Responding to Off-Campus Student Misconduct

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This article provides an exploration of the major legal issues involved in responding to off-campus student misconduct. The authors outline the historical and current relationships between institutions and students, the historical and current scope of jurisdiction, handling simultaneous campus and criminal proceedings, sample codes of conduct, and recommendations for taking disciplinary action.

INTRODUCTION

In September, 1997, several hundred Colorado State University students were involved in block parties that became "riots" off-campus, two weekends in a row. Town officials and police officers reacted with a demand for action by University officials. In September, 1998, a University of California at Berkeley student failed to report what he knew of his best friend allegedly attacking and killing a 7 year-old girl (Berkeleyan [Online], 1998, September 2). The University of California at Berkeley student body reacted with a great moral outcry and charged the Berkeley administration to take action against that individual. In October, 1998, police charged a University of Wyoming student with being an accessory to a crime in which another student, Matthew Shepard, was robbed, beaten, and killed off-campus. An interesting question lingers for student affairs professionals: will this student be charged with a violation of the student code of conduct on campus?

Based on these incidents, several questions arise:
1. Can a college or university take action against students based on codes of conduct and scope of jurisdiction for incidents that occur off-campus?
2. What is the historical and current relationship between students and institutions of higher education?

1. What, if any, are the ramifications for students when they are involved in criminal activities?

Whether campus administrators can take action and how they should proceed is in part determined by their legal relationship with the student, existing codes of conduct, and scope of jurisdiction. The applicability of campus codes of conduct to off-campus criminal actions is a question all student affairs administrators must consider. Serious political, legal, and ethical problems can arise if policies are not clearly stated and understood.

Much has changed during the last 50 years. Today, many students are more aware of their legal rights and less concerned with administrative authority. Students have begun to seek opportunities to challenge and question even the most basic institutional policies and procedures. This awareness and interest has forced colleges, universities, and courts to take positions and provide answers for off-campus discipline. Many students believe action taken for off-campus misconduct is outside an institution's jurisdiction, and therefore an infringement of their rights. Nevertheless, courts continually have upheld college and university policies for judicial action in response to off-campus conduct, as long as the prescribed regulations advance legitimate institutional interests and are relevant to any lawful mission, process, or policy established by the institution (Walker & Sheridan, 1997).

MAJOR LEGAL ISSUES

Institutions and Students: A Look at Historical and Current Relationships
Student discipline once was central to the mission of higher education. Few other issues force colleges and universities to examine and question attitudes about their relationship with students and their definition of their duty, as much as the challenge of
disciplining students (Dannells, 1997). Student discipline policies date back to the beginning of higher education. According to Dannells (as cited in Rentz & Saddlemire, 1988), "The president and the faculty exerted total behavior control over their students as part of the strict moral, ethical, and religious training that, along with the classical curriculum, was the accepted role and mission of the institution" (p. 127). Strict and detailed codes of conduct existed for the students of the institution. These codes included harsh penalties, such as public confessions and ridicule, fines, and even corporal punishment. Trustees learned about the extreme cases of misconduct, while faculty had less extreme cases delegated to them (Dannells, 1988).

**In Loco Parentis as a Doctrine**

The *in loco parentis* doctrine literally means "in the place of a parent" or "instead of a parent." An early English common law doctrine, this concept generally is believed to have been first applied to the college-student relationship in *Gott v. Berea College* in 1913 (Dannells, 1997). In this case, the Kentucky Court of Appeals ruled that a college or university has the right to "act on behalf of the parents for the benefit of protecting the safety, morals, and welfare of its students" (Barr, 1990, as cited in Busher, 1996, p. 19). This doctrine allowed the college to step into the role of the parent and gave administrators the right to exert parental authority over a student's physical, intellectual, and moral development. In addition, the student had the obligation to obey the university just as he or she would obey his or her parents. Giving administrators almost total control over the students, this concept provided great latitude in decisions regarding sanctions, including the right to expel them for almost any reason (Nussbaum, 1970). In addition, this doctrine held institutions to a high standard of care and assumed colleges and universities would protect students from foreseeable dangers the students would not necessarily understand or consider as serious (Hoekema, 1996). This doctrine commonly described the college-student relationship for most of the pre-1960s period in American higher education (Dannells, 1997).

This paternalistic approach to discipline and behavior control evolved as a result of the rise and recognition of the public university, the broadening of university missions and
objectives, the increasing secularization and pluralism of higher education in general, and increasing student enrollment (Rentz & Saddlemire, 1988). The campus activism that occurred throughout the late 1960s and early 1970s was a demonstration against the rigid controls placed on students and a demand for fundamental student rights (Bradshaw, 1979, as cited in Aurand & Snow, 1998). Consequently, colleges and universities began to change their approach. As stated by Dannells (as cited in Dannells, 1997), "the obvious difficulties, both in law and in actual practice, were well apparent, and the doctrine as it had been applied to college student discipline was generally considered impractical and untenable, if not simply dead" (p. 13).

This shift from rigid behavior control to a greater emphasis on self-discipline and self-governance was a result of the introduction of the German university model. The methods of discipline used became more humanitarian and individualized, and student-led democratic systems evolved. Administrative staff selected faculty members who had good rapport with the student body to handle non-academic related misconduct. The concept of the "student as a whole" began to develop, the first deans of men and women were appointed, and counseling as a form of corrective behavior modification became popular (Dannells, as cited in Rentz & Saddlemire, 1988). According to Dannells (as cited in Rentz & Saddlemire 1988):

Throughout the 1950's and 1960's, disciplinary affairs became less punishment and control oriented, less autocratic and more democratic, and more aimed toward education and rehabilitation....The 1960's and 1970's were characterized by increased student input into disciplinary codes and processes, broadened legal and educational conceptions of students' rights and responsibilities, and the introduction of due process safeguards in the hearing of misconduct cases. (p. 129)

The Shift Away From In Loco Parentis
The shift away from in loco parentis resulted in an important change in the nature of the relationship between academia and the law. Many legal cases cite the courts' rationale for disregarding the use of in loco parentis as an argument, including University of

The discussion about the student-university relationship in the University of Denver v. Whitlock case (1987) revolves around the "outmoded in loco parentis doctrine" that once "...imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college" (Bradshaw v. Rawlings, 1979, as cited in Aurand & Snow, 1998, p. 310). However, in the past 40 years, there has been a "gradual reappointment" of university responsibilities toward students. Today's colleges and universities are regarded as educational institutions, rather than custodial ones. Students demand autonomy and freedom without the supervision and guidance of college administrators and faculty. As a result of these demands, current students are regarded as adults, rather than children as in the past, capable of making their own decisions regarding personal safety and private entertainment. In this case regarding an off-campus incident, the Court determined the University of Denver was not involved in a relationship that placed a duty on the institution to protect the student from injuries suffered. The imposition of a duty to protect would have contradicted the policy of fostering an educational environment of student autonomy and independence previously mentioned (Bradshaw v. Rawlings, 1979, as cited in Aurand & Snow, 1998).

Similarly, in Bradshaw v. Rawlings (1979), the balance of students' individual interests in defining and regulating their own lives versus institutional interests in the nature of its relationship with its adult students is readily apparent. In this case, the Bradshaw Court cited the diminished authority of and constraints placed on today's administrators from constitutional amendments, written and unwritten law, and the evolution of new customs and procedures. Many of the rights previously entitled to administrators have been transferred to students. As a result, students now have greater privacy rights, and university regulations for on and off-campus behavior have narrowed in scope (Aurand & Snow, 1998).
Today's society views the competing interests of the student and of the institution much differently than in the past. The shift to viewing students as adults, rather than as children "of tender years," has completely redefined the scope of the duty of colleges and universities to protect students. In *Nero v. Kansas State University* (1993), the Court again reasoned that a plaintiff "cannot predicate a university's liability on 'the outmoded doctrine of *in loco parentis* and that in general, universities today 'have no legal duty to shield their students from the dangerous activities of other students'" (Aurand & Snow, 1998, p. 326). *Bradshaw* (1979) was cited in the Court's arguments.

In the court cases discussed above, as well as others such as the *Alumni Association v. Sullivan* (1990) regarding an incident occurring at Bucknell University, the courts' decisions often have relied on general standards of reasonable care, rather than the *in loco parentis* doctrine. However, courts continuously uphold the right of colleges and universities to impose reasonable restraints on student conduct and to enforce the rules with fundamental fairness. Although today's institutions can no longer rely on *in loco parentis*, an alternative that has been suggested is *in loco avunculi*, "in the place of the uncle." This doctrine encourages an approach that is "neither coercive nor neutral in matters of right or wrong" and it places institutions in a role that falls within the mission of colleges and universities in protecting and teaching students, but refrains from curtailing their fundamental rights (Hoekema, 1996, On-line Source).

The demise of *in loco parentis* and the evolution of student status as adults have left many campuses without guidance for engaging in student discipline. Faculty members rarely are involved in the day-to-day dealings regarding student conduct, and many administrators are unclear or undecided about the duty that exists regarding student discipline. This shift, coupled with increasing demands from families and communities for student supervision, and the need to create a disciplinary approach that correlates with the institution's educational purpose and mission, while still recognizing student rights, has taken on new importance. Today's institutions need to clearly define, understand, and communicate their purposes for engaging in student discipline, without
simply reacting to the outside pressures of families and the media (Dannells, 1998).

**Historical and Current Scope of Jurisdiction**

Another key issue regarding student conduct in higher education is the scope of a college's or university's jurisdiction. Several legal questions arise from this topic: Are institutions limited by incidents that only occur within campus boundaries, or can institutions also hear cases that occur outside of their walls? Should a college choose to hear a case that occurred off-campus, and if the student also is being tried in the criminal court system, does this result in double jeopardy? And, if a hearing is held both on and off-campus, can a student avoid the on-campus proceedings in order to not incriminate him/herself? In a recent issue of *The Chronicle of Higher Education* (1998, October 9), Gose raised several more questions with regard to off-campus behavior: Is the institutional process arbitrary and capricious? Is it relevant to academic lives? What are the outside pressures to punish for off-campus misconduct? Exactly how far should colleges and universities intrude into the off-campus lives of their students? What is considered reasonable? Kaplin and Lee (1997) have suggested that significant policy and legal questions arise when institutions extend their codes of conduct to address off-campus activity.

Historically, colleges have had the responsibility of educating the whole student and maintaining control over their behavior, which is described above as *in loco parentis*. "In this century, the movement was clearly away from that position toward more permissiveness and less control, at least until recent years when we have witnessed some evidence of increasing regulation of students' out-of-class lives" (Dannells, 1997, p. 15). In his 1990 study, Dannells (1997) found that institutions of higher education have increased their control over students' behavior. He found that from 1978 to 1988, the percentage of four-year institutions considering both on and off-campus offenses had increased from 35.7 to 45.7 %, and those schools only looking at on-campus behavior had decreased from 56.4 to 43.3 %. In a recent *Chronicle of Higher Education* article (Gose, 1998, October 9), the author found that of 520 institutions, three-quarters
have policies that address off-campus behavior.

Disciplining Students for Off-Campus Misconduct

Not all courts have upheld the authority of higher education institutions to discipline for off-campus misconduct. Kaplin and Lee (1997) discuss *Paine v. Board of Regents of the University of Texas System* (1972), in which "the institution automatically suspended students who had been put on probation by the criminal courts for possession of marijuana" (p. 329). This automatic reaction of the University was invalidated by the Court because the off-campus issue did not pose a threat to the institution. In *Thomas v. Granville Board of Education* (1979), the Court also found that high school administrators had to limit their power to the boundaries of the school (Kaplin & Lee, 1997); thus, the decisions effecting secondary schools also could be related to higher education.

Several cases establish the legal right of colleges and universities to create policies regarding students' off-campus behavior, and as long as the regulations advance authentic educational concerns, courts have upheld these regulations (Walker & Sheridan, 1997). In *Kusnir v. Leach* (1982, as cited in Walker & Sheridan, 1997), a student at Clarion State College faced charges on campus because of his alleged disorderly conduct at an off-campus party. The student challenged the college's authority to discipline for off-campus conduct. The Court found that "...[an institution has] a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's fitness to be a member of the student body" (Walker & Sheridan, 1997, conference proceedings).

In *Krasnow v. Virginia Polytechnic Institute* (1977, as cited in Young, & Gehring, 1986), the Court determined the university "...clearly has the prerogative to determine that any unlawful possession of drugs or criminal conduct on the part of students is detrimental to the university" (p. 14-3). In *Ray v. Wilmington College* (1995, as cited in Walker & Sheridan, 1997), a student was accused of physically and sexually assaulting a female student at his off-campus apartment. He also challenged the college's authority to
discipline him. The Court found that "an educational institution's authority to discipline its students does not necessarily stop at the physical boundaries of the institution's premises" (p. 3) and the Court reaffirmed the decision to allow institutions of higher education to determine what types of off-campus conduct is detrimental to the university or college. Based on these court decisions, administrators may discipline students for violating university standards while off campus (Due v. Florida A&M University and Gabrilowitz v. Newman, as cited in Gehring & Bracewell, 1992).

**Handling Campus and Criminal Judicial Proceedings**

In addressing the double jeopardy issue, the *Paine* Court (1972, as cited in Young, & Gehring, 1986) found that the same crime is not tried twice in the same court -- a potential violation of the Fifth Amendment clause of the Constitution-- because of the differing state interests (criminal justice system versus university discipline system) and sanctions (educational versus punitive) imposed. "The disciplinary processes used to maintain order on campus are not criminal or even civil proceedings," (Gehring & Bracewell, 1992, p. 93) and each constitute separate jurisdictions imposing "different kinds of punishment to protect different kinds of state interests" (Kaplin & Lee, 1997, p. 331). Institutions of higher education, typically, have an educational focus in their sanctions, such as attending an ethics workshop or alcohol education classes, rather than punitive criminal sanctions, such as loss of freedom or monetary fines.

Several cases have addressed the issue of postponing a college disciplinary hearing until the results of the criminal case are determined (Grossner v. Trustees of Columbia University (1968), as cited in Kaplin & Lee, 1997; Furutani v. Ewigeleben (1969), as cited in Stein, 1972, and Kaplin & Lee, 1997; Nzuve v. Castleton State College (1975), as cited in Gehring & Bracewell, 1992, and Kaplin & Lee, 1997; Hart v. Ferris State College (1983), as cited in Kaplin & Lee, 1997). The *Furutani* U.S. District Court, the *Hart* Court, and the *Grossner* Court all ruled that colleges are not required to postpone hearings until after the determinations of civil or criminal authorities, "even though actions [of courts and college disciplinary officials] arose out of the same activity" (Stein, 1972, p. 44). Some students reason that not postponing higher education hearings poses a
threat toward their Fifth Amendment self-incrimination rights. However, courts have determined there is no threat to these rights in college hearings (Stein, 1972). Students can choose to remain silent during campus proceedings; the *Furutani* Court emphasized that if students are forced to incriminate themselves during campus proceedings and that testimony is subpoenaed and later offered in criminal proceedings, then the student can oppose the offering of his or her testimony at campus hearings (Kaplin & Lee, 1997).

In cases where universities wait until the outcome of criminal proceedings, "the students must be given an opportunity to show that, despite their conviction and probation, they posed 'no substantial threat of influencing other students to [commit illegal acts]'" (*Paine*, as cited in Kaplin & Lee, 1997, p. 332-333). Administrators may not automatically "convict" students in a disciplinary setting at an institution of higher education without due process or consideration of the educational mission (Kaplin & Lee, 1997).

Woven throughout much of the information is the defense that if a college or university has written into its code of conduct that off-campus behavior may be examined by on-campus officials, then courts generally have upheld the decision of the officials to discipline for off-campus behavior.

**CODES OF CONDUCT REGARDING OFF-CAMPUS MISCONDUCT**

As stated by Walker and Sheridan (1997):

When acts of serious student misconduct occur, whether on or off campus, most people immediately turn to the host institution to remedy the situation. An effective off-campus misconduct policy one which satisfies the law, matches the institutional mission, and receives consistent application can further a college or university's ability to respond in
Institutions are influenced by many factors, including mission and philosophy, size, type, surrounding community, current trends, state and national issues, and legal rulings. Therefore, campuses also vary widely in their application, specificity, and breadth of discipline for off-campus behaviors that fall within the scope of the institution's code of conduct. In addition to the factors listed above, these codes also may be influenced by local concerns, recent incidents, and practical considerations, including case volume, desire to remain free from local law enforcement, and staffing (Walker & Sheridan, 1997).

In recent years, federal legislations have forced colleges and universities to review their positions with respect to disciplining students for off-campus misconduct. The "Drug-Free Schools and Communities Act" in the late 1980s, the "Student Right to Know and Campus Security Act of 1990," and the "Higher [Education] Amendments of 1992" have challenged institutions to review their existing codes and their enforcement of them. Extensive media coverage of recent campus incidents and the issue of campus safety and security as a topic of numerous documentaries, talk shows, and movies has only heightened the awareness and concern for the creation and modification of campus policies and procedures (Walker & Sheridan, 1997).

Sample Codes and Policies
The following are examples of policies employed by colleges and universities for responding to off-campus student misconduct (Walker & Sheridan, conference
Example 1
The University reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community. Such action may include taking disciplinary action against those students whose behavior off University premises indicates that they pose a serious and substantial danger to others. The University will not routinely invoke the disciplinary process for student misbehavior occurring off University premises. Nonetheless, it will be necessary to endeavor to protect the campus community when there is reasonable grounds to believe that a student may pose a substantial danger to others. Normally, such "substantial danger" may be manifested by a pending criminal charge, usually relating to a crime of violence, burglary, substantial theft or fraud, the sale of illegal drugs, or the possession of substantial quantities of illegal drugs. Students may be accountable to both civil authorities and to the University for acts that constitute violations of law and of this Code. Disciplinary action at the University will not be subject to challenge on the ground that criminal charges involving the same incident have been dismissed or reduced.

Example 2
Students are required to abide by the Student Conduct Code and other University policies and under the jurisdiction of the University Judicial System while on University-owned, controlled or operated property, and at University sponsored functions on or off-campus throughout the duration of their enrollment at the University....Additionally, students are subject to the jurisdiction of the University judicial system for charges or convictions of off-campus violations of local, state, or federal laws which the President or his designated agent determine threaten the safety of members of our University community or threaten the educational process of the University and which occur while the student is enrolled for classes.

RECOMMENDATIONS FOR ACTION
Based on the issues of the relationship between students and institutions of higher education, scope and jurisdiction, conduct codes, and national and legal trends, administrators should review administrative policies and practices for effective legal compliance and elimination of practical difficulties. The following are recommendations for college and university officials undertaking this process:

1. If institutions desire to implement disciplinary action against students for behavior in off-campus settings, administrators must establish and provide to students clear and concise policies. These policies should not be vague or overbroad, and they should identify "the behavior that puts the student at risk for disciplinary action, and they must not prohibit protected behavior" (Gehring & Bracewell, 1992, p. 92). A list of considerations for addressing issues surrounding the implementation of judicial policies follows (Whitfield, 1995):

   1. Define the term "student."

   1. Define the boundaries where off-campus misconduct will be enforced. Will the institution consider the surrounding community, the state, the nation, and/or the world?

   1. Include the crimes or offenses the institution can address.

   - Apply judicial procedures and institutional responses consistent with the institutional mission.

   - Determine the institutional stance on the timing of disciplinary hearings. Will they happen before, concurrently, or after criminal proceedings and convictions? Will each case be reviewed independently?

   - Determine admission policies for applicants with past criminal convictions and how these policies will be administered.

   - Decide how or if the institution will handle charges brought or resolved after a student's graduation.

   - Discuss due process requirements for students involved in proceedings for off-campus misconduct. Due process requirements for students involved in criminal proceedings should be increased.

1. In choosing to hold on-campus disciplinary proceedings for off-campus action, Walker and Sheridan (1997) suggested administrators explore the following issues:

   2. whether the college sponsored the activity (i.e. sporting events, retreats, etc.)

   3. whether codes of conduct authorize charging students for violations

   4. nature and severity of the offense

   5. whether the student "presents a clear and present danger to campus community"
6. historical action taken by the university and student's history of behavior
7. status of victims
8. whether charges have been filed in criminal or civil courts
9. whether campus or local police referred the case
10. whether media coverage occurred
11. status of the institution (private, public, two-year, or four-year)
12. location of institution (rural, suburban, or urban)

- resources the university has to handle the case

1. In determining whether to hear a case based on the seriousness of the charge, officials can use a case-by-case determination or predetermined guidelines. In considering the potential sanction and whether or not to hear an off-campus case, officials should consider if the sanction merely would mirror a sanction applied by the legal system, or if additional educational sanctions are necessary (Stein, 1972).

2. Colleges and universities are advised to continuously assess and review current policies and practices pertaining to off-campus student misconduct. Crime rates, new laws and policies, student development theory, relationships with the surrounding community, demographic changes, and evolving institutional values are all important factors to be discussed (Walker & Sheridan, 1997).

1. Campus administrators should fully explain the issues and rationale behind double jeopardy in their codes of conduct.

2. Stein (1972) also challenges university officials to follow a rational framework in determining the appropriate course for a violation, rather than emotional dictates.

3. Administrators always should continue to meet with legal counsel to ensure legal compliance.

4. Student affairs professionals should have a strong understanding of the ethical principles and standards published by the National Association of Student Personnel Administrators and the Association of College Personnel Administrators with regard to care for students, professional obligations, and the philosophical foundation of the Profession.

CONCLUSION
An in-depth exploration of the cases presented in the beginning of this article can aid student affairs professionals in understanding the action taken by the universities and the reasoning behind the administrators' decisions. In the Colorado State University incident, where students rioted off-campus, the university judicial officer held several hearings. A statement in the Colorado State University brochure entitled, "Student Rights and Responsibilities," supported administrators' actions by informing students that off-campus misconduct may be heard through the University's discipline system.

University of California at Berkeley administrators chose not to hear the case regarding the student who witnessed a felony and did not report it, despite the campus community's clamor for justice. The administrators' reasoning was based on the fact that a Good Samaritan Law did not exist in the State where the crime occurred, or in the University's code of conduct. However, this case has caused the University officials to examine their codes and consider adding a Good Samaritan rule. An interesting point has been the student response to adding this rule: while it would addresses the current case and provide a rational basis for response to similar incidents, the rule also would require students to turn in colleagues who cheat on tests. When explained in that light, the students opted not to support the Good Samaritan rule.

At the time of press, administrators at the University of Wyoming had not yet decided how to act with regard to the student being charged as an accessory to a crime. Therefore, the process of addressing the student's involvement in this off-campus incident, undertaken by University of Wyoming administrators, will be an interesting one for student affairs professionals to examine, explore, and reflect on its implications at their own institutions.

In handling cases such as these, student affairs professionals must be knowledgeable of the college's or university's current relationship with students, scope of jurisdiction, and codes of conduct that comply with legal regulations. The current relationship between students and institutions of higher education is one of reasonable care. Policies related to off-campus misconduct should reflect this relationship and respond in
instances where the campus community is at risk or in danger, the institutions' reputation is negatively effected, or the administrators perceive the student cannot make a positive contribution to the campus community based on his or her behavior. Codes of conduct should be clear and concise, and identify the behavior that puts students at risk of disciplinary action. Conduct codes should not prohibit constitutionally protected behaviors (Gehring & Bracewell, 1992). A complete and continuous understanding of these important issues will help safeguard colleges and universities from unwanted legal action.

REFERENCES


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