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## Comment

## COMMENT

BY ROBERT S. POWELL, JR.\*

THE significant questions that are agitating the student community today are not questions involving the Bill of Rights; they are rather questions about university governance, about democracy and fairness within the university. As expressed earlier by Professor Monypenny, "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."<sup>1</sup>

The participants at this conference have generally agreed that our state and federal courts have no interest in dealing with the internal campus disputes regarding the relationships of authority among students, faculty, and administrators. These conflicts are now being adjudicated in most cases through the application of persuasion and discourse. Increasingly, though, discourse is being replaced by the harsh application of power and force by all sides, a turn of events that should surprise no one who has watched the growing class identity of college students over the past ten years become increasingly frustrated by the closed process of university decisionmaking. Fortunately, the courts have maintained a keen interest in the indiscriminate censorship of the student press and speaker forums and have intervened occasionally to protect students from such grossly unfair disciplinary procedures as was evidenced in *Dixon v. Alabama State Board of Education*.<sup>2</sup>

But the laws of our larger society will not be able to transform the authoritarian structures of modern universities because in the eyes of the law, as well as in the eyes of most administrators, our universities are corporations, both in form and in essence. Therein lies the reason the law has so far been unresponsive to student concerns about university governance. The ultimate governing power of a university is almost universally vested in a small group of absentee trustees whose perspectives of the task of building learning environments are too often at very great odds with those of the resident faculty and student populations. Even the modified version of the corporate-university theory, which includes the authority to delegate various powers to the faculty, invariably leaves students powerless to act in the significant aspects of university governance that touch

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<sup>1</sup> Monypenny, *The Student as a Student*, 45 DENVER L.J. 649, 658 (1968).

<sup>2</sup> 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

their lives — discipline, rulemaking, curriculum and grades, to name but a few. Professor John McDonough of Stanford Law School recently had this to say in defense of corporate-university policies:

To [most student activists], what is wrong with present University decision-making is that it is government without representation, insofar as the students are concerned.

Is this assumption about the nature of a University well-founded?

It would be too harsh an answer, perhaps, to respond to the students by pointing out to them that we do not let the inmates run the asylum. But it may not be too harsh and it may be relevant to point out that we do not let the patients manage the hospital; we do not let clients manage the law firm; we do not let the passengers manage the airlines; and we do not let the consumers manage a business enterprise. Is a University community really analogous to a civic community? Or is it, correctly perceived, much more a kind of on-going educational enterprise, in relation to which students are essentially in the position of patrons or consumers?<sup>3</sup>

Professor McDonough's corporate analogies are repeated daily by university presidents and deans across the country as they resist any democratic participation of students in university decisionmaking. To be sure, the administrators usually modify their statements of authority with the familiar "My-door-is-always-open" or "We-consult-the-student-body-president-on-important-issues" gestures. Yet, when the university, already possessing power over students, begins the discourse with them and then ducks the issue of governance by invoking a few glib metaphors about corporations and asylums, it need only say, "Go somewhere else if you don't like it here."

The number of campuses that have undertaken major reformations, or even reevaluations, of their governing structure in the last ten years is so small as to seem almost insignificant. The trend seems to be in the opposite direction, toward even more centralization of authority, as fundraising, public relations, research projects, and prestige faculty recruitment have virtually become ends in themselves for administrators. This trend away from campus democracy should be condemned as presenting a fundamental obstacle to university academic reform.

What passes for "higher learning" today is often 40 courses pre-designed for the undergraduate and 50 other random students in which the premiums are paid for unflagging class attendance, a good memory, and very little argument about the style or content of what happens in the classroom. Those now running our universities are often quite arrogant about the way in which they have chosen to provide students with an education, as they censor student publications and forums or dictate by fiat when adult women must return to their

<sup>3</sup> McDonough, *The Role of Students in Governing the University*, AGB REPORTS, Vol. 10, April 1968, at 27.

dorms to be locked in for the night, or, using more sophisticated methods of control, they prepare for the student who has just finished twelve years of rote learning in the public school system another four years, equally as structured and rigid, and often less relevant to the student's interests and needs. "Students," observed *Moderator* magazine recently, "are being had."

These are not newly voiced criticisms, nor are they the only ones presently being raised by students. They are presented here only to point to the direction in which student disaffection is moving. The key vector is not this issue or that one — the university's relation to Harlem and IDA were the big issues at Columbia recently, while campus free speech and the relevance of the curriculum were of greater importance at Berkeley four years ago. The key is simply power, not military or destructive or selfish power, but rather the power of students to participate in the structuring (or unstructuring) of their learning experience; the power of students to regulate and supervise their own personal social conduct; the power of students to have a significant voice in shaping the institution's value judgments which investment policies or admissions procedures often reflect.

Here is where the courts may again become relevant. In a recent and widely noted speech, Cornell President James A. Perkins voiced an interesting concern:

None of us, least of all the faculty and administration, much mourns the demise of the tradition of *in loco parentis*. But we do view with some alarm the specter that seems to be rising out of its ashes and taking the form of a rash of court cases challenging decisions in areas that were once considered the educational world's peculiar province. The filing of these cases seems to suggest that judicial processes can be substituted for academic processes.<sup>4</sup>

Unquestionably, that same concern is keenly felt by the participants at this conference. And yet, the specter of the law, rising up out of the ashes of *in loco parentis*, has not made a serious penetration into the "educational world's peculiar province." Professor William Van Alstyne, in a recent survey of 72 major state universities, found the following conditions with respect to student discipline and due process:

(1) 53 percent of the schools surveyed did not provide students with a written statement specifying the nature of the particular charges against them, and only 17 percent provided such a statement at least ten days before the determination of guilt or the imposition of punishment;

<sup>4</sup> J. Perkins, *The University and Due Process*, at 1, Dec. 8, 1967 (reprint of address by American Council on Education, Washington, D.C.).

(2) 16 percent did not even provide for hearings in disciplinary cases;

(3) 26 percent did not permit the student charged to question informants or witnesses whose statements might be considered by the hearing board in determining guilt; and

(4) 30 percent did not allow the student charged to be accompanied by an advisor of his choice.<sup>5</sup>

It is true, however, that the courts are reluctant to become substantively involved in the breaches of fairness suggested by Professor Van Alstyne's findings. Given that reluctance, students must decide what role the courts and the law can play in their fight for more fairness and more participation in their institutions.

The major on-campus role that I foresee for the courts is a political one. Students will take a great many campus controversies into the courtroom, even if they recognize the probable futility of their efforts. But the merits of these issues can and will be actively and publicly debated as a result of the legal challenge. Such issues will certainly include the right of the university to meddle in the private sex life of the student; the use of the campus police to search indiscriminately student dorm rooms without student consent; the right of students to hold demonstrations on campus property; the fairness of suspending students under vague and sweeping prohibitions that are generally clarified after the fact; and the whole area of procedural due process in disciplinary matters. The least that students expect to emerge out of the frequent use of the courts as a political weapon is a healthier respect for student rights on the campus. Beyond that, we might hope that in the process of continually calling the deans and the university attorneys to task for arbitrariness and unfairness the courts may write some significant law in the area. As the opportunity for higher education becomes increasingly viewed as an essential opportunity for effective participation in our culture, and not just a luxury for the wealthy, the courts may take a harder look at the capriciousness with which many students are now being expelled from campuses. Furthermore, as the levels of government, particularly the federal government, assume an even greater burden for financing higher education, the courts may expect universities to start behaving within many of the same legal constraints that apply to other public institutions.

It is ironic — and for students, enraging — that in America, one of the last of our institutions to reflect our national passion for justice and democratic processes is the university. The illusion spread to college freshmen during orientation and to graduates at commencement about the university being at the fringes of our society,

<sup>5</sup> Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. Rev. 368, 369 (1963).

leading it and constantly demanding that society reevaluate itself in the light of new truths, new experiments, and new technologies, is a lot of garbage. Don't look to our universities and colleges to help teach America about the hard lessons of Vietnam; through the use of their mammoth research facilities for military ends and their unthinking complicity with the draft, our universities are as deeply implicated in the shame of that American adventure as any other institution in our society. If you share my concern about the portentous absence of creative, independent-minded citizenry in our culture, about the inability of our past generation of college graduates to cope with the basic problems of racism, war, violence, and poverty, don't look to our universities for help. What is learned in today's university is not how to take risks with yourself and your convictions, but rather how to avoid risks and how to accommodate yourself to the expectations of others (who are wiser, it is said); not how to develop your own sense of what is wrong with this society and how one can behave to change it, but rather how to memorize and return undigested someone else's formulations of the problems and the solutions. Education, indeed! Perhaps as nowhere else, young Americans can go to their nearby university for four years and learn the game of dependency and conformity. Perhaps as nowhere else, students can see firsthand how fraudulent our institutions can become under the leadership of men purporting to behave democratically and in the students' best interests. "Go to school," says Joey Bishop. "It's better than a kick in the teeth."

To reiterate my original point, students are most troubled today not by the legal questions, but by the question of how we can establish a university that in its internal operations meets Professor Monypenny's desire for just and fair principles. To really answer that question satisfactorily, one must move out of the context that views the university as a corporation, out of the context in which roles and authority are strictly ordered within the institution on a hierarchical basis, where power flows from the top down, as do decisions. Campus unrest will grow more militant the longer we continue to allow our universities to function in the corporate context. Eventually what will emerge from the student-institutional tension will be something similar to unions, where students will organize to bargain collectively with the administration on the key power issues such as student discipline, curriculum, grades, admissions, the university's relationship to the community, and draft policy.

It is true that no student union now exists on a major campus in the country today. It will be only a matter of time, however, until students see the futility of passing resolutions in the student senate, meeting with deans behind closed doors to be neatly bought off on

important issues, and playing student government as though it were something to divert one's energy from real campus problems. We have seen in the disruptions at Berkeley — and most recently, Columbia — the enormous tactical power in a strong, disciplined student coalition that can frame specific demands as well as specific reprisals for the administration to deal with. It will be only a few years until union models will spring up on hundreds of campuses; strong numerically, representative of the students, and very skilled tactically in how to deal with a fumbling or undemocratic administration.

I know that most of the administrators who came here to chat about students and the law do not really want to see their campuses polarized and politicized as a result of their own grip on the decision-making processes.<sup>6</sup> But for students, what is the alternative? Students have very little hope that anything like a "one man, one vote" decision regarding student participation in the universities will emerge from the courts. The tragic failures of our culture that can be traced to the educational institutions are so gigantic and so compelling that we cannot simply disregard the challenges of university reform and move on to something less basic.

The campus disorders are just beginning, I fear, if our university leaders do not become more responsive to the new demands of our college population. The students want procedures in the classroom and in the residence hall that are enlightened, just, and fair; they want to make the rules they will have to live under; they want a representative stake in the decisions that are made in the name of their institution, such as investment decisions, admissions policies, and affiliations with defense-related agencies and organizations. Students, in short, want a much bigger chunk of the power within universities than they are now accorded. If that demand makes the administrators feel a little closer to the wall, it is unfortunate, for the essential formulations of student power on campuses today come very close to the rhetoric in most college catalogues about student responsibility, student autonomy, and freedom to live and learn for oneself. When students do begin to assume their proper role as full members of a university community, whether that happens as a result of court action, through the application of more disruptive and collective student action, or through some other mechanism, I think we will be moving forward towards the creation of a higher education in America that can serve our culture, rather than spoil it.

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<sup>6</sup> While it is very true that decisionmaking processes vary widely from campus to campus, and on paper many college presidents and deans hold little of the formal power (it resides with the faculty and/or trustees), they possess great powers to effect changes in decisionmaking procedures in nearly the entire range of student affairs issues, from disciplinary to draft policies. In those areas such as curriculum, formally relegated to the faculty for decisions, the administrator's informal powers are impressive indeed.