Denver Law Review

Volume 64 | Issue 1 Article 6

February 2021

Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities

H. L. Silets

OF STUDENTS' RIGHTS AND HONOR: THE APPLICATION OF THE FOURTEENTH AMENDMENT'S DUE PROCESS STRICTURES TO HONOR CODE PROCEEDINGS AT PRIVATE COLLEGES AND UNIVERSITIES

H.L. SILETS*

I know no safe depository of the ultimate powers of the society, but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is, not to take it from them, but to inform their discretion by education.

—Thomas Jefferson[1]

I. INTRODUCTION

Honor codes at institutions of higher learning long have been a source of controversy. Disputes over honor codes generally involve their supposed ineffectiveness or their lack of requisite procedural due process as prescribed by the Fourteenth Amendment of the United States Constitution.[2] While these disputes are not new, a recent element that has changed the tenor of debate over honor codes has been the increased willingness of the judicial system to review honor code proceedings and judgments.

Not until recently have the courts been willing to enter a domain that was once the peculiar province of academicians and administrators. Final "appellate" review of cases involving alleged honor code violations historically rested with college or university presidents. These "final arbitors" of honor code proceedings were probably just as capable of making biased and perfunctory decisions as they were of impartial and fair judgments. Woodrow Wilson, for example, as president of Princeton University, was forced to render a decision in such a case early in this century.[3] A student was expelled for violating Princeton's honor

* A.B., *magna cum laude*, Princeton University, 1984. J.D. candidate, Northwestern University School of Law, 1987. The author gratefully acknowledges the advice of Professor Victor G. Rosenblum of the Northwestern University School of Law.

1. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *reprinted in* 15 THE WRITINGS OF THOMAS JEFFERSON 278 (1903)(emphasis added).

2. Section 1 of the fourteenth amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. *See* Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413, 415 (D.N.J. 1985)(quoting G. SMITH, WHEN THE CHEERING STOPPED — THE LAST YEARS OF WOODROW WILSON 28 (1964)).

code by cheating on an exam:

> [H]is mother came to plead for his reinstatement with the man who passed upon the expulsion. She said she was undergoing serious medical treatments and that the shock of having her boy expelled might well bring those treatments to naught. The answer was, 'Madam, you force me to say a hard thing, but if I had to choose between your life or my life or anybody's life and the good of this college, I should choose the good of the college.' But he could eat nothing at luncheon that day.[4]

More recently, Princeton's honor code was reviewed and upheld by the United States District Court of New Jersey as being fundamentally fair, and thus, implicitly constitutional.[5] The court noted, however, that this decision would by no means "put to rest the heated debate engendered by this and other incidents where long established honor systems have been attacked."[6] The court went on to say that "[p]ublic opinion on the subject naturally runs the entire gamut from the cynical to the reverential."[7]

Indeed, honor codes have been simultaneously attacked and praised. For example, Millard H. Rudd, the Executive Director of the Association of American Law Schools, recently characterized honor codes as "a realistic preparation for the *real* world."[8] He also stated that educators "have a responsibility to seek to bring out the best of people and not to encourage the worst or to assume the worst."[9] Others, such as author and former West Point instructor Joseph J. Ellis, have criticized honor code systems, noting that "[w]e don't live in a world in which there exists a single definition of honor any more, and it's a fool that hangs on to the traditional standards and hopes that the world will come around to him."[10] Thus, the general debate over honor codes remains heated and energetic and is not likely to subside soon.

In recent years, honor codes have become a major focus of attention both within and without the academic community[11] due to the increasing number of suits brought by students against institutions of higher learning[12] charging particular honor code systems with funda-

---

4. *Id.*

5. *Id.* at 413.

6. *Id.* at 415.

7. *Id.*

8. *Does the Honor System Encourage Cheating?*, 8 PA. L.J. REP. 18 (1985)(emphasis in original).

9. *Id.*

10. *See Cheating Prompts Air Force to Halt Cadet Honor Boards*, N.Y. Times, Sept. 20, 1984, at 1, col. 3; *see also* Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413, 415 (D.N.J. 1985).

11. *See, e.g., Princeton Is Upheld in Case Challenging Its Honor Code*, N.Y. Times, May 7, 1985, at 11, col. 3; *Princeton's Honor Code Challenged by Student*, N.Y. Times, Feb. 25, 1985, at B4, col. 1; *Cheating Prompts Air Force to Halt Cadet Honor Boards*, N.Y. Times, Sept. 20, 1984, at 1, col. 3; *Plagiarism in the Ivy*, N.J.L.J., July 1, 1982, at 4, col. 1.

12. *See* Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J. LAW & EDUC. 171, 207 (1982), wherein it is stated that "there *has* been a substantial increase in the number of court cases affecting higher education institutions" (emphasis in original).

mental unfairness[13] and with violations of students' fourteenth amendment rights to due process.[14] Some educators have viewed with alarm this "specter . . . of a rash of court cases challenging decisions in areas that were once considered the educational world's peculiar province."[15] Others believe that "student utilization of the peaceful processes of the courts is in many instances to be encouraged rather than criticized."[16]

This article will argue that judicial review of honor code proceedings provides a needed check on institutional actions that otherwise might become summary, perfunctory and insufficient. This article also will argue that judicial review is especially appropriate with regard to honor code proceedings at private colleges and universities which, unlike state institutions, usually are not thought to be subject to the scrutiny of the courts. While it may be argued that the wisdom and experience of administrators and academicians may provide a primary safeguard against summary dismissals and punishments, "experience has taught . . . the necessity of auxiliary precautions."[17] In the world of academia, therefore, one important "auxiliary precaution" can and should be judicial enforcement of due process in honor code proceedings that involve disciplinary offenses.

II. The Application of the Fourteenth Amendment to Private Colleges and Universities

In order to determine whether honor codes deprive students who attend non-public institutions of higher education of the due process protections of the fourteenth amendment,[18] the first stage of inquiry should focus on whether the fourteenth amendment is applicable to the regulations and proceedings of private colleges and universities.[19] Public colleges and universities, which are considered instruments of state government,[20] are not beyond the reach of the due process requirement

13. *See, e.g., Clayton*, 608 F. Supp. 413; Clayton v. Trustees of Princeton Univ., 519 F. Supp. 802 (D.N.J. 1981); Tedeschi v. Wagner College, 49 N.Y.2d 652, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (1980).

14. *See, e.g.*, Henson v. Honor Comm. 719 F.2d 69 (4th Cir. 1983); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986); Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443 (Iowa Ct. App. 1984); University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. Ct. App. 1984).

15. Perkins, *The University and Due Process*, Chron. of Higher Educ., Vol. II, No. 8, 5 (Dec. 21, 1967).

16. Byse, *The University and Due Process: A Somewhat Different View*, 54 Am. Ass'n Univ. Professors Bull. 143, 147 (1968).

17. The Federalist No. 51, at 337 (A. Hamilton, J. Madison) (Nat'l Home Library Found. ed. 1938).

18. *See supra* note 2.

19. *See, e.g*, Thigpen, *supra* note 12; Wilkinson and Rolapp, *The Private College and Student Discipline*, 56 A.B.A. J. 121 (1970); Comment, *An Overview: The Private University and Due Process*, 1970 Duke L.J. 795; Comment, *A Student's Right to Hearing on Dismissal from a University*, 10 Stan. L. Rev. 746 (1958) [hereinafter Comment, *A Student's Right*]; Comment, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 Yale L.J. 120 (1974).

20. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (wherein the Court noted that "[b]y and large, public education in our Nation is committed to the control of state and local authorities."); *see also* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.)

of the fourteenth amendment.[21] In dealing with private universities, on the other hand, courts have been more reluctant to extend due process guarantees to students because of a perceived lack of state action.[22] In fact, students at private universities not only have been treated differently from students at public universities, but, in at least one case, students attending the same university were not granted equal protection by the courts merely because some students were enrolled in the "private" college of the same university, even though the two colleges were located on the same campus and administered by the same personnel.[23]

Students and legal scholars have criticized the courts' posture of denying judicial protection to private university students in the honor code context.[24] Others, however, believe that courts have extended the state action doctrine too far, and that the fourteenth amendment should be used only in cases involving direct governmental action.[25] The increasing commentary and awareness of the due process rights of students at private colleges and universities has led to the development of several theories which courts have used to apply the fourteenth amendment to non-public institutions of higher education. In order to assess fully the constitutional obligations of private colleges and universities, it is necessary to examine these theories.

(state university), *cert. denied*, 368 U.S. 930 (1961); Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.) (public high school), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). In *Madera*, and in *Dixon*, the courts established that public secondary schools and state universities come under the state action doctrine as instrumentalities of state government. *Madera*, 267 F. Supp. at 369; *Dixon*, 294 F.2d at 156-57. *See, e.g.*, State v. Schmid, 84 N.J. 535, 543, 423 A.2d 615, 619 (1980) (citations omitted), *appeal dismissed*, 455 U.S. 100 (1982), wherein the Supreme Court of New Jersey stated that "[a] public college or university, created or controlled by the state itself, is an arm of state government and, thus, by definition, implicates state action."

21. The Supreme Court stated in Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969), that "[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate." *See also* Healy v. James, 408 U.S. 169, 180 (1972). Although *Tinker* concentrated on the first amendment rights of students, other courts have construed due process as equally applicable to all constitutional protections. *See, e.g.*, Robinson v. Board of Regents, 475 F.2d 707, 709 (6th Cir.)(equal protection found applicable), *cert. denied*, 416 U.S. 982 (1973). It also has been held that students do not forfeit their constitutional rights by attending a state university. Esteban v. Central Mo. State College, 415 F.2d 1077, 1085 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

22. *See* Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 995 (1976); Spark v. Catholic Univ., 510 F.2d 1277 (D.C. Cir. 1975)(per curiam); Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962); Swanson v. Wesley College, 402 A.2d 401 (Del. Super. Ct. 1979); *see also* Note, *Due Process and the University Student: The Academic/Disciplinary Dichotomy*, 37 LA. L. REV. 939, 940 (1977), wherein it was stated that "courts have been more reluctant to extend due process guarantees to private university students than to public university students."

23. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

24. *See, e.g.*, Carrington, *Civilizing University Discipline*, 69 MICH. L. REV. 393 (1971); Van Alstyne, *The Student as University Resident*, 45 DEN. L.J. 582, 612-13 (1968); Comment, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 122 (1974).

25. *See* G. GUNTHER, CONSTITUTIONAL LAW, 972-1030 (1980); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

A. *The State Action Requirement and the State Action Tests*

In the landmark case of *Burton v. Wilmington Parking Authority*,[26] the United States Supreme Court stated that significant state involvement in the affairs of private organizations would subject those organizations to constitutional restrictions such as due process. Specifically, the Court held that state action exists when

> [t]he State has so far insinuated itself into a position of interdependence with [the acting party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.[27]

While the Court in *Burton* did not explain how much state participation was necessary for state action to exist,[28] it stated in a subsequent decision, *Jackson v. Metropolitan Edison Co.*,[29] that *Burton* stood for the proposition that any private organization was subject to fourteenth amendment limitations whenever there was a "symbiotic relationship" between the acting party and the state.[30]

In *Jackson*, the Supreme Court held that state action also may exist when the state becomes sufficiently involved in the challenged activity.[31] The Court suggested that in considering the state action issue, the question is "whether there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself."[32] The Court, therefore, reasoned that the plaintiff must show government involvement in the specific act at issue such that the government has effectively granted its approval or put its weight behind the action.[33] Yet, the government's mere acquiescence or approval of the private action will not convert the

26. 365 U.S. 715 (1961).

27. *Id.* at 725.

28. In *Burton*, plaintiffs alleged that the Wilmington Parking Authority, a state entity, was responsible for the racially discriminatory practices of a privately owned coffee shop located in a building owned by the Authority. Although the Delaware Supreme Court found the discrimination to be purely private in character, the United States Supreme Court held that the state was significantly involved in the infringement of rights protected by the fourteenth amendment. *Id.* at 724.

29. 419 U.S. 345, 357 (1974).

30. *Id.*

31. *Id.* at 350-56. *Jackson* concerned a privately owned and operated electric power company. The plaintiff alleged a violation of due process when the utility terminated her service without notice, hearing, or any opportunity to pay the past due amounts. The Supreme Court held that the Commonwealth of Pennsylvania was not sufficiently involved in the challenged activity to convert it into state action, despite the government's delegation of monopoly power to the electric company. The company, therefore, was under no constitutional duty to observe procedural due process when terminating a customer's service.

32. 419 U.S. at 351.

33. *Id.* at 357; *see also* Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 597 (2d Cir. 1979) (without the intimate involvement by the state in the private act, there is insufficient nexus between state and private activity to warrant a finding of state action), *cert. denied*, 446 U.S. 956 (1980).

act into that of the government.[34]

Indeed, the government can be held responsible for a private act only when it has compelled the act by law,[35] or when it has "exercised coercive power or . . . provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]."[36] In *Blum v. Yaretsky*,[37] for example, the Court specifically rejected the contention that state licensing and funding converts private action into state action:

> As we have previously held, privately owned enterprises providing services that the State would not necessarily provide . . . do not fall within the ambit of [the state action requirement]. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.[38]

In addition to the previously enunciated "symbiotic relationship" and "close nexus" tests, the Supreme Court discussed the "public function" test in *Jackson v. Metropolitan Edison Co.*[39] and again in *Rendell-Baker v. Kohn*.[40] Under the"public function" test, government action may be present where the function performed by a private entity is "traditionally the exclusive prerogative of the State."[41] The private performance of a function that serves the public or which is "affected with a public interest" does not suffice as a "public function" under this test.[42] The logic of *Rendell-Baker* and *Blum* is that state contributions to otherwise private entities, no matter how great those contributions may be, will not of themselves transform a private actor into a state actor. Rather, the activity must be one which is traditionally associated with sovereignty.[43]

In summary, state action may be found to exist where: (1) a private

---

34. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); *see also Jackson*, 419 U.S. at 357; Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978).

35. *Flagg Bros.*, 436 U.S. at 164; *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970). The *Adickes* Court noted that "[w]hen the State has commanded a particular result, it has saved to itself the power to determine that result and thereby to a 'significant extent' has 'become involved' in it." *Id.* (quoting Peterson v. City of Greenville, 373 U.S. 244, 248 (1963)).

36. *Blum*, 457 U.S. at 1004.

37. 457 U.S. 991 (1982).

38. *Id.* at 1011 (citations omitted).

39. 419 U.S. 345 (1974).

40. 457 U.S. 830 (1982).

41. *Id.* at 842 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

42. *Id.* at 841; *Jackson*, 419 U.S. at 353-54.

43. *Jackson*, 419 U.S. at 353. The "public function" test has been applied basically in three different situations: first, when the government, after performing a particular function, attempts to avoid its constitutional obligations by transferring the function to a private entity, *see* Evans v. Newton, 382 U.S. 296 (1966); second, in cases involving the exercise of powers, such as the supervision of elections that are almost always carried out by government, *see* Terry v. Adams, 345 U.S. 461 (1953); and third, in the first amendment context, to determine if private property is the functional equivalent of a municipality, *see* Marsh v. Alabama, 326 U.S. 501 (1946).

entity possesses a "symbiotic relationship" with the state; (2) there exists a "close nexus" between the state and the challenged conduct; *or* (3) the private actor is performing a "public function" that traditionally has been exercised exclusively by the government. With respect to the state action doctrine, the Supreme Court also noted in *Burton v. Wilmington Parking Authority*[44] that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[45] In *Burton*, the Court concluded that the racially discriminatory policies of a restaurant that leased space in a public parking facility constituted state action after first examining such factors as public ownership of the land and building, and public maintenance of the building.[46] By sifting facts and weighing circumstances, the Court therefore determined that "[a]ddition of all these activities, obligations and responsibilities . . . [and] the benefits mutually conferred . . . indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."[47]

It follows, then, that in reviewing a claim by private university students for procedural due process protection in honor code proceedings, a court must invoke one of the three aforementioned theories of state action. In applying the fourteenth amendment to private colleges and universities, Judge J. Skelly Wright has observed:

> At the outset one may question whether any school or college can ever be so 'private' as to escape the reach of the Fourteenth Amendment. . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. Clearly the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. . . . And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action ? . . .[48]

Judge Wright's legal argument proposed that the performance of

---

44. 365 U.S. 715 (1961).

45. *Id.* at 722.

46. *See supra* note 28.

47. 365 U.S. at 724.

48. Guillory v. Admininistrators of Tulane Univ., 203 F. Supp. 855, 858-59 (E.D. La.), *rev'd*, 306 F.2d 489 (5th Cir. 1962)(citations omitted)(footnote omitted). In *Guillory*, suit was brought to compel Tulane University to admit qualified black applicants. Petitioner claimed that because the educational function performed by the university was governmental in nature, the school was thereby subject to the due process strictures of the fourteenth amendment. Thus, based upon the "public function" theory and various factors that established an ongoing and substantial relationship between Tulane and the state of Louisiana, *see infra* notes 49-50 and accompanying text, Judge Wright ruled that Tulane could not continue to practice racial segregation because the exclusion of blacks contravened the equal protection clause of the fourteenth amendment. Judge Wright's decision was later overturned, 306 F.2d 489 (5th Cir. 1962), and on a subsequent hearing was held to be immune from fourteenth amendment restrictions, 212 F. Supp. 674 (E.D. La. 1962). *See* Dorsen, *Racial Discrimination in Private Schools*, 9 WM. & MARY L. REV. 39, 50 (1967); Thigpen, *supra* note 12 at 184-85.

the educational process is, in and of itself, sufficient to constitute state action due to its nature as a public function. Yet, it should be emphasized that Judge Wright's opinion in *Guillory v. Administrators of Tulane University*[49] did not rest solely on a "public function" theory. Indeed, the record in *Guillory* revealed a variety of factors that established an ongoing and substantial relationship between Tulane University and the State of Louisiana.[50]

Under this "public function" analysis, then, it follows that as college educations become more necessary and as private school dependence upon government financial support increases, courts will find it correspondingly more difficult to refuse to measure the private university's actions by fourteenth amendment standards.[51] Used as the sole basis for finding state action in cases involving non-public institutions of higher learning, the "public function" theory almost uniformly has been rejected by the courts.[52] Nevertheless, many of the courts that have rejected the "public function" theory have not described explicitly whether they rejected the argument because in their opinion education is not a public function, or rather, because although education is a public function, it still is not sufficient for state action to exist. Regardless of how the courts may interpret the "public function" theory, there re-

49. 203 F. Supp. 855 (E.D. La.), *rev'd*, 306 F.2d 489 (5th Cir. 1962).

50. *Id.*

51. *See, e.g.*, Krynicky v. University of Pittsburgh, 742 F.2d 94, 103 (3d Cir. 1984)(private universities' interdependence with state interpreted as a "symbiotic relationship"), *cert. denied*, 105 S. Ct. 2018 (1985); Braden v. University of Pittsburgh, 552 F.2d 948, 958-59 (3d Cir. 1977)(state action found where state deeply enmeshed in operations of private university); *see also* Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443 (Iowa App. 1984)(common law imposes due process requirements that parallel the fourteenth amendment). *But see* Greenya v. George Washington Univ., 512 F.2d 556, 559-60 (D.C. Cir.)(lack of government role in university management precluded state action), *cert. denied*, 423 U.S. 995 (1975); Spark v. Catholic Univ. of America, 510 F.2d 1277, 1282 (D.C. Cir. 1975)(no state action found where statute authorizing funds prohibited state control over university); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973)(outright grant of fraction of cost of education does not make school an agent of the state); Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977)(constitutional due process not guaranteed by private school bulletin dismissal procedures guaranteeing "due process"), *aff'd*, 579 F.2d 45 (5th Cir. 1978); Swanson v. Wesley College, Inc., 402 A.2d 401, 403 (Del. Super. Ct. 1979)(performance of a public function by private university not state action without significant involvement in decision-making process).

52. Krohn v. Harvard Law School, 552 F.2d 21, 24 (1st Cir. 1977); Berrios v. Inter American Univ., 535 F.2d 1330, 1333 (1st Cir.), *appeal dismissed*, 426 U.S. 942 (1976); Greenya v. George Washington Univ., 512 F.2d 556, 561 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 995 (1976); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1140 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968); Isaacs v. Board of Trustees of Temple Univ., 385 F. Supp. 473, 486 (E.D. Pa. 1974); Pendrell v. Chatham College, 370 F. Supp. 494, 499 (W.D. Pa. 1974); Furumoto v. Lyman, 362 F. Supp. 1267, 1277 (N.D. Cal. 1973); Counts v. Voorhees College, 312 F. Supp. 598, 606 (D.S.C. 1970), *aff'd mem.*, 439 F.2d 773 (4th Cir. 1971); *see* Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 546 (S.D.N.Y. 1968); Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962). *But see* Hall v. Medical College of Ohio, 742 F.2d 299, 305 (6th Cir. 1984)("Providing facilities and *opportunities for the pursuit of higher education* is a long-recognized governmental function")(emphasis added), *cert. denied*, 105 S. Ct. 796 (1985); Buckton v. N.C.A.A., 366 F. Supp. 1152, 1156 (D. Mass. 1973)(Boston University, "though a private institution, clearly performs functions governmental in nature, such as providing higher education to and exercising substantial dominion over its students"); Belk v. Chancellor of Washington Univ., 336 F. Supp. 45, 48 (E.D. Mo. 1970)("Education is a public function").

mains little judicial authority for the proposition that education in private institutions, particularly at the college and university level, is a governmental function.[53] Thus, while some courts have been willing to find state action for purposes of applying the due process clause to private colleges and universities;[54] traditionally, the rights accorded students have been analyzed in terms of contractual relationships.[55]

B. *The Contract Theory of the Student-Private University Relationship*

The contract theory for assessing the student-university relationship presumes that by applying to a private university and paying tuition upon admission, the student agrees to abide by university regulations, normally specified in the university's catalogue or bulletin.[56] The student's knowledge of and agreement to conform to the university's regulations is generally implied.[57] Thus, under this type of analysis, the student's rights are determined by the express and implied provisions of the student-university contract.[58]

Despite the facility of viewing the relationship of a private college or university to its students in contractual terms, the courts have warned against a rigid application of the law of contracts. For example, in *Slaughter v. Brigham Young University*,[59] the United States Court of Appeals for the Tenth Circuit stated that:

> It is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University. . . . This does not mean that 'con-

53. Perhaps the courts eventually will accept the view that in a democracy, education is an essential undertaking for which government has a direct responsibility. As Thomas Jefferson so eloquently noted almost two centuries ago:

> Education is . . . placed among the articles of public care, not that it would be proposed to take its ordinary branches out of the hands of private enterprise, which manages so much better all the concerns to which it is equal; but a *public institution* can alone supply those sciences which, though rarely called for, are yet necessary to complete the circle, all the parts of which contribute to the improvement of the country, and some of them to its preservation.

T. JEFFERSON, selected writings, in THE LIVING THOUGHTS OF THOMAS JEFFERSON (J. Dewey, ed. 1940)(emphasis added). Thus, while higher education has not been viewed by many courts as a public function, some courts have found private colleges and universities subject to the constitutional restraints of the fourteenth amendment based on all forms of state action.

54. *See* Comment, *A Student's Right*, *supra* note 19. For cases involving expulsions from private organizations, see Rutledge v. Gulian, 93 N.J. 113, 459 A.2d 680 (1983); Higgins v. American Soc'y of Clinical Pathologists, 51 N.J. 191, 238 A.2d 665 (1968).

55. *See* Clayton v. Trustees of Princeton Univ., 519 F. Supp. 802, 806 (D.N.J. 1981); Tedeschi v. Wagner College, 49 N.Y.2d 652, 658, 404 N.E.2d 1302, 1305, 427 N.Y.S.2d 760, 763 (1980).

56. *See, e.g.*, John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924)(relationship between student and private institution is purely contractual); Samson v. Trustees of Columbia Univ., 101 Misc. 146, 167 N.Y.S. 202 (N.Y. Sup. Ct.)(discussing implied terms of contract between private university and student), *aff'd*, 181 A.D. 936, 167 N.Y.S. 1125 (1917); *see also* Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. C. & U.L. 14 (1981-82).

57. Comment, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLIAMETTE L.J. 277, 278 (1969).

58. *See* Comment, *A Student's Right*, *supra* note 19, at 746.

59. 514 F.2d 622 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975).

> tract law' must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. . . . The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category.[60]

In applying traditional contract principles to the relationship between a private college or university and its students, one court has held that the relevant terms of the college-student contract found in a school enrollment agreement did not apply to an expelled student because the contract was silent as to any refund in the event of a student's dismissal. In *King v. American Academy of Dramatic Arts*,[61] the court held that a student was not contractually bound by a provision of the Academy's enrollment agreement regarding the refundability of the student's tuition because the contract merely outlined tuition refund procedures in the event of a student's early voluntary withdrawal rather than a student's involuntary dismissal. The court reasoned that

> to the extent that the enrollment agreement would allow the Academy to dismiss a student with legal justification and also retain his payments . . . such agreement [is] unconscionable in the substantive sense in light of the agreement's one sidedness, the absolute discretion it purports to give the Academy, and the fact that a hearing was not necessary prior to dismissal.[62]

The court's refusal to apply to a student that was expelled a school enrollment agreement that did not mention tuition refunds in the event of student dismissals has alerted administrators of the necessity of explicitly stating information that the school considers vital in documents that encompass the definition of the university's contractual obligation.[63]

By analogy, a court, willing to demand that a private university or college provide each student with reasonable notice regarding the re-

---

60. *Id.* at 626 (emphasis in original).

61. 102 Misc. 2d 1111, 425 N.Y.S.2d 505 (N.Y. Civ. Ct. 1980).

62. *Id.* at 1113, 425 N.Y.S.2d at 507. *See also* Abrams v. Illinois Podiatric Medicine, 77 Ill. App. 3d 471, 395 N.E.2d 1061 (1979)(a statement in a private college bulletin stating the desirability of informing a student of his progress does not create a binding obligation); Drucker v. New York Univ., 57 Misc 2d 937, 293 N.Y.S.2d 923 (N.Y. Civ. 1968)(a student was not contractually bound by a provision in a university bulletin regarding the refundability of a registration fee because a student reasonably could not have been expected to read carefully terms buried within school application, catalogues or registration forms), *rev'd*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (N.Y. App. Term 1969).

63. A number of courts have found that a single document such as a university catalogue or bulletin does not contain the entire definition of the university's contractual obligation and have listed other sources that help define that duty. For example, in Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 150 (M.D. Pa. 1978), the federal district court for the Middle District of Pennsylvania referred to the University bulletin, the "Procedures for Graduate Students & Faculty Resolution of Graduate Student Problems," the Manual for Graduate Students, The Constitution and By-Laws and Standing Rules of the Faculty Senate, and "Policies and Rules for Students, 1975-1976." In Olsson v. Board of Higher Educ., 66 A.D.2d 196, 412 N.Y.S.2d 615 (1979), *rev'd*, 49 N.Y.2d 408, 426 N.Y.S.2d 248, 402 N.E.2d 1150 (1980), the court found that a professor's statements regarding examination criteria created contractual terms. Moreover, the court in Pride v. Howard Univ., 384 A.2d 31 (D.C. 1978), found the customary disciplinary practices in force at the time of a student's admission to be incorporated into the student-university contract.

turn of tuition fees, should be even more insistent that the university furnish each student the same type of reasonable notice of the standards of conduct and academic performance that are to control his educational career.

In summary, based upon the state action and contract theories of the student-university relationship, courts should accord to private college and university students substantially the same procedural safeguards that the fourteenth amendment requires public universities to afford their students. Reasonable notice of specific rules and fair procedures, especially with regard to honor codes, will inform students precisely of their obligations and perhaps will convince them of the validity and desirability of enforcement by a systematized and ordered procedure.

III. THE DICHOTOMY BETWEEN ACADEMIC AND DISCIPLINARY PROCEEDINGS

Assuming a court finds that the due process protections of the fourteenth amendment apply to the honor code regulations and proceedings of a private college or university, the next step is to determine whether the particular student infraction at issue is academic or disciplinary in nature. This determination is critical because of two United States Supreme Court decisions that established a dichotomy between the due process required in cases involving disciplinary dismissals and the due process required in cases involving academic dismissals.

In *Goss v. Lopez*,[64] the Court established due process guarantees applicable to students who are facing temporary disciplinary dismissal from a public school. After finding that a temporary suspension from high school implicates a protected interest, and recognizing that the disciplinary process is not a totally accurate, unerring process,[65] the Court held that a student facing temporary, disciplinary suspension "must be given *some* kind of notice and afforded *some* kind of hearing."[66]

Three years later, in *Board of Curators v. Horowitz*,[67] the Supreme Court held that there is no requirement of even an informal hearing when an applicant is facing dismissal for academic cause.[68] In differenti-

64. 419 U.S. 565 (1975). In *Goss*, the question before the Court concerned the rights of students to some kind of procedural due process before being disciplined by a ten-day suspension for misconduct at school.

65. *Id.* at 579-80. The Court noted that in disciplinary proceedings school authorities must frequently depend on the reports and advice of others, and that the nature of the conduct involved and the factual conclusions of the school authorities are often subject to dispute. *Id.* Thus, disciplinary suspensions sufficiently resemble traditional judicial and administrative factfinding so as to require a hearing before school authorities.

66. *Id.* at 579 (emphasis in original). A student facing temporary disciplinary suspension is entitled to "[o]ral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581.

67. 435 U.S. 78 (1978).

68. *Id.* at 90. In *Horowitz*, the Court was faced with a situation where a medical student in her final year was dismissed from the school because of an unsatisfactory academic performance. Without deciding the issue of the existence of a liberty or property interest, the

ating between the failure of a student to meet academic standards and the alleged violation by a student of valid rules of conduct, the majority concluded that:

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement. . . . Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.[69]

The *Horowitz* Court distinguished *Goss*, which involved a disciplinary proceeding, by finding that when disputable conduct was implicated, a hearing would "provide a meaningful hedge against erroneous action."[70] Such a hearing, however, would not accomplish the same objective in an academic dismissal.[71] The Court stated that academic judgments are more subjective and evaluative than the typical factual questions presented in average disciplinary proceedings,[72] thus justifying the differing degrees of procedural due process warranted in academic versus disciplinary suspensions.

Justice Marshall, in his separate opinion, criticized the majority's finding in *Horowitz* that an academic dismissal warrants a lesser due process standard than that required in *Goss*.[73] Justice Marshall determined that the dismissal, though characterized as "academic" by the majority, was in fact conduct-related, as was the infraction in *Goss*,[74] and concluded that in cases concerning dismissal, a "reliance on labels should not be a substitute for sensitive consideration of the procedures required by due process."[75]

The Supreme Court recently reinforced its position of deference to college or university administrators when academic dismissals are at issue. In *Regents of the University of Michigan v. Ewing*,[76] Justice Stevens, writing for a unanimous Court, stated that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judg-

---

Court found that the student had been awarded at least as much due process as the fourteenth amendment required since she had been fully informed of the faculty's dissatisfaction with her clinical progress and since the ultimate decision to dismiss the student was careful and deliberate.

69. *Id.* at 89-90.

70. *Id.* at 89 (quoting Goss v. Lopez, 419 U.S. 565, 583 (1975)).

71. *Id.* at 89-90.

72. *Id.* at 90.

73. *Id.* at 98-103 (Marshall, J., concurring in part and dissenting in part).

74. *Id.* at 99. Justice Marshall stated that the reasons given for the student's dismissal in *Horowitz* — personal hygiene and peer and patient relationships — were not at all academic. *Id.* at 104 n.17.

75. *Id* at 106.

76. 106 S. Ct. 507 (1985); *see also High Court Upholds Dismissal of Medical Student*, N.Y. Times, Dec. 13, 1985, at 15, col. 4.

ment."[77] Justice Stevens stated that the courts were ill-equipped to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.' "[78]

In *Ewing*, however, the Court left open the possibility that a student who could prove that he was arbitrarily dismissed from a state university, albeit for academic reasons, might prevail in a suit seeking redress for a violation of his constitutional rights. The Court said that such a suit would succeed only if the dismissal was "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment."[79] Justice Powell, in a concurring opinion, restated Justice Marshall's admonition of the *Horowitz* majority that judicial review of academic decisions "is rarely appropriate, particularly where orderly administrative procedures are followed."[80]

The kind of due process that will be required and the willingness of the courts to afford judicial review, therefore, depends upon whether the student infraction at issue is categorized as either academic or disciplinary. A student's violation of a school's honor code poses a special problem since honor code violations often involve allegations of cheating.[81] Cheating is an offense that the courts have not characterized neatly as either "academic" or "disciplinary."

While the courts for the most part have not reached the issue of whether to classify cheating offenses as academic or disciplinary in nature, in *Jaksa v. Regents of the University of Michigan*,[82] the United States District Court for the District of Michigan determined that cheating should be treated as a disciplinary matter.[83] The *Jaksa* court held that dismissals for cheating were similar to disciplinary dismissals in that both categories primarily involved the resolution of factual disputes as opposed to academic dismissals which generally concern "a judgment [that] is by its nature more subjective and evaluative."[84] The court reasoned that dismissal for cheating "requires greater procedural protection than academic dismissals since the former are more stigmatizing than the latter, and may have a greater impact on a student's future."[85] While this point is arguable, student dismissals for cheating, if classified

77. 106 S. Ct. at 513; *see also Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring).

78. 106 S. Ct. at 514 (quoting *Horowitz*, 435 U.S. at 89-90).

79. *Id.*

80. *Id.* at 516 (Powell, J., concurring).

81. *See, e.g.*, Henson v. Honor Comm., 719 F.2d 69 (4th Cir. 1983); Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413 (D.N.J. 1985); Bleicker v. Board of Trustees, 485 F. Supp. 1381 (S.D. Ohio 1980).

82. 597 F. Supp. 1245 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (1986).

83. *Id* at 1248 n.2. *But see* Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984)(cheating on an exam considered "clearly an academic matter" by university).

84. *Jaksa*, 597 F. Supp. at 1248 n.2 (quoting Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978)).

85. *Id.*

as academic, will not require even an informal hearing based upon the Supreme Court's holding in *Horowitz*. Thus, if the courts wish to require private colleges and universities to create honor codes that establish specific rules and fair procedures, then honor code violations involving cheating must be considered disciplinary rather than academic in order to satisfy the mandates of *Horowitz* and *Ewing*.

The majority of cases concerning honor code proceedings at both private and public colleges and universities *implicitly* recognize cheating as a disciplinary offense, and thus, unlike an academic offense, one that is subject to judicial scrutiny.[86] While the courts generally have not discussed the reasons for designating cheating as a disciplinary infraction,[87] the courts seem to look to the nature of the hearing and punishment involved in order to determine the nature of the violation at issue. For example, in *Clayton v. Trustees of Princeton University*,[88] the United States District Court of New Jersey stated that "Princeton justifiably views cheating as a serious offense against the standards of its academic community which is worthy of *serious punishment*."[89] The court held that if a material breach of Princeton's disciplinary procedures could be shown, then relief would be granted to Robert Clayton, the Princeton student who brought action against the University for alleged improprieties in the disciplinary proceedings that led to his suspension. The *Clayton* court concluded that because "the value of [a Princeton University] degree is impaired by the presence of a notation of *disciplinary suspension* on the academic transcript",[90] the student's interest was substantial enough to warrant judicial review of Princeton's honor code procedures.

In general, then, the courts seemingly do not inspect the inherent nature of the infraction in question, but rather, prefer to examine the underlying purposes of the college or university proceeding that is at issue. If the purposes of the proceeding are to determine whether or not a student violated an institution's honor code, and then to discipline the student for this infraction, the courts will treat the violation as disciplinary in nature, and therefore, subject to judicial review.

IV. The Application of Due Process Protections to Honor Code Regulations and Proceedings

Once it is determined that the fourteenth amendment's due process protections apply to private university honor code infractions, a court

86. *See* Board of Curators v. Horowitz, 435 U.S. 78 (1978); Hall v. Medical College of Ohio, 742 F.2d 299, 308 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 796 (1985); *see also* Jones v. Board of Governors of Univ. of N.C., 704 F.2d 713 (4th Cir.)(specifies process due), *aff'g*, 557 F. Supp. 263 (W.D.N.C. 1983); Nash v. Auburn Univ., 621 F. Supp. 948 (M.D. Ala. 1985)(discusses procedural due process requirements in disciplinary cases); Clayton v. Trustees of Princeton Univ., 519 F. Supp. 802 (D.N.J. 1981)(discusses role of court in disciplinary proceedings).

87. *But see Jaksa*, 597 F. Supp. at 1248 n.2.

88. 519 F. Supp. 802 (D.N.J. 1981).

89. *Id.* at 805 (emphasis added).

90. *Id.* (emphasis added).

then must decide how to adapt the fourteenth amendment's due process strictures to the regulations and proceedings of a school's honor code. As the Supreme Court stated in *Morrissey v. Brewer*,[91] "[o]nce it is determined that due process applies, the question remains what process is due."[92] Over thirty years ago, Justice Frankfurter discussed the ideal of due process in terms still applicable today:[93]

> '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . '[D]ue process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[94]

As Justice Frankfurter clearly states, the due process required by the Constitution is only that process which is "due" in light of the circumstances and interests of the parties involved. The fundamental requirements of procedural due process are merely "notice and an opportunity for hearing appropriate to the nature of the case."[95] The concept of due process does not require that every dispute between a student and a university be resolved in the same manner or follow the judicial model.[96] Rather, due process allows for many different methods of dispute resolution as long as the method used provides reasonable notice and a fair hearing.[97]

The Supreme Court has articulated three factors for consideration in determining what process is due in a particular setting: 1) the "private interest that will be affected by the official action;" 2) the risk of "erroneous deprivation" of that interest by procedures currently in force, weighed against the value of "additional or substitute procedural safeguards;" and 3) the "Government's interest," including the function involved and the financial and administrative constraints that additional or

---

91. 408 U.S. 471 (1972).

92. *Id.* at 481.

93. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)(Frankfurter, J., concurring).

94. *Id.* at 162-63; *see also* Goss v. Lopez, 419 U.S. 565 (1975).

95. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950), *quoted in Goss*, 419 U.S. at 579; *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)(time and nature of hearing depend on appropriate accommodation of competing interests); Mackey v. Montrym, 443 U.S. 1 (1979)(Stewart, J., dissenting)(dimension of prior hearing varies with nature of case); Goldberg v. Kelly, 397 U.S. 254 (1970)(due process "must be tailored to the capacities and circumstances" of the parties involved).

96. *Goss*, 419 U.S. at 578 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

97. Matthews v. Eldridge, 424 U.S. 319, 348-49 (1976).

substitute procedures would create.[98] The Supreme Court also has recognized that the due process requirements of the fourteenth amendment may be satisfied by something less than a trial-like proceeding.[99]

In *Goss v. Lopez*[100] for example, the Court held that in order to suspend a high school student for ten days, he must be "given an opportunity to explain his version of the facts . . . [after being] told what he is accused of doing and what the basis of the accusation is."[101] The Court, however, made it clear that its holding was limited to short suspensions, and that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[102] As to the formality of the requisite hearing, the Court declared that:

> The presence of attorneys or the imposition of rigid rules of cross-examination at a hearing for a student . . . would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration. But an 'informal give-and-take' between the student and the administrative body dismissing him — and foreclosing his opportunity to gain admission at all comparable institutions — would not unduly burden the educational process and would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'[103]

The recommendations as to what kind of notice and hearing is required under the due process guarantees of the fourteenth amendment were more explicitly set forth in the famous case of *Dixon v. Alabama State Board of Education*.[104] In *Dixon*, students were expelled from Alabama State College for disciplinary reasons.[105] After holding that due process requires a state university to give its students notice and the opportunity to be heard,[106] the United States Court of Appeals for the Fifth Circuit articulated standards for the nature of the requisite notice and hearing. The court said that a notice should "contain a statement of the specific charges and grounds which, if proven, would justify expulsion."[107] In discussing the hearing requirement, the court emphasized that the facts and circumstances surrounding each case were to be considered in determining the elements required in a hearing. When misconduct rather than academic failure is the subject of the hearing, the court said that "something more than an informal interview with an administrative au-

98. *Id.* at 334-35.

99. *See* Goss v. Lopez, 419 U.S. 565, 582-84 (1975); Henson v. Honor Comm., 719 F.2d 69, 74 (4th Cir. 1983).

100. 419 U.S. 565 (1975).

101. *Id.* at 582.

102. *Id.* at 584.

103. *Id., quoted in* Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975).

104. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *see supra* note 20 and accompanying text.

105. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 152 n.3 (5th Cir.), *cert. denied.*, 368 U.S. 930 (1961). Plaintiffs, who were black, were expelled from Alabama State College, because they requested service at a white lunch counter in violation of Alabama law, and they participated in several mass demonstrations.

106. *Dixon*, 294 F.2d at 158.

107. *Id.*

thority" is required, due to the possible bias of witnesses and the factual nature of the injury.[108] Although a "full-dress judicial hearing" is not always required and may not be desirable, the court stated that a hearing which allows the college authorities a chance to hear "both sides in considerable detail" would protect the rights of the individuals concerned. The *Dixon* court further stated that "the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college."[109]

While courts, in applying due process protections to honor code proceedings, will require adequate notice and a hearing prior to student dismissal, they remain split on the issue of the right to representation in student disciplinary proceedings.[110] In *Henson v. Honor Committee of the University of Virginia*,[111] the United States Court of Appeals for the Fourth Circuit noted that the right to have a student lawyer represent an accused student at all critical stages of the honor code proceedings was among the "impressive array of procedural protections" that a university could afford its students.[112] Although other cases have held to the contrary,[113] to allow a student accused of cheating the benefit of counsel in formal honor code proceedings would not only offer the student protection, but it would also protect the school from lawsuits contesting the outcome of each case on the ground that the particular honor code hearing in question was fundamentally unfair, and therefore, in violation of the fourteenth amendment. As Justice Jackson warned:

> Procedural fairness and regularity are of the indispensable essence of liberty. . . . Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance . . . against those blunders which leave lasting stains on a system of justice . . . . The most scrupulous observance of due process include[s] the right to know a charge, to be confronted with the accuser, to cross-examine informers and to

108. *Id.*

109. *Id.* at 158-59; *see also* Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir.) (due process satisfied where there "was an adequate hearing on the charge with a meaningful opportunity given to plaintiff to participate, to present his position, and to hear the witnesses presenting the facts they had knowledge of"), *cert. denied*, 423 U.S. 898 (1975); Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970)("[P]rocedural due process must be afforded a student on the college campus 'by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures.' " (quoting Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969))), *cert. denied*, 398 U.S. 965 (1970).

110. *See, e.g.*, Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972)(due process clause requires representation by counsel at suspension hearings); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967)(due process clause allows for representation by counsel at a suspension hearing), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). *But see* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967)(no right to counsel at conference relating to the suspension of a student), *cert. denied*, 390 U.S. 1028 (1968); Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977)(due process does not require the presence of an attorney at a formal hearing on disciplinary transfers).

111. 719 F.2d 69 (4th Cir. 1983).

112. *Id.* at 73.

113. *See* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Everett v. Marcase, 426 F. Supp 397 (E.D. Pa. 1977).

produce evidence in one's behalf . . . .[114]

A student accused of violating a school's honor code should be allowed to have a spokesman represent him in honor code proceedings. While representation at honor code hearings protects both the student and the university, it has not been held mandatory to satisfy due process goals of fundamental fairness.

V. CONCLUSION

The Supreme Court and various lower courts have provided a variety of legal theories and precedents upon which the judiciary can find private colleges and universities subject to the due process strictures of the fourteenth amendment. In the past, the courts were loathe to enter the domain of academia, preferring instead to defer to academicians and school administrators in both academic and disciplinary cases. With the expanding application of the fourteenth amendment to private enterprises and institutions, the courts began providing a necessary check on the disciplinary proceedings of private colleges and universities. At the insistence of the Supreme Court, however, the lower courts have continued to defer to the judgments of the schools in cases of academic dismissals.

Given, then, the growing willingness of the courts to hold private institutions accountable to the fourteenth amendment's due process requirement and the courts' increased willingness to review the disciplinary proceedings and judgments of colleges and universities, it seems logical that the honor code judgments and proceedings of private colleges and universities will fall within the purview of the courts. Students, subject to the power of one of these institutions, ask no more than fair treatment and a right to due process in honor code proceedings for alleged disciplinary violations. The requisite amount of due process should include adequate notice and an opportunity for a reasonable hearing prior to a student's dismissal. Although it is not mandatory for the proper execution of the due process ideal, it is preferable to accord students the right to representation in honor code proceedings. In effect, then, the application of the due process standards of the fourteenth amendment to the honor code proceedings of private colleges and universities would do no more than apply the spirit of the Constitution to institutions that most directly affect the lives of students. Thus, from a student's perspective, this goal seems nothing less than reasonable.

114. Shaugnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224-25 (1953).