DOCUMENT RESUME

ED 044 818 EA 003 172

AUTHOR	Phay, Robert E., Ed.
TITLE	Trustee Responsibility for the Campus in Crisis.
INSTITUTION	North Carolina Univ., Chapel Hill. Institute of Government.
PUB DATE	70
NOTE	79p.
EDRS PRICE	EDRS Price MF-$0.50 HC-$4.05
DESCRIPTORS	*Administrative Personnel, *Administrative Policy, Board of Education Role, Discipline Problems, *Educational Change, *Educational Problems, Governance, Governing Boards, School Administration, School Law, Student College Relationship, *Trustees

ABSTRACT

This report contains presentations made a t a conference for university trustees on the subject of the campus in crisis. The presentations concern preventing of and dealing with crises and examining the role of law in the institutional setting as it affects the rights and responsibilities of students, faculty, administrators, and trustees. (JF)

Trustee Responsibility for the Campus in Crisis

EDITED BY ROBERT E. PHAY

INSTITUTE OF GOVERNMENT / 1970

The University of North Carolina at Chapel Hill

The publication of this volume was made possible by the generosity of George Watts Hill and his interest in higher education.

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FOREWORD

Last December the Institute of Government and the State Board of Higher Education sponsored a conference for university trustees on the subject of the campus in crisis. For two days trustees and administrators sought answers to the question of how to prevent and deal with crisis situations and examined the role of the law in the institutional setting as it affects the rights and responsibilities of students, faculty, administrators, and trustees.

The presentations made at the conference were unusually good, and many asked to have the proceedings reproduced. Thanks to George Watts Hill, we are able to publish the major presentations made at the conference. We very much appreciate his underwriting the cost of the publication.

The first trustee conference was so successful that the Institute and the Board of Higher Education plan to continue similar meetings on an annual basis. We think that this first public law conference filled an important need in helping to keep trustees informed so that they are in a better position to make institutional decisions. We look forward to continuing this work with them in the future.

Robert E. Phay
Associate Professor of
Public Law and Government

Chapel Hill
Summer, 1970

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ROBERT W. SCOTT

Governor of North Carolina

Today when we think of a campus in crisis we usually think of demands of militant students, faculty, or employees, sometimes reinforced by larger groups from outside the campus. But the campus crisis is deeper than that. It is part of a larger ferment that affects all of higher education today and has many causes. You know what these causes are. One of them is the great increase in the demands that society is making on our universities. Another is the great increase in the number of people who are going to college. A third cause is the changing pattern of need for manpower; it is said that 60 percent of all jobs now require some training beyond the high school.

There are many other causes. I mention a few by way of reminding you that we are involved in higher education in a challenging and formative period, a period when our institutions are growing and changing rapidly and when they, and indeed all of higher education, can very easily go in any one of a number of directions--or perhaps more likely, in several directions at once.

You as trustees have far more influence than you realize. You are pivotal. If you care to, you can tip the balance in significant ways. But if you don't care--or if you don't bother to find out--what options are open, history will sweep us aside like dinosaurs, leaving only skeletons as reminders of the past.

It was my hope in calling this conference that we would come to see, in the two days here, some ways in which trustees can be more creative forces in education, guiding and inspiring their

institutions in directions that will help them and the state meet the needs of the future.

What is the job of the trustee? If I had to put it in one sentence, I think I would say that it is to help guide the development of the institution in the right direction. That is an awesome task. It involves first of all a determination of what is the right direction.

I will not attempt to tell you tonight what the right direction for higher education is, or which way you ought to want to go in your institution. The question of direction in education is one that you and the institutional administrators are obligated to wrestle with; it is your job. But I want to make some suggestions that may help as you try to determine for your own institution what the right direction is.

First of all, be sure that you as trustees ask the important questions. It is easy to become absorbed in the immediate problems of a university--the details of the budget, some difficulty in the construction of a new building, the current campus crisis--and never to get around to discussion of the more important things. One of the important questions, it seems to me, is: What is the quality of the educational experience on your campus? Are the students growing fully as human beings? Or are they growing narrowly in particular disciplines only? Are they being stimulated as much as possible, or are they largely bored? If they are bored, why? Is it their fault or someone else's? It is a major responsibility of a college to create excitement. This excitement should come from the regular work of the college, not from protests and police action.

It seems to me that we must find ways of maintaining and strengthening on each campus a sense of community. Perhaps this can be done in part by changing our patterns of dormitory construction. If so, what should the new pattern be? Perhaps we must do it in part through a better counseling system, or through group tutorial experience, or through some restructuring of classes. I don't know what the answer is, but I think it's clear that we have not yet fully come to grips with this hard question.

Another of the questions that a trustee needs to ask is this: Are our teaching methods and course offerings sufficiently flexible, imaginative, and responsive to current needs? If a curriculum is to be kept alive and responsive to educational needs, it must be constantly re-examined and there must be a continuing infusion of imagination. A trustee needs to know what

the fields are in his institution in which degrees are being offered, what the strength of the faculty is in each field, what the library and physical facilities are in the field, what the student enrollment is, and what the course offerings are. On some of our campuses there are degree programs without any students. While these programs may be justified, we should be aware that there are at the same time some challenging areas of learning where we are offering no instruction. The trustee must ask some hard questions in this area and help the administration, the faculty, and the students to find the answers.

I have suggested only two or three hard questions by way of illustration. There are many others.

You must take care not to undermine the authority of the president of the institution. It is to the president that you as trustees have delegated the operation of the university. With his advice and assistance, you will set the broad policies for the institution, but the implementation of these will be his job. You should, of course, hold him accountable. At the same time you cannot intelligently ask the hard questions that you need to ask, nor help answer them, without knowing a great deal about the institution. As you seek to learn about the institution or try to improve it in some respect, there may be a temptation to bypass the president. This is a bad practice in a business and equally bad in a university. You, like the trustee of a business, are faced with the difficult job of knowing a great deal about the organization so that you can intelligently help guide its development; yet you must never forget that you have delegated responsibility for management. For the sake of the effective functioning of the university, you must avoid undercutting the administration.

You must remember that there are other colleges and universities. Yours is not the only one. The State of North Carolina has sixteen public senior institutions. Six of them constitute the University of North Carolina. The other ten are governed by separate boards of trustees. In addition, there are the community colleges, the technical institutes, and over forty private colleges. Your particular institution is not called upon to do everything in the whole field of higher education. Your institution is not and should not be all things to all people in higher education. It is called upon to do a portion of the job only. But above all, it is called upon to do well those things that it undertakes to do.

Sometimes trustees think of themselves as advocates for their institution. They see their role as being solely that of boosting their university. But you were not elected by the

alumni or administrators of your school. You who are trustees of the University of North Carolina were elected by the legislature of the state. You who are trustees of the other universities were appointed by the Governor pursuant to the authority of the legislature, so that you all represent in the first instance the State of North Carolina. The state has deputized you to oversee the operation of one segment of its educational system. Your responsibility is to help the taxpayers of this state get the best possible education for their young people: and you cannot fulfill this obligation if you never lift your eyes beyond your own campus. If you are to see in proper perspective the role of your own institution, you must also see the role of others and try to understand their aspirations.

Every institution, in attempting to attract a good faculty and a good studentbody and to build a favorable public image, blows its own horn rather loudly. This is understandable. I would only warn you not to let the blowing of that horn, which you hear at board meetings and on so many other occasions, drown out the demands of the people of this state for higher education that is economical and free of wasteful and excessive competition. No matter what your own administration and alumni may be saying or the understandable pride you feel toward your institution, the general public is demanding that universities demonstrate a sense of modesty and selectivity in the formulation of their objectives.

As you attempt to find the right direction for your institution, consider as allies in your effort not only the administration and alumni but also the faculty and the students. If you really want to change your institution for the better--and there is no institution that cannot be changed for the better--if you really are open-minded concerning the things that ought to be changed and the various ways in which change might be effected, then I suggest that you will find among the faculty, and particularly among the students, some of your staunchest supporters. You are aware, as I am, that most of our students are interested in improving the universities, not in destroying them. Today, more than when you and I were in college, students are concerned about issues of our time. Their concern and their awareness of defects in society and in the educational system can, if properly used, improve our institutions.

We need trustees who are working with the administration, the faculty, and the students to produce an institution of such intellectual excitement and with such a sense of momentum that a crisis is unlikely to arise. Governing a university is like riding a bicycle: in order to maintain your equilibrium, you have to keep moving forward.

Today the university is a more important institution than it has ever been before. We expect the university to produce the informed and sensitive leaders for the world role that history has thrust upon us. The university as an institution is increasingly central in our society.

You who are called upon to guide a university at such a time as this are really being called upon to understand our whole society and the world in which we live. Yours is a staggering task but one that can bring you much satisfaction. Your job is ultimately one of trying to get some vision of the excellent in education. Aristotle said that the excellent becomes the permanent. The job of the trustee is to catch the vision of the excellent.

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J. A. DAVIS

Director, Southeastern Office

Educational Testing Service

There is a hazard that you and I must cope with in any remarks I make to you today; that lies in the commission I received from the Board of Higher Education, on behalf of our research office of the Educational Testing Service in Durham, to conduct a formal survey of all trustees of institutions of higher education in North Carolina. For that survey was conducted, and I am now armed with what Disraeli called, as one item in a series, "statistics."

As for the survey of North Carolina trustees, you have been provided, I am told, with one brief summary account that tells something of what we did and what we found. That survey, paralleling a national study, was aimed at some 1,600 trustees in North Carolina in the spring of 1968; some 800 responded; the questions dealt with who the trustees are, the nature of their service to their college or university, and where they stand on a number of crucial and current issues facing higher education.

The findings may have implications for a variety of targets: those who select trustees; those concerned with their care and feeding, like the president of the university; or those who are playing a potential architect's role in redesigning, or a decorator's role in highlighting, the best features of promise

of the governing board. I should like, however, to confine my observations here principally to those survey data that have implications for the trustee himself. These observations fall, I feel, into four general areas:

1. Who are you? What seem to be your particular capabilities and limitation? What are the kinds of expertise you can expect from compatriots on your own board or on other boards?

2. How ready are you for the trusteeship? What kinds of information and activity could facilitite your understanding of the college and your performance as a governing agent?

3. What view do you take of the constituent human elements of your college or university--the president, administration, faculty, students?

4. How do you, as trustees, operate? What forces may have contributed to your modus operandi? Is this what you want, what should be?

Who Are You

Who are you? If the some 800 trustees in North Carolina responding are a representative sample, you are male (88 percent) and mature (7 percent below 40 years of age, and one-third 60 or over); if you represent a traditionally white institution or a community college, you are white. If you are black, you represent a traditionally Negro college, and half of your compatriots on similar boards are white. You are fairly well educated; over all, 80 percent of you have at least a baccalaureate degree. But, more significant, you vary sharply in educational level as a function of the kind of institution you serve: for example, one out of every four trustees in the public-senior-white institutions holds a master's or higher degree, while three out of every four in the private-senior-Negro institutions hold a master's or higher. As for religious affiliation, we have plenty of Methodists, Presbyterians, and Baptists among us, but few (3 percent) Catholics or Jews. In income, you vary by type of institution served, but in general have a median annual income around $25,000, with 20 percent earning $50,000 or more.

By occupation, in the public white institutions the largest group are business executives (about half), while in the private white institutions this category contains about one-third of the

trustees. Almost one-fourth in the private junior or senior college group are clergy; if you open your board meetings with prayer in the public white institutions, you probably call in the college chaplain. Law and medicine are fairly well represented on the public college boards. Hardly visible or absent in our statistics are such professional people as architects, engineers, researchers, professional educators at any level, public administrators, and authors or journalists (although there are some interesting variations in these "minority" professions when trustees are considered by type of institution they serve.)

In political party affiliation, the total trustees responding, and those in the community college group, parallel almost exactly the voter-registration figures for North Carolina at the time of the survey. But more than 90 percent of the senior public trustees, against about two-thirds of the private, report they are Democrats. Had the trustees responding in North Carolina controlled the national presidential election and had it been held at that time, though, Mr. Nixon would be in office; Mr. Rockefeller came in second, Eugene McCarthy third, then Johnson, then Reagan.* There were strong differences by institutional type, color, and control. In political ideology, one-fifth considered themselves conservative, two-thirds moderate, and one-tenth liberal.

Thus, this observer can probably speculate safely that the business affairs of the college or university are in good hands and verify a variety of occupations represented on the boards. But: considering the total economy and high-level manpower needs of the state, where do you seem vulnerable? What other kinds of expertise do you consider relevant to your task--and where and how will you obtain it? Or: are you indeed businessmen, visibly successful, augmented somewhat by lawyers, doctors, and ministers, who are concerned with rather specifically the business affairs and long-range planning and little else as long as students and faculty behave themselves and your president doesn't resign?

How Ready Are You for the Trusteeship?

The second question I have posed of the survey data today is: Are you ready for the trusteeship? Some of today's faculty or students would take issue with your stands or attitudes on educational issues, or convictions, but this you know already.

*It should be noted that the questions from which this sweeping generalization is drawn asked not for whom the trustee would vote, but rather whether he tended to "agree with the views" of the various political figures.

Rather, we might get better evidence on readiness for the trusteeship from the options the survey questionnaire provided from three kinds of inquiry: (1) what previous or concurrent experience do you have on other governmental boards; (2) how familiar are you with the most competent opinion about university governance; and (3) what opportunities have you enjoyed for knowing or getting to know your campus at first hand?

In our North Carolina sample (as elsewhere in the nation, according to the paralled national survey), the great majority--some 80 percent--are serving on a college or university trustee board for the first time, and 90 percent were serving on only one board at the time of the survey. In present service, however, some 60 percent of the North Carolina respondents have served four years or more.

In other governmental directorship, or high-level management experience, 13 percent have served in the last five years on boards of corporations whose shares are traded on a stock exchange, and 10 percent are executives of such corporations. On other governing bodies such as boards of education, or church or community affairs boards, trustees appear well seasoned: only 4 percent of those responding reported no such service in the last five years, and more than a third reported serving on five or more such boards.

The survey questionnaire also asked respondents their degree of familiarity with fifteen "classics" in the recent literature of governance or the trusteeship (e.g., Ruml and Morrison's *Memo to a College Trustee*, or Kerr's *The Uses of the University*); also it asked for report of familiarity with or frequency of reading of eleven periodicals such as the Association of Governing Boards' *AGB Reports*. Half or more of the North Carolina trustees reported book by book that they had never heard of it (though the national sample did no better), and in most cases less than 10 percent reported having read the given book completely or partially. A similar picture is obtained from the report of knowledge or frequency of reading of the eleven selections from the periodical literature, with the best record set for the *EPE 15-Minute Newsletter*, which 10 percent reported reading regularly.

No one--least of all the trustee himself--needs to state that the trustee is a busy man, with less time or reason for reading than students and faculty. But: would you be interested in leads on relevant bibliographic resources? Whatever your convictions on this, you could get out-documented rather quickly in any running debate with the people your governance affects.

The third questionnaire area postulated as relevent to our question of readiness of the trustee for his role is: what opportunities have trustees had for firsthand acquaintance with their campus? A possible flaw in this approach, for our purposes, is the prior question of what kinds of personal contact or experience outside the board room are necessary or even appropriate. If you will keep this qualification in mind, I can more safely report the relevant findings.

First, we found that about one-fourth of all North Carolina respondents have one or more earned degrees from the institution they now serve. This proportion rises to almost 50 percent for the trustees in the public-senior-white category. A fair proportion know at least the "good old days" when Bob House played a harmonica at student assemblies, or when Dr. Jackson rocked on his front porch in Greensboro in the late afternoon. The survey also asked several questions about time spent, as a trustee, in several on-campus activities outside of regular board meetings or committee activity. More than 80 percent reported less than twenty hours per year in ad hoc meetings of college groups or in personal conferences with college personnel. As was found for the national sample of trustees, the board meetings, or board committee actitivies, consume the majority of time the trustee relegates to his college or university service. Major attention at these meetings is devoted to fiscal matters, building plans, and long-range projections. The questions for you, as trustees, to consider are: do I have anything to gain from some current contact with the campus beyond what I receive, secondhand, from the president? If so, what are proper and appropriate occasions, and how may they be set up?

What View Do You Take of the Human Components of Your Institution?

Our third question--"What view do you take of the students, faculty, and others at your institution?"--is most difficult to summarize adequately in the time available here. This is unfortunate, for some of the most significant yet complex findings probably lie in this part of the data. Those interested should seek out the complete formal report.

With regard to the president, the questionnaire data is sufficiently clear and unequivocal that I am sure I need not waste your time in documenting that you know and respect him and take him seriously. Probably the greatest unanimity achieved among respondents had to do with trustee responsibility for choice of president and a sane and reasonable view of his role as your chief executive.

The faculties will probably be gratified to learn that you agree with them, in general, that many matters such as grading policy or curriculum decisions are not trustee but faculty and administrative prerogatives, or that students should be involved in policy concerning discipline for cheating. On the other hand, in their characteristic fashion, faculty may raise angry cries if they learn that less than 7 percent of one North Carolina sample of trustees felt the faculty should be involved in any direct way--in concert with administrators and/or trustees--in the choice of a college president, or that almost two-thirds of the total sample of trustees feel a loyalty oath for a professor is reasonable, or that one-fourth of the trustees responding disagree that the faculty should have the right to express opinions on any issue. Similarly, you can guess what some factions of our studentbodies would say if they knew that almost two-thirds of the trustees feel that the college should also discipline students already punished for *off-campus* civil disobedience (as opposed to on-campus civil disobedience), or that more than three-fourths favor official screening of campus speakers (ground we know well in North Carolina), or that almost half favor administrator control of content of student newspapers.

You cannot, of course--unless I were one of you and well-known for moderate viewpoints on all things--trust my selection here of areas to report with some specificity. From the sharp division of opinion among trustees on many of these issues, I doubt that you could trust me even if I were a reputable peer. Nevertheless, after sifting and resifting the data, and after trying in good conscience for as clear an empathy with you as possible, I feel a strong and pervasive in loco parentis attitude toward students, and at the very least some suspicion of the faculty and their Groves of Academe motives, or perhaps just a simple absence of good knowledge or concern as to what the great majority of faculty believe or why they feel that way.

The purpose of this conference, of course, is definitely not to hold a moratorium or a wake on the trusteeship, but rather to press throughout for the most effective leads as to how the critical and important function of the trustee may best be exercised. It would seem prudent, I believe, for any trustee to take a careful and firsthand look at the students, faculty, and administrators beyond the president (otherwise, as with students at Columbia University, they may come face to face with them in court), and seek some informed feel for where and why students or faculty take such opposite points of view from those of the trustee whether the purpose is to find an acceptable consensus or to set forces in motion which may help the "other side" understand better why a disagreement exists. (Lest any feel we have

been unfair to trustees here, we should all pause for a second to recognize that in any serious group of trustees, faculty, or students we can have all conceivable shades of opinion about anything; these different shades can be strongly held and, generally, capably defended.)

How Do You Operate?

Our final question is: how do you as, trustees, operate? Our survey attempted to get at this by taking a selection of kinds of problems, or areas for policy decisions, and asking respondents whether they felt trustees should *decide, review and advise, or approve and confirm.* We also tried to determine the kinds of topics that occupy time at board or committee meetings.

Given the subtleties of what, in a situation short of crisis, you may actually do or be asked to do, it would seem foolish to use the questionnaire data to try to offer an answer. Yet, on my own part and on the part of a number of reviewers of the data (who I have promised shall be nameless), there is an inescapable uneasiness--or in some cases relief--that trustees are, for most of the routine business of the college or university, a docile and cooperative group ready to aid the president by, in effect, asking what action he needs on whatever matters he chooses to bring to their attention (unless something rather dramatic attracting public attention has erupted). This statement, I must confess, is purposefully extreme, but it raises the largest and most critical question of all: What is the *proper* role of the trustee?

A case can be made, from logic, legal bases, and the complete survey data, that the trustee should be and is a director of the corporation, is and should be the university. But also, a case can be made that--principally due to his apparent unreadiness, customary mode of service, protective coating, or the complexity of the job and scarcity of time for it--he must be a rubber stamp in situations short of the court-of-last-resort situation. Some full-time professional educators and students--certainly many faculty and perhaps some presidents--may prefer it that way, feeling it easier to prompt than to assist and instruct.

But whatever your personal stand at this beginning point in the Governor's conference, you, the trustee, must share actively and thoughtfully in the definition of the trusteeship. It is *your* board, *your* trusteeship. The decisions you and your board colleagues make will affect who is trained for the high-level

manpower needs of the state and our society and the quality of that training. The stakes include the contribution and the conscience of a generation of students.

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BEN FISHER, *Executive Secretary*
Council on Christian Higher Education
Baptist State Convention

As one who has worked closely for a number of years in the private sector of higher education, I have been profoundly interested in the role of the trustee. For the past ten years, I have been associated with the seven Baptist colleges in North Carolina, and for a number of years I have worked with the Education Commission of the Southern Baptist Convention. This body supports more than seventy-three colleges and universities. It has been our experience in the private sector, and we believe this to be true in the public sector, that the role of the trustee in higher education has greatly expanded. There are a number of reasons for this expansion. Among them are new responsibilities in a number of areas such as business management and finance, long-range planning, fund-raising, faculty and student participation in college and university governance, public relations, defining educational aims and objectives, and public service.

Because others are scheduled to deal with these matters, I shall address myself briefly to only one point, and that is communications. So far as I know, there has never been a time in American higher education, in either the public or private sector, when the purposes and aims of higher education need so badly to be interpreted to the public. There is a growing credibility gap between higher education and the average man on the street.

Student extremists and the violence that they have engendered have caused dismay and concern throughout the country. The student revolt beginning in Berkeley in 1964-65 and the subsequent student "takeovers" at such institutions as Columbia, Cornell, Harvard, San Francisco State, Chicago, Wisconsin, Princeton, St. John's, City College of New York, Wiley, Central State (Ohio), Howard, and a host of others--not to mention recent serious outbreaks on campuses in North Carolina--are events that have most sharply pointed up the so-called "student rebellion."

Moreover, student interest in areas of social concern has been greatly misunderstood. The trustee today, whether he is in a public or private college or university, has an obligation and an opportunity to interpret these events in their proper context. There needs to be a sifting of legitimate student protests and desires for participation in social reform from the violent extremism that represents less than 3 percent of the total student enrollment. Communication has become a new and key role for the trustee.

Having said this, I would like to say that the trustee of a public or private college or university today has no neutral ground on which he can safely stand. If he agrees to serve as a board member, he will be either a help or a hindrance. I would suggest the following criteria:

A Trustee Is a Help:

When he sees his job as a difficult and responsible task.

When he budgets his time and plans ahead to attend the meetings of his board and special called meetings of the sub-committee and of the executive committee when necessary.

When he will accept specific responsibilities in either committee or general work.

When he makes an earnest effort to be objective in evaluating the work, personnel, program, and policies of his institution.

When he is willing to give serious study to all phases of fiscal, academic, administrative, and community programs of the college or university.

When he understands the distinction between making policy and administering policy. When the trustee fails to make this distinction, he can cause great harm. After these policies have been established, the implementation should be left strictly to the college or university administration.

When he respects the work and the authority of the board of trustees as a whole.

When he commits himself to resisting all pressure groups and individuals, either within or without the institution, who exert religious or political force inimical to the purpose of the school. Too much could not be said in supporting this point. It is the judgment of those in positions to know that the fight

against repressive legislation, both at the state and national level, will be a continuing pattern. To keep our schools free and at the same time responsible will be a primary task of the trustee.

When he is willing to act, think, and work as an individual rather than as the representative of any special group. This perhaps is one of the most difficult things a trustee must come to understand.

When he is thoroughly committed to the ideals and purposes for which his institution was founded.

The Trustee Is a Hindrance:

When he accepts this position of trusteeship as an honor rather than as a hard task and duty.

When he agrees to undertake the assignment because, although he feels that he is too busy to accept, he really cannot think of any good way to refuse.

When he is sincerely interested and would like to do a good job, but does not bother to look far enough ahead in his schedule to be able to attend meetings and to carry out assignments.

When he accepts the job with an "axe to grind": political, theological, denominational, administrative, or financial.

When he does not understand and is unwilling to learn the purpose, problems, and broad plan of development for the institution.

When he fails to understand that the main function of the board of trustees is legislative; that is, the board establishes broad policies. When these broad policies have been established, they are then turned over to the administration to be carried out.

When he fails to understand that the authority of the board rests in the board as a whole and not in an individual trustee.

When he yields to pressure groups, either within or without the institution.

When he fails to understand that he must act not as a representative, emissary, delegate, or messenger, but as an individual according to his understanding, conscience, and integrity.

And, finally, the trustee is a hindrance, however noble and dedicated he is to his institution, when he has a narrow perspective. This is particularly true of the trustee of a public college or university, for he has a responsibility that transcends a particular institution; and he should never seek to promote his own institution at the expense of total higher education in his state.

4

W. C. HARRIS, JR.

Trustee, University of North Carolina

Member, Board of Higher Education

The role of the trustee has changed, in changing, and ought to change. It frequently has been said that the function of the trustee is to select a president, establish broad policies, and then sit back and enjoy the honor of being a trustee. Until a few years ago, in all probability, the policies had been set before a trustee's appointment and were adequate, and if the president survived his term, then his primary concern at trustee meetings involved budgetary matters mainly seeking additional funds.

As long as institutions of higher learning remained relatively aloof from society, most of the complaints resulted from a losing football or basketball team. But now that colleges and universities have become involved in governmental, business, and social problems, they are open to new criticisms and pressures from all sides--and they need all the help they can get. Thus, I think that the future role of the trustee will be more demanding, more intriguing, and more challenging than ever it was before.

To a limited extent trustees already have become a buffer between the administration and forces inside and outside of the institution. This is as it should be--the administration should turn to its board of trustees as an insulating force to help preserve and protect the integrity of the institution. The public institutions, being dependent upon public funds, have lived with this problem of outside flak for a number of years and have had a measure of success. In the main, this can be credited to courageous administrators, a sprinkling of forthright trustees who stood up and spoke out, help from news media that understand freedom of speech as well as freedom of press, faculty groups like the AAUP, the public awareness of the growing importance of

a college degree from a quality school--and, of course, some good football and basketball tickets for the right people. But it is also true that the armor has been dented from time to time by a speaker ban law or withdrawal of support by an alumnus--and the trustees were slow to move. In fact, trustees usually are late in getting into the act of decision-making and find themselves reacting when sometimes they should have taken the initiative.

There is a new danger that arises from governmental grants and research contracts. As we become more and more dependent upon federal funds, we must be alert to the possibility of more and more federal authority. We need to protect our freedom, but at the same time we must fulfill our obligations. If we are to continue our societal role and to request more and more funds, public and private, we must develop new techniques to justify our needs and new ways to preserve our integrity.

Trustees can also be a creative force. Many problems in higher education are not peculiar to ivory towers, and many lay trustees have had more experience in working on some of those problems than college administrative personnel. However fine college administrators may be, for the most part they are professional educators. Trustees could help them with management skills. They should require a public audit of our institutions. This would include a systematic evaluation of accomplishments and goals, a sharp eye on costs, an examination of personnel performance to find institutional shortcomings without fear of being accused of destroying academic freedom, an inventory of facilities and equipment, an examination of financial practices, a study of space utilization, etc.--all because trustees of institutions of higher education have an obligation to taxpayers and other supporters to provide quality education and to spend their money wisely and efficiently.

One last thought. In this state trustees need to look beyond just their institutions. They need to take a good look at the Board of Higher Education. At the moment, it is a planning and coordinating state agency that is doing a first-class job. But it has few teeth; it is not a governing authority. As you know, quality education is becoming extremely expensive. No one institution can do all things for all of the people. We cannot afford wasteful duplication of scarce resources. For instance, does every campus need research libraries, expensive laboratory equipment, mammoth computer facilities? Can we afford to duplicate programs when those in existence are meeting the state's needs? These and other questions cannot be answered by us individually, but they must be answered by us collectively. I think that the Board of Higher Education, with the proper authority, can be the salvation of quality education in North Carolina--it can help insure quality education in each of our state institutions, and without it all of them may well sink to mediocrity.

5

HENRY W. LEWIS

Professor of Public Law and Government

Institute of Government

This panel--entitled "Who Rules the Campus"--is scheduled to follow an examination of the "Board of Trustees: Legal Formality or Creative Force?" Subsequent sections of the program deal with "The Trustee and Administration," "The Trustee and the Student," "The Trustee and the Faculty," and "Alternative Strategies in Handling and Safeguarding Against Campus Disturbances." Thus, the emphasis of this panel is on the authority--legal and administrative--which boards of trustees, administrative officers, faculties, and students may exercise in dealing with faculty and student discipline in the campus crisis.

The following questions seem to be worth attention.

With Respect to the Institution's Board of Trustees:

1. What are the limits of trustee authority in dealing with (a) faculty, (b) student, and (c) nonacademic employee conduct and discipline?

2. As a practical matter, how active a role can trustees play in handling matters of conduct and discipline?

3. How are boards of trustees organized to deal with matters of conduct and discipline?

4. To what extend do boards of trustees delegate responsibility for dealing with (a) faculty, (b) student, and (c) nonacademic employee conduct and discipline?

5. By what means do boards of trustees delegate such responsibility?

6. To whom do boards of trustees delegate responsibility for (a) faculty, (b) student, and (c) nonacademic employee conduct and discipline?

   (a) Administrative officers?
   (b) Faculty?
   (c) Students?

7. When boards of trustees delegate authority in matters of conduct and discipline, what limitations are placed on the delegations?

8. When a board of trustees delegates authority in matters of conduct and discipline, does it permit further delegation? For example, if a board has delegated such authority to an institution's president, may the president further delegate this responsibility to (a) faculty, (b) students, or (c) other administrative officers?

9. Are there specific categories of conduct and discipline that are not delegated by the board of trustees? For example, in cases of actual or potential disruption of the normal operations of the institution, does the board of trustees reserve to itself sole responsibility for handling discipline?

10. If a board of trustees has delegated its authority in matters of conduct and discipline, are provisions made for appealing a conviction to the board or some committee of the board? If provision for appeal is made in such a case, does the board rehear the entire matter de novo, or is the hearing by the board restricted to reviewing an assertion of a denial of due process and fair hearing by the agency that heard the case initially?

11. If a board of trustees has delegated its authority in matters of conduct and discipline and there is an acquittal by the agency to which authority has been delegated, does the board retain jurisdiction to reopen and rehear the case on its own motion?

With Respect to the Institution's Chief Administrative Officer:

1. Does the chief administrative officer (president, chancellor, etc.) have full authority to deal with (a) faculty, (b) student, and (c) nonacademic employee conduct and discipline?

2. Are there limitations on the chief administrative officer's authority in these matters?

3. What is the source of the chief administrative officer's authority in matters of conduct and discipline?

4. As a practical matter, how active a role can the chief administrative officer play in handling matters of conduct and discipline?

5. Does the chief administrative officer share his responsibility for conduct and discipline? If so, does he share it on his own authority or by specific authorization of the board of trustees?

6. Does the chief administrative officer have authority to delegate responsibility in matters of conduct and discipline to:

   (a) Other administrative officers?
   (b) Faculty or faculty committees?
   (c) Student government or student government agencies?

7. By what means does the chief administrative officer make such delegations of responsibility?

8. Does the chief administrative officer impose restrictions in his delegation of responsibility for conduct and discipline? Are there categories of conduct and discipline which he does not delegate?

9. If a chief administrative officer has delegated his authority in matters of conduct and discipline, are provisions made for appealing a conviction to him? If provision for appeal is made, does the chief administrative officer rehear the entire matter de novo or is his hearing restricted to reviewing an assertion of a denial of due process and fair hearing by the agency which heard the case initially?

10. If a chief administrative officer has delegated his authority in matters of conduct and discipline, does he retain authority to review and reverse on his own motion decisions of the agency to which he has delegated responsibility.

With Respect to the Institution's Faculty:

1. What is the authority of the faculty to deal with *faculty* conduct and discipline?

2. By what means does the faculty obtain authority to deal with matters of faculty conduct and discipline?

3. If the faculty has such authority:

   (a) Are there any restrictions on this authority?
   (b) Does the faculty derive its authority by delegation from the board of trustees or from the chief administrative officer?
   (c) Does the general faculty handle such cases or has the faculty established an agency of its own to handle them?

4. If the faculty has authority to deal with faculty conduct and discipline, are provisions made for appealing a conviction to (a) the chief administrative officer or (b) the

board of trustees? If provision for appeal is made in such case, does the chief administrative officer or board of trustees rehear the entire matter de novo, or is the hearing restricted to reviewing an assertion of a denial of due process and fair hearing by the faculty agency that heard the case initially?

5. If the faculty has authority to deal with faculty conduct and discipline and there is an acquittal by the faculty agency, does the chief administrative officer or board of trustees retain jurisdiction to reopen and rehear the case on their own motion?

6. What is the authority of the faculty to deal with *student* conduct and discipline?

7. By what means does the faculty obtain authority to deal with matters of student conduct and discipline?

8. If the faculty has such authority:

   (a) Are there any restrictions on this authority?
   (b) Does the faculty derive its authority by delegations from the board of trustees or from the chief administrative officer?
   (c) Does the general faculty handle cases of student conduct and discipline or has the faculty established an agency of its own to handle such cases?

9. If the faculty has authority to deal with student conduct and discipline, are provisions made for appealing a conviction to (a) the chief administrative officer or (b) the board of trustees? If provision for appeal is made in such case, does the chief administrative officer or board of trustees rehear the entire matter de novo, or is the hearing restricted to reviewing an assertion of a denial of due process and fair hearing by the faculty agency that heard the case initially?

10. If the faculty has authority to deal with student conduct and discipline, and there is an acquittal by the faculty agency, does the chief administrative officer or board of trustees retain jurisdiction to reopen and rehear the case on their own motion?

<u>With Respect to the Institution's Students:</u>

1. What is the authority of the students to deal with student conduct and discipline?

2. If students have such authority, is it held by the agencies of student government or by the students as a body?

3. By what means does student government or the studentbody obtain authority to deal with matters of student conduct and discipline?

4. If the student government or studentbody has such authority:

   (a) Are there any restrictions on this authority?
   (b) Does student government or the studentbody derive its authority by delegation from the board of trustees, from the chief administrative officer, or from the faculty?
   (c) Is there an agency of student government established to perform this function?

5. If student government has authority to deal with student conduct and discipline, are provisions made for appealing a conviction to (a) the chief administrative officer, (b) the faculty, or (c) the board of trustees? If provision for appeal is made in such a case, does the chief administrative officer, faculty, or board of trustees rehear the entire matter de novo, or is the hearing restricted to reviewing an assertion of a denial of due process and fair hearing by the student agency that heard the case initially?

6. If student government has authority to deal with student conduct and discipline, and there is an acquittal by the appropriate student agency, does the chief administrative officer, faculty or board of trustees retain jurisdiction to reopen and rehear the case on their own motion?

6

E. K. POWE

Trustee, North Carolina Central University

Who rules the campus? The answer to that question may very well depend upon who is asking the question, or how the question is presented.

In the past fifteen or twenty years, legislatures, governing boards, administrations, faculty, and students have all taken

a much more legalistic approach to the governance of colleges and universities than in the entire prior history of such institutions. One has only to scan a legal digest under the title "Colleges and Universities" to see that in the post-World War II period a vast new body of law is developing in this field. The trend started with the successful court challenge of admission policies of state-supported colleges and universities by racial and ethnic groups; and the present student concern for local, national, and international problems and the increased tendency of students to seek redress for grievance in the courts promise that the trend will continue.

Currently, courts are being called upon almost daily to answer many questions concerning the governance of colleges and universities, and in particular state-supported colleges and universities. They have generally upheld what is considered an inherent power of boards of trustees of state-supported colleges and universities to promulgate rules and regulations for the governance of such institutions. While stating that trustees have a great deal of latitude in this respect, the courts have also said that the power is not unlimited and that such rules and regulations must be fair and reasonable. Furthermore, they are placing much emphasis upon procedural due process. Students at tax-supported institutions must be given a reasonable opportunity to make defense to charges before discipline is imposed. In addition to admission policies, rules and regulations on guest speakers, tenure of professors, discipline of students, off-campus conduct of students, school publications, cheating, conduct of demonstrations, and many other matters have been recently put to the test of the courts. It seems clear that the old doctrine of the university in loco parentis to students has yielded and the student, by court determination, has been cast in a more sophisticated role--one that assures him certain rights and freedoms corresponding somewhat, in the student's relation to the institution, to a citizen's relation to his state or country.

The powers of the board of trustees of the The University of North Carolina were tested by the court in the case of *In re Carter* in 1964. This case involved appeals of a student from a decision of student government to the chancellor of the University at Chapel Hill, to the president of the Consolidated University, to the board of trustees, and finally to the courts. In that case the North Carolina Supreme Court commented that it would seem that the board of trustees of The University Of North Carolina and its executive committee have authority under the Constitution of North Carolina and applicable statutes to delegate to the faculty and administrative officers of the University

and to the student government organized under a written constitution a limited authority to act in matters pertaining to discipline as long as the board retains final jurisdiction. Thus, the governing board itself has the obligation to serve as a sort of court-of-last-resort within the governing framework of the school.

Historically, the governance of public-supported colleges and universities in North Carolina has been traditional in the sense that the governing boards acting under statutory authority have the ultimate responsibility for the institutions they serve. They have the inherent power to promulgate rules and regulations to achieve the purposes for which the institution was created. Theirs is a policy-making function, whereas the function of the institution's administration is to implement the policies that have been adopted by the governing board. Today, faculties are playing an increasing role in the development of policies at state-supported institutions, though their authority in this respect is delegated.

Following the trend toward a more legalistic approach, the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges in 1966 issued a "Statement on Government of Colleges and Universities" in which fairly clear lines of responsibility are drawn between board, administration, and faculty. Moreover, representatives from the American Association of University Professors, the U.S. National Student Association, the Association of American Colleges, and others met in Washington in June, 1967, and drafted a "Joint Statement of Rights and Freedoms of Students." Both of these positions tend to place more participation in the decision-making process on the faculty and the studentbody respectively.

The North Carolina Board of Higher Education, in its special report of November, 1968, recommended that all institutions adopt the "Statement on Government of Colleges and Universities" and that each college and university in North Carolina re-examine its present policies and procedures and establish new ones where needed to insure that the concerns of students are properly reflected in decisions that affect them.

In addition, there are many other influences on the government and rule of public colleges and universities. Congress and federal agencies play an important part, and also the North Carolina legislature and state administrative agencies. The Governor, the Council of State, the State Personnel Department, the Advisory Budget Commission, the Board of Higher Education, and other

agencies all play an important role in ruling the campus.

One final point. On occasion the General Assembly will step in and legislatively pronounce policy for the institutions in areas that have previously been considered trustee prerogatives. In fact, the 1969 General Assembly enacted legislation whereby any student on state-supported scholarship who is convicted of engaging in or inciting to riot, unlawfully seizing or occupying a building, or other associated crimes shall have his scholarship revoked. Legislative action of this type can be expected as the result of public pressure. Such action deprives boards of trustees of discretion in dealing with such problems. Manifestly, a public institution is subject to legislative control. Accordingly, it is sometimes said that the trustees of state universities and colleges are merely instruments to carry out the will of the legislature in regard to the state's educational institutions, both the institutions and the trustees being under the absolute control of the legislature.

If, as I believe, a more legalistic approach will be sought in the future with respect to the policies, decisions, and internal management of public colleges and universities, greater importance and stress must therefore be given by the trustees in the adoption and promulgation of policies in documenting their board actions. This course also has been recommended by the Board of Higher Education.

Furthermore, it seems incumbent upon the governing boards of state-supported colleges and universities to be more resourceful in anticipating problems and planning solutions in advance. For certainly if the board, in its modern concept, does not rule the campus, the legislature and the courts will.

7

WILLIAM C. FRIDAY

President, University of North Carolina

While it is not the task of this panel to identify and discuss the role students and faculty members must play in an effective shared responsibility for the governance of the institution, I do wish to say that we view it as a shared responsibility and would insist that identified roles for each of these

component constituencies be established.

At the outset, I believe it is clear that unless there are fundamental understandings set forth in clear language in the basic documents of the institution establishing the role of the trustee as policy-maker and the administration as the agency for carrying out those policies, the campus will indeed experience a crisis.

By this I mean that issues that arise when a campus is in a crisis situation stand a better chance of being resolved with promptness if basic lines of authority and responsibility are clear. And these lines of authority and responsibility should be established before the crisis arises. Neither the trustee nor the administration should have the added burden of trying to evolve working relationships while seeking solutions to campus issues.

Let me be specific. It is the trustee's responsibility to establish institutional policy on disruptive activity. The administration, let us hope, would be prepared to offer its own ideas as to what such a policy should be. Students and faculty members must have a participating role in shaping the proposals that come from within the campus. However, the final decisions rest with trustees, and they should be made at a time free of conflict.

In shaping institutional policy, attention should be paid to controlling statutory requirements, to existing judicial decisions, and, of great importance, to the established traditions of the institution relating to academic freedom, peaceful picketing, the exercise of constitutional rights, and the safeguards of due process. It is the administrator's duty to present these concerns to the trustees before action establishing institutional policy and to offer the trustees sound guidance in making sure that fundamental rights and requirements, both to the individual and the institution, are not abridged.

Experience teaches us that once policies are established, it is important that lines of authority be kept clear and that lines of communication between trustees and the administration be kept open in order that full information be provided.

In other words, the application of policy is the task of the administrator, and there should be sufficient flexibility within the delegation of authority to enable the administration to deal

effectively with the crisis, keeping trustees advised of administrative actions as they occur. This will keep the trustees informed and build support and strength for the ultimate resolution of the problem.

Trustees may disagree with a particular decision or course of action being used by the administrator; when such disagreement occurs, obviously it should first be communicated to the administrator. To insure against such conflict, the administrator should consult with trustees, or a representative group of their number, when serious questions of policy interpretation arise.

I state these principles of administration as guidelines because a crisis cannot be handled through a committee. While widespread consultation and involvement are essential, there must be a focal point for discussion and action under established policy. That is the role of the administrator working with representative leadership of campus constituencies.

Among state institutions there are considerations that apply in a crisis that do not present themselves to private institutions and their trustees and advisers. For example: relationships with the officers and staff of several state agencies should be clear to permit prompt assistance, if needed, and to insure the essential communication from the start. For example, if the Office of the Attorney General is to be involved in securing injunctive relief or as counsel in litigation, the administrator needs to know that he may act and under what conditions he may pursue these legal remedies. The decision to use legal action requires detailed information, documentation that is legally admissible and supported by evidence, identification of individuals, among other things. Unnecessary or burdensome delay in the decision process in these instances is costly.

My advice for any institution that so far has escaped what may be called a campus crisis would be that the following steps be taken to achieve a sound procedure to follow when crisis comes:

1. Consult with trustees and administrators of institutions similar in size and program where a crisis has occurred to review that experience and learn the cause-and-effect relationships as well as the judgment and wisdom gained by those who have experienced disruption.

2. Measure the experience and methods used by others against your own present thinking and competence. For example, is your campus security staff adequate? What role should faculty and

students play? Do you have due process procedures established? Do you have an established grievance procedure? Is legal counsel available for guidance?

3. Resolve to handle a crisis as best you can through procedures you establish within your institution.

4. Devise means of securing against physical violence. It must be clear to all that physical violence is not to be tolerated and that the institution will, to the best of its ability, see that acts of violence are not committed. It must be equally clear, ideally before a crisis occurs, that violators of institutional policy will receive a prompt trial under established requirements of due process.

5. Keep all lines of communication open so that grievances and criticisms will be heard and, when merited, acted on promptly. The best way to prevent unrest is to seek out its true causes and deal with them as promptly and effectively as possible. The identity of those who seek disturbance for its own sake becomes clear in such a process. This category contains comparatively few persons, but to assume thay do not exist is an error. Obviously, your methods of dealing with these persons (real disruptors) will vary from the responses you give to highly motivated, active students.

I enumerate these points to illustrate the complexity of dealing with unrest in a modern college or university. But deal with it you must--now and for some months to come.

Knowledgeable trustees understand the great importance of freeing the administrator to act, being available to consult with him, and acting as interpreters and advocates of their own policies. They should support the administration as it executes trustee policy. They should listen to responsible criticism and advise the administration of their best judgment as the crisis moves on to resolution.

Wise trustees understand that the social revolution taking place in America, with all its involvements and deep ramifications, has chosen as its major battleground the campus of the college or university. Its fundamental force is *change*. You are in error is you assume that all student activity is bad or uninformed. Neither should we assume that only "foreigners" are involved, for a casual look will tell you that many of the young people in leadership roles of those forces working for change are from our own communities. If we are candid with ourselves, we know that in many instances their expressed concerns are right, and we should give these young people the wisest guidance of which we are capable. The University of North Carolina is fortunate in having trustees who know and understand these problems and provide support for administrative activity.

To the administrators here assembled, you know that these are days of real concern to an academic community, and that you are where the action is. If we understand that there are short-range objectives to be achieved in dealing with an immediate crisis and that these objectives must be realized in the context of longer-ranged concerns for the continued vitality and health of the institutions, then our chances of survival are better. In any event, I doubt that many of us would really choose to be anywhere else, and this will remain true for as long as we maintain good working relationships with the constituencies of the university, first among them being the trustees.

8

IRVING E. CARLYLE

Trustee, East Carolina University

The most important function performed by the trustees of a university is to elect a president or a chancellor when a vacancy occurs.

The great universities in America are now and always have been those with a strong and able president who was both an educator and an administrator. In fact, it is the president or chancellor who gives strength to the institution. He gives the institution its image. His is the voice of education in the area served.

Dean Acheson, in his excellent book just off the press, *Present at the Creation*, refers with pride to the fact that for twenty-five years he was a life Fellow of Yale University, and he cites the three great figures of American University Education as Charles W. Eliot of Harvard, Daniel Coit Gilman of Johns Hopkins, and William Rainey Harper of Chicago--all pre-eminent leaders of great universities.

It was my good fortune to learn firsthand what Acheson was talking about by taking my undergraduate work and my professional training under two of the greatest presidents that each of two ancient institutions ever had--William Louis Poteat at Wake Forest and Edwin A. Alderman at the University--both North Carolinians.

And so I can say with conviction that in times of calm and in times of crisis on the campus, the role of the president or

chancellor is more powerful than that of all the others combined if he is the man he should be. He must be the leader in seeing that the university functions as a place of learning and that disruption, violence, and rebellion are suppressed when they arise. If he shifts that responsibility to the trustees or the faculty, he shirks his full duty.

The second great trustee function is to help the university obtain adequate financial support. One of the headaches of every university executive is how to get enough money to do the job. The trustees have the obligation to help the president solve this problem through approaches to the legislature, foundations, and friends.

Third among the trustee functions is to examine, support, and approve the constructive policies recommended by the administration. The trustees must never let the president down in the performance of his leadership of the institution. This is especially necessary when a campus crisis develops.

Fourth, the trustees must support the administration and faculty and the students to the hilt in the propagation and preservation of freedom of the mind and the freedom of inquiry and the search for truth in the university.

Daniel Coit Gilman, the great president of Johns Hopkins University, spoke on this point as follows: "The institution we are about to organize would not be worthy of the name of a university, if it were to be devoted to any other purpose than the discovery and promulgation of the truth;. . ."

And so, in general and in regard to any so-called campus crisis that might occur in North Carolina, the president or chancellor is the central figure, with the faculty and trustees being obligated to give him the strongest moral support. The president should master the art of negotiation with recalcitrant and rebellious students. As he fulfills that function, three courses are open to him: the hard line, the middle line, the soft line. In my opinion he should almost aways follow the middle line, and seldom if ever follow the hard or the soft line.

The fitness of the chief executive officer for the task just reviewed was best described by F. A. P. Barnard, the great president of Columbia University from 1864 to 1889, when he said, "The first trait of character which I regard as essential to the success of a college officer is one in which few are bound to fail, . . .and that is firmness."

Therefore, I would say that in dealing with any campus crisis the essential qualities of the real executive are firmness

and fairness, and if he lacks either or both of those two qualities, he is bound to fail regardless of what the trustees do.

In this same area, Charles W. Eliot, in his inaugural address at Harvard in 1869, said, "The most important function of the president is that of advising the Corporation concerning appointments, particularly about appointments of young men who have not had time and opportunity to prove themselves to the public. It is in discharging this duty that the President holds the future of the University in his hands."

With respect to the relationship between trustees and faculty, Jasper Adams, president of Charleston College in South Carolina from 1824 to 1836, had some things to say that are relevant to this discussion: "No college in this country has permanently flourished in which the trustees have not been willing to concede to the faculty, the rank, dignity, honor and influence which belong essentially to their station." And he also said, "It is settled by the experience of our colleges that whenever the trustees have interfered in the instruction and discipline, they have acted without tact, without address, without knowledge, without firmness, without perseverance, and with such a mixture of rashness and indecision that they have signally failed."

What I am saying is that in the prevention and suppression of any violent student outbreaks on the campus of any North Carolina university, which I regard as a remote possibility, the president or chancellor must be the commander-in-chief and the trustees, faculty, and the public must be his loyal supporters.

No university is perfect. Too many of them have changed too little to meet the changing times. Too much they have disregarded the definition of education given by Robert Hutchins: ". . .the deliberate, organized attempt to help people to become intelligent. . . .It is interested in the development of human beings through the development of their minds. Its aim is not manpower but manhood."

If any campus crisis arises or threatens to arise on any North Carolina University at any time in the future, the chief defender of the university and the person who must move with speed and initiative, with courage, firmness, and fairness is the president or chancellor, and not the trustees or anyone else.

9

MARION D. THORPE

President, Elizabeth City State University

Those of you in attendance here today, whether you like it or not, are responsible for the election of the present President of the United States. In no small way, you are responsible for the leadership in the United Nations. This is so because you govern education and therefore you govern minds. You set the pace for the future, and provide the basis for history before history itself occurs. You are the mind-stickers. He who controls education controls the nation, the world, and perhaps the universe. Boards of trustees, if not individual members, when they function properly determine the social, psychological, and in some cases physiological shape of individuals and society. They do this by making sure that students and the people students affect and associate with know what to think, when to think, and how to think. Thinking is action and leads to further action. Action is perhaps the most vital part of society. Hence, action defines in great part the term society. The shape of the world then rests squarely on the shoulders of trustees of institutions of education and various state and federal agencies that are given educational responsibility. (In no way does this diminish the role of the student, for the university or college is for the student. And we have not answered the question as to what happens when the student does not want it this way.)

The board of trustees is legally responsible for all of the institution's affairs in a over-all and general way, along with and in cooperation with such other agencies as may be designated by state legislators and laws--local, state, and federal.

Because a 12-man or a 100-man board cannot do all of this alone, or perhaps not even together, the necessary administrative authority is designated to the president, who in turn has helpers. Perhaps even this additional manpower will not, in the future, be able to get all of the job of education done, but this is the best arrangement we have at the moment.

Trustees set broad policy. Administrators implement. Trustees hire, evaluate, keep, and fire (or run away) presidents. Trustees study, recommend and evaluate, and safe-keep institutional goals and purposes. Trustees are reservoirs for financial support. A board sets broad policies for expenditures, and at the same time it secrues and contributes to new sources of financial assistance.

Trustees also review and evaluate the recommendation and structure of the institution for achieving its goals. The

trustees have defined what quality education is and help to evaluate its attainment.

One of the most pressing responsibilities of a board of trustees is in the arena of public relations. Trustees should be expert public relations people for the institution--for the alumni, the university community, the state, and the nation. Always, trustees are goodwill ambassadors.

Of no less importance is the responsibility for the trustees to provide an environment conducive to learning, but also conducive to needed change. Trustees must actively and effectively get the word to the public, including legislators, while at the same time making sure that the proper environment exists.

Trustees must maintain continuous liaison and effective communication with various levels of government, especially state government, including its highest voices.

In today's narrowed world, nation, and state, trustees of state-supported institutions of higher education have a responsibility not only to their individual institutions, but to the *state system as a whole*. This means that the trustees of more advantaged institutions should recognize their responsibility to share and increase the bread and then the pie and ice cream with the less advantaged institutions of higher education.

One of the most important functions (particularly in the age of unitary systems in higher education--witness Louisiana, Tennessee, and Virginia) of the board is to be aware of and certain about the institution's purpose and place. Lack of understanding about purpose and place is more serious than student uprisings, faculty disagreements, local apathy, or lack of funds, because this lack of understanding and necessary affirmation and reaffirmation leads to many other kinds of undermining. However, once any kind of undermining is detected, it is the duty of the trustees to discuss, seek, and arrive at ways of meeting the challenge. The first step is examination of purpose. The second is help to devise new systems to implement the achievement of goals that ought to be educationally modern, attentive to a truer and fairer democracy in which participation by teachers and learners is wide, and balanced by a new system (which has not been devised) of the rights of administrators. Administrators have rights and responsibilities. Too few in and out of higher education seem to recognize this. The structuring of these is a continuous challenge to the administrator and the board of trustees.

One of the pertinent articles concerning the topic at hand today was written by Emmett B. Field, who was vice-president and dean of faculties at the University of Houston when he wrote it.

He is now a top administrator with the Southern Association of Colleges and Schools. The title of his article is "The Academic Community: Its Members and their Relations." Let me quote and paraphrase a portion of this article dealing with the role of trustees:

> By custom and law, lay boards of trustees hold the alternate authority that is lodged in institutions of higher learning. The trustees set broad policies. . . .seek funds for the institutions, provide them with financial oversight, interpret them to the public and generally act as their agents. Legally the trustees of the institution. . . .of all groups in the academic community. . .tend to be the least visible to faculty and students. This apparent remoteness has given rise to the claim that the idea of lay trusteeship is outmoded. If a satisfactory substitute is evident, however, I am unaware of it. The influence of trustees on the integrity of colleges and universities may be very subtle, but it is also very real. I would agree with Charles Frenkle, that "it is doubtful that faculties and studentbodies could by themselves. ... .and without help of the trustees, successfully defend its autonomy, even if so many of the economic problems could be resolved."
>
> The most crucial act trustees ever perform is the naming of a new president. . . . The role of the President is to guide the board, direct the administration, lead the faculty, mold the studentbody, provide for the non-academic staff, raise money, provide physical and property management, solve problems others cannot handle, speak for the institution, be an educational statesman, symbolize the academic community, and fill all voids. He may appoint others to help him with these awesome tasks, but it is he, along with the board, who must take final responsibility for seeing that the necessary work of the institution is carried out.

Whether any president or board of trustees in combination with the president can do all of these things and provide for all of this discharge of responsibility is a serious question in higher education today. But it is my opinion that the present direction must be an effort for doing so.

Presidents are favorite targets of the group whose well-being they attempt to serve. Even so, it is the responsibility of the board of trustees in its public relations function as well as in its custodial function to make certain that the president and administrators are protected against onslaughts.

An additional major responsibility of a board of trustees is to cooperate with state educational coordinating agencies, governors, and legislators. In North Carolina, this means cooperation with the State Board of Higher Education. A recent study shows that governors and legislators want more of this kind of cooperation but state college and university presidents want less. Nevertheless, in a racially unitary system, which is being sought by HEW, unnecessary duplication must go by the wayside. Inter-institutional cooperation must obtain, and integration must be a two-way street. It seems to me that some centralized agency must determine in the final analysis how this can be accomplished and accomplish it.

One of the most pressing of trustee responsibilities is the financial responsibility necessary for a disadvantaged institution. I know of one educational institution undergoing a self-study for the state as well as regional accreditation that was disadvantaged to a horrifying degree. It had recently lost its president; its dean had died; there was no business manager; no comptroller; no purchasing officer. Several departmental chairmen and several faculty members with earned doctorates had taken long leaves of absence. It had no dean of men; the dean of students was not trained in the area and admitted that he knew very little about student personnel; the dean of women was abroad (or perhaps I should say overseas); counselors were nonexistent. Two of its dormitories were without residence directors. For a staff of 200, there were only four secretaries on the campus. There was no director or assistant director of development, no director of public relations. There was no assistant dean. Its budget had been frozen and its capital improvement projects canceled. The federal flow of funds to the institution, particularly those for student aid, had been stopped due to an investigation. I could go on, but I think the point is made.

The board of trustees for this institution worked diligently to solve these many problems, and it could not shed the responsibility to make certain that its efforts were successful. In the name of and for the sake of higher education, I am glad to report that most of these problems, because of the good work of the board of trustees, have been remedied. These problems could not have been solved without serious deliberation, good public relations, many conferences with state officials, great cooperation with coordination agencies, and of course, the financing necessary to first establish and then fill the positions necessary for the institution's successful functioning.

It is also the role of the trustees never to interfere in the administration of the institution once they have set broad

policy. "Loose talk" with faculty, staff, and students does far more harm than good to the smooth functioning and administration of an institution. At the same time, however, the trustees must remain good public relations people. How this is done will depend on the circumstances and the kind of questions being raised about the institution and the board at the time.

Also, the trustees must shoulder and publicize their responsibilities for putting down illegal disruptions and revolutions and civil wars.

Board members as well as administrators must properly use the authority of the chairman of the board and not push individual projects to the detriment of the whole of the institution.

I should like to say something about the role of the trustees and the responsibility for the institutions with a predominantly black population. I think that the responsibility of boards in these schools is to provide for appropriate studies, black or any other color, as dictated by the background of the students and their realistic possibilities in the world of work after graduation. In this same sense the board of trustees, whether it is predominantly white or not, must provide black power through the institution. The kind of power of which I speak is not militant but rather is a milieu that provides the students with a firm basis for acquiring economic, political, educational, financial, and moral power. To do this and all of the other kinds of things talked about in this speech means that trustees in the final analysis are responsible simply for quality and relevant education.

So what should be the respective roles of the trustees and the administration? I think that they should function as one. Disagreement should be aired in the privacy of the board meetings and not in public. The entire positive program of the institution should assure society of a meaningful order in the midst of change and needed change where order exists.

10

RALPH SCOTT

Trustee, University of North Carolina

Member, Board of Higher Education

A number of speakers at this conference have reminded us that there are many underlying causes of the campus crisis, but at the present time the immediate manifestation of the crisis is the

protest of the students. Hence this panel in which students themselves talk to us is in a way the most significant panel of our conference.

I want to leave as much time as possible for the students to talk to you and you to talk to them (hoping I won't get caught in the middle); so my introductory remarks will be brief. I want simply to remind you of two things:

First, student protest is neither new nor exclusively American. You may be comforted to learn that it is old and worldwide. As you may know, Bologna was in many ways the first great European university, older than Paris, Oxford, or Cambridge. At Bologna in the early middle ages the students dominated the university, running everything and hiring and firing the professors. And somehow Bologna has lived to tell the tale. Within the past couple of years there have been student protests in every west European country, with possible exception of Switzerland, and the students in Europe voice the same complaints that we hear in this country. For generations the students have stirred things up in Latin American universities. Unfortunately most of the universities there seem to have suffered rather severely as a result of the prolonged and frequent disturbances. In Asia and Africa there are many recent examples of student protests. So we in this country and in this state are by no means alone.

Second, I want to remind us once again of the great variety that exists in attitude and in maturity within each studentbody. You are going to hear today from several mature, thoughtful, responsible students. There are others like them, but we should bear in mind that many students are not so mature as these and that a few of them are quite irresponsible, bent only on creating havoc in the university and in society at large. I hope that as the students talk to us today they will help us get a clearer idea of the relative roles of the various groups of students on their campuses--the extreme militants at one end, the passive students at the other, and the many variations in between.

The president of Rhode Island College said recently that his one great discouragement in dealing with students is that "hardly any emphasis [is put] on the educational matters of academic reform. . . .on the part of any of the radicals. They are talking simply about power. They are not talking about ideas. They are not talking about the learning process. They are not talking about how to improve teaching; they are not talking about curricula. They are talking about who controls the teaching, who controls the curriculum, who hires and fires faculty members, and so on."

I hope our panelists this morning, either in their formal remarks or during the question period, will give us their view

of the extent to which the more active students in North Carolina are concerned with educational reform. Are they motivated by passion for academic improvement, or is their principal motivation desire for power?

11

ALAN ALBRIGHT

Studentbody President, University of North Carolina at Chapel Hill

The essence of life at a university is change. In our times the university must seek to renew itself in face of society's changing demands. Since this change takes place within all sectors of the community, this morning I would like to begin by discussing what I feel might be perceived as today's student mind. From that point we might determine how changes in the student perspective relate to the trustee's responsibility in today's "campus crisis."

No one who attempts to understand existing "campus unrest" can help but believe that there is a great deal wrong with the university and society. A new awareness of the potential of student involvement--student power--has arisen. There has also developed a significant group of individuals which has demonstrated a sincere concern for what it feels is the difference between the promise and the performance of America.

Keeping in mind the difference between promise and performance, let us examine for the next few minutes two areas of concern to today's student: (1) the student's role within the university; (2) the university's role with the community.

As we look to the student's role within the university, we see that today's students are attempting to undertake the responsibilities of developing regulations that affect their well-being. Students are beginning to say that the very promise of the university to permit free inquiry requires that its academic curriculum be flexible to the needs of individual students. Students are asking for increased expression in determining their own education. They are striving to see a closer relationship between their courses and the problems they perceive. As never before, they are saying that the educational process cannot be isolated from the problems of race, poverty, and economic oppression. And finally, as I see it, students are demanding that the university broaden its understanding of where learning may take

place. Students must feel a stake in their environment, in attempting to shape its institutions, and in developing their own knowledge of the world through participation in it.

In looking to our second area of concern to the student mind, we see the student beginning to examine more closely the relationship between the university and the surrounding community. Many are saying that the traditional ties of the university should be replaced with new commitments to alleviate the problems of race, poverty, and economic oppression. No longer must the university attempt to maintain a posture of neutrality and isolation; it must become a partisan of progressive forces in society.

With the university questioning its traditional role in the community, five areas for future action are apparent:

1. The university should work to increase its recruitment of minority and disadvantaged students.

2. The university should examine the flexibility of its admission standards in light of concern for enrollment of disadvantaged students.

3. The university must expand its scholarship commitment in all areas.

4. The university must reaffirm its concern with the needs of individuals within the institution. In doing this, it should also acknowledge the special contributions and talents of the black students within this community and the special attention that they deserve.

5. The university should attempt to increase the broader community's knowledge of the services provided by agencies within the institution, as well as the areas of potential service by the institution.

I have attempted to convey to you my thoughts on the student perspective in the light of the changing university. Let us now look at the role of the trustee in the changing university.

With the university's increasing role in the community, and with the unfortunate national attention to violent student unrest, we have seen great increase in the active involvement of the trustees within the operation of our institutions. The question from a student perspective, then, becomes whether the trustee involvement is of a positive or negative nature. Does the involvement take the form of reaction to a particular problem on campus, or is it positive leadership with thorough understanding of the complexities concerned within any particular institution. Positive involvement means active and understanding leadership on the part of the trustee body.

For the trustees to accept the challenge of being actively involved in the affairs of their institution requires that they undertake a commitment to try to understand the complex situations existing on their campus, and this means also a commitment of time.

Today our universities face many problems, but they survive through continual change. My personal hope for solutions to their complex problems today lies in cooperative action. Cooperative action and understanding among all parties of the university community--students, faculty, administration, trustees, and non-academic employees. But what programs can we initiate to provide this understanding and cooperation? The alternatives for creative action are limited only by our imaginations. Today I will mention three possibilities:

1. Virtually every institution today needs an examination of the total scope of university governance on its campus. This takes the form of a clearer definition of the roles and responsibilities of the student, faculty, and administration in decision-making. We can also know that there is a strong national trend toward an all-university council that addresses problems and policy considerations which affect the entire university community. Members from the university trustees should be asked to take part in this all-university council.

2. Programs like Operation Interface--which bring together student, business, educational, and governmental leaders--are areas in which university trustees can play a very beneficial part. Cooperative action in such fields as scholarship aid and internship programs are possibilities where the expertise of university trustees can be a tremendous asset to student, faculty, and administration efforts in these areas.

3. All campuses can expand their efforts to bring the trustees to the campus at times other than those specifically set aside for a meeting of the complete board. This informal contact can play a critical part in strengthening the communication between trustees and other sectors of the university.

These have been a few possibilities for cooperative action on today's campuses. The challenges that today's changing university faces are great. And also the challenge that faces any of us involved within these institutions is greater than at any time in the past. Our concern, support, and criticism, be it both informed and constructive, will have tremendous impact on the future of our institutions.

12

WILLIAM W. VAN ALSTYNE
Professor of Law
Duke University

A chief justice of the Supreme Court once observed that general propositions do not solve concrete cases. That can apply to introductory remarks also: one can speak so generally that he speaks to nobody's particular concern. Therefore I propose to be quite brief, but I hope that you will feel free to direct more specific questions to me.

Of general propositions, I want to mention three. One has to do with resolving crisis in the short term. Another has to do with the prospect of resolving the long-term crises that have now become almost an academic way of life in the United States. Indeed, as many of you know, over 125 universities were disrupted by violence last year; over 540 sustained at least major disruptions short of physical violence. The trend since 1964 has been in this direction. There is no immediate reason to suppose that it will be reversed. So I think that one has to talk in terms of both particular issues and, in the long range, the structure that may yield tensions and conflict that tend to engender long-term crisis. And finally, a footnote or two about the particular role of the faculty in a practical way.

My impression, from reviewing difficulties at Duke University and across the country in behalf of AAUP and the American Bar Association, is that when a particular crisis develops, the governance may already have failed. That is to say, there is no point in asking how one may best manage a crisis once conflict has appeared on campus, sides have been chosen, and disruption has occurred. The phenomenon of disruption is itself vivid testimony to the failure of the institution in an earlier stage to anticipate and resolve its difficulties. So institutions that have not yet sustained any serious disruptions should not be comforted by that fact but rather should take counsel immediately.

We have become gradually bureaucratized in higher education. Lines of communication have thinned; they have become elongated. We have placed structures between students and boards of trustees, who are remote and fairly absent. We are out of touch with particular issues. In eavesdropping on the last panel, for instance, I was interested in the question that someone raised about who speaks for the student. A survey of particular developments around the country would indicate that the crises developed not

because of well-organized student government or things of that sort. It is the issue rather than the constituency that makes the crises. The crisis stems from the fact that a given felt problem--felt by the student, felt by the employee, felt by the faculty--has been unattended, so that those who are angered feel that they have no option other than to attract attention--to signal distress by causing commotion.

There is nothing unusual about this. Dick Gregory expressed it best when he addressed the undergraduates of Harvard College at their convocation about three years ago. He was trying to make vivid and specific precisely why agitation by Negroes seems to be a necessary technique of signaling social grievance, and he put it approximately in the following way:

> You go to the vending machine and put a dime in and pull the lever in order to get a candy bar out. You pull the lever and nothing comes out. You feel mildly miffed by that, so you pull another lever, settling for a candy bar you don't want quite as much. Nothing happens there. In considerable indignation, you finally pull the coin-return lever and the coin doesn't come back. Finally you look up at the face of the machine for a little notice and it is there. Here you are in New York, and the sign says, "In case of difficulties, write to the home office in Des Moines, Iowa." So what do you do? What would most men do? Why, you kick the goddamn machine!

Now I submit that if you review the pattern of incidents across the country you will find that, to a considerable extent, this is what is happening in our universities as well. It is the welling-up of frustration that results in the kicking of the machine in order to signal distress.

Coming back to the first of our three general propositions dealing with short-term crisis, I suggest that the most important element in the appropriate management of a crisis is the development of means to avoid its occurrence. In the short term, I think, each self-respecting institution of higher education needs temporarily to bypass the current structure and set up an ad hoc committee that has as its sole responsibility the immediate identification of any latent grievances that seem to pervade that institution. It should then farm out whatever issues there may be to any extant groups or establish new ones that are composed to respond to the nature of a particular issue and see whether it can be resolved now, before the group maintaining the grievance feels so frustrated that it thinks it must cause commotion in order to signal the felt distress.

A companion suggestion on the management of the short-term crisis is this: Most institutions still, in late 1969, operate

either under a no-rule system of an archaic rule system that in the case of public universities is an unqualified legal disaster. It is a legal disaster because in the last six years the federal courts, responding to student complaints, have so extended the application of the Fourteenth Amendment and other portions of the Constitution that many universities that have hoped to rely upon current rules in order to maintain order will be helpless when the federal court finds that their rules are unconstitutional. The rules are legally insufficient under the circumstances.

Indeed, Grayson Kirk, when he was being interviewed in the aftermath of the Columbia disruption, shocked his interlocutor on nationwide television when asked, if he had it all to do over again, what he would do differently. He shocked the interlocutor because of the apparent triviality of his response, which was that he would have wanted the rules of the college comprehensively revised to assure their reliability and fairness in order that the college would not subsequently be embarrassed politically or legally by the sheer inefficiency of the archaic rule structure under which Columbia had attempted to operate. Most institutions need immediate review of their rules. I do not propose the content of this review, but point out that historical inattention to this aspect of university life now puts a lot of public institutions in a terrific bind. What do you do if the advice of counsel is that if you try to enforce a given rule, it will very likely be overthrown?

For the short term at least, it may also be extremely advisable for the trustees, president, faculty, and students to try to compose ad hoc monitoring groups. These are instant advisory groups that are better able to advise the president or the chancellor or the trustees, whoever may become involved in a given fracas, instantly of the proportion of the unrest and identify those significantly involved--not for policing purposes alone, but also in order that the administration may grasp the magnitude of the grievance and better anticipate any possible escalation of that grievance into a major disruption. Those responsible for preventing disruption should then try to work immediately with the provocatives to de-escalate, to soften this thing, to mitigate its impact, to mediate the results, and to paper it over, at least for the short term.

Thus I think that the improvisation of ad hoc monitoring groups is a significant strategy in managing crises in the short term. Indeed, institutions that have pursued the matter after initial trauma--after real disruption--in the ways that I have tried to outline have at least done better in recent years. That was true at Stanford during my visit last spring. Stanford was disrupted at that time at least three times by week-long occupation of buildings. I would guess, however, that there was little news of it here. It never reached the AP releases and

was never a matter of TV comment, primarily because the confrontations never became violent. They never involved mass destruction of property. They were cooled through a combination of the things I have tried roughly to outline. These provisions did seem to straighten things out at Stanford in the short term.

But a long-term matter, about which I am not so optimistic, is the difference in the attitudinal profile between boards of trustees in general and other university constituents. There is an ominous difference, a very great gap, in terms of general perspectives--not merely educational perspectives but general attitudes and dispositions--between boards of trustees and academic enterprises--the faculty, the students, and the nonacademic employees who do not necessarily share a common point of view.

The survey that was reported in the *Durham Herald* this morning apparently was taken partly from the group and was reported back to this group yesterday. It indicates a view of certain things that is 180 degrees different from what exists on campus in fact. A similar trustee survey taken by the national Educational Testing Service reflects the same difference. Let us accept this report as merely a neutral observation and not pass judgment as to whose perspective is the better perspective. Wherever there is this degree of difference in basic attitudes in the management and the self-values of academic enterprises, however, it is predictable that in the long term there will continue to be points of friction, abrasiveness, and conflict.

As a matter of strategy, one may correct this attitudinal gap by a variety of techniques, but there are two obvious ways: One is to reshape admission standards respecting students and hiring standards respecting faculties so that one gets trustees on campus a homogeneity in their point of view with that of the board of trustees and the political bodies who appoint them. This strategy would flatten out the differences in basic attitudes and make sure that none other than the "safe" students are admitted in the first instance.

I reject that alternative not only because I find it educationally offensive, but also because it is legally intolerable. That is to say, there is no way on earth a public institution can, within the law, impose any ideological admission standards on its students or ideological standards of hiring on its faculty. I know, however, that there is some disposition to do so. As reported, at least two-thirds of the surveyed trustees favor political loyalty oaths, which, incidentially, have frequently been declared unconstitutional by the Supreme Court.

The other way of going about it, with all due respect, is to shake up the selection process respecting boards of trustees. Now I put the emphasis on shaking up the selection process rather

than the direct appointment of students, faculty, or employees to the boards of trustees, for I do not regard it necessary to the resolution of campus tensions that there be categorical representation of the students or the faculty as such. Nor do I think it desirable. For the question asked earlier about who speaks for the students certainly comes back to plague us if we formalize their representation on boards of trustees. If one makes this momentous move, he surely wants to be certain that the students who have that eminent post do indeed represent the students and that the granting of this particular aspect of generosity will solve the problem.

We can never be sure who speaks for the students, but, as I have tried to say earlier, the issue creates the conflict rather than a given constituency representing a group that can be counted upon to create the conflict. The studentbody president at most universities, for instance, probably does not represent the students in the sense of being able to anticipate the issue that would generate strife. Conventionally, the studentbody president at most public institutions is, regrettably, not necessarily a person uniformly well regarded by all of the students. (I can defame myself as well in this observation, as a former studentbody president, and recollect personal history.) In general the studentbody president has a certain tentative political interest to try out, and he invests his concern in dress-rehearsal politics on campus. Student government in general has not attracted extremely able people because historically it has been a play parliament or, as the students put it in more colorful phraseology, a jockstrap government. That is essentially what it has often tended to be. Since it is in any case not often an influential body on every issue, it has tended not to attract people with the most serious particular concerns. The notion that to put the studentbody president on the board of trustees will automatically resolve problems and adequately inform the trustees in advance of any ad hoc student group's complaint is misconceived. In my view it is not a promising approach to the subject.

The better approach, it seems to me, is to take a very hard and critical look at the underlying total selection process of the trustees. They need not be faculty members, for instance, to be men drawn from the areas of life where they will share attitudes with academicians. A trustee need not be a fellow student from this or any other institution to have at least something in common with the younger generation. The selection process currently varies a great deal from board to board, but as one looks at profiles of trustees according to occupation, age, and attitude, he sees that the selection process itself is contributing to the gap. That gap, in my view, has got to be closed, and I do not regard it as feasible to do so by squeezing on admissions or modifying hiring factors. I frankly see no alternative, therefore, to the idea that one look at the selection process itself.

Let me be specific: One of our tentative recommendations at Duke, still under discussion in our governance commission is to reject the suggestion that there be two faculty members or three students on the board of trustees. The commission recommends, rather, that the committee that proposes the slate of prospective trustees to be approved by the current board of trustees be shaken up to present a different profile of people from the present nominating committee. This new constituency within the nominating committee should assure that it will propose a broader selection of trustee candidates.

The observation has been made here and elsewhere that students are unaware of what people not associated with their colleges are thinking. The trustees necessarily have to take into account that there are people involved, of course, other than the students on campus. But, respectfully, the proposition also holds the other way around. The estrangement between the academic enterprises and people who vote or taxpayers whose sons are involved here is at least aggravated or contributed to by the failure of some trustees to carry the communication function the other way. They must not only take to the university that which they hear at the local community level or the state legislative level, but they must also take back to those communities and to the legisture a persuasive representation of those difficulties, problems, issues, and concerns that are felt in the academic community. It cannot be a source of surprise, it seems to me, that students are baffled as to how folks at home feel the way they do (and folks at home are enormously troubled about circumstances on campus) when the group that has the greatest eminence, the greatest prestige, the greatest authority to be heard does not try to perform the communication function in both directions. Thus reviewed from a national point of view, with no reference to any particular board or state, boards of trustees have been conspicuous by their silence in attempting to communicate back to the legislature and back to political constituencies outside the university, in trying to indicate the relative merits or demerits of a particular controversy. It seems to me, therefore, that among the critical functions of trustee boards in the short term must be the improvement of political reporting and information and persuasion to the body of politics to which ultimately all public universities, at least, are answerable.

Finally, as the last general proposition on the role of the faculty, I think that the minimum safe observation, as a practical matter, is that in crises the faculty is in fact the single most critical group. That is to say, where any significant plurality of the faculty tends to come out, it can make a crucial difference in the resolution of the given crisis. If the faculty basically sides with those who are otherwise ventilating the grievance or causing the commotion, that is almost a sure guarantee that the fracas will then erupt into a very major one. On the other

hand, if the faculty tends to side with the other view and can be drawn into a mediating role, the lack of support in any major component of the faculty itself generally means in advance, even to power-oriented students who tend to see these things clearly in confrontation terms, that their own particular effort cannot prevail under the circumstances. As an eminently practical matter, therefore, the faculty will play a crucial role by default if not by design.

Finally, then, on the connection between the faculty and the trustees, I would suggest that when the board of trustees itself is so very large that one cannot even suppose that the entire board can keep in constant communication with the campus or its faculty body or its internal organization, it too should improvise an ad hoc monitoring group for the short term to maintain the function of communication.

13

ROBERT E. PHAY

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Until very recently higher education occupied a sanctified position in our society. Its procedures and actions were largely unquestioned by the courts. As a recent court decision put it, "Historically, the academic community has been unique in having its own standards, rewards, and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interferences."

This remarkable position has changed rather drastically since World War II--largely because of increasingly frequent application of the due process clause of the Fourteenth Amendment to the U.S. Constitution to the university's procedures and actions. Before examining due process of law as it relates to problems of student discipline, let us look at the general question of the changing position of the university with respect to judicial scrutiny.

LEGAL SCRUTINY OF UNIVERSITY PROCEDURES

The impact and consequences of close judicial scrutiny have been viewed differently by various elements of the academic profession. Some have seen it as healthy and necessary; others

have viewed it with alarm. The position of the critics who see the change as detrimental to institutions of higher education has probably been set forth most clearly by Dr. James A. Perkins, former president of Cornell University. In a 1967 address entitled "The University and Due Process," before the New England Association of Colleges and Secondary Schools, President Perkins said that he views "with some alarm the specter. . .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."

Examples of litigation that has subjected the processes of the university system to court review include the following recent cases:

1. A suit in Iowa against a state university to forbid it from imposing higher tuition rates on out-of-state students on the basis that higher rates discriminated against nonresidents in violation of the Fourteenth Amendment's equal protection requirement.

2. A suit by Parsons College against the North Central Association of Colleges and Secondary Schools to force reinstatement of the college's accreditation. Although the suit was denied, the court accepted the position that the basis for accreditation was subject to judicial review.

3. A suit by a legal scholar against the *Rutgers Law Review* for rejecting an article submitted for publication. The author argued that the student editors had been so indoctrinated by a liberal law school faculty that they could not view his conservative article objectively. The contention was that by refusing to print it, they had violated his right of free speech under the First Amendment.

4. A suit filed by student leaders at Long Island University in which a temporary restraining order was obtained to prevent the appointment of a new chancellor on the basis that the students had not been consulted as promised by the board of trustees.

Similar cases abound, but these serve as adequate examples of the new judicial scrutiny of the university's processes. Student suits involving dismissal or suspension will be discussed in more detail later.

President Perkins concludes from the litigation that the time may not be far off when "the granting of diplomas and degrees, the marking of papers and awarding of grades, indeed, almost every aspect of academic affairs will be open to the legal challenge that it conform to judicial standards."

Perkins lists four reasons why he thinks this development has come about and why the once inviolate academic decisions have now become so vulnerable to judicial review. He cites first the ubiquitous financial support of federal and state government that has recently been well documented by Jacques Barzun in his book *The American University*. Public support brings public scrutiny of how the money is spent and how the product turns out. When conflicts arise, courts traditionally have been the institution that has reconciled the dispute and defined the extent of the state's power to control private and institutional interests. In this conflict, Perkins thinks that public rather than institutional standards will prevail.

A second reason Perkins gives for increasing court scrutiny of academic matters is the strong egalitarian drive for higher education since World War II. Equality, as a legal concept, means equality of treatment, which often conflicts with the academic procedures. Before the academic bar, students are not all equal.

Third, civil rights protection by public authority has been extended into many areas once considered purely private. Courts, under expanded due process and equal protection concepts, will protect an individual from discrimination in housing, job opportunity, and access to public facilities. Perkins fears there is no stopping point and that this "protection" of the individual may be extended to educational institutions, so that such things as admission practices (in which freshman classes are deliberately designed to contain appropriate mixtures of students), scholarship rules, and designation of holidays may be prohibited because they violate individual civil rights.

Four, an erosion has occurred in disciplinary supervision of the young by the family, public school, and college. One result of the far wider freedom for the under-30 generation has been a willingness to question the educational institution in court. The successful suit brought by studentbody leaders at Chapel Hill and several members of the faculty to have the North Carolina speaker-ban law declared unconstitutional is an indication of the willingness of students and faculty to challenge state educational policy in the court. Although this new freedom of youth may be a reason why the university is in court more often, most people will agree that the greater willingness to question is also a very healthy change in the student of today.

This changed position of higher education with respect to judicial review, Dr. Perkins concludes, is threatening the existence of our institutions as a place where free inquiry can be made. The substitution of civil for academic rule creates two

major problems for the academic community. One is the prospect that the academic institution may be prevented from making qualitative decisions about human talent. The other is that the institution's ability to protect academic freedom may be sacrificed. This, he says, we cannot let happen.[1] Incidentally, the public school people are concerned about the same problem, and fear that the courts are becoming super-school boards as they make educational decisions that as an institution they are not structured or competent to do. The decision of Judge Skelly Wright in *Hobson v. Hansen*, in which he knocked down the "track system" in the District of Columbia, is cited as an example.

Five months after President Perkins' broadside against the encroachment of due process concepts into higher education, Professor Clark Byse, past president of the AAUP and professor of law at Harvard University, delivered a speech entitled "The University and Due Process: A Somewhat Different View" to the 1968 annual meeting of the AAUP. Byse said that he did not share President Perkins' fears that judicial review of institutional decisions will lead to a situation in which "almost every aspect of academic affairs will be open to legal challenge," in which the university will spend its "lifetime on the witness stand," in which qualitative academic decisions will be replaced by "wrangling over technicalities," and in which "civil jurisdiction over intellectual inquiry would be complete." Byse says that he does not blanch at the prospect of judicial review because to him due process is not a legal octopus about to strangle the academic community with its tentacles of insensitivity, expense, and delay; it is not an enemy but an old friend.

1. President Perkins spells these objections out in some greater detail by listing some of the consequences of these two problems. One consequence is that the process of matching institution and program with individual interests and capabilities--which involves admissions, guidance, testing, grading, and counseling--will result in permanent damage to the academic processes for judging quality and to quality itself. Another consequence is loss of institutional autonomy through constant legal interference as every move and conversation becomes liable to replay in the courtroom. Still another result is delay in getting decisions. The judicial system is overloaded, and its decisions take time. Parties may wait months and even years for court action while academic careers and the institutions grind to a standstill. Finally, the spark between the student and the teacher will die if each constantly faces the prospect of having to testify against the other. See the address by Dr. James Perkins to the New England Association of Colleges and Secondary Schools in Boston, December 8, 1967, *The University and Due Process* (Washington: American Council of Education, 1967), pp.7-8.

The Fourteenth Amendment's due process clause provides that no person shall be deprived of life, liberty, or property without due process of law. The North Carolina Constitution has a comparable provision in the "law of the land" clause of Article I, Section 17. The ideal of due process was described by Justice Frankfurter in the following words:

> [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment, inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished--these are some of the considerations that must enter into the judicial judgment [of whether due process has been afforded].[2]

As Frankfurter's statement indicates, the requirement of due process varies with the conditions and circumstances of each individual case, and requires a minimum standard of fairness rather than the best possible procedure. As one court has observed, if the rudimentary elements of fair play are followed, the requirements of due process will have been fulfilled.[3]

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2. Frankfurter, J., Concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1951).

3. Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

After stating his disagreement with Perkins' fear of due process, which he attributes to a "misunderstanding of the flexible and functional character of the concept," Byse expresses some different concerns about judicial scrutiny of the processes of higher education. One is that the adjudicated cases leave gaps in procedural due process, particularly in the private sector. He also says that if judicial review of academic processes were extensive, some administrators would not exercise their independent judgment. They would find it easier to yield to demands made of them than to face the judicial review that might follow a refusal to acquiesce to the demands. Others, he thinks, would leave the hard decisions to the courts. Some evidence of the latter result is seen in the public schools, where some administrators, rather than simply comply with the law and desegregate their schools, have left it to the courts to make the decision for them. Still another adverse consequence of constant judicial review is that it shifts the "focus of inquiry from that which is desirable or wise to that which is constitutional or legal." In other words, it fosters legalism.[4]

Byse concludes, however, that while there is danger in judicial review, Perkins has overstated the case. On balance, he says, judicial review clearly should and will continue to play a role in higher education.

DUE PROCESS AND STUDENT DISCIPLINE

Most of the challenges made to university procedures in the area of student discipline have come from student suits challenging a suspension or expulsion or a refusal by an institution to grant a degree. Ten years ago most of these suits were dismissed on one of the following three bases:

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4. Byse quotes with approval the following observation by Professor Lon L. Fuller on the implications of judicial review to the university:

> It inevitably means a projection of "legalism" into the internal administration of the university. The university, to be sure its decisions will stand up on review by the courts, must itself adopt the modes of thought and action characteristic of courts of law. It must formalize its standards of decision, it must emphasize the outward act and its conformity or non-conformity to rule, instead of looking to the essential meaning of the act and the compatibility of that meaning with educational objectives. All of this means inevitably some loss in the sense of commitment to educational aims, some diversion of energy toward secondary objectives. Fuller, "Two Principles of Human Association" 16 (mimeo, 1967).

1. *The right/privilege distinction.* College attendance was considered a privilege, not a right.[5] The institution was not obligated to accept any student seeking admission or to permit an individual to remain a student. If college attendance is but a privilege, then due process of law--which applies only to a deprivation of life, liberty, or property--does not apply.

2. *In loco parentis.* This legal concept viewed the student as a child under the jurisdiction of the college, the college standing in the place of the parent. Thy parent college was given almost complete authority over the actions of the student.[6]

3. *Contract theory.* The idea was that when the student enters college, he enters into a contract with the institution, agreeing to abide by the rules and regulations set down by the college, usually as set forth in the college catalogue.[7]

All three of these theories were devices used by the courts to avoid interference in the operation of the college community; they have now been either repudiated or greatly modified. The ever increasing importance of education has resulted in the right/privilege distinction's being substantially undercut and at times rejected.[8] The in loco parentis concept has been specifically repudiated by several cases as courts recognize that today's colleges have more students over 30 than under 18.[9] The contract theory has come to be viewed as a misrepresentation of the parties' intentions. Neither administrators nor students view their day-to-day relations as governed by a formal contract, and the theory has been restricted primarily

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5. See *e.g.*, Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928).

6. See *e.g.*, Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1925).

7. See *e.g.*, North v. Board of Trustees of Univ. of Illinios, 137 Ill. 296, 27 N.E. 54 (1891).

8. See Dixon v. Alabama State Bd. of Educ. 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); and Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961). See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

9. See *e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968), where the court said, "We agree with the students that the doctrine of *'In loco parentis'* is no longer tenable in a university community."

to suits against private institutions, which are not subject to the Fourteenth Amendment's due process and equal protection clause unless state action can be found.[10]

With these self-created restraints largely removed, courts have begun to define the minimum standards and procedures that a university must observe to avoid constitutional infringement. This examination has centered around the due process clause. This amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . ."

Two types of due process--substantive and procedural--emerge from this clause. Substantive due process refers to the rights of an individual to engage in certain types of conduct without restraint by the state--e.g., rights to free speech, assembly, expression, press, and association are examples. Procedural due process refers to the procedures and methods employed in the enforcement of laws and regulations, e.g., proper notice, right to appeal, and cross-examination. Let us first look at substantive due process--the types of conduct the university may or may not constitutionally prohibit--and then consider procedural due process--that procedure which an institution must observe before it suspends or expels a student for violating university rules or regulations.

SUBSTANTIVE DUE PROCESS

Freedom of Speech and Assembly

The First Amendment right of speech and assembly extends to the state university campus through the due process clause of the Fourteenth Amendment. Thus the right to speak, criticize, distribute literature, and picket are guaranteed rights of the university community. As the Supreme Court said over twenty years ago, the student does not leave his constitutional rights at the schoolhouse door.[11]

At the same time, however, the rights of speech and assembly are not absolute. They can be curtailed if they materially and substantially interfere with the operation of the school.[12] As

10. See Van Alsytne, *The Student as University Resident*, 45 Denver L.J. 582, 583-84 and note 1 (1968).

11. West Virginia v. Barnette, 319 U.S. 624 (1943).

12. See Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

the California Supreme Court points out in a case arising from the Berkeley filthy-speech movement:

> An individual cannot escape from social constraint merely by asserting that he is engaged in political talk or action. . . .Thus, reasonable restrictions on the freedoms of speech and assembly are recognized in relation to public agencies that have a valid interest in maintaining good order and proper decorum.[13]

The area in which a question of free speech and assembly is most often raised is conduct in public demonstrations. In prohibiting certain types of demonstrations or disciplining students for conduct at demonstrations considered by the university to be unacceptable, the university has been challenged on the ground that its action violates the First Amendment's guarantee of freedom of speech and assembly.

The right to assemble at college or university buildings and to demonstrate peaceably has been upheld many times. This right does not include, however, the right to exclude others from free passage into an area or building. In *Buttny v. Smiley*,[14] a case arising from demonstrations on the University of Colorado campus against CIA recruitment, a federal district court ruled that students may not prohibit other students from free access to a building. The university has a proper and necessary interest in keeping its buildings and corridors open to normal institutional operations, and it may discipline students and others who obstruct these operations.

Another improper limitation on First Amendment rights is prior restraint. In *Hammond v. South Carolina State College*[15] the court held a college regulation requiring all demonstrations and parades to receive prior approval unconstitutional on the basis that the regulation was a restraint on student First Amendment rights. Federal district courts in North Carolina and Illinois have recently declared speaker-ban statutes to be un-

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13. Goldberg v. Regents of the University of California, 248 Cal. App.2d 867, 57 Cal. Rptr. 463, 471 (1967). See also American Civil Liberties Union v. Board of Educ. of Los Angeles, 55 Cal.2d 167, 359 P.2d 45 (1961).

14. 281 F. Supp. 280 (D. Colo. 1968). See also Evers v. Birdsong, 287 F. Supp. 900 (S.D. Miss. 1968).

15. 272 F. Supp. 947 (D. S.C. 1967).

constitutional, ruling that such statutes must be very carefully drawn to escape the constitutional infirmity of vagueness.[16] While some speech may be regulated (for example, the filthy speech at Berkeley), the statute or regulation implementing the statute must be precise, narrow, and limited. Any type of speaker-ban regulation, however, is probably futile. As Professor Charles Wright recently noted, "I cannot find a single case decided on its merits in this decade in which a speaker ban has been upheld by a court."[17]

Freedom of the Press

The extent to which the university may control student publications has been substantially limited by several recent court decisions. In *Dickey v. Alabama State Board of Education*,[18] a federal district court held that a student editor could not be expelled for writing "censored" over the space where the editorial he had been told not to publish would have appeared. The editorial praised the University of Alabama president for supporting academic freedom for university students and critized the governor. In a more recent case, another federal district court ruled that a state college, Fitchburg State College, may not censor a student newspaper in advance of publication even though the state provides financial support.[19] In this case, the student newspaper had published an article by Black Panther leader Eldridge Cleaver that contained obscenities. The president withdrew funds to prevent the paper from publishing the article and appointed two administrators to review all material before publication. The court said, in ruling against the college, that "the state is not necessarily the unrestrained master of what it creates and fosters. Having fostered a campus newspaper, the state may not propose arbitrary restrictions on the matter to be communicated."[20]

The Fitchburg case has far-reaching implications for student papers. It raises the question as to the degree of control

16. Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968), and Snyder v. Board of Trustees of the Univ. of Illinois, 286 F. Supp. 927 (N.D. Ill. 1968).

17. Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027 (1969).

18. 273 F. Supp. 613 (M.D. Ala. 1967).

19. The Chronicle of Higher Education, March 2, 1970, at 1, Col. 5.

20. *Ibid.*

and responsibility for censorship that the university has for student publications when the university is the publisher and provides some financial support for the paper. As publisher, the university bears legal responsibility for the paper's contents. The corollary to legal responsibility is the power to control what is printed in the paper. It seems clear, for example, that the university can require the student editors to comply with state laws respecting libel or obscenity. It is unclear, however, how extensively the university may forbid such things as undocumented allegations, deliberate harassment and attacks on personal integrity. The Fitchburg State College case leaves doubts about the university's authority and duty to prevent such unethical practices.

A study on campus government and student dissent recently done by the American Bar Association dealt with the university's right to control student publications for which there is institutional subsidy and liability. It said that the university may not censor editorial policy or content in any broad sense, but may provide for limited review "solely as a reasonable precaution against the publication of matter which would expose the institution to liability."[21] I seriously question whether constitutional requirements of free speech and free press impose such limited control. If they do, the university as publisher is far more limited than the typical newspaper publisher. If the ABA opinion represents the constitutional limits on university control of its student publications, the recommendations of the AAUP *Joint Statement on Rights and Freedoms of Students* may be the only reasonable alternative. They suggest that "whenever possible the student newspaper should be an independent corporation financially and legally separate from the university."[22]

Suits have been brought and cases are now pending on student rights in the area of association, religion, and economic factors. Right to privacy, confidentiality of records, and loyalty oaths represent other litigated areas of the law that time will not permit us to examine, but all these questions concern basic rights that are part of substantive due process of law.

PROCEDURAL DUE PROCESS

Procedural due process--dealing with the procedures and methods employed in the enforcement of regulations of the institution--is the second aspect of due process. The leading

21. The Chronicle of Higher Education, February 24, 1970, at 2, Col. 4.

22. 154 AAUP Bull. 258, 260 (1968).

case on procedural due process is *Dixon v. Alabama State Board of Education.*[23] It signaled a dramatic change in the judicial approach to student expulsion and suspension. Before this decision, the courts had largely relied on the in loco parentis concept, the right/privilege distinction, or the contract theory as the basis for not reviewing procedures involving student dismissals. The court in *Dixon* rejected these theories and required the school to give proper notice and provide a fair hearing on the expulsion. Since *Dixon,* the cases have expanded on what a college must do to accord due process of law. These requirements can be broken down into the following elements.

Vagueness

An expulsion or suspension must be pursuant to a statute or regulation that gives adequate notice of the conduct prohibited. If the regulation is vague or ambiguous, it may be held not to afford due process of law because it does not properly communicate the type of action that, if engaged in, will result in expulsion.

Soglin v. Kauffman,[24] which grew out of demonstrations on the Madison campus of the University of Wisconsin against Dow Chemical Company, is an example of a recent case that invalidated university expulsion on this basis. The federal district court threw out the suspensions and expulsions, which were based on a regulation providing that students may support causes "by lawful means that do not disrupt the operations of the University, or organizations accorded the use of university facilities."[25] The court held that this rule dealt with First Amendment freedoms, an area where courts are particularly demanding in requiring specificity in a rule. The court found that this rule failed to give any description of the type of conduct that might be considered disruptive and was, therefore, too vague to be constitutional.[26]

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23. 294 F.2d 150 (5th Cir. 1961), *cert. denied.* 368 U.S., 930 (1961).

24. 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd* 418 F.2d 163 (7th Cir. 1969).

25. *Id.* at 991.

26. See also Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968), which declared the North Carolina speaker-ban law unconstitutional because it was too vague.

In another case arising out of the Dow Chemical demonstration on the Madison campus,[27] the Wisconsin Supreme Court upheld a criminal conviction under a state statute that made it a misdemeanor "...to engage in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." The student alleged that the statute was void for vagueness, but the court found that it had established adequate standards and was not vague.

From these and other cases, it is clear that disciplinary rules and regulations are subject to challenge on the basis that they are too vague. Thus rules should be set forth in writing and promulgated in such a manner as to reach all parties affected by them. A regulation that requires a student to "conduct himself as a lady or gentlemen" or not engage in "misconduct" is clearly insufficient, since it does not specifically say what type of conduct would invoke disciplinary action. It is important to state the regulation with as much clarity and detail as possible.[28]

Notice

The matter of notice in procedural due process has several aspects. One is the right to be forewarned of the type of conduct that, if engaged in, will subject one to expulsion. This aspect of notice was just discussed under the heading of vagueness. Another aspect of notice is the requirement that the student accused of a violation be given a written statement specifying the charges against the student, the statement must refer to a specific rule or regulation that has been violated and state when and where the hearing is to be held. If these things are done, proper notice has been given.[29]

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27. State v. Zwicker, 41 Wis.2d 497, 164 N.W.2d 512 (1969).

28. Professor Charles Wright, in his recently published Holmes Lecture, comments: "I think it no overstatement to say that the single most important principle in applying the Constitution on the campus should be that discipline cannot be administered on the basis of vague and imprecise rules." *Supra* note 17 at 1065.

29. See Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961); and Scoggin v. Lincoln Univ., 291 F. Supp. 161, 171 (1968). But see, Due v. Florida A&M Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

Although prior notice of the hearing is an absolute requisite for due process, a university has discharged its responsibility if it honestly attempts to reach a student by telephoning him and sending a registered letter. If a student cannot be reached because he has changed his address without notice to the university, the student cannot later complain that he did not receive notice.[30]

Another aspect of notice is how soon before the hearing notice must be given. No definite rule can be stated. What is proper notice will depend upon the circumstances in the particular case. In a Central Missouri State College case,[31] the court required ten days, while two days' notice of the hearing was found sufficient in an expulsion case at Tennessee State University.[32] In the latter case, notice had been given earlier that the students had not been cleared to re-enter the university.

Still another aspect of notice is informing the student of his procedural rights prior to a hearing. This can be accomplished by sending him a printed statement outlining the procedure at the time he is notified of the charges. It is good practice to include a complete disciplinary and procedural code in the university catalogue or in a student handbook. Sending the student a copy of this statement should satisfy this aspect of notice.

Since some if not most students will prefer a more informal procedure, particularly in cases of minor violation, a waiver of formal process should accompany the statement of charges. If a student chooses the informal procedure, the university need not have a formal hearing. As Professor Wright observes, formal

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30. See Wright v. Texas Southern Univ., 392 F.2d 728 (5th Cir. 1968), a case in which students deliberately avoided being served notice. The court held that after deliberately frustrating the notice and hearing process, the students cannot later object to the expulsion as a denial of due process.

31. Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

32. Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969). See also Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967), in which the court found nothing inherently prejudicial in allowing only three days to prepare for a hearing. The court went on to say, however, that the student is entitled to prove that he would be "seriously prejudiced" by the three-day time.

hearings with due process observance "are likely to be demanded in only two kinds of cases: charges of cheating or similar serious misconduct in which the facts are disputed, and charges arising out of demonstrations or other activity of a political nature."[33]

Hearings

The most fundamental aspect of due process is the right to a fair hearing. It need not be limited by the technical rules of a court of law, but it must be conducted in accordance with the basic principles of due process of law. These were spelled out in the *Dixon* case as follows:

> The nature of the hearing should vary depending upon the circumstances of the particular case. [But] a hearing which gives the. . . administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. . . .[T]he rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college . . . . [T]he student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present. . . .his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.[34]

Another aspect of the hearing is the make-up of the hearing board. It must of course not be composed of individuals with a direct interest or conflict of interest in the hearing.[35] The *Joint Statement* recommends that the committee include "faculty members or students, or if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding."[36]

The degree of impartiality, however, is not settled It

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33. Wright, *op. cit. supra* note 17, at 1083-84. See also *Joint Statement, supra* note 22, at 261.

34. 294 F.2d 150, 158-59 (5th Cir. 1961).

35. See Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967). See text at pp. 65-67.

36. 54 A.A.U.P. Bull. 258, 261 (1968).

is clear from *Wasson* that one may not be both a witness and a judge. Faculty members and administrators who are not directly involved in the case would appear to be sufficiently impartial.[37]

Inspection of Evidence

The court likely will require that a student be "permitted to inspect in advance of any hearing any affidavits or exhibits which the college intends to submit at the hearing." This was required in the *Esteban*[38] case. Inspection should include not only the evidence to be used against the student at the hearing, but also a list of witnesses and copies of the complaints and statements.

Witnessess, Cross-Examination, Confrontation, and Compulsory Production

The use of witnesses--allowing the student to confront informers, to call his own witnesses, and to compel their attendance--has produced considerable controversy in student discipline cases. In criminal proceedings and in most administrative proceedings, these rights have been held to be fundamental to procedural due process. In student discipline cases, however, the courts have given conflicting opinions. In one recent case the court held that students should be "permitted to hear the evidence presented against them and to question at the hearing any witness who gives evidence against them."[39] In the *Carter* case, Judge Williams at the trial court level ordered a new hearing on a student expulsion and said that "petitioner shall have the right to subpoena and cross-examine any witnesses that have heretofore testified in this proceeding."[40]

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37. See Roy Lucas, *Student Rights and Responsibilities,* in The Campus Crisis 64-65 (1969).

38. Estaban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967). See also *In re* Carter, 262 N.C. 360, 137 S.E.2d 150 (1964).

39. Estaban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967).

40. *In re* Carter, 262 N.C. 360, 367, 137 S.E.2d 150, 155 (1964). The North Carolina Supreme Court invalidated Judge Williams' order because he had exceeded his jurisdiction by granting relief not asked by the petitioner. The Supreme Court, however, offered no opinion on the matter of cross-examination of witnesses.

Most courts have concluded differently, finding that confrontation and cross-examination is not a requirement of procedural due process. In *Goldberg v. Regents of University of California,*[41] the California Supreme Court held that a full-dress judicial hearing with right to cross-examine witnesses is not required because (1) it was impractical to carry out, and (2) the attending publicity and disturbance of university activities may be detrimental to the educational atmosphere. In accord is a general order issued by the judges of the Western District of Missouri, from whence the *Esteban* case came. This general order was adopted to give guidance to that district in student-expulsion cases, and it provided that "[T]here is no general requirement that procedural due process in student disciplinary cases provide for . . . .confrontation and cross-examination of witnesses. . . .compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence."[42] This position is the one most generally taken by the courts.[43]

Self-Incrimination

University disciplinary proceedings have generally been viewed as administrative proceedings that are not sufficiently criminal in nature to require the Fifth Amendment's protection against self-incrimination. There are times, however, when a student's conduct may result in his being charged with violating both a criminal law and a university rule. In situations where criminal proceedings and disciplinary proceedings are both pending, students have claimed that they cannot be compelled to testify in the earlier disciplinary hearing on the basis that the testimony, or leads from it, may be used to incriminate them at the later criminal proceeding. This objection, based on the Fifth Amendment's protection against self-incrimination, has been raised unsuccessfully in several cases. In *Furutani v. Ewigleben,*[44] students sought to enjoin expulsion hearings until

41. 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967).

42. *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education,* 45 F.R.D. 133, 147-48 (W.D. Mo. 1968).

43. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 149 (5th Cir. 1961); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942); and Wong v. Hayakawa, No. 50983 (N.D. Cal. 1969). See Wright, *op. cit. supra* note 17, at 1076.

44. 297 F. Supp. 1163 (N.D. Cal. 1969).

after criminal actions arising out of the same activities on the basis that they would be forced to incriminate themselves to avoid expulsion and that their testimony would then be offered against them in the subsequent criminal proceedings. In denying their request, the court held that the students can object at the criminal trial to incriminating statements made at the expulsion hearings and that no Fifth Amendment right had been jeopardized. In so ruling, the court relied upon *Garrity v. New Jersey*,[45] a case in which compulsory testimony at a state investigation was held inadmissible in a subsequent criminal prosecution arising from the investigation.

The *Furutani* decision represents the majority opinion,[46] although at least two cases have suggested that the privilege against self-incrimination would be available at a hearing on expulsion.[47] But it is quite clear that the defense of self-incrimination will not be the basis for postponing expulsion hearings until criminal trials are completed.[48] Several commentators, however, have argued that the privilege against self-incrimination should be available in disciplinary proceedings involving violation of criminal statutes, such as occupying a campus building.[49] They note that in no other state proceeding can persons be compelled to confess their guilt of a crime, and "there is no reason to think that the university disciplinary proceeding can be an exception."[50] Under existing case law, however, the university may proceed with a prior disciplinary proceeding and, under the majority of opinions, students may be compelled to testify.

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45. 385 U.S. 493 (1967).

46. See Goldberg v. Regents of University of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967), and *General Order on Judicial Standards*, *supra* note 42, at 147.

47. State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942); Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (1967).

48. See Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D. N.Y. 1968). See also Kalaidjian, *Problems of Dual Jurisdiction of Campus and Community*, in Student Protest and the Laws, 136-39 (G. Holmes ed. 1969).

49. Wright, *op. cit. supra* note 17, at 1077, and Lucas, *op. cit. supra* note 37, at 70-72.

50. Wright, *op. cit. supra* note 17, at 1077.

Double Jeopardy

Students have argued that the Fifth Amendment's prohibition against double jeopardy prohibits the application of both criminal and administrative sanctions against the same individual for the same offense. There is no legal basis for this claim. As Porfessor Wright notes, "Claims of 'double joepardy' are not uncommon, but are utterly without merit."[51]

Right to Counsel

In most of the student disciplinary cases that have reached the courts, colleges have permitted students to have legal counsel with them at the disciplinary hearing; the question of the right to be represented by counsel has therefore seldom been in issue. Most decisios in which legal counsel was in issue have held it to be not a requirement of due process.[52]

Several cases to the contrary have specifically upheld the right to counsel in some form.[53] In the siminal North Carolina case, *In re Carter*, the superior court specifically stated that the parties are entitled to counsel.[54] It is my opinion that toward full right to counsel, and the right soon will be required by the courts. I would recommend that if a student asks for legal counsel, it be granted.

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51. *Id.* at 1078. See also *General Order on Judicial Standards*, *supra* note 42, at 147-48.

52. See Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Due v. Florida A&M Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963); *General Order on Judicial Standards*, *supra* note 42, at 147. One of the more recent court expressions on the issue of right to counsel occurs in Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968). Students at Bluefield State College (West Virginia) demanded legal counsel at a hearing investigating alleged student disruption at a football game. The court held that the Sixth Amendment guarantee of right to counsel in criminal and semi-criminal cases does not apply to purely civil actions, as here. One should note that the faculty committee proceeding involved in *Barker* was investigatory, not adjudicatory. *Id.* at 237-38.

53. See Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967).

54. 262 N.C. 360, 367, 137 S.E.2d 150, 155 (1964). Lower court ruling was reversed on other grounds. *Id.* at 375.

Public Hearing

Most cases reviewed allowed students to choose whether the hearing would be open or closed.[55] In those cases in which a public hearing had been denied and the point litigated, the courts uniformly have held that an open hearing, in the sense that a defendant in a criminal case is entitled to a hearing in open court, is not required to comply with procedural due process.[56] Thus a fair procedure does not require that the disciplinary proceeding be open. (Incidentally, one of the problems the administration encountered at Columbia University was students' making a demonstration out of student disciplinary hearings, One solution to this problem was to schedule hearings in very small rooms.)

Let me point out that the Sixth Amendment provision for a public trial is not for the benefit of the public; it is for the protection of the accused. This constitutional safeguard is met if two or three neutral observers are allowed in the hearing room.[57] There is no requirement on the university to permit such theatrical performances as recently occurred in the trial of the "Chicago Seven." A completely open session can be the quickest way to destroy the fair and orderly function of the hearing.

Impartial Tribunal

As one court put it, "a fair hearing [in a student expulsion proceeding] presupposes an impartial trier of fact . . . ."[58] The question is, what constitutes an impartial trier of fact? In student discipline cases, one usually finds a commingling of the decisional and prosecutorial functions. The trier of fact usually includes administrators or others with prior knowledge and contact, if not direct involvement, with the case, and at times members of the tribunal have been permitted to be witnesses against an accused student.

55. See *e.g.*, Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).

56. See Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968); *General Order on Judicial Standards*, *supra* note 42 at 147.

57. See Van Alstyne, *Comments*, in Student Protest and the Law, 206-7 (G. Holmes ed. 1969). See also, Wright, *op. cit. supra* note 17 at 1079-80.

58. Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967).

Several cases have discussed the matter of the combined decisional and prosecutorial functions of the tribunal, and all that I have found have permitted the functions to be combined.[59] The courts have reasoned that it is difficult and burdensome, sometimes impossible, to obtain a panel with no previous contact with the case. If the student thinks there is bias, malice, or personal interest in the outcome of the case on the part of any member of the tribunal, he has the right to have that member or those members removed upon proving that the bias exists. This opportunity to prove bias satisfies the constitutional requirement for an impartial tribunal.

Cases will arise in which the trier of fact is so closely connected with the student hearing that he clearly should not, in my opinion, be permitted to serve on the tribunal. A student expulsion case at Oshkosh State University is an example of such a case.[60] The students faced expulsion on charges of breaking into the president's office, threatening him, and holding him prisoner. Under university rules, the president considers appeal from student discipline cases and makes recommendations to the board of regents. The regents wisely excused the president from participation in the hearing and obtained the services of a former state supreme court justice to conduct the hearings and make recommendations. This procedure represents a fair and easy way of eliminating conflicts of interest. Even if the president in such a situation could be fair in his judgment, the university avoids the likely accusation that it has not provided an impartial tribunal.[61] The best procedure, though not required as a matter of law, is that recommended in the *Joint Statement*. "No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding."[62]

An issue related to the question of the impartial tribunal is the constituency of the forum. Clearly, the Sixth Amendment's

59. *Ibid.* See also Wright v. Texas Southern Univ., 277 F. Supp. 110 (S.D. Texas 1967); Jones v. State Bd. of Educ. 279 F. Supp. 190 (M.D. Tenn. 1968). *aff'd* 407 F.2d 834 (6th Cir. 1969), *cert. dismissed* as improvidently granted, U.S.25L. ed. 2d 27 (1970).

60. Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968).

61. But *see*, Estaban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), in which the court said that all evidence must be before the president of the college, since he is the one with the authority to expel or suspend a student.

62. *Joint Statement, supra* note 22, 261.

requirement of a trial by an impartial jury, which is construed to mean a jury of one's peers, is not required in student disciplinary cases. The Sixth Amendment applies only to criminal prosecutions. Since a disciplinary hearing is a civil proceeding, reviewable in a court of law, the constitutional requirement of a jury trial has no application.

I would suggest that a jury trial by one's peers is not only not constitutionally required but also undesirable. In my opinion, the type of forum best suited for the university community is one in which there are representative members from all parts of the academic community that are bound by the rules governing the campus. This would normally include students, faculty, administrators, and nonacademic employees. One problem with a mixed tribunal, however, is the AAUP's insistence that faculty be tried only by faculty. They have never, to my knowledge, insisted that students be tried only by students. Apparently all are equal but some are more equal than others.

Search and Seizure

A student's right to privacy while living in a dormitory room has become an important issue on the campus today. Both the *Joint Statement* and the *Model Code*, prepared by the Student Rights and Responsibilities Committee of the ABA's Law Student Division, recommend that a student's privacy be honored except in "extreme emergency circumstances," and the National Student Association reports that there are more student complaints about dormitory regulations than on any other subject.[63]

Questions as to privacy have focused on the type of search that can be made of a student's dormitory room. If the student lives off campus, his Fourth Amendment protection against unreasonable search and seizure takes the same form as it would for any other citizen: a police officer can conduct his search of the student's premises only (1) with probable cause for the search and a warrant granting him authority, (2) with probable cause and circumstances such that obtaining a warrant would frustrate the purpose of the search, or (3) as an incident to an arrest made on the premises. In the latter case, the scope of the search would be very narrow and could certainly not cover the entire premises. When the student lives in a university dormitory, however, a different constitutional standard has been applied. Some of the reasons advanced by the courts for a different standard have been the special necessities of the student-college relationship, student understanding that they cannot

63. Lucas, *supra* note 37, at 49.

regard their rooms as free of governmental intrusion because of college regulations permitting searches,[64] and the need to protect the entire student population from illegal activities in dormitory rooms.

The leading case on this subject is *Moore v. Student Affairs Committee of Troy State University*.[65] Here a search was made with a warrant, under the student's protest and not incidental to a legal arrest. The court held that the Fourth Amendment prohibition against unreasonable searches and seizures was not violated. In this case reliable informers had reported the presence of marijuana in the student's room, and there was evidence that the student was getting ready to leave and that he might be tipped off to the search before a warrant could be obtained. Marijuana was found in his room; the search was upheld on the basis that there was a "reasonable belief" by the college that the student was using the dorm room for illegal purposes.

The court held that if there is a "reasonable belief" that a crime is being committed or that contraband is in the room, the Fourth Amendment prohibition against unreasonable searches and seizures is not violated. Although the terms themselves do not tell us much, the court points out that the "reasonable belief" standard is lower than the "probable cause" standard that is required in all other warrantless searches. This lower standard is permissible, the court says, because student expectations of privacy are not as great as they would be in off-campus housing because of the existence of school regulations permitting the college "to enter rooms for inspection purposes."[66]

64. See Wright, *op. cit., supra* note 17, at 1078-79.

65. Moore v. Student Affairs Committee, 284 F. Supp. 725 (M.D. Ala. 1968). See also, People v. Kelly, 195 Cal. App.2d 669, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961), which upheld a warrantless search at California Institute of Technology on the basis of dormitory rules that permitted the search and the fact that police probably had evidence to arrest the student before they searched his room.

66. The *Moore* case was the basis for a recent North Carolina Attorney General's opinion that college dormitory searches are permissible when a reasonable belief exists that a student is using his dormitory room for illegal purposes or for purposes that would seriously interfere with campus discipline. See letter from N.C. Attorney General to James B. Mallory, East Carolina University Dean of Men, 13 January 1970.

The *Moore* decision is not easily reconciled with several other decisions in the area of administrative searches, i.e., searches concerning fire and health inspections.[67] A recent lower court opinion from New York declared illegal a dormitory room search at Hofstra University in which there was no warrant.[68] Police in this case entered a room because of the smell of marijuana in the hallway and information previously received about the defendant from an unidentified informant. This case is distinguishable from the *Moore* case, however, because there was no evidence that a search warrant could not have been obtained prior to the search.

In my opinion it is unwise to rely on the *Moore* case unless a clear "emergency" situation can be shown. Clearly it is preferable to obtain a search warrant if at all possible. The *Joint Statement* recommendation on searches strikes what seems to me to be a fair balance between the institution's legitimate needs to protect itself and the student's right of privacy in his dormitory room. It provides:

> Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained. For premises such as residence halls controlled by the institution an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for a lawful search should be followed.[69]

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67. See Camera v. Municipal Court, 387 U.S. 523 (1967).

68. People v. Cohen, 52 Misc. 2d 366, 292 N.Y.S. 2d (Dist. Ct. Nassau Co. 1968).

69. *Joint Statement, supra* note 22, at 261. See also *Comment, College Searches and Seizures: Privacy and Due Process Problems on Campus*, 3 Ga. L. Rev. 426 (1969), and *Comment, Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure*, 17 Kan. L. Rev. 512 (1969).

Mass Hearings

At times universities have found it desirable or necessary to conduct an expulsion hearing in which charges simultaneously were considered against large numbers of students. In *Buttny v. Smiley*,[70] the court upheld this procedure in a case involving sixty-five students who had locked arms to deny access to buildings at the University of Colorado in protest to CIA recruitment on campus. The students admitted acting as a group, and the court held that they could be tried as a group. Professor Van Alstyne made the following observation on the constitutionality of this procedure:

> There certainly is no legal impropriety in holding a joint trial, and I don't believe that even with the assistance of counsel the student could constitutionally insist upon a separate trial, despite the possibility that a kind of prejudice may occur because of testimony in one part of the trial that relates to another student.[71]

Immediate Suspensions

There may be circumstances in which a university finds it necessary to suspend a student summarily pending a later hearing on the suspension or on permanent expulsion of the student. Immediate suspension may be employed only in the extreme situation where the continued presence of the student on the campus endangers the proper functioning of the university or the safety or well-being of him or other members of the university community.[72] In the few cases that have considered this issue, interim suspensions have been permitted only in extreme situations

70. 281 F. Supp. 280 (D. Colo. 1968).

71. Van Alstyne, *Comment*, in Student Protest and the Law 206 (G. Holmes ed. 1969).

72. The extraordinary nature of interim suspensions is reflected in the *Joint Statement's* recommendation on the status of a student pending final action. It provides: "Pending action on the charges, the status of a student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emtional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property." *Supra* note 22, at 61.

and where a hearing was soon to follow.[73] In a recent case from the University of Wisconsin,[74] the court declared invalid a suspension for thirteen days pending a hearing on expulsion for the violent disruption of the Madison campus. The university submitted numerous affidavits to show that the continued presence on the campus would endanger both persons and property. The court accepted this testimony but held that there was no showing that it would be impossible or unreasonably difficult for the regents, or an agent designated by them, to provide a preliminary hearing prior to the interim suspension order. Immediate suspensions are permissible, the court held, only when it can be shown that it is impossible or unreasonably difficult to afford a hearing.

CONCLUSION

I have now covered the major aspects of substantive and procedural due process. Several issues, such as the confidentiality of student records, transcripts, punishments, and appeals have been mentioned only in passing or skipped in the interest of time. In general, I think one can conclude from the case law that if the procedures used in our institutions to deal with people are basically fair, we need have little concern over their disruption from the application of concepts of due process.

At least two points stand out. First, you need legal advice before making most of your institutional decisions, particularly in the area of student discipline. This is an area in which the law is changing rapidly, and many vexing questions about what the Constitution requires are still unresolved. Second, your institution needs, if it does not now have, specific written policies as to the types of conduct that are prohibited on your campus and the procedures for trying alleged violations of that code. In developing these policies, you should look at the court decisions just discussed so that your code and procedures will comply with constitutional standards. If your institution does only these two things, it will have done much to minimize the possibility of future campus disruptions.

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73. See Wright, *op. cit. supra* note 43 at 1074-75 for discussion of the interim suspension cases.

74. Stricklin v. Regents, 297 F. Supp. 416 (W.D. Wis. 1969), *appeal dismissed for mootness,* 420 F.2d 1257 (1970).