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ABSTRACT

Universities have responded to disruptive disturbances and to the underlying student unrest in various ways. Internal disciplinary actions, the use of police or national guard, the use of court injunctions and criminal prosecutions have been used by various institutions at different times. The purpose of this report is to develop principles and procedures that will ensure freedom for dissent, while preserving order. The report deals first with the protection of freedom of expression and political activity in public colleges and universities, including the freedom of association, of speech and assembly, of the press, and within the classroom. The protection of these freedoms in private institutions is also discussed. The next section deals with the maintenance of order with justice and presents university disciplinary procedures and the principles for achieving reliability and fundamental fairness. These include: the need for rules, equality of enforcement, "impartiality of the trier of fact," notice of the charge, information concerning the nature of the evidence, opportunity to be heard, basis of the decision, and representation of the accused. The relationship between campus and civil authority isdiscussed, including such issues as injunctions, criminal sanctions, civil actions for damages, the need for planning, double jeopardy, and revocation of financial assistance. (AF)

# Report
# of the
# American Bar Association
# Commission on Campus Government and Student Dissent

This Report was made possible by the cooperation of the American Bar Association and the American Bar Foundation. Comments concerning the Report should be mailed to the American Bar Association Commission on Campus Government and Student Dissent, American Bar Foundation, 1155 East 60th Street, Chicago, Illinois 60637.

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# REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT

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## I.

## BACKGROUND AND SCOPE OF THE REPORT

### A. Confrontation on the Campus

Campus unrest is a major problem of national concern. The focal point of that concern is clearly related to confrontations that have occurred in unprecedented numbers during recent years between students and university and civil authorities. Within the past academic year alone, an estimated one hundred and forty-five institutions of higher learning were torn by violence, and nearly four hundred more endured some form of nonviolent disruptive protest.* In response to the gravity and urgency of public concern, the Board of Governors of the American Bar Association authorized the appointment of this Commission in August, 1969, and charged it with responsibility to develop legal standards, procedures, and administrative guidelines relevant to student unrest and campus violence. President Segal appointed the Commission in August.

Historically, college campuses have been important and proper centers of social criticism. During the last few years, however, and particularly during 1968-69, disruption and violence have occurred at many institutions. The assertion of non-negotiable demands, campus strikes and boycotts, and demands for amnesty to law breakers have become recurrent techniques of confrontation politics. Arson, willful destruction of property (including manuscripts and notes of faculty members), assault and battery, the occupation of buildings, interruption of classes,

* Bayer and Astin, *Violence and Disruption on the U. S. Campus, 1958-1969*, Fall 1969 EDUCATIONAL RECORD. The authors defined violent protest as any campus incident which involved (a) burning of a building; (b) damage to a building or furnishings; (c) destruction of files, records, or papers; (d) campus march, picketing, or rally with physical violence; and (e) the injury or death to any person. Nonviolent disruptive protest was defined as any campus incident which involved (a) occupation of a building; (b) barring of entrance to a building; (c) holding officials captive; (d) interrupting classes, speeches, or meetings; and (e) general campus strike or boycott or disruption of school functions. The characterizations are those of Bayer and Astin, not of the Commission.

disruption of meetings, barring entrance to buildings, holding administrators captive, violations of injunctions, and other unlawful conduct have all entered an appearance on campus. Highly politicized student groups, sometimes aided by non-students, have been able to halt the normal operations of institutions and thwart university disciplinary proceedings. On a few campuses there is reason to believe that a determined core of revolutionaries seek the destruction of the university they attend if it cannot be transformed in the image that they desire. While disruptive protest has not been and is not characteristic of most colleges and universities, both the number and intensity of the disruptions cause deep concern in a nation that is now providing an opportunity for higher education to more students than any other society in history.

Of great concern also, are the grievances of university students and their opportunity to express these grievances. Many students question the values and priorities of higher education. They are concerned about the policies of the institutions that they attend, the inadequacy of channels of communication, the lack of responsiveness by administrators and faculty, the impersonality of university life, limitations on their freedom of expression, and their inability to participate directly in the decisions that affect their lives. Some charge that universities are hypocritical in that they fail to practice what they preach, especially in areas of faculty commitment to teaching, labor relations with non-academic employees, fundamental fairness in disciplinary hearings, and institutional [illegible] for the social problems of the community.

In addition, as the Brock Report* has recently pointed out, there are fundamental differences concerning the proper function of a university in American society. Traditionally, most faculty members have struggled to keep universities apart from the divisive social problems of the nation, as neutral institutions seeking objective truth. Some students dispute the neutrality of higher education, asserting that modern universities have become the handmaiden of a military-industrial complex, both in their educational mission of teaching and research and their financial entanglements resulting from grants, contracts, and investments. Other students eschew such characterization but assert that universities should reject neutrality and become, in the words of the Brock Committee, "partisans [illegible] progressive forces in society."

* Report of 22 Congressmen, led by Honorable [illegible] E. Brock, submitted to President Nixon on June 18, 1969, and inserted in the Congressional Record on June 24, 1969.

Some claim that universities exist primarily for students. Others contend that society in general is the principal intended beneficiary of higher education. Although there is obviously some truth in both points of view, the difference in emphasis may assume considerable significance in evaluating demands and proposals for change.

The hierarchical nature of universities and the preferred status of some members of the faculty runs counter to the egalitarian notions of some who assert that all who are affected are equally capable of participating in the decisions that confront the academic community and that no group is entitled to special privilege. Minority group students have special concerns about the relevance of the traditional degree programs for some, especially those who aspire to provide leadership for the disadvantaged.

Student concepts of the proper functions and structure of universities are expressed in demands that more courses deal directly with immediate social problems and values, that more study be undertaken directly in the community rather than in the classroom, that grading systems be modified or eliminated, and that special educational programs for the disadvantaged or minority groups be instituted. They seek greater student participation in university governance, more formalized disciplinary procedures in which basic rights of students are expressly recognized and new procedures that will produce prompt faculty or administrative response to articulated complaints.

Many college students are equally critical of American society's perception and response to the problems facing it. Many speak in terms of the "Establishment" and include within its ambit government, business, churches, the military, and the educational system. They are concerned about racial discrimination, poverty, hunger, the values of materialism, the draft, the war in Viet Nam, and the incapacity of the young to translate their concerns into effective political action. They disagree with the priorities that they claim the "System" has set for the allocation of societal resources to meet national needs, and they decry what they regard to be national aggrandizement in the conduct of our international affairs. They see the university not only as a forum in which to discuss these matters but also as an instrument to effect the societal changes that they deem to be necessary. They want to participate in the policies that will accomplish these changes, and they deny the legitimacy of efforts by the university to limit their political expression concerning these issues.

Obviously, not all students share all of these views, and the inten-

sity of concern about different issues varies widely among the many campuses of the nation. At the same time, it must be recognized that a number of these grievances have considerable substance in fact. Impersonalism, inattention, and neglect have been evident in the curricula, procedures, and internal and community practices of many institutions.

It is ironic that many of the disruptive disturbances have taken place in institutions least deficient in their sensitivity to student concerns. Indeed, the Commission believes that the very excellence of a given university and its lack of repressive policies may be conditions conducive to unrest. Students may be less willing to assert perceived grievances if summary repression is the only foreseeable result. Complete apathy in a vigorous academic institution, however, is not to be expected or desired. It may sometimes be as much a cause of concern as confrontation itself. Expression of grievances may be desirable, but it is equally desirable that the tension be expressed in forms which are consistent with law.

There is also reason to suggest that some issues have been the subject of demonstration on campus not because the university has more (or even as much) influence or responsibility than other institutions for the determination of national and international policies, but simply because its very fragility and tolerance constitute an invitation to those who may seek to use these issues to attack the institutions of our society. No university, however progressive, can avoid confrontation with those who are determined to use it merely as an instrument of revolutionary politics.

The universities have responded to the disruptive disturbances and to the underlying student unrest in various ways. Internal disciplinary actions, the use of police or national guard, the use of court injunctions and criminal prosecutions have, in different circumstances, been used by various institutions to cope with disorders. In a substantial number of institutions there have been substantive institutional changes in response to the underlying merit of student grievances, from relatively minor changes in procedures to fundamental overhauls of academic programs, disciplinary machinery, and institutions of government. In some institutions, provision has been made for increased participation of students at various levels of university authority, including membership on the Board of Trustees. At other institutions, a careful consideration of the issue has resulted in a determination that the principle of administrative accountability is preferable to representation of all segments of the academic community in the decision-making process.

The reaction of higher education to campus unrest has not dispelled public concern. Student disruptions have already resulted in legislation in approximately one-half of the states and in the Congress, with additional legislative proposals now under consideration. The courts are reviewing university disciplinary actions and procedures in unprecedented numbers. Alumni and the citizenry in general are demanding that order be maintained, while students continue to protest over the allegedly slow pace of institutional reform.

The danger to higher education is apparent if violent disturbances continue to interfere with the educational missions of our institutions of higher learning or if members of our academic communities become more alienated from the universities and society of which they are a part. The importance of the orderly functioning of our universities is too great to tolerate the number and kinds of disruptions that have become commonplace. At the same time, there is a risk that certain efforts to maintain order may themselves be excessive and may indirectly contribute to disruptions infringing upon rights of students within a university freely to express their dissent and to be dealt with fairly when charges of misconduct are asserted against them.

### B. Specific Objectives of the Commission

Principles and procedures must be developed that will insure freedom for dissent, while preserving the order required for those endeavors that constitute the reasons for the existence of universities. The Commission has resolved to concentrate its efforts in this Report on the formulation of those principles and procedures.*

The Commission has deliberately avoided detailed recommendations in part because of the formidable difficulties caused by the diversity of higher education in America and the complexity of the relationships within each institution.

More than seven million students are currently enrolled in nearly 2,600 colleges and universities in the United States. Two thirds of these students attend public institutions that account for forty percent of all institutions of higher learning. The remaining third are unevenly dis-

* In doing so, the Commission is not unmindful of the need to seek solutions to underlying causes of campus unrest and the need to reconcile differing views concerning student and faculty participation in university governance. The Commission will review the issue of governance when it has had the benefit of studies of this subject currently under consideration by several professional associations, including the American Association of University Professors and the American Council on Education Special Committee on Campus Tensions.

tributed among 1,500 private institutions, and nearly sixty percent of these institutions have some degree of religious affiliation.

Private institutions share a common principal dependency on private financial support, but their particular dependency even in this regard varies greatly and they otherwise reflect almost every imaginable variety of educational ecology. They include giant universities heavily invested with major research and graduate programs, thousands of students from eighteen to thirty-five years, and campuses with widely differing degrees of decentralization and impersonality. At the same time, the complex of private higher education also includes theological seminaries, technical institutes, and proprietary colleges with concentrated financial dependency, specific doctrinal commitments, and such diverse educational circumstance that detailed prescriptions uniformly responsive to the situation of all private institutions alike are impractical and undesirable.

Variety in educational circumstance is equally obvious among public colleges and universities in which the greater number of students are enrolled. They, too, reflect major differences in size, resources, personnel, function, curriculum, facilities, governance, and tradition. They embrace the state and federally financed multiversities of more than 30,000 students drawn from great distances to large campuses of uncertain boundaries scarcely separating them from the city at large. They include small, two-year community colleges with purely local student bodies of eighteen and nineteen year olds, compact campuses, a liberal arts curriculum, and community boards of control administering small budgets from locally-dependent tax sources. At a time when public attention to campus unrest may tend to suggest that most of higher education is pursued in one or two kinds of institutions—such as the very large and impersonal multiversity or the small but permissive liberal arts college—it may be instructive to note that a quarter of the entire college student population is found in junior colleges.

This central theme of diversity in higher education means that this Commission's prescriptive statement of principles must appropriately restrict itself to a limited number of recommendations within the practical capacity of each institution to consider according to its own particular circumstances. Any attempt to provide detailed prescriptions would presuppose a nonexistent sameness in the circumstances of all institutions of higher education.

The present state of the law limits the power of state universities to restrict political expression and to administer summary discipline to a

much greater degree than is true of private institutions, and our recommendations appropriately take those legal limitations into account. Furthermore, available evidence indicates that disruption and violence has been especially prevalent in some of the large academically selective institutions, and substantive and procedural standards therefore must also be formulated with the needs of these institutions in mind. Additionally, there is reason to believe that the need for formulating principles governing freedom of expression and the adjudication of charges of student misconduct may be the greatest in some of our small institutions which have not yet experienced the intensity of student concern manifested at other institutions. Thus, our recommendations are meant to be useful to them as well.

The Commission is aware that its concern about the protection of legitimate dissent will be of limited value to a number of institutions that have already accepted the basic principles reviewed in this Report. And, again, there are necessarily a number of smaller, highly specialized institutions that are unlikely to be faced with the prospect of violence by a politicized student group and may not need even the limited degree of institutionalized rules reflected in our recommendations.

A second factor that argues persuasively against any attempt to draft specific rules is the complexity of the relationships within any particular institution of higher learning. Few universities conform to the image of a monolithic institution in which power is concentrated in a small group of administrators who are capable of responding promptly to any crisis that may arise. In most institutions, the power of college administrators is shared with trustees, faculty, and others. Frequently, the authority of the president and his administrative subordinates is not commensurate with their responsibility. In all institutions, the relationships among students, faculty, administrators, trustees, boards of visitors, alumni, the communities in which they are located, and the public at large are complex and sophisticated. Special relationships with religious bodies or state legislatures may compound the difficulty of understanding how any given university functions.

The nature of these relationships in any one university is usually incapable of comprehension without an understanding of the traditions, informal understandings, indentures, corporate charters, or state and federal legislation, which make up the background for the daily operations of every university. Rapid growth in an era of change has resulted in a situation where many universities themselves have not yet been able to evaluate the degree to which such factors affect decision-making or the exact

role of different groups in the formulation of policy. Many institutions are now engaged in such self-evaluation, and the deliberations may affect the kinds of specific rules that will be appropriate for any given institution.

The Commission's recommendations are based upon the premise that within a university it is possible for men of good faith to engage in free expression, and that it is possible for institutions of self-government, including university disciplinary proceedings, to operate effectively. These conditions exist in the overwhelming majority of American institutions of higher learning. Unfortunately, there are universities where, on occasion during recent years, different conditions have prevailed. For example, disciplinary hearings have been interrupted, hearings have been turned into politicized propaganda tirades, coercion has been exercised to preclude rational consideration and determination of the issues involved.

A university should not permit its fairly established procedures to be frustrated by conduct of this nature. University disciplinary proceedings are fragile instruments. A university does not have a career judiciary, or marshals, sheriffs or bailiffs to enforce its orders and maintain order. Any dedicated group of disrupters can interfere effectively with the deliberations of any university tribunal. Such a situation is akin to the type of insurgency which justifies martial law, and an institution may be required to depart from its normal procedures (such as closing a hearing to the public) when it is immediately threatened with disruption.

With these reservations, the Commission has divided its Report into two sections: The Protection of Freedom of Expression; and, The Maintenance of Order with Justice.

## II.

## THE PROTECTION OF FREEDOM OF EXPRESSION

### Introduction

During its 1968 Term, the Supreme Court of the United States for the first time in twenty-five years reviewed a case involving student freedom of expression. Its decision ended in granting relief to several public high school students who had been suspended for wearing black armbands on campus as a peaceful expression of dissent to American involvement in Viet Nam. After emphasizing repeatedly that the record in the case contained no evidence of intimidation or material disruption upon which the school might otherwise have properly relied as a basis for its disciplinary action, the Court went on to make certain observations that are of importance to the recommendations of this Commission:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.
>
> . . . .
>
> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.
>
> *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969).

This Commission's recommendations necessarily reflect the fact that public institutions of higher education are subject to the First Amendment, and that the Constitution itself thus provides a substantial measure of protection for free speech on campus. While the precise scope of student political rights on campus remains uncertain (given the relative infrequency of litigation, the near absence of Supreme Court review and

considerable disagreement among the lower courts), a reasonable basis does exist to project an outline of those rights "applied in light of the special characteristics of the school environment," and limited by "constitutionally valid reasons" for their fair regulation.

Our recommendations distinguish generally between public and private institutions because their needs and circumstances may differ sharply, especially for institutions with announced doctrinal commitments and specially limited vocational or religious objectives, and where the First Amendment may not apply. At the same time, our recommendations for public institutions may also be appropriate for many private institutions as well. To a considerable extent, this similar treatment of student expression in many private institutions as in public institutions reflects the fact that a clear distinction cannot always be made in a given case as a matter of law, educational policy, or institutional need. Increasingly, for instance, more and more private institutions rely upon governmental assistance to underwrite new construction, research, salaries, and student aid. The Supreme Court has said: ". . . when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." Whether the First Amendment will be held to apply to certain private institutions or at least to certain aspects of their operations when they are financed and otherwise significantly involved with government has not yet been decided by the Supreme Court. Nevertheless, prudent planning requires the recognition that the Court may hold that the Amendment is applicable.

Beyond this, the "special characteristics of the school environment," referred to by the Supreme Court, vary considerably among public and private institutions alike, with the consequence that the latitude of institutional regulation of student expression may be broader at some institutions than at others irrespective of whether they are public or private. Limitations on facilities, finance, and personnel in a small community college may, for instance, preclude the extent of political activity feasible to accommodate within a larger institution.

The difference in average age of students in a given college may make it educationally appropriate to provide for a degree of advice and consultation inessential to observe to the same extent at an institution with a largely graduate student body. Additionally, emergency circumstances within a given public institution may justify special measures essential to the restoration of order, just as they may do so in the larger society. In these and other respects, it may obviously be of secondary importance to

determine whether a given institution is either private or public in a technical sense.

Finally, the Commission wishes expressly to note that not all of our suggestions necessarily reflect established legal requirements even as applied to public institutions. To a certain extent, this is unavoidable because the law is not entirely settled. More substantially, however, our recommendations attempt to report standards that may be seen as fair and feasible, faithful to the law as it has developed, and also responsive to the needs of students and the constraints of higher education.

## A. Freedom of Expression and Political Activity in Public Colleges and Universities

Students enrolled in public institutions of higher education are entitled to the same First Amendment freedoms that they hold as citizens. In the context of the campus itself, the fair exercise of those rights involves the following considerations.

### 1. *Freedom of Association*

Students should be free to organize and to participate in voluntary associations of their own choosing subject to university regulations insuring that such associations are neither discriminatory in their treatment of other members of the academic community nor operated in a manner which substantially interferes with the rights of others.* Under appropriate circumstances, *e.g.*, where university funds may be involved, or where support is provided other than through voluntary contributions of the members themselves, the university may reasonably require a reliable accounting procedure and a list of officers or other persons responsible for the overall conduct of the association. While a faculty advisor may be of benefit to an association and provision may be made to encourage this degree of faculty support, a voluntary student association ought not be subject to the control of its advisor nor should freedom of association be denied to groups unable or unwilling to secure assistance of this kind. Affiliation of a voluntary student association with extramural organizations is not by itself a sufficient reason to deny that student association the use of campus facilities, although reasonable pro-

* Commission member Caruso prefers the following language: "Students should be free to organize and to participate in voluntary associations of their own choosing subject to university regulations insuring that such associations are neither unreasonably discriminatory in their treatment of other members of the academic community nor operated in a manner which interferes with the rights of others."

vision may be made to safeguard the autonomy of a campus organization from domination by outside groups.

Freedom of association on campus may properly reflect personal or political interests of the members not necessarily related to the operation of the university or its regular instructional program. The right to voluntary association is not limited to those groups that necessarily hold interests coincident with those of the institution as such; but, campus organizations are under a strong obligation to avoid any representation that their actions necessarily reflect the views of the university.

Acts of intimidation or disruption of the university may properly be forbidden by rules applicable to all members of the academic community, including voluntary associations. Thus, violations of such rules by voluntary associations may properly result in the imposition of sanctions against an association corporately, and not merely against its members as individuals. In addition, a public institution may not forbid freedom of association because of misgivings about the general political or philosophical objectives of any particular group. Laws governing criminal solicitation, attempt and conspiracy are, however, equally applicable to students as to all others and overt acts in material furtherance of an illegal objective may be subject to university discipline as well as redress under general law. Upon proper consideration of this subject with legal counsel, whose assistance may be necessary to inform the institution on the scope of its authority in this area, specific regulation may then be provided.

### 2. *Freedom of Speech and Assembly*

Rules specifically applicable to speech and assembly on campus should be clear and specific to avoid the possibility of arbitrary enforcement and to avoid degrees of uncertainty which might otherwise inhibit the exercise of orderly and peaceful expression.

No rule should restrict any student expression solely on the basis of disapproval or fear of his ideas or motives. At the same time, the fact that students may pursue interests in political action through speech and assembly on campus does not abrogate their accountability as citizens to the constitutional laws of the larger society, and the university is entitled to reflect these constraints in its own regulations. Accordingly, willful defamation, public obscenity, certain incitements to crime, as well as other civil or criminal misconduct under laws applicable to a manner of speech or assembly directly damaging to the rights of others may be subject to institutional redress.

In addition, institutions of higher education have a serious obligation to protect the operation of the university from disruption and to protect the members of the academic community and all others authorized to use their facilities from harassment and coercion. Modes of speech or assembly that are manifestly unreasonable in terms of time, place, or manner may be forbidden by clear and specific university rules. Such rules are a condition rather than a limitation of freedom within the university. Thus, demonstrations, speeches or assemblies that are disruptive because they are staged in a manner that congests access or passage, or due to their noise or location, and expressions imposed on semi-captive audiences or offensively upon unwilling third parties may appropriately be forbidden.

Freedom of expression is not confined to oral or written communication alone, and symbolic conduct ought not be forbidden where it is neither disruptive by its manner nor otherwise violative of rules applicable to conduct as such. Freedom of expression on campus, moreover, ought not be restricted only to areas especially suitable for stationary assembly. An effective opportunity to reach others whose interest a student may desire to attract may appropriately extend to other facilities on campus to the extent that their normal operation is generally compatible with peaceful communication. Thus, the distribution of printed matter in places of general public access, and the exercise of other forms of expression which are not disruptive of the customary use of various university facilities should not be restricted.

In addition to being protected in the exercise of their own freedom of speech, students should be free to invite and to hear any person of their own choosing. Routine procedures required by a public institution before a guest speaker is invited to appear on campus, such as those applicable to other assemblies on campus, should be designed to insure only that there is an orderly scheduling of facilities and adequate preparation for the event. Institutional control of campus facilities thus should not be used as a device of censorship. Guest speakers, not otherwise associated with the university, are nevertheless accountable for their conduct under valid general laws, and the university may seek the assistance of those laws under appropriate circumstances. While a student organization ought not be held responsible for unforseeable illegal actions by a speaker on campus at their invitation, sponsorship with knowledge of the speaker's intended or probable violation of the law, which violation does in fact occur in connection with that sponsorship, may appropriately result in disciplinary action against the sponsoring students.

### 3. *Freedom of the Press*

Freedom of the press is in a basic sense but a special aspect of freedom of speech. As a consequence, many of the rules protecting and limiting other modes of expression on campus will apply equally to the regulation of publications. Ideological censorship is thus to be avoided in the determination of printed matter available on campus; access to publications is not to be denied because of disapproval of their content; and regulation of student publications that operate on the same basis as other private enterprises should be subject only to the same control as those respecting the reasonableness of time, place, and manner of distribution. Similarly, valid general laws proscribing willful defamation, public obscenity, and other actionable wrongs apply equally to printed matter as to other forms of expression on campus. Finally, just as the institution has an obligation to discourage interference with speech, so also may it prohibit acts of vandalism or other misconduct that seeks to hinder the orderly distribution and availability of publications on campus.

As already noted, a student publication that operates on the same basis as other private undertakings may be subject only to the same control as they. The regular student press is often distinguishable from other publications, however, and frequently cannot be treated as though it were an enterprise financially and legally separate from the university. Student newspapers may be supported by compulsory student fees and other direct and indirect institutional subsidy. They may be legally integrated with the operation of the university in such a fashion that the institution is answerable under the law for actionable statements injurious to others. They may be associated with a department of journalism or other curricular discipline carrying academic recognition and supervision. In each of these instances and others, the integration of the student press and the university may make it appropriate that rules be provided for its fair regulation and protection.

The fact of institutional subsidy and liability does not warrant censorship of editorial policy or content in any broad sense. The university may provide for limited review, however, solely as a reasonable precaution against the publication of matter which would expose the institution to liability. Provision should be made to advise student editors and managers of laws applicable to the student press and to the institution, and the rules may provide that editors and managers are subject to an additional obligation to review copy with a person appropriately designated to furnish them counsel on any matter which the editors have

reason to know may raise a substantial question of institutional liability. At the same time, editors and managers of student publications should be protected from arbitrary suspension and removal from office because of student, faculty, or administrative disapproval of editorial policy or content. Only for proper and stated causes should editors and managers be subject to removal and then by orderly and prescribed procedures.

Where the student press is supported by compulsory student fees or other significant university subsidy or where there is a generally accepted public identification with the particular institution, it may properly be subject to rules providing for a right of reply by any person adversely treated in its publication or in disagreement with its editorial policy or its treatment of a given event. Similarly, since the right of fair access to a publication supported by compulsory subscription may be essential to protect those thus compelled to support the press, provision should be made for the publication of news and views offered by persons who feel that they are not adequately represented in the coverage of that press, subject only to reasonable standards of newsworthiness and review of possibly actionable statements.*

Faculty or administrative supervision of publications integrated with academic credit and training in journalism should be limited to academic requirements and evaluation. As a matter of policy, provisions for review of faculty or administrative evaluations believed to reflect bias or prejudice extend equally to the protection of students in journalism.

University published and financed student publications should appropriately indicate that the opinions there expressed are not necessarily those of the university or the student body. Moreover, other student publications may fairly be required to indicate that they are not published or financed by the university, and that opinions expressed therein are without university endorsement.

4. *Within the Classroom*

The classroom is not an unstructured political forum. It is a center for the study and understanding of a described subject matter for which the instructor has professional responsibility and institutional accountability. Control of the order and direction of a class, as well as control of the scope and treatment of the subject matter, must therefore immediately rest with the individual instructor, free of distraction or disrup-

* Commission member Caruso would grant the same right of access to a publication which enjoys a generally accepted public identification with a particular institution, although not supported by compulsory subscription.

tion by students or others who may be in disagreement with the manner in which he discharges his responsibilities. Thus, disruption of the classroom itself or conduct within the classroom insubordinate of the instructor's immediate authority may appropriately be forbidden by the rules of the university. The rules may properly reflect the obligation of each student to respect the rights of others in the maintenance of classroom order and in the observance of that standard of elementary courtesy common to every intellectual discipline.

Given the fact that the classroom may not be utilized to ventilate grievances relevant even to the conduct of the class itself, at least when the instructor indicates his reluctance to depart from the assigned materials, universities should provide some orderly means outside of the classroom for the review and disposition of such grievances. Where such means are provided, or where students otherwise express their grievance with the conduct of a given course without disrupting the classroom itself, they should not be subject to instructional reprisal or punitive grading for doing so. To safeguard these prerogatives as well as to protect students from instructional evaluation based on political bias, individual prejudice, or other considerations not reflecting a professional assessment of educational performance, provision should be made for an orderly procedure of appeal from instructional evaluations allegedly reached on nonacademic grounds.

### B. Freedom of Expression and Political Activity in Private Colleges and Universities

Students enrolling in private institutions of higher education are generally subject to whatever extent of regulation each institution has determined to be appropriate to its own needs and circumstances. The Constitution does not require that a private seminary subordinate its belief in revealed truth to criticism within its own walls, nor does it forbid the dedication of private assets for secular purposes which the grantor or his trustees desire to limit specifically as they think best. A private college is generally free to determine to its own satisfaction the nature and conditions of the educational service it wishes to offer. In a pluralistic society, the basic value of all of these institutions inheres in the fact that they offer alternatives which remain highly attractive choices to many people.

Correspondingly, the principal obligation of these institutions to those whom they encourage to enroll is primarily one of clear and honest dis-

closure. Where the institution thus makes clear its own expectations and provides an understanding of what it deems incompatible with its purposes as well as what it will attempt to provide, respect for its rules may be expected in the conduct of its students subject to whatever process of change the institution has otherwise established.

In practice, however, some private institutions (*e.g.*, a school with a fixed doctrinal or ideological objective) may also need to reflect their special characteristics in their staffing and admissions policies, as well as in their rules and publications. Otherwise, some students and faculty may come into the institution in spite of, rather than because of, the institution's special characteristics. Their displeasure with policies with which they disagree may result in controversy which in turn may trigger a disruption, despite the institution's attempt to make its policies clear in its rules and publications.

We have noted earlier in this Report that many private institutions neither feel a need for regulating student political expression in any manner differently from what we have recommended for public institutions, nor do they think it desirable to set themselves apart in this respect. Indeed, it deserves to be said that a number of private institutions do not maintain even that degree of restriction on student political activity which the law allows even to their public counterparts. The commission fully supports the many distinguished private colleges that have adopted such policies. The Report intends only to acknowledge that variation among the circumstances of all our institutions of higher learning makes it imperative to recognize that each institution must enjoy a substantial measure of freedom in reconciling these recommendations with its policies and objectives.*

* Statement by Commission Members Clark, Dash, Long, Shestack and Young: The Commission has set forth desirable standards, which the Constitution mandates, for the exercise of freedoms of assembly, speech and press in public colleges and universities. But we believe the Report falls short in not recommending those standards for so-called private colleges and universities. The relationships between "private" educational institutions and the government through grants, research projects and tax benefits have become so pervasive that few institutions (with perhaps the exception of seminaries) can be considered to be "private" enough to be excluded from the reach of the Fourteenth Amendment. Even if a college or university qualifies as "private," its role toward the individual student is so dominant and the student so limited in his ability to go elsewhere, that the individual should be afforded rights against such private dominance just as the individual is afforded rights against the state by virtue of the Fourteenth Amendment. While the Fourteenth Amendment has not generally been held to apply to cases of private dominance, the Amendment sets a standard to which our society should aspire. Colleges and universities should be among the first who opt for that standard.

While we understand the desire of college administrators to maximize their options, at this mature stage of appreciation of individual rights, the standards of the Fourteenth Amendment should not be considered an undue burden for institutions of higher learning.

We believe also that the Report should have emphasized the need for colleges and universities to provide adequate means for receiving and considering the views of students. Otherwise, the freedom of association, speech or assembly which are afforded lose a considerable portion of their value, and incentive is given for disruptive forms of conduct. Since the subject of student participation in governance of educational institutions will be the subject of further Commission exploration, we shall not dwell on the point now.

## III.

## THE MAINTENANCE OF ORDER WITH JUSTICE

### Introduction

The interests of the public and higher education will be best served by entrusting the primary responsibility for the maintenance of order on the campus to the universities when they are willing and able to perform the function.

In most universities the maintenance of order does not constitute a major problem. Most students voluntarily abstain from disruptive activity. In most cases the normal channels of university governance are able to find solutions to disputes before controversy erupts into a disorder.

New techniques are being utilized on some campuses to accelerate decision-making where the normal institutional processes are felt to be too slow or inflexible to achieve a satisfactory solution within the time available. Undoubtedly, other alternatives for the resolution of campus disputes will be found as universities continue to engage in self-evaluation of their disputes resolution machinery.

Searching self-evaluation, the identification of valid grievances, and prompt attention to institutional shortcomings provide the most effective assurance for the maintenance of order. As in other fields of endeavor, prevention is to be preferred over therapy.

Not all confrontations can be avoided. On occasion disputes may concern issues which the university lacks the power to resolve. On matters within institutional competence there may be an honest difference of opinion on matters too fundamental to permit compromise, or the power to take effective action may rest in a person or body other than the immediate parties to the dispute. Finally, no university can avoid confrontation with those who openly espouse its destruction or those who assert non-negotiable demands. In such circumstances, a confrontation may result in a disruption if students are unwilling to conform their conduct to the requirements of law. In such cases, primary reliance should be placed on university disciplinary procedures, supported by university security personnel, for the maintenance or restoration of order and the prevention of future disturbances. The imposition of effective sanctions against students guilty of misconduct after prompt,

fair disciplinary proceedings will normally be sufficient to maintain an acceptable level of order without the necessity of outside intervention.*

Nevertheless, conditions can arise where a university may be required to seek the assistance of civil authorities or civil authorities may, on their own initiative, determine that intervention is necessary in order to protect persons, property or the orderly functioning of the university or to put a halt to flagrant violations of law.

Both the use of internal disciplinary procedures and the intervention of civil authorities pose issues of great importance to the public and to institutions of higher learning. This portion of the Report deals with these matters.

## A. University Disciplinary Procedures

### Introduction

The Commission is concerned exclusively with appropriate procedures in cases where a substantial sanction, such as suspension or expulsion, may be imposed for alleged misconduct by a student. The recommendations of the Commission are not intended to apply to purely academic decisions by a university, nor do they apply to cases in which the penalties involved are not serious. Furthermore, the Commission recognizes that a student, with knowledge of his rights, may prefer and may choose to accept informal procedures for the determination of guilt or the imposition of a sanction.

For reasons stated previously, no attempt shall be made to suggest a model of universal utility. Instead the Commission recommends that institutions of higher learning structure their disciplinary proceedings in a manner reasonably calculated to accomplish several goals. The procedures established should facilitate a reliable determination of the truth or falsity of the charges. They should provide fundamental fairness to the parties, and they should be an effective instrument for the maintenance of order. The Commission rejects the proposition that one of the purposes of university disciplinary proceedings is to provide a forum to politicize a campus.

#### 1. *Principles for Achieving Reliability and Fundamental Fairness*

##### a. *The Need for Rules*

A number of colleges and universities have instituted disciplinary proceedings against students on the basis of their "inherent authority"

* See page 8, *infra*.

to maintain order on campus, in spite of the absence of any rule forbidding the particular conduct which formed the basis of the charge. Where the particular conduct involved substantial disruption and was otherwise of such a nature that the students could not reasonably have supposed that it would be condoned by the institution, the university's authority to proceed simply on the basis of its inherent authority has generally been upheld by the courts. On the other hand, one federal court of appeals has recently rejected the view that inherent authority alone is a sufficient basis for serious disciplinary action, further observing that the doctrines of vagueness and overbreadth that other courts have applied to invalidate certain university rules applicable to political activity "presuppose the existence of rules whose coherence and boundaries may be questioned."

Given the unsettled state of the law and the reasonableness of competing points of view on this subject, the Commission is not inclined to recommend either that a university may never act against a student other than pursuant to a published rule clearly furnishing the basis for a specific charge or that it may freely act against the student even in the absence of any clearly applicable and previously published rule. Rather, the Commission believes it more useful to state the various considerations according to which an institution may better determine what fundamental fairness may require in the circumstances of a given case:

(1) A college or university ought not be expected to formulate elaborately detailed codes of conduct comparable to the consolidated criminal statutes of a state. An attempt to differentiate among all possible offenses in comparable refinement is not within the resources of many colleges, it may detract from the educational character of an academic institution, and it may inadvertently encourage an adversary relationship in which professional quibbling is substituted for fundamental fairness.

(2) For most purposes, however, it is feasible for a college or university to describe its standards with sufficient clarity and to publish those standards in a form readily available to its students in a manner which, while not exaggerated in length, detail, or complexity, will provide fair notice of what is expected and what is forbidden.

(3) While it might be helpful to designate a responsible person or group of persons to furnish an authoritative advisory opinion upon inquiry by those wishing to know whether a proposed course of conduct would be deemed to violate a rule that is somewhat vague, or would be deemed to be inconsistent with the institution's inherent power to main-

tain order on campus, the value of such a procedure should be seen as complementary to published rules and not as a general substitute for rules.

(4) Where a rule has been adopted which is applicable to behavior involving some aspect of freedom of speech, association, or assembly, there is a special obligation that the rule be stated with clarity and precision.

b. *The Scope of Rules*

The Commission elsewhere in this Report records its view that university rules may appropriately overlap certain state and federal statutes, and that the concept of double jeopardy does not limit the scope of a university's rules. Thus, a student who disrupts a classroom in a manner that subjects him to a general statute applicable to assault and battery may also appropriately be subject to university disciplinary processes as well. Conversely, the fact that certain student conduct is not necessarily subject to any state or federal statute does not make it inappropriate for a college to forbid such conduct, as may ordinarily be true of cases of cheating on examinations or plagiarism. The relation of college rules to general law is therefore largely coincidental, and the scope of university rules is appropriately determined by the announced objectives of the university and the extent to which it has reasonably determined that certain rules are fairly related to the accomplishment and protection of those objectives. Given the diversity of our institutions of higher learning and the fact that they are not all established for identical purposes, it is consequently not possible to describe uniform outside limits on the nature and scope of the rules that each may choose to maintain.

At the same time, the Commission recommends that a college or university ought not proliferate its rules beyond the point of safeguarding its own stated objectives. In this respect, a college rule that does no more than to duplicate the function of a general statute and to multiply the individual's punishment under general law without vindicating any distinct and separate concern of the academic community may be seen by many as a form of double punishment and lead to bitterness and recrimination. The Commission emphasizes, therefore, that the scope of university rules ought to be determined by each institution with reference to its own needs and objectives, and not with reference to the scope of state or federal jurisdiction.

c. *Equality of Enforcement*

The university has an obligation to apply its rules equally to all students who are similarly situated. This does not mean, however, that a university is required to refrain from prosecuting some offenders because there are other offenders who cannot be identified or who are not presently being tried for some other valid reason. In the absence of evidence of discriminatory enforcement, the university may properly try those offenders against whom charges have been brought although it is clear that there are other offenders who are not before the tribunal.

d. *Impartiality of the Trier of Fact*

The truth or falsity of charges of specific acts of misconduct should be determined by an impartial person or group. Fundamental fairness does not require any particular kind of tribunal or hearing committee, nor does it necessarily require that the finder of fact comes from or (in the case of a group) be composed of any particular segments of the university community.

e. *Notice of the Charge*

A student accused of specific acts of misconduct should receive timely notice of the specific charge against him. The charge should be sufficiently precise to enable the student to understand the grounds upon which the university seeks to justify the imposition of a sanction and to enable him adequately to prepare any defense which may be available to him.

f. *Information Concerning the Nature of the Evidence in Support of the Charge*

If a student denies the facts alleged in the charges, he should be informed of the nature of the evidence on which the disciplinary proceeding is based. He should either be given the right to confront the witnesses against him or be provided with the names and statements of the witnesses who have given evidence against him. In cases where credibility is involved, fundamental fairness may require that a student be provided the opportunity to question his accusers.

g. *Opportunity to be Heard*

The student should be given an opportunity to respond to the evidence against him. He should be able to present his position, make such denial or explanation as he thinks appropriate, and testify or present such other evidence as is available to him. The technical rules of evidence applicable to civil and criminal trials are not applicable. A

student may waive his right to a hearing either expressly or by his failure to appear without justification at the time set. Failure to appear without justification may itself be made punishable.

h. *Basis of Decision*

The trier of fact before whom the hearing is conducted should base its decision on the evidence presented at the hearing. A finding of guilt and the imposition of a sanction should be based on substantial evidence.

i. *Representation of Accused*

A student should have the right to be represented at the hearing by any person selected by him, such as a fellow student, a faculty member, a lawyer, or a friend from outside the university community.

The Commission understands the doubts of those who are concerned that the participation by a lawyer may make some disciplinary procedures unworkable, especially where the trier of fact is not a lawyer and legal counsel for him is unavailable. The Commission agrees that it would be most unfortunate if university disciplinary proceedings were to be conducted in the atmosphere sometimes characteristic of criminal trials.

It also recognizes, however, that a hearing on charges of misconduct is an adversary proceeding in the sense that the university is seeking to impose a sanction of substantial severity upon the student, and the student is seeking to avoid the imposition of the sanction. Frequently, there will be sharp controversy over questions of fact, under circumstances in which a young student may lack the expertise to investigate effectively or be too inarticulate to present his case adequately without professional assistance. In many cases there will be a need for counsel for the same reasons that counsel is needed in civil and criminal cases, juvenile proceedings, administrative hearings, or negotiations between private persons.

In complex cases where a student is represented by counsel, it may be essential to have a law trained hearing officer, and on occasion it may also be desirable for the university to present its case through counsel. It may be necessary for the university to utilize the services of members of a law school faculty, local attorneys in private practice, its general counsel, or lawyer alumni to meet such needs.

j. *Interim Suspension*

As a general rule the status of a student should not be altered until the charges brought against him have been adjudicated. Experience has

shown, however, that prompt and decisive disciplinary action may be required in extreme cases before there is an opportunity to conduct a hearing, as in cases in which a student's continued presence on campus constitutes an immediate threat or injury to the well-being or property of members of the university community, or to the property or the orderly functioning of the university. The imposition of interim suspension should entitle the suspended student to a prompt hearing on the charges against him. Fundamental fairness may require an informal review of the decision to impose interim suspension in the absence of a prompt hearing on the charges.

2. *Implementation of Principles*

It is clear that the principles discussed in the preceding section are not self-executing. The Commission also recognizes that some may think it desirable to broaden the procedural protection afforded students, while others may question the desirability of some of the principles enunciated above, at least in the case of some private universities.

The Commission has stated what it deems to be desirable standards. It recognizes that individual institutions of higher learning will have to develop their own procedures in response to their special needs. In doing so, they will be required to make difficult decisions in attempting to implement these general principles.

Some of the problems of implementation are clear:

Should the trier of fact be a faculty member, administrative official, alumnus, tribunal, hearing committee, or some other person or group? If the trier of fact is to be a group, of whom will it be composed and how will it be selected? Who may file charges; how should they be investigated; what standards should govern their disposition? What degree of specificity should be required; should consolidation of charges against different students be permitted; how should they be served; what time interval should usually exist between service of charges and hearing? Should the defendant be permitted to stand mute? Should evidence in support of the charges be normally presented by report, statements, or live witnesses? What quantum of proof should be utilized by the trier of fact as a criterion for determining whether there is "substantial evidence" of guilt? Will the hearing normally be open or closed; and what circumstances, if any, will justify a departure from the normal procedure? Should an appeal be permitted, and, if so, what will be the scope of the appeal and to whom should it be addressed?

These are but examples of questions that may result in a wide range

of responses in the different kinds of institutions of higher learning across the country. The Commission does not suggest that any one set of answers is best for all. The basic test must be the extent to which proposed procedures contribute or detract from the reliability of fact finding, fundamental fairness, and effectiveness.

3. *Effectiveness*

It is not sufficient that disciplinary procedures be reliable and fair. They must also be effective. Effectiveness is particularly dependent on the overall attitude of the university community itself. It assumes a widely shared commitment to the principle of institutional self-governance. It requires that misconduct be reported, that charges be filed by those who have the responsibility to do so, that the witnesses will testify if called, that findings of guilt be made when the evidence so warrants, and that penalties be imposed when guilt is found and sanctions are appropriate. There must be a general willingness to participate in the proceedings and to respect the finality of their results. It must be possible for proceedings to be conducted without fear of interruption or retaliation against those who participate.

In some universities the imposition of the sanction of suspension or expulsion has triggered new disorders. The university community must appreciate that its failure to police its own house will inevitably lead to intervention by civil authority.

## B. Relationship Between Campus Authority and Civil Authority

### Introduction

In the words of the National Commission on the Causes and Prevention of Violence, members of the university community "cannot argue that of all Americans they are uniquely beyond the reach of the law." A citizen is not immunized from the law by virtue of his status as a student.

The Commission has earlier in this Report affirmed its belief that there are persuasive reasons why the interests of the public and the university community may be best served by entrusting the primary responsibility for the maintenance of order to universities when they are willing and able to perform the function. At the same time, it has recognized that there are circumstances in which the intervention of civil authorities may be required.

Intervention by public authority may take several different forms: the issuance of an injunction; selective arrests; the introduction of sub-

stantial numbers of police into the campus; civil suits for damages. All have advantages and disadvantages. Whether or when there should be recourse to any of these techniques raises questions of judgment and discretion, rather than issues of law. The Commission can do no more than to indicate some of the considerations that should influence the decision of what techniques should be utilized and when they may be most appropriate.

1. *Injunctions*

A number of institutions have sought injunctive relief for the purpose of quelling campus disturbances, with varying degrees of success. Some courts have granted injunctions upon the theory that the presence of an immediate threat to property or persons or a significant interference with the educational mission of the institution constitutes a threat of irreparable harm justifying injunctive relief. In at least one state, it is no longer necessary to allege that irreparable injury is threatened if the court finds that a state of emergency exists or is imminent within the institution." In most instances, universities have been able to obtain a temporary restraining order upon an *ex parte* application by counsel.

There are a number of advantages to the use of injunctions in cases of student disorders: An injunction can be narrowly drafted to deal with a specific disturbance with much more precision than a general statute, thus responding more effectively to the disruption while avoiding unduly broad limitations upon freedom of expression. The injunction constitutes a public declaration by the courts of the unlawful nature of the actions taken or threatened by the disrupting students. The issuance of an injunction may generate a favorable public reaction to the position of the university. It may persuade moderate students to refrain from participating in the disruption. It imposes restraint upon the disrupting students by a non-university governmental entity. Students may obey a court order when they would ignore the orders of a university official. The injunction may provide students with an opportunity to end a disruption without losing face. If contempt proceedings are instituted to enforce the injunction, the hearing of the contempt citation will generally be accelerated on the court's docket, thus resulting in a speedier determination than might have occurred if the criminal processes had been utilized.

There are also disadvantages. It is frequently necessary to utilize local law enforcement officers to serve process. In most states, the injunction is not self-enforcing, although at least one state statute makes

a violation of an injunction a crime in itself. Enforcement of an injunction through court proceedings may involve some of the same problems as those presented when police are used to quell a disturbance. A university that is not prepared to enforce the injunction through contempt proceedings should not seek one. To obtain an injunction in such a situation might permit a court decree to be flouted by students with impunity.

There may be significant procedural problems involved in establishing proof of notice of the injunction when the defendant is brought before the court in contempt hearings. There may be substantial problems of identification when large numbers of students are involved. Where the evidence is insufficient, there is a possibility that an acquittal may have the effect of re-enforcing the status of the offenders within the campus community. An improvidently secured injunction may have the effect of polarizing resistance to university discipline. Improper resort to the injunction for the purposes of restraining the exercise of First Amendment freedoms may result in lower court denials or appellate court reversals embarrassing to the university, and may contribute to the arguments of dissidents that the university does not respect basic constitutional rights.

In determining whether to seek injunctive relief, a university may wish to consider other factors as well. Violation of an injunction may be punishable even in circumstances where the injunction should not have been granted, but enforcement of the sanction of contempt in such a case may in practice contribute to a disrespect for the law. Indiscriminate use of injunctions may encourage disruptions if students conclude that they can engage in disruptive activity without fear of arrest or university disciplinary proceedings as long as they are prepared to yield to a court order when the university seeks injunctive relief. Certainly no institution should depend upon the injunctive relief as the sole remedy to assist it in dealing with disruptions or threats of disruptions.

It has been suggested that a statute conferring jurisdiction upon federal district courts to issue injunctions in cases of some campus disturbances would be desirable. A federal statute would provide a uniform procedure for the use of injunctions throughout the country. Necessarily, however, federal courts would be required to rely in the first instance upon the relatively small contingent of United States marshalls to enforce their orders.

The Commission has reached no conclusion on the desirability of such a statute. If such a statute is enacted, however, the Commission believes

that it should not preempt state jurisdiction and should not be aimed at students exclusively. Such a statute should follow the model suggested by the National Commission on the Causes and Prevention of Violence, authorizing universities, along with other affected persons, to obtain federal court injunctions against willful private acts of physical obstruction that prevent other persons from exercising their First Amendment rights of speech, peaceable assembly, and petition for the redress of grievances.

*2. Criminal Sanctions*

Arson, assault, breach of the peace, conspiracy, disorderly conduct, false imprisonment, inciting riot, malicious destruction of property, riot, willful interference with meetings, trespass, and unlawful entry are examples of the wide range of conduct that fall within the traditional ambit of the criminal law. In addition, a number of states have recently enacted new legislation dealing with civil disorders or specifically relating to student disturbances. Recently enacted statutes in different states make it a crime to refuse to disperse or leave a building or property when notified to do so by a designated official; prohibit interference with freedom of movement or the use of facilities; punish "willful disturbance," conduct that "impedes, coerces, or intimidates" university personnel, or "disruptive acts"; make it a felony to enter and destroy records; or prohibit the possession of firearms or "molotov cocktails" on campus. Also, several states have modified their riot laws or enacted comprehensive riot control legislation. Additional state legislation authorizes designated university officials to require persons who are not students or employees to leave the campus or permit such officials to place the campus off limits to persons outside the academic community.

It is doubtful that most students realize the broad range of conduct that is subject to the criminal law. Local arrangements between "town and gown" and discretionary enforcement on campus of drug and alcohol laws have, with the passage of time, insulated some members of some campus communities from a recognition that their conduct is subject to all the laws of the jurisdictions in which they are located.

The criminal laws may be enforced in various ways. A university may request police assistance or police may enter a campus for the purpose of enforcing laws without the request or the consent of the university. Police intervention may precede or follow formal charges by a complainant or prosecutor.

Recourse to the initiation of criminal charges by a university should

normally be limited to circumstances when it is impossible to deal with the problem adequately within the university. As the Commission has indicated earlier in this Report, normally an internal disposition of the problem will be most effective. In addition there are other factors which deserve consideration. In common with forms of the use of external authority, the assertion of criminal charges possesses the potential of generating more widespread disruption on the campus. Furthermore, the processes of the criminal law are rarely swift, and a prompt resolution of serious charges in the criminal courts is unlikely. In addition, the university loses control over the proceedings. The decision of whether to drop charges, accept a plea to a lesser offense, or award probation rests with prosecutors and judges, and their judgment may be properly affected by factors other than those of guilt or innocence of the accused.

There are communities, however, in which local police and prosecutors are prepared to ignore what transpires on the campus unless assured of university support. In such circumstances, it may be necessary for the institution to take the lead in invoking the criminal process when necessary because of conduct that endangers the university or members of its community.

The use of police may be limited to arrests, with or without warrant, of previously identified suspects sometimes after a disruption has occurred and subsided. In some cases this may be done without the necessity of introducing any substantial number of police officers into the campus, and after there has been time to discuss alternatives and reach agreement concerning the manner and time at which the arrests will take place. In other circumstances, however, there may be a need to introduce a substantial number of police onto the campus quickly to stop or prevent an unlawful activity, as in cases of violence or imminent threats of violence where the university is unable by itself to maintain or restore order.

There are clear dangers involved in ordering police to enter a campus in large numbers. The university should recognize that any massive intervention of police on the campus carries with it the possibility of "broadening support for the radical movement, polarizing campus opinion, and radicalizing previously uninvolved persons."

Nevertheless, a university and the members of its community may find themselves in a defenseless position, guarded by only a small cadre of security officers who have received little training in the maintenance of order, in the face of determined efforts at disruption by large num-

bers of persons. To permit wide-scale lawlessness may encourage students to believe that the law may be flouted with impunity, and that the role of police is confined to controlling conduct outside of the university

The practicalities of the situation will often pose a dilemma. In its early stages a disturbance may be ended or an occupied building recaptured with a minimal use of force. But it is at this stage that there is often the least support for the use of off-campus assistance because of confidence that order can be restored through negotiations and other internal means. Intervention by the police involves possibilities of provocation and over-reaction that may result in an exacerbation of the controversy that gave rise to the unlawful activity. Inaction, on the other hand, may result in substantial damage to property, a heightened danger to members of the university community, and interruption of the orderly functioning of the university for an indefinite period.

The Commission is unable to state a general principle that will govern all circumstances. The attitudes of faculty, students, alumni, trustees, and the community in which the institution is located, the history of the relationship between the police and students in the community, the objectives of the disturbance, the number of students involved, and the seriousness of the disruption are among the factors that must be considered.

Any decision that a university makes in such a complex situation may be subject to criticism by someone. Responsible citizens should recognize the difficulty of the problem and give great weight to the judgment of the officials who are best able to make the difficult assessments required and who have the responsibility for the welfare of the institution and the maintenance of order.

Legislation has been introduced in the Congress to expand the federal criminal law to encompass specified acts of disruption in federally assisted institutions of higher learning. The Commission is unconvinced that there is need for federal criminal legislation at this time. Internal disciplinary procedures and state and local laws appear to provide effective techniques for the resolution of controversy and the maintenance of order. Serious consideration of the advisability of the intervention of federal law enforcement agencies and the federal courts should be deferred until there is sufficient experience with existing local institutional processes and laws to determine whether federal legislation is necessary or desirable.

3. *Civil Actions for Damages*

Civil suits for damages should be brought in appropriate cases by a university or members of a university community for injuries arising out of student disturbances. In a number of institutions there has been substantial damage resulting from fires, smashed furniture, and injuries to equipment and buildings. Students have lost instruction that they otherwise would have received. Indirect damage has resulted from higher costs caused by increases in insurance costs and the reluctance of companies to write institutional types of insurance.

On occasion either a university or a member of the academic community may choose to bring suit for damages. Frequently, however, a private damage suit will not constitute a viable alternative because of problems of proof, docket delay, the uncertainty of collection on a judgment and other reasons.

4. *The Importance of Planning*

Many of the problems involved in the determination of the extent to which civil authority should be utilized and the form that it should take are readily foreseeable. Plans can be developed to deal with many contingencies. The advice of university counsel, prior consultation with local police and public officials, informing members of the university community of what action will be taken in different situations, can go far towards minimizing the adverse effects that sometimes have accompanied recourse to civil authority in the past. Few things are more important than for universities to establish contact with civil authorities and develop in advance understandings concerning the circumstances that will justify intervention and the manner in which they will react if intervention becomes necessary.

5. *Double Jeopardy*

The fact that a student has been subject to university disciplinary proceedings does not in any way preclude a subsequent trial of the student for the same conduct by public authorities if his conduct violated the laws of the jurisdiction. Likewise, the fact that a student has been tried in the criminal courts does not preclude the assertion of an appropriate disciplinary sanction against him by the university. There is no legal basis for the claim of "double jeopardy" in either case. The institution should recognize the possibility, however, of injustice resulting from the imposition of multiple sanctions for the same conduct. In cases where the university proceeds after state action has taken place, con-

sideration should be given by the university to any prior state punishment in determining the appropriateness of a university sanction. A criminal court should properly consider the sanction already imposed by a university tribunal in determining what penalty it should impose. Prosecutors or university officials, as the case may be, should carefully consider whether it is desirable to proceed where a defendant has been acquitted in prior proceedings in court or before a university tribunal. These matters are, however, addressed to the discretion of responsible officials and do not give rise to any right of immunity from a different or additional finding or sanction made by the body that has initially delayed its exercise of jurisdiction.

6. *Legislative Denial or Revocation of Financial Assistance*

Provisions of several federal statutes and provisions in the legislation of several states either require or authorize institutions to deny financial assistance under specified programs to students who have engaged in specified types of disruptive conduct. The language of the statutes varies in a number of particulars. There is a considerable difference in denominating the kind of conduct that will justify the denial of assistance; whether a conviction is required, and, if so, by what kind of court; the programs of financial assistance to which the "cut off" provisions apply; the period during which funds should be denied; whether an institution is required or permitted to initiate proceedings to terminate assistance; and similar matters.*

* Sec. 706 of the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1970, Pub. Law 91-153, 91st Cong., 1st Sess., provides an example:

> Sec. 706. No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan, a grant, the salary of, or any remuneration whatever to any individual applying for admission, attending, employed by, teaching at or doing research at an institution of higher education who has engaged in conduct on or after August 1, 1969, which involves the use of (or the assistance to others in the use of) force or the threat of force or the seizure of property under the control of an institution of higher education, to require or prevent the availability of certain curriculum, or to prevent the faculty, administrative officials or students in such institution from engaging in their duties or pursuing their studies at such institution: Provided, That such limitation upon the use of money appropriated in this Act shall not apply to a particular individual until the appropriate institution of higher education at which such conduct occurred shall have had an opportunity to initiate or has completed such proceedings as it deems appropriate but which are not dilatory in order to determine whether the provisions of this limitation upon the use of appropriated funds shall apply: Provided further, That such institution shall certify to the Secretary of

Some do not expressly require that a hearing be held before financial aid is terminated. The termination of financial assistance, however, constitutes a substantial sanction against an individual, and it is clear that such a determination should depend upon a finding that certain facts exist. In these circumstances, it seems appropriate that a hearing be conducted, and indeed, one may be required by the due process clause. The hearing, in common with a hearing in a disciplinary proceeding, does not necessarily have to have all the elements of a civil or criminal trial, but the student should be entitled to written notice of the proposed termination and a hearing at which he is confronted with the evidence supporting the proposed action, given an opportunity to rebut and explain it, and to present his own evidence. The decision should be based on the evidence that is produced at the hearing.

In addition to the legislation already enacted, a number of other proposals to curtail financial assistance to students involved in disruptions or to the universities at which they are enrolled have been introduced in the Congress during the last two years. One proposal would increase the time period during which funds could be denied, and deny benefits under the GI Bills and the children's allowance section of the Social Security Act, not covered by existing legislation. Legislation has also been introduced that would require the suspension of all federal financial assistance to any university that experienced campus disorders and that failed "to take appropriate corrective measures forthwith." Other proposed legislation would require federally assisted institutions to develop a plan for dealing with campus disorders and have it available upon request upon penalty of cutting off funds, and require institutions to deny assistance under federal programs to students involved in disorders on pain of withdrawal of federal aid.

The Commission views with deep concern these statutes and proposals for terminating financial aid to students who engage in disruptive activities and to the universities which they attend. A university might be required under such legislation to cut off financial aid on a basis of its own determination despite doubts as to the legality or constitutionality of its action. Termination of aid would be required without reference to relative culpability. These proposals could operate in a discriminatory manner because they apply only to those who receive federal financial aid, a specific class of needy students. Thus, the wealthy student who leads a campus disruption would be unaffected by the legislation while

Health, Education, and Welfare at quarterly or semester intervals that it is in compliance with this provision. . . .

a follower could lose the financial assistance needed to complete his education. Proposals to withdraw all aid from institutions of higher learning could deny assistance to innocent students who need financial aid.

The Commission agrees with the conclusions of the National Commission on the Causes and Prevention of Violence:

> Existing laws already withdraw financial aid from students who engage in disruptive acts. Additional laws along the same lines would not accomplish any useful purpose. Such efforts are likely to spread, not reduce the difficulty. More than seven million young Americans are enrolled in the nation's colleges and universities; the vast majority neither participate in nor sympathize with campus violence. If aid is withdrawn from even a few students in a manner that the campus views as unjust, the result may be to radicalize a much larger number by convincing them that existing governmental institutions are as inhumane as the revolutionaries claim. If the law unjustly forces the university to cut off financial aid or to expel a student, the university as well may come under widespread campus condemnation.*

### 7. *Training for University Security Personnel*

The need to resort to intervention by civil authorities depends in large part upon the ability of university security personnel to maintain order. Their ability to perform their tasks with efficiency and tact depends in part upon the training they have received. Funds should be made available for the development of training programs for university security personnel, and these programs should include a substantial component designed to make the officers sensitive to the aspirations and tactics of student groups.

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* Commission member Caruso dissents.

## IV.

## CONCLUSION

Our institutions of higher learning are facing a crisis. They face frustration of the reasons for their existence by disruption within and the loss of their autonomy from intervention without.

There is widespread student unrest and demands that the role and structure of the university be reexamined. There is a deep public concern that order be maintained on the campus.

The challenge to the university community is one of self-evaluation and self-reform. Institutions of higher learning must assess the validity of the complaints asserted by students and make the changes which are required to meet the thrust of valid complaints and to serve the best interests of the institution. The process of self-evaluation and self-reform can only be accomplished within a climate of freedom of dissent and freedom from disorder.

The Commission appreciates that at a time when universities are undergoing a reexamination of their objectives and internal structures and when traditional allocations of power within the university are being challenged, that tension is likely, if not inevitable. But tension itself is not necessarily evil, and may be the hallmark of a sensitive progressive academic community.

Unavoidably, disruption will sometimes develop from periods of tension. All disruptions cannot be prevented, but they can be minimized and they can be dealt with effectively when they occur.

The manifest interests of universities and students require both that freedom of expression be encouraged and that order be maintained. The Commission's recommendations are designed to provide guidelines to suggest how these objectives should be pursued. It is sanguine that they are capable of achievement, and that our universities will meet the challenges that confront them.