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House Bill 1219: A Study

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HOUSE BILL 1219: A STUDY

INTRODUCTION

ON JUNE 17, 1970, then Governor James A. Rhodes signed into law Amended Substitute House Bill 1219 (hereinafter referred to as H.B. 1219), commonly called the Ohio Campus Disorder Act.[1] To most of the general public and to critics of the existent university policies toward campus disorders, the bill represented a long overdue "get tough" policy against "radical" and "undisciplined" students, and a reaction against university administrators who were viewed as being far too lenient with their students, almost to the point of condoning disruptive student behavior. To other faculty members, administrators, students, and civil libertarians, however, the bill represented a denial of certain fundamental constitutional rights to students, and an example of repression far greater, perhaps, than that which they viewed as causing campus disorders in the first place.

H.B. 1219 has been in effect for more than a year now, and although it has been the subject of one court challenge,[2] the issues concerning its constitutionality have not been resolved. Because of the importance of these issues the statute will certainly be challenged in the future.

The significance of H.B. 1219 is twofold. First, it represents the most complex and thorough-going response to the problem of campus disorder in the country. Few states have attempted to simultaneously impose criminal sanctions on disrupters, provide for discipline through an elaborate hearing procedure outside the university structure, and also create extraordinary powers for university administrators in time of emergency.[3] As of yet, the writer knows of no other state which has attempted to so specifically provide what procedural rights students are entitled to in disciplinary hearings.[4] The broad scope of these provisions suggests a variety of novel and serious constitutional problems.

Secondly, and perhaps more significantly in the long run, H.B. 1219 represents an assertion by the state of the primary responsibility for the discipline of disruptive students in the more serious cases. Since student

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[1] OHIO REV. CODE §§2923.61, 3345.22, 3345.23, 3345.24, 3345.25, and 3345.26. (Effective date September 16, 1970).

[2] Blount v. Davis, Case No. C71-197 (N.D. Ohio, filed February 25, 1971).

[3] Florida and Louisiana have come the closest in providing as comprehensive statutory schemes. *See* FLA. STAT. ANN. §§240.045, 239.581, and 877.13; and LA. REV. STAT. ANN. §§17:3103, 17:3104, 17:3105, 17:3108, and 17:3109.

[4] *See* notes 8, 9, and 11 *infra.*

discipline has traditionally been regarded as a matter reserved exclusively to the university community, the state's assertion of primary authority for discipline could profoundly alter the university-student relationship and must necessarily limit the flexibility of the university's response to campus problems.

Because H.B. 1219 does raise certain constitutional questions which will soon come before the courts, and because of its potential impact on higher education in Ohio, a complete study of it is in order. This Comment seeks to do that by analysis of the background events leading up to the bill's introduction, its legislative history, a summary and explanation of the act's important provisions, an analysis of potential constitutional infirmities in view of current court decisions, and a discussion of relevant policy considerations. The purpose of this Comment is not to assess the wisdom or desirability of the statute, but to examine it in terms of current concepts of due process.

BACKGROUND

The basic impetus for H.B. 1219, as well as for the enactment of statutes throughout the country specifically relating to the campus, was the growing number of campus disturbances in the late 1960's and 1970. The American Bar Association Commission on Campus Government and Student Dissent noted in 1970:

> Within the past academic year alone an estimated one hundred and forty-five institutions of higher learning were torn by violence, and nearly four hundred more endured some form of non-violent disruptive protest.[5]

Coupled with an expectation that universities would be increasingly subjected to considerable disruption was the growing feeling that the problem was beyond the control of university administrators. The President's Commission on Campus Unrest reflected the growing view in terms unusually blunt for commission reports:

> Universities have not adequately prepared themselves to respond to disruption. They have been without suitable plans, rules, or sanctions. Some administrators and faculty members have responded irresolutely. Frequently, announced sanctions have not been applied. Even more frequently, the lack of appropriate organization within the university has rendered its response ineffective. The university's own house must be placed in order.[6]

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[5] REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT, American Bar Association, at 1 (1970).

[6] REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST at 7, (Arno Press ed., 1970).

With campus problems ever increasing and the universities apparently unable to control the situation, state legislatures began to "move into any vacuum created by vacillation or ineffectiveness in college and university disciplinary procedures."[7] It was not until 1969, however, that most of the state legislatures began to enact comprehensive acts specifically dealing with campus disruption. This legislation fell into three general categories in terms of overall purpose and effect. The first category purported to deprive any student involved in a campus disturbance at a state supported university of all forms of financial aid.[8] The second category included statutes creating criminal offenses generally denominated as "interference," "obstruction," or "disruption."[9] Most of the states which enacted campus disruption legislation had statutes falling into this category. Any activity disrupting, obstructing, or interfering with the lawful and peaceful activities of the university was made a misdemeanor, as was the destruction or unlawful occupation of campus property and buildings. A third group of statutes affected the university disciplinary process itself, either by making provisions for expulsion of students who committed certain offenses,[10] or by authorizing university officials to promulgate codes of conduct and discipline students for violation thereof.[11] There appears to be no significant case law interpreting these statutes to date.

Congress has also responded to the campus situation by enacting

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[7] Edward C. Kalaidjian, *Problems of Dual Jurisdiction of Campus and Community*, STUDENT PROTEST AND THE LAW 135 (G. Holmes ed., 1969).

[8] *See, e.g.*, ILL. STAT. ANN. §30-17; PURDEN PA. STAT. ANN. §§5104.1, 5158.2; TENN. CODE ANN. §49-4120; and WISC. STAT. ANN. §36.43.

[9] *See, e.g.*, ARK. STAT. ANN. §§41-1447, 41-1448; CALIF. REV. CODE ANN. PENAL CODE, §§602.10, 626.6, 626.8; COLO. REV. STAT. §40-8-22; GEN. LAWS IOWA §33-3716; BURNS IND. STAT. ANN. §§10-4532, 10-3534; LA. REV. STAT. ANN. §14-328; ANN. CODE MARYLAND ART. 27, §123A; MICH. COMP. LAWS ANN. §§752.581, 752.582, 752.583; MINN. STAT. ANN. §624.72; REV. STAT. NEB. §28-831; N.M. REV. STAT. ANN. §§40A-20-10, 40A-20-11, 40A-20-12; OKLA. STAT. ANN. §21-1327; S.C. CODE §16-551; TENN. CODE ANN. §§39-1215; 39-1216, 39-1217; TEXAS EDUC. CODE ART. 295a, 295b; UTAH CODE ANN. §§76-66-3, 76-66-4, 76-66-5; and REV. CODE WASH. ANN. §§28B.10.570, 28B.10.571, 28B.10.573.

[10] *See supra* note 3.

[11] *See, e.g.*, CALIF. REV. CODE ANN. §§22505, 22508; FLOR. STAT. ANN. §240.045; KANSAS STAT. ANN. §17-1401; MCKINNEY'S CONSOL. LAWS N.Y. ANN., EDUC. LAW, §6450. For a discussion of the California statute see Comment, *Recent California Campus Disorder Legislation: A Comment*, 8 HARV. J. LEGIS. 310 (1971). A discussion of the New York statute is found in Crary, *Control of Campus Disorders: A New York Solution*, 34 ALBANY L. REV. 85 (1969).

legislation depriving disruptive students of certain forms of federal financial aid.[12]

The forerunner of H.B. 1219 in Ohio was section 3345.21, Ohio Revised Code, which is still in effect.[13] It empowers boards of trustees of state universities to regulate the use of all state university property and prescribe codes of conduct for students. Such codes are required to be published in a manner "Reasonably designed to come to the attention of and be available to all faculty, staff, visitors, and students." The statute also provides that a board of trustees can eject, expel, or suspend any person violating the regulations, but does not provide any procedure for doing so, apparently intending to leave that to each university.[14]

Public and legislative discontent with the effectiveness of internal university disciplinary proceedings increased in 1969 and this undoubtedly encouraged the series of bills introduced into the Ohio House of Representatives during the First Session of the 108th General Assembly. These bills[15] were referred to the House Education Committee and in turn to a subcommittee. After seven public hearings and a considerable amount of testimony from university administrators, the subcommittee reported that it would take no action on the bills. This decision was based not only on testimony from law enforcement officers that no new laws were needed, but also on:

> ... [t]he desire and assurance of university and college administrators that they can and will deal effectively and firmly with future

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[12] 20 U.S.C.A. §1060 provides:

> (a) If an institution of higher education determines, after affording notice and opportunity for hearing ... that such individual has been convicted by any court of record of any crime ... which involved the use of ... force, disruption, or seizure of property ... to prevent officials or students in such institutions from engaging in their duties or pursuing their studies, and that such crime was of a serious nature ... the institution ... shall deny for a period of two years any further payment to, or the direct benefit of, such individual under any of the programs specified in subsection (c) of this section.
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> (b) If an institution of higher education determines, after affording notice and opportunity for hearing ... that such individual has willfully refused to obey a lawful regulation ... and such refusal was of a serious nature and contributed to a substantial disruption of the administration of such institution, then such institution shall deny ... for two years ... any further payment ... under any of the programs specified in subsection (c) of this section.

Subsection (c) programs include: the federal student loan program, educational opportunity grant program, the student loan insurance program, the college work-study program, and fellowship programs.

For a discussion of these provisions, and their merit, see Comment, *Higher Education and the Student Unrest Provisions*, 31 OHIO ST. L. J. 111 (1970).

[13] 132 Ohio Senate Journal 468 (Effective 6-10-68).

[14] Of course, procedures in public schools would have to comply with constitutional standards of due process.

[15] House Bills 57, 403, 481, 776, 777, and 778.

> occurrences and that they will implement the laws of this state in dealing with such disturbances.[16]

While the report left the primary responsibility for meeting disorders with the universities, the subcommittee warned that should administrators fail to deal "immediately, firmly, and effectively" with disorders, it was recommending that the "Legislature act in their place. . . ."[17]

The campus disorders leading up to the killing of four students by the National Guard on May 4, 1970, at Kent State University and the riots and campus closings at Ohio University and Ohio State University, provided the final catalyst for a new flood of legislative proposals, of which H.B. 1219 was a part. Those individuals involved with H.B. 1219 recall that the public pressure for strong legislation was overwhelming, and it was said that letters ran nine to one in favor of firm, if not harsh action against campus dissidents.[18] As a result, some fourteen bills[19] were introduced between May 8 and May 27, 1970, offering a wide variety of solutions to campus problems. Bills provided for such disciplinary action as immediate expulsion for any student who engaged in any act of force or violence disrupting university activities (university officials to make the determinations); criminal penalties for interference with law enforcement officers and college administrators; criminal sanctions for rioting or the closing of any school; civil class actions by students or administrators against student disrupters; summary suspension of disruptive students followed by a hearing, the student being banned from the campus during any suspension; and power was given to university administrators to declare emergencies and impose curfews and limit freedom of assembly. There was even a bill[20] providing for the execution of an "oath of understanding," a type of contract between the student and university, the student agreeing either to abide by university rules, or resign if unable to do so.

While it was uncertain what action would be taken, it was clear that the Legislature would act.

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[16] Report of the Sub-committee on the Education Committee, 108th General Assembly, Ohio House of Representatives, at 3 (mimeo., 1969).

[17] *Id.* at 4.

[18] Interview with Mr. Thomas Swisher, Ohio Legislative Service Commission, at the State House, Columbus, Ohio, September 15, 1971 [Hereinafter referred to as *Interview*].

[19] House Bills 1194, 1195, 1196, 1202, 1206, 1207, 1208, 1209, 1214, 1215, 1218, 1219, 1220, and 1229. *See* Ohio Assembly Bulletin, 108th General Assembly, Final Ed. (1969070).

[20] H.B. 1229.

LEGISLATIVE HISTORY OF H.B. 1219

The first draft of H.B. 1219 was introduced on May 22, 1970,[21] and four days later it was referred to committee. While the bills introduced in the first session of the 108th General Assembly were assigned to the House Education Committee, the group of bills introduced in May were referred to the Judiciary Committee. Presumably, it was felt that that committee was better equipped to handle the complex legal problems presented by the new bills.

Although less than a month passed between its introduction and its final approval, nearly two weeks of all-day hearings were held on the proposal, and no one apparently was prevented from testifying. In fact, the response of educators invited to speak was described as weak.[22]

While the final form of H.B. 1219 has been met by strong objections from many sides, it is a modest proposal when compared to the first draft introduced into the Ohio House. As originally written, H.B. 1219 created a crime of "disruption," which occurred when a person "in circumstances creating a substantial risk of disrupting the orderly conduct of lawful activities at a college or university," wilfully committed certain enumerated acts. Some of these acts included engaging in such vaguely defined conduct as "violent or turbulent behavior," making "unreasonable noise" or "addressing unwarranted and grossly abusive language to any person."[23] In terms of disciplinary procedures, the first draft provided that (1) any person convicted of an offense wilfully committed in circumstances creating a substantial risk of disruption of the orderly conduct at a university could be immediately dismissed by college authorities; (2) arrest for an offense outlined above could result in immediate suspension, and (3) any other wilful conduct tending to "urge," "incite," "encourage," "maintain," or "aggravate" a riot, whether constituting an offense or not, resulted in immediate suspension if found necessary to protect university interests.[24] The bill thus provided for what was called "front end" suspension or dismissal; that is, immediate disciplinary action before any hearing was held on the validity of the charges. However, a hearing before a faculty committee was provided subsequent to the dismissal or suspension, but only upon written request by the student.[25] The faculty committee was empowered to modify or

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21 All information concerning the dates of legislative action on H.B. 1219 were taken from the Bulletin of the 108th General Assembly, Final Ed. (1969-70), at 470, unless otherwise specifically noted.

22 *Interview, supra* note 18; Interview with State Representative William Batchelder on May 13, 1971.

23 First draft, H.B. 1219 [Hereinafter cited as First draft], §2923.61 (A) (1)-(6).

24 First draft, §3345.22 and 3345.23.

25 First draft, §3345.24(C).

affirm the sanctions imposed in any way, and its decisions were final.[26] In addition to other provisions, the bill declared the existence of an emergency situation calling for it to be put into immediate effect.[27]

While in the Judiciary Committee the bill was redrafted a dozen times,[28] but what precise changes took place before a substitute bill was reported on June 2 are difficult to determine since most of these intermediate drafts were discarded. The general approach of the bill was probably intact when it reached the House floor on that day. After a few minor amendments,[29] by a vote of 73-20 the bill was declared an emergency measure entitled to immediate effect and then was passed, 80-14, and sent to the Senate.

In the Senate the bill was substantially changed, the most significant change being the rejection of the "front end" suspension provisions. Again, it is unclear from available information precisely what changes were made. However, the primary hearing provisions which later became part of the final bill, now Ohio Revised Code subsections 3345.22 (A)-(H), were added by amendment from the floor[30] on June 4th, the same day the bill passed the Senate, 21-10. The Senate, however, refused by a nearly equal margin to declare the act an emergency measure.

The next day the House refused to accept the Senate amendments and the bill went to conference committee when the Senate insisted on its amendments. On the same day that committee made its recommendations, in large part accepting the Senate version with a few language changes.[31] The greatest change in conference involved the addition of subparagraph (B) to what later became section 3345.24 Ohio Revised Code. This provided that the disciplinary procedures contained in the bill in no way limited the inherent authority of university officals to summarily suspend a student, faculty, or staff member provided there was notice given and a hearing was subsequently provided. Both Houses accepted the conference report and the bill was sent to the Governor for his signature.

SUMMARY OF PROVISIONS

H.B. 1219 adds one section to the criminal code[32] and five sections to the education code.[33] Like the original bill introduced, the first section of the act (section 2923.61 Ohio Revised Code) creates the crime of

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26 First draft, §3345.25(C).

27 First draft, §3345.99(B)(3).

28 Interview, *supra* note 18.

29 *See* 133 Ohio House Journal 2237-2242 (June 2, 1970).

30 133 Senate Journal 1580-1582 (June 4, 1970).

31 133 Ohio House Journal 2326-2327 (June 5, 1970).

32 OHIO REV. CODE §2923.61.

33 OHIO REV. CODE §§3345.22, 3345.23, 3345.24, 3345.25, and 3345.26.

"disruption." Any person is prohibited "in circumstances which create a substantial risk of disrupting the orderly conduct of lawful activities at a college or university"[34] from wilfully performing the following acts: (1) entering or remaining upon university property "without privilege" or refusing to leave such place when ordered to do so by proper authority; (2) violating any restriction imposed pursuant to section 3345.26 Ohio Revised Code; (3) engaging in any conduct urging, inciting or encouraging another to violate section 2923.61 in circumstances in which such conduct would create a clear and present danger of such violation;[35] (4) with force or violence disrupt the orderly conduct of lawful activities at a college or university, or (5) engage in conduct threatening or involving serious injury to persons or property.[36] While not specifically stated in the bill, violation is apparently a misdemeanor, since the penalty for violation is a fine of not more than one hundred dollars or imprisonment of thirty days, or both, for the first offense. Subsequent offenses are punished by a fine of not more than five hundred dollars or imprisonment of six months, or both.[37]

Sections 3345.22 and 3345.23 embody the principal disciplinary scheme of the act. Any student[38] arrested for violating certain enumerated sections of the Ohio Revised Code[39] affecting persons or property on a college or university is subject to the procedure.[40] The specified sections generally include most offenses associated with campus disruption, including all forms of assault, arson, malicious destruction of property, carrying concealed weapons, riot, and inciting to riot, as well as the disruption offenses under section 2923.61 Ohio Revised Code.

Upon the arrest of the student, the arresting authority is required to notify the president of the university which the student attends, who in turn is required to notify the Ohio Board of Regents. Within five days of arrest (subject to continuances for reasonable cause not to exceed ten days) the Board of Regents must afford the student a hearing to determine whether such student shall be suspended from the university. Presiding over the hearing is a referee selected by the Board of Regents, who must be an attorney admitted to practice in Ohio, but not connected in any way with the university involved.[41] The referee has the authority to

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[34] OHIO REV. CODE §2923.61(A).

[35] OHIO REV. CODE §2923.61(A)(1)-(3).

[36] OHIO REV. CODE §2923.61(B)(1) and (2).

[37] OHIO REV. CODE §2923.61(C).

[38] The act also covers faculty, staff members, and employees. "Student" has been used here only for the purposes of brevity.

[39] Set forth in OHIO REV. CODE §3345.23(D).

[40] OHIO REV. CODE §3345.22(A).

[41] OHIO REV. CODE §3345.22(B).

administer oaths, issue and enforce subpoenas, and preserve order in the proceedings by use of the contempt power.[42]

The core of the bill for the purposes of procedural due process analysis later is subparagraph (D) of section 3345.22, which defines the nature of the hearing as well as the procedural rights afforded the accused. The hearing shall be "adversary in nature" and conducted "fairly and impartially," but, more importantly, "the formalities of the criminal process are not required." The person whose suspension is being considered has: (1) the right to be represented by counsel (although counsel need not be furnished); (2) the right to cross-examine witnesses, and (3) the right to testify and present testimony in his behalf. In addition, in the absence of waiver, any testimony of the person whose suspension is being considered cannot be subsequently used in any university proceeding against him. Interestingly, no specific provision is made in the section requiring notification to the student involved of the specific criminal violation which gives rise to the hearing. Such notice would be valuable in attacking the "jurisdictional" basis for any hearing, particularly if the student's offense was outside those set forth in section 3345.23(D). Section 3345.22(B) does provide that immediate notice of time and place of any hearing must be sent to the individual, but does not go beyond that. At least in one actual case, however, such notice was, in fact, given.[43]

Subparagraph (D) also empowers the referee to separate the witnesses and bar from the proceedings any persons who are not essential to it, with the exception of the news media.

If the referee finds on the preponderance of the evidence that the student has committed the offense for which he was arrested, he may order the person suspended or placed on strict disciplinary probation if his continued presence is deemed not dangerous to the university. Subsequent violation of the probation results in "automatic" suspension, although the bill is unclear on the question of who determines when such a violation has occurred. Any suspensions imposed are effective until a determination of guilt or innocence is made on the criminal charge by a court.[44] If there is a conviction, the suspension automatically becomes a dismissal,[45] but the student may be readmitted in the discretion of the board of trustees after the lapse of one calendar year from his dismissal on terms of strict disciplinary probation. If there is no conviction (or a

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[42] OHIO REV. CODE §3345.22(C).

[43] Exhibit "E" attached to the complaint in *Blount v. Davis, supra* note 2, was a copy of a notice of hearing sent to the defendants involved in that case. It specifically cited the code sections violated which gave rise to the hearings.

[44] OHIO REV. CODE §3345.22(E).

[45] OHIO REV. CODE §3345.23(A).

conviction is reversed on appeal), the suspension (or dismissal) terminates, the student is reinstated, and all record of such suspension (or dismissal) expunged from his records.[46] Any person not appearing for a hearing is to be declared suspended.[47]

Orders of the referee are appealable on questions of law and fact to a court of common pleas which may permit the student suspended to return on terms of strict disciplinary probation if his presence will not prejudice its good order.[48]

Trials for offenses triggering the disciplinary procedures are to take precedence over all other matters in the courts,[49] which enables the university to quickly rid itself of disrupters, as well as to make unwarranted suspensions as short as possible.

Section 3345.24 provides that the disciplinary procedures in the bill are applicable regardless of any regulation or procedure used by the university itself, and in no way affects the right of the university to take appropriate disciplinary action or to summarily suspend any student.

No person suspended pursuant to sections 3345.22 or 3345.23 may enter or remain on university premises without the permission of the board of trustees or the president of that university.[50]

The final provision of H.B. 1219 is section 3345.26, a section which has received relatively little notice considering its potential impact on student disorders and on the constitutional rights of those involved. That section empowers the board of trustees or the president of a university to declare a "state of emergency" when there is a "clear and present danger of disruption of the orderly conduct of lawful activities" at a university. During such an emergency the president of the board of trustees has the power to: (1) limit access to university property; (2) impose a curfew; (3) restrict the right of assembly, and (4) provide "reasonable" measures to enforce (1)-(3). Notice must be given of all restrictions, and as in section 3345.24, this section does not affect the inherent authority of university officials to meet disorders, whether an emergency exists or not.

H.B. 1219 IN THE COURTS

On February 25, 1971, *Blount v. Davis* was filed in the federal district court for the Northern District of Ohio seeking declaratory and injunctive relief against H.B. 1219.[51] Two student plaintiffs sought to stop

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[46] OHIO REV. CODE §3345.23(E).
[47] OHIO REV. CODE §3345.22(H).
[48] OHIO REV. CODE §3345.22(G).
[49] OHIO REV. CODE §3345.23(D).
[50] OHIO REV. CODE §3345.25.
[51] Case No. C71-197 (filed February 25, 1971).

hearings which they were about to undergo as a result of their arrests arising out of some demonstrations at Kent State University in early February. Other students and faculty members, subject to application of H.B. 1219 in the future, sought a declaratory judgment that H.B. 1219 was unconstitutional.

The plaintiffs argued that H.B. 1219 on its face and as applied, violated the First, Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. Specifically, they alleged that it violated the double jeopardy clause of the Fifth Amendment by subjecting students to two trials. They argued that the student was forced under H.B. 1219 to undergo a disciplinary hearing on the same charge and concerning the same facts as were involved in the criminal prosecution stemming from the arrest.[52] It was contended that H.B. 1219 violated the Fifth Amendment and equal protection clause of the Fourteenth Amendment because it "arbitrarily and unreasonably establishes a legislative classification of . . . university students . . . as the subject for greater punishment for an offense . . . than for . . . other persons."[53] It was further urged that the bill violated the Fifth Amendment privilege against self-incrimination because a person was "required, under penalty of automatic suspension" to give evidence and testimony involving the same facts and issues in the subsequent criminal proceeding, the protection in H.B. 1219 extending only to the defendant in such a proceeding which was "not co-extensive with the protection of the privilege accorded them under the Fifth Amendment."[54]

Further objection was made to the fact that the referee's findings were based on the "preponderance of the evidence," and it was argued that the findings should be based on the "beyond a reasonable doubt" standard. Further, the short period between the preparation for the hearing, the hearing, and the criminal trial was said to be a denial of fair trial, as was the automatic suspension for failure to appear at the hearing because it was without regard to extraordinary circumstances which might prevent the defendant's attendance.[55]

H.B. 1219 was said to violate the Sixth Amendment by denying a public trial because the referee was empowered to exclude all those not essential to the proceedings.[56] It was contended that such language as "the good order and discipline of a college or university will not be prejudiced or compromised thereby,"[57] "in circumstances which create a substantial

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[52] Blount complaint, para. 32.
[53] Blount complaint, para. 33.
[54] Blount complaint, para. 34.
[55] Blount complaint, para. 35.
[56] Blount complaint, para. 36.
[57] OHIO REV. CODE §§3345.22(E), 3345.22(G).

risk of disrupting the orderly conduct of lawful activities at a college or university"[58] and "engage in conduct which threatens or involves serious injury to persons or property at a college or university,"[59] was vague and overbroad and thus violated the plaintiffs' rights to notice of the nature of the charges against them under the First and Fourteenth Amendments.[60] Also alleged was a violation of the right to trial by jury under the Sixth Amendment.[61] Finally, the penalties under H.B. 1219 were said to be cruel and unusual punishment, in violation of the Eighth Amendment.[62]

The court failed to reach the merits of this barrage of attacks (putting the hearing off indefinitely on the constitutional issues), and declined to enjoin the disciplinary hearings on the authority of a then-current Supreme Court decision concerning the propriety of federal courts enjoining state prosecutions. That decision, *Younger v. Harris*,[63] in essence limited *Dombroski v. Pfister*[64] to its facts by directing federal courts not to enjoin state criminal proceedings for alleged violations of constitutional rights unless the state prosecutions were in bad faith.[65] The plaintiffs in *Blount*, however, did contend that the enactment and application of H.B. 1219 was in bad faith. Its passage, it was said, was intended to "harass" plaintiffs and others, and to "intimidate" and "inhibit" them in the exercise of their First Amendment rights, as well as to "exonerate" the National Guard from blame in the shootings at Kent State and "whitewash" reports of the President's Commission and F.B.I. on the Kent tragedy.[66] While the Court's opinion is but one sentence long and makes no specific findings, presumably there was a finding that there was not bad faith for the purposes of *Younger*. If the sole basis of petitioner's argument was that the passage of the bill was to punish students because of Kent State, the Court's apparent judgment that no bad faith was shown was probably correct. It has been shown that legislation similar to H.B. 1219 had been under consideration for several months prior to Kent State and that many other state legislatures had already responded to campus disorders by some sort of legislation. This is at least some evidence that this legislation was not a rash, thoughtless response. While these responses may not have been wise, it is difficult to say they were acting in bad faith. Indeed, it may be impossible to even

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58 OHIO REV. CODE §2923.61(H).
59 OHIO REV. CODE §2923.61(B)(2).
60 Blount complaint, para. 37.
61 Blount complaint, para. 40.
62 Blount complaint, para. 39.
63 91 S. Ct. 746 (1971).
64 380 U.S. 479 (1965).
65 91 S. Ct. at 753.
66 Blount complaint, para. 58.

show that a legislature acts in bad faith, for such requires an analysis of the hidden motivations of every legislator. While it would perhaps have been preferable for the legislature to allow universities more time to respond to the problem, the seriousness and immediacy of the problem certainly suggested that something had to be done. The elimination of the harsh language in the first draft of section 2923.61, as well as the changing of the "front end" suspension provisions (which probably would have been legally valid[67]), do not seem consistent with a bad faith attempt to truly "harass" or "intimidate" students. Of course it was alleged that what was left in the bill by the legislators was sufficiently bad to characterize the bill as in bad faith. However, it would seem that the fact that the bill is unwise or even violative of constitutional rights does not establish "bad faith" in its passage. In addition, it is not so clear that H.B. 1219 is unconstitutional on its face. In fact, H.B. 1219 provides more procedural safeguards to the defendant than courts presently require of university disciplinary proceedings.[68] The record of any unjustified suspension is to be expunged from the student's record, an admittedly small, but important concession.

It should be noted that *Younger* also suggests that enforcement of a statute which is on its face "patently and flagrantly" unconstitutional could be properly enjoined by a federal court.[69] Perhaps the Court's order here represented a finding on that fact as well.

Up to the time of publication of this article no further proceedings have occurred in *Blount* with respect to the merits of the constitutional claims.[70]

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[67] Summary suspension in certain circumstances (with a hearing at a later date) has met the approval of a surprisingly wide variety of groups. *See* JOINT STATEMENT ON RIGHTS AND RESPONSIBILITIES, Sec. VI(G), American Association of University Professors and others, 53 A.A.U.P. Bul. 365 (1967); REPORT OF THE A.B.A. COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT, American Bar Association, at 24 (1970); MODEL CODE OF STUDENT RIGHTS, RESPONSIBILITIES AND CONDUCT, American Bar Association, S 44 (1969); ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES, American Civil Liberties Union (1970); Wright, *The Constitution on the Campus,* 22 VAND. L. REV. 1027, 1074 (1969). *See also* Stricklin v. Regents of the Univ. of Wisconsin, 297 F. Supp. 416, 420 (W. D. Wisc. 1969). One commentator has contended that the delayed suspension provisions finally adopted in H.B. 1219 seriously fail to protect the interests of the university because of the time lag between the disruptive conduct and the disciplinary hearing (although only a matter of a few days). Pettigrew, *Due Process Comes to the Tax-supported Campus,* 20 CLEV. ST. L. REV. 111, 122 (1971).

[68] See the section on procedural due process *infra.*

[69] 91 S. Ct. 746 at 755.

[70] On April 15, 1971, defendants filed an answer substantially denying all plaintiffs constitutional objections. Subsequent to the writing of this article the writer learned that hearings on the constitutional claims may be held sometime in January, 1972.

THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

A student's procedural rights in university disciplinary proceedings were quite limited until 1961 when the Eighth Circuit Court of Appeals decided the case of *Dixon v. Alabama State Board of Higher Education.*[71] Prior to the *Dixon* case the courts had been reluctant to interfere in what they saw as internal university matters and conceded to the universities considerable, if not absolute, power to discipline students. This approach was justified on a number of theories. The university was said to stand *in loco parentis* to the student, and accordingly the university had broad authority to discipline its "child" without interference.[72] The student-university relationship was also sometimes characterized as being contractual in nature, the student agreeing by his entrance to abide by certain conditions or face automatic suspension or expulsion.[73] Certainly the most powerful relationship theory was the concept that college attendance was a "privilege" and as such it could be taken away arbitrarily, with no thought at all of due process. This latter theory received the Supreme Court's blessing in *Hamilton v. Regents of the University of California,*[74] one of the few cases to ever reach the Court dealing with student discipline.

The privilege argument, in particular, persisted, and found support as late as 1959 in the case of *Steier v. New York State Education Commissioner,*[75] which one writer has called the "last gasp of a dying order."[76] So far as can be found, at the time of the *Steier* decision no court had ordered reinstatement for a student expelled or suspended from college.[77]

The foregoing merely re-emphasizes the dramatic shift made by *Dixon* in 1961. After discarding both the "privilege" and "contract" theories, the court in *Dixon* suggested the change in society which gave rise to the need for a new approach:

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy

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[71] 294 F. 2d 150 (8th Cir. 1961), *cert. denied* 368 U.S. 930 (1961).

[72] A good discussion of this approach is found in Van Alstyne, *Procedural Due Process and State University Students,* 10 U.C.L.A. L. REV. 368, 370 (1963).

[73] *See* Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144, 11 Ohio C. Dec. 515 (1901); Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1925); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Barker v. Trustees of Bryn Mawr College 278 Pa. 121, 122 A. 220 (1923).

[74] 293 U.S. 245 (1937).

[75] 271 F. 2d 13 (2nd Cir. 1959).

[76] Wright, *The Constitution on the Campus,* 22 VAND. L. REV. 1027, 1030 (1969).

[77] Wright, *supra* note 76, at 1029.

> life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.[78]

While not specifically holding that a college education was a matter of constitutional right, the Court found that it was a matter of such great value to the individual that it could not be taken away arbitrarily, and that such deprivation required an act "consonant with due process of law."[79] The Court specified what it felt was necessary to satisfy the requirements of due process: (1) there should be some notice of the hearing containing a statement of the specific charges and grounds which would justify expulsion; (2) the student should be given "the names of the witnesses against him and an oral or written report on the facts to which each witness testifies"; (3) the student should have the opportunity to present a defense and to produce either oral or written testimony of witnesses in his behalf, and (4) a report of results and findings of the hearing should be open to the student's inspection.[80]

Besides setting forth certain guidelines for the hearing itself, *Dixon* was also important because it represented a more active judicial role in reviewing university disciplinary proceedings which had long been left virtually untouched.

Like many cases that mark great changes in the direction of the law, however, *Dixon* failed to go far enough to ensure that this direction of development would be continued. It failed to specify what should be done with regard to certain other rights of the adversary process, such as the right to counsel, the privilege against self-incrimination, and the right to confrontation of witnesses. In fact the Court, after enumerating some of the requirements of due process, emphatically indicated that, "[t]his is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required."[81] Many courts after *Dixon* would use this language and the Court's failure to include all the rights of the adversarial process within its holding to support their contention that procedural rights beyond those set out in *Dixon* were not required by due process.

The cases shortly after *Dixon* substantially followed its holding without modification.[82] But subsequent cases began stressing the limiting language in *Dixon* (that no full-dress judicial hearing was required),[83] or

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[78] Dixon, 294 F. 2d at 157.

[79] Dixon, 294 F. 2d at 155.

[80] Dixon, 294 F. 2d at 158, 159.

[81] Dixon, 294 F. 2d at 159.

[82] *See* Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961); Due v. Florida A&M Univ., 233 F. Supp. 396 (N.D. Flor. 1963).

[83] *See* Barker v. Hardway, 283 F. Supp. 228, 236 (S.D. W. Virg. 1968), *aff'd*, 399 F. 2d 638; Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968).

began to develop standards of due process of their own[84] without outrightly rejecting *Dixon*.[85]

In the midst of all this rather confused development the case of *Esteban v. Central Missouri State College* was decided.[86] First, it comprehensively examined the problems set forth in *Dixon* and attempted to further delimit the potential scope of that decision. Secondly, the case was apparently highly influential on those who drafted H.B.1219.[87] Why this particular case was singled out as the primary statement of the requirements of due process is unclear, since it is entitled to no more force as the guiding law than is *Dixon*. Undoubtedly, the more restrictive approach which *Esteban* took toward students' procedural due process rights was more in conformity with the legislative aims. Of course this picking-and-choosing between diverse standards has been facilitated by the Supreme Court's failure to consider the issue.[88]

Esteban was an action by several college students under the Civil Rights Act, 42 *United States Code* section 1983, seeking reinstatement after being suspended for activities associated with some demonstrations at Central Missouri State College in March, 1967. The students had originally been suspended without notice or hearing, but a court order, based on *Dixon*, directed that they be given a hearing,[89] at which the original suspensions were reaffirmed. The plaintiffs then filed the complaint here, alleging *inter alia* that the hearings which they had been given lacked procedural due process. After disposing of preliminary questions of jurisdiction, mootness, *res judicata* and exhaustion of remedies, the court outlined its view of the nature of student disciplinary hearings:

> The discipline of students in the education community is, in all but the case of irrevocable expulsion, a part of the teaching process. . . . the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is

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[84] *See* Sigma Chi Fraternity v. Regents of the Univ. of California, 258 F. Supp. 515 (D. Colo. 1966) ("fundamental fairness" test); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968) ("fundamental fairness in light of all circumstances"); Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) ("rudimentary elements of fair play"); Perlman v. Shasta Joint Junior College District Board of Trustees, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (Court of Appeals, Calf. 1970) ("fair notice and fair hearing depending upon the circumstances").

[85] Wright notes that no court, state or federal, has challenged the basic Dixon holding that students have constitutional rights that the courts will recognize and protect. 22 VAND. L. REV. 1027, 1032 (1969).

[86] 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F. 2d 1077 (8th Cir. 1969); *cert. denied*, 398 U.S. 965 (1970).

[87] Interview with State Representative William Batchelder (R-23rd District) on May 13, 1971.

[88] The Supreme Court denied certiorari in both *Dixon*, 368 U.S. 930 (1961), and *Esteban*, 398 U.S. 965 (1970).

[89] *See* Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967).

> unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal or state criminal law.[90]

The court flatly stated that such cases as *Kent v. United States*,[91] *In re Gault*,[92] and *Cox v. Louisiana*[93] were inapplicable because analogies between disciplinary proceedings and the criminal law were not sound. The court refused to require the safeguards of the criminal process because:

> . . . [t]o impose upon the academic community in student discipline the intricate, time-consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.[94]

After discussing the university's authority to prevent unlawful gatherings and the problem of vagueness with regard to university codes of conduct, the court attempted to define the nature of the student-university relationship. The attendance by the student at the university was a "voluntary entrance into the academic community" by which the student "voluntarily assumes obligations of performance and behavior reasonably imposed by the institution of choice relevant to its lawful missions, processes, and functions."[95] The court appears to be returning somewhat to the contractual or privilege theory of the pre-*Dixon* period, although this is not entirely clear. The court avoids the implications of *Dixon* without rejecting it entirely. It seems, however, that by using this approach the court was manifesting its reluctance to review and critically examine student disciplinary procedures, and that no extension of student rights beyond *Dixon* would be forthcoming. This view is further supported by the court's statement that they should not intervene to enjoin university procedures unless there was: (1) a deprivation of due process, that is "fundamental concepts of fair play"; (2) "invidious discrimination"; (3) "denial of federal rights," or (4) "clearly unreasonable, arbitrary or caprious action."[96] The court held that since the plaintiffs had not

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[90] 290 F. Supp. at 628.

[91] 383 U.S. 541 (1966). The Court rejected the *parens patual* philosophy used in juvenile proceedings and held that due process required that a juvenile be provided with a hearing, assistance of counsel, access to juvenile records, and a decision from the court suitable for appellate review.

[92] 387 U.S. 1 (1967). In striking down Arizona juvenile court procedure, the court held that due process required: (1) adequate notice of hearing; (2) right to counsel to all; (3) a privilege against self-incrimination, and (4) the right to confrontation and sworn testimony of witnesses available for cross-examination.

[93] 377 U.S. 536 (1965). The court held a Louisiana breach of peace statute unconstitutional for overbreadth because it could be (and was) applied to limit provocative, but protected speech.

[94] 290 F. Supp. at 629.

[95] 290 F. Supp. at 631.

[96] *Id.*

established any of these factors, relief must be denied. The Court of Appeals for the Eighth Circuit affirmed the district court's opinion in *Esteban,*[97] Judge Blackman (now Justice Blackman) writing the majority opinion. The opinion does not add much, other than to say that the Court was not certain that it was significant whether attendance at a college was a right or privilege, since a student could "act so as constitutionally to lose his right or privilege to attend a college."[98] "College attendance, whether it be a right or privilege, very definitely entails responsibility."[99]

Shortly after its opinion in *Esteban* the Western District Court of Missouri, *en banc,* felt there was such confusion as to what standards were to be followed in disciplinary proceedings that it issued a general order to help clarify the area.[100] It substantially reiterated the approach of the court in *Esteban,* but specifically noted that there were three requirements of due process: (1) notice in writing of specific grounds and the nature of the evidence on which the disciplinary proceeding is based; (2) a fair opportunity for the defendant to present his position, explanations, and evidence, and (3) no discipline except on grounds supported by substantial evidence.[101] These are basically the requirements set forth in *Dixon.* The court went on to say, however, that:

> There is no general requirement that procedural due process in student disciplinary cases provide for legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence.[102]

With minor exceptions, the Missouri federal court's statement of the required procedural rights seems to include those minimal rights upon which most courts have agreed.[103] The American Bar Association's Commission on Campus Government and Student Dissent has listed the procedural rights which it feels should be given to students: (1) timely notice of charges; (2) right to cross-examine opposing witness; (3) an

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97 415 F. 2d 1077 (1969).

98 Esteban v. Central Missouri State College, 415 F. 2d 1077, 1089 (8th Cir. 1969).

99 *Id.*

100 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 (1968).

101 *Id.* at 147.

102 *Id.*

103 Wright concludes there is a general agreement among the courts on four safeguards: (1) notice of the grounds of the charge; (2) notice of the nature of the evidence against the defendant; (3) opportunity to be heard in defense, and (4) no punishment except on the basis of substantial evidence. 22 VAND. L. REV. 1027, 1071-72 (1969).

opportunity to be heard; (4) that findings be based on substantial evidence, and (5) the right to be represented by counsel.[104] With the exception of the right to cross-examination and to representation by counsel, these are consistent with *Dixon, Esteban,* and the *General Order.* Although there are a few decisions in which a right to counsel has been recognized, most decisions are to the contrary,[105] and there appears no strong support for a right to cross-examination.[106]

An examination of the procedural rights provided under H.B. 1219 reveals that it meets and exceeds what the courts have deemed necessary for university disciplinary proceedings. It should be recalled that the bill not only provides for notice, opportunity to testify and present testimony, and findings based on preponderance of evidence (probably a higher standard than "substantial evidence"), it also provides for representation by counsel, the right of cross-examination, and some self-incrimination protection. Thus on preliminary analysis, no procedural due process problems are encountered. However, this analysis would not seem to fully answer the question. Both in *Dixon* and *Esteban* the courts had specifically noted that the complexities of the criminal process would not be required because of the nature of the body which would have to hold these hearings. After holding that a "full-dress" judicial hearing was not constitutionally required of the university, the court in *Dixon* added: "[s]uch a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out."[107]

In language cited from *Esteban* above,[108] the court there makes it clear that to require elaborate procedures would work great handicaps on the

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[104] REPORT OF THE A.B.A. COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT, American Bar Association, at 24 (1970). This is also substantially the position presented in the Report of the President's Commission on Campus Unrest (Arno Press ed., 1970); JOINT STATEMENT ON RIGHTS AND RESPONSIBILITIES, American Association of University Professors and others, 53 A.A.U.P. Bul. 365 (1967); and the MODEL CODE OF STUDENT RIGHTS, RESPONSIBILITIES AND CONDUCT, American Bar Association (1969).

[105] Wright, *supra* note 69, at 1075; *pro* counsel, *see* Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967); Madera v. Bd. of Educ., 267 F. Supp. 356 (S.D. N.Y. 1967), *rev'd,* 386 F. 2d 778 (1967), *cert. denied,* 390 U.S. 1028 (1968). *Contra,* Wasson v. Trowbridge, 382 F. 2d 807 (2nd Cir. 1967); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Virg. 1968), *aff'd,* 399 F. 2d 638 (1968); Due v. Florida A&M Univ., 233 F. Supp. 396 (N.D. Flor. 1963); Esteban v. Central Missouri State College, 290 F. Supp. 622 (1968); General Order on Judicial Standards, 45 F.R.D. 133 (1968).

[106] State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W. 2d 822 (1942); General Order on Judicial Standards, 45 F.R.D. 133 (1968).

[107] 294 F. 2d at 159.

[108] 290 F. Supp. at 629.

institution and work injustice to the defendant as well.[109]

> The university community does not lend itself to judicial proceedings. Students and faculty do not make particularly good judges or jurors. Few are equipped to fill these roles adequately. Faculty and administrators on judicial bodies may find themselves in the dual role of prosecutor and judge. Increasingly, lawyers are present during proceedings and it is difficult for judges without legal training to control the hearings.[110]

It seems apparent, then, that the requirements of procedural due process were largely developed with a view toward what would be practical for the academic community. Undoubtedly, the court's traditional reluctance to get involved in university affairs also affected the extent to which it would require "complex" procedures which the courts might have to enforce in the end. Under H.B. 1219, however, the entire disciplinary process is removed from the educational environment. The judge and jury are a legally trained referee, and presumably the prosecutor is the university proceeding through counsel. Thus the university discipline cases cannot be taken as fully controlling the question of H.B. 1219's sufficiency under procedural due process. The same considerations which lead the courts to find the intricacies of the adversarial process a substantial burden on the university structure would seem absent in the situation where the proceeding is taken entirely out of university hands. If anything, it would appear that courts could and should require more of the disciplinary process outside the university milieu. As former Justice Fortas once cautioned, "[d]epartures from established principles of due process have frequently resulted not in slighted procedure, but in arbitrariness."[111]

Concerning the right to counsel, in particular, H.B. 1219 does allow for such representation, but counsel need not be furnished. At least one case[112] suggests inferentially that if the government proceeds through counsel then the student should be entitled to it as a matter of right. Particularly since the penalty of expulsion "can often have much more serious consequences to a student than a typical penalty he would receive in a civil court,"[113] the need for "fairness, impartiality, and orderliness"

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[109] "... [T]o compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the educational institutions, nor the ultimate advantages that society derives therefrom." Goldberg v. Regents of the Univ. of California, 57 Cal. Rptr. 463, 472 (Court of Appeals, Calif. 1967).

[110] Knauss, *The University Response to Disruptive Behavior*, STUDENT PROTEST AND THE LAW 21 (G. Holmes, ed. 1969).

[111] *In re* Gault, 387 U.S. 1, 18 (1967).

[112] Wasson v. Trowbridge, 382 F. 2d 807, 812 (2nd Cir. 1967).

[113] Knauss, *supra* note 110, at 22.

as expressed in some recent cases in the juvenile area,[114] would require counsel in all cases, and appointment if necessary. In other areas, H.B. 1219 goes beyond current requirements by providing for confrontation and cross-examination as well as for some self-incrimination protection, thus enabling it to withstand, for the most part, even a stricter standard of due process, should it be imposed.

OTHER CONSTITUTIONAL PROBLEMS

H.B. 1219 has been said to suffer from a number of other constitutional infirmities. It is argued that it violates the double jeopardy clause, the right to public trial, and the right to trial by jury. The referee's findings based on preponderance of the evidence is alleged to be a denial of due process. It has been contended that punishment under it is a violation of equal protection and a cruel and unusual punishment.[115]

Most or all of these objections are based on the assumption (and contention) that the disciplinary proceedings under H.B. 1219 are criminal in nature; of course, such rights as the right to be free from double jeopardy, trial by jury, and the "beyond reasonable doubt" standard ordinarily apply to criminal proceedings. Case law, however, uniformly stresses that disciplinary proceedings are civil in nature.[116] *Esteban* indicated that such proceedings are not "punitive or deterrent in the criminal sense" and not "equivalent to the criminal law processes of federal or state criminal law."[117]

It seems that unless the proceedings can be characterized as criminal, many of these objections must fall.[118] While in form the proceeding is civil in nature, the effect of it on the student may be more serious than some criminal offenses.[119] There is some caselaw in Ohio suggesting that even

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[114] *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 382 U.S. 541 (1966).

[115] *See* complaint in Blount *supra.*

[116] Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Virg. 1968); Siegel v. Regents of the Univ. of California, 308 F. Supp. 832 (N.D. Calf. 1970); Perlman v. Shasta Joint Junior College Dist. Bd. of Trustees, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (Court of Appeals, Calif. 1970); Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968).

[117] 290 F. Supp. at 628.

[118] Supporters of H.B. 1219 view the proceedings not as additional punishment for misconduct, but as a device primarily for the protection of the university. Thus it is the object of the proceedings rather than their form which is determinative of the civil-criminal question.

This emphasis on the state's interest, however, tends to overlook the effect on the student and the need to protect his rights. Section 3345.22(E) directs the referee to suspend a student guilty of the offense involved, but he may permit the student to remain on campus when the "good order and discipline" of the university will not be prejudiced or compromised thereby.

[119] Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 296 (1968).

in administrative proceedings there should be an attempt to comply with all aspects of the adversarial process as far as possible.[120]

There seems to be no objection to trying and punishing a person civilly and criminally for the same act; in fact this is often done.[121] However, there may be policy objections to trying the student twice for the same act. Professor Van Alstyne suggests that such a procedure may violate the spirit, if not the technical form, of double jeopardy.[122] He argues that separate disciplinary sanctions should only be applied where the university has a distinct interest to protect aside from the broader interest of society in general.[123] Since H.B. 1219 automatically goes into effect without regard to whose interests need protection, it seems to disregard Van Alstyne's approach, although it is arguable that the university always has an interest, perhaps the paramount one, in disciplining a student for *on-campus* offenses.

Concerning the public hearing problem, the few cases which discuss the issue soundly hold that an open hearing is not an absolute requirement,[124] particularly because of the problem of disciplinary hearings themselves becoming disrupted and turned into "political trials." H.B. 1219 does provide that although individuals not essential to the hearing "may" be excluded therefrom, this does not apply to members of the news media. While this appears unconstitutional on its face and would be so as applied, a court could interpret this section to allow exclusion of the public only where the hearings have been disrupted, thus avoiding the constitutional issue.

The most potentially troublesome portion of H.B. 1219 may be section 3345.26. This is the section giving the board of trustees or president of a university the power to declare a state of emergency and limit access to campus, impose curfews, and restrict the right of assembly. There seems to be little question that a curfew-type ordinance, properly drawn and administered, is not unconstitutional.

> . . . [T]o be consistent with due process, government restrictions on the freedom of movement must bear a direct and material relation to the achievement of a compelling governmental object. A city faced with the immediate prospects of a civil disorder with all that has

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120 *See* Bucyrus v. Department of Health, 120 Ohio St. 426, 166 N.E. 2d 370 (1929); State *ex. rel.* Southard v. Columbus, 128 Ohio St. 295, 191 N.E. 2d 5 (1934). Ohio's Administrative Procedure Act, OHIO REV. CODE §§119.01-119.13, apparently does not apply to this proceeding, §119.01.

121 Arrests for serious traffic offenses may involve both criminal penalties and administrative proceedings for revocation of license.

122 Van Alstyne, *The Student as University Resident,* 45 DENVER L.J. 582, 599 (1968).

123 *Id.* at 601.

124 Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968).

> meant in terms of deaths, injuries, and destruction, would have little difficulty in establishing such a compelling interest.[125]

Whether the statute is constitutionally firm depends in large part on whether it is narrowly drawn and provides clear guidelines for administrative discretion.[126] Under H.B. 1219 the president of a university may declare an emergency where there is "a clear and present danger of disruption of the orderly conduct of lawful activities at such college or university through riot, mob action, or other substantial disorder."[127] One of the few recent cases on the subject reaching the Supreme Court level, and one apparently influential on the sponsors of H.B. 1219, dealt with the question of the permissible scope of emergency statutes. *Stotland v. Pennsylvania*[128] involved the validity of a Philadelphia ordinance authorizing the mayor to declare a state of emergency "if he finds that the city or any part thereof is suffering or is in imminent danger of suffering civil disturbance, disorder, riot or other occurrence which will seriously endanger the health, safety and property of the citizens."[129] The court majority dismissed the appeal on the grounds of lack of a substantial federal question, suggesting that the statute was free from constitutional defect. If anything, the language in section 3345.26 is more precise and restrictive than that in the ordinance in *Stotland.* Justice Douglas dissented in *Stotland,* arguing that there were substantial questions here since the prohibitions authorized under the ordinance could extend to all places, public and private, to assemblies regardless of their orderliness, and there were no limitations on the length of time of any prohibition.[130] It appears likely that there will be further development in this area of the law in the near future.

CONCLUSION

This examination of H.B. 1219 has shown, I believe, that the act stands on a much firmer constitutional foundation than appears, perhaps, on first reading. Clearly, to what extent the courts will apply the safeguards of the criminal process remains open to question because of the uniqueness of the act's structure. The courts should, I think, apply stricter standards of due process to H.B. 1219 that they have formulated for university proceedings since those under H.B. 1219 more closely

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125 Comment, *The Riot Curfew,* 57 CALF. L. REV. 450, 473 (1969), citing Zemel v. Rusk, 381 U.S. 1 (1965).

126 Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1962).

127 OHIO REV. CODE §3345.26(A).

128 398 U.S. 916 (1970), *dismissing an appeal of* 214 Pa. Super. 35, 251 A. 2d 701 (1969).

129 398 U.S. at 916.

130 *Id.*

resemble the criminal process. With the university proceeding through counsel and a legally trained state officer as judge and jury in an adversary setting, the increased power of the state confronting the individual almost compels increased protection for him, at least the assurance that he will have counsel despite his economic circumstances. Of course, the presence of counsel should help in preserving the other rights of the student, and quite often the assurance that rights are protected is of more importance than the statement of the existence of the right itself.

Beyond that, however, it is contended that most of the objections to H.B. 1219 are really representative of an underlying disapproval of it on *policy*, not *legal* grounds. Many of the critics really feel this is not the proper response to the problem of campus disorders. It does seem unfortunate and perhaps unwise that the primary responsibility for discipline should be so completely removed initially from the academic community, that community supposedly most affected by the conduct in question.[131] Also, the creation of yet a third level of sanctions (criminal sanctions and the still-intact university sanctions being the other two) seems questionable, and seems to be a disciplinary "overkill." Of course, it must be remembered this all evolved from the view that the universities had failed to discipline their own.

Unless a court is found which is particularly sensitive to policy arguments, or it is successfully urged that proceedings under H.B. 1219 are more nearly criminal than civil in nature, it does not seem that future challenges to H.B. 1219 are likely to be successful.

PAUL M. SCOTT*

[Editor's Note: On January 11, 1972, the federal district court in Cleveland dismissed the complaint without prejudice in Blount v. Davis upon a motion of plaintiff for leave to withdraw the complaint because of changed circumstances.]

[131] In its Interim Report, the 108th Ohio General Assembly Select Committee to Investigate Campus Disturbances conceded that "it is undesirable for any legislature to attempt the actual management of the universities." Report at 3 (mimeo. 1970). The report suggests that a better solution than that in H.B. 1219 is a standardized model code of conduct and disciplinary procedures which all state universities could follow, the universities retaining the primary responsibility for student discipline.

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