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THE ROLE OF LAW IN HIGHER EDUCATION —  
AN ADMINISTRATOR'S VIEW

JOHN H. VANDERZELL†

I. INTRODUCTION

IT IS TO BE EXPECTED that the dean of a small liberal arts college would say that education is desperately important and that our educational institutions are indispensable. To say that is unlikely to startle anyone or any group, or to stir great controversy. Yet, it is pernicious and wrong to say:

Only in our universities can we hope to find the values . . . that alone distinguish a humane society, and give the individuals within it the hope of leading lives of . . . worth and fulfillment.<sup>1</sup>

Colleges and universities cannot carry that burden.

Without pretending to a systematic analysis, it is at least arguable that confidence in the efficacy of all manner of institutions has eroded — the church, the political parties, political organizations, government, work institutions — to the point that responsibilities cast upon them in the past have now been thrust on our educational institutions. This should not be surprising, given the historical confidence in the educability of every man and the faith that the answer to all of our problems lies in more education.

If it is true that the burden has been so heavily cast on educational institutions and if it is true that the burden is too great to bear, it is small wonder that there should be either disenchantment with higher education or impassioned pleas for reform of it, or both. Given concurrent developments in law and political sensitivity concerning the fourteenth amendment and education, the most predictable thing in the world was the jointure of the two in *Brown v. Board of Education*<sup>2</sup> and *Serrano v. Priest*.<sup>3</sup> As William Beaney put it, the thrust of legal developments is "increased judicial scrutiny of procedures used in reaching decisions that adversely affect vital interests of individuals and groups."<sup>4</sup> In light of these developments, the most predictable

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1. Humphrey, *Student Confrontations: Are They Inevitable?*, 11 WM. & MARY L. REV. 580, 583 (1970).

2. 347 U.S. 483 (1954).

3. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

4. Beaney, *Students, Higher Education, and the Law*, 45 DENVER L.J. 511, 521 (1968).

thing in the educational world should have been the Free Speech Movement at Berkeley and its aftermath. The campus has now been politicized and judicialized.

## II. COLLEGES AS COMMUNITIES

Most colleges and universities could have been described only a short time ago as "communities." While sociologists struggle with that term and find it hard to use analytically, John D. Millett, the former President of Miami University of Ohio saw colleges and universities to be the very definition of community.<sup>5</sup> Not that there was no room for admonitions and cautions, for although the "process of bringing together . . . [college community constituencies] through a dynamic of consensus" is imperfect and needs attention it is neither absent nor, with tinkering, irremediably flawed.<sup>6</sup>

An entire catalogue of explanations of the causes for the failure to realize the campus as a community, as Millett could see it, is beyond the scope of this paper. However, some discussion of the matter is important, for the campus has become not only judicialized, it has become litigious or downright cantankerous. In point of fact, it is not difficult to accept, indeed embrace, judicialization of the campus, if by that we mean living by knowable and reasonable rules. But to get to that point — to the point of legal order — there must be "a social order involving many informal customs, understandings, and other unspecified but implicitly assumed patterns of cooperation and competition . . . allowing its members many mistakes and adjustments without threatening the [social] order as a whole."<sup>7</sup>

Part of the problem of college and university governance is the identification of constituencies having legitimate interests and, therefore, rights in it. Faculty, students, administrators, and trustees are obvious constituent groups, but realistically, it is not too difficult to extend the list. Parents require and young people demand acceptable ways for offspring to leave home. The most socially acceptable way is to "send off" or "go off" to college. Yet, most parents insist that the young sally forth to a controlled environment not too dissimilar from the one at home.

Government at every level, ranging from the Pentagon to the local planning commission, has an interest in the research and training which colleges can supply. Industrial and commercial enterprises also

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5. J. MILLETT, *THE ACADEMIC COMMUNITY* (1962).

6. *Id.* at 235.

7. Lunsford, *Who Are Members of the University Community?*, 45 DENVER L.J. 545, 555 (1968).

have interests sufficient to cause them to make gifts and grants which colleges are not likely to spurn or needlessly put in jeopardy.

An allegation of considerable merit on some campuses is, indeed, that the university community has been hopelessly corrupted by the inclusion of constituents which pervert its purpose: curricular compromises are required to qualify for R.O.T.C. money; government grants drain premier teachers from the teaching roster; oaths are demanded in return for scholarship aid; parietals are demanded in return for tuitions. Older, and therefore wealthier, alumni insist the place not "go to the dogs." By this, they mean it must not change too much or its athletic teams must not lose too often. In so far as colleges have a moral responsibility to the larger community, residential neighbors insist the campus be wholesome and quiet and its facilities be open and available. The list could be expanded without adding to the point that, as the expectancies of the role and function of higher education expand, the constituent groups multiply without coming to a consensus.

Notwithstanding the grouping of these outside constituencies as a community, society at large expects a payoff from the institutions it supports. Colleges and universities have been given support in a multitude of ways, including the benign characterization of some collegiate behavior as "highjinks" which, if engaged in by others, would bring down the law. In return, at least for the stronger universities, society has expected and has, by and large, tolerated a tension between the orthodoxy of town and the acerbic questioning of gown. The price exacted from the institutions of higher learning — the price to be paid for academic freedom — is, as an institution, to *stay* in its ivory tower. William Sloane Coffin, Jr., exhorting universities to act with compassion in behalf of humane values, nonetheless observed without apology that, "of course, there are prudential considerations that are real, particularly for college presidents."<sup>8</sup> One of the reasons college presidents are so put upon now must be because society has entrusted them with such an enormous burden but is so fractured itself that it is nearly impossible to act prudentially<sup>9</sup> about anything.

Colleges are in the midst of a financial crisis so severe that many may not survive. Even those which are financially stable are cutting costs, thereby eliminating programs, faculty, and services. These institutions are vulnerable in the sense that prudent decisions by boards of trustees and presidents are likely to be heavily weighted in favor of fiscal considerations. To comply with governmental demands that

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8. W. COFFIN, *Universities and Social Order*, in TWENTY-FIVE YEARS 197 (G. Smith ed. 1970).

9. Prudence should not be read in this context as timidity or caution.

the names of students who have been found in violation of college rules concerning demonstrations be reported to a granting agency<sup>10</sup> may be distasteful, but if this means loss of financial aid or payment of legal costs to challenge the order, a prudential decision may be to comply as quietly as possible. Or, since the key word in grantsmanship these days is "innovation," it is not unlikely that colleges have and will develop programs without any conviction about their merit but which will be appealing to the "innovation bureaucracy."

The success an institution can have in dealing with these "outside" constituencies to preserve the integrity and autonomy of the community rests in the acumen, energy, and reputation of its president rather than in legal relationships. How well all institutions fare depends, in great part, on the achievements of the Kingman Brewster's, the Curtis Bok's, and the Keith Spalding's. Similarly, the failures of Berkeley and Columbia, warranted or not, are attributed to us all.

### III. THE COMMUNITY AS A CALDRON

It is not quite correct to say our house has not been in order. Before the incredible breakdown in external and internal consensus, before the social juices turned to bile, there was no great hassle about formal procedure to protect the rights of faculty or students. The good institutions had long since adopted the 1940 statement of the American Association of University Professors (AAUP) on academic freedom and tenure and its amendments. Also students had been represented or had been in the majority on discipline committees.<sup>11</sup> Nevertheless, the breakdown must be recognized; there is no "glue" of trust to bind together the elements in the community.

A remedy, Robert B. McKay suggests, is to effectuate the purpose of higher education as stated in the Berkeley *Report of the Study Commission on University Governance*:

[I]ntellectual growth of its students: their initiation into the life of the mind, their commitment to the use of reason in the resolution of their problems, their development of both technical competence and intellectual purpose.<sup>12</sup>

10. *Haverford College v. Reecher*, 329 F. Supp. 1196 (E.D. Pa. 1971) (three-judge court).

11. Cf. Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. Rev. 368 (1963), wherein appeared a report on 72 major universities' procedures in student discipline matters. The early interest of Van Alstyne marks him as prophetic. Yet, the results may be misleading. In the first place, more formal hearings could result in more suspensions and fewer "second" and "third" chances with counselling. In the second place, large state universities are likely to be quite different in these matters than good, private liberal arts institutions.

12. McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558, 560 (1968).

It is hard to take exception to such a statement, although there are more than a few who would include a place for emotion and passion and a few more who would include political action. Where the differences emerge — and bitter ones they are — is over the question of how to achieve these objectives. There are still those who hold out for a core curriculum. There are many who can see in required courses of study only the frustration of students' interests. There are still others who insist that there can be no courses at all in the conventional sense. Rather, classes are to be "happenings" or "T-group" sessions. Not too long ago a campus crisis nearly occurred over the question of whether professors should prepare syllabi for their courses and, if so, whether the dean or the curriculum committee could see them. According to one view, to prepare and distribute a syllabus would be stultifying, and to let the dean or the curriculum committee have more than a catalogue description of a course would be an intrusion on academic freedom.

Closely related to the course–no course, structured–unstructured controversy is the difference among the professoriate about evaluation of student academic performance. There is no doubt at all that, until recently, some professors were unconditionally opposed to giving any grades below an "A" on the grounds that to do otherwise would put the student, who might be doing poorly with other professors, in danger of the military draft. Still others have been adamantly opposed to evaluations of academic work because there are no standards by which to measure. Finally, there are those who insist that grading is antithetical to the learning environment and sets professor against student in a hostile relationship. While students, professors, deans, and administrators prepare to go to the barricades on such curricular and academic policy questions,<sup>13</sup> boards of trustees look on in dismay. There is at least the chance that they will not merely look on forever.

The purpose, curriculum, and evaluation arguments merge with differing notions of governance and power. Students have made good on attempts to obtain power as members of the academic community. They sit on every committee — in some instances in the majority — of the college and make final judgments, along with their faculty colleagues, about every facet of college activity. Some professors say they will not serve on committees again because they do not have the time or the patience to reinvent the wheel every year. Others say that

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13. For a cursory introduction to some of these issues, see J. AXELROD, *SEARCH FOR RELEVANCE* (1969); R. KAUFFMAN, *THE STUDENT IN HIGHER EDUCATION* (1968); H. TAYLOR, *STUDENTS WITHOUT TEACHERS* (1969); R. WOLF, *THE IDEAL OF A UNIVERSITY* (1969).

students have their most meaningful "learning experience" in departmental and college committees.<sup>14</sup>

The professoriate in many of the best schools now have power which was previously exercised exclusively by trustees. Perhaps initially with reluctance but more recently with confidence, trustees accepted the superiority of the judgment of the professoriate on every matter except money-raising and care of the endowment. However, it is not at all clear that the trustees will continue to defer to committees who reach conclusions grounded in the lay opinion of students. If there are to be lay judgments controlling the enterprise, they may conclude that their own is as good as any student's. In fact, they may conclude it is better.

There have been many hypotheses to explain the behavior of present-day students.<sup>15</sup> One of the most engaging is based upon television's presentation of snippets and snatches of information which, absent any historical or comparative perspective, clearly demonstrates the moral depravity of all previous generations.<sup>16</sup> These daily demonstrations convince the students of their own moral superiority. While this development may indicate that the most pressing educational challenge of our time should be to put in context all the media messages by which students have been bombarded,<sup>17</sup> this hypothesis hardly seems to justify student power.

It is not the intention of this article to imply that students have no insight or experience to make valuable judgments. Nor is it the intention to deny that administrators may be appropriately charged with bureaucratic behavior. Nor can it be said that professors are always so solicitous of their teaching to be without fault. But, there is reason to argue about how much governance, and in what ways and by whom is the governing power to be exercised. So long as this argument takes place in the absence of consensus about the institutional purpose, it is bound to be acrimonious and devoid of trust.

Departmental protectiveness must be added to this caldron. It is not likely, as a matter of law, that an academic department could have a grievance against the college. Yet, there are grievance procedures written and in effect which give an academic department an oppor-

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14. For an impassioned plea for student power and "student freedom" as the essential educational methodology, see W. Birenbaum, *Lost Academic Souls*, in *AGONY AND PROMISE* 18-24 (G. Smith ed. 1969).

15. For a listing and critique of the hypotheses for student behavior, see S. Halleck, *Twelve Hypotheses of Student Unrest*, in *TWENTY-FIVE YEARS* 287-305 (G. Smith ed. 1970).

16. *Id.* at 300.

17. Smith, *Campus Unrest: Illusion and Reality*, 11 *WM. & MARY L. REV.* 619 (1970).

tunity to lodge a grievance against the college of which it is an administrative unit.

In this milieu of acerbity, presidents, deans, professors, and students must find common ground in principles of procedure if the institution is to survive long enough to experience what must be a utopia — John Millet's "dynamic consensus."<sup>18</sup>

#### IV. CONSIDERATIONS FOR THE COMMUNITY

It is almost unbelievable that a result of Columbia was the widespread institution of student disciplinary procedures which had been in effect for years in many liberal arts colleges. The response to student unrest, even in those colleges where discipline was already very much in the hands of students, has been to heighten sensitivity to the specific disciplinary procedures employed. Not many colleges have been laggard in developing legally sophisticated procedures. To the extent that they have been, it is because they, perhaps like specialists in juvenile delinquency problems,<sup>19</sup> think they have a range of concerns more possible of solution through the application of their expertise rather than through the expertise of lawyers. They are not entirely wrong.

Students, Dean McKay says, want it both ways — sanctuary from outside penalties and freedom from university sanctions.<sup>20</sup> The university has been prepared to give both, in considerable measure, to the short- and long-term advantage of the student, the college, and the public.<sup>21</sup> Students are not of one mind on this question of formal procedures and educational counselling. In fact, while they admonish their peers that no one over thirty is to be trusted, one of their major complaints is that they have inadequate rapport with faculty. Refined processes require formal systems and yet they claim that the system is already too bureaucratized, too rigid, too much bound to formal rules and procedures, and too little concerned with individual students as humans. A recent report points up the ambiguity:

[N]egative conduct rules should be diminished, with . . . emphasis . . . on counselling and education. . . . Minimum rules . . . should be explicit . . . but they should not be over-elaborated or addressed to every conceivable situational nuance.<sup>22</sup>

18. See text accompanying note 6 *supra*.

19. See, e.g., *In re Gault*, 387 U.S. 1 (1967).

20. McKay, *supra* note 12.

21. Cf. McCaughey, *The Usable Past: A Study of the Harvard Rebellion of 1834*, 11 W.M. & MARY L. REV. 587 (1970) (an account of how Harvard solved its problems by prosecuting in the courts). Recently, I received a well-reasoned memorandum suggesting that the only recourse we have is to emulate Harvard's procedure of 1834.

22. Wilson, *Campus Freedom and Order*, 45 DENVER L.J. 502, 509 (1968).

The professoriate is little different. For many years good colleges have embraced the procedures developed by the AAUP. Not surprisingly, those procedures are protective of faculty rights, but they provide no formal procedure for laying sanctions, short of dismissal or suspension.<sup>23</sup>

Whether it can safely be left to the lawyers and the courts to fashion those words and phrases which will protect the rights of students, faculty, administrators, and the college is open to serious question — that they will fashion remedies as cases demand, is certain. As is true of most case law, there will be a time of uncertainty which is inconvenient but not catastrophic. While *Tinker v. School District*<sup>24</sup> leaves all educational administrators with an enormous burden of judgment on the likelihood of its projected consequences,<sup>25</sup> college administrators can learn to live with it. For example, requirements that standards of conduct not be unconstitutionally vague are not so difficult to meet as long as it remains unnecessary to define meticulously every possible type of the specific actions which are proscribed. Surely, the vagueness doctrine as applied in criminal cases is not the standard.<sup>26</sup> However, the courts have not been too helpful in telling us exactly what is the positive, as opposed to the negative, standard. A suggestion that the rule for vagueness is whether men of common intelligence need not guess at the regulations' meanings hardly is definitive. Yet, *Sill v. Pennsylvania State University*<sup>27</sup> and *Haverford College v. Reecher*<sup>28</sup> both say that "disturbing and interfering with" the functions of the college is not too vague as a proscription.

Of greater concern than substantive standards flowing from the first amendment are procedural standards stemming from sensitivity to fairness (at least for now, since many private colleges may be "ahead of" state colleges, it is not necessary to pursue here the public-private distinction). A strain of considerable magnitude is the popular notion that due process in student discipline cases is criminal process. Students, faculty members, and administrators have all become experts on due process, apparently from dramatic productions on television. Clearly, colleges cannot and ought not duplicate the procedures of the

23. There are AAUP statements, such as those of 1968 and 1969 on Professional Ethics, of 1965 on Extramural Utterance, and of 1969 on Professors and Political Activity, which hint at less severe sanctions. AAUP, POLICY DOCUMENTS AND REPORTS OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (1969).

24. 393 U.S. 503 (1969).

25. Cf. *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971); *Butts v. School Dist.*, 436 F.2d 728 (5th Cir. 1971); *Evans v. State Bd. of Agr.*, 325 F. Supp. 1353 (D. Colo. 1971); *Sword v. Fox*, 317 F. Supp. 1055 (D. Va. 1970), *rev'd*, 446 F.2d 1091 (1971).

26. *Sill v. Pennsylvania State Univ.*, 315 F. Supp. 125 (M.D. Pa. 1970) (three-judge court).

27. *Id.*

28. 329 F. Supp. 1196 (E.D. Pa. 1971).

criminal court. This seems to be the reality behind the suggestion that we abandon discipline procedures entirely and refer all cases to the county courts.

The United States District Court for Connecticut decided a pre-publication censorship case in *Eisner v. Board of Education*.<sup>29</sup> The court found the substantive regulations wanting, and the absence of "an adversary proceeding of any type or for a right of appeal" to be an unconstitutional deprivation.<sup>30</sup> It is left to the school board to fashion some "type" of "adversary" proceeding. One can take exception to this judicial advisory that an "adversary" proceeding is the *sine qua non* of procedural fairness, unless the term is used in the loosest, most non-professional sense. While the formulation of the Second Circuit is not more precise, at least the spirit seems to be different. In *Farrell v. Joel*,<sup>31</sup> the court, upholding the suspension of a number of high school pupils, said that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."<sup>32</sup> Indeed, the court goes on to say that in cases of "minor" discipline "common sense" is a good substitute for "zealous adherence to legal positions."<sup>33</sup> Yet, neither the *Eisner* nor the *Farrell* formulation is very useful, even though college administrators will find the bias of the latter preferable to that of the former.

The District Court for the Eastern District of New York considered a statewide code of substantive and procedural regulations concerning student conduct in *Student Association of the State University of New York, Inc. v. Toll*.<sup>34</sup> The student association sought a declaratory judgment against the constitutionality of procedures which: (1) made the Chief Administrator the determiner of whether a fact-finding investigation should be held; (2) made an "impeccable" committee the fact-finding agency; and (3) made the Chief Administrator the determiner of the sanctions to be levied on the basis of the findings of the committee. The model is clearly to be found in administrative law rather than in criminal due process.

Professors Karlesky and Stephenson found,<sup>35</sup> at least for the small liberal arts college, that there are serious limitations to an all-

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29. 314 F. Supp. 832 (D. Conn. 1970).

30. *Id.* at 836.

31. 437 F.2d 160 (2d Cir. 1971).

32. *Id.* at 162, citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Cf. *Evans v. State Bd. of Agr.*, 325 F. Supp. 1353 (D. Colo. 1971).

33. 437 F.2d at 163.

34. 332 F. Supp. 455 (E.D.N.Y. 1971).

35. Karlesky & Stephenson, *Student Disciplinary Proceedings: Some Preliminary Questions*, 42 J. HIGHER ED. 648 (1971).

or-nothing approach. They maintained that an administrative or, as they called it, a "questionary" process run essentially by the students for the investigation of minor infractions of defined conduct should be installed. For major offenses defined by the college and the civil authorities, the college has no real alternative to initiating action in the courts.

Karlesky and Stephenson's conclusion is understandable but unacceptable. They merely convert all of the problems into the question of forum. Consider a student-dominated discipline committee with a sophomore as chairman and having final authority as to fact-finding, law, and sanction. Consider further that this committee must handle a proceeding involving activist students who are represented by counsel and are challenging the constitutionality of a regulation on the grounds of vagueness. The only staff assistance to the committee comes from a dean of students whose effectiveness as a dean is dependent upon establishing and maintaining rapport with dissident student groupings on campus. Such an illustration surely suggests that the problem is more complex than Stephenson and Karlesky believe.

The first flaw in this system is the extent to which "collegial" governance ignores the corporate character of the college and the delegated responsibilities of the president. The reason for this flaw may be due: in part, to encourage a "dynamic consensus;" in part, as a concession to student power; in part, out of recognition of notable student competence; in part, out of acceptance of participation as a necessary learning experience; in part, out of expediency; in part, out of ignorance; in part, out of good will; and in part, out of weariness.<sup>36</sup> It is at least arguable that the chief administrative officer, the president, can seek advice, counsel, and recommendations from committees and that committee determinations should be very persuasive — even controlling as to certain matters — but he cannot delegate away his responsibilities and duties, especially to a first-semester sophomore. There may be no avoiding the storm that might result from a presidential determination to give away what he legally could not, but politically could. What the AAUP has never claimed as a procedural right for professors has, on some campuses, been given to students unassisted by any student association.

The relationship between procedures and academic freedom is undoubted. The AAUP has made enormously valuable contributions to higher education in the United States, and none is more valuable than

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36. See McClellan, *Comment*, 45 DENVER L.J. 539 (1968); Mager, *Changes in Institutional Governance: Legal Restraints Involving Delegation of Authority of Governing Boards*, 5 COLLEGE COUNSEL 37 (1970).

its fight for academic freedom, won largely through its insistence on academic due process and tenure. Until recently, the controlling assumption has been that elected members of the faculty can and will make fair investigation of specified charges, giving due notice and hearing, and that presidents and boards of trustees — entitled though they may be — will follow the findings and recommendations of such faculty committees.<sup>37</sup> Under the system, if a burden of proof is put anywhere, it should be about equally divided between the institution and the faculty member. Actually, whether the burden falls one way or another probably is determined by the bent of the elected committee at any time.

More recently, the faculty-union movement, the civil rights movement, and the generally litigious campuses have produced certain major developments in law and practice: (1) "giving of reasons," (2) academic freedom of nontenured faculty, and (3) a right to tenure. There are more but these three will suffice.

Without diminishing the importance of the continued vigilance of the AAUP guardianship of academic freedom in any way, "it is well settled that the employment of a public school professor, instructor, or teacher may not be terminated for his exercise of constitutionally protected rights."<sup>38</sup> It is the association of academic freedom with the first amendment which makes academic freedom a constitutional right.<sup>39</sup> It is probable that good, strong institutions applaud such a constitutional development. Even in such institutions, however, there are problems in application. In day-to-day operations, the chances are very, very good that a professor whose academic performance is poor, but whose exercise of first amendment rights is robust, will not be held to a high performance standard. The more sensitive to academic freedom an institution is, the greater its timidity is likely to be in such circumstances.

Todd Furniss, whose work and research in academic due process is extensive, claimed that it is not uncommon for a professor, whose

37. AAUP, STATEMENT ON ACADEMIC FREEDOM AND TENURE (1940).

38. *Shields v. Watrel*, 333 F. Supp. 260, 262 (W.D. Pa. 1971), *citing*, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 389 (1967); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971); *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970); *Pred v. Board of Pub. Instruction*, 415 F.2d 851 (5th Cir. 1969); *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1960).

In *Shields*, a college English professor had his contract terminated by the state educational institution, allegedly for engaging in first amendment activities. However, the district court found that the professor had not been rehired due to legitimate operational economies, and in any event, he had not sufficiently proved his allegation. 333 F. Supp. at 263.

39. See *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 92 S. Ct. 2701 (1972).

reappointment is in serious doubt because of poor performance, to create circumstances which make a first amendment claim plausible.<sup>40</sup>

In a number of documented cases, these techniques [of harassment and delay] have been combined with the enlistment by the faculty member of student activists to support his case, a subsequent sit-in that included the faculty member, and a still later claim that administrative action during the sit-in was a conspiracy to deny him free speech. This . . . action is in fact . . . used . . . by those who know they are to be denied renewal on grounds of inadequate performance.<sup>41</sup>

It is small comfort to college administrators to know that the courts can, and will, cut through the apparent to discern the real, as was done in *Shields v. Watrel*.<sup>42</sup> The cost in time, money, energy, and patience is more than many can sustain. Furthermore, events of this kind can strain the collegiate system beyond endurance. The practice has always been to reach adverse performance decisions with as little damage to the professor's career options and personality organization as possible. Charges and findings of inadequacy have not been broadcast but rather have been held in confidence. Lately, some faculty members on some campuses have impugned the integrity of the college, its administrators, and its committees by charging violation of academic freedom as the cause of non-renewal, knowing that the college will not fight back by a disclosure of the entire record.

One way to offset this strategy is through the establishment of a faculty-elected grievance committee. This committee can be given the responsibility to review the faculty member's claim and the ground for the college's decision in his case and to determine whether the faculty member's claim warrants a hearing by a judicial committee. If the committee finds it does not, then no recourse can be had to the formalities of collegiate adjudication.<sup>43</sup> Such a scheme will work only so long as faculties elect from their own ranks prestigious professors whose reputation for balanced judgment is impeccable.

Such a grievance procedure does not take the place of "giving reasons" for a nonrenewal of contract. Whether reasons should be given in writing has been a question which has divided the membership of the AAUP, faculties, and trustees. The courts have less difficulty with this question than with the question of whether reasons are findings which may be challenged on substantive or procedural grounds

40. Furniss, *Giving Reasons for Nonrenewal of Faculty Contracts*, 52 Ed. Record 328 (1971).

41. *Id.* at 334.

42. 333 F. Supp. 260 (W.D. Pa. 1971). See note 38 *supra*.

43. Franklin and Marshall College, *Grievance Procedures* (Feb. 9, 1972).

or whether reasons are charges to be proven in a highly structured collegiate system.<sup>44</sup>

There are two problems with written reasons, neither of which involve questions of law. The first is political and goes to the question of whether the reasons given will be accepted as the "real" ones. If the case involves a campus activist, the answer is probably in the negative, but such a response would be expected in any case, so nothing is gained or lost.

The second problem is more difficult to characterize but involves the variables of judgment of faculty personnel committees. If it becomes necessary for the members of such committees to write reasons for nonrenewal, they are likely to be more cautious and less willing to take risks in making judgments about appointments.<sup>45</sup> If they know, as they must come to know, that the burden of proof has shifted to them by the necessity to commit to writing the subtle judgments they must make, they are likely to opt for what is safe.

For the most part, faculty personnel committees in small liberal arts colleges have to make judgments of degree. Is the teaching good rather than mediocre? Are the publications of high caliber or only fair? Is the professor sufficiently available for student consultations? Has he made positive contributions to the committee work of the college? To what degree has he contributed to the work of the department? Given a department of three or four members, is he sufficiently compatible with his colleagues to allow the department to develop and pursue a program? What weight should be given to these criteria?<sup>46</sup> Should the standard be present levels of performance or an absolute standard coming from aspiration? And then, in application of the criteria, the judgments of degree occur; the vote of the committee on the question of retention may be three "no's" and two "yes's."

Finally, should the outcome in the courts, in the faculty-union contracts, and in the development of internal systems, be such as to leave job security as the only remaining justification for tenure, then the concept of tenure will be in for some very serious trouble. Faculties will not find allies in the student body on the tenure issue. Nontenured faculty will be pitted against tenured faculty, and trustees will find new support for their power — a cause they thought was lost.

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44. See *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971); *Sinderman v. Perry*, 430 F.2d 939 (5th Cir. 1970), *aff'd*, 92 S. Ct. 2701 (1972); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Miller v. Parsons*, 313 F. Supp. 1150 (M.D. Pa. 1970).

45. *Drown v. Portsmouth*, 435 F.2d 1182 (1st Cir. 1970).

46. Franklin and Marshall College, Professional Standards Committee Handbook (Dec. 1970).

V. THE COMMUNITY'S FUTURE

So long as all the unresolved problems of our society are expected to be resolved through education, by denying our colleges and universities a special function of their own, we can expect disillusion, disquiet, and contention. There is difficulty and division enough in the colleges, without seeing in them the only hope for mankind. The larger problem is in the restoration of confidence in other social institutions as well as in the colleges.

Until that happens and until we come to terms with a working definition of the role of the pre-productive young, we will be politicized and our immediate constituencies will be litigious. We will also be confused about the categories with which we must deal, *i.e.*, whether a given action is justified by academic freedom or is irresponsible academic behavior. The isolated courts can give helpful answers to this question, but they cannot quell the intrusive political acrimony out of which the questions grow but from which academic administrators cannot escape.

Finally, there is a danger that the legal principles developed by courts will be shaped by cases coming from the weaker rather than the stronger institutions. In the past the AAUP, steeped in the ethos of higher education, has worked patiently and effectively on the basis of national experience. Now, given the faculty-union movement, it may be that the dominant norm will be set by the courts in deciding cases growing out of the meanest circumstances.