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Due Process Comes to the Tax-Supported Campus

*Harry W. Pettigrew**

TODAY MANY UNIVERSITY ADMINISTRATORS view with alarm the spectre of a rash of court decisions challenging areas that were once considered the educational world's peculiar province.¹ The panorama of paranoid interrogation which the lawyer receives from the distressed administrator often includes the following questions: Are "judicial processes"—being "substituted for academic processes"?² Is due process a legal octopus which is about to strangle academe with its tentacles of insensitivity, conflict, obtuseness, technicality, wrangling, inflexibility, expense, and delay?³ Must the administrator be constantly apprehensive of the "summons server"?⁴ Must universities provide elaborate public trials in the university auditorium for students accused of the most opprobrious behavior as a prerequisite to removing them from the campus, when all the while buildings are burning and chaos reigns? Will a court intercede to order a student's grade raised from a "B" to an "A" after determining that the professor drew his grading curve in an unorthodox manner? The answer to all the before-stated questions is unequivocally, No!

What then of the student? His protestations generally take on this tone: Does the student shed his constitutional rights when he enters the community of scholars? May the student be summarily suspended or expelled under any circumstances and for any reasons deemed appropriate by the administration? The answer is again clearly, No!

The reason, of course, for such negative answers is the due process clause of the Fourteenth Amendment to the United States Constitution.⁵

What Is This Thing—Due Process?

"Due process" is an elusive concept.⁶ "It is not a mechanical instrument. It is not a yardstick. It is a process."⁷ "Its exact boundaries are undefinable, and its content varies according to specific factual con-

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¹ Byse, *The University and Due Process: A Somewhat Different View*, 54 A.A.U.P. Bull. 143 (1968) (hereinafter cited as Byse), citing a speech by the then-President of Cornell University, James A. Perkins.

² *Id.*, at 143.

³ *Id.*, at 144.

⁴ Caldwell, *The Changing Legal Relationships Between Students and Universities*, 45 College and University 245 (1970).

⁵ ". . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law" U. S. Const. amend. XIV.

⁶ *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

⁷ Frankfurter, J., concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951).

texts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."⁸

The layman's conception that due process is a conglomerate of technicalities is simply wrong. Due process does not demand the best possible procedure; instead, it imposes procedural minima.⁹

Due Process and the Tax-Supported University

Madison stated, "If men were angels, no government would be necessary."¹⁰ It may be added that if those who govern were even demi-angels no due process would be necessary. However, it must be recognized that arbitrariness, even sincere "arbitrariness is not unknown in the most elite intellectual circles,"¹¹ and university administrators are among those not uniformly known as paragons of fair play.

In the past, in order to vindicate summary action, administrators could draw on a whole grab-bag of conceptualisms:¹² First, that attendance at the university was a privilege rather than a right;¹³ Second, that the university stood *in loco parentis* to the student;¹⁴ Third, that the vague rules, so commonly found in university catalogues—that a student could be dismissed whenever the institution thought this ad-

⁸ *Hannah v. Larche*, *supra* n. 6.

⁹ Byse, at 145.

¹⁰ *Id.*, at 146.

¹¹ *Id.*, at 143. "It is . . . shocking to find that a court supports (officials at a state educational institution) in denying the student the protection given to a pickpocket," Seavey, *Dismissal of Students: "Due Process,"* 70 Harv. L. Rev. 1406, 1407 (1957).

¹² *Wright, The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1030 (1969) (hereinafter cited as *Wright*).

¹³ *Anthony v. Syracuse University*, 231 N.Y.S. 435 (1928); *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934); *Dixon v. Alabama State Board of Education*, 186 F. Supp. 945, 950 (M.D. Ala. 1960), where the court held, "(t)he right to attend a public college or university is not in and of itself a constitutional right." The case was *reversed*, 294 F. 2d 150 (1961). See also *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1144 (1968) (hereinafter cited as *Developments in the Law*).

¹⁴ *North v. Board of Trustees of Illinois*, 137 Ill. 296, 27 N.E. 54, 56 (1891), where it was stated that "—the will of the student is subservient to that of those who are at the time being his masters." *Contra*, "As of October, 1960, there were more students enrolled in universities who were from thirty to thirty-five than those under eighteen. The under eighteen group itself comprised less than 7% of college enrollment." U. S. Bureau of the Census, Department of Commerce, *Current Population Reports, Population Characteristics*. Series P-20, No. 110, 12, July 24, 1961, cited in *Van Alstyne, Procedural Due Process and State University Students*, 10 U.C.L.A. L. Rev. 368, 376 n. 29 (1963). A great many boys went to college in the colonial era at the age of 13, 14, 15. They did need taking care of and the tutors were *in loco parentis*.

visible—constituted a contract that the student had accepted;¹⁵ Fourth, that formal punishment, where imposed, was only a continuation of the guidance and counseling function, much like Clausewitz saw war as a continuation of diplomacy;¹⁶ or Fifth, that the Fourteenth Amendment was inapposite to student disciplinary action.¹⁷

Today, a tax-supported institution of higher education is considered a state governmental body. When a tax-supported university acts to suspend or expel a student, that act is such an injury that the "Constitution requires the act to be consonant with due process of law."¹⁸ That is, "students are now declared to be 'persons' under (the) Constitution, . . . possessed of fundamental rights which the State must respect . . ."¹⁹

This turnabout in the law was not accomplished in a vacuum. It mirrored, perhaps was even compelled by, dramatic changes in the nature of education itself.²⁰ A college education is no longer regarded as a luxury for the fortunate few, but rather a necessity for the multitudes.²¹ Therefore, the sanctions imposed as discipline may involve consequences for a particular student more grave than those involved in some criminal court proceedings.²² In contemporary society, the interest, whether a privilege or a right, of a student in continuing his education is vital. A student's relations with his institution should not be seriously impaired by disciplinary action unless he is accorded due process of law.²³

¹⁵ Mutual Obligations of Student and University, 54 Ohio Jur. 2d Universities and Colleges § 54; 15 Am. Jur. 2d Colleges and Universities §§ 22 and 28. Note, Uncertainty in College Disciplinary Regulations, 29 Ohio State L. J. 1023 (1968); Anthony v. Syracuse University, 231 N.Y.S. 435 (1928); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923). The court in Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913) stated that "(w)hether the rules or regulations are wise, or their aims worthy, is a matter left solely to the discretion of the authorities. . . ." Developments in the Law, 1145.

¹⁶ Monypenny, University Purpose, Discipline and Due Process, 43 N.D.L.R. 739, 748 (1967) (hereinafter cited as Monypenny).

¹⁷ Sherman v. Hyman, 171 S.W. 2d 822, 827 Tenn. (1942).

¹⁸ Rives, J., majority opinion in Dixon v. Alabama State Board of Education, *supra*, n. 13 at 155. "This opinion by Judge Rives had the force of an idea whose time had come and it has swept the field," Wright, 1032.

¹⁹ Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511; 89 S. Ct. 738, 739 (1969). However, the opinion goes on to state, ". . . just as they themselves must respect their obligations to the State."

²⁰ Wright, 1032. Monypenny, 739-40, the easiest purpose to recognize is the transmission of knowledge. However, within this broad umbrella there is a "profound conflict between the view that the university exists to serve the present constitution of society and assure its maintenance and the view that the campus provides its most important contribution as a place of innovation and experiment."

²¹ Wright, 1032. More than seven million students were enrolled in nearly 2,600 colleges and universities in the United States in 1969, Report of the American Bar Association Commission on Campus Government and Student Dissent, 5 (1969).

²² Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968).

²³ Dixon v. Alabama, *supra* n. 13.

Obviously the facts and circumstances surrounding discipline at a tax-supported institution contain a myriad of variables. Nevertheless, certain minimum indicia for due process have been developed by court decisions.²⁴

Although there is a plethora of case law concerning due process at state-supported institutions, any given university is bound to follow only those decisions by courts which have jurisdiction over that particular campus.²⁵

²⁴ *Id.*, at 158.

²⁵ The only reported cases in Ohio on college student discipline are state court cases. The prominent cases deal with private colleges. *Koblitz v. Western Reserve University*, 11 Ohio C.D. 515 (Cuyahoga Cir. 1901) stated at 523-24:

Custom again, has established a rule. The rule is so uniform that it has become a rule of law; and, if the plaintiff had a contract with the university, he agreed to abide by that rule of law, and that rule of law is this: That in determining whether a student has been guilty of improper conduct that will tend to demoralize the school, it is not necessary that the professors should go through the formality of a trial. They should give the student whose conduct is being investigated, every fair opportunity of showing his innocence. They should be careful in receiving evidence against him; they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood, by all surrounding circumstances, as to who is right, and then act upon it as jurors with calmness, consideration and fair minds. When they have done this and reached a conclusion, they have done all that the law requires of them to do. They are not trying the accused for a criminal offense as a civil court. They are helpless to pronounce the judgment of the civil authorities upon him. They are trying only the question whether it is detrimental to the good discipline and the good morals of the school to allow the person whose conduct is being examined, to remain in the school; and, if they find he is guilty, they determine the degree and pronounce a judgment that is fair under the circumstances. That may be a private reprimand. It may be a reprimand before the school. It may be suspension; it may be expulsion; it may be any penalty that the authorities over the school may see fit to impose. The only requirement necessary, so far as concerns a review of the matter in a court of justice, is that it shall not be so unreasonable and oppressive as to leave the conclusion of unfairness on the part of the teachers.

See also *Sherman v. Hyman*, *supra*, n. 17; *Shoppelrei v. Franklin University*, 11 Ohio App. 2d 60 (Ct. App. Franklin 1967); *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 759 (W.D. La. 1968); *Saxbe*, Student Discipline at State Universities, 40 Ohio Bar 1353 (1967); *West v. Board of Trustees of Miami University*, 41 Ohio App. 367 (1931); and *McGinnis v. Walker*, 40 N.E. 2d 488 (Ohio 1942).

Thus far the "state action" doctrine has not been sufficiently developed to subject "private" colleges to the due process clause of the Fourteenth Amendment and therefore the private college cases are not determinative of the procedures required by a tax-supported institution.

Otherwise "private" institutions have been found to be involved in sufficient "state action" to make them susceptible to the Fourteenth Amendment where there was any one or a combination of the following: 1) state control, either financial, constitutional or legislative, 2) public function, or 3) state contacts. "Application of the doctrine has been limited to private institutions with a policy of racial discrimination. The courts have seemingly been reluctant to extend the doctrine to terminate other kinds of activities that would be deemed unconstitutional if performed solely by the state. Two cases decided during (1968) serve to exemplify this reluctance." *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968) and *Powe v. Miles*, 407 F. 2d 73 (2nd Cir. 1968). Accord, *Greene v. Howard University*, 412 F. 2d 1128 (D.C. Cir. 1969). See also, Comment, Student Due Process in the Private University: The State Action Doctrine, 20 Syracuse L. Rev. 911, 914-19 (1969); Comment, Judicial Intervention in Expulsions or Suspensions by Private Universities, 5 Williamette L. J. 277 (1969).

Guidelines for Ohio colleges were provided by the United States Sixth Circuit Court of Appeals for both the procedure involving a hearing, and the rules and regulations for student conduct.²⁶

The guidelines stated by the Court concerning matters of procedure are as follows:

A) Pure academics are still within the sole purview of the educators.²⁷

B) As to misconduct, only the most informal administrative procedures are necessary where the potential sanctions for the alleged misconduct do not include suspension for a significant period of time or expulsion.²⁸

C) The rudiments of an adversary proceeding, with elements which do not encroach upon the special interests of the university, should be provided where the potential sanction for misconduct is severe.²⁹

Generally, the required rudiments of an adversary system include:

1) There must be notice³⁰ and some opportunity for a hearing³¹ before students may be *expelled*.³²

2) Notice of the specific charges two full days before the hearing is sufficient.³³

²⁶ *Jones v. State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd* 407 F. 2d 834 (6th Cir. 1969), *cert. den'd* 90 S. Ct. 779 (1970); *Norton v. The Discipline Committee of East Tennessee State University*, 419 F. 2d 195 (6th Cir. 1969).

²⁷ Although not stated explicitly, both *Jones* and *Norton* (both, *supra* n. 26) only involve misconduct. However, *Jones*, at 198, cited *Dixon v. Alabama State Board of Education*, *supra*, n. 13 as a well established case for *misconduct*. (Emphasis added.) In *Dixon*, at 158, the court said that "(b)y its nature, a charge of misconduct, as opposed to a failure to meet *scholastic* standards of the college, depends upon a collection of the facts concerning the charged misconduct. In such circumstances, a hearing which provides an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved." (Emphasis added.) *Accord*, *Wright v. Texas Southern University*, 392 F. 2d 728, 729 (5th Cir. 1968); *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747, 761 (W.D. La. 1968), which stated that a student is not denied due process where he is denied admission because of *scholastic ineligibility*.

²⁸ *Jones v. State Board of Education*, *supra* n. 27; 279 F. Supp. 190, 198, which only dealt with expulsion.

²⁹ *Id.* at 198.

³⁰ *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 589 (1952).

³¹ *Powell v. State of Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932).

³² *Jones v. State Board of Education*, *supra* n. 27. Where a master was deprived of his academic degrees without notice or a hearing, the court condemned this procedure as "contrary to natural justice," Comment, *The College Student and Due Process in Disciplinary Proceedings*, 13 S.D.L.R. 87, 92 n. 39 (1968) citing, *The King v. Chancellor of the University of Cambridge*, 92 Eng. Rep. 370 (K.B. 1732). A trial-type hearing was required in *Hill v. McCauley*, 3 Pa. County Ct. 77 (1887). The 1917 edition of *Corpus Juris* stated that a college could not dismiss a student "except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence." But the 1939 edition added for the first time that "this doctrine has been disapproved by other authority," Van Alstyne, *op. cit. supra*, n. 14 at 373.

³³ *Jones v. State Board of Education*, *supra*, n. 27 at 199, where the general notice was received over two months earlier.

3) There need not be a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.³⁴

4) Disciplinary proceedings are not to be tested according to niceties of procedure required in court.³⁵

5) The technicalities governing the burden of proof in civil or criminal cases are irrelevant.³⁶

6) The findings of the hearing committee must be based on substantial evidence and may not be arbitrary and capricious.³⁷

7) The student must be granted an opportunity to produce evidence in his own behalf,³⁸ and,

8) Testimony proffered against the student-accused by members of the committee hearing his case is not such a denial of fundamental fairness as to deny due process, in the absence of a showing of bias or prejudice.³⁹

The guidelines stated by the court concerning rules and regulations are as follows:

1) A university has inherent general power to maintain order and to formulate and enforce reasonable rules of student conduct.

2) University regulations should not be tested by the same requirements of specificity as statutes, and,

3) It is not necessary to have a specific regulation providing for disciplinary action for the circulation of false and inflammatory literature in order for the university to discipline the student.⁴⁰

The Future of Due Process on Campus

Of course there are other considerations to evolving an acceptable and workable disciplinary system, than merely being cognizant of the minimal procedural and substantive due process requirements. One must also be apprised of: first, the trends of other state and federal case law and the views espoused by scholars in order to anticipate a United States Supreme Court decision; second, the positions asserted by in-

³⁴ *Id.* at 202.

³⁵ *Ibid.*, witnesses were not under oath and formal rules of evidence were not invoked.

³⁶ *Id.*, "the burden was placed on (the students) to convince the F.A.C. that they should be readmitted."

³⁷ *Id.*, at 200.

³⁸ *Id.*, at 197; see also *Baltimore and O. R. Co. v. United States*, 298 U.S. 349 (1936).

³⁹ *Jones v. State Board of Education*, *supra*, n. 27, at 200. *Contra*, "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," Comment, *The Fourteenth Amendment and University Disciplinary Procedures*, 34 Mo. L. Rev. 236, 252 (1969) (hereinafter cited as Comment, 34 Mo. L. Rev. 236).

⁴⁰ *Jones v. State Board of Education*, *supra* n. 27.

fluent special interest groups; and, finally, the expectations of the institution's multiconstituency.

With the realization that "(d)ue process of law is not for the sole benefit of an accused . . ." rather . . . "(i)t 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* considerations,"⁴¹ "(a) great university should not have to be dragged, kicking and screaming, into the decade of newly honed freedoms."⁴² Instead, the university should first adopt the minimum due process requirements of its jurisdiction, then, the institution should look to the other before-mentioned criteria to develop additional processes and rules for student discipline which accommodate as many safeguards as are reasonably possible without substantially interfering with the institution's purposes and goals.

The following suggestion should be considered. The student should be allowed to waive, in writing, his right to a formal hearing with the rudiments of an adversary system, where the student neither contests the facts nor the potential sanctions.⁴³ However, where there is no such waiver by the student, additional guidelines are advised.

The suggested procedural guidelines include: All testimony should be introduced in the presence of the student.⁴⁴ The student (or his representative) should have the right to cross-examine witnesses.⁴⁵ The student should have the right to have his attorney actively par-

⁴¹ Jackson, J., dissenting in *Shangnessy v. United States*, 345 U.S. 206, 224-25 (1953).

⁴² Newman, *The Berkeley Crisis: Recollections, Overview, and Response to Professor Louisell*, 54 Calif. L. Rev. 118, 122 (1966).

⁴³ Wright, at 1083. Comment, 34 Mo. L. Rev. 236, 248. Report of the American Bar Association Commission on Campus Government and Student Dissent, 20 (1969).

⁴⁴ Allowed by the university, *Jones v. State Board of Education*, *supra* n. 27. Ordered by the district court in *Esteban v. Central Missouri State College*, 415 F. 2d 1077, 1081 (8th Cir. 1969); or at least 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, *Dixon v. Alabama State Board of Education*, *supra*, no. 13; *Zanders v. Louisiana State Board of Education*, *supra*, n. 27; Report of the American Bar Association Commission on Campus Government and Student Dissent, 23 (1969); *Van Alstyne*, 45 Denver L. J. 582, 593-94 (Special 1968). *Contra*, Unless administrators believe their procedures should reflect the statement in an order case that "... honorable students do not like to be known as snoopers and informers against their fellows . . .," *Sherman v. Hyman*, *supra*, n. 17. Due process allows, under certain circumstances, that some evidence presented remain confidential, *Wasson v. Trowbridge*, 382 F. 2d 807, 813 (2nd Cir. 1967).

⁴⁵ Allowed by the university, 279 F. Supp. 190, 194. Ordered by the court in *Esteban v. Central Missouri State College*, *supra*, n. 44 at 1081. "(Cross-examination is) the greatest legal engine ever invented for the discovery of truth," Wigmore, *Evidence*, § 1367 (3rd ed. 1940). Compare Joint Statement on Rights and Freedoms of Students, 54 A.A.U.P. Bull. 258, 261 (June, 1968); *Van Alstyne*, *supra*, n. 44; Report of the American Bar Association Commission on Campus Government and Student Dissent, 23 (1969); Model Code for Student Rights, Responsibilities and Conduct, Student Law Division of the American Bar Association, 6 (1969). But see *Dixon v. Alabama State Board of Education*, *supra*, n. 13.

ticipate in the hearing.⁴⁶ There should be a verbatim record of the proceeding.⁴⁷ The student should have the right to a public hearing.⁴⁸

As with any right, the right to a public hearing is the servant of reasonableness and fairness and therefore may not be the subject of abuse by either the parties to the proceeding or any third party. The following provisions should accommodate the respective interests of the student and the university:

The committee shall ordinarily hold a hearing on charges in closed session. However, the student charged shall have the right to an open hearing if he requests the same in writing at least twenty-four (24) hours prior to the scheduled time of the hearing, except that the committee reserves the right to require a hearing to be held in closed session at any time such a session becomes necessary for the orderly conduct of the hearing. Where the hearing is open there shall be a separation of witnesses. The parents or guardian of the student may be present during a closed hearing. The hear-

⁴⁶ Allowed by university, *Jones v. State Board of Education*, *supra* n. 27 at 194. Ordered by the court in *Esteban v. Central Missouri State College*, *supra* n. 44 at 1081. A student should have the right to be represented at the hearing by any person selected by him. In many cases there will be a need for counsel for the student, Joint Statement of Rights and Freedoms on Students, *supra*, n. 45. Model Code for Student Rights, Responsibilities and Conduct, *supra* n. 45; Van Alstyne, *op. cit. supra*, n. 44. "(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 (1966). Where prosecution of the student before the discipline committee was conducted by a senior law student who was chosen to prosecute because of his familiarity with legal proceedings, and prosecution resulted in expulsion or suspension, due process was denied by not permitting participation by the student's retained counsel, *French v. Bashful*, 303 F. Supp. 1333, 1337-38 (E.D. La. 1969). Cf., *Norton v. Discipline Committee of East Tennessee State University*, *supra* n. 27, where the court stated that the denial of a continuance to students to obtain counsel was not a denial of due process under the circumstances, where at the hearing each student was given a full opportunity to state his views and had an opportunity for counsel on appeal, and had a plenary hearing in the district court with counsel. *Contra*, where a suspended or expelled student was not entitled to counsel at the hearing before a committee which had only advisory powers, *Wasson v. Trowbridge*, *supra*, n. 44; *Barker v. Hardway*, 283 F. Supp. 228, 237 (S.D.W.Va. 1968). Due process does not require that a pupil, who had been suspended from school by the principal for behavioral difficulties, be represented at a guidance conference by an attorney, *Madera v. Board of Education of the City of New York*, 386 F. 2d 778, 780 (2nd Cir. 1967).

⁴⁷ Provided by university, *Jones v. State Board of Education*, *supra* n. 27, at 194. In the absence of a transcript, there shall be both a digest and a verbatim record, such as a tape recording, of the hearing in cases that may result in the imposition of such sanctions as restitution, suspension, and expulsion, Model Code for Student Rights, Responsibilities and Conduct, *supra*, n. 45. Each side may at its own expense make a record of the events at the hearing, *Van Alstyne, op. cit. supra*, n. 44 at 593-94; *Esteban v. Central Missouri State College*, *supra*, n. 44. Stenographic or mechanical recording of proceedings before the university disciplinary committee is not necessary to due process, *Due v. Florida A. and M. University*, 233 F. Supp. 396, 403 (N.D. Fla. 1963).

⁴⁸ *Jones v. State Board of Education*, *supra* n. 27 at 201 reveals that the university allowed reporters, and perhaps others, to be present. The hearing shall be private if requested by the accused student, Model Code for Student Rights, Responsibilities and Conduct, *op. cit. supra*, n. 45. *Contra*, There is no (case) authority which necessitates a public hearing, *Zanders v. Louisiana State Board of Education*, *supra* n. 27.

ing committee may request the Office of Security to provide a non-uniformed person to act as bailiff at any hearing.⁴⁹

Any exhibits (e.g., documents) which either party wishes to enter into evidence should be presented to the opposing party at least forty-eight (48) hours prior to the hearing.⁵⁰

The burden of proof should rest upon the university official bringing the charges. However, there need not be any set standard of proof.⁵¹ Non-appearance of a student witness (not including the accused) after being notified by certified mail return receipt requested, without good cause shown for such non-appearance, should be the subject of separate disciplinary action.⁵²

The student-accused should have the right to remain silent without such silence being deemed as prejudicial to his case.⁵³ In order to better balance the student's right to remain silent with the interests

⁴⁹ Procedure used by Ad Hoc Hearing Committee for May 1970 Student Suspensions at Ohio University. There were no problems in maintaining proper decorum.

⁵⁰ Ordered by the court in *Esteban v. Central Missouri State College*, *supra*, n. 44; Joint Statement on Rights and Freedoms of Students, *op. cit. supra*, n. 45; Van Alstyne, *op. cit. supra*, n. 44.

⁵¹ Joint Statement on Rights and Freedoms of Students, *op. cit. supra*, n. 45. Although the formalities of a trial in a law court are not necessary, and although the exigencies of school or college life may require the suspension of one reasonably thought to have violated disciplinary rules, it seems fairly clear that a student should not have the burden of proving himself innocent, Seavey, *op. cit. supra*, n. 11. *Contra*, Koblitz v. Western Reserve University, *supra*, n. 25. Schoppelrei v. Franklin University, *supra*, n. 25; Zanders v. Louisiana State Board of Education, *supra*, n. 27.

⁵² Van Alstyne, *op. cit. supra*, n. 14 at 382. *Goldstein v. New York University*, 78 N.Y.S. 739 (1902); *State ex rel. Englehardt v. Vermillion*, 110 N.W. 736 (1907). *Contra*, *People ex rel. Bluett v. Board of Trustees*, 134 N.E. 2d 635 (1956), where the court said that a university has no authority to compel the attendance of witnesses at the hearing or to compel them to testify if present.

⁵³ *Sherman v. Hyman*, *supra* n. 17 at 826; *Goldwyn v. Allen*, 281 N.Y.S. 2d 899, 906 (1967). *Contra*, *Goldberg v. Regents of the University of California*, 57 Cal. Rptr. 463, 475 (1967); General Order of Judicial Standards of Procedure and Substance, 45 F.R.D. 133, 147 (W.D. Mo. 1968) (hereinafter cited as General Order). Cf. Cross-examination may be required where there are "conditions of enlightened action," Byse, at 145. Where the university violation is also a criminal violation (e.g., taking over a campus building) the privilege must be recognized, Wright, at 1077, citing *Grossner v. Trustees of Columbia University*, *supra*, n. 25. See also *Furutani v. Ewigleben*, 297 F. Supp. 1163 (N.D. Cal. 1969). But where the violation is not also a crime (e.g., cheating) the university may require the testimony if it is worth the effort. Since in fact an inference will be drawn against the student if he chooses not to testify, no matter what protestations are made to the contrary, to allow the privilege generally as a prudential matter has little practical effect, Wright, at 1077. Miranda warnings cannot be required to be given by a college administrator to a student not in custody, Wright, at 1077, citing *Buttny v. Smiley*, 281 F. Supp. 280, 287 (D. Colo. 1968). There is no legal double jeopardy where the student is disciplined by the university and criminally prosecuted, Wright, at 1078, citing *McKay*, *The Student as Private Citizen*, 45 *Denver L. J.* 558, 564 (1968) and *General Order*, 147-148. In addition, the university is not required to postpone its disciplinary proceeding until the criminal charge is disposed of, Wright, 1078, citing *Furutani v. Ewigleben*, *supra*, n. 53; *Grossner v. Trustees of Columbia University*, *supra* n. 25; *Goldberg v. Regents of the University of California*, *supra*, n. 53.

The author suggests that even though the items in this footnote are not required, an administration must carefully weigh other factors in developing policy.

of the university, it should be provided that "where the student knowingly and voluntarily waives his right to remain silent, but subsequently refuses to answer questions, such silence may be deemed prejudicial to his case relative to the unanswered questions."⁵⁴

No findings or recommendations for the imposition of sanctions should be based solely upon the failure of the student-accused to answer or appear at the hearing. In such a case the evidence in support of the charges should be presented and considered and the committee's findings and recommendations made explicit as in any other case.⁵⁵

The findings as to each charge and the recommendations of the committee should be furnished in writing solely to the student and a designated university official after the conclusion of deliberations.⁵⁶ However, it is strongly urged that at least once per quarter the administration make a "State of the Student Judiciaries Report" listing without names the number of students suspended or expelled.⁵⁷

Perhaps the procedural issue of most public (political) interest surrounding student discipline is whether the university administration has the power and the authority to summarily extricate students from the campus under certain disruptive circumstances.

Such diverse special interest groups as the American Civil Liberties Union, the American Association of University Professors, and the American Bar Association concur, that the university may invoke interim suspension of a student pending a later hearing at which he will be given all of the ordinary procedural protections, where conditions for holding a disciplinary hearing prior to suspension make such a hearing reasonably impossible, and that the interim suspension is invoked only for:

⁵⁴ Procedure used by Ad Hoc Hearing Committee for May 1970 Student Suspensions at Ohio University.

⁵⁵ Model Code for Student Rights, Responsibilities and Conduct, *op. cit. supra*, n. 45. In *Scott v. Alabama State Board of Education*, 300 F. Supp. 163 (D.C. Ala. 1969), the court stated that students, who on advice of counsel, did not take advantage of an opportunity for a hearing according to due process, waived whatever rights they may have had to use them.

⁵⁶ Procedure used by Ad Hoc Hearing Committee for May 1970 Student Suspensions at Ohio University. Compare *Van Alstyne*, *op. cit. supra*, n. 44. *Dixon v. Alabama State Board of Education*, *supra*, n. 13; *Zanders v. Louisiana State Board of Education*, *supra*, n. 27; *French v. Bashful*, *supra*, n. 46; The Report of the American Bar Association Commission on Campus Government and Student Dissent, 24 (1969); *Esteban v. Central Missouri State College*, *supra*, n. 44.

Generally, the right to appeal is provided. *Zanders v. Louisiana State Board of Education*, *supra*, n. 27 recommended the right to appeal.

⁵⁷ As a policy matter confidentiality of names of disciplined students may be wise. However, total confidentiality creates an artificial environment in which the average student has no knowledge that the university not infrequently suspends or expels students for a variety of reasons. This state of ignorance may cause needless tension when it is publicized that students have been suspended or expelled for disruption surrounding political action.

- a) the student's own physical or emotional safety and well-being, or,
- b) reasons relating to the safety and well-being of students, faculty, or university property.⁵⁸

⁵⁸ In *Jones v. State Board of Education* *supra*, n. 27 at 202 it was stated that the demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective," citing *Cotton Mills v. Administrator*, 61 S. Ct. 524, 536 (1941). In *Jones* the students were informed of indefinite suspensions at the end of the school year with hearings during the summer. Expelled university students were not denied due process by the fact that the announced purpose of the faculty committee which heard the charges was to determine whether to "readmit" students, where the objective of the hearing was to provide the students with an opportunity to show cause why disciplinary action should not be made final and the hearing was held before the final decision was made. In *Schiff v. Hannah*, 282 F. Supp. 381, 383 (S.D. Mich. 1966), a graduate student was denied reenrollment without a hearing. Limiting this decision to the facts of the case, the court suggested (but did not order) that the rules in *Dixon* now be followed.

Perhaps *Dixon* itself should be interpreted in light of *dictum* found at 157, where the court stated that in the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense.

Scoggin v. Lincoln University, 291 F. Supp. 161, 172 (W.D. Mo. 1968), in *dictum*, provided that no principle of law requires an educational institution to commence disciplinary proceedings at a time when the campus is in an uproar. Appropriate action can be taken consistent with the circumstances to insure the temporary removal of students and others who persist in efforts to reduce the academic community to a state of permanent chaos. The hearing of disciplinary cases produced by violent student conduct may, and probably should, be continued for a reasonable time consistent with conditions on the campus. If a particular educational institution has promulgated an appropriate disciplinary code, and is engaged in the process of following such a code, it need not fear that one of its students will be able to maintain some sort of federal court action before the institution has had a reasonable period of time, under the circumstances, within which to conduct a proper disciplinary proceeding in accordance with its established code. In *Stricklin v. Regents of the University of Wisconsin*, 297 F. Supp. 416, 420 (W.D. Wis. 1969), it was stated that, when appropriate university authority has reasonable cause to believe that danger will be present if a student is permitted to remain on campus pending a decision following a full hearing, an interim suspension may be imposed, but not without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it, in which case a preliminary hearing is required at the earliest practical time. The purpose of a preliminary hearing is to persuade the suspending authority that there is a case of mistaken identity or that there was extreme provocation or that there is some other compelling justification for withholding or terminating the interim suspension. In *Barker v. Hardway*, *supra*, n. 46, the president attempted to get the students to come to his office. They refused. Then he sent them letters relating the suspensions and reasons, and their right to appeal with an appropriate hearing. In denying *certiorari* Mr. Justice Fortas said: "The petitioners were suspended from college not for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others. An adequate hearing was afforded them on the issue of suspension." (After suspension.) The Report of the American Bar Association Commission on Campus Government and Student Dissent, 24 (1969), *j. Interim Suspension*, provided as a "general rule that the status of a student should not be altered until the charges brought against him have been adjudicated. Experience has shown, however, that prompt and decisive disciplinary action may be required in extreme cases before there is an opportunity to conduct a hearing, as in cases in which a student's continued presence on campus constitutes an immediate threat or injury to the well-being or property of members of the university community, or to the property or the orderly functioning

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It should be noted that Sections 3345.22, 3345.23 and 3345.25 of Ohio Revised Code (House Bill 1219)⁵⁹ are of no great value to the university during a period of campus uproar.⁶⁰ Experience indicates that to provide a student with a fair hearing of an adversary nature it may take several days merely for preparation and a full day for the hearing itself,⁶¹ with perhaps numerous administrators and security officers being tied up as witnesses. In addition, the bill allows for a potential delay of at least ten (10) days from arrest until hearing.⁶² Therefore, assuming the student is capable of making bail, the burden of removing an allegedly dangerous student from the campus until the confusion subsides remains firmly fixed on the shoulders of the university through its disciplinary process.⁶³

Although the university may recognize that "procedure is the heart of the law" and adopts many procedural refinements, the university must realize that a cardiac transplant into a necrotic body of vague and antiquated rules is of negligible value; that is, the university should develop rules and regulations proscribing specific conduct with accompanying rationale and guidelines. This is especially true in light of the central contemporary issue enveloping the student discipline question. That crucial issue is whether the works of Thoreau will be the

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of the university. The imposition of interim suspension should entitle the suspended student to a prompt hearing on the charges against him. Fundamental fairness may require an informal review of the decision to impose interim suspension in the absence of a prompt hearing on the charges." Model Code for Student Rights, Responsibilities and Conduct, *op. cit. supra*, n. 45, stated that in extraordinary circumstances the student may be suspended pending consideration of the case. Such suspension should not exceed a reasonable time. The Joint Statement on Rights and Freedoms of Students, *op. cit. supra*, n. 45, provided that, pending action on the charges, the status of a student should not be altered, or his right to be present on campus and to attend classes suspended, except for reasons relating to the safety and well-being of students, faculty, or university property.

Academic Freedom and Civil Liberties of Students in Colleges and Universities, American Civil Liberties Union (April, 1970), 19 n. 1. provided that "(a) student may be suspended only in exceptional circumstances involving danger to health, safety or disruption of the educational process. Within twenty-four hours of suspension, or whenever possible prior to such action, the student should be given a written statement explaining why the suspension could not await a hearing."

⁵⁹ A Bill to enact §§ 2923.61, and 3345.22 to 3345.26 inclusive, of the Ohio Rev. Code, to control campus disorder, and to provide for the immediate suspension or dismissal of students and faculty, under certain circumstances. (Effective September, 1970.)

⁶⁰ The psychological deterrent value of such provisions is not discounted; rather, the effectiveness of the application of the mechanics to specific persons is discounted. However, Ohio Rev. Code §§ 2923.61 and 3345.26 of House Bill 1219 do provide some legal tools which may enable the university to better protect its interests.

⁶¹ On the average the hearing of evidence took six hours and deliberations three more hours for each case processed by the Ad Hoc Hearing Committee for May 1970 Student Suspensions at Ohio University.

⁶² Ohio Rev. Code, § 3345.22(A).

⁶³ *Id.* at (A) and (B). "Primary reliance should be placed on university discipline procedures . . ." Report of the American Bar Association Commission on Campus Government and Student Dissent, 19 (1969).

standard by which allowable political action is to be measured and disciplinary action dispensed, or whether the subtleties of the First and Fourteenth Amendments in relation to the special and peculiar interests of an institution of higher education will be the standard.⁶⁴ Unless and until a consensus on allowable political action is established and

⁶⁴ In *Norton v. The Discipline Committee of East Tennessee State University*, *supra* n. 27 at 198 the court held, that literature distributed by plaintiff students on campus urging students to stand up and fight and calling university administrators despots and problem children to be reprimanded by students was not privileged under the First Amendment as expression of free speech but was calculated to cause disturbance and disruption of school activities and bring about ridicule and contempt for school authorities, and suspension of students who distributed such literature was not improper. Judge Weick, further states, "(t)he students have no constitutional right to misbehave on the college campus." At 199, the Norton court stated, "(i)t is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities had the right to nip such action in the bud and prevent it in its inception." Similarly Judge Miller in *Jones v. The State Board of Education*, *supra* n. 27 at 204 stated that "(t)he indefinite suspension of the plaintiffs resulted from their obstructive conduct which, just as in the case of picketing and parading, is subject to regulation even though commingled with expression and association." See also *Tinker v. Des Moines Independent Community School District*, *supra* n. 19 at 740, which held that "a student may express his opinions, even on controversial subjects . . . , if he does so without *materially and substantially interfering* with appropriate discipline in operation of the school and without colliding with the rights of others." (Emphasis added), citing *Burnside v. Byars*, 363 F. 2d 744, 749 (5th Cir. 1966).

But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech, citing *Blackwell v. Issaquena County Board of Education*, 363 F. 2d 749 (5th Cir. 1966), where some students harassed others who did not wear "freedom buttons" and created much disturbance. The *Tinker* court added, at 737, that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." In *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613, 618 (M.D. Ala. 1967) it was stated that State school officials cannot infringe on their student's right of free and unrestricted expression where the exercise of such right does not materially and substantially interfere with requirements of appropriate discipline in operation of the school. In *Esteban v. Central Missouri State College*, *supra*, n. 44 at 1087 it was provided that conduct of college students who participated in a mass gathering that engaged in potentially disruptive conduct, aggressive action, disorder and disturbance, acts of violence, and destructive interference with the rights of others, did not constitute protected free speech and assembly.

The "public-property-syndrome" advocated by the new left, that is, the theory that "since the particular location in question is referred to as public property, it belongs to all of the people, and therefore, there are no prohibitions on using any state-owned property for protest," is succinctly rebutted by Justice Fortas in *A. Fortas, Concerning Dissent and Civil Disobedience* 46-47 (1968), where he states, "... public use does not authorize either the general public or the university faculty and students to use them in a way which subverts their purpose and prevents their intended use by others. The public character of a university does not grant to individuals a license to engage in activities which disrupt the activities to which those facilities are dedicated."

The state may be required to tolerate discussions intended to publicize antiwar views in the Port Authority Bus Terminal. It need not tolerate such discussions in the reading room of the university library. The factors to be considered, such as "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended . . . are essentially the same." But examination of these factors leads to different results in different cases. A university is not obliged to tolerate interference with "any lawful mission, process, or function of the institution," or, in a simpler phrase, that "the normal activities of the University" are protected. On this view, the quiet of

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published, "judicializing" and otherwise "legalizing" the discipline process is at most a delay and probably an exercise in futility, relative to growing student disenchantment.

Conclusion

Legal counsel for each university is urged to recommend to his university the adoption of the minimum due process requirements of its jurisdiction and such additional safeguards as are reasonably possible without substantially interfering with the institution's purposes and goals. The administration of each university is urged to improve its own academic community by such adoption and to continue the commitment, not because, if it does not, the administrators will spend their "lifetime on the witness stand," or because, if it does not, academe will become a legal nightmare.⁶⁵ This plea rests upon the view that the long-term interests of the university require that it do what is right, regardless of what immediate consequences may be feared from either the legislature or the militant student.⁶⁶

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the library reading room, the decorum of the classroom, and the pageantry and drama of the stadium are given preference, not because these are more or less "educational" than a "teach-in" on Vietnam would be, but because these are the "normal activities" of the university as defined by those to whom the state has entrusted the governance of the university. Other activities, to the extent that they are protected by the First Amendment, must be permitted but they need not be permitted at a time or place that will interfere with the normal activities. On the view that the First Amendment applies with full vigor on the campus, it is a false dichotomy to suggest, as some have, that there are circumstances in which a university can limit or forbid "the exercise of a right guaranteed by the Constitution or a law of the United States to persons generally." The First Amendment should not be read as granting rights in a vacuum, but rather as granting rights that exist at a particular time and place. "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." A rule barring loud discussions in the reading room of the library does not limit "the exercise of a right guaranteed by the Constitution . . . to persons generally," for no one has a constitutional right to speak in a place so clearly inappropriate. The nature of the university, and the pattern of its normal activities dictate the kinds of regulations of time, place, and manner that are reasonable, but the First Amendment is no bar to reasonable regulations of that kind. Here are some guidelines concerning free speech: 1) expression cannot be prohibited because of disagreement with or dislike for its contents, 2) expression is subject to reasonable and nondiscriminatory regulations of time, place, and manner, and, 3) expression can be prohibited if it takes the form of action that materially and substantially interferes with the normal activities of the institution or invades the rights of others. See Wright, at 1040-43. Interim Statement on Campus Disorder, U. S. National Commission on the Causes and Prevention of Violence, 4 (1969). Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967). (T)he university may legitimately seek to preserve an "academic" atmosphere on campus, Developments in the Law, 1132. The standards imposed by the school may be higher than those imposed on the general public by civil and criminal laws, Comment, The Scope of University Discipline, 35 Brooklyn L. Rev. 486, 489 (1969). There is conflict between the Seventh and Eighth Circuits as to the specificity required in the regulations, Haskell, Judicial Review of School Discipline, 21 Case W. Res. L. Rev. 211, 217 (1970).

⁶⁵ Byse, at 148.

⁶⁶ Wright, at 1088.