North Carolina Central Law Review

Volume 3 | Issue 1 Article 6

10-1-1971

Student's Constitutional Rights and the University Disciplinary Committee

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STUDENT'S CONSTITUTIONAL RIGHTS AND THE UNIVERSITY DISCIPLINARY COMMITTEE

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GENERAL PRINCIPLES

The purpose of this paper is to provide general guidelines which will exemplify the limits and effects of basic student constitutional rights and their relationship with the university's disciplinary committee.

Generally stated, the purpose of the university is "to impart and to advance the boundaries of knowledge." Inherent in reaching its educational goals, is the administrative duty and power to forestall and control student conduct which will "impede, obstruct or interfere" with its mission. On the other hand, the students have a corresponding duty not to interfere with the educational process of teaching and learning, or in any manner to impose on the university's efforts to advance and expand the horizons of knowledge.[1] It is now generally accepted that the university has inherent power and authority to make reasonable rules for governing the university and that the student is obligated to obey such rules if they are reasonable and closely relevant to the university's educational undertakings.[2] Although the university's rule making power has judicially been recognized, the court insists that such regulations constitute a reasonable exercise of the power and discretion vested in the university's administration. A key to what constitutes "reasonable regulations" is that regulations and rules which are necessary to maintain order and discipline have always been judicially considered reasonable.[3] This, however, does not mean that the university may require a student to surrender his constitutional rights as a condition precedent to attending the university.[4] On the other hand, enrollment does not grant any privilege, immunity, or special consideration to the student; and most assured-

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[1] Sherry, Governance of the University: Rules, Rights, and Responsibilities, 54 Col. L.R. 27 (1966).

[2] Golberg v. Regents of University of California, 57 Cal. Rptr. 463 (Cal. Ct. App. 1st Dist. 1967), 363 F.2d 749 (9th Cir., 1966).

[3] Dicky v. Alabama State Board of Education, 273 F. Supp. 613 (D.C., Ala., 1967).

[4] *Id.*

ly, it does not vest him with the right to disrupt the educational process or violate his fellow student's constitutional rights.[5]

In today's society, education is an indispensable necessity; however, attending a public university is not a "right *per se* but is a conditional right." Students who meet the scholastic standards and whose conduct is not inconsistent with the university's educational process may exercise the right to obtain an education.[6] This right once vested—upon admittance to the university—may not be divested without "due process." This constitutional requirement is limited in that only "the rudimentary elements of fair play" need to be observed. Such "fair play" is fluid and flexible for it is to be determined on a case by case basis.[7]

While the university must comply with the elementary principles of "procedural fair play," it is not essential nor mandatory that it adopt all the formalities and niceties enjoyed before a court of law. The courts will not interfere, if the university proceeds in a sound, fundamentally fair, and reasonable manner.[8]

Then, as a general rule, provided the procedural requirements are met, a university has inherent general power to maintain order and to formulate and fulfill its function of imparting knowledge and it may exclude from its campus those who are detrimental to its well-being.[9] On the other hand, the university, like all other public institutions, is subject to the United States Constitution and federal and state statutes.[10]

The States' educational agencies and boards, as arms of the state, are not exempt. Therefore, a citizen—be he a student, teacher or professor—may not be required "to shed his constitutional rights at the university's gate."[11] It has long been established that the Fourteenth Amendment of the Constitution of the United States prohibits the States from denying or infringing upon a citizen's vested rights without due process. Educating the youth for citizenship is a highly significant function; but such education may not be at the expense of the student's constitutional rights. America cannot afford to teach in its history and political science classes

[5] Buttny v. Smiley, 281 F. Supp. 280 (D.C., Colo., 1968).

[6] Moore v. Student Affairs Committee of Troy State, 284 F. Supp. 725 (D.C., Ala., 1968).

[7] Dixon v. Alabama State Board of Education, 294 F.2d 150-157 (5th Cir. 1961).

[8] Jones v. State Board of Education of and for State of Tennessee, 279 F. Supp. 190 (D.C., Tenn., 1968).

[9] *Id.*

[10] Hammond v. South Carolina State College, 272 F. Supp. 947 (D.C., S.C., 1969).

[11] Tinker v. Des Moines School District, 393 U.S. 503 (1969).

the principles of American government and outside the classroom discount them as mere platitudes.[12] Constitutional rights must exist in fact, not merely in principle.[13]

While on campus the students remain citizens possessed of fundamental rights[14] which under the Fourteenth Amendment university officials must respect. The university is America's most sacred "marketplace of ideas"; thus the protection of constitutional rights becomes most imperative.[15] The university is a public place, and its dedication to educational endeavors does not contemplate that the students' rights may be cut off as if the premises were totally private property.[16] The university may not become an authoritarian camp.

Even though all constitutional provisions have equal standing, it is essential to note that some of these rights acquire different limitations and meanings under different conditions and situations. For example, the individual oriented rights of the First Amendment have the same judicial construction whether they are exercised on or off the university's campus. This is because these rights are individual oriented and remain attached to him whether he is on or off campus. On the other hand, the Fourth, Fifth, and Sixth Amendment rights are given a different and opposite construction when claim to them is asserted off campus rather than on campus. For example, a student who is charged with a criminal offense is entitled to the protection of the full thrust of "unreasonable searches and seizures," "the right to counsel" and "a full-dressed judicial hearing."[17] On the other hand, if he is charged with "plagiarism" or "conduct which disrupts the university's educational atmosphere" he is not entitled to the full thrust of the above-mentioned rights because university disciplinary proceedings are civil in nature and constitutional rights are primarily designed to protect the person in criminal cases.

This is not to say that the student is not entitled to constitutional protection in areas covered by the Fourth, Fifth, and Sixth Amendments. Interests affected by these amendments are protected by the "due process clause" of the Fourteenth Amendment; but the due process standard is

[12] West Virginia State Board of Education v. Barnette, 319 U.S. at 637 (1943).
[13] Tinker, *op. cit.*
[14] Tinker, *op. cit.*
[15] Keyishian v. Board of Regents, 385 U.S. 589 (1967).
[16] Hammond v. South Carolina State College, 272 F. Supp. 947 (D.C., S.C., 1969); Edwards v. South Carolina, 372 U.S. 229 (1963).
[17] Dixon, *op. cit.*

narrower in scope, for it is limited to affording the student "fundamental fairness in light of all the circumstances."[18]

The importance of these differences is that when First Amendment rights are in issue, the university has less control of students exercising their freedom of speech, of press and of assembly in their pristine form, but has greater latitude when dealing with the procedural aspects of the disciplinary process. Conversely, the student has complete constitutional protection when exercising his First Amendment rights, and his right against self-incrimination but a lesser degree in the proceedings before the disciplinary committee because his constitutional protection is limited to "due process" and not to the full protection afforded in criminal prosecutions.

First Amendment Rights

General Rule:

The university may not prevent, infringe upon, or enjoin a student from exercising his right to speech, press, or assembly when such right is being enjoyed in its "pristine form" because to do so would constitute a denial of his First Amendment rights.[19]

The right of freedom of expression, assembly, and right to petition the government is an indispensible democratic freedom secured by the First Amendment[20] which the student may exercise while on or off campus.

The First Amendment "clearly and expressly prohibits any law which abridges the freedom of speech, press, or the right to assemble and to petition the government to redress grievances." These rights are not to be restricted unless and until there is "a clear and present danger of riot, disorder or immediate threat to public safety, peace and order."[21] An early distinction should be made between these rights in pristine form and conduct which is co-mingled with them. Conduct which endangers the orderly educational process is a departure from the First Amendment and receives no protection under it.[22] Therefore, a university rule which prohibits "parades, celebrations, and demonstrations" without prior university approval is a prior restraint on the students' right to freedom of speech and assembly because it prohibits First Amendment rights in their

[18] Buttny, *op. cit.*
[19] Hammond, *op. cit.*
[20] Jones, *op. cit.*
[21] Dennis v. United States, 341 U.S. 494 (1951).
[22] Cox v. State of Louisiana, 379 U.S. 494 (1965).

pristine form, for the prohibitions are not limited "to conduct which disrupts the educational environment."[23] On the other hand, participation in and instruction of others to commit an illegal act—to block the university's administrative building—constitutes an illegal seizure of the university building because it totally disrupts the activities which are scheduled to be held in that building. Thus, activity which ends in taking possession by physical force and paralyzing the mission of the university is unconstitutional for it is not a lawful means of expression or assembly.[24] If the demonstration were peaceful and non-disruptive, it would be entitled to First Amendment protection.[25]

When a student engages in "pure speech" or "symbolic speech" in a quiet and orderly expression of opinion and is not coupled with disorder or disturbance it may not be prevented or silenced for fear of a disturbance which has not yet ensued, because such apprehension of future disturbances is not sufficient to encroach upon a student's vested right of freedom of speech.[26] Before a university official may silence a student, such a student's "conduct," as opposed to "pure speech," must "materially and substantially" interfere with the operation of the university's academic mission.[27]

It has long been recognized that even though "freedom of speech is not absolute" the state may not restrict a person until his speech presents a clear and present danger, and that no such danger exists until the speech produces a "substantive evil" which the government may constitutionally prevent.[28] The court has also held that "a function of speech is to invite dispute, even though it may be provocative, challenging, and would stir the public to anger" and to quash such speech would constitute an unlawful restriction on the vested right of freedom of speech.[29] On the other hand, speech which tends to incite an "immediate breach of the peace" may be punished or prevented because it does not have constitutional protection. The use of "obscene, profane, libelous, insulting or fighting words"[30] coupled with an electrifying or heated atmosphere falls in the category which may be prohibited and prevented because such conditions are caused by speech which does not fall within the protection

[23] Hammond, *op. cit.*
[24] Zanders v. Louisiana State Board of Education, 281 F. Supp. 747 (1968).
[25] Edwards v. South Carolina, 372 U.S. 229 (1963).
[26] Tinker, *op. cit.*
[27] Burnside v. Byars at 749, 363 F.2d 744 (5th Cir. 1966).
[28] Schenck v. United States, 249 U.S. 47 (1919).
[29] Terminiello v. Chicago, 337 U.S. 1 (1949).
[30] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

of the First Amendment. This does not mean however, that a hostile reception qualifies the speech for censorship. If tension and hostility emanate from the "audience" rather than the speaker, he should not be silenced. The speaker is exercising his constitutional right to speak; while the audience has no constitutional or statutory right to become violent and cause a breach of peace. If peace and order are to be preserved, the audience which has no right to breach the peace should be removed so that the speaker may continue to enjoy his right and the non-hostile part of the audience to listen.[31] To silence the speaker would constitute censorship which is repugnant to the concept of freedom of speech.[32]

Thus, when students in the exercise of symbolic speech wore black armbands to protest the government's policy in Vietnam and such display was quiet, passive, and orderly, the school's administrative officials could not suspend the students from school for violating a school rule which prohibited such armbands. To do so, without the student's "conduct" materially and substantially interfering with the operation of the school, would abridge the student's right to freedom of speech.[33] Certainly the display of the armbands alone did not present a "clear and present danger" to the school's educational process. Thus the rule was a prior restraint on the enjoyment of political expression.

South Carolina State College was, likewise, enjoined from suspending students who, without obtaining prior approval of the College president, assembled on campus to express their views as to college policies. Such assembly, without prior approval, was a violation of the rules of the College handbook. The court held that speech and assembly could be limited only "when such rights are gravely abused and thus endanger the paramount interest" of the university. The rule requiring permission from the President constituted a prior restraint on the student's First Amendment rights of freedom of speech, the right to peaceably assemble and to petition the government—the college being an arm of the state government—for a redress of grievances.[34] The "prior approval rule" would tend to intimidate and to discourage students from enjoying their constitutionally vested rights and this is the precise evil that the First Amendment prohibits. The First Amendment clearly prohibits laws—or administrative rules, for they have the same legal effect as laws—that

[31] Edwards v. South Carolina, 372 U.S. 229 (1964).
[32] Near v. Minnesota, 283 U.S. 697 (1931). Thomas v. Collins, 323 U.S. 516 (1945). Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).
[33] Tinker, *op. cit.*
[34] Hammond, *op. cit.*

abridge the freedom of speech, press, or right to assemble. Once such a right is vested the student is entitled to enjoy his right without meeting further approvals.

The struggle for the right to print without a license is well engraved in the annals of American history. Today's courts tend to guard freedom of the press with keen interest and a licensing requirement to print is swiftly removed. For example, the court promptly enjoined Troy State College from suspending Gary C. Dickey, editor of the College's newspaper, for styling an editorial space "A lament for Dr. Rose," "censored." Dickey's editorial had been censored because the College president prohibited college student editors from criticizing the Governor or State Legislators. Dickey's editorial was in support for Dr. Rose, president of Alabama University, who had come under legislative criticism. The court ruled that a state may not compel college students to forfeit constitutionally vested rights as a condition precedent to attending a state-supported institution, particularly when the student did not, in the exercise of his constitutional right of freedom of speech or press, "materially and substantially interfere with requirements of appropriate discipline in the operation of the school."[35]

The right of freedom of speech may be "pure speech," as the delivery of a speech; "symbolic speech," as the "wearing of black armbands to protest the Vietnam War"; or the assembly in a group or parade. However, regardless of the means selected for expression the "clear and present danger," "the immediate breach of peace" and "the previous restraint" rules apply.

In essence, then, the university may not require a student to shed his constitutional rights as a condition precedent to attending the university. And the students may exercise their right to freedom of speech, press, and assembly so long as it remains within constitutional protection or is not coupled with conduct that materially and substantially interferes with or disrupts the normal academic and adminstrative operation of the university.

Conduct not Protected by the First Amendment

General Rule:

The university may make all reasonable rules for carrying out its administrative and academic mission, and may enforce them by enjoining,

[35] Dicky, *op. cit.*

disciplining, or expelling students whose conduct materially and substantially interferes with the administrative process or disrupts the academic atmosphere. Student conduct which disrupts the university's mission is beyond the First Amendment limits and does not have "protection under the constitutional umbrella."[36]

The First Amendment right of speech, press, and assembly may not be exercised in any manner that interferes with or disrupts classes, assemblies, libraries, laboratories or the university's administrative process.[37] There is no authority for the notion that paralyzing the operation—academic or administrative—of the university is protected by the breadth of the First Amendment. Students taking such course of action assume the risk of disciplinary action or expulsion by attempting to correct their grievances by conduct and methods that have no constitutional protection. However, students who are present but do not actually block or take part in blocking the building entrances are not entitled to punishment because their speech or assembly does not interfere with the university's mission and thus is constitutionally warranted.[38]

Disciplinary action on matters of this sort are based on misconduct and not on criticism of the university, thus such disciplinary measures are not prohibited. On the other hand, it must be remembered that university "officials cannot infringe on the students' right of free and unrestricted expression when the exercise of such right does not materially and substantially interfere with requirements of appropriate discipline in operation of school."[39]

Additional conduct which is not protected by the First Amendment and thus is subject to university disciplinary action is "student's marching and stomping through classroom buildings, clapping their hands, shouting and chanting obscenities with the admitted purpose of disrupting classes and to recruit students to join their cause."[40] Likewise, the wearing of "freedom buttons," may be prohibited. For example, pushing and shoving ensued, when students tried to pin such buttons on fellow classmates. Later the throwing of the buttons out the window caused an unusual degree

[36] Wright v. Texas Southern University, 277 F. Supp. 110 (D.C., Tex., 1967).
[37] Sherry, Governance of the University; *op. cit.* Rules, Rights, and Responsibilities, 54 Col. L.R. 31 (1966).
[38] Zanders v. Louisiana State Board of Education, 281 F. Supp. 747 (D.C., La., 1968).
[39] Dicky, *op. cit.*
[40] Dicky, *ibid.*

of commotion. This conduct could be prohibited because it collided with the rights of others and was disruptive of the educational process and tended to undermine the school's administrative authority[41]

Also, conduct which far exceeds the student's right to bring grievances to the attention of the university officials may be prohibited or controlled by suspension from the university if necessary. Students had no right to complain of their suspension when they as demonstrators "displayed their placards, chanted themes, and deliberately obscured the university's president's view of a football game by holding a placard directly in front of his face," and as the demonstrators became more menacing, the president, the dean and their guests were forced to leave the game; and while leaving, one of the demonstrators spat into the face of a police officer, others tried to physically block their exit, while still others beat upon and rocked the president's car and yet others threw rocks which landed on an officer's face. It is clear that no sort of disciplinary measures would infringe upon the student's First Amendment rights to "freedom of speech, peaceful assembly, or petition for redress of grievances."[42]

It can never be overemphasized that First Amendment rights do not constitute "a license to trample upon the rights of anyone else and if such rights are exercised they must be exercised in a responsible manner and without depriving others of their rights because the enjoyment of their right is equally precious."[43] Students acting beyond the limits of the First Amendment assume the risk of the consequences which may include suspension from the university, probation, or any other reasonable disciplinary measure.

Fourth and Fifth Amendment Rights

General Rule:

Fourth Amendment rights apply to criminal cases and not to administrative civil proceedings. Thus, university officers may search, without a warrant, a student's dormitory room when they have "reasonable cause to believe" that an illegal act is being committed or that such act may interfere with the university's academic decorum. "Dormitory rooms are a university auxiliary in carrying out its academic mission and a student

[41] Blackwell v. Issaquerra County Board of Education, 363 F.2d 749 (5th Cir. 1966).
[42] Barker v. Hardway, 283 F. Supp. 228 (D.C., W. Va., 1968).
[43] Rains v. City of Danville, 337 F.2d 579 (4th Cir. 1964).

who takes up residence in such a room does not acquire the privacy or interest which is protected by the Fourth Amendment."[44]

Due to their close relationship, although not dependent on each other, the Fourth and Fifth Amendment rights will be considered simultaneously.

Again it must be emphasized that constitutional rights are not governed by the same limits of judicial construction. The right against self-incrimination like the First Amendment rights is individual-oriented and whether exercised on or off campus is controlled by the same judicial standard; but Fourth Amendment rights are not, because this amendment controls criminal cases and the nature of disciplinary proceedings by the university as an administrative agency is civil and not criminal. The university has no criminal jurisdiction but merely civil jurisdiction under which it may make all reasonable rules necessary to conduct the operation of the institution for the purpose which it was dedicated. For example, if a student is charged with rape, murder, larceny, burglary, etc., whether or not allegedly committed within the jurisdictional confines of the university, the university has no criminal jurisdiction to cope with matters of this kind. However, if the alleged offense is in conflict with the university's regulations which are university or academic oriented, then the university's administrative authority may be invoked. For example, the university has jurisdiction over plagiarism, and conflicts arising from violations of dormitory regulations.

Thus, the search, without a warrant, of a student's dormitory room which is based on sufficient "information to amount to probable cause to believe" that the student is in possession of marijuana is justified because the university has sufficient interest in preventing its dormitory rooms from being used for an illegal purpose or for a purpose which would seriously and materially interfere with campus order.[45]

The thrust of the Fourth Amendment does not apply because the student's association with the university is a "special relationship" which "does not depend on the theory of right to privacy or on traditional property concepts." Neither is the relation based on "contractual rights, nor does the university stand *in loco parentis* to the student." So the inspection is not justified because the student waived or contracted away his

[44] Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (D.C., Ala., 1968).
[45] *Id.*

Fourth Amendment rights; but rather its validity rests on whether the search is a reasonable exercise of the duty regarding the maintaining of discipline which will insure an educational atmosphere. If the search meets this test, then it is presumed to be reasonable, even though in theory, it may "infringe upon the outer bounds of the Fourth Amendment rights of the student."[46]

Dormitories are "auxiliaries of the University which are maintained and conducted in furtherance of its educational purpose." The student is not a tenant nor does he have "complete and totally unrestricted rights of a lodger because the dormitory is not a commercial lodging quarter." When the student takes up residence in a university dormitory, he implicitly agrees to conform to and to obey all necessary and reasonable rules adopted by the university designed to promote the general order of the institution.[47] Thus, a student who rents a dormitory from the university "waives objection to any reasonable searches." Another well-established rule is that "the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior who is charged with a responsibility of maintaining discipline, order, or security."[48]

The "reasonable cause to believe test" which justifies a search by university officers is lower than the "probable cause" standard used in criminal law cases. The reason is that the university disciplinary proceedings are "civil and not criminal in the constitutional sense." With this in mind, it is easier to see that, even though the student is subject only to reasonable university rules, "his rights must yield when the exercise of his rights interferes with the operation of the school's education program."[49]

Administrative Investigations

General Rule:

Fact-finding administrative investigations may be conducted without infringing on a "campus organization's" Fourth Amendment rights because any resulting university action would be civil and not criminal in nature. The Fifth Amendment is not offended because it applies solely to natural and not to artificial persons.

The Fourth Amendment does not control when the university is con-

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[46] *Id.*
[47] Englehart v. Serena, 300 S.W. 268 (1927).
[48] Moore, *op. cit.* United States v. Grisby, 335 F.2d 652 (4th Cir. 1964).
[49] Moore, *op. cit.*

ducting a purely fact-gathering investigation. Information from such an investigation is not used for criminal prosecution purposes. For example, in today's revolutionary and rapidly changing times the university may need to investigate its campus organizations, its established programs or practices. The desired information may be either for the purpose of making, repealing, modifying, and amending rules and regulations or for re-orienting the university's general policies, or for purposes of obtaining information or evidence with which to settle student disputes.[50]

An administrative investigation of an organization, whether or not it is incorporated, may be conducted if such investigation is for a lawfully authorized purpose which the State government has power to control. "Such investigation need not be in response to a particular complaint" because the investigation is conducted to determine whether rulings or policies need revision or whether certain campus organizations, or their officers, are subject to university rulings and, if they are, to determine whether they were violating such rulings. Records may be requested and if denied, a subpoena should suffice. The major limitation on compelling the organization's records to be turned over to the university is that "the records are relevant to the inquiry."[51] The thrust of this investigation is to gather facts, but it may culminate in administrative action if the facts discovered justify filing a complaint. The university has a legitimate right to satisfy itself that a campus organization's operations are in accordance with the university's rules and regulations;[52] and if not, to order the required compliance.

The officers of campus organizations generally raise two questions. First, whether the university is compelling the organizations to give testimony against themselves? Second, whether the organization may plead the Fifth Amendment against the university's administrative process? The answers are "no," because it is the organization that is being investigated, not the officers in their personal capacity. The function of the right against self-incrimination is limited to protecting only natural persons from compulsory incrimination, either through their own testimony

[50] Rules applied to "Administrative Investigations" are limited to general administrative rules. For general information of footnotes 50 through 63, and 81 through 93 see *American Jurisprudence* 2nd Administrative Law, (Reprinted from Volumes 1 and 2 Am. Jur. 2d) Sections on "Investigations," etc. The Lawyers Co-operative Publications Company, Rochester, N.Y., Bancroft-Whitney Company, San Francisco, Calif., 1962.

[51] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208-209 (1946).

[52] *Id.*

or through personal records.[53] Since the campus organizations are artificial persons, they are not entitled to protection against self-incrimination.[54] Thus, students, on a personal basis, may plead the Fifth Amendment,[55] but may not plead it in their official representative capacity, even if they tend to be incriminated.[56]

In another area where the above issues are raised, the court has held that all records "required by law to be kept" cease to be private and become public records. And since the right against self-incrimination is limited to a person who has proprietary or possessory interest[57] in the requested material, "public records," not being of a proprietary nature must be made available for inspection upon administrative request.[58] Thus the "records required to be kept by law" rule denies the person who holds them for the organization the right to claim the right against self-incrimination.

However, before the university requires records to be kept, the records must primarily be "for regulatory purposes, of the type that are customarily kept, as articles of incorporation of campus organizations, and must be colored as "public" under the law or rules.[59]

On the other hand, if a student, and not an organization, is being investigated, a fishing expedition is not allowed if the thrust of the needed records or information would tend to incriminate the student of an activity for which criminal punishment may be meted if he is found guilty of breaking a law or ruling. The reason is that the records would contain evidence which would incriminate the student and compel him to give incriminating evidence against himself which is strictly prohibited by the Fifth Amendment.[60]

Another procedure which may facilitate the universities in gathering information is using the "immunity bath rule." This rule holds that anyone who is granted immunity from prosecution forfeits the right against self-incrimination. If he refuses to testify, he may be cited for contempt.[61]

[53] United States v. White, 322 U.S. 694 (1944).
[54] Hale v. Henkel, 201 U.S. 43 (1906). Wilson v. United States, 221 U.S. 361 (1911).
[55] Smith v. United States, 337 U.S. 137 (1949).
[56] Hannah v. Larch, 363 U.S. 420 (1960).
[57] United States v. White, 322 U.S. 694 (1944).
[58] Wilson v. United States, 221 U.S. 361, 380 (1911).
[59] Ullman v. United States, 350 U.S. 422 (1956).
[60] Shapiro v. United States, 335 U.S. 1 (1948).
[61] Marchetti v. United States, 390 U.S. 390 (1968); Grosso v. United States, 390 U.S. 62 (1968); Communist Part of the United States v. United States, 384 F.2d 957 (D.C. Cir. 1957).

The university may, in the interest of justice, student interest, or expediency, compel the desired testimony by granting an "immunity bath" to the student or person concerned. Such procedure will enable the university to proceed with its fact-finding mission.

A student is entitled to claim his right against self-incrimination before an administrative body. The right against self-incrimination is an individually oriented right and, like the First Amendment rights, the student may not be denied this right on the ground that university proceedings are civil in nature and not criminal. This is a vested right and may be exercised while one is before a university disciplinary committee.

On the other hand, the right to be assisted by counsel in administrative proceedings does not apply.[62] The reason is that the witness is before a fact-finding investigatory proceeding and not before a criminally "accusatory or adjudicatory body." In essence, no fine or criminal punishment flows from these investigations. The court is of the opinion that a witness before an investigatory body is much like one before a grand jury, where no constitutional right to counsel exists.[63]

Due Process

General Rule:

University administrators may not capriciously or arbitrarily dispense with disciplinary action because to do so would offend the due process clause provided by the Fourteenth Amendment. Student rights which do not enjoy specific constitutional protection are protected by the "fundamental rudiments of fair play."[64]

The general guideline in determining procedural "due process" is that when a public university, as an agent of state government, undertakes any action which may affect the student's interest or may tend to cause him injury, the university must provide the student with "fair play." It is immaterial that a student's interest is classified as a "right or a privilege," for the fact is that it is "a vested interest" and such interest enjoys constitutional protection. Administrative due process must not be taken to mean that students are entitled to a "full-dress judicial hearing." A judicial type of a hearing coupled with publicity may prove to be disturbing and detrimental to the university for it may disrupt the univer-

[62] Hannah, *op. cit.*
[63] In re Groban, 352 U.S. 330 (1957).
[64] Buttny v. Smiley, 281 F. Supp. 280 (D.C. Colo., 1968).

sity's educational atmosphere.[65] Nonetheless, just because there are no specific "students' rights" mentioned in the Constitution, it does not mean that a student may be denied the right of "association with the university," or deprived of his liberty or property without due process. The court has aptly stated, "one may not have a constitutional right to go to Bagdad, but the government may not prohibit one from going there unless by means consonant with due process of law."[66] It is well-established that the state may not grant a privilege, such as admitting a student to enroll in its universities, in exchange for the student's surrender of his constitutional right to procedural due process.[67]

The right to obtain an education is "an interest of extremely great value." Therefore, disciplinary measures should be based on reasonable rules; and, action to enforce them may not be arbitrary or capricious. The courts insist that the disciplinary rules, and their enforcement, be reasonable because, any other standard may "break a student's spirit and do inestimable harm to his education."[68]

The thrust of administrative "due process"—fair play—is that the student is entitled to notice of the charge against him, information as to the nature of the evidence, an impartial hearing, an opportunity to confront his accusors, and an opportunity to present his evidence and any explanations.

Some of the more specific judicial requirements that control university disciplinary hearings are—(a) A written statement of the precise and specific charges is to be furnished the accused student at least ten days prior to the hearing; (b) The student must be given the names of the witnesses against him and be allowed to inspect in advance of the hearing any evidence, material, affidavits, or exhibits which the university or witnesses will present against him; (c) He must be given reasonable time to prepare and meet them; (d) The accused may be permitted to have counsel at the hearing to advise him—but not to represent him; (e) He must be assured of the right to present oral or written evidence by way of witnesses, affidavits or exhibits; (f) He is to be allowed to hear his accusers, see their evidence, question and cross-examine any witness who presented incriminating evidence against him; (g) The hearing officers are to reach their decision solely on facts presented at the hearing; and (h) If the hearing is not before the board of education, a written record

[65] Esteban v. Central Missouri State College, 272 F. Supp. 649 (D.C., Mo., 1967).
[66] Cafeteria and Restaurant Workers v. McElroy *et al.*, 363 U.S. 886 (1961).
[67] Dixon, *op. cit.*
[68] Dixon, *ibid.*

must be made of their findings and the disciplinary measures; (i) The record is to be presented to the student for his inspection; (j) The court further holds that the university or the student may, at his own expense, make a recording of the hearing.[69] But recordings of proceedings before university disciplinary committees are not necessary to satisfy due process.[70] If these fundamental elements of "fair play" are followed by the university's disciplinary committee, "the requirement of due process of law will have been fulfilled."[71]

When university rules or regulations provide a student with a right to a "hearing," careful attention should be given to the exact right to which the student is entitled. "A hearing may consist of an adjudicatory proceeding where facts in dispute are tried. At this type of hearing, facts may be presented, the defendant confronts his accusers and cross-examines them, and presents summation arguments to the tribunal."[72] Conversely, "a hearing may be a proceeding where the only materials presented to the tribunal are oral arguments."[73] The university can avoid unnecessary criticism of being unfair or arbitrary by providing for a "trial" rather than for an "opportunity to present arguments." The trial will not only give the evidence by cross-examination, but will give the administrative body "answers as to who did what, where, when, how, why, with what motive or intent."[74]

It is quite possible that the one who accuses another may be "malicious or mistaken or both and distort the true facts." On the other hand, the accused may know the correct facts and may be successful in disproving the false or malicious accusations.[75] If the facts are at issue, the accused has his Sixth Amendment right to be confronted with the witnesses who testify against him.[76] Once the right to confrontation becomes a fact, the tribunal will have the most ideal opportunity to learn the true facts, because it is at this time that the defendant will bring forth evidence to discredit his accusers.[77]

It is well established that "trials" are time consuming and in the event

[69] Esteban, *op. cit.*
[70] Esteban, *op. cit.* Dixon, *op. cit.*
[71] Due v. Florida, 233 F. Supp. 396 (D.C., Fla., 1963).
[72] Dixon, *op. cit.*
[73] K.C. Davis, *Administrative Law Text*, 113, West Publishing Co. (1959).
[74] Davis, *ibid.* 113.
[75] Davis, *op. cit.* 115-116.
[76] Davis, *op. cit.* 120.
[77] U.S. Const., Amend. VI.

of an emergency, a hearing, whether a trial or oral argument, may not be feasible; therefore, the administrative committee may, without a hearing, summarily dispense with the controversy. However, the rights of the students that are caught in the traffic of the emergency must not be considered settled without a hearing. The emergency rule holds that in the event of an emergency the administrative body does not have to insure the students a hearing, prior to the dispensation of the controversy, as long as the students are given a hearing, even after the passing of the emergency, but before the final decision of the administrative body is rendered.[78]

It should be kept in mind that "the purpose of the hearing is to determine whether the charges are true" and that "disciplinary proceedings conducted by an educational institution are not to be tested according to the niceties of procedure required in a court of law. Thus the demands of due process do not require a hearing, at the initial stage or at any particular point . . . so long as the requisite hearing is held before the final order becomes effective." For example, students were not denied due process when they were expelled from the university; but subsequent to the expulsion, and prior to the final decision a hearing was granted to determine whether or not they were to be readmitted.[79]

Adjudication Procedure

The adjudicative procedure is begun with the administrative body's notification to the student defendant of the charges levied against him. Notice of "the charges should be made with reasonable clarity" so that the defendant will be able to adequately know of the charges against him and will have sufficient time to prepare his defense.[80] The notification should, not only give "reasonable notice" so that the defendant will not be prejudiced by surprise charges[81] but also set a date for the hearing which will give the accused adequate time to prepare his defense. The hearing date should not be too close to the date the accused was given notice of the charges against him for it would deprive him of adequate time to prepare.[82] On the other hand, it should not be too far removed in time because memory of facts tend to become blurred as time passes

[78] Davis, *op. cit.* 120.
[79] North America Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).
[80] Jones, *op. cit.*
[81] Kwong Hai Chew ex rel. v. Colding, 344 U.S. 590 (1953); *In re* Buck's License, 232 P.2d 791 (1951), 258 P.2d 124 (1953).
[82] E.B. Muller and Co. v. F.T.C., 142 F.2d 511 (6th Cir., 1944).

and thus may deprive the student of substantive rights.[83] The thrust of "adequate notice" is simply to inform the student of "certain charges" so that he will not be misled as to exactly what he is being charged with[84] and to insure that he has sufficient time to prepare, so the issue of time will not be prejudicial nor detrimental to him.

There will be instances when new facts will be discovered subsequent to the commencement of the hearing. They may be introduced so long as they are not prejudicial and detrimental to the student, even though they tend to modify the original charges. If they tend to be prejudicial to him, then he should be given additional time to prepare.[85] The overall guideline is, therefore, that "the right to a hearing" must mean the right to a "meaningful hearing" which includes the duty to insure that the student is aware of matters which include the duty to insure that the student is aware of matters with which he must contend.[86]

A well-established rule is that if the judgment of the administrative body directly affects the students' rights *"in personam,"* then "the judgment may not be rendered if the administrative body has not obtained jurisdiction over the student, and, if a judgment is rendered, it is void."[87] Therefore, to gain jurisdiction over the student, he must have been given "adequate and fair notice."[88] If the administrative tribunal has not gained *"in personam* jurisdiction," then it may not adjudicate the student's rights.[89] The student may be given "actual—personal—or written notice."[90] If the university is proceeding against an organization, notice may be given to its representatives.[91] On the other hand, if the university's notice proves to be defective, but the student or organization representative "appears before the administrative unit without challenging the defect—such as too short notice, he is deemed to have waived his right to object to lack of adequate notice."[92]

In essence, the test in determining whether or not a student has been

[83] United States Ex Rel. Turner v. Fisher, 222 U.S. 204 (1911). Bronanman v. Harris, 189 F. 461 (1911).
[84] Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).
[85] Radio Officers Union v. N.L.R.B., 347 U.S. 17 (1953).
[86] N.L.R.B. v. Waterfront Employers, 211 F.2d 946 (9th Cir. 1954).
[87] Gonzales v. United States, 348 U.S. 407 (1955).
[88] National Licorice Co. v. NLRB, 309 U.S. 350 (1940).
[89] Oliphant v. Cathage Bank, 80 So. 2d 63 (1955).
[90] National Licorice Co., *op. cit.*
[91] Cowan v. State, 116 P.2d 854 (1941). McCarthy v. Cass Head Timber Co., 302 P.2d 238 (1956).
[92] Chamber of Commerce v. Federal Trade Commission, 13 F.2d 673 (1926).

afforded procedural due process of law is whether the university officers have acted arbitrarily or capriciously, or whether they have been fundamentally fair in the light of the total circumstances.[93] Therefore, a student expelled without a hearing was not denied due process when the university dean personally had seen him on campus after curfew hours and asked him to leave and he had refused, then asked him to come to his office and he never came, and later attempted to contact him by mail but could not because the student did not provide the university with his address as was required. Subsequently, the Dean visited the student's father to inquire of the student's address, but could not get it because the father did not know. Finally, through certified mail, the student was informed of his expulsion from the university. In this case, the evidence is clear that the Dean diligently tried to contact the student and to give him notice but failed, not because his efforts were capricious or unreasonable, but because the student failed to cooperate. "The Dean did all that he could and nothing else could be required." If the court would reinstate the student, it would amount to condoning the student's irresponsible attitude and would be disarming the university of authority to discipline recalcitrant students. Certainly "the constitutional umbrella should afford no protection to those who choose to go out in the rain bareheaded."[94]

On the other hand, the above rule is not to be taken to mean that all university actions will be upheld by the court if the university officials are of the opinion that re-admission of an expelled student may undermine university discipline. The expulsion of a student for violating an unconstitutional university rule will not be upheld because to do so the court would be sanctioning state action which abridges "basic rights guaranteed by our constitution."[95] The issue is not whether the student would be afforded due process, but whether the reason for expulsion is constitutional. Even if he is afforded due process, the dismissal will be void because it is based on an unconstitutional regulation.

Due process is also met when the disciplinary committee gives the student a fair opportunity to prove his innocence, and is careful in admitting and weighing all evidence, so as not to receive evidence from

[93] Brahy v. Federal Radio Commission, 61 App. D.C. 204, 59 F.2d 879 (1932). Seward v. Denver and R.G.R. Co., 131 P. 980 (1913).

[94] Winters v. United States, 281 F. Supp. 289 (1968).

[95] Wright v. Texas Southern University, 277 F. Supp. 110 (D.C., Tex., 1967), off. 392 F.2d 728 (5th Cir. 1968).

sources which may tend to be "freighted with prejudice" and then proceeds to reach a decision with a "calm, objective, open and fair mind."[96]

The hearing being a most crucial state of the disciplinary process, the committee should not take lightly the nature of the evidence, nor its responsibility of presenting substantial evidence. The university has the burden of proving the student guilty of misconduct and must be careful of not compelling the student to prove himself innocent. Thus, when the university did not present evidence, but solely listened to the student's evidence for two and one-half hours and on that basis alone expelled 29 students accused of illegally blocking the entrance of the university's administrative building, such hearing did not meet the "rudiments of fair play."[97]

Sixth Amendment Rights are not Essential to "Due Process"

General Rule:

The right to counsel is limited to criminal cases; thus, the student is not entitled to the "constitutional right to counsel" before a university disciplinary committee because such proceedings are civil in nature. However, a student, through due process, is entitled to have counsel advise him during the hearing, but may not represent him. On the other hand, the student may not have a "constitutional right" to counsel, but may enjoy such right "if given by congressional or legislative act or by University rules and regulations."

Closely related to the nature of the hearing is the issue of whether the student has a right to counsel in an education administrative hearing. The court holds that in non-criminal proceedings, investigative and non-adversarial hearings the right to counsel does not apply, because such a right is limited to criminal cases and not to civil proceedings.[98] In 1968 the court held that it "knew of no legal authority that required University officials to advise a student involved in disciplinary proceedings of his right to remain silent and to be provided with counsel."[99] Thus it appears that the university is not obligated to advise or to give student involved in disciplinary proceedings the "Miranda Warning."

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[96] Dicky, *op. cit.*

[97] Zanders, *op. cit.*

[98] Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); 285 F. Supp. 936 (1968).

[99] Buttny, *op. cit.*

The right to counsel is not a prerequisite to a reasonable and fair hearing in all types of governmental proceedings.[100] "The fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect as a constitutional principle that no administrative inquiry can be had *in camera* unless a lawyer be allowed to attend."[101] It is emphasized that disciplinary hearings before a university committee are "civil proceedings" and "unless the right to counsel is read into the due process clause of the Fourteenth Amendment, which at present is not done, or is granted by congressional or legislative act" or provided by a university administrative rule, such "constitutional" Sixth Amendment right to counsel is non-existent in disciplinary proceedings.[102] Caution should be taken in applying this rule, because if the student is afforded the "right to counsel" by any of the above methods, then the "right" is "vested" and to deny him such a vested right would infringe on his right to due process.

The concept of due process is flexible and leaves the university wide latitude in dispensing with disciplinary measures because "inherent in the concept of due process of law is the exclusion of the dogmatic application of specific rules developed in context to entirely distinct forms of government action."[103] Therefore, there is no uniform criteria applicable to all situations. But as has been previously stated, "the touchstones of the application of due process are reasonableness and fairness in view of all the facts and circumstances of the particular case." It should be noted that "judicial law indulges in the presumption that University officials act reasonably, fairly and in good faith and the student has the burden of proof to show that his conduct was not arbitrary or capricious."[104]

However, the university should strive to establish a procedure which provides for substantial justice and dispense with the notion that "assuring the students of the minimum elements of due process is sufficient and if a grievance persists, an appeal to the courts will remedy the administrative shortcomings." Such a notion is more theoretical and illusory than factual. It is well known that such is the case "when the amount involved is small," or conversely, "when the cost of appeal is great."[105] The fact

[100] Madera v. Board of Education, 267 F. Supp. 356 (D.M., N.Y., 1967), 382 F.2d 778 (2d Cir. 1967).
[101] *In re* Groban, 352 U.S. 330 (1957).
[102] Barker v. Hardway, 283 F. Supp. 228 (D.C., W. Va., 1968).
[103] Wasson, *op. cit.*
[104] Barker, *op. cit.*
[105] K.C. Davis, *op. cit.* p. 126.

that a statute, as in Texas, provides for a new trial in the courts, does not dispense with the necessity of a proper and legal hearing before the administrative body.[106]

CONCLUSION

In today's society, an education is vital and indispensible. Without an adequate education, students may not be able "to earn an adequate standard of living, enjoy life to the fullest, or fulfill as completely as possible the duties and responsibilities of good citizens." The students' academic interest is the "right to remain in the university free from unfettering restrictions which may tend to impede his education."[107]

When student-university interests come into conflict with each other, they must be balanced and accommodated so that the university may carry out its academic mission and simultaneously, the student may pursue his education. Thus, when the student meets the academic standards and is admitted to the university, "he acquires an educational interest" which is constitutionally protected by the "due process clause of the Fourteenth Amendment." However, when he engages in "conduct" which substantially and materially interferes with the university's academic purposes, the student may be disciplined or expelled, as long as such disciplinary measures are "in accordance with the fundamental elements of fair play." But, when the student exercises his First Amendment rights to petition the government, speech, press, assembly or the Fifth Amendment right against self-incrimination, the university may not infringe upon them as long as they are exercised in their pristine form.

In other words, there are not constitutional limitations on an "individual oriented right," as when the above-mentioned First and Fifth Amendment rights are exercised in pristine form. However, when the action is "university oriented," as the disciplinary committee's action in conducting investigations, hearings, etc., the constitutional protection is limited to "due process" and the broader protection of the Fourth, Fifth and Sixth Amendments does not apply because the administrative proceedings are not criminal. Finally, the university may undertake disciplinary action on all "conduct" which substantially and materially disrupts the university's academic mission.

[106] L.A. Darling Co. v. Water Resources Commission, 67 N.W.2d 890 (1955).
[107] Dixon, *op. cit.*