public or private.

the matter is an inadequate guide to developing workable operating relationships.

The mention of the pattern of authority within the institution brings us to the question of ends, since authority has meaning in terms of the purposes for which it is used. One of the most characteristic and important uses of institutional authority is in defining the ends or purposes of the institution, at least that is what the writers on administration tell us for organizations in general. If we deal with power, then those who have legal power define the ends of the institution. In this sense, we see at once that the definition of the ends or goals of the institution is by no means a prerogative of the board of trustees, whatever the law may hold. None of our academic institutions have their ends defined strictly by boards of trustees. They are also defined in various parts by the incorporating body, society, the accrediting association, and the endless interaction of the administrative officers, faculty, student body, and, I might add, the nonacademic staff, which disposes of a considerable portion of institutional authority. The bookkeepers, the parking lot operators, the student union staff, the dormitory managers, the architect, the engineer, and the registrar, all have a sizeable impact on the character of the institution.

It is interesting to note that in none of the discussions on the actual or ideal government of a university does anyone ever refer to the nonacademic staff, although they are very clearly part of the government. If one takes some of the challenges which are currently being put to the university, such as the obligation to act morally in all relationships with the community or society, one must consider such matters as employment, purchasing, land acquisition, and investment, which are not normally controlled either at the faculty or presidential level but by another group of persons entirely. Their connection with the rest of the campus is unfortunately slim. They are not part of the general discussion of ends and purposes, but they influence these ends, not perhaps those which are espoused, but those which are achieved. The question of ends cannot therefore be said to be in fact the exclusive or particular concern of any single element of the academic institution.

The complexity of the university in its procedures for defining ends has something to do with the question of the relationship of the students to the institution, both with respect to what the relationship is or should be and as to the mode of resolving questions with respect to it. The legal authority of the institution to define its academic character and to judge student accomplishments in achieving the standards for institutional awards determined by that academic character has gone virtually unchallenged in the courts. The

courts normally settle the cases in terms of jurisdiction — the institution has power in these matters, and its use of that power is virtually nonreviewable. Thus, difficult questions of justice, including the procedure for achieving justice, are avoided. However, for the institution itself the question is not what legal competence it has to set academic standards but what standards should be set and with whose participation. The question of standards must embrace also the question of academic purpose — What are the ends to be achieved in the educational program? The challenge we have faced from the students is that these are *not* matters solely for decision by the faculty and the administrative officers.

We must meet the student challenge by means other than the reiteration of legal authority, or even the reiteration of the doctrine of special competence. The processes of decisionmaking must be looked at in terms of who has a legitimate interest which ought to enter into the decision. It is not a question of who has established rights but of who has legitimate interests, whether those interests are recognized in the decisional pattern or are being protected by it. I recognize that there may be more than one way of advocating, advancing, or recording an interest when it is not apparently included in the formal arrangements, but there should be some way in which it has an impact if it is a legitimate interest.

The feeling of outrage which we may quite properly sense in viewing certain events must be moderated by reflection on the questions of who are members of our community, who has a right to make assertions about its character, and in what way can those assertions be incorporated in the self-definition of the institution. It is not a matter of abandoning perquisites. It is a matter of recognizing that the pattern of authority in educational institutions is one in which many share; that there are many forms of authority including enrolling or not enrolling for classes and curricula; that all of these modes of authority shape institutions; and that a claim to authority by those who have never possessed it is not necessarily an indication that the walls have been mined and the torch is being laid to the powder train. If one approaches institutional decisions in this broader context, then the function of a cautionary statement of legal limits is clear, and one need not be concerned with the questions of whether status, contract, or constitutional principle is the best way of defining this obviously complex relationship.