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CIVILIZING UNIVERSITY DISCIPLINE†

Paul D. Carrington*

UNIVERSITIES used to be thought of as families. The benign dean played the role of the firm, fair father. Good students, like good children, were not to question his integrity or his wisdom.¹

Less than half a century ago, the Supreme Court of Michigan gave an especially notable expression to this view.² A "young lady [of] 18 years"³ was not permitted to continue her studies at the Michigan State Normal College at Ypsilanti because she failed to give an adequate account of her behavior to the dean of women, in response to the dean's assertion that the young lady was habituated to tobacco and had let herself be seen in public on the lap of a young man. The supreme court affirmed the action of the trial court in refusing mandamus, and commended the dean for the "motherly interest"⁴ she had taken in the plaintiff, and for upholding the "ideals of young womanhood."⁵ Moreover, the court added, the act of the plaintiff in airing her defiance in the public press had made it impossible for her to return to the institution and was itself a sufficient basis for the administrative action.⁶

Today, of course, this view of the university community seems quaint. The idea of a university bearing parental responsibility was always an awkward partner to the companion concept of the university as an institution for promoting maturity and independence.⁷ That inconsistency may have contributed to the demise of the university's role as a substitute parent. More important, perhaps, is the fact that many universities have become so large that there is no longer a perceptible resemblance to a family. But, especially, the idea of a university as a parent died because parents themselves lost or surrendered their power over their mature offspring.⁸ The substitute

† The substance of this article was first presented as an address under the auspices of the Institute of Continuing Legal Education on August 21, 1970, in Ann Arbor, Michigan.

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1. See generally F. RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* (1962), and L. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* (1965).

2. *Tanton v. McKenney*, 226 Mich. 245, 197 N.W. 510 (1924).

3. 226 Mich. at 246, 197 N.W. at 511.

4. 226 Mich. at 253, 197 N.W. at 513.

5. 226 Mich. at 253, 197 N.W. at 513.

6. 226 Mich. at 253, 197 N.W. at 513.

7. For an examination of the intellectual implications of the nineteenth-century approach to university discipline, see L. VEYSEY, *supra* note 1, at 25-56.

8. See generally L. FEUER, *THE CONFLICT OF GENERATIONS* (1969).

parent could hardly maintain greater authority than the real one.⁹ It is, therefore, no longer possible to think of university discipline as an aspect of family law and relations; it has become necessary to find a new intellectual underpinning and corresponding new institutions to deal with problems formerly handled in a family manner.

The new conception which seems to have filled the void left by the decline of *in loco parentis* is one that views university discipline as quasi-criminal. This conception is based on the assumption that the university, as a subsociety, should have an apparatus modeled after the criminal-law system that serves the larger society. The university's quasi-criminal process, armed with the sanction of expulsion, should accordingly operate to reprove and control conduct that offends the standards of the university community or, perhaps, of the larger society. This conception brings with it a procedural apparatus or ritual not too different from that employed in criminal proceedings. Many educational institutions are now in the process of establishing such a quasi-criminal apparatus. Moreover, the criminal-law model has evidently influenced the pronouncements contained in the much noted *Joint Statement on Student Rights and Freedoms of Students* (*Joint Statement*)—prepared by associations of students and educators¹⁰—and also in the more recent *Statement on Students' Rights and Responsibilities* (*American Bar Section Statement*)—promulgated by the Section of Individual Rights and Responsibilities of the American Bar Association.¹¹

It is the purpose of this Article to suggest that the criminal model is not the only possible system of university discipline. There are alternatives to be found in the operation of the civil courts and other administrative agencies that have received little consideration. It is a common, but mistaken, assumption that the proper way to deal with offensive conduct is by means of social punishment.¹² The

9. The problem should not be viewed only in the glare of current events. In order to gain the proper perspective, it is necessary to recall the frequency, over the years, of utterances such as that of a Davidson professor in 1855: "Indulged, petted, and uncontrolled at home, allowed to trample upon all laws human and divine, at the preparatory school, . . . [the American student] comes to college, but too often with an undisciplined mind, and an uncultivated heart, yet with exalted ideas of personal dignity, and a scowling contempt for lawful authority, and wholesome restraint. How is he to be controlled?" Quoted in F. RUDOLPH, *supra* note 1, at 105. On the relationship between family relationships and institutional power relationships generally, see R. SAMPSON, *THE PSYCHOLOGY OF POWER* (1965).

10. 53 AM. ASSN. U. PROF. BULL. 365 (1967) [hereinafter *Joint Statement*]. As to the actualities of practice, see Note, *Procedural Due Process and Campus Disorder*, 1970 DUKE L.J. 163.

11. 1 HUMAN RIGHTS 140 (1970) [hereinafter *ABA Section Statement*]. The author of this Article served as chairman of the drafting committee for that statement. To some extent, this Article reflects a change of view in the past year.

12. Many examples of reliance on this assumption could be found in the legislation

unfortunate consequences of a general tendency of legislatures to "overcriminalize" have been noted elsewhere.¹³ The trend in university discipline may be regarded as a special application of that tendency, or, at least, as a related phenomenon.

I. SOME SHORTCOMINGS OF THE CRIMINAL LAW

The use of the criminal law as a model for university discipline should be appraised in light of the shortcomings of the criminal law as a servant to the larger society.

Traditionally, the criminal law has been intended to serve multiple but related goals. First, the criminal law is socialized vengeance; in other words, it serves as a lightning rod by relieving or absorbing feelings of vengeance that might otherwise cause continuing disorder. A related objective is to give expression to the public mores or sense of community, to reinforce the shared morality, and to celebrate our agreement about proper standards of behavior. These goals, in turn, relate to that of deterring disapproved conduct, partly by means of the social pressure generated by the expression of common disapproval, and partly by making the misconduct a bad bargain for the premeditating miscreant. All of these goals shade into the objective of rehabilitating the wrongdoer by teaching him to behave in an acceptable manner. Effective rehabilitation involves a rebuilding of the social fabric that was damaged by the misconduct; this rebuilding is partly accomplished by venting the odium that would otherwise prevent the resumption of peaceful relations between the offender and the offended. Thus, we return to the first stated goal; wherever you start on the wheel, all the goals interconnect to justify and shape the design of a system for social punishment.¹⁴

For some people, a system of social punishment has worked well. We must admire the engine of social control developed by the Cheyenne and described for us by Llewellyn and Hoebel.¹⁵ It may help to emphasize the romantic nature of our instinctive assumptions if we

of any state. A notable example is the perhaps apocryphal legislation of a western state that condemned as criminal the conduct of a mortgagee who failed to perfect his security interest in an automobile by recording. The statute neglected to make provision for any civil impairment of the mortgagee's unrecorded interest.

13. See PRESIDENT'S COMM. ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 97-107 (1967); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967). Cf. J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 170-88 (Hafner Pub. 1948).

14. For somewhat different statements of these goals, see H. HART, PUNISHMENT & RESPONSIBILITY (1968); O. HOLMES, JR., THE COMMON LAW 39-76 (1881); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 71-79 (1968); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

15. K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY chs. 4-7 (1941).

consider that system briefly. A major social problem of the Cheyenne was the prevention of cheating on the communal buffalo hunt. The lone hunter was always tempted to take the first shot and gain an easy kill before his fellow hunters were ready for a common charge; if he yielded to the temptation, the herd would be aroused and the common take would be much reduced. The Cheyenne dealt sternly with the cheater; he was beaten promptly and severely, his pony destroyed, and his goods forfeited. But this punishment was followed by a healing ritual in which the cheater's pony and goods were largely replaced, at public expense. Thus, through the Cheyenne system of criminal law the public odium was spent, the standard of conduct was reinforced, misconduct was deterred, and the offender was rehabilitated.¹⁶

These virtuous goals, however, can most easily be attained in primitive societies. The model of social punishment does not work well in a large, impersonal, heterogeneous society—especially in one that shares some of our ideals.¹⁷ Few modern societies have achieved success in punishing strangers in large numbers in a manner consistent with the humanist ideals of individual dignity and freedom. Such success as can be found is localized in tight, homogeneous communities.¹⁸

There are many reasons for our limited success with social punishment. Several may be usefully mentioned here. First, the size and technology of our society dictate a separation of functions between those persons who formulate our standards of behavior and those persons who enforce them. Our rules are formulated and the penalties prescribed by legislators who act in a setting that views the wrongdoer from a very limited perspective. At the legislative level, wrongdoers are never seen as friends, relatives, or neighbors, but as dehumanized abstractions. As a consequence, our legislation seldom expresses our real morals, but reflects instead the ones we would apply in judging the conduct of unseen strangers. That is to say that our legislation is often unrealistically harsh. It does not express a sense of community, but of alienation from offenders. Because so often punishment expresses our worst instincts rather than our best, its deterrent and rehabilitative effects are impaired.

16. *Id.* at 115-18.

17. Like most of the statements that follow in this section, this assertion is not documentable, but is offered as a revelation of premises. The reader seeking material to challenge some of these premises might do well to begin with H. HART, *THE MORALITY OF THE CRIMINAL LAW* (1964).

18. R. NISBET, *COMMUNITY AND POWER* (1962) is an elaboration of a point well known to small-town residents: the most effective constraint on behavior is a narrow range of acquaintance and association.

Criminal laws, moreover, are seldom improved in their enforcement. Police, judges, and wardens must harden themselves in order to do their work; as a result, the values they impart to the law as they apply it are only sometimes more sensitive than those that impelled the law's makers. The exceptions are erratic, making the process more arbitrary and less effective as an expression of community morals, as a deterrent, as a lightning rod, or as an agency of rehabilitation.

When we do get to punishment, it is a pale substitute for vengeance. The most common characteristic of civilized punishment is the absence of any participation by those who were offended. The opportunity to exult in the shared experience of not being punished, of being thus rewarded for right behavior, is minimized by the remoteness of the punishment administered. In order to make punishment remote, we find it necessary to destroy the social roots that may be the instrument of rehabilitation, without knowing or caring enough to provide an alternative. The result is that our punishment tends to reinforce antisocial tendencies, not to change them. The most that can generally be claimed is that we sometimes get wrongdoers out of harm's way.

Because we know that the criminal law is harsh, uneven, and ineffective, we are moved to constrain enforcement with a variety of procedural requirements that resemble the Marquis of Queensberry Rules¹⁹ in their delicacy. The countercontrols, which we apply to police and prosecutors, judges and jurors, reflect a deep-seated distrust of such officials and, indeed, a deep-seated uncertainty about the worth of social punishment. Many of these countercontrols are indispensable, even though they significantly obstruct the system of punishment by assuring delay which, in turn, prevents deterrence and rehabilitation.

These many shortcomings in the criminal law suggest some of the difficulties to be encountered when it is used as a model for small instruments of social control of student behavior.

II. COMMUNITY PUNISHMENT IN UNIVERSITY LIFE

The goals of social punishment are not uncongenial to the university, at least in their abstract form. A university community may have some moral standards that can justifiably be expressed and invigorated; a university community does require for its existence that intolerable behavior be discouraged; a university is in the business of teaching and is therefore quite suited to the task of rehabilitating alienated youth; and, most clearly, universities

19. The very formal constraints imposed on prizefighters as they perform the task of pulverizing each other.

can be scenes of bitter disputes that need to be relaxed by some kind of social intervention. But the obstacles to community punishment are even more substantial for the university as a subsociety than for the larger society as a whole.

The most pervasive disability of university punishment is the absence of any satisfactory sanction that a university can bring to bear as a punishment. The traditional form of university punishment—exclusion—is at the same time both too mild and too harsh to support a system of punishment that effectively serves the prescribed goals. It is too mild to satisfy the resentments of those who are offended by truly serious misconduct, such as arson or substantial violence to persons. Such matters must be handled by conventional social punishment, whatever the use made of university sanctions. At the same time, exclusion from the university, even for lesser offenses, is inadequate to interrupt the unwanted behavior. While imprisonment at least puts the wrongdoer out of reach, exclusion does not have that effect; the excluded student is free to remain in the vicinity, and is likely to do so if he is really bent on further mischief. Indeed, by relieving the wrongdoer of academic responsibility, the university can be giving him more time to devote his energy to his harmful activities.²⁰

Exclusion is equally too harsh in important respects. First, even though exclusion fails to sever the relations that encourage the unwelcome behavior, it does sever those that might operate to engage the wrongdoer in useful activity. All our experience indicates that young people who continue with their academic efforts will probably find some useful occupation eventually. But what is to become of the expelled or suspended student who is cut off from progress toward utility? Is it reasonable to assume that he will find a nice, warm steel mill where he can perform day labor and repent his sins? Or will he join the street people? In dealing with prisoners or parolees, our public institutions make every effort to interest convicts in study as a means of rehabilitation. A judge who sentenced a criminal for a suspended term on condition that the convict abandon his studies and spend his time in the streets would rightly be thought mad and impeached. Yet that is precisely what a university must do when it resorts to exclusion as a means of punishment.

Also, exclusion may be too harsh in that its consequences may be durable or unseen. In the eyes of some students, exclusion is seen as an academic parallel to capital punishment, or at least to outlawry

20. *But cf.* W. GLASSER, *REALITY THERAPY* (1965) for the development of the idea that temporary exclusion may serve to reinforce the individual's understanding of his own dependencies.

—which was abandoned as a punishment in England many centuries ago.²¹ To some extent, this view is related to opposition to the Viet Nam war, because it is somehow assumed that expelled students are sent to Viet Nam to be killed in the muck—a pretty emotional assumption. As one who was expelled from school many years ago, the author can attest that the event can, with hindsight, be regarded as a very insignificant event, no more harmful and much more interesting than a severe tongue-lashing.²² But this is not always the case. The competition for academic credentials is becoming ever more critical to career success. It is true that we do not know what we are doing to a student when we subject him to exclusion; the consequences could be grave, with the gravity bearing no relation to the degree of guilt or to any measure of the harm caused by the wrongdoer's misconduct.

Thus, the exclusionary punishments of expulsion or long-term suspension are at the same time ineffective deterrents and obstructions to the attainment of the other goals of community punishment, because the hostility with which they are viewed undermines the moral force of the process. Indeed, this weakness magnifies other weaknesses in the quasi-criminal system of university community punishment—weaknesses that resemble those found in the parent model of the criminal law. These other weaknesses pertain to the lack of evenhandedness and effectiveness of administration, to the dilatory encumbrances on the process of decision and enforcement, and to the lack of quality of the moral preachments expressed. These frailties are numerous and are reflected at almost every stage in the process of university community punishment. Many of them are giving rise to significant legal problems as the system strains to meet the needs of the times.

The first problem lies in the formulation of standards of conduct that express the morality of the university community. There are the Ten Commandment-type norms that are part of the standards of the larger community expressed in the criminal law; these present no problem, and are generally best enforced through ordinary channels. When it comes to coping with less usual, more academic types of misconduct, the inherently disagreeable nature of academic men is likely to make agreement difficult. This is especially so when we consider the need for consultation with those persons whose conduct

21. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I* 476-78 (1895); 2 *id.* at 447-50.

22. The author, it must be disclosed, was expelled from the Phillips Exeter Academy, Exeter, N.H., in 1948, for drinking beer in the dormitory. The event has had little or no durable consequences.

is to be governed. While there is no legally enforceable right to student participation in the making of rules of conduct,²³ practical enforcement problems are greatly magnified by the absence of such participation.²⁴ Both the *Joint Statement*²⁵ and the *American Bar Section Statement*²⁶ endorse the right of students to participate in the formulation of rules governing student conduct. It is sometimes difficult to obtain youthful agreement to standards of conduct that are to be enforced by means of exclusionary sanctions.

Indeed, the political problem of obtaining acceptance of rules of conduct reflects a second legal problem presented by the task of identifying the kinds of misconduct that can be lawfully proscribed upon pain of exclusion. There are limits on the power of public institutions, at least, to formulate standards of conduct that lack an "educational purpose" related to the goals of the governing board.²⁷ The abandonment of the parental role leaves relatively little of a student's conduct that is not his private concern rather than the legitimate concern of the university.²⁸ In addition, some relatively passive forms of conduct may be defended as expressions of ideas; the line between thought and action is becoming increasingly blurred, and it especially behooves a university to be very scrupulous in not stepping over that line.²⁹ A university administration that exceeds these limitations on what is properly punishable conduct, even if it is supported by student representatives, risks losing the moral force that is the essential ingredient of effective community punishment.

A third problem associated with the use of university discipline as a form of community punishment is the lack of clarity with which university conduct rules are expressed. Student members of a university family might have been expected to respond instinctively to the family notions of right and wrong,³⁰ but if they are to be treated as

23. *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

24. See C. FRANKEL, *EDUCATION AND THE BARRICADES* 40-59 (1968).

25. *Joint Statement*, *supra* note 10, art. IV(C). For a criticism of the *Joint Statement* on this point, see Bloustein, *The New Student and His Role in American Colleges*, in *DIMENSIONS OF ACADEMIC FREEDOM* 92, 118-21 (1969).

26. *ABA Section Statement*, *supra* note 11, art. III.

27. Compare *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962), with *Goldberg v. Regents*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). Such constraints may be imposed by the constitutional requirements of substantive due process or equal protection. See, e.g., *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969). But cf. *Pratz v. Louisiana Polytechnic Institute*, 316 F. Supp. 872 (W.D. La. 1970).

28. *Accord*, *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968). See also McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558, 560-66 (1968); Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 582-89, 603-06 (1968).

29. But see *Norton v. Discipline Comm.*, 419 F.2d 195 (6th Cir. 1969).

30. *Hutton v. State*, 23 Tex. App. 386, 5 S.W. 122 (1887); *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156 (1859).

quasi-criminal accuseds, they should be entitled to quite explicit notice of the rules of conduct.³¹ Thus, the United States Court of Appeals for the Seventh Circuit has recently held a university rule against "misconduct" unconstitutionally vague.³² Insofar as first amendment-type activities are concerned, application of the vagueness principle rests on firm ground,³³ as does use of the companion principle of overbreadth, which invalidates rules that are overinclusive and have a chilling effect on constitutionally protected activity.³⁴ It may be doubted that the Seventh Circuit's decision would really prevent a university from administering punishment in a grave case because of bad drafting of a rule of conduct.³⁵ But the decision reflects the growing concern with the lack of clarity of such rules and gives added emphasis to the need to draft them clearly in order to make the enforcement proceeding creditable.

A fourth problem is the difficulty in identifying the proper membership for a tribunal to administer university community punishment. Continued reliance on the old dean may be legal,³⁶ but it is ineffective to harness any moral force behind any given decision. The same is true for the use of the professional hearing officer, although he at least offers the advantage of a measure of detachment.³⁷ Again, although there is no legal right to student participation in the tribunal, such an arrangement seems wise.³⁸ But reliance on the forms of student government to produce a judiciary is likely to stimulate a harmful politicization process. Alternatively, student participation might take a form similar to that of a jury of randomly selected peers, but this approach leads back to the need for a professional hearing officer to guide the peers through a contentious hearing. In either case, there is some threat of nullification or of a "constitutional crisis" generated by the withdrawal of student participants. And either approach threatens to produce some debilitating delay, even

31. On the demise of the common law of crimes, see Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332 (1947).

32. *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969). Cf. *Sullivan v. Houston Independent School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969).

33. See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

34. *Dombrowski v. Pfister*, 380 U.S. 479, 485-86 (1965). See Note, *supra* note 33, at 77-85.

35. Compare *Esteban v. Central Mo. State College*, 415 F.2d 1077 (8th Cir. 1969), with *Siegel v. Regents*, 308 F. Supp. 832 (N.D. Cal. 1970).

36. E.g., *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968). See also *Sill v. Pennsylvania State Univ.*, 315 F. Supp. 125 (M.D. Pa. 1970); *Counts v. Voorhees College*, 312 F. Supp. 598 (D.S.C. 1970).

37. Cf. *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967).

38. See *Joint Statement*, *supra* note 10, art. VI (D)(1), and *ABA Section Statement*, *supra* note 11, art. IX(3).

without crisis. All of these hazards are intensified by the general uneasiness about the nature of exclusionary punishment.³⁹

A fifth consequence of the use of the criminal-law model, and perhaps the most vexing to university attorneys today, is the companion use of quasi-criminal procedural principles. Many new procedural safeguards in the university setting are already embedded in the Constitution, at least insofar as due process is required as a preliminary to long-term exclusion.⁴⁰ It is too early to speak explicitly of which safeguards bear constitutional status, or how far the constitutional requirements are applicable to private institutions.⁴¹ But due process in expulsion cases is almost certain to include the right to have decisions made on the basis of a record that will stand judicial inspection;⁴² it is likely to include the right to confront accusers⁴³ and to be represented by counsel.⁴⁴

The concept of procedural due process spills over into the sixth problem with the use of the criminal-law model—a growing concern for the etiquette of investigation. It would be fatuous to suggest that every interview between a dean and a student should begin with a *Miranda* warning,⁴⁵ but it is not premature to suggest that university punishment proceedings must face the challenge of appraising claims that evidence gathered by deans or university investigators was gained through improper fraud or harassment.⁴⁶ If it is not yet law, it seems equally clear that such administrative activities as dormitory searches will be open to serious challenge when they are viewed from the setting of a disciplinary proceeding.⁴⁷

39. See text accompanying notes 20-21 *supra*.

40. The leading case is *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). Cf. *In re Gault*, 387 U.S. 1 (1967). See Van Alstyne, *supra* note 28, at 589-98; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

41. Cf. *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970); *Brown v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Bright v. Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970). See Beaney, *How Private Are Private Institutions of Higher Education?*, in *STUDENT PROTEST AND THE LAW* 171 (G. Holmes ed. 1969); Comment, *An Overview: the Private University and Due Process*, 1970 DUKE L.J. 795.

42. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 652 (W.D. Mo. 1967). But cf. *Jones v. Board of Educ.*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968).

43. In *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967), the student but not his counsel was permitted to cross-examine the accuser. For a collection of cases, see Van Alstyne, *supra* note 28, at 594 n.29.

44. For a review of the cases, see *ABA Section Statement*, *supra* note 11, art. IX, comment (h).

45. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Cf. *Mathis v. United States*, 391 U.S. 1 (1968); *United States v. Mackiewicz*, 401 F.2d 219 (2d Cir. 1968).

46. See *Krawez v. Stans*, 306 F. Supp. 1230 (E.D.N.Y. 1969); *Leogrande v. State Liquor Authority*, 25 App. Div. 2d 225, 268 N.Y.S.2d 433 (1966); *ABA Section Statement*, *supra* note 11, art. IX(8).

47. But cf. *Moore v. Student Affairs Comm.*, 284 F. Supp. 725 (M.D. Ala. 1968).

Also closely related to these procedural problems is the seventh problem, which is the difficulty of acquiring adequate evidence to sustain effective university punishment. The trend toward examining the quality of the evidence of guilt⁴⁸ reflects the growing uneasiness about the purpose and result of a disciplinary decision. And it is a trend that must be faced with a growing shortage of ready witnesses. Few universities have a subpoena power.⁴⁹ Most lack an investigative staff. And the general hostility on the part of students and faculty toward the process discourages witnesses and complainants from coming forward.⁵⁰

An eighth problem resulting from the use of the criminal-law model and the dubious sanction of exclusion is an urgency in the disciplinary process. The larger society's system of punishment is a poor model in this regard because punishment is often so long delayed that it becomes irrelevant.⁵¹ But university punishment becomes stale faster. In part, this is because the community is in such flux; within a year, the normal university turnover results in a significantly different community. Those who are still there are older, and are not themselves the same. Both the youthful offenders and offended will have changed in such a period, so that a belated exclusion may not be very meaningful to either. Perhaps the impact can sometimes be made more immediate by means of an interlocutory suspension, but this is of doubtful legality if it cannot be shown to contribute in some way to the immediate needs of public safety.⁵² At the least, the university could and should prevent accused students from graduating out of the proceeding. Consequently, it is important to keep the process moving at a rapid pace in order to make the punishment effective.

At the same time, haste is very difficult to make. Time is often allowed for counsel to prepare, and this allowance is difficult to deny in a matter involving grave punishment such as exclusion. Other procedural paraphernalia, such as selecting a hearing body, may add

48. See *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968). Cf. Van Alstyne, *The Constitutional Protection of Protest on Campus*, in *STUDENT PROTEST AND THE LAW* 181, 199-200 (G. Holmes ed. 1969).

49. *ABA Section Statement*, *supra* note 11, art. IX(6) attempts to remedy this deficiency: "It is the responsibility of all students, as well as other members of the community, to serve as witnesses if called." See also note 89 *infra*.

50. *ABA Section Statement*, *supra* note 11, art. X.

51. It is not uncommon for two years to elapse between arrest and affirmation of a federal conviction. 1969 DIR. ADMIN. OFFICE U.S. CTS. ANN. REP. 270. If it is assumed that the accused has been on bail during that period, it must be further assumed that he has either been committing more wrongful acts or that he has behaved himself for the past two years; in either case, the sentence is obsolete.

52. *Stricklin v. Regents*, 420 F.2d 1257 (7th Cir. 1970). But cf. *Buck v. Carter*, 308 F. Supp. 1246 (W.D. Wis. 1970).

to the delay. But great delay is especially likely to occur in situations in which the concurrent jurisdiction of a criminal court has been invoked. If the same act of misconduct is the subject of both criminal and university proceedings, it is almost impossible for the university to proceed with satisfaction. It is not unlikely that the police and prosecutors will ask that the university proceeding be delayed in order to avoid premature disclosure of evidence.⁵³ Even if no such request is made by prosecutors, there is much to be said for the student's claim to the right to delay, even though it lacks status as a legal compulsion. The university proceeding is "civil" in the sense that the accused student has no right to remain silent in order to protect against an adverse outcome.⁵⁴ But he may be justified in remaining silent if his answers might be used in a criminal proceeding against him.⁵⁵ It is very doubtful that a student could be lawfully punished for exercising his privilege against self-incrimination in such a way in the discipline proceeding, although if he were coerced to yield, he might succeed in suppressing the use in a criminal proceeding of any evidence thus disclosed.⁵⁶ As a practical matter, if the student is to be expected to testify, or if he is to be given a fully protected opportunity to do so, the only proper course is to delay the disciplinary proceeding until the criminal case is decided.

Yet a ninth problem with the concept of community punishment is the problem of double jeopardy. This is not a legal problem for private universities, nor, almost surely, for public universities either. It is probably still sound law that one who violates two sets of rules created by different legislative authorities is subject to different kinds of punishment at the hands of each.⁵⁷ But whatever the law, a strong argument can be made that students should not be punished more

53. On the very restrictive discovery practice customary in criminal proceedings, see FED. R. CRIM. P. 15, 16, discussed in 8 J. MOORE, FEDERAL PRACTICE §§ 15 & 16 (2d ed. 1970).

54. See *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *In re General Order on Judicial Standards of Procedure & Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968) (en banc). A university cannot be authorized to impose strictly criminal sanctions. K. DAVIS, ADMINISTRATIVE LAW § 2.13 (1958).

55. Cf. *Spevack v. Klein*, 385 U.S. 511 (1967).

56. Cf. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

57. For purposes of the double-jeopardy principle, the university sanction remains "civil" and hence not a duplication of criminal punishment. See note 54 *supra*. But see *Waller v. Florida*, 397 U.S. 387 (1970), in which the Supreme Court held that a state and a municipality within it were not separate sovereign entities, and that it was therefore double jeopardy for the state to try the defendant after he had been convicted and punished by a municipal court for the same offense. This holding indicates some movement in the law of double jeopardy. See also *Van Alstyne*, *supra* note 28, at 598-603; *Haddock & Mulock, Double Jeopardy Problems in the Definition of the Same Offense*, 22 U. FLA. L. REV. 515 (1970).

severely for their misconduct than other offenders. If the offender "pays his debt to society," must he pay it to the university as well?

Many of the difficulties encountered in respect to the foregoing problems contribute to a tenth problem, which takes on a life of its own. This is the atmosphere of contentiousness and technical nit-picking that pervades the scene of many disciplinary tribunals. Today's youth is nothing if not energetic in exploiting all of their rights, real or imagined. The criminal bar could profit from the example of students in raising technical obstacles to proceedings. With increasing and disturbing frequency, such proceedings tend to be dominated by histrionic haggling, producing a carnival effect that encourages kibitzing and abusive comments. It requires a hardy spirit to play the role of unpopular litigant, witness, or judge in such proceedings. University hearing officers are often in need of something like the contempt power in order to sustain the moral force of the proceeding.⁵⁸

Eleventh, almost all of these problems also contribute to an overall concern about the cost of university punishment. How much is it worth in time and treasure to obtain a single suspension? If it is necessary to operate a cumbersome, unpleasant, unreliable, and generally counterproductive machine in order to accomplish that result, prudent administrators will often judge that it is not worth the cost. The cost of administering punishment raises the threshold of irritation that it is necessary to reach before punishment is commenced. As this threshold is raised, it approaches the level at which resort to ordinary criminal punishment is more appropriate anyway, and narrows by yet another dimension the range of misconduct properly subject to university discipline.

Indeed, a survey of all the problems at once almost compels the conclusion that the case for university punishment is lost. In order to gain the kind of moral support that would be needed if the goals of

58. Draftsmen of university bylaws might consider the wisdom of the following proposed inclusion:

The Right to an Orderly Hearing

Any individual involved in proceedings is entitled to be protected from harassment, or the fear of harassment, by other participants or by observers. In addition, the university community is entitled to have the trier of fact protected from the influence of threats, harassment, or unruly mob behavior. At the request of any complainant, respondent, or witness, the presiding officer is obligated to prevent and deter hostile, threatening, or unduly disrespectful remarks or behavior by any individuals present, and also to prevent and deter prolonged or emphatic audience response to testimony or argument. In meeting this obligation, the presiding officer will, upon request of any complainant, respondent, or witness:

- (1) limit those in attendance to participants, their immediate families, counsel, the press, and other students or faculty in the university who surrender their university identification to the doorkeeper during the period of their attendance;
- (2) warn any individual who once violates the right to an orderly hearing;
- (3) impose a penalty not to exceed \$10 for a second and for each subsequent violation of the right; and
- (4) remove from the room any individual, including any participant, who unreasonably persists in violating the right.

punishment were to be effectively served, we must so confine its application that it is not clear what, if any, application it has, and we must so burden the process with dilatory safeguards, collateral inquiries, risks of miscarriage, and expenses to both institution and student, that it is simply an impossible venture. Universities are just no good at the job of social punishment. If this makes them seem inferior to the tribes of the Cheyenne,⁵⁹ it should be reflected that the Cheyenne were not much good at running universities.

Perhaps the emerging institutions and processes of socialized punishment in university communities should be preserved for the amusement and diversion they create.⁶⁰ In today's world, such amusement is not easy to find, and it may keep troublesome youth off the streets. But it is a mistake to assume that any of the theoretical goals of punishment can be effectively served by such a monstrous device so unthinkingly appended to the body of an institution to which it is almost perfectly unsuited.

III. UNIVERSITY PUNISHMENT AS AN ARM OF THE CRIMINAL LAW

Into this grotesque situation come the voices of those who urge that the university should be using its disciplinary machinery not merely to serve the narrow interests of the university, but to express the public's idea of right conduct as an arm of the criminal law. In the halls of Congress and the state legislatures, in meeting rooms of alumni and trustees, in editorial pages and in the speeches of the Vice President, in opinion polls and election returns the word is coming through quite clearly that ungrateful students who offend their parents' neighbors, the voters, and the taxpayers, with their disruptive conduct should be rewarded with a forfeiture of their rights to further enjoyment of relationships with universities. In the public's name, let the universities condemn their troublesome students!

Why are universities so slow to respond to this mandate? As we have seen, universities acting in their own interest are not really able to condemn their students to outer darkness; much less are they able to do so effectively in response to external pressure. The external pressure does almost nothing to solve any of the problems just

59. See text accompanying notes 15-16 *supra*. The Cheyenne system of social punishment "was anything but dilatory. What is more, it was usually effective in restraining a people not used by custom to restraint." K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* 130-31 (1941).

60. In this respect, university discipline resembles the equity practice of the early nineteenth century. "Jarndyce [v.] Jarndyce has passed into a joke. That is the only good that has ever come of it." C. DICKENS, *BLEAK HOUSE* 5 (Scribner 1899). Glazer reaches a similar conclusion by a quite different route in *Campus Rights and Responsibilities: A Role for Lawyers?*, 39 AM. SCHOLAR 445 (1970).

described; university punishment is still a cumbersome, ineffective enterprise. And new problems are added by viewing university punishment as an arm of the criminal law.

One problem with such a view is that a university tribunal cannot effectively express and enforce the morality of a larger constituency. University autonomy is more than a political theory; it is a largely inevitable fact. Institutions serving special constituencies are ultimately dominated by them.⁶¹ The tendency of the criminal law to fail in its purpose because of the discrepancy in standards between the legislative policy makers and the enforcers is greatly increased when the two sets of officials serve different constituencies. University institutions, however autocratic in structure, cannot fail to respond to the values of the university community. To expect a university tribunal to play the role of a hanging judge to enforce the public's opinion about student conduct is little more realistic than to expect a Mississippi governor to serve as chief prosecutor of the campaign for school desegregation.

The difference in moral standards applied to student misconduct by the general public and by the university community is substantial.⁶² The generation gap needs no elaboration. Moreover, the inadequacies of exclusionary penalties are much more keenly felt by the university community than by the general public. The university community is generally more tolerant of rebellious expression, although less comfortable about violence. But, above all, the university community and its institutions, which the general public seeks to press into service, are far more likely to view offenders as fellow humans rather than as abstractions lacking in redemptive worth. The general tendency of the public and its policy makers to be overly harsh is nowhere more apparent than in its response to recent student misconduct.⁶³

In fact, the student values may be much closer to the operative morality of the American people than is the rhetorical morality that serves as the basis for the criminal law. Relatively few members of our society would actually apply a forfeiture morality to their friends, neighbors, and relations. The public outcry concerning student misconduct expresses the morality used only in our utterances about the behavior of unseen strangers.

If the public's indignation must be vindicated, the proper place to achieve that result is in the public's own courts. A university ad-

61. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 10-16 (1965).

62. *See generally* L. FEUER, *THE CONFLICT OF GENERATIONS* (1969).

63. *See, e.g.*, the report of the Kent State grand jury. *N.Y. Times*, Oct. 17, 1970, at 1, col. 1.

ministration that feels too much pressure should deflect it to the public prosecutor who is in business to absorb it.⁶⁴ The parental responsibility of a university to protect its children from law enforcement is as dead as the university's parental authority.⁶⁵ Students are in every respect subject to the criminal law. There is little excuse for imposing different penalties on students than on other offenders by imposing university punishment in the form of exclusionary sanctions, at least insofar as the purpose of such punishment is to vindicate public indignation.⁶⁶

It should also be emphasized that the public morality can be enforced in civil courts as well as criminal. We are now familiar with the use of injunctions,⁶⁷ but why does no one seek civil damages? Building seizures,⁶⁸ class disruptions,⁶⁹ and recruiting incidents are all torts; the offenders are liable for compensatory and, in some cases, punitive damages. True, many students have no resources with which to pay large civil judgments; but many do, and most plan to acquire them. This approach offers the very important advantages of using the public's own judges and jurors, of dramatizing the harm by presenting a real plaintiff as well as a real defendant, of providing personal as well as public satisfaction to those harmed, and of providing a more hospitable procedure than the criminal court.

It is true that the civil courts can become entangled in cumbersome, dilatory, and expensive procedures. In some communities, they may be quite unsatisfactory for small claims. But for all of their shortcomings, they can be far superior to anything that the university can provide as a response to troublesome behavior. Increasingly, private-law remedies are gaining recognition as instruments for influencing conduct in such disparate fields as consumer protection⁷⁰ and en-

64. It may be possible in some states for public universities to enact rules of conduct as ordinances which would be enforceable by local prosecutors. *E.g.*, CAL. EDUC. CODE § 23604.1 (Deering 1969): "Trustees may establish rules and regulations for the government and maintenance of the buildings and grounds of the state colleges. Every person who violates or attempts to violate the rules and regulations is guilty of a misdemeanor." *Cf.* MICH. COMP. LAWS ANN. § 390.891 (1967).

65. See McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558, 562-63 (1968); ABA MODEL CODE FOR STUDENT RIGHTS, RESPONSIBILITIES AND CONDUCT § 28 (1969).

66. There is frequent confusion between the separable issues of using police and using prosecutors. The use of police in a crisis situation is a much more delicate problem which can be resolved only in the light of particular circumstances.

67. See generally Herman, *Injunctive Control of Disruptive Student Demonstrations*, 56 VA. L. REV. 215 (1970); Rosenthal, *Injunctive Relief Against Campus Disorders*, 118 U. PA. L. REV. 746, 752 (1970).

68. See Board of Higher Educ. v. Students for a Democratic Socy., 60 Misc. 2d 114, 300 N.Y.S.2d 983 (Sup. Ct. 1969).

69. See Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, 310 N.Y.S.2d 972 (Sup. Ct. 1970).

70. *E.g.*, CAL. CIV. CODE § 3369 (West 1970). See Eckhart, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970).

vironmental law.⁷¹ Why not employ these remedies for influencing conduct in the university setting as well?

IV. THE CIVIL- OR PRIVATE-LAW MODEL: RESTITUTION FOR ACADEMIC REFORM

If we might overcome our primitive instinct for retributive punishment, we might consider the advantages of a system of university discipline that would follow the pattern of private civil remedies rather than the criminal-law pattern which is so rapidly becoming traditional. The Appendix to this Article sets forth one effort to pursue such a design.⁷² The proposal is hardly a solvent of all problems. It will not meet the causes of tension. Nor will it give any satisfaction to the unrepentant revolutionary who seeks to use the university as his base of operations. But it may offer some hope of giving some effective service to the goals that the process based on the criminal model is increasingly unable to serve.

Except for strictly academic sins such as cheating, which are very difficult to fit to the pattern,⁷³ the civil-law model would place primary emphasis on restitution by wrongdoers to the victims of harm.⁷⁴ Wrongdoers would be expected to repair or replace property damaged or misappropriated,⁷⁵ the common law of trover or restitution being used as a model for harms to tangible personal property. Similarly, restitution for all medical bills would be required.⁷⁶ Indeed, the critical element of the model is the extension of the restitution concept to apply to intangible harms inflicted by wrongdoers.⁷⁷ Such an extension would, of course, be quite familiar in all civil courts, accustomed as such courts are to the idea of compensating for pain and suffering, for loss of reputation, or for loss of a prospective advantage. Because the university tribunal carries less authority than a civil court to make the necessary quantifications, it seems appropriate to provide standard formulae that place a roughly computed value on damage resulting from the interruption of a unit of instruction or from other harms to the ongoing operation of the institution.⁷⁸ Such formulae would reduce the strain on the fact-finding process.

Of course, there are situations in which restitution is not sufficient

71. *E.g.*, MICH. COMP. LAWS ANN. §§ 691.1201-07 (Supp. 1970).

72. *See* the Appendix and note 100 *infra*.

73. *See* Appendix § 2 *infra*.

74. *See* Appendix § 3 *infra*.

75. *See* Appendix § 3(a) *infra*.

76. *Id.*

77. *See* Appendix § 3(b) *infra*.

78. *Id.*

to deter repetition of wrongful conduct. But this is a problem known to private law, and it seems possible to borrow the traditional private-law device of assessing additional obligations for wrongdoers if that appears necessary to fashion an effective deterrent.⁷⁹ The model set forth in the Appendix suggests a limitation in the size of deterrents assessed by university tribunals to a trebling of the sum assessed as restitution. This is a concept borrowed, of course, from antitrust law.⁸⁰ In fixing the size of the deterrent, the university tribunal would presumably adhere to the customary practice of considering the offender's financial means, his motives, and any other factors bearing on the need for a deterrent.⁸¹

Under the proposal, the "students of the university" are to be compensated for harms wrongfully done to the learning environment.⁸² Actions to recover for such harms may be brought by any student or teacher affected by the alleged misconduct. The complainant is to be compensated for his trouble in bringing the claim. Any amount recovered in excess of that used to compensate the complainant, whether awarded as a deterrent or as compensation for the intangible harm to the learning environment, might be paid into the school's scholarship fund.

The model suggests that, unlike most American civil courts, the university tribunal should allow the wrongdoer to spread his compensatory payments over a year.⁸³ The jurisdiction of the tribunal would be limited to sums of 1,000 dollars or less; in order to collect larger sums, it would be necessary to invoke the jurisdiction of the civil courts.⁸⁴ The university might appropriately attempt to provide employment for students needing the resources to meet these obligations, but this cannot be assured as a matter of right without placing undue strain on the employment relation. Exclusionary sanctions or discharge would be imposed only on students in default of their obligations as fixed by the judiciary.⁸⁵ Collegial wrongdoers might share the burdens resulting from their wrongdoing, instead of limiting the burden to the one wrongdoer who is identified and used "as an

79. See Appendix § 4 *infra*.

80. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1964), provides "[t]hat any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained"

81. On the range of considerations weighed in the assessment of punitive damages in civil courts, see *Developments in the Law—Damages 1935-1947*, 61 HARV. L. REV. 113, 119-21 (1947).

82. See Appendix § 5 *infra*.

83. See Appendix § 6 *infra*.

84. See Appendix § 7 *infra*.

85. See Appendix § 9 *infra*.

example."⁸⁶ A default by a student would always be curable; thus, if he is excluded, it is by his own choice, expressed in his contumacy.

What other advantages might be claimed for such a system of university discipline? Let us review the problems encountered in the use of the criminal model. One consequence of adopting the proposed system would be to relieve some of the pressure on the legislative process. The pressure would be relieved in each of the first three aspects described earlier.⁸⁷ Because the civil or private model focuses on the harm rather than the moral preachment, it is less important if the moral preachment of the judgment does not quite reflect the moral values of the governed; participatory democracy is still important, but it is less critical. Because the civil-law model focuses on relations between the individual members of the community rather than between the university and the individual offender, there is less reason for concern about the governing board's legislative competence. It should always serve a legitimate "educational purpose" to maintain a process that teaches young people that wrongdoers must bear the harmful consequences of their misdeeds. Because the harm inflicted on the wrongdoer by the prospective judgment is not durable and because it involves a transfer of an already experienced loss rather than the creation of a new one, there is less need for concern about the explicit quality of the legislative mandate. There is no reason to suggest that a university tribunal should be a common-law court making its substantive rules of whole cloth, but surely there is less objection to that kind of creativity in the civil setting than in the criminal setting. "Void for vagueness" is a concept that should have little application to civil remedies that are used to correct measurable harms to identifiable individuals or groups.⁸⁸

The composition of the university tribunal is still an occasion for concern, and there is no reason to abandon student participation as judges or jurors. But, in the civil model, there is less occasion for concern about jury nullification of the punishment process. There is less reason to suppose that witnesses will feel a moral obligation to withhold evidence from a plaintiff than from the prosecution.⁸⁹ And there

86. See Appendix § 8 *infra*.

87. See text accompanying notes 23-35 *supra*.

88. *But cf. Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967). See also K. DAVIS, *supra* note 54, § 2.04.

89. Indeed, it would not be inappropriate to consider including in the bylaws a discovery rule comparable to that available in civil and administrative proceedings. For example:

Testimony and Discovery.

- (a) Every member of the university community is obligated to cooperate in the resolution of disputes presented to the university judiciary. If asked to testify in a proceeding, each member is obligated to do so.
- (b) On motion of any party participating in any proceeding, the judiciary will

is less basis on which to contend for special and burdensome standards or burdens of proof.

The prospects for proceeding with dispatch are considerably enhanced in the proposed civil system. It is not appropriate, of course, even in the civil setting, to abandon all procedural safeguards. Universities should continue to recognize the right to counsel, the right to confront accusers, and other similar basics of due process.⁹⁰ But it would be more tolerable for a university tribunal to proceed prior to the determination of a companion criminal case, just as civil courts often do in private matters.⁹¹ The concern for investigative improprieties is more relaxed in the civil setting.⁹² And, except with respect to the deterrent remedy, there is no occasion for concern about double jeopardy. But above all, the civil-law model offers the hope of relaxing some of the contentious and dilatory spirit that pervades contemporary university discipline. There is far less reason to professionalize the process: who can afford counsel in such a small-claims court? And the carnival of contention would seem less appropriate, and thus would be less likely to occur, in a proceeding to compensate harm than in a proceeding to impose durable punishment.

At the same time that dispatch is made easier to attain, the need for it becomes a little less pressing. This is so because the focus is no longer on doing something with or to the offender, but is transferred to the task of doing something for the offended, who is seldom in such a hurry for small claims compensation. Thus, almost all of the problems aroused or aggravated by the attempt to impose community punishment on members of the university are in some measure alleviated by a change of emphasis to the compensation of harms.

declare the obligation of any member to make physical evidence or documents available for use and to submit to transcribed questioning prior to hearing.

(c) Any member who fails to meet his obligations under the preceding subparagraphs may be subject to a penalty of not more than \$50 and may be excluded from the university until he meets such obligation.

90. See notes 40-47 *supra* and accompanying text.

91. Concern for the procedural rights of the accused has been the basis for some constraint in employing injunctive remedies, the rubric being that "equity does not enjoin a crime." The exceptions to this principle are many and include situations in which the plaintiff can show "special harm" resulting from the forbidden conduct. See *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1013-16 (1965). In compensation cases, the existence of the criminal proscription may even serve to reinforce the claim under the negligence per se doctrine. See W. PROSSER, *THE LAW OF TORTS* § 35, at 202-03 (3d ed. 1964). On the other hand, civil discovery is sometimes deferred if awaiting the outcome of companion criminal litigation will thereby serve to prevent its use to circumvent the narrower criminal discovery rules. *E.g.*, *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962). But cf. *United States v. Simon*, 373 F.2d 649 (2d Cir. 1967).

92. Cf. *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964). But cf. *Leogrande v. State Liquor Authority*, 25 App. Div. 2d 225, 268 N.Y.S.2d 433 (1966); *Village of Laurel Hollow v. Laverne Originals, Inc.*, 24 App. Div. 2d 616, 262 N.Y.S.2d 625 (1965).

It is not unreasonable to suppose that, for all of these reasons, the civil-law model would give better service to the goals of punishment than punishment itself. Surely, the goal of deterrence would be better served by such a system if, indeed, it is swifter and more sure. In order to persuade a premeditating miscreant that he should not engage in the kind of misconduct that is the subject of disciplinary proceedings, big penalties are not needed. Who would think it worth even one hundred dollars to disrupt the largest class or meeting?

Likewise, the cause of rehabilitation is advanced because the wrongdoer's useful activities and development are not disturbed; he is provided with a suitable means for making amends and is restored to the community, just as was the punished Cheyenne who violated the rules of the hunt.⁹³

With respect to the need to express the moral code of the community, the civil remedies are far more humane and expressive of our common ideals. Some readers may be attracted to the thought that monetary remedies are crass and unfair to impecunious students. But this is a mistake. It is important to keep in mind that money is liquid power or freedom that entitles the holder to make some choices for himself; such a rearrangement of monetary resources is a limitation on freedom not different in its essential nature from sanctions in kind, such as imprisonment and exclusion. The critical characteristic of the monetary sanction is that it respects the individual's freedom to make his own choice about what he will forego as a consequence of his misconduct. Literally, millenia of western history teach us that monetary sanctions are the cheapest, most effective, and most civilized way to cope with misconduct.

Finally, we must ask whether civil sanctions serve the need to vent community anger and forestall private retribution. There are surely some vocal members of the public and some of its elected representatives who would be offended by the thought that a class disrupter, for example, got off with paying only 150 dollars to the university scholarship fund. But, to the extent that civil sanctions are inadequate as deterrents, they are less inadequate than the criminal-type exclusionary punishments that must be administered slowly, awkwardly, and erratically.

Many readers must share a sense that something is lost or missing in the civil model. So far as the author can tell, the source of this feeling is the loss of satisfaction to the harsh and primitive instinct that causes us to believe that a forfeiture should be imposed on other people's ungrateful children. For reasons here disclosed, that instinct

93. See notes 15-16 *supra* and accompanying text.

leads us astray. The instinct may be basic and normal, but it is like fear of crowds, or noise, or airplanes, or a distaste for all change, in that it is an instinct that operates against self-interest. The feeling is a part of the instinctive dislike of strangers which civilized men must learn to suppress if the fruits of civilization are to be harvested in full.

For some universities, there may be a question concerning the legal power of the institution to administer a system of civil sanctions. The requirement of restitution for wrongs as a condition of continued membership in the university has been an occasional practice for a very long time and has not been challenged in any reported litigation. But a broader reliance on such sanctions makes the university tribunal more like a civil court; therefore, some courts might be attracted to the idea that such a tribunal, in a public university, is exercising a "judicial power" that cannot be lawfully exercised by a nonjudicial body.⁹⁴ Such a holding seems very unlikely to occur if it must be based on state constitutional law, but it may be more likely if it can be fortified by restrictive language in the enabling legislation that creates the governing board.⁹⁵ The question may be more pressing with respect to the power to enforce "deterrent obligations." Although the federal law is quite permissive with respect to such practices, some state courts have been reluctant to approve anything resembling administrative application of criminal sanctions such as fines.⁹⁶ On the other hand, the exercise of the proposed sanction can reasonably be regarded as a lesser-included power in contrast to the power to exclude students from the university altogether.

Perhaps the most serious objection to the proposal is that it may appear to some to be novel. I find that objection difficult to evaluate. As one who has devoted some years to an effort to initiate students to the mysteries of the common-law forms of action, I am stunned by

94. Compare *State v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957), in which the court invalidated legislation creating an industrial accident commission on this ground, with *Johnson v. Sanchez*, 67 N.M. 41, 351 P.2d 449 (1960), which held that the suspension of a driver's license is an administrative act that a court cannot be required to review de novo. Much more typical is the federal law, exemplified in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), in which the Supreme Court upheld the National Labor Relation Board's power to administer back-pay awards.

95. Such restrictions in the enabling legislation are not likely to be found. Contrary implications can be found in much recent "student unrest" legislation. See generally Comment, *Higher Education and the Student Unrest Provisions*, 31 OHIO ST. L.J. 111 (1970). Obviously, civil sanctions are more rational, less punitive, and no less monetary than scholarship revocation, which is so widely demanded by legislators.

96. See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 109-15 (1965); Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943). It is at least possible that any local problems of this kind might be overcome by enabling legislation that authorized a trial de novo in the civil courts conditioned on the appellant's payment of the costs of the university process. Cf. *Ex parte Smith*, 381 Pa. 223, 112 A.2d 625 (1955).

the suggestion of novelty in a proposal that embraces, almost in whole, the old law of trespass,⁹⁷ trespass on the case,⁹⁸ and trover.⁹⁹

All that I can say in response to this objection is that ancient ways are sometimes best. The Norman kings who invented those writs may have known what they were doing when they sought to establish public tranquillity by establishing remedies that could not fail of public acceptance, even among the "alienated" Saxons, because those remedies so clearly served not only the common interest, but also the individual interests of the Saxons themselves. The practice of this ancient wisdom will not meet the expectations of those who wait for universities to curse the darkness by uttering grievous but vain threats at our troublemakers. But such a practice might be more suitable to the needs of those who seek illumination for the path toward a more humane and peaceable society.

APPENDIX

CIVIL SANCTIONS: A MODEL UNIVERSITY BYLAW¹⁰⁰

1. *Purposes: Relation to Criminal and Civil Law.* University discipline is intended

- (a) to deter conduct of members of the university which is harmful to others;
- (b) to teach its members that individuals are accountable for harms they cause to others;
- (c) to repair internal relationships which may be damaged by student misconduct; and
- (d) to enable the university to continue its assistance in the development and rehabilitation of alienated or miscreant young people.

It is not a primary purpose of university discipline to vent the general public's indignation at the antisocial behavior of its students. For

97. *E.g.*, *The Six Carpenters' Case*, 77 Eng. Rep. 695 (K.B. 1611), holding conduct comparable to a class disruption to be actionable as trespass *ab initio*.

98. Consequential damages, as for injuries to advantageous relations (*i.e.*, academic or employment relations), were recoverable on the case. *E.g.*, *Chamberlain v. Hazlewood*, 151 Eng. Rep. 218 (Ex. 1839).

99. Trover might lie for the conversion of personal property, including administrative records and professional notes. *See Vaughn v. Wright*, 139 Ga. 736, 78 S.E. 123 (1913).

100. This proposed bylaw is not offered as a complete provision. Additional, more specific, substantive provisions should be included, as well as provisions establishing a tribunal and a procedure, which might include items such as those described in notes 58 & 89 *supra*. The proposal is made in such detail only with great diffidence. It cannot be presumed that all the problems arising from a shift to a civil model have been resolved. Premature publication is justified only for the purpose of stimulating more mature consideration.

that purpose, the general public's own legal system should be employed. Members of the university community are subject to both civil and criminal laws in full measure, and university punishment will not be used as a substitute for the enforcement of such laws.

2. *Academic Offenses.* Students offending rules against cheating, or similar rules of a strictly academic nature, may be penalized by having a full and fair statement describing their offense, in terms approved by the judiciary, included as a part of their academic record. In addition, the judiciary may approve an award of a failing grade in the course in which the offense occurred, a forfeiture of all academic credit for the semester, or exclusion from a particular course of study, department, or school.

3. *Restitution.* Members of the university community who wrongfully cause harm to the university or to other members or guests are obligated to make restitution for harm resulting from their misconduct:

- (a) Restitution for tangible harms may include medical or repair bills and replacement costs. Movable property which is damaged or misappropriated as a result of misconduct may be replaced at the option of the owner and then becomes the property of the offending party.
- (b) Restitution for intangible harms will be calculated according to standard formulae announced by the judiciary. Thus, a student who is harmed by physical or extreme verbal abuse which obstructs his study is entitled to restitution based on a formula measuring the intangible harm by the economic cost to the average student of the period of study obstructed. Similarly, a student or employer who is harmed by the obstruction of an employment interview is entitled to restitution measured by the average cost of such interviews.

4. *Deterrence of Harmful Misconduct.* The judiciary will impose additional obligations, not to exceed double the amount imposed for restitution, if restitution is deemed an inadequate deterrent to similar acts of misconduct by the offender or other students. In fixing the amount of such a deterrent obligation, the judiciary may take account of the financial means of the offender, his motives, penalties imposed by outside authority, and any other factors bearing on the need for additional deterrence. A deterrent obligation will not be imposed on a student who has been prosecuted under the criminal law or who has been subjected to civil liability for punitive damages for the same act of misconduct, or against whom criminal prosecution

is pending. Any party seeking the imposition of a deterrent obligation thereby undertakes not to seek criminal punishment or punitive civil damages against the same student for the same act.

5. *Class Claims.* The students of the university are entitled to be compensated for any harm wrongfully inflicted on the learning environment by members of the university community.¹⁰¹ Claims for such compensation may be brought by any student or teacher affected by the alleged act of misconduct. In such cases, the complainant, if successful, will be compensated for his trouble in the amount of fifteen per cent of the assessed recovery; the balance will be paid for the benefit of the scholarship fund.

6. *Payment.* Obligations are due when the decision of the reviewing authority is announced, or when the time for seeking review has elapsed, unless the judiciary otherwise provides, by the terms of its decision. Offenders lacking the means to make immediate satisfaction will be authorized by the judiciary to extend payment by installments over a period not to exceed one year. No degree will be conferred nor transcript issued for a student whose installment payments have not been completed. Employees may be required to authorize payroll deductions as a condition to the right to extend the time for payment.

7. *Limitation on Remedies.* In no case will an obligation of more than 1,000 dollars imposed by the judiciary on a student for a single act of misconduct. For the purpose of this rule, each day of continuous misconduct will constitute a separate act. To the extent that obligations enforced under this bylaw are inadequate to compensate the university or individual members of the university community for harms caused by misconduct, resort must be had to the civil courts. Amounts paid in meeting obligations imposed under paragraphs 3 or 4 will be credited against any corresponding civil recovery.

8. *Multiple Offenders: Joint and Several Liability.* A member of the university community who has joined in an act of misconduct with others will be subject to full restitutionary and deterrent obligations. However, only one payment shall be required for each item of tangible or intangible harm; a member who fully meets an obligation for which others are also liable is entitled to equal contribution from all whose liability is established. A respondent may bring others into the proceeding for the purpose of having their joint liability established, in order that secondary obligations can be imposed.

101. Formulae for computing the value of harms to the learning environment might be provided. Thus, the cost of an hour of classroom instruction might be computed by dividing the teaching budget by the number of hours of instruction. The product of that division might be regarded as an appropriate measure of restitution for a class disruption.

9. *Exclusions and Discharge.* A student who has not met an obligation imposed by the judiciary within ten days after it becomes due will be excluded from the university until he meets the obligation. Exclusionary penalties will not otherwise be imposed. Students who are absent from the university for a full semester because of a sentence imposed pursuant to a criminal conviction must apply for readmission and will be considered for admission on the same terms as those applied to other applicants for readmission who have been away for the same period of time. A failure or a refusal of an employee to meet an obligation determined by the judiciary may be cause for discharge.