

University of Hawaii at Manoa

School of Law

MEMORANDUM

May 6, 1974

TO: Members of the Law School Community

FROM: Dean Hood

On Monday morning, April 22, I received a document which asked, on behalf of a majority of the present class, that Professor Hopkins be relieved of his present teaching assignment and that he be prohibited from assuming any future teaching responsibilities at this school. In support of such a request it was asserted that Professor Hopkins "is an incompetent teacher" and various premises for that conclusion were specified. In turn, Professor Hopkins has requested that I reject such a call for his removal from teaching and that I give early and like circulation to an expression of confidence in his motives, integrity and competence.

These competing requests, and the respective judgments upon which they rest, touch the heart (in both the functional and metaphorical sense) of the School. They come at a time when every member of this community, student and faculty alike, has expended near full measure of intellectual and emotional energy upon an arduous journey through our first academic year. Extraordinary demands have been made upon everyone; they have been met with high achievement and abiding good will under the most trying of circumstances. We have all had to treat as "trifling" conditions of work and study which ill befit a graduate school. In addition, we now find ourselves at the point in the school year which is invariably typified by a combination of high anxiety and debilitating fatigue. In short, there are ample reasons to explain a diminution (if not loss) of understanding, good will and perspective at a time and under circumstances in which all are needed in some abundance.

We are also members of a law school community without a history. Several consequences flow from that fact, not the least of which is that we are faced with a multitude of important unsettled issues, all of which we are resolved to

address as matters of first impression. In turn, we find ourselves -- of necessity -- treating those issues without benefit of either established precedent or fully developed procedures. The problem at hand, serious and demanding under the best of circumstances, has unquestionably been exacerbated by the lack of guidance a history would have given us. It is important, therefore, to not only resolve the present dispute, but to set out carefully the operative principles pertinent to the resolution of like problems in the future.

I

There is a rich and varied range of graduated responses which a Dean may draw upon to remedy deficiencies of faculty performance. They run the gamut from consultation and advice to the preferment of formal charges leading to dismissal. Intermediate strategies include measures which extend from persuasion to coercion in an effort to change and improve behavior. Representative devices include adjusting the curriculum or altering course schedules in order to insure that no student is required to take coursework from such a teacher. Understandably, the functional solutions which are available short of dismissal increase as the curriculum expands and the faculty grows. It is also usually the case that a faculty member who experiences difficulty in a particular course is willing, if not eager, to opt for a more productive setting elsewhere in the curriculum, once he or she concludes that the problem cannot be solved other than at high personal and institutional expense. Again, the opportunity to work such voluntary solutions is constrained in a less than full program.

At the lower end of the scale of responses, the faculty can and should play an important role. Even though it lacks formal power to impose its will on a colleague with regard to method of course presentation and examination, its power to shape and influence performance is substantial. Professional teachers expect such guidance; it is their entitlement, as well as a prerogative of their colleagues. If a faculty feels that its persuasion is insufficient to remedy a problem about which they remain concerned, they can be expected to take the matter to the Dean with an appropriate recommendation. If, in their

judgment, the Dean fails to take corrective action upon their urging, they are free to (and, given requisite seriousness, obligated to) take the matter to his -- and their -- administrative superiors in the University.

The high end of the scale of available responses is represented by the institution of formal dismissal proceedings.* There are special attributes, consequences and costs which necessarily attach to the invocation of so severe a response. The academic rules of this (and every other) University, the requirements of academic freedom and attendant procedural safeguards promulgated by the American Association of University Professors (and expressly subscribed to by the Board of Regents of the University of Hawaii) and, not least of all, the guarantee of due process contained in the Fourteenth Amendment all require formal notice of the charges, presentation of evidence, right to counsel and cross-examination, decision by peers, and review by higher authority. It is in the nature of such proceedings that they are adversarial and lengthy. They inevitably, whatever the outcome, bring injury to both the institution and to the professional involved. It would be irresponsible, therefore, to hastily invoke the ultimate sanction of dismissal, with all its attendant costs, without first exhausting every fair opportunity to remedy professorial deficiencies. It would, on the other hand, be equally irresponsible to fail to seek the imposition of such a sanction once I am satisfied that a remedy cannot be effected. I do not conclude that such a case is at hand.

II

I have the benefit of a wealth of information, unusual in its amount and specificity, regarding the past and present competence of Professor Hopkins, both as a teacher and as a scholar. This information includes high estimates of competency, creativity and productivity from a wide spectrum of fellow professionals, ranging from former colleagues to

*Total prohibition of teaching is not a remedy which falls short of and which may, therefore, be treated differently than dismissal. The opportunity to meet students is, by definition, an integral part of the work of a faculty member hired as a teacher/scholar. He or she may not be denied that opportunity without invocation of the formal procedures associated with dismissal.

Members of the Law School Community
May 6, 1974
Page 4

Deans of national law schools, who were familiar with his views about law, the legal system and legal education. Predictions about Professor Hopkins would bring thoughtfulness, creativity and -- to recount a word often used -- brilliance to our important and demanding venture have found validation in his important and influential contributions to the development of our program. The national recognition which the school has already received, and in which we can all take pride, is attributable in large measure to the reputation for creativity which Professor Hopkins brought to Hawaii and which finds expression in our program.

I have also had the previous benefit of -- and reviewed carefully -- course evaluations of former students of Professor Hopkins at a first-rate national law school. I have also received, of course, and studied with even more attention, your written evaluations from Professor Hopkins' first semester course. The rule of confidentiality we have adopted regarding such communications prohibits me from divulging (or even characterizing) the content of the evaluations. They are intended as a vehicle for the candid expression of your encomiums, concerns and suggestions for improvement. They have not been solicited to be ignored -- nor have they been, unless one insists that dismissal is the only appropriate response to the range and weight of opinion received. The concerns you have expressed have engendered appropriate concern of my own. Even more importantly, they have (as I hope you would expect) given rise to concern in Professor Hopkins, leading to his own resolve to fairly address your concerns and, to the extent amenable to his influence, alter any and all classroom conditions which lead to dysfunction.

Opinions differ about the degree to which class conditions can -- and have been -- altered. The only point upon which there seems to be unanimity, including Professor Hopkins, is that his class has not, by far, functioned as well as it could and should. Findings of fault have been urged upon me which would fix exclusive (or, at least, predominant) "blame" on one or the other side of a severely troubled classroom relationship. A breach -- described by some as "irreparable" -- has unquestionably occurred. In my judgment the causality of the breakdown has

Members of the Law School Community
May 6, 1974
Page 5

involved many participants and has been interrelated and interactive.

The bond of a teacher and a class, often (as in this case) imposed on each, is a relationship as sensitive and imponderable as other human and organizational relationships; it is perhaps more delicate than most. Everyone who has met classes knows that both success and failure is near inexplicable. The quality of the first hours (if not minutes) of class, the particulars of this or that exchange, alterations of innumerable variants in both classroom presentation and participation, all converge in not only the tone, but the success, of a class or a course. It is in recognition of such variation that judgments of competency should fairly be made over a decent range of experience; professionals should ultimately be judged and reputations should be earned on the basis of consistent performance, whether good or ill. This is no less true of law professors than lawyers.

The accumulation of all of the information I have described above, as well as lengthy conversations with Professor Hopkins regarding his own estimates of the facts and his resolve to do all within his power to eliminate learning dysfunction, lead me to confidence that he -- and we -- will enjoy the benefits of lively, vibrant and productive class experiences in which he will, as he has recently himself pledged, "earnestly attempt to create an anxiety-free atmosphere conducive to learning."

In that venture he will need your equally earnest collaboration. Just as I have eschewed the opportunity to specify Professor Hopkins' fault in the breakdown of the class relationship, I shun, for the same reasons, specifying my estimate of yours -- or, for that matter, my own in preventing a rupture. None of us can find room for great pride. What we can and should look for -- and must all insist upon -- is evidence of renewed willingness to create and nurture a productive atmosphere in the School. I find cause for optimism in the fulness of my knowledge regarding Professor Hopkins' work and his motives, as well as in his response (joined by Professor Miller) to your expressed concerns regarding the Comparative Decision-Making Processes course.

I find cause for optimism in the expressions of student understanding which have come to me in fair number during the past two weeks, as well as in the mode of your own participation in Professors Hopkins' and Miller's current course. In turn, I hope that you can find in this memorandum sufficient cause to place value upon my own expressions of resolve not to sacrifice students -- or professors -- or the welfare of the School -- to unnecessary harm, whatever the cost of remedy.

III

We of the legal profession have a reputation, which in my judgment is deserved, for possessing a special capacity for dispassionate analysis, a clear-eyed regard for the facts, an open-minded willingness to look at a problem for every side, a human historical perspective that enables us to perceive problems in their full context, a nose for detecting trouble in advance, and a talent as conceptual architects to design imaginative adaptations to head it off.

Bayless Manning

Finally, I would observe that the present dispute can be viewed as having put into question the ability of the members of a law school community to communicate, reason and problem-solve, even in the heat of controversy. The problems are by no means yet solved; variants will unquestionably occur in the future. We will all have need and opportunity to develop, improve and broaden our abilities to respond productively to new challenges to our precious and delicate educational environment.

I do not agree with those who feel that conflict within an academic community -- particularly one in which many of the members are self-selected by virtue of a propensity to (at least) verbal aggressiveness -- is a mark of failure. I am more prepared to argue that it is a sign of vitality. I would press such an argument even with regard to the dispute at hand, were it not for some of the forms in which the conflict

Members of the Law School Community
May 6, 1974
Page 7

was cast and the (often early) rigidity of positions taken on various sides. The fact that the dispute has now hardened into the positions described in the first paragraph of this memorandum is, to me, a greater measure of collective failure than the fact of the conflict.

We must continue to seek ways of maintaining vigorous debate about everything we do, with productive instead of disruptive effects. We all have much to learn about how to do this. A cessation of communication and a retreat to fixed positions, preparatory to frontal attack, befits those whose tastes run to war and bloodshed. As Bayless Manning instructs above, lawyers are supposed to have a richer and more productive arsenal of responses to disagreement -- and even to passionate, open conflict.

It is for these reasons that I intend to use every means at my disposal to improve and maintain fruitful multilateral communication among all of us, despite disagreements which most certainly will occur on a regular basis. I also intend to use every means at my disposal to restrain anyone, faculty or student, whose purpose or behavior threatens disruption or other injury to this communication process. In sum, I intend to promote in every possible way the free and uninhibited exchange of competing ideas which is the hallmark of every good academic institution. This will require of some of us changes of both behavior and previous modes of communication. At best, it will not provide a quiet life for any of us. But it will, I hope, keep us from stagnant tranquility, at one extreme, and the degeneration of debate into invocations of power, at the other.

David Hood