

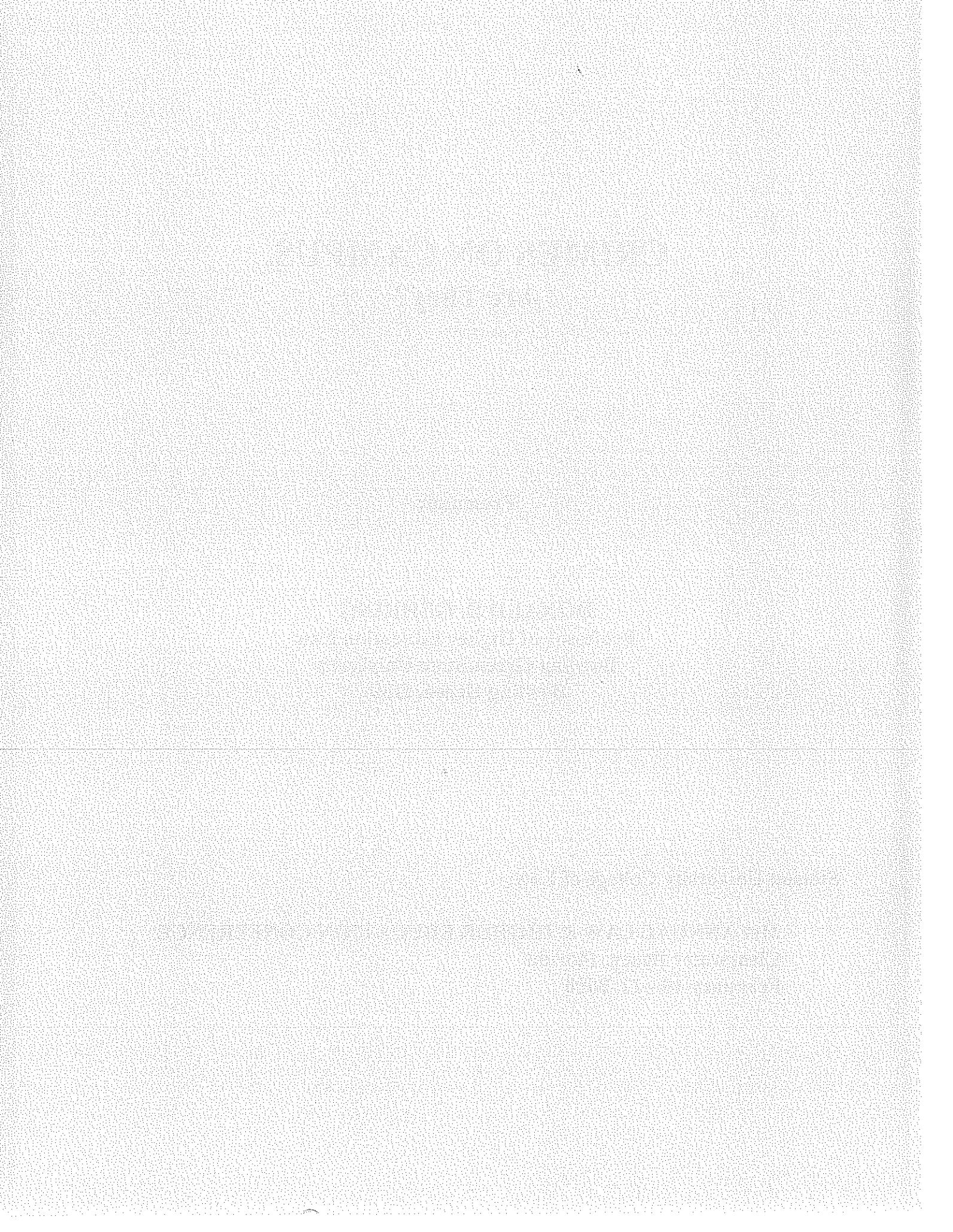
**CRIMES ON CAMPUS.
Are They?**

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Crimes on Campus. Are They?

by

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Four years ago Nina Bernstein (1996) wrote on the front page of the New York Times that campus disciplinary systems “designed to deal with youthful misbehavior are investigating and judging serious student-on-student crime” (p. 1). More recently another reporter, Dana Hawkins (1999) writing online for U.S. News and World Report, said campus disciplinary panels were going beyond “...adjudicating charges of cheating and plagiarism and are now commonly investigating rapes, assaults and other serious crimes” (p. 1). In the same article S. Daniel Carter of Security on Campus also assumes campus disciplinary systems are adjudicating serious crimes that they are ill equipped to handle. Even a professional student affairs administrator reviewing a manuscript for the NASPA Journal questioned whether colleges and universities should be dealing with crimes such as rape when they were not proficient in DNA testing (personal correspondence, Larry Roper, Editor reporting reviewer’s comments, 1999).

Certainly crimes occur on college and university campuses throughout the country. But is it true, as these journalists and others report that institutions are adjudicating crimes? The purpose of this paper is to explore that issue.

In the early years of student challenges to the authority of colleges and universities to discipline them the federal district court for the western district of Missouri issued a General Order on Judicial Standards of Procedures and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education (1969). In that order the court listed several lawful missions of higher education institutions including “To teach principles of patriotism, civil obligation and respect for the law”, “To

teach the practice of excellence in thought and performance” and “To develop students to well rounded maturity, physically, socially, emotionally, spiritually, intellectually and vocationally” (p. 137). The court then said that “...the institution may discipline students to secure compliance with these higher obligations as a teaching method or to sever the student from the academic community” (emphasis added, p. 141). The court was also aware that there would be those who would confuse the disciplining of students with criminal procedures and it specifically spoke to the difference between the two. The court said:

The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.

In the lesser disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to

campus and dismissal with leave to apply for readmission, the lawful aim of discipline may be teaching in performance of a lawful mission of the institution. The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent (p. 142).

It is interesting to note that the court characterized student behavioral violations as misconduct rather than crimes. It is also worthy of note that the court suggested that the purpose of criminal law is to be deterrent and punitive whereas the purpose of discipline is to teach or to determine that the student is no longer qualified to continue as a member of the academic community.

A United States Court of Appeals discussed the nature of college regulations saying “Certainly these regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself...” (Esteban v. Central Missouri State College, 1969, p. 1088). Once again a federal court is saying that college regulations are not criminal statutes. If they are not criminal statutes how can a violation be a crime? This court also tells us that the purpose of criminal law

is punitive while college discipline is educational. Even the Supreme Court has said that “Suspension is ... a valuable educational device “ (Goss v. Lopez, 1975, p. 739).

It is true that students are sanctioned through the disciplinary process. As Pavela (1985) has suggested, “effective discipline requires just punishment” (p. 47). However, Pavela recommended a just punishment as a means of receptivity to ethical instruction and responsibility – teaching in furtherance of the lawful missions of higher education.

The analogy of campus rules to serious crimes seem to be beloved of journalists, but not of judges who are experts in the field of jurisprudence. Judges tell us that the rules for which institutions discipline are not criminal statutes, the nature and function of the two processes are different and they refer to violations of the rules as misbehavior rather than crimes.

But it is true that serious crimes such as rape and assault do occur on college campus. When there are such crimes, they also usually involve the violation of a campus regulation. For example, a rape which is a crime might also violate the campus regulation prohibiting physical abuse or sexual contact without permission. The same set of facts may give rise to both a crime and a university violation. Colleges and universities are not authorized, nor should they be, to adjudicate crimes. Only federal, state or county prosecutors can prosecute crimes. If it is alleged that a rape has occurred on campus but the prosecutor has decided that, because the elements of the crime of rape can not be proved beyond a reasonable doubt, no charges will be brought, should the institution fail to respond since a “crime” is involved. The commentators seem to suggest that because a “crime” has been alleged and the university is “ill equipped to deal with serious crimes” (Hawkins, 1999 quoting S. Daniel Carter) it should not adjudicate violations of its own rules against physical abuse or sexual touching without permission.

Crimes (both minor and serious) require that specific elements be proven beyond a reasonable doubt. The violation of a campus regulation simply requires that it be found

more reasonable than not that the student engaged in conduct in violation of community standards.

Even the federal Congress has been misled and has failed to distinguish between crimes and campus rules. Wrongly informed by the Clerys and the Society of Professional Journalists, Congress has confused crimes and institutional rules. In the Higher Education Amendments of 1998 (P.L. 105-244) Congress required that institutions report the number of students referred for discipline for liquor law violations. Underage students who consume alcohol on campus may be found guilty of a liquor law violation, but only after a court of competent jurisdiction, providing due process, makes a finding of fact that beyond a reasonable doubt the elements of the statute prohibiting underage consumption of alcohol were all met. As it also happens, the student may be found not guilty. To confuse this with violating a university rule, also mandated by Congress in the Drug Free Schools and Communities Act Amendments of 1989 (20 U.S.C. 1145), is to suggest that the student is guilty of a liquor law violation before the student has had his or her day in court.

Another potential problem with this language strikes at the heart of private institutions. If a private institution refers a student for disciplinary action for a "liquor law violation" is that private institution engaging in state action? To say no one under the age of 21 may possess or consume alcohol on campus is quite different from saying that the college will enforce state liquor laws. Private institutions engaged in state action must conform to the restrictions of the Constitution. Most private institutions voluntarily provide due process in conformance with the Fourteenth Amendment, but if they are enforcing state laws they will be required to adhere to the due process clause.

Rather than passively accepting that campus disciplinary systems are dealing with crimes as misinformed journalists and Congress have assumed, colleges and universities must vigorously oppose this commingling of the terms. Stoner and Cerminara (1990)

have suggested that in drafting a student code of conduct administrators should purposely “avoid language implying that criminal standards apply” (p. 93).

Where institutions use criminal language in their student codes such as rape or assault and students found in violation challenge their sanctions in court the institution may find itself having to justify the elements of the crime. In a case where an altercation broke out between two former roommates at Florida A&M University a disciplinary hearing resulted in one of the women being found responsible for assault and battery based on a finding that she grabbed the other student’s arm after being slapped by her (Hardison v. Florida Agricultural and Mechanical University, 1998). The student appealed the University’s sanctions to a Florida Court of Appeals. The court held that assault and battery required an “unlawful and intentional application of force to the person of another” (p. 112). Although the student admitted that she grabbed her former roommate’s arm she said she did so only after being slapped and thus it was in self-defense. The court pointed out that a person is justified in using force against another where it is necessary to defend against the other’s eminent use of unlawful force. Thus, grabbing the student’s arm as an act of self defense would not be “unlawful”, an element required to be proved before one can be found guilty of assault and battery. Since the University had not proved the student’s grabbing was unlawful the court reversed the University’s finding of a violation and directed the institution “to vacate such violation and to strike the penalties imposed thereon” (p. 112).

The commingling of crimes and campus rules could lead to even more serious consequences. In another section of the Higher Education Amendments of 1998 (P. L. 105-244) Congress used very convoluted language in what seemed to be an attempt to differentiate between crimes and campus rules but only added to the confusion. In Section 951 the statement appears:

Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence...or a nonforceable sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense (citation omitted).

By stating that the disciplinary proceeding is conducted against a student "who is an alleged perpetrator of any crime of violence..." does the law require that the student first be arrested or indicted for a crime of violence? If the student has not been arrested and charged or indicted is he or she an "alleged perpetrator of any crime of violence?" What does it mean to find that a student committed a violation of an institution's rules with respect to a crime?

Although this section does not mandate that the final results be disclosed, but only removes, their protection under the Family Educational Rights and privacy Act (20 U.S.C. 1232), it may effectively require disclosure at public institutions under state open public records laws. However, where administrators disclose the final results of a disciplinary hearing are they essentially saying the student is an alleged perpetrator of a crime of violence? If they disclose the final results and the student has never been arrested and charged with or indicted for a crime of violence has the administrator defamed the student?

The analogy of crimes to campus rules simply put has muddied the water and no one knows the dangers that lie below the surface. Institutions must constantly challenge

those who believe that campus disciplinary systems deal with serious crimes. We do not prosecute crimes but only discipline students who violate our rules.

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