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Fourteenth Amendment and University Disciplinary Procedures, The

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THE FOURTEENTH AMENDMENT AND UNIVERSITY DISCIPLINARY PROCEDURES

I. INTRODUCTION

It is a time-honored maxim that educational institutions must necessarily exercise a great deal of discretion in the governance of students. But a recent shift in the judicial attitude toward some aspects of the relationship between the student and the university has resulted in the imposition of fourteenth amendment limitations on the traditional independence of university disciplinary authority.

The development of most immediate impact has been the requirement that fundamental procedural safeguards be afforded the student threatened with expulsion or suspension from a state university for a disciplinary violation.[1] This response is laregly the result of recognition by the courts that the student's interest in being allowed to remain at the university is worthy of procedural due process protection. An additional development of potentially greater significance is the indication that the courts will take jurisdiction when there is an unreasonable interference by the university with the exercise by students of constitutionally protected freedoms.[2] This article will discuss first the jurisdictional theory which has brought the state university student's interest within the protection of the fourteenth amendment, and secondly the elements of procedural due process applicable to university disciplinary proceedings.[3]

II. THE JURISDICTIONAL THEORY

A. *The Nature of University Authority and the Reluctance of the Courts to Interfere*

The authority of the governing boards of state universities to prescribe and enforce rules and regulations is conferred by state constitutional provisions

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1. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

2. Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967). *Cf.* Soglin v. Kauffman, 37 U.S.L.W. 2357 (W.D. Wisc. 1968); Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968); Buckley v. Meng, 35 Misc.2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962); Egan v. Moore, 20 App. Div.2d 150, 245 N.Y.S.2d 622 (1963), *aff'd,* 14 N.Y.2d 775, 199 N.E.2d 842, 250 N.Y.2d 809 (1964); Tinker v. Des Moines Independent Community School Dist., 383 F.2d 988 (8th Cir. 1967), *cert. granted,* 390 U.S. 942 (1968).

3. There are many current questions relating to fourteenth amendment rights of students which are beyond the scope of this comment. *E.g.,* May the university discipline a student for off-campus activities unrelated to his academic life? Is the student subjected to double jeopardy when he is disciplined by the university for conduct which is also punishable under state or municipal law? Must the rules and regulations of a university prescribe with specificity the conduct which shall be punishable by the university? Will the requirements of due process, substantive and procedural, be extended to private universities under the expansive concept of "state action"? For materials dealing with these questions see the bibliographies at 45 DENVER L. J. 612-13 (1968) and 54 CALIF. L. REV. 175-78 (1966).

or by statute.[4] The authority to regulate student conduct may be implied if not made express, and the term "inherent" authority is also frequently employed to describe a source of university authority to govern students.[5]

The inevitable reluctance of the courts to interfere with the authority of the university to govern its students received justification in several early theories of the relation of the student to the university. A precept the courts found handy was that the university, state-operated or private, stands in the place of the parent as to the moral and disciplinary training of the student and that the courts have no more authority to interfere than they would have "to control the domestic discipline of a father in his family."[6] The majority of the courts, therefore, found judicial abstention warranted by noting that the regulation of a university is a job entrusted to the expertise of peculiarly qualified officials who should not be unduly hampered in the exercise of their discretion.[7]

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4. *E.g.,* Mo. CONST art. IX; § 172.100, RSMo 1959. *See* Ray, *Powers and Authorities of the Governing Boards of State Colleges and Universities,* 17 KY. L.J. 15 (1928).

5. Goldstein v. New York Univ., 76 App. Div. 80, 78 N.Y.S. 739 (1902); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, *cert. denied,* 319 U.S. 748 (1942); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Jones v. State Bd. of Educ. of and for State of Tenn., 279 F. Supp. 190 (M.D. Tenn. 1968). The courts treat the concept of "inherent authority" as distinct from authority which is implied from a statute or constitution. The notion appears to have deep historical roots. *See, e.g.,* King v. Chancellor of Univ. of Cambridge, 6 T.R. 89, 106, 101 Eng. Rep. 451, 460 (K.B. 1794). *Cf.* Morris v. Nowotny, 323 S.W.2d 301 (Tex. Civ. App. 1959).

6. State *ex rel.* Pratt v. Wheaton College, 40 Ill. 186, 187 (1866). *See also* Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); John B. Stetson Univ. v. Hunt, 88 Fla. 510, 516, 102 So. 637, 640 (1924); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations,* 2 LAW IN TRANS. Q. 1, 3 (1965).

The doctrine of *in loco parentis* was originally used primarily as a defense in suits involving potential tort liability of school teachers when administering some type of corporal punishment to young students. Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 755-756 (W.D. La. 1968). It is clear that the doctrine retains no vitality today as to university students, having been repudiated as inapplicable in several recent decisions. Goldberg v. Regents of Univ. of Calif., 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967); Zanders v. Louisiana State Bd. of Educ., *supra*; Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Jones v. State Bd. of Educ. of and for State of Tenn., 279 F. Supp. 190 (M.D. Tenn. 1968); Soglin v. Kauffman, 37 U.S.L.W. 2357 (W.D. Wis. 1968).

7. *E.g.,* Woods v. Simpson, 146 Md. 547, 126 A. 882 (1924); Samson v. Trustees of Columbia Univ., 101 Misc. 146, 167 N.Y.S. 202 (Sup. Ct. 1917); Jones v. State Bd. of Educ. of and for State of Tenn., 279 F. Supp. 190 (M.D. Tenn. 1968). It is clear, of course, that the courts will not interfere where the discretion of an instructor in evaluating a student's *academic* performance is involved, except where a student could establish manifest malice or bad faith. Connelly v. University of Vermont and State Agric. College, 244 F. Supp. 156 (D. Vt. 1965); Wright v. Texas Southern Univ., 277 F. Supp. 110 (S.D. Tex. 1967), *aff'd,* 392 F.2d 728 (5th Cir. 1968).

The primary reason for the reluctance of the courts to interfere has been described as a fear of undermining the institutional authority and autonomy of the university. *See Developments—Academic Freedom,* 81 HARV. L. REV. 1045, 1148 (1968); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for Uni-*

The biggest obstacle to judicial review, however, was the view that the student had no "right" which was deserving of protection by the courts from unreasonable treatment.[8] For many years it was so clear to the courts that the student's interest in receiving an education was a mere privilege or benefaction that the applicability of federal or state due process requirements was not seriously considered. Hence, the only rights of the student capable of enforcement were those specifically provided for by statute[9] and those which could be found to exist under the student's "contract" with the university.[10] The method by which the contract approach was often employed to secure independence from judicial review is well illustrated by the 1926 case of *Anthony v. Syracuse University*.[11] A co-ed was informed that she had been dismissed from the University but was given no definitive reason for the punishment.[12] The University's defense to her action for reinstatement was that she had contracted away her right to object to an expulsion without cause when she had signed a waiver agreement[13] upon her entrance. The decision

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versity Disciplinary Proceedings, 53 MINN. L. REV. 301, 315 (1968). For a general discussion of reasons for judicial abstention see Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

8. *See* Hamilton v. Regents of Univ. of Calif., 293 U.S. 245 (1934); Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959). *Cf.* State *ex rel.* Sherman v. Hyman, where the court stated that the student had a "qualified property right," but one which is not protected by the fourteenth amendment. 180 Tenn. 99, 111, 171 S.W.2d 822, 826-7 (1942), *cert. denied*, 319 U.S. 748 (1943).

9. A few cases have dealt with a dismissal or suspension of a primary or secondary school student in violation of statutory procedural requirements. *E.g.*, State *ex rel.* Crain v. Hamilton, 42 Mo. App. 24 (1890), involving the construction of the Missouri statute conferring upon school boards the power to suspend, "whenever, upon due examination, they become satisfied that the interest of the school demands such expulsion." *Id.* at 31.

10.

> The relationship existing between the university and the student is contractual . . . there is implied in such contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued as a member thereof.

Goldstein v. New York Univ., 76 App. Div. 80, 83, 78 N.Y.S. 739, 740 (1902). *See also* John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); People *ex rel.* Cecil v. Bellevue Hospital Medical College, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct.), *aff'd mem.*, 128 N.Y. 621, 28 N.E. 253 (1891); Koblitz v. Western Reserve Univ., 21 Ohio C.C. R. 144, 11 C.C. Dec. 515 (1901); Frank v. Marquette Univ., 209 Wis. 372, 245 N.W. 125 (1932).

11. 224 App. Div. 487, 231 N.Y.S. 435 (1928), *aff'g*, 130 Misc. 249, 223 N.Y.S. 796 (1927).

12. She was advised that the "school authorities had heard rumors that she had caused trouble in her sorority house." 224 App. Div. 487, 489, 231 N.Y.S. 435, 437 (1928).

13.

> Attendance at the University is a privilege and not a right. In order to safeguard those ideals of scholarship and that moral atmosphere which are in the very purpose of its foundation and maintenance, the University reserves the right, and the student concedes to the University the right, to require the withdrawal of any student at any time for any reason

of the lower court to nullify the waiver for policy reasons[14] was reversed on appeal. The appellate court found that the waiver simply meant that the student need not be given a reason for the dismissal. Since the student plaintiff had the burden of proving a breach by showing that her dismissal was not related to legitimate university objectives,[15] and since she could make no such showing, the decision of the lower court had to be reversed. Another well known early case held that the student could be dismissed even though guilty of no "overt act, if he is not in accord with [the university's] standards," where the student had impliedly agreed to such a regulation.[16]

Since no state had by statute imposed restrictions on the freedom of disciplinary activity by the state university, and since the courts generally drew no distinction between state universities and private universities, the state university student generally found himself in the same position as the student at a private university.[17] It gradually became the position of a majority of the courts that there was a condition implied in the contract that the student would not be dis-

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deemed sufficient to it, and no reason for requiring such withdrawal need be given.

130 Misc. 249, 257, 223 N.Y.S. 796, 806 (1928).

14. The provision was held repugnant and void because it was deemed lacking in mutuality and fairness. 130 Misc. 249, 223 N.Y.S. 796 (1927).

15.

The University may only dismiss a student for reasons falling within two classes, one in connection with safeguarding the University's ideals of scholarship, and the other in connection with safeguarding the University's moral atmosphere. When dismissing a student, no reason for dismissing need be given . . . [although the] reason must fall within one of the two classes mentioned above.

224 App. Div. 487, 491, 231 N.Y.S. 435, 440 (1928).

16. John B. Stetson Univ. v. Hunt, 88 Fla. 510, 519, 102 So. 637, 641 (1924). Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), made it clear that such provisions in contracts with state universities are not enforceable. The argument could be made that such a provision in a contract with a private university would also be unenforceable because unconscionable, as falling within the category of "adhesion" contracts. *See* Van Alstyne, *Procedural Due Process and State University Students,* 10 U.C.L.A. L. REV. 368, 370-371 n. 9 (1963). *But cf.* Carr v. St. John's Univ., 34 Misc.2d 319, 231 N.Y.S.2d 403 (Sup. Ct. 1962), upholding the dismissal of students for participation as witnesses in a non-Catholic wedding; and Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), holding that a private university could dismiss a student without notice and hearing for any reason "deemed sufficient to the university," where the catalog stated that the university reserved this right. The *Greene* decision, currently pending decision on appeal, has been argued. Before hearing the appeal on the merits, the court of appeals ordered temporary reinstatement of the students. Civil No. 1949-67 (D.C. Cir., Sept. 8, 1967).

17. *E.g.,* State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433, *cert. denied,* 277 U.S. 591 (1928).

In People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App.2d 207, 134 N.E.2d 635 (1956), a student was suspended and subsequently expelled from a public university, without notice or a formal charge, after an informal appearance before the disciplinary committee. This decision may be criticized as not allowing the student the benefit of rights which other decisions have held must be afforded by even *private* universities.

missed from the university without notice and some form of an opportunity to be heard in his defense,[18] but this rule only went as far as the procedures employed in the dismissal and not to the substantive reason for the action. The only implied substantive condition that could be found was that the student could not be dismissed "arbitrarily."[19] In practice this meant that the aggrieved student was required to show that the punishment had no relation whatsoever to the ideals of scholarship or discipline. Moreover, the majority view regarding procedural safeguards, drawing no distinction between public and private universities, remained very flexible and the courts found it easy to say that, under the circumstances, the university authorities had done all that was required by "fundamental fairness."[20] In short, the student was virtually unable to obtain review of his dismissal without a showing of malice or bad faith on the part of the university.

B. *Initial Considerations of the Applicability of the Fourteenth Amendment*

The first case to consider the applicability of the fourteenth amendment to the exercise of disciplinary authority was a 1942 case in which the court adhered to the majority view that the law requires that the university give notice and a chance to be heard to the student before he may be dismissed. But the court refused to base the decision on constitutional grounds, stating that "the due process clause of the Constitution can have no application where the governing board of a school is rightfully exercising its inherent authority to discipline students."[21]

A significant development occurred in 1948, with the enactment of federal legislation making the federal courts available for the litigation of cases involving deprivation of civil rights regardless of the amount in controversy.[22] In 1958 a

18. *E.g.*, Baltimore Univ. v. Colton, 98 Md. 623, 57 A. 14 (1904); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433, *cert. denied,* 277 U.S. 591 (1928); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied,* 319 U.S. 748 (1943); *see* Annot., 58 A.L.R.2d 903 (1958). For an example of the contrary view taken by some courts, see People *ex rel.* Bluett v. Board of Trustees, note 17 *supra.*

19. People *ex rel.* Cecil v. Bellevue Hospital Medical College, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct. 1891), *aff'd mem.*, 128 N.Y. 621, 28 N.E. 253 (1891); Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Frank v. Marquette Univ., 209 Wis. 372, 245 N.W. 125 (1932).

20. *E.g.*, State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433 (1928), *cert. denied,* 277 U.S. 591 (1928); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied,* 319 U.S. 748 (1943); People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App.2d 207, 134 N.E.2d 635 (1956).

21. State *ex rel.* Sherman v. Hyman, note 20 *supra,* at 111, 171 S.W.2d at 827. The Court felt that notice and hearing were required, not as an essential of due process, but rather because of a "rule so uniform it has become a rule of law." *Id.* at 109, 171 S.W.2d at 826. Some confusion has arisen from the ambiguity of the opinion, and it has also been urged that the case could stand equally well for the proposition that the due process clause is applicable, and that the requirements were satisfied in this case. Van Alstyne, *Procedural Due Process and State University Students,* 10 U.C.L.A. L. REV. 368 (1963).

22. 28 U.S.C. § 1343 (1958), providing:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress

former student at state-supported Brooklyn College brought an action in a federal court alleging that his expulsion was in violation of his rights of due process, equal protection, and free speech. The dismissal of the action by the district court was affirmed,[23] but the appellate tribunal split 2-1 on the jurisdictional issue, with two of the judges expressing their opinion that the federal courts did have jurisdiction to hear a student's claim of a denial of due process.[24] But it was not until a few years later, when the scope of the federal statute providing for liability of one acting under state authority[25] was expanded,[26] that it became clear that the student might seek redress in a federal court if he could establish that he had an interest within the protection of the fourteenth amendment.

C. *The Response—Protection of the Student's Interest*

In 1960 a group of students at Alabama State College for Negroes were dismissed for their continued participation, despite a warning by the president of the college, in civil rights demonstrations near the courthouse and other county office buildings. Notices of expulsion were mailed to the six plaintiffs, but no charges were made and no opportunity for hearing was granted prior to expulsion. The Court of Appeals for the Fifth Circuit, in *Dixon v. Alabama State Board of Edu-*

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the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

23. Steier v. New York State Educ. Comm'r., 271 F.2d 13 (2d Cir. 1959), *aff'g* 161 F. Supp. 549 (E.D.N.Y. 1958).

24. Judge Moore felt that the federal district court had jurisdiction to hear Steier's claim that he had been deprived of a constitutional right, but that since the facts showed that his dismissal had not been unreasonable or improper, the dismissal by the district court should be affirmed. Judge Gibson, also voting to affirm, did not feel that the district court originally had jurisdiction to hear this cause because 42 U.S.C. § 1983 (1958), had generally not been construed to afford a right of action except where there had been systematic discrimination against a racial or other minority group. *E.g.*, Cranney v. Trustees of Boston Univ., 139 F. Supp. 130 (D. Mass. 1956), Judge Clark dissented, agreeing with Judge Moore that these civil rights acts were meant to confer upon the federal district courts the jurisdiction over the student's asserted denial of due process. He believed in addition that Steier had pleaded a case sufficient to get by the defendant's motion to dismiss for failure to state a cause of action.

25. It was necessary for the student to base his prayer for relief upon a statute such as 42 U.S.C. § 1983 (1958), since 28 U.S.C. § 1343(3) requires that the civil action be "authorized by law." 42 U.S.C. § 1983 provides:

Every person who, under color of any statute . . . of any State . . . subjects . . . any . . . other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

26. Monroe v. Pape, 365 U.S. 167 (1961), made it clear that 42 U.S.C. § 1983 (1958) was to have a broad application, indicating that it could now also be used as a basis of relief by a state university student alleging a denial of due process.

cation,[27] reversed the dismissal of plaintiff's suit by the district court, holding that due process requires that students at a state-operated college be given notice of the charges against them and an opportunity for a hearing before they can be expelled for misconduct.

Since it had by this time been established that the federal courts had jurisdiction of a student's suit for deprivation of a right secured by the fourteenth amendment, the critical problem was whether the student had a constitutional right that had been violated. The doctrine that had been relied upon by the district court was that "the right to attend a public college or university is not in and of itself a constitutional right,"[28] but the appellate court pointed out that the Supreme Court had abrogated the distinction between "rights" and "privileges" where governmental action unjustifiably injures the interests of private individuals. The theory is that if the government is going to act, it may not proceed unfairly or arbitrarily where private interests are at stake, even though the government may have no duty to act at all, and even though it is merely dispensing "gratuities." The most notable example is in the area of public employment.[29]

The Supreme Court has never specifically passed on the question of whether the student's interest in his continued education comes within the protection afforded to "life, liberty, or property" by the due process clause, but the *Dixon* opinion seems to indicate that the word "liberty" encompasses what is being protected:

> Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens . . . expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.[30]

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27. 294 F.2d 150 (5th Cir. 1961), *rev'g* 186 F. Supp. 945 (M.D. Ala. 1960), *cert. denied*, 368 U.S. 930 (1961).

28. Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945, 950 (M.D. Ala. 1960).

29. *E.g.* Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Educ., 350 U.S. 551 (1956). "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, *supra*, at 192. *See* Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

30. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961). It is interesting to compare this statement to a statement of the Supreme Court in Bolling v. Sharpe, 347 U.S. 497, (1954), which, unlike its companion case, Brown v. Board of Educ., 347 U.S. 483 (1954), was decided on due process grounds since the equal protection clause of the fourteenth amendment is not applicable to the federal government: "Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." 347 U.S. 497, 499 (1954). *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923); Sweezy v. New Hampshire, 354 U.S. 234 (1957). But for a logical argument that the right really involved is an equal

Dixon was undeniably a sharp break with tradition, making it clear that the state university's power to dismiss a student for misconduct is subject to limitations imposed by the fourteenth amendment. The decision reaches the implicit conclusion that there are reasons why this area of administrative activity should be subject to at least some of the procedural requirements of other areas where the government deals through an agency with the interests of private individuals.

III. The Requirements of Procedural Due Process

A. *The Initial Guidelines*

The court in *Dixon* indicated its recognition of the fact that there are several factors to be considered in determining the requirements of due process, but they emphasized that the "extremely great value" of the student's interest was controlling where there are no considerations of immediate danger to the public, or of peril to the national security,[31] which should prevent the board from exercising at least the fundamental principles of fairness. The court made it clear that it was not attempting to define a rigid formula applicable to every situation, but "for the guidance of the parties," it indicated generally the nature of the notice and hearing required. "The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion. . . . The nature of the hearing should vary depending upon the circumstances of the particular case."[32] Viewing the situation before it, the court stated that "something more than an informal interview" was necessary—something that would give "an opportunity to hear both sides in considerable detail." While specifying that a full scale judicial hearing, with the right of cross-examination of witnesses, is not required, the court stated that nevertheless "the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college."[33]

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protection right, see Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 Law in Trans. Q. 1 (1965). This view is adopted in Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968).

31. Dixon v. Alabama State Bd. of Educ., *supra* note 30 at 157. The recognition by the court of the need for considering the public interest as well as the individual interest, indicating that the test of what constitutes due process is essentially a balancing test, was prompted by recent Supreme Court decisions in other areas of administrative adjudication. *E.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

32. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961).

33.

> In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection.

B. *Subsequent Cases*

Following closely on the heels of *Dixon* was a case involving the expulsion from Tennessee A & I State University of students who had been convicted of disorderly conduct by municipal authorities in Jackson, Mississippi, for sitting in at bus terminals during the summer vacation.[34] Since they had been suspended under a regulation requiring such action when a student was "convicted on charges involving personal misconduct," and since, without notice and a hearing, ". . . the committee did not know and had no way of knowing what the plaintiffs had actually done . . ."[35] the summary dismissal was a violation of due process. In ordering reinstatement of the plaintiffs pending notice and hearing, the court stated that consideration should be given to the observations made by the Court of Appeals for the Fifth Circuit in the *Dixon* case.

One 1963 case represents the attitude that a broad view should be taken of the whole proceeding, and that, in particular, the requirement of notice may be liberally construed if there is no indication that unfairness resulted from the failure to give more specific notice. In *Due v. Florida A & M University*,[36] the plaintiffs had been convicted of contempt in a Florida circuit court for violation of a restraining order issued against student demonstrators. The plaintiffs were telephoned and advised to appear before the University Discipline Committee. Upon presenting himself, each plaintiff was then advised of the charge against him. The plaintiffs made no requests for the calling of witnesses or the securing of counsel.[37] The court, after quoting the *Dixon* statement that due process does not require a full judicial trial, stated:

> More specific routines of notice and advisement may be indicated in this regard, but a foisted system of rigid procedure can become so ritualistic, dogmatic, and impractical as to itself be a denial of due process. The touchstones in this area are fairness and reasonableness.[38]

Dixon v. Alabama State Bd. of Educ., *supra* note 32, at 159. The *Dixon* decision has been construed in subsequent cases as holding only that some notice and some hearing must be afforded the student. *E.g.*, Wright v. Texas Southern Univ., 392 F.2d 728 (5th Cir. 1968). The problem is that "hearing" is a term of indefinite meaning, which may be intended to denote either a trial-type hearing or an argument-type hearing. K. DAVIS, ADMINISTRATIVE LAW TEXT, § 7.01 (1959). While *Dixon* and subsequent cases indicate that a full trial-type hearing is not necessary, it is clear that more than an argument type of hearing is necessary when "adjudicative facts" are in dispute, and that at least *some elements* of the trial-type hearing must be afforded the student who demands a trial of the fact issues upon which the contemplated disciplinary action is based. See note 57 *infra*.

34. Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

35. 200 F. Supp. 174, 180 (M.D. Tenn. 1961). The school authorities were even uncertain as to the exact charge pending against the students.

36. 233 F. Supp. 396 (N.D. Fla. 1963).

37. The plaintiffs admitted the contempt convictions, but argued that they had been improperly cited for contempt because the circuit court had erroneously concluded that they were the leaders of the demonstration in which they had participated. Due v. Florida A & M University, 233 F. Supp. 396 (N.D. Fla. 1963).

38. Due v. Florida A. & M. Univ., *supra* note 37, at 403.

As a result of cases adhering to the line of reasoning in *Due*, it is relatively clear that "fundamental fairness" continues to characterize the approach of the majority of the courts to student disciplinary cases. In one recent case[39] two of the students had been personally observed by the dean of the university while engaged in activities violating university regulations.[40] The dean requested of one of the students that he come to the dean's office to discuss the incident, but the student never appeared. The dean subsequently made attempts to contact the two students by mail, but both of them had failed to keep the university informed of their mailing addresses, as required by regulation. At the end of the term, the plaintiffs received notification that they would not be permitted to re-enter the university. The district court stated that the dean exercised "his best efforts" to inform the students of the charges against them, and that this was sufficient, "particularly where their whereabouts were not disclosed to the University in violation of a valid regulation."[41] Significantly, the court emphasized that the holding of *Dixon* does not extend to the question of the *adequacy* of notice and hearing, but to "whether the students had a right to *any notice* or *hearing whatever* before being expelled."[42] In another case,[43] the student plaintiffs were not given specific notice of the charges against them until two days before their hearings were to begin, although they had requested a clarification of the vague statement of charges they had earlier received. The court held there was no denial of procedural due process, distinguishing *Dixon* and *Knight v. State Board of Education*[44] on the ground that in those cases the final disciplinary action was taken before the students had been given *any* notice or an opportunity for a hearing.[45]

A somewhat stricter judicial attitude is represented by a 1967 case involving the suspension of two students from Central Missouri State College.[46] Following their participation in two nights of disturbances, each of the plaintiffs was orally advised of the reason the college was considering taking action, and each was given an opportunity to appear before the dean of men. It appeared that the

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39. Wright v. Texas Southern Univ., 392 F.2d 728 (5th Cir. 1968), *aff'g* 277 F. Supp. 110 (S.D.Tex. 1967).

40. Of eight student plaintiffs, five had been dismissed for scholastic deficiencies. The complaint of these students was properly dismissed because no court can be expected to pass upon the scholastic fitness of a student—this is an area the courts leave totally to the discretion of the school. See note 7 *supra*. The sixth plaintiff appeared before both the Dean and the President of the University, with an opportunity to speak in his own defense. The court found no evidence indicating the hearing was inadequate.

41. Wright v. Texas Southern Univ., 277 F. Supp. 110, 113 (S.D. Tex. 1967).

42. *Id.* at 112, quoting from *Dixon* (emphasis added).

43. Jones v. State Bd. of Educ. of and for State of Tenn., 279 F. Supp. 190 (M.D. Tenn. 1968).

44. 200 F. Supp. 174 (M.D. Tenn. 1961). See discussion in text accompanying note 34 *supra*.

45. *See also* Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968).

46. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967).

plaintiffs were somewhat uncertain of the precise charges against them, and that the dean was only one of a number of persons comprising the board making the recommendation of suspension. Holding that due process requires that the hearing be held before the person or group of persons responsible for determining the facts in issue and the action to be taken, the court ordered a new hearing with additional procedural safeguards.[47]

In recognition of the controversy regarding the appropriate current standards of judicial review in student disciplinary cases, the United States District Court for the Western District of Missouri recently conducted hearings in an effort to achieve "clearly enunciated reliable standards" to guide future decisions within that federal district.[48] The resulting memorandum, representative of the prevalent approach, states:

> Three minimal requirements apply in cases of severe discipline, growing out of fundamental conceptions of fairness implicit in procedural due process. First, the student should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based. Second, the student should be given an opportunity for a hearing in which the disciplinary authority provides a fair opportunity for hearing of the student's position, explanations, and evidence. The third requirement is that no disciplinary action be taken on grounds which are not supported by any substantial evidence. Within limits of due process, institutions must be free to devise various types of disciplinary procedures relevant to their lawful missions, consistent with their varying processes and functions, and not an unreasonable strain on their resources and personnel.[49]

And in the next sweeping paragraph the court indicated that, aside from observance of the three minimal requirements, universities within the district need

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47. The court ordered that the following safeguards be provided the student:
(1) written statement of the charge at least ten days prior to hearing;
(2) the right to appear before the person with the authorized responsibility for determining the disposition of the case;
(3) the right to inspect in advance of the hearing any evidence to be submitted at the hearing;
(4) the right to have counsel present at the hearing for purposes of advice;
(5) the right to hear the evidence, and to question witnesses;
(6) the right to receive a statement in writing of the findings and of the disposition to be made of the case;
(7) the right to make a record of the hearing, at his own expense.

48. The hearings were prompted primarily by the filing of three major cases in that court. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967), claim of procedural due process violation sustained; Scoggin v. Lincoln University, 291 F. Supp. 161 (W.D. Mo. 1968), claim of procedural due process violation sustained; and Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1968), claimed violation of substantive due process held without merit.

49. General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147 (1968) [hereinafter cited as General Order].

have no great concern about adherence to a technical due process scheme, as long as it appears that the student was treated fairly:

> There is no general requirement that procedural due process in student disciplinary cases provide for legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence. Rare and exceptional circumstances, however, may require provision of one or more of these features in a particular case to guarantee the fundamental concepts of fair play.[50]

It is true that due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances,"[51] and that the elements of procedural due process comprise a much broader category of procedural safeguards than those which will be found to be essential requirements in a particular case. There are, however, some elements of due process which are so fundamental and which impose such a negligible burden upon the university, that the courts would be warranted in treating them as general requirements applicable to every case. While it is true that a liberal construction of the required procedural elements in favor of the university may seldom result in an actual injustice, inherent in such an approach is the necessity that the court evaluate the conduct of the student, and then measure the university's response in the light of the facts as they appeared to the university. If it is apparent from the circumstances that the student was probably culpable, then the fundamental fairness approach requires only the minimum on the part of the university. While this provides for efficiency in matters of student discipline, the difficulty is that it forces the rare student actually receiving unfair treatment to seek relief by legal action. In a proceeding at law, the student is severely handicapped in meeting his burden of proof by the presumption that the university officials have operated within the proper limits of their discretion.[52] The student is entitled to a hearing by the university, regardless of how irresponsible his conduct may appear. Recognition of this by the courts will force the university to take positive steps to provide consistent and

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50. *Id.* at 147-148.

51. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). A frequently quoted description of the nature of due process is the one enunciated by Mr. Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGath:

> Due process is not a mechanical instrument. . . . It is a process. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations which must enter into the judicial judgment. 341 U.S. 123, 163 (1951) (concurring opinion).

52. Barker v. Hardway, 283 F. Supp. 228, 237 (S.D.W.Va. 1968).

regularized procedures that will secure far greater protection overall for the innocent student.[53]

C. *Procedural Safeguards*

The burdens imposed upon the university by due process requirements will not be as onerous as may be feared if it is true that students charged with offenses are usually willing, when confronted, to admit the violation and accept the punishment.[54] For these students an informal interview is sufficient. Moreover, there is less need for regularized procedure where the penalty is less than suspension, and will result in no permanent notation upon the student's record.[55] But each student charged with a serious violation should be given notice of the charges and the nature of the evidence against him, and directed to meet informally with a dean or other appropriate official. When he appears before the dean, the student should be informed of the punishment appropriate to the offense, and then given at least three options: (1) to admit the violation and accept the punishment indicated, (2) to elect to appear informally before a regularly constituted hearing board, either for the purpose of denying the violation or of showing mitigating circumstances, or (3) to elect a formal hearing before the board. Allowing the student to choose between these three alternatives would provide assurance of fair treatment to the student, and yet would leave the university free to employ summary procedures where there is no need for, and the student does not desire, a formal hearing.

The proper procedural safeguards attendant to a formal hearing must be determined from the relative position of both parties. There are some aspects of a full adversary hearing that the university is simply not equipped to handle.[56] Nevertheless, it is clear that due process now may require the observance of some of the following procedural safeguards commonly associated with trial-type hearings,[57] and may grow to require more.

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53. "Due process of law is not for the sole benefit of an accused. It is the best insurance . . . against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration." Byse, *The University and Due Process: A Somewhat Different View,* 54 A.A.U.P. BULL., 143, 145 (1968).

54. Heyman, *Some Thoughts on University Disciplinary Proceedings,* 54 CALIF. L. REV. 73, 76 (1964).

55. All of the cases have recognized that it is only where the student may be subject to serious punishment that he is entitled to the safeguards of procedural due process. *E.g.,* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

56. *See* State *ex rel.* Ingersoll v. Clapp., 81 Mont. 200, 263 P. 433, *cert. denied,* 277 U.S. 591, *error dism'd,* 278 U.S. 661 (1928); People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App.2d 207, 134 N.E.2d 635 (1956). In *Bluett,* for example, one of the main grounds of the decision sustaining the suspension of a student who was suspended after an informal appearance was that the president of a university has no authority to compel the attendance of witnesses at the hearing or to compel them to testify if present.

57. Professor Kenneth Davis distinguishes between an "argument" type of hearing and a "trial" type of hearing. A formal hearing held by the university

1. Choice of Public or Private Hearing

When a formal hearing is to be held, the student should be able to elect between a public and a private hearing. Of course, where there is an indication that disruptions or assemblages would result from an open hearing, the university should be permitted to require that the hearing be private. Moreover, a public hearing is not an essential safeguard against unfairness,[58] and it is likely that in most instances the student will prefer a private hearing. Nevertheless, the indication by the university of its willingness to remove the shroud of secrecy from disciplinary proceedings will be one factor aiding the development of a relationship of trust and understanding between students and administrators.

2. Counsel

The student should be allowed the accompaniment of a parent, lawyer, friend, or teacher when he appears formally or informally before any university official. But recent cases[59] have made it clear that whether a student is entitled to *representation* by counsel depends upon the presence or absence of other safeguards affecting the student's overall ability to defend himself in a given situation, and

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would be an administrative trial-type hearing within the definition offered:

> A trial is a process by which parties present evidence, subject to cross-examination and rebuttal, and the tribunal makes a determination on the record. The key to a trial is opportunity of each party to know and to meet the evidence and the argument on the other side; this is what is meant by determination "on the record." K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.01 (1959).

58. Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968), held that a failure to provide a public hearing was in no way a violation of due process, stating that the fact that the public was excluded, "in no way tends to establish bias or unfairness in those proceedings." *Id.* at 768. It is interesting to note that in Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968), the court stated that an open hearing was not an essential guarantee, looking to factors which were not present in *Zanders*—the fact that "plaintiff was given the right to have his counsel attend and the opportunity to confront and cross-examine all witnesses against him." *Id.* at 731. The court also noted that a full transcript of the hearing had been made by a court reporter. In *Zanders,* the student had the benefit of neither counsel nor a written record of the proceedings. Nevertheless, there is little doubt that the *Zanders* decision was legally sound as it related to the facts of that case, and that an open hearing is not an essential element of due process in all but extreme instances.

59. Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967). *Cf.* United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22, 25 (E.D. Pa. 1950). The sixth amendment to the Constitution of the United States, now incorporated within the fourteenth amendment, confers upon the defendant in a criminal case the right to employ his own counsel or to have counsel appointed. Gideon v. Wainwright, 372 U.S. 335 (1963). Only one case, however, has drawn an analogy between criminal prosecutions and student discipline. Soglin v. Kauffman, 37 U.S.L.W. 2357 (W.D. Wis. 1968), holding a university regulation unconstitutional for vagueness and overbreadth. Many others have rejected the analogy. *E.g.,* Barker v. Hardway, 283 F. Supp. 228 (S.D.W.Va. 1968). Buttny v. Smiley, 281 F. Supp. 280 (D.Colo. 1968). *See also* General Order, *op. cit. supra* note 49, 45 F.R.D. 133, 142 (W.D. Mo. 1968).

no case has yet involved a situation in which the student *must* be afforded representation by counsel. Several decisions, however, have stated that he must be allowed the advice and accompaniment of counsel.[60] The Supreme Court has distinguished between investigatory and adjudicatory activities of administrative bodies, and has held that an individual is entitled to representation by counsel where the hearing is adjudicatory.[61] Recognizing that the contested student disciplinary hearing is also adjudicatory in nature, and that in some instances due process may require fuller participation by counsel, several universities have begun to provide for it in their disciplinary procedures.[62]

Dixon had indicated that cross-examination of witnesses may not be an essential requirement of due process,[63] but a subsequent case has ordered that the student in that case, but not his counsel, should be given the right of cross-examination.[64] Disciplinary procedures at a number of universities have begun to provide for cross-examination of witnesses by counsel as well as by the student,[65]

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60. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961); Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D.Mo. 1967). *See also* Goldwyn v. Allen, 54 Misc.2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967), involving the removal of the right of a high school student to take New York State Regents examinations, for alleged cheating on one such examination. It was held that the right could not be removed without a hearing at which she would be entitled to the assistance of counsel. *But cf.* Madera v. Board of Educ., 386 F.2d 778 (2d Cir.), *rev'g* 267 F. Supp. 356 (S.D.N.Y.), *cert. denied,* 390 U.S. 1028 (1968), reversal on the grounds that the hearing was not essentially disciplinary, but more in the nature of counselling.

61. Hannah v. Larche, 363 U.S. 420, 442 (1960). *Cf.* Kent v. United States, 383 U.S. 541 (1966), holding that a juvenile is entitled to representation by counsel at critical stages of juvenile proceedings; *In re* Gault, 387 U.S. 1 (1967), providing that the juvenile is entitled to the assistance and advice of counsel in preparing for his defense. *But see* Barker v. Hardway, 283 F. Supp. 228 (S.D.W.Va. 1968), denying the students' request for representation by counsel. This denial was based, in part, on the ground that the expulsion hearing was investigatory in nature rather than adjudicatory, since the only function of the hearing committee was to "gather facts and make recommendations to the president and faculty who could accept or reject them as they might choose." *Id.* at 238. This aspect of the decision ignores the holding of *Esteban,* note 60 *supra,* and also seems questionable in view of the trend in administrative law to recognize such hearings as adjudicatory. *See* W. GELLHORN and C. BYSE, ADMINISTRATIVE LAW (4th ed. 1960).

62. Examples of cases in which the university went to great lengths to provide the student with all feasible procedural safeguards, including counsel, are Goldberg v. Regents of Univ. of Calif., 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967), and Buttny v. Smiley, 281 F. Supp. 280 (D.Colo. 1968). In *Buttny,* the plaintiffs were represented at the hearing by two senior law students and one law graduate.

63. This is not to imply that a full dress hearing, with the right to cross-examine witnesses, is required. 294 F.2d 150, 159 (5th Cir. 1961).

64. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D.Mo. 1967).

65. *E.g.,* Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D.Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D.La. 1968); Buttny v. Smiley, 281 F. Supp. 280 (D.Colo. 1968); Jones v. State Bd. of Educ. of and for State of Tenn., 279 F. Supp. 190 (M.D. Tenn. 1968); Goldberg v. Regents of Univ. of Calif., 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967).

in implementation of the idea that the formal hearing will probably be best conducted where both sides are represented by lawyers.[66]

3. Secret Evidence

Protection from the use of extra-record evidence by the university has been recognized as an element of due process,[67] but no case has yet held it to be an essential requirement. It is suggested, however, that the hearing committee should not be allowed to rely upon any evidence of which the student has no knowledge.[68] In particular, any rumors communicated to the board outside of the hearing should be presented to the student to allow an opportunity for explanation or denial. The adjudicators should "determine the facts of each case solely on the evidence presented at the hearing."[69]

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66. "[A]ctive participation by lawyers will safeguard the fact-finding process and will support the acceptability of the eventual judgment." Heyman, *Some Thoughts on University Disciplinary Proceedings,* 54 CALIF. L. REV. 73, 80 (1960).

It is interesting to note that the *Joint Statement on Rights and Freedoms of Students,* 54 A.A.U.P. BULL. 258 (1968), recommends merely that the student "appearing before the hearing committee should have the right to be assisted in his defense by an advisor of his choice," without specifying any particular degree of participation by counsel.

67. *E.g.,* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D.Mo. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961).

68. The student "shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing." Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967). If the student is to be allowed to discover in advance of trial the evidence which is to be used against him, it would seem anomalous that the use of extra-record evidence, of which the student has no knowledge, should be permitted.

69. Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967). But this recommendation is limited severely by Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968), where the fact that counsel for the hearing board acted both as prosecutor and as advisor to the board did not amount to a deprivation of due process in the absence of additional evidence showing bias or prejudice. *Cf.* Jones v. State Board of Educ. of and for State of Tenn., 279 F. Supp. 190, 200 (M.D.Tenn. 1968).

What about evidence obtained as a result of a random search of a student's dormitory room? A recent decision on this question has held that an abridgement of the student's right of privacy would be upheld even though there is no "probable cause," where the search is "based on a reasonable belief" on the part of the college authorities that a student is using a dormitory room for "a purpose which is illegal or which would otherwise seriously interfere with campus discipline." Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730 (M.D. Ala. 1968). The theory is that college dormitory residents stand in a "special relationship" to the college, and that the student's right of privacy may be subordinated where the institution is properly exercising its authority to fulfill its educational responsibilities. *Ibid.* However, the court's dictum indicates rather strongly that evidence obtained by a mere random search upon no particular basis or "reasonable cause to believe" would not be admissible under the fourth and fourteenth amendments because the student's interest would not be subordinated where the university has no legitimate basis for the search. *Id.* at 730. *Cf.* People v. Overton, 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967), holding that a high school principal, suspecting presence of marijuana in student's locker, had properly consented to search by police over student's objections.

A related concept is that the student should have the opportunity to appear before the person, or entire group of persons, who have the adjudicative responsibility and the responsibility for deciding the nature of the action, if any, to be taken. In *Esteban v. Central Missouri State College*,[70] the court specified that the hearing should be conducted before the person or body which alone has the actual authority to expel or suspend a student from the college. The court noted, however, that it is only necessary that all evidence be presented to this person or group in some appropriate manner, as by a transcript of an authorized hearing.[71] Hence, it is clear that the responsibility for the initial hearing may be delegated to any appropriate official or group of people.[72]

4. Separation of Functions

It is highly desirable from the viewpoint of the student to have the presentation of evidence against him performed by a person who does not sit as a member of the hearing board, and who is not entitled to vote with regard to the disposition of the case. One recent case has held that, where it had been conceded by the student's counsel that the hearing board had acted "entirely upon a fair and impartial basis," the fact that the counsel for the hearing board had acted both as prosecutor and as advisor to the board did not amount to a deprivation of due process.[73] Similarly, where two members of the faculty hearing committee had offered testimony against the plaintiffs, the court held that this fact was not sufficient in itself to constitute a denial of "fairness" in the absense of "a showing of other circumstances, such as malice or personal interest in the outcome of

70. 277 F. Supp. 649 (W.D. Mo. 1967).

71. *Id.* at 651. In Barker v. Hardway, 283 F. Supp. 228 (S.D.W.Va. 1968), the procedures of Bluefield State College had provided that a student subject to disciplinary action could appear before the Dean of Men, Dean of Women, Faculty Committee on Student Affairs, or the President. State law provided that the adjudicative authority at the college rested with the president and faculty, and could not be delegated. The aggrieved students appeared before the Faculty Committee on Student Affairs, whose only function was "to gather facts and make recommendations to the president and faculty who could accept or reject them as they might choose." *Id.* at 239. Although no challenge to this procedure was made on the basis of Esteban, *supra* note 69, it is not likely that such a challenge would have been sustained, because of the fact that a full transcript was taken at the hearing before the committee, and was preserved for review by the faculty and president.

72. It is clear that due process does not require that any members of the student body should sit upon the hearing board. But in recognition of the value of such a provision, some universities provide for the hearing board to be composed of some student members as well as faculty or administrators. *E.g.*, University of Missouri Rules of Procedure in Student Disciplinary Matters, § 5 A (1968); University of Oregon Student Conduct Program, § E (1965), reprinted at *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1, 67 (1966). Similar procedures were also provided by Troy State University in Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D.Ala. 1968).

73. Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 761 (W.D.La. 1968). State courts and federal courts have generally held, in review of administrative adjudications, that due process does not forbid the combination of investigation or accusation with adjudication. K. DAVIS, ADMINISTRATIVE LAW TEXT, § 13.02 (1959).

a case."[74] There would seem to be no justification, however, for requiring an affirmative showing of bias where the challenged member of the hearing board performs the total function of prosecutor in the case, and is not simply a witness testifying against the student. It is also, of course, highly desirable that any person testifying in the case should not sit as a member of the hearing board.

5. Privilege Against Self-Incrimination

It has been urged by some writers[75] that the student who requests a formal hearing should have the right to remain silent and the right to refuse to answer questions which might produce evidence subjecting him to: (1) punishment for violation of a university regulation, and (2) punishment by civil authorities for violation of state or municipal law. That a student should not be compelled to give evidence incriminating himself was recognized in one case,[76] but the court did not regard the question as a constitutional issue. Cases in other areas of administrative activity indicate that this right, guaranteed only recently against state abridgement by the fourteenh amendment,[77] is becoming an essential element of procedural due process in proceedings other than criminal prosecutions.[78] Nevertheless, it does not appear likely that this right will be extended into the student disciplinary area in the immediate future.

6. Record

The right to make a full and complete record of the hearing has been recognized as an element of due process,[79] but it has not been held that the university is bound, at its own expense, to make a complete record if the student does not have one made on his own. One case, however, has indicated that, although the

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74. Jones v. State Bd. of Educ. of and for State of Tenn., 279 F. Supp. 190, 200 (M.D.Tenn. 1968).

75. *E.g.*, Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 82 (1965); Johnson, *The Constitutional Rights of College Students*, 42 TEX. L. REV. 344, 356-60 (1962). It is clear that allowing the student the right to remain silent would be totally inappropriate in an *informal* hearing before either the dean or a hearing board.

76. State *ex rel.* Sherman v. Hyman, 171 S.W.2d 822, 826 (Tenn. 1942).

77. Malloy v. Hogan, 378 U.S. 1 (1964).

78. *E.g.*, Spevack v. Klein, 385 U.S. 511 (1967), holding that a lawyer could not be disbarred for refusal to testify on fifth amendment grounds in a bar association disciplinary proceeding. The position of the student is arguably analogous to the position of the lawyer in *Spevack*, although the potential consequences of disbarment proceedings might normally seem to be of greater significance, or more permanent effect, than the student disciplinary proceedings. *Cf.* Garrity v. New Jersey, 385 U.S. 493 (1967), holding that police officers could not be forced to forego the privilege against self-incrimination under the threat of being removed from their jobs, during the course of a state investigation of alleged traffic ticket fixing.

79. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D.Mo. 1967); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

university is not bound to provide for a record, the university must as an alternative provide a de novo hearing in the event of an appeal by the student.[80]

7. Written Findings

The hearing board should submit to the student written findings of fact whenever the student has put the facts in issue at a formal hearing.[81] The student should also be informed of the way in which such findings relate to the pertinent university regulation. Without such information, the student is unable to know the precise basis of the decision, and is consequently unable to frame a challenge to the decision on an appeal.

8. Appeal

The right of appeal to the governing body of the university has long been recognized, in practice, as an element of due process,[82] and one case has recommended the provision of such a right.[83] The student need not be afforded a hearing de novo, but the record should be reviewed and the student should be allowed to file a written memorandum and to appear personally.

9. Suspension Before Hearing

It is very significant that, at least in some instances, the initial hearing afforded the student need not be given him *before* disciplinary action is taken. In two recent cases[84] the students were given notice that they *had been* suspended or dismissed, and that they were entitled to a hearing to show cause why the disciplinary action should not be taken. The justification for this procedure, in theory, is that there is no greater burden upon the student than if the university postpones disciplinary action until after formal hearings.[85] It would seem sounder to describe this procedure as a legitimate exercise of the inherent authority of the

80. Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968). The court took the position that the students were not denied due process by the failure of the university to make a record of the hearing because they were afforded a hearing de novo on appeal, which is more fair than a review of the record of earlier proceedings.

81. This safeguard received specific recognition in Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967), and Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961).

82. Most universities have recognized the value of providing for the right of appeal by the student. A survey made in 1962 by Professor W. W. Van Alstyne, to which 72 state colleges and universities responded, indicated that 90 per cent provided for some type of appeal from the initial determination. Van Alstyne, *Procedural Due Process and the State University Student,* 10 U.C.L.A. L. REV. 368, 369 (1963).

83. Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 761 (W.D. La. 1968).

84. Jones v. State Bd. of Educ. of and for State of Tenn., 279 F. Supp. 190 (M.D.Tenn. 1968); Barker v. Hardway, 283 F. Supp. 228 (S.D.W.Va. 1968).

85. Jones v. State Bd. of Educ. of and for State of Tenn., *supra* note 84, at 202.

university to maintain order on the campus, by suspending the student from classes for a reasonable time pending his hearing.

D. *The Problem of Implementation*

Many universities on their own initiative are beginning to take strides to insure that disciplinary proceedings are in accordance with due process requirements.[86] From the point of view of universities seeking to maintain their autonomy in disciplinary matters, this has been a wise decision, since the courts will probably remain reluctant to interfere as long as the university is complying with well-recognized fundamental standards of fairness. On the other hand, recalcitrant universities, or those which are merely slow to bring their procedures up to date, will eventually be forced by judicial sanction to comply with the minimum requirements of procedural due process.

> If minimum standards of fairness, having been repeatedly articulated for over fifty years, are not afforded to students in disciplinary cases, then, as is becoming the rule rather than the exception in all fields today, courts, state and federal, will draft rules on an *ad hoc,* case by case, basis to insure that rights of students are adequately protected.[87]

Even with the approach presently taken by the courts toward review of disciplinary proceedings, the universities may have difficulty in implementing the requisite procedural safeguards. Should the courts eventually abandon the fundamental fairness approach in favor of a more rigid and specific formula, the university's limited authority may create substantial problems.[88] However, the difficulty may be considerably eased by granting some additional powers to the university to enable it to handle its responsibilities. For example, how might the university compel witnesses to attend the hearing?[89] In particular, what about the witness who is not a student at the university? By what authority can the hearing board maintain order and control the conduct of the participants during the hearing?

There is a need for some creative thinking in this area, and the legislatures might provide an answer by vesting state universities with, for example, limited authority to issue subpoenas and compel testimony, including the power to

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86. *E.g.,* University of Missouri Rules of Procedure in Student Disciplinary Matters (1968); University of Oregon Student Conduct Program, § E (1965), reprinted at *Symposium: Student Rights and Campus Rules,* 54 CALIF. L. REV. 67 (1966).

87. Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 760 (W.D.La. 1968).

88. Note the procedural requirements of the court orders issued in *Esteban,* set out in note 47 *supra.* When the university does attempt to provide a hearing affording the student the benefit of these safeguards, the attempt may be partly frustrated.

89. See footnote 56 *supra.* One suggestion has been to make the student's willingness to testify a condition of admission, similar to the way in which some schools require an agreement to observe the honor code as a condition of admission. Van Alstyne, *Procedural Due Process and the State University Student,* 10 U.C.L.A. L. REV. 368, 382 (1963).

make application for contempt orders in the state courts. Another possible solution is indicated by a decision[90] of the North Carolina Supreme Court, holding that the determination by the University Board of Trustees regarding a suspended student's readmission was a final administrative decision within the meaning of the state administrative procedure act.[91] It is clear that the governing board of the state university may be an "agency" within the comprehensive definition of most state acts,[92] and that a student disciplinary hearing could constitute a "contested case" or "administrative decision" within the meaning of most acts.[93] The application of state administrative procedure acts where the student contests the charges against him would provide for greater certainty as to the procedures to be followed, and would give the hearing board the necessary authority to conduct orderly hearings. It might be desirable, however, to provide for more flexibility in disciplinary hearings than are allowed by the act, and to prescribe rules which can deal more specifically with the problems encountered by the university hearing board.

IV. A New Concept of University-Student Relations

With violence and turmoil a growing phenomenon on so many campuses today, a re-evaluation of the legal theory of the relationship between the student and the university is essential. It is clear that there are such things as "student rights" today, but it is also clear that the courts have not been willing to allow the emergence of individual rights to destroy or substantially impede the operation of the educational system. The courts have recognized the necessity of revitalizing and developing the concept of the "inherent authority" of the university to maintain order and discipline on the campus, among both students and non-student activists from outside the university.

But the concept of inherent authority does not sufficiently describe the relationship of the student to the university. Now that the application of the fourteenth amendment to student discipline and to the exercise of first amendment freedoms[94] has exploded both the theory of *in loco parentis* and the validity of a contractual analysis, a new model must be established. It is significant that al-

90. *In re* Carter, 262 N.C. 360, 137 S.E.2d 150 (1964). *Cf.* Morrell v. Harris, 418 S.W.2d 20 (Mo. 1966), holding that the dismissal of an employee by the Board of Education was a final administrative decision within the meaning of the Missouri Administrative Procedure Act.

91. N.C. Gen. Stat. §§ 143-306 to 316 (1964).

92. An administrative "agency" is generally defined as any state officer, committee, board, or department authorized by law to make rules or administrative decisions affecting citizens. *See* F. Cooper, State Administrative Law 96 (1965).

93. A "contested case" or an "administrative decision" is defined by most state acts as any decision, order, or determination rendered by an agency in a proceeding in which the legal rights, duties. or privileges of specific parties are required by law to be determined after opportunity for agency hearing. F. Cooper, *op. cit. supra* note 92, at 119.

94. For example, in Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D.Ala. 1967), the plaintiff-student was notified that he had been suspended because of his violation of a college rule that "there could be no editorials written in the school paper which were critical of the Governor of the State of Alabama or

though most of the cases in recent years involving student due process claims have been brought in the federal courts, the United States Supreme Court has so far been able to avoid review of the lower court decisions. But the pronounced conflicts among district court decisions[95] will ultimately require an examination by the Supreme Court of the nature and extent of the due process rights of today's state university students.

There are several possible theories available. If we accept the idea that the university must be prepared to deal at arm's length with college men and women, then the obvious legal model would seem to be that of the typical administrative agency of the government.[96] The governing body of the state educational system may be regarded as the delegate of the state's authority and responsibility for education; hence all disciplinary action must be designed to facilitate the educational process.[97] Reasonable rules and regulations have their place, and the university *is* justified in removing a troublemaker from the university community. However, as when any part of the government deals with citizens, the state cannot abridge or affect the substantial interest of an individual without due process of law.[98] Thus, a student may not be expelled or suspended on the basis of

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the Alabama legislature." *Id.* at 616. Not only was the editorial written by the student a clear example of the exercise of freedom of expression, but the president of the college had in fact testified that this policy of not allowing criticism of the governor or state legislature was *not* for the purpose of maintaining order and discipline among the students. *Id.* at 618. Just a few months prior to *Dickey,* the case of Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967), had sounded the death knell for university action taken pursuant to regulations constituting a "prior restraint," where the regulation in question stated that "the student or any part of the student body is not to celebrate, parade, or demonstrate on the campus at any time without the approval of the office of the President." *See also* other cases cited note 2 *supra.*

95. For example, with regard to the student's right to appear before the body having final adjudicative authority, contrast Barker v. Hardway, 283 F. Supp. 228 (S.D.W.Va. 1968), basing the denial of the right to counsel partly upon the ground that the hearing committee was not the final adjudicative authority of the university, with Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967), holding that due process requires that the hearing be held before the body with the final adjudicative responsibility. Apparently, counsel in *Barker* failed to point out the discrepancy between *Esteban* and the procedures employed at Bluefield State College.

96. A variation of this idea, but with essentially the same characteristics, is the model of the public-service agency suggested in Linde, *Campus Law: Berkeley Viewed From Eugene,* 54 CALIF. L. REV. 40, 64-66 (1966). An additional suggestion would employ for an administrative model the regulatory powers of a municipal government. Note, *Reasonable Rules; Reasonably Enforced—Guidelines for University Disciplinary Proceedings,* 53 MINN. L. REV. 301, 333-335 (1968).

97.

> An ancient malcontent who throws a brick through the window of the social security office, a group of workers staging a sit-in for unemployment checks, a veterans' organization picketing a V.A. hospital, may each commit some punishable offense—but they do not *ipso facto* give the administering agency cause to terminate their eligibility under these programs.

Linde, *op. cit. supra* note 96, at 64.

98. K. DAVIS, ADMINISTRATIVE LAW TEXT, §§ 7.11-7.20 (1959).

failure to meet inexplicit standards of comportment or decency unless the conduct of the student is such as to be a disruptive influence on other students or in the university as a whole.

It has also been suggested that the relationship of the student to the university should be regarded as a fiduciary relationship, since the purpose of the school is to educate the students, and since the students place their trust in the institution to perform its obligations adequately and fairly.[99] As a fiduciary, the university has an obligation to the students as a whole to dismiss or punish those students whose conduct interferes with the education of others, and the fiduciary model would also require the school to provide the accused student with the maximum possible procedural safeguards. It would place upon the university the burden of showing that all appropriate safeguards were provided the student, and that the university performed its obligatiosn as a fiduciary in dealing with the accused student.[100] The difficulty with this analysis is that it is essentially a benevolent form of *in loco parentis,* and consequently rests too much upon the same type of fiction. In actuality, neither a parent nor a fiduciary would sever all ties with the student because of the student's misconduct. Moreover, according to figures published in 1961, the mean age of American college students is more than 21 years, and there are more students older than 30 years than there are younger than 18 years.[101] Consequently, it would seem more appropriate to emphasize the responsibility of the *student* as well as that of the university.

V. Conclusion

The law has achieved a peculiar posture in the area of discipline of university students. While the courts have recognized that the student's interest in being allowed to continue his education is worthy of the same treatment afforded the substantial interest of any other citizen which is affected by an administrative agency, the courts remain reluctant to interfere where it is likely that no unfairness to the student resulted from the procedures employed. If the courts are to demand stricter compliance with specific elements of due process, the university must be given greater capability to conduct an administrative type hearing. The only alternative is to revert to an approach of extreme laxity in the construction of the requirements of procedural due process.

In either case, the concept of the special nature of the university community need not be abandoned, because in some ways the "specialness" of the university is

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99. Seavey, *Dismissal of Students: Due Process,* 70 Harv. L. Rev. 1406, 1407 (1957). Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory,* 54 Ky. L. J. 643 (1965).

100. Goldman, *op. cit. supra* note 99, at 674.

101. This fact was recently judicially noticed by the United States District Court for the Western District of Wisconsin in Soglin v. Kauffman, 37 U.S.L.W. 2357 (1968). These figures, published in 1961 by the U. S. Bureau of the Census, are also cited in Van Alstyne, *The Student As University Resident,* 45 Denver L. J. 582, 591 (1968).

more apparent than ever before.[102] The courts have increasingly recognized this fact, and are currently grappling with the problem of understanding what is taking place on our campuses today.[103] It is clear that the understanding courts have of the proper role and function of the university, and their view of the degree of maturity and responsibility of today's college students, will be a large factor in the development or lack of development of rights of students under the fourteenth amendment. As for procedural due process, the question of whether the "fundamental fairness" approach will ever evolve into a more specific formula will depend to a great extent upon whether the courts, recognizing the changing nature of the university and its relationship to its students, feel that the law should be a catalyst, a reflector, or an impediment to the evolution toward limitation of discretion in the discipline of university students.

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102. *Developments—Academic Freedom,* 81 HARV. L. REV. 1045 (1968); Monypenny, *Toward a Standard for Student Academic Freedom,* 28 LAW & CONTEMP. PROBS. 625 (1963); Murphy, *Educational Freedom in the Courts,* 49 A.A.U.P. BULL. 309 (1963). *See* cases cited note 2 *supra.*

103.

> Before undertaking to intervene in the educational processes, and to impose judicial restraints and mandates on the educational community, the courts should acquire a general knowledge of the lawful missions and the continually changing processes, functions, and problems of education. Judicial action without such knowledge would endanger the public interest and be likely to lead to gross injustice.

General Order, *op. cit. supra* note 49, 45 F.R.D. 136 (W.D.Mo. 1968).