The University and the Bail System: In Loco Altricis

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THE CENTRAL ARGUMENT OF THIS ARTICLE is that where a transient college student is arrested financial bail is seldom necessary to assure the defendant's presence in court. However, in such a case financial bail is almost always required by the court, since in the area of bail, as with other criminal law problems, the pragmatic exigencies of the traditional American criminal law system place a heavy burden on any transient to realize the same protections, privileges, and rights provided the indigenous population.¹

The principal objective of this article is to describe an alternative to the financial bail system for the arrested transient college student. University students make up a large and growing class of transients,² who, in recent years, have been highly visible victims of the financial bail system. This class of transient college students has been created by a substantial number of college students emigrating from their parents' place of residence to a somewhat distant university community for approximately nine months of the year, in which time the students normally have negligible ties with their new community except for those with the university.

The modern university can and should provide the necessary assistance to this student between his arrest and trial by substituting a theory of in loco altricis for the superannuated and passing concept of in loco parentis.³ That is, the student-university relationship should be

** In Loco Altricis is a Latin phrase which describes a relationship between the student and the university, whereby an important function of the university is to offer those services to the transient student which the student has lost due to the severance of his hometown community ties.

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² More than seven million students were enrolled in nearly 2,600 colleges and universities in the United States in 1969. REPORT OF THE AMERICAN BAR ASSOCIATION COMMITTEE ON CAMPUS GOVERNMENT AND STUDENT DISSENT, 5 (1969).

³ The in loco parentis doctrine is an extension of the concept of the state as parens patriae—the state succeeding to the duties of the parent whenever the latter is unable to attend to them. Wisconsin Indus. School for Girls v. Clark County, 103 Wis. 651, 668-69, 79 N.W. 422, 428 (1899). The in loco parentis doctrine is well illustrated in Gott v. Berea College, 156 Ky. 376, 379; 161 S.W. 204, 206 (1913) by the following quotation:

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise, or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be. . . .

In Lander v. Seaver, 32 Vt. 114 (1859) over a century ago the court exposed the more obvious difficulties of in loco parentis:

[Parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.

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such that an important function of the university is to offer those services to the transient student which the student has lost due to the severance of his "home-town" community ties, rather than to exercise surrogate authority for the parent in regulating the student's behavior.

The Hypothetical Student-Accused

Mr. S, a twenty-year old transient student, is arrested in a drug raid in the middle of the winter quarter. At the time of the arrest Mr. S was in his dormitory room with Mr. R, his roommate, who had on his person ten grains of codeine. Mr. S has never had any illegal drug in his physical possession. Messrs. S and R are charged under state felony statutes for having a narcotic drug under their control and/or their possession.

Bail is set at $2,500 each. Mr. S is a junior with a "C" average. He works summers and vacations to defray college expenses and recently has been working part-time during the academic year to meet the rising college costs. The socio-economic level of the parents of Mr. S is middle-middle class. They have a daughter who is a freshman in college and two high-school age children. All of their assets are mortgaged. The grand jury does not meet for four months. The family is told that the bondsman will require a premium of $250 plus collateral and that the expense of competent defense counsel will probably exceed $500. If the student somehow manages to secure bond, must he drop out of college to earn the necessary money for his defense or will

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The schoolmaster [university] has no such natural restraint. Hence he [it] may not safely be trusted with all a parent's authority, for he [it] does not act from the instinct of parental affection. (The concept of the university is added.) Id. 122-123.

In addition, the mean age of the American college student is over 21 years and there are fewer students under the age of 18 than over the age of 30. U. S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, Series P-20, No. 110, Population Characteristics 12 (1961). Even in Blackstone's time, the doctrine did not apply to persons over 21. Van Alstyne, Student Activism, The Laws and the Courts, in PROTEST! STUDENT ACTIVISM IN AMERICA 537 (Foster and Long eds. 1970) [hereinafter cited as PROTEST].

4 This concept may be somewhat analogous to the concept of the university in a fiduciary capacity. Seavey, Dismissal of Students: "Due Process," 70 HARV. L. REV. 1406 (1957). However, unlike the in loco parentis doctrine, the logic of the fiduciary concept may be limited to on campus student activities.


6 OHIO REV. CODE § 3719.09(B) (2) and (C) (September 16, 1970) provides that the possession of more than four grains of codeine is presumptive evidence of the intent to violate the statute. OHIO REV. CODE § 3719.99(c) (1969) provides that a violation of § 3719.09 is punishable as a felony.

7 In most states the grand jury meets according to court rule. Therefore, in counties with small populations ("college towns") the regular sessions of the grand jury may only be every six months.

8 "[T]he preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to . . . aid [of court-appointed counsel] as at the trial itself.'" Coleman v. State of Alabama, 359 U.S. 1 (1970).
he qualify for court-appointed counsel as an indigent? Of course, he may have already been suspended from his university merely because of the arrest. Does it matter that four months later the grand jury does not indict Mr. S, or has the archaic system of bail already punishing him?

The bail bond system, which postulates a monetary payment as a prerequisite to pretrial freedom, must, of necessity, allow the af-

9 Trial judges have a tendency to determine the indigent or non-indigent status of a college student in accordance with the ability of the parents to provide financial assistance. However, it is contended that ‘counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pro-

10 This is the disciplinary practice at many universities. Contrary, The Report of the American Bar Association Commission on Campus Government and Student Dissent, 24-25 (1969), 7Interim Suspension, provided: ‘As a general rule the status of a student should not be altered until the charges brought against him have been adjudicated. Experience has shown, however, that prompt and decisive disciplinary action may be required in extreme cases before there is an opportunity to conduct a hearing, as in cases in which a student’s continued presence on campus constitutes an immediate threat or injury to the well-being or property of members of the university community, or to the property or the orderly functioning of the university. Model Code for Student Rights, Responsibilities and Conduct, Student Law Division of the American Bar Association, 6 (1969) stated that in extraordinary circumstances the student may be suspended pending consideration of the case. The Joint Statement on Rights and Freedoms of Students, 54 A.A.U.P. Bull. 258, 261 (June, 1968) provided that, pending action on the charges, the status of a student should not be altered, or his right to be present on campus and attend classes suspended, except for reasons relating to the safety and well-being of students, faculty, or university property. Academic Freedom and Civil Liberties of Students in Colleges and Universities, American Civil Liberties Union (April, 1970), 19 n. 1, provided that, ‘a student may be suspended only in exceptional circumstances involving danger to health, safety or disruption of the educational process.

11 The commercial bondsman was a welcomed innovation in early America because of the many newcomers who were without personal friends or relatives to aid them in securing bail. Note, Bail or Jail: Toward an Alternative, 21 U. Fla. L. Rev. 59, 61 (1968) [hereinafter cited as Bail or Jail: Toward an Alternative]. Today, as then, the government has a legitimate interest in requiring some assurance that the released defendant will appear for trial so that the orderly processes of criminal justice are not subverted. Rails, Bail in the United States, 48 Mich. State Bar J. 28, 31 (Jan., 1969) [hereinafter cited as Rails]. However, does bail in the form of commercial bonding bear a rational relationship to this state interest?

The amount at which bail is set by the court does not indicate the financial stake of the accused who is released on a bondsman’s suretyship. The stake of the accused may be limited to the typical premium of between five and ten per cent of the face amount of the bond which is paid to the bondsman. Rails, 31. Upon payment of such premium, it is forever lost even though the accused appears at the appointed time. If the accused absconds, the bondsman must forfeit the entire face amount of the bonds at least in theory. The bondsman, even though infrequently exercising his common-law ability to pursue and arrest the bail jumper, has oftentimes avoided forfeiture (Paulsen, Pre-trial Release in the United States, 68 Colum. L. Rev. 109, 115 (1968) [hereinafter cited as Paulsen]), since the state or federal law enforcement agencies, with their developing police science technology, frequently recapture the bail jumper at the taxpayer’s expense before a forfeiture is ordered. Bail or Jail: Toward an Alternative, 70.

Since the accused can expect no refund of the bondsman’s premium should he return for trial at the proper time, what is the factor that encourages him to return at all? Of course, the bondsman may require collateral in addition to a premium, but the court does not know whether a higher bond for a particular applicant means that he has a greater stake. Rails, 31. Since the bondsman is responsible to no one and is subject to no review, he can refuse to write a bail bond whenever he chooses without a valid or sensible reason. Criminal Law Edition, 2 Ohio State Bar Association Letter 1, 2 (Jan., 1965) [hereinafter cited as Ohio State Bar Service Letter].

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fluent to glean from the system certain advantages which are not accessible to the economically disadvantaged. The result of such dissimilarity of pre-trial treatment is the creation of burdens to the public, to the accused, and to the integrity of the judicial system, which in turn provide impetus to the evolving constitutional doctrines which eschew the results of such economic disparity.

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In such instances the bondsmen "hold the keys to the jail in [their] pockets... The court... is relegated to the relatively unimportant chore of fixing the amount of bail." Pannell v. United States, 320 F. 2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

However, these advantages must be minimized where their existence is based on a bondsman system which is not a demonstrably rational and effective approach to its ostensible reason for existence—assuring the accused's presence at trial. Larkin, Legal Services for the Poor—A Bail Project for Boston, 49 Mass. L. Q. 307, 309 (1964).

The burdens to the public may include (A) the detention expense, (B) the family of the accused successfully applying for relief, (C) the deprivation of funds to hire counsel, therefore, the state will often have to appoint counsel and provide a free transcript on appeal, (D) the loss of revenue from the earning power of the accused, and (E) the drainage of the police force of manpower to maintain cells for detention until trial.

The burdens to the accused may include (A) the loss of employment, (B) the subjection of the accused to the influence of the persons already convicted of crimes and serving their jail sentences, (C) the disruption of family ties, and (D) the exhaustion of assets, and the inability to get welfare while in pretrial detention.

The burdens to the accused and to the integrity of the judicial system may include (A) the impairment of the defense for the accused, because i) an accused is more effective in locating and persuading witnesses to testify than his attorney and is sometimes necessary for the finding of exculpatory evidence, ii) counsel cannot easily communicate with his client, iii) the accused is exposed to bad jailhouse advice by the police and prisoners, iv) an accused is unable to work and thereby choose his own counsel, and v) the accused is tempted into a hasty guilty plea or to insist upon an immediate trial in spite of the disadvantages flowing from hurried work by the defense counsel; (B) the guilty appearance that attaches to the accused's entry into the courtroom before the jury under a police escort, and; (C) the severance of important family ties and regular employment which may suggest to a court that this accused's prospects for rehabilitation through probation have been lessened. The statistical correlation between 1) pretrial detention and 2) conviction and prison sentence, which certain bail studies have noted, suggests that 1) detention and 2) conviction and prison sentence are causally related. Ralls, 32.

The Due Process clause of the Fourteenth Amendment provides a multi-pronged argument to the effect that the contemporary financial bail practice often denies the accused: 1) fundamental fairness because although he alleges he is innocent, he is being punished by incarceration before being convicted, 2) procedural due process because pretrial detention adversely affects the disposition of his case and thereby deprives him of a fair trial, 3) effective assistance of counsel because the defendant cannot aid in his own case preparation, and 4) the ability to make bail because the amount is excessive. See Foote, 1135. As to the fourth prong (the due process-excessive bail argument) in United States v. Lawrence, 25 Fed. Cas. 887, 888 (No. 15577 (C.C.D.C. 1835)) the Circuit Court implied in dictum that the Constitution forbade excessive bail and that to require bail greater than the accused could make would be to require excessive bail. However, few courts have followed the Lawrence dictum. More recently in Stack v. Boyle, 342 U.S. 1, 6 (1951) the Court implied in dictum that bail set in the average amount is reasonable and that individualization is required only for amounts greater than the average.

In addition, the equal protection clause of the Fourteenth Amendment is the basis for the argument that no man should be denied release because of indigence; that is, a man is entitled to release on personal recognizance unless the government overcomes heavy presumptions favoring freedom. This argument was presented in dictum in Bandy v. United States, 81 S. Ct. 197, 197-8 (1960). The Bandy case is the best indication to date that the equal protection philosophy of Griffin v. Illinois, 351 U.S. 12, 18 (1956)—which held that the denial to indigents of a free transcript on appeal was a denial of equal protection—might apply in the field of bail. Contra, Reeves v. State of Alaska, 411 P. 2d 212, 216 (Alaska 1966).
Proposal for ROR for Transient College Students

Objective

At present, the judiciaries of most college towns and urban centers with transient student populations have neither the manpower nor ready access to information on the majority of accused parties in order to rationally predict whether an accused will appear for trial, should a financial bond not be required.\(^{17}\)

The objective of this proposal is to ameliorate the economic and constitutional problems inherent in financial bail by assuring the courts that verified information as to the relevant factors of an accused's proclivities to appear at trial will be provided as a predicate for a more widespread release of the accused on his own word that he will return for all proceedings up to and including trial, that is, on his own recognizance\(^{18}\) (hereafter referred to as ROR).

\(^{17}\) The judge, at arraignment, knows the current charge and probably the accused's past record, if any. Ordinarily, there is no factual input to the judge concerning the character or financial condition of the defendant. On occasion an attempt is made to elicit such facts, but usually no inquiry is made. Whatever information may be present, even by the accused's attorney, is usually unverified. Moreover, the process may be even less personalized, since in many localities bail is set in reference to a pre-arranged schedule keyed solely to the charge involved. Paulsen, 113. The result is that bail is often set higher than is reasonably necessary to assure the appearance of the accused at trial. Ares, et al., The Manhattan Bail Project, 38 N.Y.U. L. Rev. 67, 71 (1963) [hereinafter cited as Ares, et al.].

\(^{18}\) The ROR doctrine has developed substantially from the 1936 case of McNair's Petition, 324 Pa. 48, 187 A. 498, wherein the magistrate's requiring no bail was held to constitute, without more, no offense or violation of his duties of office, although the practice was not recommended or encouraged.

The Manhattan Bail Project, the precursor of many successful projects, reported that during its first thirty months 2,300 of the accused who were evaluated to be good risks were released OR. Only one per cent failed to appear. The factors which have been utilized to determine whether the accused has sufficient community ties to be a good risk are as follows: 1) residence, 2) employment, 3) relatives in the area, and 4) any previous convictions. During the same period, about three per cent of a comparison group freed on financial bail failed to appear in court. Thus the project staff concluded that verified information about an accused's background is a more reliable criterion on which to release an accused than is his ability to purchase a bail bond. Ohio State Bar Service Letter, 2.

These projects have relieved the accused and society of the many burdens imposed when financial bail is the sole form of release. In addition, they have accommodated the constitutional arguments which militate against financial bail.

In the federal system Rule 46, Federal Rules of Criminal Procedure, and the Bail Reform Act of 1966 (18 U.S.C. §§ 3041, 3141, 3141-3143, 3146-3152, 3568) now provide that under certain circumstances the accused may be released on his personal recognizance or upon the execution of an unsecured appearance bond.

Several states have provided for release on one's own recognizance. Representative of these laws is the Ohio Rev. Code § 2937.29 (1965):

Release on own recognizance.

When from all the circumstances the court is of the opinion that the accused will appear as required, either before or after conviction, the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in section 2937.99 of the Revised Code. (emphasis added.)

Under the Ohio Rev. Code § 2937.99 (1965) the penalty for non-appearance is a misdemeanor where the release was on a charge of a misdemeanor and a felony where the charge was a felony.

In order to determine whether the statute is mandatory or permissive the term "may" must be construed. In statutory use the word "may" is generally construed to make the provision in which it is contained discretionary (Dennison v. Dennison, 185 Ohio St. 146, 134 N.E. 2d 574 [1956]), at least where there is nothing in the sense of the entire statute which requires a mandatory construction. State ex rel. John

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Such an effort could eventually cover all defendants within the jurisdictions. However, because of the possibilities of lack of initial manpower the project may be limited to the impecunious student and non-student defendant. Such an indigent would be defined as any party who by his own resources does not have the ability to make financial bail. In addition, initially the project may be limited to felonies or even only certain types of felonies.19

Both the local bar association,20 legal aid service, or other similar

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The term "may" has been declared to be mandatory where the due administration of justice requires it (Fugitt v. Lake Erie & W. R. Co., 287 F. 556 (1923)), or in order to give effect to the clear policy and intention of the legislature (State ex rel. John Tague Post v. Klinger, 114 Ohio St. 212, 151 N.E. 47 [N.D. Ohio 1926]), that is, where the legislature means to impose a positive and absolute duty. Cincinnati v. Roettinger, 105 Ohio St. 145, 137 N.E. 6 (1922).

The obvious purpose of this statute was to encourage the use of ROR by providing statutory sanction, since at the time of its enactment the Ohio legislature was aware of a successful experience in Toledo's experimental ROR project. Criminal Law Edition, 3 Ohio State Bar Association Service Letter 1, 3 (1965).

The use of the term "opinion" in the statute, in reference to the court's opinion, further indicates the intention of the legislature to make the operation of the statute discretionary.

Even though the effectuation of the statute may be discretionary (Harrington, Attorneys Conducting Criminal Defense Have New Duties to Client, 38 Ohio Bar 1309, 1310 [1965] [hereinafter cited as Harrington]), this does not ordinarily allow for willful or arbitrary action by the court, rather the court is regulated by established rules of law. Fessenden v. Fessenden, 32 Ohio App. 16, 165 N.E. 746 (1928). The established principles of law, in relation to release on one's own recognizance, would arguably be analogous to the statutory requirements for financial bail. Ohio Rev. Code § 2937.23 (1961), states that, "[i]n all cases [bail] shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial of the case."

However, in order to successfully gain reversal on appeal for abuse of discretion it must be shown that the attitude of the trial court was unreasonable, arbitrary or unconscionable. Lee v. Jennings Transfer Co., 14 Ohio App. 2d 221, 237 N.E. 2d 918 (1967).

The argument that the due administration of justice requires the statutory language to be construed as mandatory becomes cogent when based on the constitutional arguments of denial of due process and denial of the equal protection of the laws (see n. 16 supra) in conjunction with a viable bail project which will effectively provide the judge with verified information as to "all of the circumstances" of the accused's probabilities of appearing as required. Cf. Even if the statute would be construed as mandatory, verified information may be essential to ROR as indicated by Reeves v. State of Alaska, 411 P. 2d 212 (Alaska 1966), where the attorney for the indigent defendant, at 216, refused to submit facts for the trial judge to consider in determining whether the defendant should be released OR, but chose to assert, at 213 n. 4, the equal protection clause of the Fourteenth Amendment (as well as an Alaska statute and the Alaska Constitution) as entitling him to be released OR. The court, at 214, held that an indigent defendant does not have an absolute right to pretrial ROR. In addition, in Koen v. Long, 302 F. Supp. 1383 (E.D. Mo. 1969) the court, at 1391, stated: "No court has yet held that the Eighth Amendment or any other affords a basis for claiming a constitutional right to be released in any given situation without bail or on one's own recognizance."

19 Although the Manhattan Bail Project initially excluded certain categories of bailable offenses, soon they included all bailable offenses. Workshop: Establishing Bail Projects, 1965 U. Ill. L. F. 42, 48 (1965).

20 "Each jurisdiction should adopt procedures designed to increase the number of defendants released on an order to appear or on their own recognizance. Additional conditions should be imposed on release only where the need is demonstrated by the facts of the individual case. Methods for providing the appropriate judicial officer with a reliable statement of the facts relevant to the release decision should be developed." American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release 25 Approved Draft (1968) [hereinafter cited as Standards Relating to Pretrial Release].
organization, and the university, should have the requisite commitments to the total community to provide resources and guidance for the success of such a project.

**Methodology of Implementation**

Each locale must develop its own program molded by many variables. A paradigm is as follows:

1. Members of the local bar association or legal aid service, members of the general community, or university students may act as staff members. The university should provide the interviewers with training in the behavioral science aspects of interviewing and other interpersonal relationship training. The possibilities for the source of student staff interviewers should include law students and graduate students in such areas as psychology, sociology, and guidance and counseling, where the student would have developed a professional attitude toward such interviewing.

2. The staff member assigned to that shift will contact the county and/or municipal jails. The desk officer will inform the project worker of any newly incarcerated defendants.

3. Upon learning that an accused is incarcerated the staff member will proceed to the jail and record the defendant's previous criminal record and the current charge(s) against him.

21 The easiest purpose to recognize for the existence of the university is the transmission of knowledge. However, within this broad umbrella there is a "profound conflict between the view that the university exists to serve the present constitution of society and assure its maintenance and the view that the campus provides its most important contribution as a place of innovation and experiment." Monypenny, *University Purpose, Discipline and Due Process*, 43 N. D. L. Rev. 739, 739-40 (1967). Under either view, the university's participation in the ROR program should fit within its purpose.

22 The community of Athens, Ohio, with a non-student population of approximately 13,000 and an Ohio University student population of 18,000 is presently implementing a variation of the below mentioned program. Suggested procedural forms are available by writing to the author, Department of Business Law, Copeland Hall, Ohio University, Athens, Ohio 45701.

23 As in several other states, the Ohio Supreme Court has, by its Rules of Practice, made provisions whereby third year law students may be certified to act as legal interns and thereby may represent, under supervision, an indigent. *Rules of Practice of the Supreme Court of Ohio, Rule XVII A.*, 20 Ohio St. 2d xvii, xxxv (1970). Under this rule, legal interns have ready access to interviews with indigent clients.

24 Where the turn-key of the jail is uncooperative with a non-lawyer Data Verifier, "defense counsel may find it a part of his duty to assist his client in providing the interviewer with the information needed to make the determination as to whether or not release without bond is justified." "Protection of his client's financial interest, as well as the overriding interest in the client's personal freedom, will motivate the defending counsel." Harrington, 1310. This "duty" is reasonably easy to effect since the defense counsel's client has both a constitutional and statutory right to consult with his counsel.

In the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court at 339, stated: "The Sixth Amendment provides, 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.'" The Court at 342, further stated: "We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."

In *Powell v. State of Alabama*, 287 U.S. 45 (1932), the Court stated: "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, (Continued on next page)
If the record indicates that he is eligible for bail and the accused indicates that he would like to receive ROR, he will be interviewed by the staff member to determine whether he is a good risk, in that he has ties to the community and, therefore, will return for trial. The interview will take about fifteen minutes.25

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the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.” Further, in Spano v. New York, 360 U.S. 315, 325 (1959) (Douglas, J., Black, J., and Brennan, J., concurring), added: “Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”

In addition, there exists a statutory right in most states for a client’s consultation with his attorney prior to trial. The Ohio Revised Code provides several sections in point:

If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Whoever, being a police officer in charge of a prisoner, or the custodian of any jail or place of confinement, violates this section shall be fined not less than one hundred nor more than five hundred dollars or imprisoned not more than thirty days, or both. (emphasis added.)

§ 2935.20 (1965) Right to counsel.
After the arrest, detention, or any other taking into custody of a person, with or without a warrant, such person shall be permitted forthwith facilities to communicate with an attorney at law of his own choice who is entitled to practice in the courts of this state, or to communicate with any other person of his own choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. Such person shall have a right to be visited immediately by any attorney at law so obtained who is entitled to practice in the courts of this state, and to consult with him privately. No officer or any other agent of this state shall prevent, attempt to prevent, or advise such person against the communication, visit, or consultation provided for by this section.

Whoever violates this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days, or both. (emphasis added.)

§ 2937.03 (1961) Arraignment; counsel; bail.
After the announcement, as provided by § 2937.02 of the Revised Code the accused shall be arraigned by the magistrate, or clerk, or prosecutor of the court reading the affidavit or complaint, or reading its substance, omitting purely formal parts, to him unless such reading be waived. The judge or magistrate shall then inquire of the accused whether he understands the nature of the charge. If he does not indicate understanding, the magistrate shall give explanation in terms of the statute or ordinance claimed violated. If he is not represented by counsel and expresses desire to consult with an attorney at law, the judge or magistrate shall continue the case for a reasonable time to allow him to send for or consult with counsel and shall set bail for such later appearance if the offense is bailable. If the accused is not able to make bail, or the offense is not bailable, the court or magistrate shall require the officer having custody of accused forthwith to take a message to any attorney at law within the municipal corporation where accused is detained, or to make available to accused forthwith use of telephone for calling to arrange for legal counsel or bail. (emphasis added.)

25 Despite the attempt by the interviewer to avoid the subject, defendants sometimes allude to the question of guilt. The relationship between the interviewer and the prosecution therefore needs to be clarified in order to assure the defendant that the information he gives will not be used against him at trial. The same problem (Continued on next page)
A point system helps evaluate the answers to the questionnaire, and if the accused appears to be a good risk the above information is verified, where possible, by telephone.

For verification the staff members will only speak to those persons who the accused has agreed in writing should be consulted. The verification process will take about one hour.

If the case is still considered a good risk after verification, a summary of the information is taken to the court, where a recommendation that the defendant be released on his own recognizance is submitted to the judge. (Where a non-lawyer executes the verification process, perhaps a designated attorney should review the recommendation before it is forwarded to the judge.) The recommendation is not a public record.26

The court is, of course, free to accept or reject the recommendation for release OR.27

After a defendant is released OR, project staff members will notify him in writing of the date and location of subsequent court appearances. Often a friend or employer will agree to help get the defendant to court. If so, this person will be notified as well.

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### Academic Commitment as Community Tie

The traditional factors used in other bail projects for determination of community ties are 1) residence, 2) employment, 3) relatives in the area, and 4) any previous convictions. Such limited criteria, in general, will not make a transient college student a likely subject for ROR.

In order to make the transient college student a more likely subject for ROR the university may assist by creating particular community ties. Such community ties include allowing the student presently enrolled at the university to (1) consent in writing to have his academic and disciplinary records checked to ascertain his commitment to the university28 and (2) separately consent in writing to have all of his academic records and degree withheld until that student appears at trial.29 The consent to the holding of records will provide the student with three points on the evaluation form toward the minimum required five points, which is necessary before ROR will be considered to be recommended for the accused.

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The office of every college dean and the student activities offices will be informed of the necessity for the judiciary to have access to verified information on the student-accused.

The interviewer, upon being given the written consent of the student-accused, will present the written consent card to the office worker in any of the above appropriate offices. The office worker will have a particular form which the office worker will fill out based on the information in the student's files. The total points from this office form will then be computed by the office worker who will give the total to the interviewer and deposit the calculation form in the student's academic file. The interviewer will then record this total on the student-accused's consent card. The interviewer will never have actual knowledge of the facts on the accused's academic or disciplinary record. The interviewer will then total these points with any other points. The above procedure is in accord with both the legal guidelines and the words and spirit of most university policies on the confidentiality of student files.30

(Continued from preceding page)

<table>
<thead>
<tr>
<th>RECORD CHECK</th>
<th>Date</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNIVERSITY STUDENT CONSENT AND WAIVER FORM*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name of Student</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Last</td>
<td>First</td>
<td>Middle</td>
</tr>
</tbody>
</table>

SOLELY FOR THE PURPOSE OF VERIFYING THE FACTS WHICH I HAVE PROVIDED THE DATA VERIFIER, I KNOWINGLY AND VOLUNTARILY WAIVE MY RIGHT TO THE CONFIDENTIALITY OF MY UNIVERSITY ACADEMIC AND DISCIPLINARY RECORDS AND I KNOWINGLY AND VOLUNTARILY CONSENT TO HAVE MY UNIVERSITY ACADEMIC AND DISCIPLINARY RECORDS CHECKED BY THE BAIL PROJECT.

*To be filled out in duplicate.

Signature of Student ________________________________

29 Below is an example of a form for the student-accused's consent to have his records and degree withheld:

<table>
<thead>
<tr>
<th>RECORD AND DEGREE HOLD FORM*</th>
<th>Date</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Student</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Last</td>
<td>First</td>
<td>Middle</td>
</tr>
</tbody>
</table>

I AGREE TO HAVE MY UNIVERSITY ACADEMIC RECORDS AND DEGREE HELD BY THE UNIVERSITY UNTIL DISPOSITION OF THIS CASE IF I AM RELEASED ON MY OWN RECOGNIZANCE.

*To be filled out in duplicate.

Signature of Student ________________________________

30 Although college records may technically be kept by persons who are not public officers, they meet most of the tests of being public records. M. WARE, LAW OF GUIDANCE AND COUNSELING 41 (1964). However, the availability of public or quasi-public records for inspection by various individuals will be controlled either by common-law concepts or by statutes.

In the Matter of Thibadeau, No. 6849, decided by Ewald B. Nyquist, Acting Commissioner of Education, University of the State of New York, State Education Department (Sept. 22, 1960), the common-law right of inspection of pupil personnel records was extended to the student, or if the student was a minor, to his parent or guardian. The commissioner's holding indicated that state statutes making some reports privileged or confidential were not effective as to the student, his parents, or guardian, but it prevents disclosure to third parties.

Although there has been little legislation in regard to educational records, the Michigan, Oklahoma, and California statutes are typical of the few statutes which have been passed:

(Continued on next page)
Where, after verification, the case is considered a good risk and the judge releases the student-accused on his own recognizance, a copy of the court's journal entry recording such release will be sent to an appropriate university administrator, who will then process a hold procedure form. Copies of such hold form will be delivered to the appropriate university offices to hold the student's personal and academic records including his transcript, and to the student to confirm the hold on his records.

Upon the appearance of the student-accused at all proceedings up to and including trial, a copy of the court's journal entry recording such appearance (s) will be sent to the above mentioned university administrator, who will then process a release of hold restrictions form. Copies

(Continued from preceding page)


... nor to produce such records or transcript thereof, except ... with the consent of the person so confiding or to whom such records relate, if such person is 21 years of age or over, or, if such person is a minor, with the consent of his or her parent or legal guardian.

Oklahoma makes revelation of information about a child a misdemeanor (Okla. Stat. 70-6-16 [1949]).

California Education Code 10751 (West 1960).

No [person] ... shall permit access to any written records concerning any particular pupil ... to any person except under judicial process unless the person is one of the following (a) Either a parent or guardian of such pupil, (b) a person designated,—in writing by such pupil if he is an adult, or by either parent or guardian of such pupil if he is a minor.

The Model Code for Student Rights, Responsibilities and Conduct, Student Law Division of the A.B.A. 5 (1969) provided that, “[n]o information in any student file may be released to anyone except with the prior written consent of the student. ... [T]he conditions of access to each [academic and disciplinary record] should be set forth in an explicit policy statement [of the university]. ... Information from disciplinary and counseling files should not be available to unauthorized persons on campus, or to any person off campus without the express consent of the student involved except under legal compulsion or in cases where the safety of persons or property is involved.” Joint Statement of Rights and Freedoms of Students, 54 A.A.U.P. Bull. 258, 259 (June, 1968); A Statement of Rights and Responsibilities of College and University Students, 1 Human Rights 140, 151-2 (1970). Academic Freedom and Civil Liberties of Students in Colleges and Universities, American Civil Liberties Union (April, 1970) provided: “Access to student records should be confined to authorized university personnel who require access in connection with the performance of their duties. All persons having access to student records should be instructed that the information contained therein must be kept confidential, and should be required to sign and date their adherence to this procedure. ... Persons outside the university should not have access to student academic records without the student's written permission, or to any other records, except in response to a constitutionally valid subpoena.” See Strachan, Should Colleges Release Grades of College Students to Draft Board?, 43 N.D. L. Rev. 721 (1967).

In addition, it may be that students have rights of privacy declared by the Ninth Amendment or found in the “penumbras” of other constitutional provisions (Griswold v. Connecticut, 381 U.S. 479 [1965]) that the universities must respect.

The Initiation of HOLD form may contain the following provisions: “The Initiation of Hold Procedures requested by the office listed below will cause your records maintained in the Registrar's Office and in the Office of Student Affairs Records to be placed in an inactive status until the Hold has been released. This will result in the non-release of any information about your attendance, including the issuance of transcripts.

"To release the Hold on your records you must satisfy the requirements established by the office originating the Hold. The specific nature of these requirements may be obtained by contacting the office originating the Hold."

The RELEASE of Hold Restrictions form may contain the following provisions: “This notice is to certify that the student named below has satisfied the obligations for which a Hold had been placed on his records in the Registrar's Office and in the Office of Student Affairs Records.

"The issuance of this form indicates that the student is entitled to the privileges associated with enrollment provided he is eligible in all other respects."
of such release form will be delivered to the appropriate university offices to release the student’s personal and academic records, and to the student to notify him that such records have been released from hold status.

**University-Student Relationship After ROR**

The situation may occur where a student-accused, with full knowledge of the subject matter of the consent form, signs such consent form to have his records held, is released OR, and then does not appear for trial, but later requests that his records be released. Of course, the university must remain firm on its commitment to hold the records and degree. The thrust of such a decision by the administration of the university is that the consent agreement is effective to hold the student’s records unless and until either the student appears for all court proceedings up to and including trial, or a court order is obtained declaring the agreement void, voidable, unenforceable in law, or subject to injunctive relief.

Assuming the student elects to bring a court action for the release of his records, if he personally enters the state to bring such an action, the state authorities would probably assert jurisdiction over the student, arrest and try him for the original charge and the separate offense of bail-skipping. Nevertheless, he might bring a civil court action in a state court for the release of his records.

In addition, when the student is a citizen of a state other than the locus of the university, he might file an action in federal court asserting jurisdiction based on diversity of citizenship. It is difficult to conceive such a federal suit extending beyond the pleading stage because of the rapidly burgeoning abstention doctrines whereby a federal court in a diversity action may decline jurisdiction. However, assuming such a federal action could extend beyond the pleading stage, where the ground for recovery goes to the binding nature of a consent agreement, state substantive law will control.

33 If the student was a minor at the time of giving consent he may attempt to disaffirm his consent contract by mail or otherwise from outside the jurisdiction and request the release of his records.

34 The diversity statute, 28 U.S.C. §1332, purports to speak in very broad terms. If a suit is between citizens of different states, and the jurisdictional amount is satisfied, the district court has original jurisdiction. There are, however, limitations on the breadth of the jurisdiction thus seemingly conferred. The rapidly burgeoning abstention doctrines permit, and in some circumstance may require, a federal court to decline jurisdiction, or to postpone its exercise, even though the requirements of the diversity statute are satisfied. One such abstention doctrine is that a federal court should refrain from exercising its jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. Stefanelli v. Minard, 342 U.S. 117 (1951); Douglas v. City of Jeannette, 319 U.S. 157. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, §25 and §52 (1970); FED. R. CIV. P. 12(b).

35 In Erie Railroad Company v. Tompkins, 304 U.S. 64, 78 (1938) Mr. Justice Brandeis summarily stated the rule: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”
State Substantive Law

Sovereign immunity. The threshold problem to a suit brought under state substantive law is that, in many states, as in Ohio, the constitution recognizes that suits may be brought against the state only in such courts and only in such manner as may be provided by statutes. The common-law doctrine of sovereign immunity applies when the state is sued in contract or in tort in its own courts or in the federal courts.

If the university in question is a state-supported institution and the suit is against the university or its officer, as representing the state in action and liability where the state, though not a party to the record, is the real party against which relief is sought and where a judgment for the plaintiff, though nominally against the defendant as an individual, could operate to control the action of the state or subject it to liability, such a suit is treated as a suit against the state.

Despite the persistence of the doctrine of sovereign immunity in many states, an analysis of the ramifications of the consent agreement under state substantive law is provided in recognition of the shaky foundation of the doctrine of sovereign immunity which is based on the old common-law concept that assumes that the state will ever be ready and willing to act justly toward its citizens in the absence of statutes or the intervention of the courts.

Release contract. This agreement which is styled a “consent agreement” is, in effect, a release contract which releases the rights of the

36 Ohio Const., art. 1, § 16.


However, such statutes are narrowly construed. In Wolf v. Ohio State Univ., 170 Ohio St. 49, 162 N.E. 2d 475 (1959) the court refused to find consent to suit even though Ohio Rev. Code § 3335.03 (1953) provided that the Board of Trustees of The Ohio State University was empowered to “sue and be sued.” The court reasoned that since this section did not provide in what courts and in what manner suit could be brought against the Board, it was not the intention of the legislature to consent to suits being brought.


41 A release contract is a writing which is supported by a sufficient consideration and purports to be an immediate termination of the maker’s contractual rights. Restatement of Contracts § 402.

To constitute a valid contract there must be the following: 1) a meeting of the minds of the parties, 2) a legally sufficient consideration, 3) parties capable of contracting, and 4) a lawful subject matter.

The meeting of the minds, that is, assent, is usually expressed by an offer and an acceptance. Jacob v. Canine, 7 Ohio App. 268 (1917). The student-accused’s execution of the particular form and thereby making a consent promise to have his records held is an offer to the university, which offer is accepted by the university’s act of holding the records; a unilateral contract is thereby formed.

Legally sufficient consideration consists of a legal detriment to the promisee or a legal benefit to the promisor. Nott v. Johnson, 7 Ohio St. 270 (1857). The university will have provided legally sufficient consideration for the promise of the student (Continued on next page)
student to evidence of attending college if he does not appear for all proceedings up to and including trial.\footnote{42}

Since the parent (the father, and under certain circumstances the mother) of the infant is entitled to the services of his child,\footnote{43} the right of the parent to sue and recover based on infringement of that right will, of course, depend upon the existence of tortious conduct on the part of the defendant-university; that is, there must first be a tort for which an action might be maintained by the child before the parent’s right obtains.

Because this right of the parent is entirely distinct from that which may be maintained on behalf of the child, generally speaking, the parent must engage in a separate release agreement in order for there to be a bar to an effective suit by the parent for the loss of services of the child.

However, because of the old rationale that a separate action by the parent for the loss of services of the child due to wrongful exclusion from school cannot be maintained by the parent on the theory that the child alone is damaged,\footnote{44} it is doubtful that a parent may maintain an action for loss of services of the child due to the university’s holding of the student’s records and diploma.

$Duress$, $coercion$, or $undue$ $influence$. In relation to the “consent agreement,” the student might assert that it was obtained by duress, coercion, or undue influence.

Although the words “duress” and “coercion” are not synonymous, their meanings often shade one another\footnote{45} to the extent that the def-

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since the act of holding the student’s records is both 1) a legal detriment to the university-promisee in that the university was not previously under a legal obligation to hold the student’s records under these circumstances, and 2) a legal benefit to the student-accused-actee in that the student had no prior legal right to have the university hold his records under these circumstances. The student-accused will have provided legally sufficient consideration for the university’s act of holding his records since the student-accused’s consent promise to have his records held is a legal detriment to the student-accused-actee in that the student was not previously under a legal obligation to consent to have his records held under these circumstances.

In order for the parties to have the capacity to contract, they must have the ability to understand or agree. Hosier v. Beard, 54 Ohio St. 398, 43 N.E. 1040 (1896). Therefore, so long as the student has the ability to understand the nature of the attempted agreement he has the capacity to contract. Likewise, the university, through one of its authorized agents, has the capacity to contract. The university would have authority to enter into such a contract as a fulfillment of its educational purpose, which includes, where practical, expediting the student’s return to his academic pursuits so long as he is neither a danger to himself, the academic community, or the public in general.

There are no statutes or recognized public policies that militate against the lawful nature of the subject matter of the attempted contract. See Hendrickson Machine Co. v. Schumacher Co., 7 Ohio L. Abs. 732 (1929).

\footnote{42} A release may be subject to the happening of a condition precedent. Stowe v. United States Exp. Co., 179 Mich. 349, 146 N.W. 158 (1914).

\footnote{43} See OHIO REV. CODE § 2111.08 (1953).


\footnote{45} “’Duress’ generally carries the idea of compulsion, either by means of actual physical force or threatened physical force applied to the person to be influenced ... or reputation of such person. ‘Coercion’ may include a compulsion brought about by moral force or in some other manner with or without physical force.” McKenzie-Hame Co. v. Carbide, etc., Coro., 73 F. 2d 78 (8th Cir. 1934).
ition of duress in courts of law has been enlarged "to regard any transaction as voidable which the party seeking to avoid was not bound to enter into and which was coerced by fear of a wrongful act by the other party to the transaction." Furthermore, even though the statement is not strictly accurate, it has been said, "duress is but the extreme of undue influence," and, therefore, duress, coercion, and undue influence may be analyzed together as to certain of their mutual elements. In regard to the mutual element of pressure (for duress, coercion, and undue influence), the sole pressure that can effectively be asserted to have been in existence is that which normally and necessarily flows from incarceration, and not from conversation by an agent for the university or merely from that agent's presence. In addition, the requisite pressure does not exist since the student "really has a choice" among: 1) signing the consent agreement so that the university may be of assistance to the student in that he may more readily be considered for ROR, 2) hoping to be released OR based on his community ties independent of those ties which would be formed by the university acting on the execution of the consent agreement, 3) posting bond, or 4) remaining incarcerated. As to the mutual element of a wrongful act (for duress and coercion), where an agreement, such as this consent agreement, is formed pursuant to a state ROR statute and/or under the authorization of the local bar association it can hardly be argued to be wrongful.

Minority. Another assertion of the student in a court action might be that, due to his minority the consent agreement may be avoided. However, the minor's attempted disaffirmance should not succeed; that is, although the general rule of the jurisdiction may be that infants' con-

46 Williston on Contracts, Rev. Ed. § 1603.

47 Commercial Nat'l Bank v. Wheelock, 52 Ohio St. 534, 40 N.E. 636 (1895).

Where by virtue of the relation between them it is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable, as it deprives the other of his free agency. Peck v. Williams, 82 Ohio App. 35, 79 N.E. 2d 562 (1948).

In the absence of a relationship between the parties to a transaction which tends to give one dominance over the other, undue influence must generally be proved by the party setting it up and will not be presumed. Purdy v. Watts, 88 Conn. 214, 90 A. 936 (1914). When such a relationship of dominance of one party exists, however, as is ordinarily the case where there is a fiduciary or confidential relation between the parties it raises a presumption of undue influence and throws upon the dominant party the burden of establishing the fairness of the transaction and that it was the free act of the other party. Brown v. Canadian Indus. Alcohol Co., 209 Cal. 596, 269 P. 613 (1930).

48 It is neither duress nor undue influence when a party is constrained to enter into a transaction by force of circumstances for which the other party is not responsible. Stillman v. United States, 101 U.S. 465 (1879).

49 Joannin v. Ogilvie, 49 Minn. 564, 568, 52 N.W. 217 (1892).

50 The pressure must be wrongful. Connolly v. Bouck, 174 F. 312 (8th Cir. 1909). In order that a transaction may be avoided on account of duress or undue influence, it must appear that the consent of the student seeking to avoid the transaction was coerced; that is, that he was actually induced by the duress or undue influence to give his consent, and would not have done so otherwise. Towson v. Moore, 173 U.S. 17 (1899).
tracts are voidable, the public policy underpinnings of such a rule should disallow disaffirmance.\(^5\)

The policy reason for allowing disaffirmance is that the welfare of an infant is the law's first consideration, and it is the settled policy of the law to protect the infant against liability on his contracts, whether provident or improvident, on the theory that his mind and judgment are immature and that he needs to be sheltered from his own imprudent folly.\(^2\) There is a serious question whether the above policy reason should apply when a college-age student knowingly consents to a contract that is of vital interest to his well-being.\(^3\)

*University regulations.* Regardless of the peculiar facts that may surround the independent consent agreement, in many states where a student matriculates at a college or university, a contractual relationship is established under which, upon compliance with all the requirements for graduation, he is entitled to a degree or diploma. When a student is admitted to a private university he impliedly promises to submit to and be governed by all the necessary and proper rules and regulations which have been or may be adopted for the governance of the institution.\(^4\)

Although state-supported universities often assert the contractual relationship as a basis of the student-university relationship, such public institutions also have the delegated power of the state which allows the university authorities to make all necessary and proper rules and regulations for the orderly management of the institution.\(^5\)

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\(^{51}\) Cassella v. Tiberio, 150 Ohio St. 27, 80 N.E. 2d 426 (1948).

An infant may avoid a contract through a legal representative. Crockett Motor Co. v. Thompson, 177 Ark. 495, 6 S.W. 2d 834 (1928). However, since an infant cannot personally prosecute an action in court, an action on his behalf must be brought by a guardian ad litem. Irby v. Dowdy, 139 Ark. 299, 213 S.W. 739 (1919).

\(^{52}\) Mestetzk v. Elf Motor Co., 119 Ohio St. 575, 165 N.E. 93 (1929).

\(^{53}\) For example, where there is an obligation that is imposed by law, it is an exception to avoidance of contracts by infants. Such an obligation is imposed by Ohio Rev. Code \(\S\) 2937.38 which states that, in any matter in which a minor is admitted to bail, the minority of the accused shall not be available as a defense to a judgment against the principal or surety. The statute is not precisely in point; however, it is a close enough analogy to reveal a public policy behind the denial of the ability to disaffirm such a consent contract.

In addition, the following statement is a cogent reason for disallowing disaffirmance: "Such non-monetary conditions as constitutionally may be imposed should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication." Standards Relating to Pretrial Release 25-28.


In a case where an expelled student was refused a transcript of completed credits furnished to her, the court said that the action, based partly on contract and partly on duty from long recognized and established customs and usage, was within the province of equity and the court could grant relief. Strank v. Mercy Hosp., 383 Pa. 54, 117 A. 2d 697 (1955). However, the courts have held that the burden of establishing a breach of contract lies upon the student. Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928). In addition, the courts have permitted the institution to negate any implied rights of the student by an express statement in the publication. Robinson v. Univ. of Miami, 100 So. 2d 442 (Fla. 1958).

\(^{55}\) Pyeatte v. Board of Regents, 102 F. Supp. 407 (W.D. Okla.), aff'd without op., 342 U.S. 336 (1952). The Pyeatte case at 415, provided that regulations of the board of re-
The courts have generally employed the law of contracts to adjust student-school relations by enforcing the contractual terms which many universities have incorporated into their publications.56

Where the student has been found to be duly qualified under the university-student contract, and the issuance of a diploma depends upon ministerial acts, the performance of which are arbitrarily refused, it seems that mandamus will lie, even though the issuance of the diploma is not required by statute.57 Therefore, it would appear that where the student has, upon matriculation, contracted with his institution to the effect that the university need not grant a degree or diploma unless all the necessary and proper rules, including the separate ROR consent contract, are met, the granting of a degree or diploma where such ROR consent contract existed and the student did not appear for trial, would not be a ministerial act subject to mandamus.

Thus, if an explicit explanation of the nature and results of the consent form is included in the student handbook, the consent contract to hold all records may be binding58 even against attempted avoidance and will not subject the university administrator to a mandamus action.

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57 Such would be the case where the relator has complied with all the requirements and regulations entitling him to a diploma, and is unreasonably deprived thereof. Valentine v. Independent School Dist., 187 Iowa 555, 174 N.W. 334 (1919). See also State ex rel. Watkins v. Donahay, 110 Ohio St. 494, 144 N.E. 125 (1924).

58 Contra, Since the terms of the contract are dictated, the law of contracts of adhesion would provide the proper standard for interpretation. Accordingly, the burden of clarity as well as the burden of proof would be on the institution. As long as the institution prescribes the terms of the agreement, any ambiguity should be construed in favor of the student, just as any confusion in an insurance policy is resolved in favor of the insured or his beneficiary. Cf. Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 633 (1943).

In some circumstances a court might refuse to enforce certain "consent waiver" clauses on the ground that they are unconscionable or against public policy. Just as automobile warranty disclaimers have been held void in view of the importance of and need for the defense of the consumer, provisions of this kind might be denied effect because of the interest in and occasion for the protection of the student. At times, for geographical, financial, or other reasons a student seeking a college education may have no choice but to enroll at a university which includes a "waiver" clause among its regulations. In any case, he will almost certainly have insufficient bargaining power to obtain any other terms than those the school chooses to dictate. See Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1145-1147 (1968).

The doctrine of unconstitutional conditions limits the restrictions a university can place on a student's exercise of constitutionally guaranteed rights. It states that the enjoyment of a benefit or privilege provided by the government may not be conditioned upon the waiver or relinquishment of a constitutional right except where justified by an overriding societal interest. Applied to the educational context this means that once a state establishes a university, it may not condition attendance on the abandonment of constitutionally protected rights. Keyishian v. Board of Regents, 385 U.S. 589 (1967). Therefore, it can be argued that the constitutionally protected

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Fourteenth Amendment Due Process Clause

Since a college education is no longer regarded as a luxury for the fortunate few, but rather a necessity for the multitudes, the consequences for a particular student of the deprivation of evidence of attending college may be more grave than those involved in some criminal court proceedings.59 Furthermore, today, a tax-supported institution of higher education is considered a state governmental body; therefore, when a tax-supported university acts to the detriment of a student, that act may be such an injury that the "Constitution requires the act to be consonant with due process of law."60 That is, students are now declared to be "'persons' under [our] Constitution . . . possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."61 Therefore, the deprivation of attending college, especially by a state institution,62 may raise serious state and federal constitutional questions.

Jurisdiction. To determine whether a person can gain relief in federal court for the alleged deprivation of his civil rights one must look to the question of whether the Congress has provided the federal courts with jurisdiction to hear such cases. 42 U.S.C.A. § 1983 (Civil Rights

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interest in attending a state-supported university [see note 70 infra] cannot be conditioned upon a waiver of an equally important interest in access to evidence of such attendance in the form of his records and/or diploma, where the waiver supposedly comes into being merely by the student being admitted to the university, since the university administration has included a provision for a student to choose to have his records and diploma held to assist the student in receiving ROR. However, such an argument does not bear scrutiny. The only "contract" or regulation created in this regard, if any, is that if the student at some later time freely chooses to have his records and diploma held to assist him in receiving ROR the university will hold the records and diploma as the student and the university separately agree between themselves. Thus, it can hardly be said that there is an attempted waiver of a constitutional interest at the time of admission to the university.

60 Dixon v. Alabama State Bd. of Educ., 294 F. 2d 150, 155 (5th Cir. 1961) (Rives, J., majority opinion). "This opinion by judge Rives had the force of an idea whose time had come and it has swept the field." Wright, The Constitution on the Campus, 22 VAND. L. REV. 1027, 1032 (1969).
62 Thus far the "state action" doctrine has not been sufficiently developed to subject "private" colleges to the due process clause of the Fourteenth Amendment. Therefore, the private college cases are not determinative of the procedures required by a tax-supported institution, and the converse.

Otherwise "private" institutions have been found to be involved in sufficient "state action" to make them susceptible to the Fourteenth Amendment where there was one or a combination of the following: 1) state control, either financial, constitutional or legislative, 2) public function, or 3) state contacts. "Application of the doctrine has been limited to private institutions with a policy of racial discrimination. The courts have seemingly been reluctant to extend the doctrine to eliminate other kinds of activities that would be deemed unconstitutional if performed solely by the state. Two cases decided during [1968] serve to exemplify this reluctance." Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968) and Powe v. Miles, 407 F. 2d 173 (2nd Cir. 1968). Accord, Greene v. Howard University, 412 F. 2d 1128 (D.C. Cir. 1969). See Comment, Student Due Process in the Private University: The State Action Doctrine, 20 SYRACUSE L. REV. 911, 914-19 (1969); Comment, Judicial Intervention in Expulsions or Suspensions by Private Universities, 5 WILLAMETTE L. J. 277 (1969). Contra, the presence of government has so far penetrated, that few colleges are today wholly "private" in the sense of being altogether immune to the Fourteenth Amendment and the Bill of Rights. Van Alstyne, The Judicial Trend Toward Student Academic Freedom, 20 FLA. L. REV. 290, 291 (1968).

https://engagedscholarship.csuohio.edu/clevstlrev/vol20/iss3/9
Act of 1871) is the usual basis for a federal suit for declaratory and injunctive relief against the president and board of trustees of a state-supported university where it is alleged that, acting under color of law, they deprived the student of rights secured to him by the Constitution of the United States.63

The federal remedy (42 U.S.C.A. §1983) is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked.64

*Sovereign immunity.* The common-law doctrine of sovereign immunity has been held to apply in a suit brought under the Federal Civil Rights Act. Such was the case in *Corbean v. Xenia City Board of Education,*66 where, after a suit in the Ohio state courts against the school district for tort was dismissed because of sovereign immunity, an action was commenced in the federal district court. Federal jurisdiction was asserted by labeling the action one to redress deprivation of civil rights under 28 U.S.C. 1343 (3). The United States Court of Appeals for the Sixth Circuit affirmed the district court stating: "The decisions of the Ohio Courts in this litigation reaffirmed adherence to the doctrine of sovereign immunity, and found it applicable here. We follow Ohio law in this tort action unless such Ohio law offends federal law or the United States Constitution. [citations omitted.] We have held that Ohio's doctrine of sovereign immunity has not been abrogated by the Civil Rights Acts."66 (Emphasis added.)

In the *Corbean* case, a tort action was initiated in the state court. This cause was subsequently brought to the federal district court for the sole reason that sovereign immunity barred the action in the state court. However, in *Roth v. The Board of Regents of State Colleges*67 an action was initiated in the federal court alleging the deprivation of a *positive* constitutional right. The *Roth* court stated, in reference to the common-law doctrine of sovereign immunity, the reasons for the doctrine "do not support extending, nor have courts extended, the doctrine to shield officials from the type of equitable relief here requested."68

In addition, the *Roth* case made it clear that neither the Eleventh Amendment nor the doctrine of *Hans v. Louisiana* serves as a shield of sovereign immunity in an action for declaratory and injunctive relief in accordance with 42 U.S.C.A. §1983.69

*Substantive due process.* Assuming there is jurisdiction and no similar bar to a suit, substantive due process will not provide relief. This is, in part, because, although the interest, whether a privilege or a

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66 Id., 481.
68 Id., 975.
69 Id., 974-975.
right, to attend college, is vital, it is not a "fundamental personal freedom [race, religion, speech, association, self-incrimination, etc.] calling for application of the rule 'where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' But whatever the scope and derivation, it is such an interest that it may not be taken away under arbitrary, capricious or unreasonable standards; that is, although it is not a positive constitutional right, it does receive general due process protection.

Procedural due process. Likewise, such an interest may not be divested in an arbitrary, capricious or unreasonable fashion in regard to the procedure used.

Under the proposed ROR program, since both the standards and procedure for holding the student's records and diploma are rational and fair and clearly consented to, it will be upheld against an attack based on deprivation of general due process.

Conclusion

A ROR bail program which reasonably assures the appearance of the accused at trial, but allows him pretrial freedom without substantial financial loss is desirable, workable, and often necessary for the college-oriented communities. With the establishment of such a program, the arrested transient college student is simply provided limited community ties similar to those he would have in his home town.

70 Dixon v. Alabama State Bd. of Educ., 294 F. 2d 150, 156 (5th Cir. 1961).
73 The following cases deal with student discipline. However, the general principle regarding fairness may be analogous: "The only requirement necessary, so far as concerns a review of the matter in a court of justice, is that it shall not be so unreasonable and oppressive as to leave the conclusion of unfairness on the part of the teachers." Koblitz v. Western Reserve Univ., 11 O.C.D. 515, 524 (Cuyahoga Cir. 1961). Although (since Western Reserve University was a private school) there were no due process determinations, the Koblitz case still went off on the doctrine of reasonableness and fairness.

The case of Monroe v. Pape, 365 U.S. 167 (1961), made it clear that 42 U.S.C. § 1983 (1958) was to have a broad application, which indicated that it could now also be used as a basis of relief by a state university student alleging a denial of due process. Based on such statutory construction, the cases of Jones v. State Bd. of Educ. of and for the State of Tennessee, 279 F. Supp. 130 (M.D. Tenn. 1968), aff'd, 407 F. 2d 834 (6th Cir. 1969), cert. denied, 397 U.S. 31 (1970) and Norton v. The Discipline Comm. of East Tennessee State Univ., 419 F. 2d 195 (6th Cir. 1969) stated that the procedures afforded the students were both fair and reasonable and therefore did not deprive them of their due process rights.

74 Such a program may be a minimum necessity in reducing the schisms between and among the student, university administration, and non-university community subcultures, assuming such divisiveness to be caused, at least in part, by the duplicity of the theory of justice in the American legal system and its application, as perceived by the respective parties.