Legal and Educational Aspects of Student Dismissals: A View from the Law School

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LEGAL AND EDUCATIONAL ASPECTS OF STUDENT DISMISSALS: A VIEW FROM THE LAW SCHOOL

by

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THE dismissal of a student from a law school for academic or disciplinary reasons is a traumatic experience for the individual whose educational and career opportunities are so terminated or impaired. The dismissal process may also have significant impact on the vitality of the school's operation and its achievement of educational goals. There is little doubt that a "University, as an academic community, can formulate its own standards, rewards and punishments to achieve its educational objectives."[1] Thus, the university has the inherent power to formulate and enforce rules of student conduct that are "appropriate and necessary" to the maintenance of order where reasonably necessary to further the institution's educational goals.[2] Similarly, it has power to regulate academic progress.[3] It follows that a student's failure to comply with rules of conduct or standards for academic progress may legitimately result in dismissal. Accordingly, it can be argued that the dismissal process for a student in college or professional school is within the sound discretion of the institution.

There are, however, certain legal constraints on the dismissal process. The judicial characterization of the student-university relationship as in loco parentis or as contractual may affect how a student may be dismissed. If the institution is a state entity, there are constitutional due process limitations whether the dismissal is for misconduct or academic deficiencies. Beyond these legal requirements, educational considerations may also be present, namely, whether the nature of the institution as a law school itself affords any constraints on the dismissal process.

Although the manner in which educational institutions discipline and dismiss students may not be the pressing problem it was in the late 1960's, that fact should not deter an appraisal of the dismissal process. A reexamination of student dismissal procedures is valuable if the handling of disciplinary matters is not viewed as a mere expediency, but considered for its symbolic impact and educational potential in legal education. Such an inquiry begins with a survey of the legal requirements involved in the dis-

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1. Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 885, 57 Cal. Rptr. 463, 476 (1967).

2. *Id.* at 879, 57 Cal. Rptr. at 472.

3. Board of Curators v. Horowitz, 435 U.S. 78 (1978), *discussed at* notes 149-73 *infra* and accompanying text.

missal of a student from school as relevant to a law student. This background of legal constraints provides a perspective from which the educational potential of the dismissal process can be considered.[4]

I. THEORETICAL FOUNDATIONS FOR REGULATION OF THE STUDENT-UNIVERSITY RELATIONSHIP

A. *In Loco Parentis*

American institutions of higher education once held tight reins on their students, unfettered by external intervention. Students were expelled from universities for a variety of innocuous reasons such as smoking,[5] joining a secret club,[6] and not being "a typical Syracuse girl."[7] One student was summarily dismissed from law school for maliciously accusing a fellow student of sending annoying letters to a female law student.[8] Religious and political beliefs were also the subject of university discipline, as one student was dismissed for being a "fanatical atheist"[9] and another for giving a speech encouraging draft resistance.[10] Both the summary process used and the reason for dismissal were deemed within the exclusive discretion of the university since the relationship between the school and student was characterized in family terms. Under the doctrine of in loco parentis the courts viewed schools as being in a parental relation to their students.[11] "[A] schoolmaster is regarded as standing in loco parentis, and, like the parent, has the authority to moderately chastise pupils under his care."[12] One application of this theory is found in the summary dismissal of a female student by a school's dean of women upon the assertion that the young lady was habituated to tobacco and had been seen in public on the lap of a young man. When the young lady challenged the dismissal in court, the school's action was upheld. The court commended the dean for her "motherly interest" in the plaintiff and observed that the plaintiff's public defiance of the school was itself sufficient basis for disciplinary action.[13]

Adherence to this doctrine as defining the student-school relation has

4. The scope of this Article is limited to the theme as stated. It is not intended to give comprehensive treatment to the subject of student rights as such, nor to evaluate different kinds of disciplinary systems that might be employed by a school, nor to propose an ideal code of conduct. For a bibliography on the subject of student rights, see Van Alstyne, *The Student as University Resident*, 45 DEN. L.J. 582, 612-13 (1968); *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1, 177-78 (1966); Project, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795, 808-10.

5. McClintock v. Lake Forest Univ., 222 Ill. App. 468 (1921).

6. People *ex rel.* Pratt v. Wheaton College, 40 Ill. 186 (1866).

7. Anthony v. Syracuse Univ., 224 A.D. 487, 231 N.Y.S. 435 (1928).

8. Goldstein v. New York Univ., 76 A.D. 80, 78 N.Y.S. 739 (1902).

9. Robinson v. University of Miami, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958).

10. Samson v. Trustees of Columbia Univ., 101 Misc. 146, 167 N.Y.S. 202, *aff'd*, 181 A.D. 936, 167 N.Y.S. 1125 (1917).

11. *See* R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 25-56 (1965); Holland, *The Student and the Law*, 22 CURRENT LEGAL PROB. 61, 66 (1969).

12. Roberson v. State, 22 Ala. App. 413, 414, 116 So. 317, 317 (1928).

13. Tanton v. McKenney, 226 Mich. 245, 253, 197 N.W. 510, 513 (1924).

now diminished to the point that its continued viability is doubtful. This development is due in part to the changing character of American colleges and in part to the logical flaws in the in loco parentis doctrine. Many universities have become so large that there is no longer a perceptible resemblance to a family.[14] Aside from the impersonal relationship, it is difficult to speak of the university as a substitute parent when most of the students have reached the age of majority[15] or are married or otherwise free of parental control.[16] Moreover, the parent analogy breaks down when it is remembered that real parents would not be allowed to "evict" their child.[17] Another flaw in the parental delegation idea arises if parents instruct the university to act toward their child in a manner inconsistent with its own rules.[18] Given these considerations, it is unlikely that a court today would view a law school as standing in loco parentis to a student, with essentially unfettered authority to discipline.[19]

B. *Contract*

The relationship between student and university can also be described under a contractual theory.[20] A student may "agree to grant to the institution an optional right to terminate the relations between them."[21] Under this theory the student and university have agreed to certain terms which limit the rights of students and result in the imposition of sanctions when violated. The contract provisions are usually scattered throughout a variety of documents such as admission and registration forms, catalogues or bulletins, and school rules and regulations.[22] Such provisions may be im-

14. *See* Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 294 (1968).

15. *See id.* at 294; Holland, *supra* note 11, at 66. In Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 876-77 n.11, 57 Cal. Rptr. 463, 470 n.11 (1967) (citation omitted), the court said:

> In earlier decades in loco parentis had some superficial appeal because the vast majority of college students were below 18. Today, in contrast, there are more students between the ages of 30 and 35 in universities than there are those under 18, and the latter group account for only seven percent of the total college enrollment . . . .

The age of majority has been reduced from age 21 to age 18 in many jurisdictions. *See, e.g.*, CAL. CIV. CODE § 25.1 (West Supp. 1979).

16. Note, *The Scope of University Discipline*, 35 BROOKLYN L. REV. 486, 487 (1969).

17. Van Alstyne, *supra* note 14, at 295.

18. Holland, *supra* note 11, at 68.

19. Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968): "[T]he doctrine of 'In Loco Parentis' is no longer tenable in a university community . . . ." Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 876, 57 Cal. Rptr. 463, 470 (1967) (footnote omitted): "[S]tate universities' should no longer stand in loco parentis in relation to their students."

20. Zumbrun v. University of S. Cal., 25 Cal. App. 3d 1, 10, 101 Cal. Rptr. 499, 504 (1972): "The basic legal relation between a student and a private university or college is contractual in nature." *See also* Searle v. Regents of Univ. of Cal., 23 Cal. App. 3d 448, 452, 100 Cal. Rptr. 194, 196 (1972); Anthony v. Syracuse Univ., 224 A.D. 487, 490, 231 N.Y.S. 435, 439 (1928).

21. Anthony v. Syracuse Univ., 224 A.D. 487, 490, 231 N.Y.S. 435, 439 (1928).

22. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 651 (1966). "The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract." Zumbrun v. University of S. Cal., 25 Cal. App. 3d 1, 10, 101 Cal. Rptr. 499, 504 (1972).

plied as well as expressed[23] and may consist of any "reasonable condition" determined subsequent to commencement of the relationship.[24]

The difficulty of imputing to the student knowledge of even the express contract terms located in the full complement of university bulletins, regulations, and forms is one troublesome aspect of the contract theory.[25] It is doubtful whether students are aware that they have entered into a commercial transaction.[26] Moreover, it is unreasonable to expect that students would or could read the mass of regulations and forms typical of the modern university.[27] Thus, if the student-university relation is contractual, it may be characterized as a contract of adhesion. If so, its disciplinary terms may not be given full effect because of the absence of a meaningful bargain, in that the university unilaterally dictates the terms and possesses disproportionate bargaining power.[28]

Despite this criticism, the contract doctrine is currently cited by courts as the governing relation between students and the university, especially when the school is a private university.[29] While reliance upon the contract theory historically has maximized the school's discretion and limited student rights,[30] such a result is not required by the nature of the doctrine. One court has observed that " 'a contract between the student and the institution is created containing two implied conditions: (1) that the student will not be arbitrarily expelled, and (2) that the student will submit himself to reasonable rules and regulations for the breach of which, in a proper case, he may be expelled . . . .' "[31] The arbitrary denial in bad faith of a student's readmission by a university has been held to state an actionable claim for specific performance of a contract between the university and the

23. *See, e.g.*, Andersen v. Regents of Univ. of Cal., 22 Cal. App. 3d 763, 769, 99 Cal. Rptr. 531, 535 (1972); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); Comment, *A Student's Right to Hearing on Dismissal from a University*, 10 STAN. L. REV. 746, 747 (1958).

24. Giles v. Howard Univ., 428 F. Supp. 603, 606 (D.D.C. 1977). In disallowing plaintiff's claim that his dismissal from medical school for failure to satisfy probation conditions violated the school promotion statement, which did not contain the unsatisfied conditions, the court held the promotion statement permitted his dismissal or retention upon compliance with any reasonable condition.

25. *See, e.g.*, Goldman, *supra* note 22, at 652-53; Kutner, *Habeas Scholastica: An Ombudsman for Academic Due Process—A Proposal*, 23 U. MIAMI L. REV. 107, 143 (1968); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 314 (1968).

26. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1147 (1968).

27. *See* Goldman, *supra* note 22, at 653.

28. *See id.* at 653-54; *Developments in the Law—Academic Freedom*, *supra* note 26, at 1146, 1147 (a student "will almost certainly have insufficient bargaining power to obtain any other terms than those the school chooses to dictate"); Note, *The Scope of University Discipline*, 35 BROOKLYN L. REV. 486, 488 (1969); Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. 277, 281 (1969).

29. *See, e.g.*, Berrios v. Inter Am. Univ., 535 F.2d 1330 (1st Cir. 1976); Giles v. Howard Univ., 428 F. Supp. 603 (D.D.C. 1977); Lyons v. Salve Regina College, 422 F. Supp. 1354 (D.R.I. 1976).

30. *See, e.g.*, Anthony v. Syracuse Univ., 224 A.D. 487, 231 N.Y.S. 435 (1928).

31. Andersen v. Regents of Univ. of Cal., 22 Cal. App. 3d 763, 769-70, 99 Cal. Rptr. 531, 535 (1972) (quoting CAL. JUR. 2d *Universities and Colleges* § 58, at 505 (1959)).

dismissed student.[32] The contract doctrine may also afford increased benefits to a student when a university violates its own procedures made a part of the contract. One court reinstated a grade of "Incomplete," rather than the "Failure" designated by the dean, following a finding that the dean was not authorized under the school's "grade appeal process" to substitute a grade for one recommended by the grade appeal committee, which had awarded an "Incomplete."[33] Additionally, if the contract theory is employed, one commentator has observed that a proper application of contract law would place the burden of proof on the university when it terminates the contract by dismissal for a student's breach.[34] Placing the burden on the school has not been the practice, however, as most courts require the student to show that the school has acted arbitrarily in a dismissal.[35] Furthermore, it might be argued that contractual principles of reasonableness require a court to imply a contract term that the university will operate in a reasonable and fair manner in any disciplinary proceeding.[36] Thus, the prevailing contract doctrine of student-university relations could be applied to afford some protection against a school's arbitrary dismissal of students.

II. DUE PROCESS CONSTRAINTS ON STUDENT DISCIPLINE

A. *Emergence of Constitutional Due Process Considerations*

Until 1961, attempts to secure judicial review of student dismissals as violative of constitutional due process were unsuccessful.[37] Judicial review was denied on the ground that federal courts lacked jurisdiction over student claims of unjust treatment by universities. It was said: "Education is a field of life reserved to the individual states. The only restriction the Federal Government imposes is that in their educational program no state may discriminate against an individual because of race, color or creed."[38] Even if a federal court had jurisdiction over such a claim, it was the pervasive view that a student was admitted to a college "not as a matter of right but as a matter of grace after having agreed to conform to its rules and regulations."[39] This view found support in the Supreme Court's character-

32. Williams v. Howard Univ., 528 F.2d 658, 660 (D.C. Cir.), *cert. denied*, 429 U.S. 850 (1976); Frank v. Marquette Univ., 209 Wis. 372, 245 N.W. 125, 127 (1932).

33. Lyons v. Salve Regina College, 422 F. Supp. 1354, 1358-63 (D.R.I. 1976).

34. *Developments in the Law—Academic Freedom*, *supra* note 26, at 1146.

35. *See, e.g.*, Williams v. Howard Univ., 528 F.2d 658, 660 (D.C. Cir.) (a student must adduce evidence of a violated contractual right), *cert. denied*, 429 U.S. 850 (1976).

36. If it can be implied into the university-student contract that the student will not be arbitrarily expelled, it follows that it can be implied there must be a fair proceeding to determine if expulsion is warranted. Otherwise, a student could be arbitrarily expelled. *See* note 31 *supra* and accompanying text.

37. As of 1959, no court had ordered reinstatement for a student expelled or suspended from college. See Byse, *Procedure in Student Dismissal Proceedings: Law & Policy*, STUDENT PERSONNEL, Mar. 1963, at 131-36.

38. Steier v. New York State Educ. Comm'r, 271 F.2d 13, 18 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960).

39. *Id.* at 20.

ization of attendance at a state university as a mere "privilege."[40] If college attendance was a privilege and not a right, as the Court reasoned, there was no constitutional protection in school discipline proceedings and thus no requirement of constitutional due process prior to expulsion.[41]

An abrupt departure from this settled rule came in 1961 when the Fifth Circuit Court of Appeals ruled in *Dixon v. Alabama State Board of Education*[42] that the expulsion for misconduct of six students from a state college without notice and some opportunity for a hearing on the reasons for the dismissals violated the due process clause of the Constitution.[43] Even if attending a public university is only a privilege rather than a right, the court observed: "[I]t nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process."[44] The court reasoned that "[w]henever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process."[45] The "right to remain at the college . . . is an interest of extremely great value"[46] that, absent "immediate danger to the public," cannot be denied by the school without "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."[47] The *Dixon* court held that prior to a disciplinary expulsion of students from a state university, "notice and some opportunity for hearing" are constitutionally mandated by the due process clause of the fourteenth amendment.[48]

Dixon was not an aberration. Its rationale has been followed in a series of cases involving expulsions and suspensions from public universities and secondary schools.[49] Yet *Dixon* has not turned the federal courts into "wet nurses or baby sitters" for the nation's students, as feared by the dissenters in *Dixon*.[50] The *Dixon* court observed that a "full-dress judicial hearing"[51] was not necessary; the procedure could "vary depending upon the circumstances of the particular case"[52] so long as "the rudiments of an

40. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 261 (1934).

41. *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945, 950 (M.D. Ala. 1960).

42. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

43. The misconduct for which the students were expelled was not specified, although it concerned the dismissed students' involvement in off-campus civil-rights demonstrations. The notice of expulsion assigned no specific ground for expulsion. *Id.* at 151 n.2.

44. *Id.* at 156.

45. *Id.* at 155.

46. *Id.* at 157.

47. *Id.*

48. *Id.* at 158.

49. *See* Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975), for a collection of federal court decisions that uniformly hold the due process clause applicable to decisions made by public educational institutions for student expulsion or suspension. For state court decisions to the same effect, see North v. West Virginia Bd. of Regents, 233 S.E.2d 411 (W. Va. 1977); De Prima v. Columbia-Greene Community College, 89 Misc. 2d 620, 392 N.Y.S.2d 348 (1977).

50. 294 F.2d at 160 (dissenting opinion).

51. *Id.* at 159.

52. *Id.* at 158.

adversary proceeding" are provided.[53] In adopting the *Dixon* rationale, other courts have approved a variety of procedures deemed adequate to insure "fairness and reasonableness" in student disciplinary matters.[54]

Any lingering doubt as to the accuracy of the *Dixon* rationale and the scope of its application was removed in 1975 when the Supreme Court addressed the issue in *Goss v. Lopez*.[55] The Court held that the disciplinary suspensions of nine students from a public high school for up to ten days without a hearing violated the due process clause. With *Goss*, the Supreme Court finally ended any notion of a public school's autonomy and immunity from due process considerations when it interrupts the attendance of a student, whether for a short or long period of time.[56] The Court reasoned that while there is "no constitutional right to an education at public expense," property interests protected by the due process clause are normally not creatures of the Constitution, but rather are established by other sources such as state statutes and rules.[57] Thus, while state employees,[58] welfare recipients,[59] and parolees[60] have no constitutional right to their status, they have "legitimate claims of entitlement" which trigger due process protection before such status can be terminated.[61] If a state affords certain benefits, it may not divest them without affording constitutional due process.[62]

The due process clause protects property and liberty, both of which, according to *Goss*, are threatened in school expulsions. The state must "recognize a student's legitimate entitlement to a public education as a property interest."[63] Likewise, students' liberty interests are at stake in "charges of misconduct" that "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[64] Thus, the Court held:

> the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspen-

53. *Id.* at 159.

54. *See, e.g.*, Sill v. Pennsylvania State Univ., 462 F.2d 463 (3d Cir. 1972); Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 402 (N.D. Fla. 1963) (telephoned notice was appropriate). As to what are fair and reasonable procedures in student dismissal cases, see notes 75-109 *infra* and accompanying text.

55. 419 U.S. 565 (1975).

56. *Id.* at 584.

57. *Id.* at 572.

58. Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952).

59. Goldberg v. Kelly, 397 U.S. 254 (1970).

60. Morrissey v. Brewer, 408 U.S. 471 (1972).

61. 419 U.S. at 573.

62. "Having chosen to extend the right to an education . . . [the State] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 574.

63. *Id.*

64. *Id.* at 575 (footnote omitted).

sions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.[65]

B. *What Process Is Due Under the Constitution*

Dixon, *Goss*, and their progeny[66] establish that a public educational institution must comply with the due process clause when it attempts to exclude its students from the educational process. Once it is determined that due process applies, however, the question remains of what process is due. *Dixon* recommended the "rudiments of an adversary proceeding," and required both notice with a statement of specific charges and a hearing containing procedural safeguards greater than those of an informal interview.[67] *Goss* also spoke of "rudimentary precautions" in requiring oral or written notice of the charges with an explanation of the evidence and an opportunity for the student to present his side of the story.[68] Beyond these minimal requirements, apparently the circumstances of each case will determine the procedures necessary to insure fairness, since "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[69] Although "notice and hearing should precede removal,"[70] there may be situations where immediate removal from school is necessary. In such an event the notice and hearing should follow as soon as practicable.[71] In its discussion of brief suspensions, the Court stopped short of construing due process to require that a student must have "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[72] But the Court emphasized that the minimal procedures applied only to short suspensions of not more than ten days, and stated that "[l]onger suspensions or expulsions . . . may require more formal procedures."[73] Furthermore, there may be "unusual situations" involving short suspensions in which "something more than the rudimentary procedures will be required."[74]

Given this flexible guide and a reluctance to impose the full trial procedure on educational administrators, the courts have been inclined to approve of disciplinary proceedings lacking some of the standard features

65. *Id.* at 576 (footnote omitted).

66. For a collection of federal cases applying due process to dismissals of students from state colleges, see Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975).

67. 294 F.2d at 159.

68. 419 U.S. at 581. Truncated trial-type procedures in each case are not necessary or desirable so long as there is a "meaningful hedge against erroneous action" that alerts the disciplinarian to any dispute about facts and arguments about cause and effect. *Id.* at 583-84. For example, contrary to the criminal or civil trial pattern, the Court states there need be no delay between the time notice is given and the hearing. *Id.* at 582.

69. 419 U.S. at 578 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

70. 419 U.S. at 582.

71. *Id.* at 582-83. "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." *Id.* at 582.

72. *Id.* at 583.

73. *Id.* at 584.

74. *Id.*

associated with judicial proceedings. Clearly, "procedures for dismissing college students [are] not analogous to criminal proceedings."[75] Adequate notice is a fundamental requirement, and more serious cases require sufficient time to prepare for a hearing.[76] A notice should contain a statement of the specific charges and the grounds that, if proven, would justify expulsion under the applicable regulations of the school.[77] A notice may be constitutionally defective if it does not contain adequate information such as the date of the misconduct charged.[78] Many courts have held that the presence of counsel is not a sine qua non of a fair hearing;[79] others have indicated, however, that the denial of a request for presence of counsel may render the proceeding invalid.[80] The right of the student to confront and cross-examine the witnesses against him has been held necessary by some courts[81] and not essential by others.[82] While confrontation may not be essential, it may be a reliable indicator of the overall fairness of the proceedings.[83] There is general agreement that a student must be allowed to present oral or written evidence on his behalf, including his own testimony and that of his witnesses.[84] In presenting his case, however, the student may not exercise the privilege against self-incrimination.[85] Formal rules of evidence need not be followed,[86] and hearsay evidence is allowable,[87] but a disciplinary decision must be based only on the evidence presented at the hearing, and that evidence must be "substantial."[88] While

75. Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 473 (1967).

76. *See, e.g.*, Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967).

77. Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 473 (1967).

78. Keller v. Fochs, 385 F. Supp. 262 (E.D. Wis. 1974).

79. *See, e.g.*, Madera v. Board of Educ., 286 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Haynes v. Dallas County Junior College Dist., 386 F. Supp. 208 (N.D. Tex. 1974).

80. *See, e.g.*, North v. West Virginia Bd. of Regents, 233 S.E.2d 411, 417 (W. Va. 1977).

81. *See* Esteban v. Central Mo. State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967); De Prima v. Columbia-Greene Community College, 89 Misc. 2d 620, 392 N.Y.S.2d 348, 350 (Sup. Ct. 1977).

82. *See* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

83. *See, e.g.*, Moore v. Student Affairs Comm., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Buttny v. Smiley, 281 F. Supp. 280, 288 (D. Colo. 1968).

84. *See, e.g.*, Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Jones v. State Bd. of Educ., 279 F. Supp. 190, 197 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969).

85. *See* Furutani v. Ewigleben, 297 F. Supp. 1163, 1165 (N.D. Cal. 1969). *But see* State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, 826 (1942).

86. *See* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 883, 57 Cal. Rptr. 463, 475 (1967). The court in *Goldberg* concluded that a state college in a student dismissal proceeding need not follow the rules of evidence usually applicable in judicial proceedings. Likewise, a hearing body in a dismissal proceeding may consider hearsay evidence, need not recognize the privilege against self-incrimination, and need not recognize a rule that a person subject to university discipline can refuse to answer questions under any and all circumstances.

87. *See, e.g., id.*; Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

88. Scoggin v. Lincoln Univ., 291 F. Supp. 161, 171 (W.D. Mo. 1968); Esteban v. Central Mo. State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967).

a student has no right to an open hearing,[89] a closed hearing must comply with due process.[90] There is no constitutional requirement as to the composition of the hearing board,[91] and charges of adjudicatory bias have so far been unsuccessful.[92] There is, however, agreement that a student is entitled to an impartial tribunal.[93] Such impartiality is doubtful if the sole disciplinarian is also the complaining witness in a suspension proceeding.[94] As to a record of the proceeding, due process does not require that a stenographic or mechanical recording be made,[95] but the school or student may record at their own expense.[96] The decision of a hearing board, however, must be written,[97] public, and available for student inspection.[98] The punishment imposed, assuming the proceedings have been fair, is within the discretion of the school[99] and not subject to judicial review unless there is a shocking disparity between the offense and the penalty.[100] Although the decisions have been assailed by commentators,[101] courts have found no due process prohibition to a school's imposition of sanctions for student violations of local or state law even if there is also prosecution for a public offense.[102]

89. *See* Moore v. Student Affairs Comm., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968).

90. In Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961), the court said that a full-dress judicial hearing, "with the attending publicity . . . might be detrimental to the college's educational atmosphere and [thus] impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved . . . ." A closed hearing may be necessary under state statutes protecting the privacy of students' files and records. Marston v. Gainesville Sun Pub. Co., 341 So. 2d 783 (Fla. Dist. Ct. App. 1977). If the hearing body is the faculty, however, it might be argued that under some state "open public meeting" acts a disciplinary hearing must be open to the public. *Cf.* Cathcart v. Anderson, 85 Wash. 2d 102, 530 P.2d 313 (1975) (law school faculty meetings are subject to state open meetings act).

91. *See* Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Project, *Procedural Due Process, and Campus Disorder: A Comparison of Law and Practice*, 1970 DUKE L.J. 763, 781.

92. *See, e.g.*, Jones v. Board of Educ., 279 F. Supp. 190, 200 (M.D. Tenn. 1968); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 883, 57 Cal. Rptr. 463, 475 (1967).

93. Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972); Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1080 (1969). *But see* Beattie v. Roberts, 436 F.2d 747, 751 (1st Cir. 1971).

94. Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973). *See generally* Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

95. Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963).

96. Esteban v. Central Mo. State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967).

97. *Id.* at 652.

98. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Woody v. Burns, 188 So. 2d 56, 58 (Fla. Dist. Ct. App. 1966).

99. Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 702 (5th Cir. 1974) (disciplinary findings and punishment "when reached by correct procedures" will be upheld unless "clearly unreasonable"), *cert. denied*, 420 U.S. 962 (1975); *see* Cornette v. Aldridge, 408 S.W.2d 935 (Tex. Civ. App.—Amarillo 1966, mand. overr.).

100. Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 n.3 (5th Cir. 1974).

101. *See* Van Alstyne, *supra* note 4; Wright, *supra* note 93, at 1068-69.

102. *See* Buttny v. Smiley, 281 F. Supp. 280, 285 (D. Colo. 1968); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 402 (N.D. Fla. 1963). Professor Wright has recognized the force of the arguments advanced by Professor Van Alstyne that

Claims have also been made for due process protections that are somewhat beyond the minimal notice and hearing guarantee. Arguments that the Constitution requires a written code specifying what acts are sanctionable have not been successful.[103] It has been held, however, that a general prohibition of "misconduct" without more specification is unconstitutionally vague as a basis for expulsions or suspensions for a significant period.[104] Furthermore, if a school sets forth a code or procedure, it would constitute a due process violation for the school to depart therefrom to any significant degree.[105] The question of whether due process and the fourth amendment afford protection against warrantless searches of dormitory rooms by school officials is in dispute.[106] The exclusionary rule, however, has been held not to apply in student disciplinary proceedings, even when the search is concededly unlawful.[107] Claims of protection from double jeopardy have been rejected where the challenged second prosecution is by the state after a disciplinary proceeding.[108] Summary discipline, where immediate dismissals are ordered with hearings to follow, has been limited to emergency situations in which the safety of students or others is threatened.[109]

> due process prohibits the university from enforcing any regulation that is not related to the legitimate business of the university or that punishment at the university for conduct that does not abuse any privilege extended by the university is so arbitrary as to be a denial of equal protection of the laws.

Wright, *supra* note 93, at 1069 (footnotes omitted).

103. In Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968), the court said: " 'The University is not required to provide a negative type of behavioral code typical of criminal laws.' " *Id.* at 284 (quoting a statement by the administrative council of the university). *See* 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, 146 (W.D. Mo. 1968) (en banc) [hereinafter cited as General Order] (a school need not establish a code of student conduct). *But see* Wright, *supra* note 93, at 1060-67 (code of student conduct should be established); Note, *A University May Properly Dismiss Students Whose Conduct Disrupts the Educational Atmosphere of the University if It Grants the Students the Basic Elements of Procedural Due Process—Notification and a Hearing on the Charges*, 5 HOUS. L. REV. 541, 547-48 (1968) (suggests that substantive due process requires promulgation of a code of conduct).

104. Soglin v. Kauffman, 295 F. Supp. 978, 991 (W.D. Wis. 1968).

105. Escobar v. State Univ. of N.Y./College at Old Westbury, 427 F. Supp. 850, 858 (E.D.N.Y. 1977).

106. *See* State v. Kappes, 26 Ariz. App. 567, 550 P.2d 121 (1976); Delgado, *College Search and Seizures: Students, Privacy, and the Fourth Amendment*, 26 HASTINGS L.J. 57 (1974); Comment, *Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure*, 17 U. KAN. L. REV. 512 (1969); Note, *The Relationship of the Fourth Amendment to Student Disciplinary Hearings*, 30 U. PITT. L. REV. 561 (1969). In Moore v. Student Affairs Comm., 284 F. Supp. 725, 731 (M.D. Ala. 1968), the court upheld a dormitory room search by school officials and police without benefit of warrant stating: "A Student who lives in a dormitory on campus which he 'rents' from the school waives objections to any reasonable searches conducted pursuant to reasonable and necessary regulations . . . ."

107. Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976); Moore v. Student Affairs Comm., 284 F. Supp. 725, 727 (M.D. Ala. 1968).

108. *See* McKay, *The Student as Private Citizen*, 45 DEN. L.J. 558, 564 (1968); General Order, *supra* note 103, at 147.

109. Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 419 (W.D. Wis. 1969). Even though an immediate suspension appears warranted, it must be preceded by a preliminary hearing to determine if the facts justified summary suspension. *Id.* at 420.

From this brief survey of what minimal procedures satisfy due process,[110] it is obvious that the standard features of judicial procedure have not been required for student dismissals from state schools. Aside from notice and a hearing opportunity, there appears to be no agreement on the precise procedures necessary, so long as the process employed was fair under the circumstances. Thus, while a dismissal of a student is reviewable for due process compliance, the courts do not view the fourteenth amendment as dictating a certain body of procedures that a school must employ.

C. *Limitations on Constitutional Due Process*

Even the minimal due process standards are not applied to all student discipline. The full extension of due process protection in student disciplinary proceedings and dismissals is limited by three factors. First, some courts consider due process procedures unnecessary in school disciplinary proceedings that do not result in suspension or dismissal. Secondly, the courts have not extended due process rights to students in private schools. Thirdly, due process for academic dismissals is of a greatly diluted variety.

Nonexclusion Discipline. There is authority for the view that due process procedures of notice and hearing are required only in school proceedings that result in suspension, expulsion, or some kind of dismissal from attendance at the institution.[111] Other types of disciplinary matters need not be attended with such procedures as notice and hearing. There is no constitutional mandate for "such procedures before corporal or other minor punishment is applied to a student."[112] Exponents of this view rely upon *Ingraham v. Wright*,[113] in which the Supreme Court held that due process did "not require notice and a hearing prior to the imposition of corporal punishment in the public schools."[114]

The Court in *Ingraham* stated that when state school authorities "punish a child for misconduct by restraining the child and inflicting appreciable physical pain . . . Fourteenth Amendment liberty interests are implicated."[115] The Court, however, reasoned that the infliction of reasonable corporal punishment was a common law privilege, and, because of the availability of adequate traditional remedies for abuse of the privilege, "the case for administrative safeguards is significantly less compelling."[116]

110. In connection with what process is due, it should be noted that the denial of due process rights to students suspended for misconduct would be actionable for damages. In Carey v. Piphus, 435 U.S. 247 (1978), the Court held that even when student suspensions were justified, the denial of a hearing prior to suspension from a public school, absent proof of actual damages, entitles the suspended students to nominal damages.

111. Horne v. Cox, 551 S.W.2d 690 (Tenn. 1977).

112. *Id.* at 692.

113. 430 U.S. 651 (1977).

114. *Id.* at 682. Another proposition decided was that corporal punishment did not constitute cruel and unusual punishment under the eighth amendment. *Id.* at 671.

115. *Id.* at 674 (footnote omitted).

116. *Id.* at 679 (footnote omitted).

While the Court did not exclude corporal punishment from due process protection, it found the particular procedures of notice and hearing unnecessary since the risk of violating a child's substantive rights was regarded as minimal.[117] Thus, while more sophisticated procedures may not be warranted as a matter of course for minor punishments, due process is applicable when a public educational institution "imposes a mild, as well as a severe, penalty upon a student."[118]

With regard to public institutions of higher education, it appears that any discipline involving exclusion from the educational process can be tested by due process guidelines. Exclusion from the educational process would seem to include removal from a class or course as well as removal from the institution's auxiliary services such as a library or dormitory.[119] Minor discipline, such as the removal of a student from a one-hour class session, may not trigger the necessity of an adversary proceeding, but due process would be a guide to insure a fair and reliable determination by the disciplinarian.

Private Schools. Students at private educational institutions are not afforded due process protection in dismissals or disciplinary matters because such institutions are not considered governmental agencies or instrumentalities.[120] The fourteenth amendment provides that "[no] state [shall] deprive any person of life, liberty, or property, without due process of law," but absent state action, due process is not applicable.[121]

While the denial of due process protection for student disciplinary matters in private schools has been the prevailing view of the courts,[122] it has been subjected to criticism as both logically indefensible and an unwar-

117. *Id.* at 682.

118. Farrell v. Joel, 437 F.2d 160, 162 (2d Cir. 1971).

119. *See* Escobar v. State Univ. of N.Y./College at Old Westbury, 427 F. Supp. 850 (E.D.N.Y. 1977) (court ordered plaintiff reinstated to dormitory room).

120. Actions of colleges and universities not operated by the state or funded by state monies, and which do not hold themselves out as state universities, have been held not to be actions of the state. Wahba v. New York Univ., 492 F.2d 96, 98 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1140 (2d Cir. 1973).

121. The fourteenth amendment requires due process only for deprivations of property which are attributable to "state action." *See* Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972). Since "property" has been interpreted to include the right to attend college and be free from illegal exclusions, public schools and state colleges come under the state action doctrine. *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.) (public high school), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

122. *See, e.g.*, Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971); Bright v. Isenbarger, 445 F.2d 412 (7th Cir. 1971); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972); Brownley v. Gettysburg College, 338 F. Supp. 725 (M.D. Pa. 1972); Rowe v. Chandler, 332 F. Supp. 336 (D. Kan. 1971); McLeod v. College of Artesia, 312 F. Supp. 498 (D.N.M. 1970); Counts v. Vorhees College, 312 F. Supp. 598 (D.S.C. 1970); Torres v. Puerto Rico Jr. College, 298 F. Supp. 458 (D.P.R. 1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *dismissed as moot*, 412 F.2d 1128 (D.C. Cir. 1969); Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962).

ranted reading of the state action principle.[123] It is argued that the disciplinary proceedings of a private university involve a degree of state action sufficient to invoke the due process clause, owing to the expansion of the state action doctrine and the degree of governmental involvement in private education. "While the principle that private action is immune from the restrictions of the fourteenth amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer."[124] Such privately owned and operated enterprises as a company-owned town,[125] a street car and bus company,[126] and a political party[127] have been subjected to due process application upon findings that they were affected with public functions. In the same vein, a racially discriminatory admissions policy of a private school has been held to violate the equal protection clause of the fourteenth amendment.[128] As one court observed: "one may question whether any school or college can ever be so 'private' as to escape the reach of the fourteenth amendment."[129] It was reasoned that a private institution need not be regarded as an agency or instrumentality of the state for there to be "state action." Recognition of state action for purposes of due process protection is not the equivalent of finding governmental control and domination.

There are several approaches to the question of whether state action is involved.[130] One approach is to weigh the degree of governmental involvement in private education. Government financial aid to private universities, both direct and indirect, has become commonplace.[131] Direct financial aid is found in scholarships, student loans, government work-

123. *See* Keller & Meskill, *Student Rights and Due Process*, 3 J.L. & EDUC. 389 (1974); O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155, 166-67 (1970); Note, *The College Student and Due Process in Disciplinary Proceedings*, 13 S.D. L. REV. 87, 90 (1968); Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 U. ILL. L.F. 438, 439 (1962).

124. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974).

125. Marsh v. Alabama, 326 U.S. 501 (1946).

126. Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952).

127. Terry v. Adams, 345 U.S. 461 (1953). *See generally* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 859 (E.D. La.) ("[P]rivate ownership or operation of a facility impressed with a public interest does not automatically insulate it from the reach of the Fourteenth Amendment."), *rev'd per curiam*, 306 F.2d 489 (5th Cir. 1962).

128. *See* Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965); Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967).

129. Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858 (E.D. La.), *rev'd per curiam*, 306 F.2d 489 (5th Cir. 1962).

130. An interesting summary and critique of various approaches to the question of state action is contained in Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974), where the court identified five different approaches: contact counting or interest analysis; ascertaining and balancing the constitutional interests involved; the public function theory of state action; state regulation in the challenged activity; and the general extent of government control over the actions of the organization, such as financing and regulation.

131. For a case finding state action where a state provided financial aid to a private school, see Griffin v. State Bd. of Educ., 239 F. Supp. 560 (E.D. Va. 1965). *But see* Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 547-48 (S.D.N.Y. 1968) (receipt of state money—30% of school budget—is alone not enough to make recipient a governmental agency). While direct financial aid has proved to be an important factor in finding state action, *e.g.*, Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975), the court in Winsey v.

study programs, and research grants.[132] Indirect financial aid is found in tax-exempt status, the loan of public land or facilities, the power of eminent domain, and building programs underwritten with governmental loans.[133] Aside from fiscal involvement, there is governmental regulation of private universities in state authorization to grant degrees, state accrediting, and state-issued charters.[134] Additionally, some private universities have governing boards with members designated by the state.[135] The motivation for these government benefits to private education and the degree of involvement are cited as bases for a finding of state action; namely, private education is fulfilling a public function.[136] The Supreme Court has observed that "education is perhaps the most important function of state and local governments."[137] Given the importance of education to a democracy, it is clear that the "administrators of a private college are performing a public function."[138] Partly for this reason, it has been suggested that private universities should be considered and treated as public utilities.[139]

State action may also be found in the very nature of modern campus life. The great power of the university over its students means that it is functionally a government analogous to a company-owned town exercising quasi-governmental powers.[140] No one of these factors may persuade a court that state action is present, but the cumulative impact of these indicators of state involvement and public function may lead to a judicial reevaluation of the applicability of the due process clause to student disciplinary proceedings at private universities.[141]

Despite these appealing arguments for extending fourteenth amendment protection to actions by private colleges or professional schools, courts have generally been unwilling to interfere with nonstate school disciplinary processes by holding these to be state action.[142] This reluctance also

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Pace College, 394 F. Supp. 1324 (S.D.N.Y. 1975), declared that the amount of government funding is immaterial unless it can be shown to have caused the alleged injury.

132. *See* Comment, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. 277, 290 (1969).

133. Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969) (special tax exemption for University of Denver, a private school); Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965) (donation of city or state property to private college). *See generally* O'Neil, *supra* note 123, at 181-84.

134. *See, e.g.*, ARK. STAT. ANN. § 80-1615 (1960) (state requirements for degree); LA. REV. STAT. ANN. § 17:411 (West Supp. 1979) (state authorization to award degrees); T. BLACKWELL, COLLEGE LAW 25 (1961) (state issued charter).

135. *See* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 863-64 (E.D. La.), *rev'd per curiam*, 306 F.2d 489 (5th Cir. 1962); T. BLACKWELL, *supra* note 134, at 55.

136. *See* O'Neil, *supra* note 123.

137. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

138. Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 859 (E.D. La.), *rev'd per curiam*, 306 F.2d 489 (5th Cir. 1962).

139. *See* Corson, *Social Change and the University*, 53 SAT. REV., Jan. 10, 1970, at 76.

140. *See* Marsh v. Alabama, 326 U.S. 501 (1946); O'Neil, *supra* note 123, at 184.

141. Project, *supra* note 4, at 800-01 (the indicia or cumulative approach).

142. *See, e.g.*, Berrios v. Inter Am. Univ., 535 F.2d 1330 (1st Cir. 1976); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973); Counts v. Voorhees College, 312 F. Supp. 598

appears to be present in cases involving discipline for academic deficiencies.[143] Courts may be more willing to find state action where racial discrimination is involved because of the peculiarly offensive nature of such conduct.[144] Thus, absent racial discrimination, the prospect is weak for courts' requiring constitutional due process protection in student discipline processes in nonstate schools.[145]

Academic Discipline. Dismissals for failure to meet academic standards, although certainly an interruption or termination of the educational experience, are not subject to the same kind of due process protection that is occasioned by dismissals or suspensions for misconduct.[146] The Supreme Court addressed the question of what procedural due process is necessary for an academic dismissal from a state medical school in the recent case of *Board of Curators v. Horowitz*.[147] The Court assumed the existence of a liberty or property interest necessary for entitlement to procedural protection under the fourteenth amendment, and concluded that the procedure was sufficient if the student had been fully informed of faculty dissatisfaction with her progress and the dangers that this posed to a timely graduation and continued enrollment.[148] The ultimate dismissal of Horowitz was preceded by a multistage process characterized by notice of the grounds for dissatisfaction and adequate opportunity to answer the claimed deficiency.[149] The Justices were all in agreement that Horowitz "received all the procedural process that was due her under the fourteenth amend-

(D.S.C. 1970), *aff'd mem.*, 439 F.2d 723 (4th Cir. 1971); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

143. *See* Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

144. *See, e.g.*, Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.) (with possible exception of racial discrimination, mere financial support constitutes insufficient state involvement to trigger constitutional guaranties), *cert. denied*, 423 U.S. 995 (1975); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). Furthermore, if racial discimination qualifies as "a badge of slavery," it may be invalid under the thirteenth amendment without a showing of state action.

145. In holding that a private club was not engaged in state action when it refused service to a black person, the Supreme Court in Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972), stated that for state action to be present the state must have "significantly involved itself" with the conduct in question. In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), involving a public utility's allegedly improper termination of service to a customer, the Supreme Court stated that there must be "a sufficiently close nexus" between the state and the challenged activity in order to find state action. Thus, it seems unlikely that the impetus for extension of the state action concept to include private school disciplinary processes will come from recent Supreme Court decisions.

146. For a compelling argument that students have constitutionally protected liberty and property interests in their public education, which warrant notice and hearing prior to the deprivation of these interests for academic reasons, see Dessem, *Student Due Process Rights in Academic Dismissals from the Public Schools*, 5 J.L. & EDUC. 277 (1976).

147. 435 U.S. 78 (1978).

148. *Id.* at 85.

149. The student, Horowitz, began her final year of medical school on probation. Thereafter, the Council of Evaluation, a faculty-student group that assessed academic performance, considered continued reports of dissatisfaction and concluded that she not be considered for graduation that year and absent radical improvement that she be dropped as a student. As an "appeal," she was allowed to take examinations evaluated by seven physicians, of which only two recommended her graduation. The council thereupon reaffirmed its decision. After subsequent negative performance ratings, the council recommended she

ment."[150] The concurring and dissenting Justices, however, were unable to accept the majority's opinion to the extent it "conclude[d] that no hearing of any kind or any opportunity to respond [was] required" prior to dismissal for academic reasons.[151]

According to the *Horowitz* majority, "[a]ll that *Goss* required was an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.' "[152] The very nature of due process, the Court observed, requires flexibility and "the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct" is a difference that "calls for far less stringent procedural requirements in the case of an academic dismissal."[153] This difference had been recognized in a series of state and federal decisions holding that "formal hearings" need not be held in the case of academic dismissals.[154] The rationale for this difference, according to Justice Rehnquist, speaking for the majority, is rooted in the historic idea that " '[a] public hearing may be . . . useless or harmful in finding out the truth as to scholarship.' "[155] The harmfulness of a hearing for an academic dismissal was not detailed by the Court other than to observe the different nature of an academic and a misconduct dismissal. Suspensions for disciplinary reasons have a "sufficient resemblance to traditional judicial and administrative factfinding to call for a 'hearing.' "[156] Academic evaluations of a student, however, bear little resemblance to the judicial and administrative factfinding proceedings since the academic judgment is more subjective and the expert evaluation required is "not readily adapted to the procedural tools of judicial or administrative decisionmaking."[157] The majority opinion stressed that the educational process is not by its nature adversarial and that the introduction of adversary hearings for misconduct suspensions and dismissals is justified only because "disciplinary proceedings . . . may automatically bring an adversarial flavor to the normal student-teacher relationship."[158] This automatic adversarial flavor does not follow in the academic context, according to Justice Rehnquist, and thus the majority "decline[d] to fur-

be dropped as a student. The faculty coordinating committee and the dean approved. Horowitz appealed to the provost who, after review, sustained the decision. *See id.* at 80-82.

150. *Id.* at 108-09 (Blackmun, J., concurring in part and dissenting in part).

151. *Id.* at 96 (White, J., concurring). Justice Marshall stated that Horowitz had been awarded at least as much due process as the fourteenth amendment requires, but "I cannot join the Court's opinion, however, because it contains dictum suggesting that respondent was entitled to even less procedural protection than she received." *Id.* at 97 (Marshall, J., concurring in part and dissenting in part).

152. *Id.* at 85-86. It is somewhat interesting that three of the Justices constituting the majority in *Horowitz* dissented in *Goss*.

153. *Id.* at 86.

154. *Id.* at 88.

155. *Id.* at 87 (quoting Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913)).

156. *Id.* at 88-89.

157. *Id.* at 90.

158. *Id.*

ther enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."[159] According to the majority, public education " 'is committed to the control of state and local authorities' "[160] and thus there is no reason for "judicial interposition" in "that historic control."[161]

The *Horowitz* decision does not, however, exempt academic dismissals from due process protection. Dismissal of a student from a public educational institution for failure to comply with academic standards is a deprivation within the protection of the fourteenth amendment. This concept was expressly assumed in *Horowitz* by all of the Justices.[162] Furthermore, the *Horowitz* majority did not disturb the holding in *Goss* that "the state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause."[163] The majority opinion in *Horowitz* also cited with approval a circuit court of appeals decision that held that an exclusion from a public university for failure to comply with academic standards is within the protection of the due process clause, although requiring different procedural protections than a misconduct dismissal.[164]

The question of what process is due becomes especially interesting in light of the majority's footnote passage: "We conclude that considering all relevant factors . . . a hearing is not required by the Due Process Clause of the Fourteenth Amendment."[165] The language "a hearing is not required" would seem to reject informal as well as formal hearings. The majority opinion does not offer express guidance beyond this point. There are, however, some suggestions (albeit indirect) in the opinion as to the nature of the due process protection available.

The *Horowitz* majority cited with approval *Greenhill v. Bailey*,[166] in which the Eighth Circuit Court of Appeals held that a hearing was necessary when a medical school not only dismissed a student for academic reasons, but also sent a letter to the Association of American Medical Colleges commenting that the student either lacked intellectual ability or had insufficiently prepared his course work. According to the *Horowitz* majority: "The publicization of an alleged deficiency in the student's intellectual ability removed the case from the typical instance of academic dis-

159. *Id.* At the point when a student is about to be dismissed from school, one might question how a hearing would risk deterioration of the student-faculty relationship that would otherwise be summarily terminated. Indeed, it may well be that the general student-faculty relationship would be improved through increased student respect for a faculty willing to allow a student an opportunity to be heard before dismissal for academic reasons.

160. *Id.* at 91 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

161. *Id.*

162. *Id.* at 84-85, 96 (Powell, J., concurring), 97 (White, J., concurring), 97 (Marshall, J., concurring in part and dissenting in part), 108-09 (Blackmun & Brennan, JJ., concurring in part and dissenting in part).

163. Goss v. Lopez, 419 U.S. 565, 574 (1975).

164. 435 U.S. at 87-88 (citing Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975)).

165. 435 U.S. at 86 n.3.

166. 519 F.2d 5 (8th Cir. 1975).

missal and called for greater procedural protections."[167] As an analogous authority supportive of *Greenhill*, the Court cited its holding in *Bishop v. Wood*,[168] which upheld the dismissal of a public employee without a hearing "when there [was] no public disclosure of the reasons for the discharge."[169] The Court also cited with approval *Gaspar v. Bruton*.[170] *Bruton* held that school authorities dismissing a student for deficiencies in meeting minimum academic performance "need only advise the student with respect to such deficiencies in any form" so that the student will be made aware, prior to his dismissal, of his failure to meet those standards.[171]

To generalize, an academic dismissal from a public school does not require a prior hearing to satisfy due process unless some publication of the alleged deficiency will stigmatize the student, provided that the school authorities, prior to dismissal, advise the student of the alleged deficiency in some form adequate to apprise him of the reasons for the dismissal. If notice is to be a meaningful procedure, a student should then have the opportunity to respond, for example, to show mitigating factors or to challenge an exclusion he thinks mistaken.[172] Aside from this minimal notice-and-response requirement, however, judicial review is unavailable for a suspension or dismissal for academic reasons when there is "no showing of arbitrariness or capriciousness,"[173] ill will, or bad motive.[174]

D. *Common Law Due Process Rights*

Aside from the constitutional due process required by the fourteenth amendment, an alternative analysis of the university-student relationship compares it to private, voluntary associations that are subject to a common law cause of action for arbitrary, discriminatory, or bad faith exclusions or expulsions. This approach may provide some benefits to students at private universities and schools, which are not subject to due process requirements under the fourteenth amendment. Although courts in general have been reluctant to act upon claims of unwarranted exclusion from membership in professional or honorary societies,[175] there is "a judicially enforceable right to have [a membership] application considered in a manner comporting with the fundamentals of due process, including the showing of cause for rejection."[176] Such a judicially enforceable right would apply

167. 435 U.S. at 88 n.5.
168. 426 U.S. 341 (1976).
169. *Id.* at 348.
170. 513 F.2d 843 (10th Cir. 1975).
171. *Id.* at 851.
172. This "response opportunity" is not expressly required in the decisions considered herein.
173. 435 U.S. at 92.
174. Gaspar v. Bruton, 513 F.2d 843, 851 (10th Cir. 1975). *See also* Greenhill v. Bailey, 378 F. Supp. 632, 635 (S.D. Iowa 1974); 1976 Y.B. SCH. L. 305 (P. Piele ed.).
175. *See* Annot., 89 A.L.R.2d 964 (1963).
176. Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 166, 460 P.2d 495, 499, 81 Cal. Rptr. 623, 627 (1969).

to memberships in voluntary associations that have some effect upon the applicant's professional or economic success, or when the association has a professional or economic interest.[177] The rationale underlying this cause of action is a "recognition by the courts of the increasing effect that private and voluntary organizations have on the individual's ability and access to the economic marketplace and his opportunities to earn a living or practice his trade or profession."[178] Thus, for example, a union membership application must be acted upon in a manner comporting with due process, subject to judicial review, since the union's "asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."[179]

It follows that if factors are present which subject a membership application in a private association to judicial review for common law due process compliance, the expulsion of a member from such an association would likewise be subject to the same judicial standard. Indeed, at English common law a member of a private association was protected against expulsions that were contrary to "natural justice."[180] The American analogue for natural justice is due process, and American courts have intervened to guarantee procedural rights against expulsion to members of private associations if the procedural rules of the association were contrary to due process,[181] or if the actions taken were ultra vires,[182] or in bad faith:[183]

> The legal principle is a general one affecting all proceedings which may result in loss of property, position or character, or any disaster to another; that he shall be first heard by the board or tribunal considering his case before that body will be legally permitted to pronounce his condemnation.[184]

This principle has been applied to expulsion proceedings of such private

177. *Id.*; James v. Marinship Corp., 25 Cal. 2d 721, 732, 155 P.2d 329, 335-36 (1944); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 592, 170 A.2d 791, 797 (1961).

178. Blatt v. University of S. Cal., 5 Cal. App. 3d 935, 940, 85 Cal. Rptr. 601, 604 (1970).

179. James v. Marinship Corp., 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944).

180. *See* Dawkins v. Antrobus, 17 Ch. D. 615 (C.A. 1881); Pett v. Greyhound Racing Ass'n, 1 Q.B. 125 (C.A. 1969); Morris, *The Court and Domestic Tribunals*, 69 LAW Q. REV. 318, 323 (1953).

181. *See, e.g.*, Cason v. Glass Bottle Blowers Ass'n, 37 Cal. 2d 134, 143, 231 P.2d 6, 10-11 (1951) (en banc) (expulsion proceedings of private associations must not be malicious, contrary to the rules of the association, or contrary to natural justice; fair trial guaranteed); Switl v. Real Estate Comm'r, 116 Cal. App. 2d 677, 680, 254 P.2d 587, 588-89 (1953) (due process guarantees of notice, hearing, and a fair trial in expulsion imposed even if not in the rules of the association); Hawkins v. Obremski, 33 Misc. 2d 1009, 1011, 227 N.Y.S.2d 307, 308 (Sup. Ct. 1962).

182. *See, e.g.*, Local 57, Bhd. of Painters v. Boyd, 245 Ala. 227, 234, 16 So. 2d 705, 711 (1944) (expulsion conclusive on civil court if association gave notice and hearing, conducted in accordance with its rules); Smith v. Kern County Medical Ass'n, 19 Cal. 2d 263, 265, 120 P.2d 874, 875 (1942) (function of court in reviewing expulsion from private association is to determine whether association acted within its powers in good faith, in accordance with its laws and the laws of the land).

183. *See, e.g.*, Junkins v. Local 6313, Communication Workers, 241 Mo. App. 1029, 271 S.W.2d 71 (1954) (expulsion proceedings not conducted fairly or honestly; bias was shown).

184. Loubat v. Le Roy, 47 N.Y. Sup. Ct. 546, 551 (1886). *See generally Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1036 (1963).

associations as unions,[185] social clubs,[186] medical associations,[187] and churches.[188]

It can be argued that the university resembles such a private association, in that admission thereto and continuation therein have significant professional and economic consequences to the student. If the student-university relationship may be characterized in such terms, students at private colleges and professional schools would then have a common law right to due process before being excluded.[189] Under this theory the status of a student has the nature of a property right protected by the common law.[190] Status as a student in a university entails a reasonable expectation of receiving a degree, an expectation of considerable economic consequence. Expulsion from a university, especially insofar as it makes admission to other universities difficult, if not impossible, denies a student access to a large number of occupations and professions. At the very least, it permanently mars the student's record, making competition for graduate school and jobs more difficult.[191] Exclusions from a professional school, such as law or medicine, effectively preclude the admission to that profession. In addition to the economic loss, the status of a student is deemed by society to be inherently worthwhile. The prevailing social ethic recognizes the intrinsic value of education quite apart from the economic value, which is evidenced in public attitudes and public aid to education. The common law has protected associational interests when they are perceived as being sufficiently important to economic potential or deemed inherently worthwhile by the prevailing social ethic.[192] Thus, it can be argued that the student-university relationship is subject to common law due process constraints in an expulsion process.

One flaw in this analysis is that it tends to give rise to a presumption

185. *See, e.g.*, James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1945); Junkins v. Local 6313, Communication Workers, 241 Mo. App. 1029, 271 S.W.2d 71 (1954).

186. *See* Brooks v. Petroleum Club, 207 Kan. 277, 484 P.2d 1026 (1971); Spiegelman v. Engineers Country Club, 38 A.D.2d 728, 329 N.Y.S.2d 166 (1972).

187. *See* Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961); Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969) (en banc).

188. *See* Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970); Hendryx v. People's United Church, 42 Wash. 336, 84 P. 1123 (1906).

189. Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974).

190. As forms of wealth have changed, the category "property" has been extended from land to include intangible assets. *See* J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 11-16 (1924). Valuable interests change and law has extended protection to new ones as well as older ones. Thus it is argued that the economic value of a student's status is like other interests that are protected as property. Note, *supra* note 189, at 125-32.

191. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 575 n.7 (1975); Greenhill v. Bailey, 519 F.2d 5, 8 n.6 (8th Cir. 1975); Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969) (court ordered wrongful expulsion expunged from school record).

192. Certain memberships and associations have received coercive protection of the law because society presumes them inherently worthwhile based on widely shared fundamental values. These values warrant legal protection because they are deemed important toward promoting a better society, but largely they are considered important in and of themselves as part of the prevailing social ethic. Note, *supra* note 189, at 129-32.

against failure following admission to an educational institution, a notion somewhat at odds with the idea of recognition of academic achievement. Additionally, there may be a question of whether a university is truly analogous to an association such as a social club, union, or professional society. Despite much talk about the community of scholars, a college is not a coming together of equals as found in a union or medical association. Furthermore, a university does not occupy such a monopolistic position as a union[193] or a state medical association.[194] A student, expelled from one school, generally is free to attend another, usually in the same locale, and thus have access to the same economic or professional interests. Although a greater deprivation may occur in a professional school dismissal, it may still be found that there is no monopoly that prevents achievement of economic and professional interests. Finally, while the common law rights thesis may be sound, there seems to be greater reluctance by courts today to fashion new common law remedies or expand the scope of existing remedies, due to the increasing dominance of statutorily prescribed causes of action.[195]

III. AN EDUCATIONAL PERSPECTIVE TO LAW STUDENT DISCIPLINE

The commonly discussed approaches to the student discipline issue, whether it be the in loco parentis doctrine, contract theory, or constitutional due process, have a coercive character: the courts define what is and is not necessary when university action is challenged.[196] The resulting fo-

193. In James v. Marinship Corp., 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944), the court found denial of admission to a union violative of due process because "[w]here a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations."

194. In Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 499, 81 Cal. Rptr. 623, 627 (1969), the court found that since the defendant association was a virtual monopoly, determining the standards for the practice and certification of orthodontics, it had a fiduciary responsibility with respect to consideration of membership applications.

195. For an interesting case where the common law due process rights principle was unsuccessfully urged in the denial of membership in a national honorary legal society, the Order of the Coif, see Blatt v. University of S. Cal., 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (1970).

196. Another approach, voluntary in nature, to the problem of student discipline is stated by Professor Paul D. Carrington in his proposal to abandon what he terms the criminal model, with its disadvantages and lack of suitability to the university scene, in favor of an alternate system based on the idea of private civil remedies. Carrington, *Civilizing University Discipline*, 69 MICH. L. REV. 393 (1971). Under this civil remedies model wrongdoers would be expected to repair or replace property damaged or misappropriated, to make restitution for any medical bills, and in general compensate for pain and suffering, loss of reputation, or loss of prospective advantage.

Despite this fresh and broadening approach, the civil damages model has some debatable aspects and limits on its usefulness. It might be an awkward and revolutionary posture for a university administration to operate as a court of claims, assessing the money value of various wrongs. Imposition of an apparatus awarding monetary damages would seem quite alien to functions of an educational institution. Since the damages model excludes from its operation strictly academic sins such as cheating, *id.* at 409, there would need to be another system of discipline to dispose of such matters. Thus adoption of the civil damages system would not simplify the disciplinary process, but merely add another and different process,

cus is on what a school must do to comply with externally imposed norms. Most claims for expanding student rights in the disciplinary process have been centered on satisfying these external norms. Thus, discussions of the nature of student discipline have, for the most part, an external perspective. To the school, the subject of discipline has one immediate concern: it must be handled expeditiously to maintain institutional order. So framed, the issue of discipline is a functional administrative concern guided by external norms. A different approach offered here has an internal perspective and a voluntary character: what should be done about student discipline and dismissals in view of educational considerations? A suggested answer is a more sensitized process designed to serve as an educational instrument.

In defining the objectives of legal education, the American Bar Association has prescribed that an accredited law school "maintain an educational program that is designed to qualify its graduates for admission to the bar."[197] No further explanatory comment is provided in the accreditation standards. A curious feature about legal education is the universal sameness of its basic format and techniques;[198] yet there is a conspicuous absence of any official definition as to what "qualifies" one for admission to the bar. Under this rubric are found the trade school and apprenticeship exponents as well as the interdisciplinary abstractionists who spurn course offerings that cover bar examination subjects. There are, however, some shared ideas, and commonality is noted in the expression of legal education as a participatory introduction to the legal profession. The technique is largely participatory and the objective is professionalization.[199] Dean Hardy Dillard has observed: "We would surely all agree that a good legal education is not a 'thing' that you 'acquire.' . . . Like law itself, education

thereby increasing the burden placed on the school. Some might be offended with the prospect that a student, by paying money for his wrong, may be allowed to remain in school after potentially serious violations. The idea that the university as a whole had been wronged by violations would be difficult to satisfy with money compensation. Under this proposed model, the sanction for failure of a student to pay the damages assessed would be exclusion from school, *id.* at 410, which raises the same problems that attend expulsion under a more typical quasi-criminal model. Furthermore, the compensation system seems inadequate to cope with the student bent on drawing attention to his "cause" by seeking the drama of expulsion in declining to pay the damages.

197. Approval of Law Schools, ABA Standards & Rules of Procedure, As Amended—1977, § 301(a). *See also* H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 22 (1972) (legal education on its most basic level is preparation for the public profession of law).

198. *See, e.g.*, Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 224 (1974).

199. A strictly pedagogical view of legal education may emphasize the participatory process of the classroom, reflecting a curricular concern with course content and teaching methods. Under such a perspective, extra-classroom attributes such as the physical plant, social events, and student activities may not be characterized as an intrinsic part of legal education. But this seems an unwarrantedly narrow view of the experience. Several extra-classroom activities offer valuable participatory learning. The law review, while usually a credit offering, is essentially a nonclassroom experience, as are moot court, legal clinics, mock trial, and other inter-school competitions. There is little doubt as to the educational value of such experiences. Student government and similar activities, however, would not receive the same resounding acknowledgment of educational merit.

is not a 'thing' but a 'process.' You do not acquire a process, you participate in it."[200]

This admittedly limited characterization of legal education serves as focal point for considering the relationship of education to discipline as more than an administrative function. The Supreme Court has spoken of student discipline "as part of the teaching process."[201] It has been observed that the "student's opportunity to confront the disciplinarian . . . is part of the process of education itself."[202] But in what manner is student discipline a part of the educational process? Perhaps this can be seen in three formulations: the introduction of law students to the legal profession; the teaching of substantive and procedural doctrines of due process; and the fostering of the ideal of justice as served by law as an ordering process.

As to the first of these considerations, the learning about the profession, a recent American Bar Foundation research program in legal education reported:

> It does seem clear that law school itself has a powerful impact on the thinking of students about legal education and professionalization. For most law students, law school is their introduction to the legal profession and the law. The way in which law school shapes attitudes about itself may well carry into the public profession and that central social institution.[203]

A law student not only learns about the profession while in law school, but his perception of the law school as an institution also shapes his concept of the profession. It is argued that "law schools perform the function of socializing the law student to the norms of the legal community and therefore may have significant effects on later behavior."[204] This thought was expressed by Professor Walter Gellhorn in his admonition that law teachers "are under obligation to be more than teachers of law. They must also . . . be introducers of professional attitudes, obligations, standards."[205]

The way in which the law school deals with its students in both disciplinary matters and academic evaluations must be considered for its professionalizing effect on all students. While professionalism has many facets, one important aspect is self-regulation for the public welfare.[206] The Code of Professional Responsibility, which governs the conduct of members of the organized bar, has as its first canon that "[a] lawyer should assist in

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200. Commentary by Hardy C. Dillard, Round Table on Curriculum of the American Association of Law Schools, Washington, D.C. (Dec. 28, 1966) (reprinted in 21 U. MIAMI L. REV. 532, 535 (1967)).

201. Goss v. Lopez, 419 U.S. 565, 583 (1975): "[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."

202. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 313 n.128 (1975).

203. Pipkin, *Legal Education: The Consumers' Perspective*, 1976 AM. BAR FOUNDATION RESEARCH J. 1161, 1192.

204. Katz & Denbeaux, *Trust, Cynicism, and Machiavellianism Among Entering First Year Law Students*, 53 J. URBAN L. 397, 398 (1976).

205. Gellhorn, *Preaching That Old Time Religion*, 63 VA. L. REV. 175, 185 (1977).

206. H. PACKER & T. EHRLICH, *supra* note 197, at 22.

maintaining the integrity and competence of the legal profession."[207] It is the obligation of every lawyer to protect the public from those not qualified to be lawyers by reason of a deficiency in education or moral standards.[208]

If self-regulation is to have real meaning for a lawyer, perhaps the process should begin with the law school, including student involvement in the regulatory process. As beginning professionals, students would be forced to grapple with the perplexing problems of competence and to take responsibility for dealing with their colleagues who demonstrate by misconduct or academic deficiency their lack of qualification to be law students or lawyers.[209] Self-regulation, or at least a significant student role in the disciplinary process, would enable a student to assume responsibility for his conduct and for that of his fellow students in a participatory manner: learning by doing. Student participation could begin with the formation of a disciplinary code, if none existed, and the student role in the enforcement process. Professor Charles Allen Wright has observed that the task of drafting a code belongs to a student-faculty committee.[210] The Law Student Division of the American Bar Association has argued for a code drafted by students with annual enactments by the students.[211] Peer group consensus tends to have a greater effect on determining actual behavior than a written code handed down from a superior body. Furthermore, "professionalism depends in significant part upon adherence to standards of professional conduct, and . . . those standards must be the product of a consensus of the members of the profession."[212] Although exclusive student control over disciplinary matters may not be necessary or even desirable, a significant role for the students in the formation and enforcement of a code would go far to accomplish the educational goal of introducing law students to the legal profession.[213]

A second identifiable educational opportunity offered by the disciplinary process is the teaching of substantive and procedural legal doctrines, chiefly due process. The long history of due process in Anglo-American law is a rich and potent focus in the study of law. Justice Frankfurter noted the utility of due process:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice

207. ABA CANONS OF PROFESSIONAL ETHICS No. 1.
208. *Id.* EC 1-2.
209. *See, e.g.*, Bradway, *Restraints: A Proposal for a Student Code of Ethics*, 3 N. KY. L. REV. 133, 160, 162 (1976).
210. Wright, *supra* note 93, at 1064.
211. *A Proposed Model Honor Code*, ABA LAW STUDENT DIVISION 12 (1971).
212. *Id.* at 5.
213. This is not to suggest that in academic evaluations students be allowed to second-guess grade awards by instructors. But it does seem that there is room for student participation on school committees that review challenges claiming factual errors (*e.g.*, in calculation of grade point average) or bias (*e.g.*, race or gender discrimination).

has been done.[214]

Due process as a generalized notion of fairness is thus the central basis to the law and the practice of law. Important to this notion is the specific device of notice and hearing. "Some precepts in a lawyer's education are heard so early and repeated so frequently that the reasons for their legitimacy are soon forgotten. Notice and the right to be heard are among them. They pervade our lives."[215] The underlying rationale of notice and hearing can be explained as carrying out particular social policies efficiently and achieving order and predictability through accurate fact-finding.[216]

The disciplinary process in a law school can serve as an excellent laboratory in which to test the effectiveness of due process in protecting interests dear to law students: their continuation in law school and their potential careers as lawyers. If there is, as some have said, a movement in legal education toward learning by doing,[217] the dismissal process provides an opportunity for students to reconcile private interests with the need for order and common good through the application of traditional due process tools. One Supreme Court Justice has warned educators not to "teach youth to discount important principles of our government as mere platitudes" by neglecting fundamental fairness in school dismissals.[218]

If law schools seriously view discipline as a teaching opportunity for substantive and procedural legal doctrines, existing procedures for disciplinary and academic expulsions may require modification. An initial inquiry might be whether a specific, written code of conduct and procedure to govern disciplinary matters is needed. Some educators feel that "detailed codes of prohibited student conduct are provocative and should not be employed in higher education."[219] Yet the fundamental legal doctrine of due process requires notice as to prohibited conduct and the consequences of noncompliance.[220] A penalty should be imposed only for violation of a preexisting rule, and that rule must be sufficiently precise to control discretion and to inform those subject to penalties.[221] This is a legal doctrine of merit, worth teaching through its application in disciplinary matters.

If law school discipline is to be employed to teach due process effectively, the law school's adoption of due process procedures should not de-

214. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (footnote omitted).

215. Subrin & Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 449 (1974).

216. *Id.* at 458.

217. *See* Cramton, *Report to the President of the University for 1975-76*, CORNELL L.F., Summer 1976, at 1.

218. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

219. General Order, *supra* note 103, at 146.

220. *See, e.g.*, Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Cox v. Louisiana, 379 U.S. 536 (1965); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-81, 96-104 (1960).

221. *See, e.g.*, Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40, 52 (1966).

pend on whether it is legally compelled to do so. Indeed, in this teaching context it might be useful to regard the school as a quasi-government.[222] As the law school acts on its constituency, the students, it must do so fairly. Thus considered, due process should be the guide in all law school disciplinary action. This is not to suggest that a full jury trial with its complement of criminal procedure is warranted. Student discipline is not a criminal matter, and only fundamental due process notions are essential. Specific rights will need to be defined in view of this objective. It may be found that adopting due process as a standard will dictate the granting of more procedural rights than the courts have required under the fourteenth amendment. For example, confrontation and cross-examination may be necessary as "the best assurance of fair and enlightened action."[223] And if the school is to have an attorney in such proceedings, surely the student is entitled to one as well.[224] Given this value of due process in the educational context, a stronger case can also be made for student freedom from unreasonable search and the employment of the exclusionary rule. The scope of a code of student behavior formulated by faculty and/or students arguably should not reach strictly academic evaluations, such as grade determination, because these would not be suitable decisions for notice-and-hearing procedures since they are not factual disputes. On the other hand, whenever an academic dismissal either involves factfinding or may result in a stigmatizing effect, some kind of notice and hearing would be appropriate.[225]

A third educational potential in law school disciplinary matters is the fostering of an appreciation for justice and the role of law in ordering relations between people and institutions. Any institution of education is, overtly or covertly, teaching notions of justice, fair play and, as a result, impressions of the role of law. Schools should be sensitive to their responsibility for treating students fairly. "Scholarship cannot flourish in an atmosphere of suspicion and distrust."[226] "The American public school system, which has a basic responsibility for instilling in its students an appreciation of our democratic system, is a peculiarly appropriate place for the use of fundamentally fair procedures."[227]

Law schools should be especially sensitive to the notion of instilling in its students an appreciation of the ideals of our system of government through fair treatment. Dean Roger Cramton described the central role of the law school:

> What are law schools all about? They must be concerned above all with central concepts and values such as justice, order, power, and freedom. How can we enhance the quality of justice in our society?

222. *See* Project, *supra* note 4, at 799-800.
223. Byse, *The University and Due Process: A Somewhat Different View*, 54 AAUP BULL. 143, 145 (1968).
224. *See* Wright, *supra* note 93, at 1075-76.
225. *See* Greenhill v. Bailey, 519 F.2d 5, 8-9 (8th Cir. 1975).
226. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
227. Lucia v. Duggan, 303 F. Supp. 112, 118-19 (D. Mass. 1969).

> How can we achieve the optimum degree of order that a good society requires? How can we control and channel official power? How can we enlarge individual freedom consistent with social responsibility? And what do these concepts mean? Surely these ideas and values are related to the qualities of a legal system and to the competence of the lawyers who work within it. Scholarship and teaching that illuminate these questions are a central responsibility of legal education.[228]

If the instilling of such values is a central responsibility of legal education, reasonable procedures of fair treatment for students in disciplinary matters should not be viewed as a legal octopus about to strangle the academic community in technicality, expense, and delay. Instead, due process should be embraced as serving the very reason for the existence of a law school: not just the teaching of law in its narrow technicality, but inspiring the higher view of the law as justice.[229] If one role of the law school is to teach how law orders the relations of people and how institutions dispense justice, the law school then has a special mission to demonstrate fairness in dealing with its students and fostering a perception of itself as an institution dispensing justice. John Rawls has observed: "Thus it is maintained that where we find formal justice, the rule of law and the honoring of legitimate expectations, we are likely to find substantive justice as well."[230]

Although a central function of due process notice and hearing is accurate factfinding, due process also operates to promote human dignity.[231] By affording students the opportunity to be heard, a due process system implicitly acknowledges their dignity as human beings. Not only are individuals thereby recognized as important and their viewpoint heard, but each is also given some measure of self-control and accountability. "One can thus explain the need for notice and the right to be heard on humanizing grounds, even if the facts are known and the law clear."[232] By affording a process of fair treatment and opportunity to be heard, the law school generates the feeling that the outcome is legitimate and fair, whatever the results. If nothing else is gained thereby, surely adoption of fair procedures in disciplinary matters will help to counter the consistent student criticism that law schools are dehumanizing.[233] The infrequency of dismissals may reduce the effectiveness of the process as a day-to-day teaching tool, but the very existence of a fair and reasonable procedure would serve as an educational model and a reminder of basic legal concepts.

In summary, it is submitted that quite apart from any judicial definition of what due process requires, whether derived from the fourteenth amendment, common law, or whatever contractual relations may exist, a law school is compelled on educational grounds to provide a disciplinary process adequate to satisfy legal and educational demands. There should be a

228. Cramton, *supra* note 217, at 2.
229. H. PACKER & T. EHRLICH, *supra* note 197, at 35-36.
230. J. RAWLS, A THEORY OF JUSTICE 60 (1971).
231. Subrin & Dykstra, *supra* note 215, at 458.
232. *Id.* at 457.
233. *See, e.g.*, Savoy, *Towards a New Politics of Legal Education*, 79 YALE L.J. 444 (1970).

reasonable procedure of fair treatment affording notice and an opportunity for the student to be heard, regardless of the school's public or private status, or of the disciplinary or academic nature of the matter in controversy. The force for a more sensitized disciplinary process should come from the school, especially a law school, and the impetus for this force is the law school's very educational goals.