

## University of St. Thomas Law Journal

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Volume 4  
Issue 1 *Summer 2006*

Article 5

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2006

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### Bluebook Citation

J. Wes Kiplinger, Comment, *Defining Off-Campus Misconduct that "Impacts the Mission": A New Approach*, 4 U. St. Thomas L.J. 87 (2006).

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## COMMENT

### DEFINING OFF-CAMPUS MISCONDUCT THAT “IMPACTS THE MISSION”: A NEW APPROACH

J. WES KIPLINGER\*

#### I. INTRODUCTION

In 2000, Brigham Young University (Brigham Young) junior Julie Stoffer was chosen to appear as a cast member in the New Orleans season of the popular MTV reality show, *The Real World*. Brigham Young is a conservative university<sup>1</sup> founded on Mormon teaching with a strict honor code, forbidding members of the opposite sex from living together before marriage.<sup>2</sup> Ms. Stoffer was well aware of this policy and during her casting said, “I might even get kicked out.”<sup>3</sup> This statement proved to be quite accurate.

After the show finished taping, Brigham Young officials asked Ms. Stoffer to provide information about what type of behaviors she had engaged in while taping the show. She was suspended and four years later, expelled. Brigham Young informed Ms. Stoffer that her suspension and eventual expulsion was due to the fact that she had cohabitated with men.<sup>4</sup> In fact, she shared her bedroom only with other women. When this detail was pointed out to Brigham Young, the administration informed her that the decision would stand because she was “too well known” to be effective on campus.<sup>5</sup> A Brigham Young student stated that, as a result of Ms. Stoffer’s

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1. The term “university” is used in this paper generically, and includes all post-secondary institutions unless otherwise specifically noted.

2. See Brigham Young University, The Honor Code Office, Residential Living Standards, [http://honorcode.byu.edu/Residential\\_Living\\_Standards.htm](http://honorcode.byu.edu/Residential_Living_Standards.htm) (last visited Feb. 2, 2007). It is important to note that Brigham Young is a private university. The distinction between public and private post-secondary institutions is discussed *infra* Part III.A.1.

3. Vasugi V. Ganeshanathan, *Student on MTV Show May Face the Music*, CHRON. HIGHER EDUC. (Wash., D.C.), June 30, 2000, at A10.

4. Kent Larsen, *Stoffer, Parents Criticize BYU Following Suspension*, MORMON NEWS, July 31, 2000, <http://www.mormonstoday.com/000730/P2Stoffer01.shtml> (The expulsion letter stated, “[T]he reason for this action is your violation of the Honor Code, specifically your relationships with the opposite sex, including sleeping together with them on multiple occasions.”).

5. Charles White, *Living in the Real World: A Conversation with Julie Stoffer*, <http://www.p2pezone.com/REDESIGN/JulieStoffer.htm> (last visited Nov. 10, 2005).

behavior, “[Brigham Young] loses its function as a safe haven where you can go and study and not have to worry about temptations that would pull us away from our church standards.”<sup>6</sup>

One major issue facing university administrators, and the focus of this article, is how university administrators should determine what type of off-campus misconduct should be treated simply as students learning to get by in “the real world,” and what behavior is detrimental enough to require university response through its judicial processes.<sup>7</sup> Universities have long accepted the role of shaping tomorrow’s leaders. Inherent in that role is the obligation to discipline students for violations of rules promulgated by university administrators, as well as for violations of federal, state, and local law.<sup>8</sup> If misconduct occurs on campus-owned property, there is no question that it is squarely within the purview of a university to discipline the student. Questions arise, however, when student misconduct occurs off-campus. The code of conduct at most universities requires judicial involvement when the student’s off-campus behavior “impacts the mission” of an institution. Yet, administrators, such as those at Brigham Young, cannot clearly articulate what types of off-campus behavior will be deemed to impact the mission. Students, such as Ms. Stoffer, are unsure about how and under what circumstances the university may respond to her off-campus conduct.<sup>9</sup> This confusion between university and student is exacerbated by a state and federal court system that typically, but not always, defers to university judgment regarding such matters.<sup>10</sup>

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6. Larsen, *supra* note 4, para. 11. After her expulsion, Ms. Stoffer was inducted into President Bush’s Points of Light training course, which prepared her to serve as a role model and spokesperson on topics affecting today’s youth such as diversity, drugs and alcohol, conflict resolution, AIDS, STDs, and her commitment to sexual abstinence before marriage. Path-U-Find Communications, MTV’s Julie Stoffer, para. 3, <http://www.pathufind.com/julie.htm> (last visited Feb. 2, 2007). She has since worked with campaigns such as TRUTH, Great to Wait, and RESPECT, visited over 100 schools, churches, and events with her messages, and appeared in numerous publications, including *People Magazine*, *Newsweek*, and *USA Today*, and on such programs as *The View*, *Larry King Live*, *Politically Incorrect*, and *Men are from Mars, Women are from Venus*. *Id.* at paras. 3, 5.

7. Ben Gose, *Some Colleges Extend Their Codes of Conduct to Off-Campus Behavior*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 9, 1998, at A51 (“A 1997 survey of 520 members of the Association for Student Judicial Affairs found that more than three-quarters of the administrators work at a college or university that applies its code [of conduct] to off-campus conduct.”).

8. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 4.5.1 (3d ed. 1995).

9. Ms. Stoffer’s situation is a perfect example of this question and will be discussed and examined throughout this article. Hypothetical facts will be added to the scenario where appropriate; apologies to Ms. Stoffer.

10. The majority of cases discussed in this article were reviewed by the courts based on allegations of denial of due process, unconstitutionality of statutes, or students seeking injunctive relief from suspension or expulsion. A discussion of how university judicial actions become reviewable by state and federal courts is outside the scope of this article. For an overview of this topic, see generally K.B. Melear, *Judicial Intervention in Postsecondary Academic Decisions: The Standards of Arbitrary and Capricious Conduct*, 177 EDUC. L. REP. 1 (2003); James M. Picozzi, Note, *University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96

In an effort to alleviate confusion among university administrators, students, and the courts, this article sets forth a new approach for conceptualizing and defining what types of off-campus misconduct might be said to impact the mission. This approach requires the university to weigh and balance four factors, with three of the factors requiring the analysis of different sub-factors or prongs before an overall balance may be achieved. The factors include (1) the nature of the university, with particular emphasis on the dichotomy between public and private universities, the collegiate model, "town and gown" relations, and the overlap of the university judicial process and the criminal justice system; (2) the character of the actual student misconduct, including the proximity of the student misconduct to the university and the criminal nature of that conduct; (3) the character of the university's student body, which is based on the university's reputation, admissions standards, and types of degrees awarded; and (4) the extent to which courts impose liability on the university for the off-campus misconduct of its students.

Before examining each of these factors, it is important to understand how the issue of off-campus student conduct became muddied by the dramatic change from an *in loco parentis* doctrine to that of a mission driven doctrine.<sup>11</sup> Each of the factors previously mentioned will then be discussed and Ms. Stoffer's situation will be analyzed as an example of how university administrators should use this multi-factored analysis to clarify whether off-campus misconduct impacts the mission.

## II. HISTORICAL APPROACH TO OFF-CAMPUS MISCONDUCT

Unlike virtually every other area of law, courts tend to take a "hands off" approach when dealing with universities. The United States Supreme Court stated,

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>12</sup>

This sentiment has been echoed in many other judicial opinions and scholarly works.<sup>13</sup> Judicial deference to academic decisions is indeed an honor,

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YALE L.J. 2132 (1987); and Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359 (1987).

11. See *infra* Part II.A.

12. *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted).

13. See generally Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, As Shown By Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583, 584 (2004) ("Administrators in higher education enjoy unique judicial deference, recognized by the Supreme Court, when they are applying their educational judgment in situations

but it comes at a price: administrators' unsurety of how much control they may exert over the student body, especially in the area of off-campus misconduct.<sup>14</sup> Courts relied on the doctrine of *in loco parentis* before the 1960s, but more recently, courts have had to find other methods of analysis.

#### A. *In Loco Parentis Doctrine*

Historically, any and all off-campus misconduct was fair game for university involvement because universities maintained an *in loco parentis* relationship with students.<sup>15</sup> A special relationship was formed, creating a duty for the university to take charge of the students' conduct, whether or not the conduct in question actually affected the educational mission of the university. The courts of the early 20th century applied this doctrine in an exacting fashion, which led to results that our modern society would find absurd.<sup>16</sup> Courts of that era used the doctrine of *in loco parentis* to give judicial blessing to virtually any university decision to intrude into the private life of students. As one court stated,

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 could make 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.<sup>17</sup>

The doctrine of *in loco parentis* lost favor with the courts over time and was ultimately abandoned in the 1960s. This shift reflected the increasing rights society had bestowed upon students, including the passage of the Twenty-Sixth Amendment to the United States Constitution, which granted voting rights to persons eighteen and older.<sup>18</sup> The courts' favor of universi-

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involving college students."); Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004).

14. See KAPLIN & LEE, *supra* note 8, § 4.5.3 ("[T]he extension of a code [of conduct] to off-campus activity can pose significant legal and policy questions. . . . To avoid problems in this area, administrators should ascertain that an off-campus act has a direct detrimental impact on the institution's educational functions before using that act as a basis for disciplining students.").

15. *In loco parentis* literally means "in the place of a parent." BLACK'S LAW DICTIONARY 351 (2d pocket ed. 2001).

16. See, e.g., *Tanton v. McKenney*, 197 N.W. 510 (Mich. 1924) (female student disciplined for smoking in public and riding in a car seated on the lap of a man); *Carr v. St. John's Univ.*, N.Y., 231 N.Y.S.2d 410, 413 (App. Div. 1962) (students expelled for obtaining a civil, rather than a Catholic, marriage; university categorized such behavior as "seriously sinful"). For a more extensive list of cases, see Dale R. Agthe, Annotation, *Misconduct of College or University Student Off Campus as Grounds for Expulsion, Suspension, or Other Disciplinary Action*, 28 A.L.R. 4TH 463 (1984).

17. *Gott v. Berea Coll.*, 161 S.W. 204, 206 (Ky. Ct. App. 1913) (emphasis added).

18. *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) (noting other rights held by students, including: the right to drink alcohol in states with a drinking age of eighteen, the right to

ties controlling and disciplining students for misconduct that occurred outside the physical boundaries of the institution began to waver.<sup>19</sup> In a matter of decades, courts and universities alike were thrust into uncertainty concerning how society would categorize the relationship between student and university in the absence of the *in loco parentis* doctrine.<sup>20</sup>

### B. "The Mission" Doctrine

Uncertain of how to deal with litigation created by the civil unrest of the 1960s, courts developed new legal theories to substitute for *in loco parentis*.<sup>21</sup> This uncertainty prompted one district court to take action in helping to define the relationship between the university and its students.<sup>22</sup> Citing three major cases before the court concerning student discipline, violence on university campuses, and the need to develop uniform standards, the United States District Court for the Western District of Missouri, sitting en banc, issued a "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education."<sup>23</sup>

This decision rather explicitly defines the general lawful missions of public universities in a section plainly titled, "Lawful Missions of Tax Supported Higher Education."<sup>24</sup> Of the sixteen lawful missions defined by the court, four are relevant to this article:

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many, make a will, be a personal representative, serve as a guardian of the estate of a minor, gamble, practice veterinary medicine, drive ambulances, and join the military).

19. LUCIEN CAPONE III, NAT'L ASS'N of COLL. & UNIV. ATT'YS, JURISDICTION OVER OFF CAMPUS OFFENSES: HOW LONG IS THE UNIVERSITY'S ARM? 2 n.1 (2003) ("We agree with the students that the doctrine of 'In Loco Parentis' is no longer tenable in a university community; and we believe that there is a trend to reject the authority of university officials to regulate 'off-campus' activity of students." (quoting *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968))).

20. Even today, commentators are unsure of how to define the relationship between students and universities. See, e.g., Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator*, 23 J.C. & U.L. 755 (1997); Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485 (2003); Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829 (1997); Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991); K.B. Melear, *The Contractual Relationship Between Students and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J.C. & U.L. 175 (2003); Theodore C. Stamatakos, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471 (1990); Philip M. Hirshberg, *The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189 (1994).

21. *Bradshaw*, 612 F.2d at 139 (The panel characterized the campus revolutions of the sixties and early seventies as a "direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights.").

22. CAPONE III, *supra* note 19, at 3 ("However, the sheer number of cases coming before the courts during the Vietnam and civil rights protest era caused judges to rethink the issue.").

23. 45 F.R.D. 133 (W.D. Mo. 1968).

24. *Id.* at 137.

(3) to develop students to well rounded maturity, physically, socially, emotionally, spiritually, intellectually, and vocationally; (4) to develop, refine and teach ethical and cultural values; . . . (6) to teach principles of patriotism, civil obligation and respect for the law; and (7) to teach the practice of excellence in thought, behavior and performance.<sup>25</sup>

The panel determined that students automatically assumed an obligation to perform and behave within the guidelines reasonably imposed by the institution relevant to those lawful missions previously mentioned.<sup>26</sup> Further, the panel found that student discipline (aside from irrevocable expulsion) is a part of the teaching process.<sup>27</sup> To this end, the decision provided:

In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution. . . . Standards so established may apply to student behavior *on and off the campus* when relevant to any lawful mission, process, or function of the institution.<sup>28</sup>

### III. DEFINING MISCONDUCT THAT "IMPACTS THE MISSION"

Reviewing both cases decided and scholarly discussions that have ensued since the demise of *in loco parentis*, university administrators across the country took the decision of the District Court to heart. Currently, a university must show that the student's behavior negatively impacts the university's mission before disciplinary measures can be taken against the student.<sup>29</sup> This requires an answer to a further question: How should

25. *Id.* at 137-38 (The other lawful missions are:

(1) [t]o maintain, support, critically examine, and to improve the existing social and political system; (2) [t]o train students and faculty for leadership and superior service in public service, science, agriculture, commerce and industry; . . . (5) [t]o provide fullest possible realization of democracy in every phase of living; . . . (8) [t]o develop, cultivate, and stimulate the use of imagination; (9) [t]o stimulate reasoning and critical faculties of students and to encourage their use in improvement of the existing political and social order; (10) [t]o develop and teach lawful methods of change and improvement in the existing political and social order; (11) [t]o provide by study and research for increase of knowledge; (12) [t]o provide by study and research for development and improvement of technology, production and distribution for increased national production of goods and services desirable for national civilian consumption, for export, for exploration, and for national military purposes; (13) [t]o teach methods of experiment in meeting the problems of a changing environment; (14) [t]o promote directly and explicitly international understanding and cooperation; (15) [t]o provide the knowledge, personnel, and policy for planning and managing the destiny of our society with a maximum of individual freedom; and (16) [t]o transfer the wealth of knowledge and tradition from one generation to another.).

26. *Id.* at 141.

27. *Id.* at 142 (The panel concluded that irrevocable expulsion is merely the "determination that the student is unqualified to continue as a member of the educational community.").

28. *Id.* at 145 (emphasis added).

29. CAPONE III, *supra* note 19, at 9 ("It seems clear that colleges and universities have ample authority to exercise jurisdiction over off-campus student offenses so long as they can articulate some nexus between the offense and a vital interest of the university.").

universities determine what types of off-campus student behavior are relevant to the lawful mission, process, or function of the university, and what behaviors do not deserve university intervention? To answer this question, universities and courts should look to four major factors when defining what off-campus student acts "impact the mission." As previously stated, these four factors are: (1) the nature of the university; (2) the character of the actual student misconduct; (3) the character of the university's student body; and (4) the extent to which courts impose liability on the university for the off-campus misconduct of its students. Each of these factors will be discussed in turn.

#### A. *Nature of the University*

University administrators need to consider the nature of the university because each university is unique. No two universities share the same mission statement, student body, etc.; therefore, the types of off-campus behavior that may be deemed to impact a particular university's mission will vary from institution to institution.<sup>30</sup> The unique nature of each university is shaped by at least four sub-factors: the distinction between public and private universities, the collegiate model on which the university is based, the relationship between the university and the community in which it is located (commonly referred to as "town and gown" relations) and the overlap between the university's judicial processes and the justice system.

##### 1. *Public vs. Private*

The first sub-factor to consider is the distinction between public and private universities as public universities are required to adhere to the Constitution while private universities are not.<sup>31</sup> Public universities cannot pro-

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30. John Freidl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701, 724 (2000) ("The student conduct code should be integrated into the campus culture in a realistic and meaningful sense, not just paying lip service to the desires expressed in the institutional mission statement, but reflecting the actual implementation of that mission. A code should look very different for a small, private, residential, religious four-year liberal arts college than for a large, urban, public, commuter school.").

31. Administrators must bear in mind that, while the difference is mostly based on the classification of public versus private universities, it is not always such a clear-cut distinction. Due to government support and involvement in private universities, there is the possibility that a court may hold a private university to the standards of a public university; however, Supreme Court precedent indicates that chances of such a holding are slim. See KAPLIN & LEE, *supra* note 8, § 1.5.2. Also worth noting is that public universities are bound, albeit loosely, by the Constitution. Gen. Order on Judicial Standards of Procedure & Substance in Review of Student Discipline in Tax Supported Insts. of Higher Educ., 45 F.R.D. 133, 145 (W.D. Mo. 1968) ("It is not a lawful mission, process, or function of . . . [a public university] to prohibit the exercise of a right guaranteed by the Constitution or a law of the United States to a member of the academic community in the circumstances. Therefore, such prohibitions are not reasonably relevant to any lawful mission, process or function of [a public university]."); University May Discipline a Student for Off-Campus Misconduct Detrimental to University Interests, Subject to Constitutional Limitations, 74 Md. Op. Att'y Gen. 147 (1989) ("[A public university] may discipline a student for off-campus mis-



mulgate rules that would be in violation of a student's constitutionally protected rights. Private universities, however, can more easily regulate areas untouchable by public universities. Take, for instance, the case of Ms. Stoffer. Several private universities forbid men and women from living together off-campus.<sup>32</sup> A public university, on the other hand, cannot forbid a female student from living with a male student off-campus. Such a rule would clearly be a violation of students' constitutionally protected right to privacy.<sup>33</sup> If Ms. Stoffer had attended a public school, or had Brigham Young been found to be a "state actor," a court would have found her suspension and expulsion to be in violation of her constitutionally protected right to live with whomever she chooses. Private universities have greater power to restrict student behavior, however, their definitions of what type of off-campus conduct impacts the mission may be very different than the definition of their public counterparts.

## 2. Collegiate Model

The second sub-factor to consider is the distinction between institutions based on a traditional collegiate model (i.e., values-based residential institutions) and institutions based on the German university model (i.e., large universities with thousands upon thousands of students, faculty, and staff—the "multiversities") because this distinction has a direct impact on how students are treated by the administration.<sup>34</sup> There are certainly public universities that adhere to the small, residential model (e.g., Western Washington University),<sup>35</sup> and private universities that rival the size of large, public, land-grant institutions (e.g., New York University).<sup>36</sup> The small, residential universities are more likely to regulate off-campus behavior as they

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conduct detrimental to the interests of the institution, subject to the fundamental constitutional safeguards that apply to all disciplinary actions by educational officials."); Memorandum from Kathryn Benner, Legal Clerk, Cath. Univ. of Am., to Craig Parker, Gen. Counsel, Cath. Univ. of Am., *Public Universities Disciplining Students for Off-Campus Conduct* (July 23, 2003), available at <http://counsel.cua.edu/StudLife/resources/offcampusconduct.cfm>.

32. Note Book, *Woman Sues Thomas Aquinas College over Expulsion*, CHRON. HIGHER EDUC. (Wash., D.C.), July 25, 1997, at A41 (Surprisingly, Ms. Stoffer's case is not unique. In 1997 a female student was expelled from Thomas Aquinas College, a Roman Catholic institution. The student, Aliya Peerzada, had spent several nights with her fiancé at his off-campus apartment. Ms. Peerzada failed to acknowledge several warnings the university gave her, indicating that staying with her fiancé was a violation of the College's conduct code.)

33. 45 F.R.D. 133, 145 (W.D. Mo. 1968).

34. Jackson, *supra* note 20, at 1161 ("The most important issue is not whether a school is public or private, but whether it is a college or a university. . . . The two different models of higher education should be considered first in the resolution of any student-university dispute.")

35. See, e.g., Karen W. Morse, President, W. Wash. Univ., Office of the WWU President, Welcome to Western, <http://www.wvu.edu/president> (last visited Apr. 1, 2007) ("We combine the academic distinction and personal attention of a smaller, private college and the choices and variety of a comprehensive university.")

36. See, e.g., N.Y.U., Univ. Facts, <http://www.nyu.edu/about/facts.html> (last visited Jan. 28, 2007) (With an enrollment of over fifty thousand students, N.Y.U. is the largest private university in the United States.)

are both more interested in the character of their students, as well as more likely to know when a student has acted inappropriately off-campus (due to the fact that students are treated in a more personal fashion—a name rather than a number). On the other hand, a student at a multiversity may become "lost in the crowd," and his or her conduct is likely to go unnoticed due to the less personal attention given to each student which makes regulating off-campus misconduct more difficult. The distinction between small, residential universities and larger, less personal multiversities also calls into question the relationship between the university and the community in which it is located.

### 3. *Town and Gown Relations*

The third sub-factor to consider is the town and gown relationship between the university and the larger community because off-campus misconduct has a direct impact on this relationship. Any administrator will state that town and gown relations are an important consideration to any university.<sup>37</sup> The impact off-campus student behavior has on this relationship will vary depending on the strength of the relationship between the university and the community. Universities with close ties to the community will have greater incentive to discipline off-campus behaviors than universities with relatively few ties to the community. Universities in large metropolitan areas may not receive as much scrutiny from the community over its off-campus conduct policy, while universities in "college towns," where they are often the biggest business and largest employer, will certainly receive a great deal more feedback from the community. To illustrate this distinction, assume a student is arrested for underage consumption of alcohol and indecent public exposure and the university takes no action. If this hypothetical student went to New York University (NYU), citizens of New York City almost certainly will not be overly concerned that NYU has taken no action; presumably because such incidents are not uncommon in such a large city, and no one would recognize the student as a member of the NYU community.<sup>38</sup> On the other hand, if this hypothetical student went to the University of Wyoming (UW), citizens of Laramie would most likely *assume* that the individual in question was a member of the UW community, and would expect an appropriate response from UW officials.<sup>39</sup>

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37. LUCIEN CAPONE III, UNIV. OF N.C. GREENSBORO, *THE COLLEGE, THE COMMUNITY, AND COLLEGE STUDENTS: "WHEN WORLDS COLLIDE"* 1 (2001).

38. The author asserts that this statement is the norm for large universities in large cities, but there are exceptions. The University of Minnesota, Twin Cities has recently come under fire for failing to take action after receiving information that underage students were frequently seen drinking alcohol in a local pub. See *Did the U of M Already Investigate Allegations of Drinking at Blarney's?* (FOX 9 Investigators television broadcast Nov. 10, 2005), available at <http://www.kmsp.com/news/investigators/story.asp?1650092>.

39. Laramie, Wyoming, with a population of approximately twenty-five thousand, is the quintessential college town. UW has an enrollment of just over ten thousand (equal to forty per-

In 2004, students at Macalester College (Macalester) in St. Paul, Minnesota, blocked traffic on a large city street to protest the war in Iraq and the reelection of President Bush, prompting St. Paul police to handcuff two students.<sup>40</sup> No arrests were made and no criminal charges were filed. Macalester places a strong emphasis on supporting a respectful environment and holding students accountable for their personal choices and ethical behavior; therefore, one would think that blocking a major intersection during afternoon rush hour would be a textbook example of the type of off-campus behavior that strains town and gown relations, requiring university response.<sup>41</sup> The Dean of Students, Laurie Hamre, said that while the incident did anger some members of the community, no judicial action was taken.<sup>42</sup> Dean Hamre agreed that such incidents do tend to strain town and gown relations, but explained the community was well aware of the political involvement and activism of the Macalester community and takes such incidents in stride.<sup>43</sup> This situation also calls into question another aspect of town and gown relations—the relationship between the university's judicial system and the criminal justice system.

#### 4. *Overlap of University Judicial Processes and the Criminal Justice System*

When dealing with student conduct that occurs on-campus there is relatively little overlap between the university's judicial process and the criminal justice system. For instance, a university that disciplines a student for smoking marijuana in his or her dorm room may not always alert the local authorities to the incident.<sup>44</sup> When it comes to off-campus behavior, however, a student's actions have a greater chance of becoming involved in the criminal justice system. The focus of this sub-factor is whether the criminal justice system adequately addresses the interest of the university and

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cent of Laramie's population), and is the largest employer in the county with approximately three thousand five hundred employees.

40. Brent Hecht et al., *Anti-War Protestors Block Intersection*, THE MAC WEEKLY (St. Paul, Minn.), Nov. 5, 2004, available at <http://www.macalester.edu/weekly/110504/news01.html>.

41. Macalester Coll., Statement of Purpose & Belief, <http://www.macalester.edu/about/purpose.html> (last visited Jan. 28, 2007) ("Finally, students should be prepared to take responsibility for their personal, social and intellectual choices. . . . We are committed to helping students grow intellectually and personally within an environment that models and promotes academic excellence and ethical behavior."). In the interest of full disclosure, the author was formerly employed as a Residence Hall Director at Macalester College.

42. Interview with Laurie B. Hamre, Vice President for Student Affairs & Dean of Students, Macalester Coll., in St. Paul, Minn. (June 8, 2005).

43. *Id.* This is not to say that Macalester did not take *any* action. The student leaders of the protest did have discussions with administrators concerning the incident and ways to effectively voice frustration in a more productive manner. *Id.*

44. This is not to say that universities do not report such instances to the authorities. In fact, the Clery Act requires statistics of all criminal activity on and around campus to be reported annually. 20 U.S.C. § 1092(f) (2000), 34 C.F.R. §§ 668.41, 668.46 (2006).

whether university involvement would have educational value to the student.

The criminal judicial system is designed to punish, while the university system is designed to educate.<sup>45</sup> Therefore, when local authorities have instituted criminal action against a student, university administrators must ascertain if a university interest is implicated and, further, if there is any educational value in subjecting the student to the university's judicial processes in addition to the criminal charge. For instance, if a student is placed on criminal probation for illegal internet gambling, the university should analyze whether internet gambling implicates a university interest, and whether there is any educational value in placing the student on university probation in addition to the criminal probation.<sup>46</sup> Moreover, pursuing university judicial action in addition to criminal actions raises a host of other issues that fall outside the scope of this article.<sup>47</sup>

The University of North Carolina at Greensboro takes university action against a student's off-campus offense only when the action represents "grave misconduct that demonstrates flagrant disregard for the University community and poses a potential threat to that community."<sup>48</sup> Certainly, when the off-campus offense is serious (e.g., rape), the university should invoke its judicial process as rape implicates the interest of student safety. The university would also have a greater interest in educating the student on the effects of rape than the criminal justice system which is designed only to punish, not educate. On the other hand, if the offense is relatively minor (e.g., internet gambling), perhaps the university should defer to the criminal system. It does not seem that internet gambling seriously implicates a university interest. It would also seem that the student's contact with the criminal justice system (i.e., arrest, confinement, fines) would adequately educate her that internet gambling is illegal.

Administrators must also consider if action should be taken when a student's off-campus misconduct is not addressed through the criminal justice system. Take, for instance, the Macalester incident previously discussed. Macalester students blocking a busy intersection during rush-hour is a clear violation of law but also implicates Macalester's interest in maintaining strong town and gown relations with the community. The police declined to arrest the students, but Macalester administrators felt it was important to discuss both how the students' behavior had negatively impacted

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45. Gen. Order on Judicial Standards of Procedure & Substance in Review of Student Discipline in Tax Supported Insts. of Higher Educ., 45 F.R.D. 133, 142 (W.D. Mo. 1968).

46. CAPONE III, *supra* note 37, at 4. There is no implication of double jeopardy when universities take judicial action in addition to criminal action.

47. *Id.* (e.g., whether the cases may proceed simultaneously, issues of self-incriminations, delays in the criminal justice system, etc.).

48. *Id.* at 4-5 (citing the Student Conduct Code of University of North Carolina at Greensboro).

the university and how the students could voice their concerns in a more productive manner.

Macalester's approach of non-judicial resolutions for off-campus behavioral infractions appears to be the norm for most universities when those infractions are infrequent and relatively minor, but repeated negative off-campus behavior implicates universities' interests in a more powerful way. Due to the strain of repeated negative off-campus student behavior, some universities have been pressured by the community to take increased administrative involvement in off-campus behavior. Monmouth University, for example, has chosen to take an active non-judicial approach when it receives community complaints relating to excessive noise, property maintenance issues, and even minor issues such as parking violations.<sup>49</sup> When complaints are received, Monmouth administrators meet with students to discuss the complaint and develop strategies for preventing future incidents.<sup>50</sup> Repeated conduct or situations in which a student has received a police summons or citation or has been taken into custody, Monmouth warns, may result in judicial intervention.<sup>51</sup>

The State University of New York at Buffalo (UB) has also responded to repeated off-campus behavior, primarily intoxication and parties where alcohol is available to minors.<sup>52</sup> Citing over thirty parties which required intervention from the Buffalo police department, the Vice President for Student Affairs and the Associate Vice President for Campus Life wrote to students, "[I]t should be very clear to student party hosts and participants [that] the local police are prepared to take aggressive steps to enforce community standards in the neighborhoods surrounding the university. Please bear this in mind before engaging in any conduct that could threaten your campus or community career."<sup>53</sup>

The nature of the university is certainly a good starting point for any discussion regarding judicial intervention in off-campus misconduct. Public universities may not restrict off-campus behavior as much as private universities, while residential universities or large universities in rural areas may feel more pressure to intervene due to strained town and gown relations. Additionally, the nature of the university will have an impact on the overlap of two very distinct disciplinary systems.

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49. Monmouth Univ., Student Servs., Student Conduct Off-Campus, <http://www.monmouth.edu/student/campuslife/occs/conduct.asp> (last visited Jan. 28, 2007).

50. *Id.*

51. *Id.*

52. Dennis R. Black & Barbara J. Ricotta, Good Neighbor Letter (Apr. 4, 2005), <http://www.livingoffcampus.buffalo.edu/goodneighbor.shtml>.

53. *Id.* para. 7.

## B. Character of the Student Misconduct

The second factor university administrators should consider is the character of the student's off-campus misconduct. The spectrum of misconduct ranges from relatively minor infractions, such as parking violations, to seriously offensive behavior, such as rape or murder. When dealing with the nature of the off-campus behavior, administrators must consider what effect the misconduct has on members of the university which for minor offenses, will also be impacted by the proximity of the misconduct to the physical campus.

### 1. Effect of Misconduct on Members of the University

The first sub-factor within the character of the student misconduct is the effect the misconduct has on members of the university community. The Supreme Court, in *Goss v. Lopez*, stated, "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school."<sup>54</sup> In *Packer v. Board of Education of the Town of Thomaston*, a high school student was expelled after he was arrested for possession of two ounces of marijuana.<sup>55</sup> The expulsion was invalidated due to the fact that it was unconstitutionally vague as applied to the specific case.<sup>56</sup> Discussing whether or not drug possession impacted the educational mission, the Court stated,

We conclude, therefore, that a person of ordinary intelligence . . . could not be reasonably certain whether possession of marijuana in the trunk of a car, off the school grounds after school hours, is, *by itself and without some tangible nexus to school operation*, "seriously disruptive of the educational process."<sup>57</sup>

*Goss* and *Packer* suggest there must be a nexus between the off-campus student misconduct and the interests of the university (e.g., the educational process). Keeping in line with this pronouncement, courts have found that off-campus conduct such as sexual assaults<sup>58</sup> and stalking<sup>59</sup> create an automatic nexus that negatively impacts the mission. The nexus to the mis-

54. 419 U.S. 565, 582 (1975) (students appealed suspensions arguing a lack of due process).

55. 717 A.2d 117, 121 (Conn. 1998). Although this case involves a high school student rather than a university student, it does have implication for university administrators. See CAPONE III, *supra* note 37, at 3-4.

56. *Packer*, 717 A.2d at 121 (student appealed on basis that statute requiring his expulsion was unconstitutionally vague).

57. *Id.* at 134. The court also said, "[W]e recognize that [Mr. Packer] probably is a thorn in the side of the administration and that his conduct poses an all too familiar, and difficult, problem for school administrators." *Id.* at 135.

58. See generally *Fleming v. Reese*, No. CA-705, 1987 WL 15198 (Tenn. Ct. App. Aug. 7, 1987); *Ray v. Wilmington Coll.*, 667 N.E.2d 39 (Ohio Ct. App. 1995); *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002); *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117 (D. Me. 2004).

59. *Cooke v. Univ. of Tenn. at Chattanooga*, No. 88-80-II, 1988 WL 67169 (Tenn. Ct. App. June 29, 1988).

sion in the cases of sexual assault and stalking is the safety of the university community. Continuing this logic, cases of rape and murder would also create an irrefutable presumption that the misconduct impacts the mission of the university.

The nexus to a university interest becomes more flexible in areas such as drug possession. In addition to the *Packer* case, *Paine v. Board of Regents for the University of Texas System*<sup>60</sup> also found that drug possession did not implicate a university interest. Here, the court invalidated an automatic two-year suspension of a student after he was placed on probation for illegal use and possession of marijuana.<sup>61</sup> The university argued that drug users automatically posed a threat to other students due to the fact that they may attempt to persuade other students to use illegal drugs.<sup>62</sup> Rejecting this argument, the Court stated,

It may be . . . that most users of drugs or narcotics attempt in their social relationships to persuade non-users to sample the forbidden fruit. Certainly this is more likely to be true of one who sells these substances to others. But it by no means follows that every student convicted of a drug or narcotics offense falls into this category.<sup>63</sup>

While these two cases suggest that the institutions' policy toward off-campus drug possession was unwise, the expulsions were ultimately overturned because they were found to be in violation of the students' constitutionally protected rights.<sup>64</sup>

Other courts, however, have given the traditional deference due to a university's presumption that off-campus possession of illegal drugs negatively impacts the mission. In *Krasnow v. Virginia Polytechnic Institute and State University*,<sup>65</sup> the student argued that his subjection to the disciplinary committee based on mere possession of illegal drugs off-campus was an unconstitutional and irrebuttable presumption that drug possession negatively impacted the mission of the university.<sup>66</sup> The court rejected this argument, relying heavily on the Missouri District Court's General Standards.<sup>67</sup> The court found that university students "may be required to possess and exhibit superior moral standards," and concluded that the university was free to assume that off-campus illegal drug possession had a negative im-

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60. 355 F. Supp. 199 (W.D. Tex. 1972).

61. *Id.* (student appeal based on denial of due process).

62. *Id.* at 204.

63. *Id.* at 204-05.

64. *Id.* at 199 (denial of equal protection); *Packer*, 717 A.2d at 117 (expulsion statute unconstitutionally vague as applied to the facts).

65. 414 F. Supp. 55 (W.D. Va. 1976), *aff'd*, 551 F.2d 591 (5th Cir. 1977) (student appealed university action alleging a deprivation of constitutional right).

66. *Id.* at 56.

67. *Id.*

pact on the mission.<sup>68</sup> Relying on this rationale, the court in *Hart v. Ferris State College*<sup>69</sup> held that a university could discipline a student after she was arrested for selling cocaine.<sup>70</sup>

In light of these cases, it seems there is a balancing test at work. Where the safety of the student body is implicitly called into question (e.g., sexual assault) the nexus is irrebuttable. In the middle lie the cases such as drug possession, where courts may differ in finding a nexus to the university mission. At the far end of the spectrum lie cases that do not pose a threat to members of the university community.

The far end of the spectrum that does not implicate the safety of university students is represented in case law by *Reliford v. University of Akron*.<sup>71</sup> Here, a University of Akron student pled guilty to burglary and was subsequently dismissed as a student.<sup>72</sup> The student challenged his dismissal based, in part, on his contention that the person he burglarized was not a student and, therefore, the university could not reasonably say his conduct had a negative impact on the mission.<sup>73</sup> The court appeared willing to entertain this argument, but could not, as the issue was not properly preserved for appeal.<sup>74</sup> The court did leave the door open for future litigation by stating that the statute involved was intended "to permit state colleges and universities to deal with crimes perpetrated by students and staff *against fellow students and staff members*."<sup>75</sup>

At least one university, the University of Michigan, has taken the position that it will only address off-campus misconduct when it poses a specific threat to the members or property of the university.<sup>76</sup> When dealing with questions that surface when the conduct may or may not create an irrebuttable presumption of a nexus to the mission, administrators should consider the proximity of the misconduct to the physical campus.

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68. *Id.* at 57 ("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."). However, the court did note that off-campus drug possession seemed to have "little to do with university life." *Id.*

69. 557 F. Supp. 1379 (W.D. Mich. 1983) (student sought an injunction to prevent the university from holding a hearing, which she claimed would violate her right to due process).

70. *Id.* at 1380.

71. 610 N.E.2d 521 (Ohio Ct. App. 1991).

72. *Id.* at 522 (student appealed dismissal on the grounds that the statute at issue was unconstitutionally vague or overbroad).

73. *Id.* at 523.

74. *Id.*

75. *Id.* (emphasis added).

76. Friedl, *supra* note 30, at 701 (two students who pled guilty to embezzlement for theft of merchandise from a K-Mart not disciplined because it was not considered to be a threat to the university).



## 2. Proximity of Student Misconduct to Campus

The second sub-factor to consider is the proximity of the student misconduct to the physical campus. In 2001, the District Court for the Western District of Michigan had occasion to address issues of student safety after a student was suspended for participating in off-campus riots.<sup>77</sup> Relegating the discussion of the off-campus application of the code of conduct to a footnote, the court stated,

For example, if a student sold drugs across the street from campus, or committed arson one block from campus, such acts could certainly be taken into account in determining whether to retain a person on campus. These acts raise legitimate concern, even fear, as to the safety of the property and persons on campus—i.e., if he does it off-campus, he is as likely to do it on campus. Likewise, encouraging fires, rocking vehicles, and kicking telephone booths, even though occurring off-campus, shows a disregard for the property and safety of others that raises a legitimate concern as to the safety of the property and persons on-campus.<sup>78</sup>

Should university administrators focus on the qualifiers—“across the street” and “one block from campus”—as meaning that destructive off-campus behavior can be disciplined only if it occurs near campus? Or, should the focus be on the statement, “if he does it off-campus, he is as likely to do it on campus”? This uncertainty highlights the need for university administrators to thoroughly discuss the issue of proximity when deciding how far to extend the university’s jurisdiction.

It is impractical and unadvisable for a university to over-extend its jurisdictional arm. Aside from an increased amount of judicial cases (the thought of cases stemming from spring break alone is mind-boggling), it would be challenging for the university to show how the student’s misconduct meaningfully impacted the mission of the university. Additionally, universities must take into consideration their own liability in our litigious society (see discussion *infra* at Part III.D). The prudent course of action would be for the university to expressly limit its jurisdiction over off-campus misconduct to a certain geographical area. For example, the University of Toledo limits the application of its student code of conduct to “primary areas off-campus,” which it defines as those areas near campus patrolled by both a University of Toledo and a City of Toledo police officer.<sup>79</sup> Other universities avoid the issue by simply declining to extend their code of conduct to off-campus behavior—effective, but not a policy that lends itself to

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77. *Hill v. Bd. Trs. of Mich. State Univ.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001) (student appealed his suspension arguing procedural and substantive due process violations).

78. *Id.* at 627 n.2.

79. Univ. of Toledo, Student Conduct Brochure, Off-Campus Discipline, para. 3, <http://studentactivities.utoledo.edu/studentconduct/brochure/offcampusdiscipline.html> (last visited Jan. 31, 2007).

the presumption that the university is concerned about helping students learn to thrive in their environment, nor to enhance the town and gown relationships.

A number of universities have addressed the issue of proximity to campus only in relation to celebratory riots by including "riot acts" in the student code of conduct.<sup>80</sup> For example, at the University of Minnesota, Twin Cities (U of MN), students may be disciplined for participating or inciting riots, "in areas proximate to campus or in any location when the riot occurs in connection with or in response to a University-sponsored event."<sup>81</sup> Assuming Ms. Stoffer was a student at the U of MN and incited a riot in the streets of New Orleans after a U of MN vs. Louisiana State University (LSU) football game, it seems quite clear that the U of MN could take disciplinary action. On the other hand, if Ms. Stoffer participated in a riot due to a Northwestern University vs. LSU football game, the U of MN would be precluded from taking any disciplinary action against her based on its self-imposed jurisdictional limitations.

### C. Character of the Student Body

The character of the student body is a third factor in determining what type of off-campus misconduct will be deemed to impact the mission of a university. As the court in *Kusnir v. Leach* stated, "a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body."<sup>82</sup> While it is difficult to define precisely the character of a university's student body, administrators should begin by examining the university's reputation, admissions standards, and the types of degrees the university awards. These three sub-factors together provide a general starting point in determining what type of person the university seeks to have as a member of the student body.

Prior to *Kusnir*, universities primarily focused on the second and third "essential freedoms" of a university—what may be taught and how it shall be taught<sup>83</sup>—when determining what off-campus conduct negatively im-

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80. Laura Marini Davis, *Has Big Brother Moved Off Campus? An Examination of College Communities' Responses to Unruly Student Behavior*, 35 J.L. & EDUC. 153, 156 (2006). Incorporating "riot acts" into the student code of conduct is a growing trend most notably seen at larger universities such as the University of Minnesota and Ohio State University. In fact, these two schools, in conjunction with the Department of Justice, held a conference on celebratory riots in 2003. See Nat'l Conference Addressing Issues Related to Celebratory Riots, *Report of the Proceedings*, Nov. 20–21, 2003, available at <http://www.higheredcenter.org/violence/riots/proceedings.pdf>.

81. Univ. of Minn., *Inciting or Participating in a Riot*, Policy Statement, <http://www.fpd.finop.umn.edu/groups/ppd/documents/policy/riotpol.cfm> (last visited Apr. 1, 2007).

82. 439 A.2d 223, 266 (Pa. Commw. Ct. 1982) (student disciplined for attending an off-campus party uninvited and refusing to leave when asked to do so).

83. *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

pacts the mission. With this statement, the court has subtly called on universities to address the fourth essential freedom—who may be admitted to study.<sup>84</sup> University administrators should consider their university's admissions policy when defining what off-campus behavior will be considered to have a negative impact on the educational mission.

### 1. *University Reputation*

The first sub-factor that impacts the character of the student body is the reputation of the university because that reputation attracts a certain type of student. Choosing which university to attend is an extremely difficult decision, in which the reputation of the university plays a major role. As one reviewer noted, "A college is frequently selected by parents and students because of the special aura or quality of life on campus that distinguishes it from other institutions. Frequently, colleges are classified in the public mind and the media as liberal or conservative, religious or secular, party schools or intellectual bastions."<sup>85</sup> Moreover, a university admissions officer is likely to say that, when evaluating whether or not a prospective student should be offered admission, character counts.<sup>86</sup> It stands to reason that a university with a reputation as a conservative intellectual bastion will have a much different definition of what type of off-campus misconduct impacts the mission than a university with a party school reputation.

### 2. *Admissions Standards*

The second sub-factor that impacts the character of the student body is the admissions standards because these standards determine the composition of the student body. Universities frequently look to the past conduct of prospective students when deciding whether to accept them; however, some universities are more forgiving of character flaws than others. University administrators should look to the standards used for admitting a student, or withdrawing an offer of admission, when determining what types of off-campus behavior reflect negatively on the character of the student body. Administrators should ensure that the standards used in its judicial process are congruent with, and a logical outgrowth of, the admissions standards. Universities that are more forgiving of character flaws in the admissions process should be more forgiving in defining off-campus behavior that impacts the mission.

This can be demonstrated by examining the practice at several universities. In 1998, the University of Michigan at Ann Arbor (U of M) sus-

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84. *Id.* at 263.

85. Stoner II & Showalter, *supra* note 13, at 584.

86. Note Book, *College to Ask if Students Have Criminal Records*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 15, 1993, available at <http://chronicle.com/che-data/articles.dir/articles-40.dir/issue-04.dir/04a03703.htm>. As a spokesperson for St. Augustine's College says, "There's no reason to bring Jack the Ripper on campus just because he applied." *Id.* para. 2.

pending an incoming freshman after discovering that he had felony charges pending against him for allegedly having sex with three fourteen-year-old girls.<sup>87</sup> In the student's letter of suspension, the Vice President for Student Affairs wrote,

It has come to our attention that you may have been engaged in activities which call into serious question whether or not your matriculation at the University this fall poses a threat to the safety and welfare of other students and/or is appropriate in light of the University's standards for the judgment and character of incoming students.<sup>88</sup>

With such a strong stance against admitting a student who had only been accused of a crime, it stands to reason that the U of M would also deem similar behavior committed by current students to be of the type that impacts the mission.

Some universities are now asking students to provide documentation that they do not have criminal records before their applications will be accepted. Citing four incidents in which students were robbed, and one student who was arrested in connection with an off-campus murder, St. Augustine's College is asking for such documentation.<sup>89</sup> Harvard University, in 1995, retracted its acceptance of a female student after learning that she had "bludgeoned her mother to death with a candlestick."<sup>90</sup> This student was welcomed at Tufts University (Tufts), which noted that she had already been punished through the criminal system.<sup>91</sup> In 2005, Dartmouth College's Tuck School of Business (Tuck), decided to admit some of the one hundred and fifty students who had been accused of hacking into computer systems to determine their admission status.<sup>92</sup> Tuck determined that, while the hacking reflected negatively on the students' character, "the actions did not reach the level that would necessarily bar a person from being a valued member of the Tuck community."<sup>93</sup> The admitted students, however, will be "monitored and counseled," and the incident will be noted in their university files.<sup>94</sup> Carnegie Mellon, Harvard, Duke, and the Massachusetts Institute of Technology, on the other hand, rejected those students,

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87. See Gose, *supra* note 7; see also Friedl, *supra* note 30, at 712.

88. Gose, *supra* note 7. The student later pled guilty to conspiracy to contribute to the delinquency of a minor.

89. *College to Ask if Students Have Criminal Records*, *supra* note 86, paras. 1, 3.

90. Gose, *supra* note 7.

91. *Id.*

92. Bill Schackner, *Dartmouth Swims Against Tide, Will Admit Some Hackers*, PITTSBURGH POST-GAZETTE, Mar. 18, 2005, at B6, available at <http://www.post-gazette.com/pg/05077/473361.stm>.

93. *Id.*

94. *Id.*

characterizing the behavior as, “unethical at best—a serious breach of trust that cannot be countered by rationalization.”<sup>95</sup>

Should universities take an affirmative stance, thereby becoming guardians of student morality, when the student’s morality has already been called into question? Assume Ms. Stoffer was a student of Tufts when she was a cast member on *The Real World*. Further assume she was driving recklessly and accidentally struck and killed a pedestrian. Should Tufts address this conduct? Assuming Ms. Stoffer’s conduct was addressed through the criminal justice system, it would seem quite incongruent for Tufts to determine that her actions have had an impact on the mission. If Tufts will admit a student whose conduct is as heinous as bludgeoning a parent to death with a candlestick, then its stance toward what types of off-campus behaviors have a negative impact on the mission should conceivably be somewhat more forgiving than Harvard’s.

Universities that admit or provide continuing-education studies to students with criminal records will most likely want to think twice when deciding what off-campus conduct to address through the judicial process. The executive director of the Campus Violence Prevention Center at Towson State University stated, “We’ve all had murderers on our campuses if we have continuing-education studies.”<sup>96</sup> She went on to say that she would be hesitant to admit a convicted rapist, but noted that attending college can be beneficial to such individuals.<sup>97</sup> Aside from exponentially increasing the caseload of the hearing officers, it is hard to believe many university administrators would be excited about adjudicating cases of off-campus misconduct with methamphetamine dealers, child molesters, wife beaters, etc., simply because that student is taking one extended campus course. The focus of the off-campus behavior should be a reflection of the character of students the university serves, and it would be a stretch to hold students accountable for character flaws when the admissions office of the university has adopted a policy of admitting people whose character is obviously questionable.

### 3. *Degrees Awarded*

This incident highlights another sub-factor courts consider and administrators should take into consideration—the type of degree the student is

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95. Dan Carnevale, *Harvard and MIT Join Carnegie Mellon in Rejecting Applicants Who Broke into Business-School Networks*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 9, 2005, para. 5, available at <http://chronicle.com/cgi-bin/printable.cgi?article=http://chronicle.com/daily/2005/03/2005030901n.htm> (quoting Kim B. Clark, Dean of the Harvard Business School).

96. *College to Ask if Students Have Criminal Records*, *supra* note 86, para. 6.

97. *Id.* para. 7 (“There’s no easy answer. Colleges are not only a pathway to success; they are also a rehab means.”).

seeking, be it undergraduate, graduate, or professional.<sup>98</sup> The degree a student seeks carries with it the obligations of her chosen profession; therefore, a university should consider the types of degrees awarded and their professional obligations when considering how to define the character of the student body. As Fernand Dutile notes, "Many disciplines require performance well beyond that reflected on written examinations or term papers. Often this performance encompasses standards of conduct whose breach could also be seen as disciplinary."<sup>99</sup>

This reasoning carried the day in two important cases involving pharmacy students. In *Sohmer v. Kinnard*, a pharmacy student was dismissed from the University of Maryland School of Pharmacy after the student pled guilty to possession of cocaine.<sup>100</sup> The dismissal was also based, in part, on a finding that he functioned as an extern pharmacist while impaired as a result of the improper use of two prescription drugs.<sup>101</sup> Rejecting the student's argument that the phrase, "detrimental to the interests of the University community," was vague, the court bluntly stated, "It cannot reasonably be said that a 24-year-old student in his last year at a school of pharmacy is not aware that the illegal use and possession of narcotic drugs would violate the law and the Code of Ethics of his profession and would therefore be detrimental to the interests of the University."<sup>102</sup>

*Wallace v. Florida A & M University*<sup>103</sup> is another case in which the court was unsympathetic to the plight of an expelled pharmacy student. In this case, the student, Wallace, was arrested with approximately \$50,000 worth of cocaine and was charged with both intent to distribute, and carrying a firearm during the commission of a felony.<sup>104</sup> Not surprisingly, Wallace was expelled after his conduct was deemed to be a violation of the ethical standards expected of pharmacy students.<sup>105</sup> In addition to quoting *Sohmer*, the court noted that the hearing also referenced the fact that Wallace "had taken the jurisprudence and ethics courses at the university, a course which thoroughly familiarizes students with drug laws and a pharmacist's code of ethics, the summer quarter before his arrest and conviction."<sup>106</sup>

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98. Jackson, *supra* note 20, at 1163. Discussing how courts ought to distinguish between residential universities and 'multiversities,' Jackson stated, "A court should determine if the primary focus is on undergraduate education or postgraduate and professional programs." *Id.*

99. Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619, 632 (2003).

100. 535 F. Supp. 50, 51 (D. Md. 1982) (student appealed to the courts seeking an injunction to block his dismissal from the university).

101. *Id.* at 52.

102. *Id.* at 54.

103. 433 So. 2d 600 (Fla. Dist. Ct. App. 1983).

104. *Id.* at 601 (student appealed his dismissal from the university on the grounds that he was denied due process).

105. *Id.*

106. *Id.*

There are certainly professions that hold themselves to higher standards—lawyers, doctors, accountants, and, as discussed, pharmacists. If both the courts and the ethical boards of those professions hold members to a higher standard, then it stands to reason that universities may hold students to those higher standards on their academic journey to join their chosen profession. Surely, a university is better equipped to investigate incidents of student misconduct. A university would deal with such incidents shortly after their occurrence and is only responsible for its own students, while an ethical board, such as a board of law examiners, would not be made aware of the incident until years after the fact and is responsible for investigating the background of students from multiple universities.

The *Sohmer* and *Wallace* decisions suggest courts are willing to accept much more intrusion into a student's "real world" experimentation when that student is pursuing a professional degree. It does not follow, however, that such extensive intrusion would be warranted for a university that only awards undergraduate degrees. There is no code of ethics for German majors, for example, on which a university can reasonably rely. A caveat to this statement would be the undergraduate university that has pre-law or pre-med majors. There, the undergraduate degree would most likely be seen by the court as one step of the student's academic journey to join his or her chosen profession.

#### D. University Liability

The final factor university administrators should consider when defining the extent to which student codes of conduct will apply to off-campus misconduct is liability. Since the abandonment of *in loco parentis*, courts have typically been unwilling to hold universities responsible for off-campus injury. If located in a jurisdiction where the university may be liable for the off-campus injuries of its students, however, it logically follows that off-campus student misconduct will be much more likely to impact the mission. It would be a prudent course of action for university administrators to confer with their general counsel to determine the stance the courts have taken in their jurisdiction.<sup>107</sup>

The most often-cited case discussing university liability for off-campus student conduct is *Bradshaw v. Rawlings*.<sup>108</sup> In that case, an eighteen-year-old Delaware Valley College (Delaware) student was severely injured while returning from a university-sponsored, off-campus picnic. Two students returning from the picnic were involved in an auto accident, and as a result, Bradshaw was rendered quadriplegic. Bradshaw subsequently sued both the driver and Delaware for negligence and received a verdict in his

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107. See *supra* note 20 for an in-depth discussion of university liability.

108. 612 F.2d 135 (3d Cir. 1979).

favor.<sup>109</sup> Several facts of the incident were extremely favorable to Bradshaw: the picnic was sponsored by Delaware; flyers announcing the picnic featured drawings of beer mugs; and the flyers, and more importantly the beer itself, were paid for with Delaware funds.<sup>110</sup>

Delaware appealed the verdict and the Third Circuit reversed, stating, "the modern American college is not an insurer of the safety of its students."<sup>111</sup> Bradshaw's argument that any regulation imposing sanctions on underage drinking was sufficient to create such a duty was also rejected.<sup>112</sup> Bradshaw additionally argued that Delaware knew that underage students would drink beer and that this knowledge alone was enough to create a duty. The court rejected this argument as well, noting that many college students drink and that to impose a duty on colleges based on this fact alone would prove to be impossible.<sup>113</sup>

Based on the rationales employed by the *Bradshaw* court, and the number of other courts endorsing its view,<sup>114</sup> it would seem universities are fully insulated from liability, but nothing is ever quite so simple. In *Furek v. University of Delaware*, a case involving a hazing incident at a fraternity, the Delaware Supreme Court distinguished itself from *Bradshaw*, stating:

The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property. That duty extends to the negligent or intentional activities of third persons. . . . The likelihood of injury during fraternity activities occurring on university campuses is greater than the utility of university inaction.<sup>115</sup>

In a 2003 case, *McClure v. Fairfield University*, a Connecticut court also imposed liability on a university for an off-campus, alcohol related injury.<sup>116</sup> There, a freshman at Fairfield University (Fairfield) attended a private party at a beach near campus; the Fairfield administration knew that students frequently drank alcohol at the beach.<sup>117</sup> The student was struck by

109. *Id.*

110. *Id.* at 137. Interestingly, the kegs were purchased by the sophomore class president, who was not old enough to legally purchase alcohol. *Id.* Over the course of the evening, six or seven half kegs of beer were consumed by seventy-five sophomore students. *Id.* For the inquiring mind, six or seven half kegs amount to roughly thirteen to fifteen cans of beer per student.

111. *Id.* at 138.

112. *Id.* at 141 ("A college regulation that essentially tracks a state law and prohibits conduct that to students under twenty-one is already prohibited by state law does not, in our view, indicate that the college voluntarily assumed a custodial relationship. . . .").

113. *Id.* at 142 ("[T]his panel of judges is able to bear witness to the fact that beer drinking by college students is a common experience."). These esteemed judges must have indulged in unlawful behavior of their own while in college.

114. See CAPONE III, *supra* note 19, at n.20.

115. 594 A.2d 506, 522-23 (Del. 1991).

116. No. CV000159028, 2003 WL 21524786 (Conn. Super. Ct. June 19, 2003).

117. *Id.* at \*4.



a car while walking from the beach to the campus.<sup>118</sup> While Fairfield did not attempt to enforce its alcohol policy on the beach, the student government, responding to concerns of student safety, did provide a "Safe Rides" program, using Fairfield vans to transport students from the beach.<sup>119</sup> The court found that, due to the fact Fairfield knew underage drinking occurred at the beach and did nothing to enforce its alcohol policy, Fairfield had "indirectly encouraged students to go to the beach area in order to drink alcohol."<sup>120</sup> This, however, was not enough to create liability. The court, citing *Furek* and the Restatement (Second) of Torts (1965) section 323, found "the university, by offering the shuttle service, had assumed a responsibility for the safety of students while traveling between the beach area and the university campus. Under the circumstances, the university had a duty to protect students who traveled to and from parties at the beach area."<sup>121</sup>

Commentators suggest that cases such as *Furek* and *McClure* appear to be anomalies.<sup>122</sup> Pavela suggests that avoiding direct supervision of off-campus activities remains "legally prudent," but "educationally questionable."<sup>123</sup> Capone, however, references other scholars who question if such cases suggest an end to the courts' willingness to shield universities from liability.<sup>124</sup>

#### IV. ANALYSIS OF MS. STOFFER'S CASE USING THE NEW APPROACH

Ms. Stoffer's situation is both a perfect example of the need for a new approach in defining off-campus misconduct that impacts the mission, as well as how these factors might be weighed and balanced. Would this approach have changed the outcome of Brigham Young's decision to suspend and eventually expel Ms. Stoffer? Unfortunately, the answer is most likely, "no." While no single factor should be considered determinative, the balance still favors Brigham Young.

Regarding the first factor, the nature of the university, the weighing of the sub-factors favors Brigham Young's decision to expel Ms. Stoffer. Brigham Young, as a private university, may liberally restrict the activities of its students. While the enrollment population of thirteen thousand students would tend to suggest a large multiversity university model, Brigham Young adheres to the residential model, with a focus on developing student

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118. *Id.* at \*1 (The driver of the car was another Fairfield student who had also been drinking. The case does not elaborate on the injuries the student received.).

119. *Id.* at \*4.

120. *Id.* at \*7.

121. *Id.* at \*8.

122. See CAPONE III, *supra* note 19, at 6; Gary Pavela, *Today's College Students Need Both Freedom and Structure*, CHRON. HIGHER EDUC. (Wash., D.C.), July 29, 1992, at B2.

123. Pavela, *supra* note 122.

124. CAPONE III, *supra* note 19, at 6-7 ("[C]ommentators William Kaplin and Barbara Lee have questioned whether dicta in certain recent cases may be signaling the end of courts' willingness to let colleges and universities off the hook so easily.").

"faith, intellect and character."<sup>125</sup> And although Ms. Stoffer's actions occurred in a different state, Brigham Young may argue that those actions affected town and gown relations in that they were televised and may point to the student who stated that Ms. Stoffer's actions harmed Brigham Young in some way.<sup>126</sup> Balancing these three sub-factors, it seems to favor defining Ms. Stoffer's behavior as that which would impact the mission.

The second factor, the character of the actual misconduct, favors inclusion of Ms. Stoffer's behavior as that which impacts the mission. Although her conduct took place in a different state and did not involve any type of criminal action whatsoever, that alone is not determinative of the issue. Brigham Young might argue that, because her conduct was televised, Ms. Stoffer's actions were felt in the community as if she had done them across the street from campus or even on the campus itself, assuming Brigham Young students are allowed to watch television in the residence halls.

Analysis of the third factor, character of the student body, also suggests that Ms. Stoffer's conduct be deemed to impact the mission. Brigham Young is a conservative religious university that "provides an outstanding education in an atmosphere consistent with the ideals and principles of its sponsor, The Church of Jesus Christ of Latter-day Saints."<sup>127</sup> While the information available does not indicate the behavior Brigham Young based its expulsion on, it is interesting to note that the admissions standards of Brigham Young are based on ecclesiastical recommendations and service to the community, school, and church, among other things.<sup>128</sup> Again, the statement made by a Brigham Young student concerning Ms. Stoffer's conduct suggests that her conduct was not congruent with the character of Brigham Young's student body.

Unlike the previous three factors, the liability that Brigham Young faces in Utah would suggest that Ms. Stoffer's conduct should be excluded from the definition of conduct that impacts the mission. The Supreme Court of Utah has held that a university is not liable for a student's off-campus misconduct.<sup>129</sup> Therefore, Brigham Young would rarely face liability for the off-campus conduct of its students.

Even though the fourth factor, university liability, favors Ms. Stoffer, analysis of her situation under this newly articulated test does not change the outcome of Brigham Young's decision to expel Ms. Stoffer. As a pri-

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125. BYU, About BYU, Gen. Info., <http://unicomm.byu.edu/about/factfile/?lms=1> (last visited Feb. 4, 2007).

126. Larsen, *supra* note 4.

127. BYU, *supra* note 125.

128. BYU, About BYU, Admissions Policy, [http://unicomm.byu.edu/about/factfile/admissions\\_policy.aspx?lms=21](http://unicomm.byu.edu/about/factfile/admissions_policy.aspx?lms=21) (last visited Feb. 4, 2007).

129. *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986) (female student became intoxicated and fell off a cliff during a required class fieldtrip). *See also* *Webb v. Univ. of Utah*, 125 P.3d 906 (Utah 2005) (student was injured when he slipped and fell on an icy sidewalk while on a required class fieldtrip).

vate university, Brigham Young was free to restrict Ms. Stoffer's conduct. The character of Ms. Stoffer's conduct did impact the Brigham Young community as evidenced by statements made by members of the student body. Brigham Young determined Ms. Stoffer's conduct was not congruent with the character of its student body or the teachings of The Church of Jesus Christ of Latter-day Saints.

While the outcome of Ms. Stoffer's situation would not have been changed had Brigham Young used this new approach to define off-campus misconduct, the events leading to the expulsion of Ms. Stoffer may have unfolded differently. Had Brigham Young clearly articulated its position concerning Ms. Stoffer's participation in *The Real World*, Ms. Stoffer would have had a better understanding of how her conduct would affect her standing as a student. Both Brigham Young and Ms. Stoffer would have also avoided the confusion that must have ensued in the four years between her suspension and expulsion.

## V. CONCLUSION

Courts have been, and will continue to be, supportive when universities apply student codes of conduct to off-campus behavior and will virtually always defer to university decisions regarding what types of conduct are deemed to negatively impact the educational mission of the university. Scholars have said that the Supreme Court's deference to educational judgment involving college students is an honor.<sup>130</sup> While it may indeed be an honor, it has created a great deal of confusion among university administrators and students when it comes to what types of off-campus student misconduct will be deemed to impact the mission.

To avoid further confusion on this issue, university administrators should begin conceptualizing and defining off-campus misconduct that impacts the mission with this newly articulated approach which is based on issues that both the courts and universities have identified as important in the university-student relationship. When considering the nature of the university, courts have made a distinction between public and private institutions. Also important to this factor is the collegiate model on which the university is based, the current quality of the university's town and gown relations, and the overlap of the university's judicial process with the criminal justice system. Courts have also commented on the gravity of the student conduct in regard to the safety of other students and university property. Considering this factor, administrators should discuss how the proximity of the conduct may affect the safety of students and property.

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130. Stoner II & Showalter, *supra* note 13, at 617 ("It is an honor for college administrators that the Supreme Court has selected higher education as the one unique community in our society eligible for such judicial deference. Like all honors, it comes with a responsibility. The responsibility is a challenge to all those working in higher education: use your educational judgment carefully, deliberately, and often.").

Character of the student body is yet another factor courts feel administrators must protect. It would be almost impossible for administrators to articulate the character of the student body without reference to the university's reputation, admissions standards, and types of degrees it awards. Finally, university administrators must be aware of the amount of liability that courts will require the university to bear. After all these factors and their individual components are considered and balanced, the only thing left to do is to clearly communicate the resulting policy regarding off-campus student conduct to the students so they can see that the university is simply trying to help them live and learn in the real world.