PROCEDURAL DUE PROCESS AND STATE UNIVERSITY STUDENTS

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Recent events have made most of us aware that American college students today are experimenting with forms of social expression previously unknown on our campuses.[1] Sit-in demonstrations, which originated with groups of college students,[2] are but a dramatic illustration of a wider trend in student activities which affects the larger community as well as the university community itself. In combination with rapidly increasing college enrollments,[3] this enlivened political awareness among college students is severely testing the ability of college administrators to maintain discipline without unnecessarily infringing upon student prerogatives.

The resulting problem—to treat students fairly without jeopardizing legitimate college interests—has itself attracted renewed attention lately.[4] Judging from the autocratic fashion in which many students are disciplined for alleged offenses, however, more attention, or attention of a different kind is needed. Many students who may be expelled from college and barred from their chosen profession frequently receive less protection today than does the most petty offender on trial in a state court. Responses from seventy-two

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1 See, *e.g.*, N.Y. Times, May 14, 1962, p. 1, col. 3; *id.* at p. 32, col. 3; *id.* May 15, 1962, p. 43, col. 1.

2 See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 317. See generally PRICE, TOWARD A SOLUTION OF THE SIT-IN CONTROVERSY (Special Report by the Southern Regional Council 1960). These demonstrations have raised grave constitutional questions not only with respect to general civil authority (see, *e.g.*, cases granted certiorari at 30 U.S.L. WEEK 3393-94 (1962)), but with respect to college disciplinary authority as well. See Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

3 In the four years between 1956 and 1960, university enrollment increased from 2,883,000 to 3,570,000. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, *Population Characteristics*, Series P-20, No. 110, at 12, July 24, 1961 and No. 115, at 2, Feb. 7, 1962.

4 See, *e.g.*, BLACKWELL, COLLEGE LAW 104-31 (1961); BAKKEN, THE LEGAL BASIS FOR COLLEGE STUDENT PERSONNEL WORK 31-35 (Student Personnel Series No. 2, 1961); AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES (1961), in 48 AAUP BULL. 110 (1962); UNITED STATES NAT'L STUDENT ASS'N, CODIFICATION OF POLICY 85 (1961); Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Comment, 10 STAN. L. REV. 746 (1958); 14 ALA. L. REV. 126 (1961); Annot., 58 A.L.R.2d 903 (1958).

state universities reporting on their own disciplinary procedures acknowledge the following departures from what is ordinarily provided even for petty criminal offenders:[5]

1. Forty-three per cent do not provide students with a reasonably clear and specific list which describes misconduct subject to discipline;
2. Fifty-three per cent do not provide students with a written statement specifying the nature of the particular misconduct charged, and only seventeen per cent provide such a statement at least ten days before the determination of guilt or imposition of punishment;
3. Sixteen per cent do not even provide for a hearing in cases where the student takes exception to the charge of misconduct or to the penalty proposed;
4. Forty-seven per cent allow students or administrators who appear as witnesses or who bring the charge, to sit on the hearing board if they are otherwise a member;
5. Thirty per cent do not allow the student charged to be accompanied by an adviser of his choice during the hearing;
6. Twenty-six per cent do not permit the student charged to question informants or witnesses whose statements may be considered by the hearing board in determining guilt; and even including those colleges which normally allow some cross-examination, eighty-five per cent permit the hearing board to consider statements by witnesses not available for cross-examination;
7. Forty-seven per cent permit the hearing board to consider evidence which was "improperly" acquired (*e.g.*, removed by a university employee during a search of a student's room in the absence of some emergency justifying such a procedure).

While the situation is brighter in some regards (ninety per cent provide for some type of appeal, typically to the dean of students or to the university president), it is obviously a far cry from what normally obtains in a court of law, and would seem to warrant some explanation. The purpose of this article is to explore the reasons commonly offered for these abbreviated procedures in the colleges, in light of the emerging demands of the fourteenth amendment, and to propose a procedure which may reconcile the need for administra-

[5] The survey was conducted by the author through mailing questionnaires to the Dean of Students of each participating college or university.

tive efficiency with a competing need for more decent treatment of students.

Traditional explanations marshalled in support of summary university procedures are not without interest, especially as they have received substantial endorsement by a number of state courts. Some of the more recurrent explanations will be briefly summarized.

It has been urged that the college stands in the position of a parent to its children, and in the exercise of parental responsibility for all its students, the college should not have its discretion circumscribed by formal procedures. Thus, it is no more logical that a student disciplinary incident be pervaded with the trappings of due process (*e.g.*, a written statement of charges, a formal hearing, access to legal counsel and an independent arbiter), than that the home should be similarly invaded when a parent disciplines an obstreperous child.[6]

Another explanation frequently advanced is that college matriculation is a privilege, rather than a right. Since enrollment is extended solely at the pleasure and sufferance of the college, it may be withdrawn upon whatever conditions the college shall decide in its uncontrolled discretion to be sufficient. A classic statement of this rationale for denying due process was involved in university regulations relied upon in *Anthony v. Syracuse University*:[7]

> Attendance at the University is a privilege and not a right. In order to safeguard its scholarship and its moral atmosphere, the University reserves the right to request the withdrawal of any student whose presence is deemed detrimental. Specific charges may or may not accompany a request for withdrawal.[8]

Encouragement for including such a waiver of rights which might otherwise attach to the relationship between the university and the student, may be found in the judicial tendency to describe the relationship as purely contractual.[9]

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[6] "As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family." Stetson Univ. v. Hunt, 88 Fla. 510, 516, 102 So. 637, 640 (1925). See also Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1914).

[7] 224 App. Div. 487, 231 N.Y. Supp. 435 (1928).

[8] *Id.* at 489, 231 N.Y. Supp. at 438.

[9] "The relation between a student and an institution of learning . . . is solely contractual in character and there is an implied condition that the student knows and will conform to the rules and regulations of the institution, and for breach of which he may be suspended or expelled." Stetson Univ. v. Hunt, 88 Fla. 510, 517, 102 So. 637, 640 (1925). See also Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1914); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121,

It has been said that the maintenance of procedural due process for student offenders is substantially unnecessary. This proposition is supported by figures on student offenders obtained from universities responding to the author's survey. These figures indicate that less than ten per cent of the students deny the misconduct with which they are charged, or take exception to the discipline imposed.[10]

A perhaps related argument is that providing procedural due process for student offenders would be an economic extravagance. To require that students receive written notice of specific charges, that a hearing board be convened in every case, that counsel be admitted to the proceedings, that a transcript be made for purposes of judicial review, that witnesses be subpoenaed and that improperly seized evidence be excluded, would necessitate an unbearable increase in administrative personnel trained in legal skills which, together with the loss of time involved, would seriously injure all but the wealthiest institutions.[11]

Finally, it has been contended that procedural due process as it is observed in the courts cannot be imposed upon colleges and universities as a practical matter, since they lack the necessary authority to discharge such a responsibility. The favorite illustration of this argument involves the right of cross-examination, commonly accorded the accused in criminal proceedings and extolled by Professor Wigmore as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[12] But even this fundamental of due process assumes that there is someone present to be cross-examined. Thus, where students are reluctant to volunteer at

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122 Atl. 220 (1923). The technique of denying basic procedural safeguards by requiring a waiver as a condition of admission assumes that the courts will sustain such an arrangement even though it arises from a contract of adhesion where the bargaining power is grossly unequal, and that it will not be regarded as an unconstitutional condition. The latter is doubtful, at least with respect to state universities. See Shelton v. Tucker, 364 U.S. 479 (1960); Slochower v. Board of Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952); United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947). See also Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[10] By way of further illustration, Executive Dean B. J. Borreson of the University of Maryland writes: "I would like to state that in 15 years of experience in handling disciplinary work at the collegiate level I have experienced only two instances where students denied their involvement in a particular act." Letter to the author, April 9, 1962.

[11] Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144, 11 Ohio C.C. Dec. 515 (1901). "It has been found impracticable in colleges, and not for the best good of the pupils themselves, to lay down a large number of rules and attach to the violation of each one a penalty. . . . And the necessity of such cases would seem to forbid that every time that a pupil is to be disciplined, the trustees should be called together and go through all the formalities of a trial in court to determine whether the party is guilty and what penalty shall be inflicted upon him for his wrong-doing." *Id.* at 155, 11 Ohio C.C. Dec. at 522.

[12] 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

hearings, as is often the case, their presence may depend upon some power of the college to compel their attendance. Allegedly, however, their attendance cannot be required and thus a university cannot be expected to accord ordinary due process:

> It certainly cannot be maintained that it [a student disciplinary proceeding] means a hearing like that which constitutes the trial of a chancery suit, or like the examination of one who is charged with the commission of an offense against the law, for there is no power vested in the president of the university to compel the attendance of witnesses or to force them to testify if they were in attendance. . . . .
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> To hold that the power of suspension could only be exercised after a hearing had been held such as is indicated . . . would be to hold that the power was practically ineffective, except where witnesses voluntarily attended and testified. Such a rule would be destructive of the power vested in the president.[13]

A similar reaction to the ACLU proposal for more due process in matters affecting student discipline[14] has recently been expressed by the Executive Dean of the University of Maryland.[15]

The practice and argumentation of many universities hardly offer encouragement, therefore, to those who would hope for internally generated changes toward more substantial safeguards in determining the guilt and treatment of student offenders. They thus raise the question whether recourse to the courts would be any more rewarding.

Yet, if recent surveys are reliable, it would appear that the law will generally require only the barest semblance of procedural due process even when a student is dealt with in a manner which may substantially affect his educational opportunities, his means of earning a livelihood and his community reputation. Encyclopedic treatises suggest only that some sort of hearing may be required, but as to the type of hearing, the conclusions unhelpfully suggest

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[13] State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 213, 215-16, 263 Pac. 433, 436, 437, *cert. denied*, 277 U.S. 591 (1927), *appeal dismissed*, 278 U.S. 661 (1928). See also People *ex rel.* Bluett v. Board of Trustees of the Univ., 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956), commented on by Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Morrison v. City of Lawrence, 186 Mass. 456, 459-60, 72 N.E. 91, 92-93 (1904).

[14] AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES (1961), in 48 AAUP BULL. 110 (1962).

[15] "What they propose is unrealistic on the very grounds they are taking their stand. They propose a judicial due process, yet ignore the fact that in most universities testimony is not taken under oath, the institution has no power to compel witnesses to appear, there is no power to compel witnesses to testify if they desire not to, and most institutions have no resources with which to determine the presence of perjury except under the most extreme and obvious circumstances." Letter from Executive Dean B. J. Borreson, University of Maryland, to the author, April 9, 1962.

that "the authorities are not in agreement,"[16] that "the courts will be slow to disturb [college] decision[s] as to dismissal of a student,"[17] and that "where the regulations of a privately conducted college receiving no state aid reserve the right to exclude any student regarded as undesirable, the college is not required to prove charges and hold a trial before dismissal of a student whom it regards as undesirable."[18] Indeed, in some respects we appear to have retrogressed. The 1917 edition of *Corpus Juris* stated that a college could not dismiss a student "except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence."[19] But the 1939 edition added for the first time that "this doctrine has been disapproved by other authority"[20] and the 1962 Supplement properly acknowledges three cases decided in the intervening years which take the latter view,[21] and notes that one of but two cases supporting the former view was reversed on appeal![22]

The cases discussed thus far, however, all arose in state courts which made little effort to distinguish between private and state universities. Indeed, only one of the cases specifically referred to the fourteenth amendment or to its explicit admonition that "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ," and even that case failed to elaborate on the point.[23] The oversight is pardonable, perhaps, in that

[16] 55 AM. JUR. *Universities and Colleges* § 22 (Supp. 1962).

[17] 14 C.J.S. *Colleges and Universities* § 26 (1939).

[18] *Ibid.*

[19] 11 C.J. *Colleges and Universities* § 31 (1917).

[20] 14 C.J.S. *Colleges and Universities* § 26 (1939).

[21] 14 C.J.S. (Supp. 1962, at 197 n.71), citing Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); People *ex rel.* Bluett v. Board of Trustees of the Univ., 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, *cert. denied*, 319 U.S. 748 (1942). The *Dehaan* case is reviewed critically in 10 STAN. L. REV. 746 (1958), and the *Sherman* case is reviewed rather inadequately in 18 TENN. L. REV. 210 (1944).

[22] 14 C.J.S. (Supp. 1962, at 197 n.70). The case reference is to Anthony v. Syracuse Univ., 130 Misc. 249, 223 N.Y. Supp. 796, *rev'd*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928). This would appear to leave only Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887) intact, although this is not entirely the case. See note 27 *infra*.

[23] State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 111, 171 S.W.2d 822, 827, *cert. denied*, 319 U.S. 748 (1942). The annotation at 58 A.L.R.2d 903, 905 (1958), stating that "the applicability of the due process clause was denied," is misleading, however, as the Tennessee court refused to find fault under the due process clause only after it had determined that under the circumstances the university had "rightfully" exercised its authority. Since the plaintiffs in that case were found to have been given written notice of the charge of misconduct, an opportunity to be heard, the substance of testimony given against them, and representation by counsel, the case is equally consistent with the proposition that the due process clause requires no more than this, rather than that it was simply inapplicable to the type of interest asserted by the student.

the application of the due process clause in this context historically would have been something of a novelty. But one would suppose that when, in 1948, Congress extended the jurisdiction of the federal district courts to cases involving certain federal questions regardless of the amount in controversy,[24] an increasing number of these cases would have found their way into the federal courts to litigate a due process claim.

Yet, a recently published treatment of college law[25] noted only one such case before a federal district court. The case was dismissed for want of jurisdiction, and the dismissal was affirmed on appeal.[26] Since the United States Supreme Court has never considered a case raising a due process claim in the matter of student discipline at a state university, it might logically appear that the arguments for a free hand by university administrators, having been accepted in the state courts, reflect the current condition of the law.[27]

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[24] 28 U.S.C. § 1343 (1958): "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." Previously, such cases could be brought under 28 U.S.C. § 1331 (1958), but the requirement that the matter in controversy had to exceed $3,000 (increased in 1958 to $10,000, 72 Stat. 415 (1958)) was discouraging, since such damage was difficult to prove and ordinarily the student preferred reinstatement to damages. Such a case was brought, however, under 28 U.S.C. § 1332 (1958) which requires the same amount in controversy plus diversity of citizenship (Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957)), and the jurisdictional amount requirement under § 1331 has been held to be satisfied in civil rights cases where the monetary value of the interest being asserted was really no more ascertainable than in the student due process situation. See 28 U.S.C.A. § 1331 n.217 (1949).

For an explanation of why § 1343(3) was not used successfully in a university due process case prior to 1961, see discussion, note 34 *infra*.

[25] BLACKWELL, COLLEGE LAW 127 (1961).

[26] Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959). Two of the three circuit judges expressly disapproved the lower court's holding on the jurisdictional issue. In addition to the *Dehaan* case, *supra* note 24, an action against a university on due process grounds was also unsuccessfully attempted in Cranney v. Trustees of Boston Univ., 139 F. Supp. 130 (D. Mass. 1956), under 28 U.S.C. § 1343(3) (1958) and REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958) (although the case did not involve dismissal of a student).

[27] The fact remains, however, that there are but two cases involving state universities in which procedural due process is deprecated and the right to a hearing reduced to a meaningless exercise. People *ex rel.* Bluett v. Board of Trustees of the Univ., 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433, *cert. denied*, 277 U.S. 591 (1927), *appeal dismissed*, 278 U.S. 661 (1928). Significantly, in neither of these cases was a claim based specifically on the fourteenth amendment considered. Other cases, commonly cited in support of the college's unbridled disciplinary prerogative, are distinguishable in that they concern private colleges not subject to the fourteenth amendment, or, in the case of public secondary schools, they involve discipline not likely to bar the student from other schools or future professional endeavor. Several of the cases are simply beside the point, and in virtually all of these cases no discussion is given to constitutional considerations. See, *e.g.*, Steier v. New York State Educ. Comm'r, 271

Despite the apparent approval of the courts and the several explanations offered by the universities, there is reason to be uneasy in this matter. Consider again, for instance, the old mainstay of administrative autocracy based on the theory of in loco parentis. Is the relationship of a modern, large American university and its student body really akin to that of a parent and its child? In certain significant respects, it would not seem so at all.

In terms of the power exercised, the university asserts that it is not obliged to observe more than a bare semblance of due process before suspending or expelling a student with the probable consequence of cutting off any further educational opportunities and admission to a profession of his choice, and stigmatizing him in the community.[28] The power of parents is more restricted. With respect to young children, parents may not "lawfully suspend" or "expel" them from the home, and indeed, for a parent to attempt to throw his child out could well result in criminal prosecution of the parent by the state. Similarly, while family circumstances certainly affect a child's opportunity for a college education and his prospects in a chosen profession, it surely would not be held that a parent's authority extends to preventing a child from matriculating in a university or to stopping him from entering a given profession. Yet, by means of interuniversity agreements and self-imposed profes-

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F.2d 13 (2d Cir. 1949); Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1925); Smith v. Board of Educ., 182 Ill. App. 342 (1913); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1914); Woods v. Simpson, 146 Md. 547, 126 Atl. 882 (1924); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); Vermillion v. State *ex rel.* Englehardt, 78 Neb. 107, 110 N.W. 736 (1907); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (1928); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923); Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932).

On the other hand, one case may fairly be cited as requiring procedural guarantees at least as high as what is urged in text accompanying note 59 *infra*, although here, too, the rationale was strictly in terms of local law requirements and without reference to constitutional considerations. Hill v. McCauley, 3 Pa. County Ct. 77 (1887). See also Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904). For other cases generally supporting some due process requirements, see McClintock v. Lake Forest Univ., 222 Ill. App. 468 (1921); Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913); Morrison v. City of Lawrence, 186 Mass. 456, 72 N.E. 91 (1904); Bishop v. Inhabitants of Rowley, 165 Mass. 460, 43 N.E. 191 (1896); Gleason v. University of Minn., 104 Minn. 359, 116 N.W. 650 (1908); Goldstein v. New York Univ., 76 App. Div. 80, 78 N.Y. Supp. 739 (1902); People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 60 Hun 107, 14 N.Y. Supp. 490, *aff'd mem.*, 128 N.Y. 621, 28 N.E. 253 (1891); Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144, 11 Ohio C.C. Dec. 515 (1901); Geiger v. Milford School Dist., 51 Pa. D. & C. 647 (Ct. C.P. 1944); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943).

[28] As Professor Seavey points out, a law student who is dropped for alleged cheating on examinations will find admission to another law school extremely difficult, and in many jurisdictions admission to the bar impossible. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

sional "standards," the unilateral decision of a college to dismiss a student for cheating, promiscuity or some act of rowdyism, carries with it the power to cut the student off from other schools and many professions as well. Thus, the analogy between the home and the university fails in terms of the impact of the disciplinary decision.

The prerogative of parents to deal summarily with their own children is partly justified in that the intimate and recurring contacts within the family circle render it utterly infeasible to require that every disciplinary episode, from toilet training through table manners, be accompanied by formalized procedures. The legitimate interest of a university in the conduct of its students is not so detailed, constant or intimate. The infrequency of serious student misconduct makes it more feasible to provide for regularized procedures at college than at home, and the presence of such a procedure would not tend to induce the same insubordination in college-age young adults as in minor children at home.

The common assertion that the university's extraordinary power is one entrusted to it by parents of its students is utterly unsubstantiated and probably untrue. Certainly it is difficult to imagine that parents either demand or could reasonably expect that metropolitan state universities with their large student bodies of 10,000, 20,000 and more, the majority of whom reside off-campus, should stand in the place of the parents and closely supervise their "children." Even were the assertion correct, however, and the notion of in loco parentis made to rest on the presumed desire of the parents and a literal delegation of their authority, it is a safe conjecture that the same parents would not want their children expelled or suspended without a full measure of due process in the decision-making routine of the university.

Similarly, the proposition that summary discipline by a university is justified because it is dealing with "legal infants," whose collective welfare must be safeguarded by keeping them free of contamination by undesirable elements, simply will not wash. Virtually all entering university students today are at least eighteen[29] (itself the age of "legal" adulthood for many purposes), and the average age of all students including graduate students—who are

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[29] As of October, 1960, there were more students enrolled in universities who were from thirty to thirty-five than those under eighteen; the under-eighteen group itself comprised less than 7% of college enrollment. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, *Population Characteristics*, Series P-20, No. 110, at 12, July 24, 1961.

[30] *Ibid.* The median age is slightly less than twenty, but it is significant that over one million university students are more than twenty-two years old and that apparently they are regarded as much the "children" of the universities for disciplinary procedural purposes as their teenage colleagues.

ordinarily accorded no more due process than are undergraduates—is above twenty-two.[30] By way of comparison, young men volunteering for military service are certainly no older than their college counterparts, and the demand for discipline in the military is far greater than on a university campus; but here the Uniform Code of Military Justice guarantees due process far beyond what is currently observed in most universities!

In view of this, is there really any warrant for the usual rationale for in loco parentis as offered in the following statement?

> In administering disciplinary action, the college or university is not bound by the general principles of justice found in our courts. The college is in a position where it is responsible for the welfare of a large number of students, most of them legally infants. The college, therefore, cannot afford to take a chance on a questionable character, as he may corrupt the balance of the students.[31]

In stating that the college "cannot afford to take a chance," the writer evidently meant that the college cannot afford to observe "general principles of justice" in determining whether a student in fact committed an alleged offense, and what penalty, if any, might be appropriate, for fear that some actual offenders—as in "real" life—may go free if such procedures are scrupulously observed. Is there really anything so special about a university, however, that we should increase the odds that the innocent will be convicted so as to decrease the odds that the guilty will go unpunished? Or is Professor Seavey correct in exclaiming:

> At this time . . . when we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play.[32]

Finally, whatever may have been the basis for in loco parentis historically, may it not long since have passed away? Professor Henry Steele Commager believes that it has:

> [In loco parentis] was transferred from Cambridge to America, and caught on here even more strongly for very elementary reasons: College students were, for the most part, very young. A great many boys went up to college in the colonial era at the age of 13, 14, 15. They were, for most practical purposes, what our high school young-

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31 BAKKEN, THE LEGAL BASIS FOR COLLEGE STUDENT PERSONNEL WORK 34 (Student Personnel Series No. 2, 1961).

32 Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957).

> sters are now. They did need taking care of, and the tutors were in loco parentis. This habit was re-enforced with the coming of education for girls and of co-education. Ours was not a class society. There was no common body of tradition and habit, connected with membership in an aristocracy or an upper class, which would provide some assurance of conduct.
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> All of this now is changed. Students are 18 when they come up, and we have a long tradition with co-education from high school on. Students marry at 18 and 19 now and have families. Furthermore, we have adjusted to the classless society and know our way about. Therefore the old tradition of in loco parentis is largely irrelevant.[33]

Recent developments in the federal courts[34] give legal force to these reinvigorated arguments that students are entitled to greater safeguards during serious disciplinary proceedings. These developments are of the greatest significance, since they mark the first application of fourteenth amendment procedural due process to state colleges and, specifically, to the manner in which they discipline their students. In *Dixon v. Alabama State Bd. of Educ.*,[35] a number of students were expelled from a state college presumably because they had participated in an off-campus sit-in demonstration. None of the students was provided with notice or a hearing concerning his misconduct, and thus the issue before the lower court was technically quite narrow, *i.e.*, were the bare rudiments of procedural due process required of the college. The district court dismissed the

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[33] Letter to the author, May 5, 1962.

[34] The developments began indirectly with Monroe v. Pape, 365 U.S. 167 (1961), and require a brief discussion of two federal statutes, 28 U.S.C. § 1343(3) (1958) (noted *supra* note 24), and REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). Section 1343 required that the "civil action" testing a due process claim in the federal courts without reference to an amount in controversy be "authorized by law," *i.e.*, that the cause of action otherwise be described by federal statute. Section 1983 appears to authorize such an action, for it provides: "Every person who, under color of any statute . . . of any State . . . subjects . . . any . . . other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Prior to 1961, however, the federal courts construed § 1983 so as to authorize a cause of action only where the unconstitutional practice was directed against a readily isolated minority group on a systematic basis, *e.g.*, generally widespread police abuse of Negroes. See, *e.g.*, Swanson v. McGuire, 188 F. Supp. 112 (N.D. Ill. 1960), for a brief discussion and reference to cases. Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959), and Cranney v. Trustees of Boston Univ., 139 F. Supp. 130 (D. Mass. 1956), illustrate the reluctance of the federal courts to apply § 1983 to isolated instances of due process claims. See particularly the dissent of Judge Clark in *Steier*, 271 F.2d at 23. In Monroe v. Pape, *supra*, the Supreme Court greatly expanded the application of § 1983 (see Justice Frankfurter's dissenting opinion, 365 U.S. at 202), and the federal courts have since been used to litigate constitutional issues under § 1983 almost commensurate with the breadth of the due process clause itself. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) and Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961) which tested state university due process were both brought under § 1343(3).

[35] 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). See 75 HARV. L. REV. 1429 (1962); 60 MICH. L. REV. 499 (1962).

case,[36] relying substantially on the older cases previously discussed; but the court of appeals reversed the decision, and by dicta extended elements of due process, which must be observed by a state college before a student is expelled, to include the following:

1. Notice, containing a statement of the specific charges and grounds which, if proven, would justify expulsion under the college's regulations;
2. A hearing which must amount to more than an "informal interview" with an administrative authority, and which must preserve at least the "rudiments of an adversary proceeding":
   a. An opportunity for the student to present his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf;
   b. Although cross-examination of witnesses may not be required, as a substitute the defending student "should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies."[37]

One might properly be puzzled as to what became of the several arguments other than in loco parentis which colleges had successfully invoked elsewhere to insulate their decisions from judicial review. They were not ignored, rather, they were properly overborne by the court. To the argument that the students had waived any right to due process by conceding the right of the college summarily to dismiss them as a condition of admission, the court rejoined: "[I]t nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process."[38] In disposing of the argument that the students had no constitutional right to remain since they initially had no constitutional right to be admitted, the court pointed out that such an assertion had been emphatically rejected in analogous situations by the federal courts: "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."[39]

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[36] 186 F. Supp. 945 (M.D. Ala. 1960).

[37] 294 F.2d at 158-59.

[38] *Id.* at 156.

[39] *Ibid.* The court was quoting Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961), which was cited with approval in Local 473, Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961), in dicta rejecting a preliminary argument that federal employment can be terminated without due process because such employment is a privilege rather than a right.

Dixon v. Alabama was not reviewed by the Supreme Court, and it remains to be seen whether it will endure. Currently, there is every indication that it will not only endure, but that it will be substantially expanded. Four months after *Dixon*, another district court had occasion to pass on the fourteenth amendment arguments of students who had been suspended indefinitely without notice or a hearing, once again because they participated in sit-in demonstrations and were arrested for breach of the peace.[40] The court enjoined their suspension, and explicitly referred to the *Dixon* opinion for the type of notice and hearing the college must provide. Since the Supreme Court's recent revitalization of a substantive federal statute which now provides ready access to the federal courts in cases of this nature,[41] we may reasonably expect these tentative beginnings to be explored more seriously by the courts in the coming years.

As preventive law is every bit as desirable as preventive medicine, it may now be useful to spell out the meaning of procedural due process, as the courts are likely to define it, in the context of student discipline. One may search the case reports in vain for some meaningful verbal encapsulation of procedural due process, for the Supreme Court "has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."[42] With a certain pardonable pretentiousness, the Court has suggested that due process of law reflects: "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,"[43] procedures which "have been found to be implicit in the concept of ordered liberty,"[44] and "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[45]

Much more to the point, the Court has indicated that the specific demands of procedural due process will be tested in a given case by a careful weighing and balancing of the following elements:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—

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40 Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).
41 See discussion in note 34, *supra*.
42 Twining v. New Jersey, 211 U.S. 78, 100 (1908).
43 Holden v. Hardy, 169 U.S. 366, 389 (1898).
44 Palko v. Connecticut, 302 U.S. 319, 325 (1937).
45 Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

> these are some of the considerations that must enter into the judicial judgment.[46]

Applying these considerations to alleged student misconduct at a state university requires an analysis no different than would be applied to any other problem involving due process. With the benefit of a considerable judicial history of analogous due process cases, support exists for the propositions advanced in the following discussion.

A. *The Degree of Protection to Which a Student Is Entitled in the Process of Determining His Guilt and Punishment Is in Direct Proportion to the Harm Which Could Result to Him From Such Determinations.*

A convenient illustration of this principle relates to one's right to counsel in a state criminal proceeding. Where a man is on trial for his life, the Supreme Court has held not only that he has a right to counsel, but that the state must positively provide him with counsel should he be unable to afford it.[47] In a trial where something less than life is involved, the fourteenth amendment does not necessarily require that the state provide counsel,[48] but it does require at least that the defendant be allowed to be represented by counsel should he wish it.[49] And, again, where the worst that can result from an administrative proceeding is some social stigma or the eliciting of information which might be used against the witness in some subsequent hearing where counsel would be allowed, the fourteenth amendment has been held not to guarantee a right to counsel.[50]

In the state university context, the proper result will similarly correspond with the gravity of the charge and the seriousness of the penalty. Where the disciplinary proceeding could result in expulsion or indefinite suspension, the harm to the student in terms of terminating his education and foreclosing professional opportunities may well rival the harm in criminal proceedings. Even where the penalty might not be so severe in itself, the social stigma attached to certain types of misconduct may warrant substantial protection in the decision-making process, quite aside from the pen-

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[46] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951).

[47] Moore v. Michigan, 355 U.S. 155 (1957); Powell v. Alabama, 287 U.S. 45 (1932).

[48] Betts v. Brady, 316 U.S. 455 (1942). *But see* Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961), *cert. granted*, 370 U.S. 908 (1962) (No. 890, Misc.), which requested counsel to discuss whether the rule of *Betts* should be reconsidered. See also Gibbs v. Burke, 337 U.S. 773 (1949).

[49] Chandler v. Fretag, 348 U.S. 3, 9 (1954).

[50] *In re* Groban, 352 U.S. 330 (1957).

alty which may be imposed. Illustrative cases might involve an accusation of homosexual activity, criminal assault or even cheating on examinations—at least with respect to students in professional colleges and graduate schools. On the other hand, where the penalty may involve only an oral reprimand, restriction of some university privileges, or probationary status or the offense concerns socially pardoned misbehavior, presence of counsel surely would not be required by the fourteenth amendment and might fairly be disallowed in the interests of administrative convenience and efficiency.

Precisely the same can be said with respect to other incidents of due process, such as the right to cross-examine adverse witnesses and the neutrality of the hearing board. Certainly one who has accused the student or who offers testimony against him ought not to be allowed to participate in the disciplinary decision. And while we may respect the desire of students for anonymity in reporting against their fellows where the alleged offense is minor and the punishment from a determination of guilt is modest, understandably that desire ought to give way to the protection of the innocent where the accused student may be expelled should the unchallenged testimony of a nameless accuser be believed. While this may discourage some students from reporting incidents within their knowledge, so will it discourage others who would exaggerate or report falsely out of malice. Moreover, the college itself is in an excellent position to remove the stigma which students might otherwise feel in testifying, by making the decision its own; it can require such willingness as a condition of admission—a practice frequently followed in schools conducting unproctored examinations on the honor system.[51] Additionally, the inclusion of such a rule would effectively provide the college with an intracollegiate subpoena power and would overcome the objection that some state courts have previously made to requiring a right of cross-examination. With respect to those few accusers whose forthright cooperation cannot be enlisted by the college, as an off-campus landlord anonymously reporting on his student tenants, it would appear far better to drop the incident altogether should the landlord insist

[51] The point was expressed quite well by a lower state court in 1887: "It [the right of confrontation] will prevent the harm which so often may, and, no doubt, does, result from professors placing reliance on the mistaken, prejudiced, false or malicious statements of the private informer. The feeling which students entertain toward such persons is not different from that which prevails in society at large. Permit the accused to meet his accuser face to face. Have it understood that testimony is given, because exacted of the witness, and that it is not the voluntary information of the tale-bearer, and infamy will no longer attach in colleges to those who may give evidence against their fellows, nor will faculties meet extraordinary difficulties in discovering the truth." Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77, 88 (1887).

on his anonymity, rather than require the student to risk expulsion on the basis of testimony he has not heard and thus is in no position to rebut, offered by an accuser whose motives and accuracy have gone untested in even an informal adversary procedure. Indeed, the *Dixon* case may require at least that the names and testimony of adverse witnesses be disclosed to the accused student, if nothing more.[52] In any case, the point should be clear that the measure of required due process is closely connected with the measure of harm to the student involved in the infraction of which he is accused.

This sensibly graduated treatment of due process overcomes objections that the maintenance of procedural guarantees by colleges would be financially burdensome and administratively infeasible. For the same evidence which indicates that but a small minority of all student offenses result in serious disciplinary action —an argument currently used to deprecate the need for due process—serves equally well to make clear that because this is so, it would not be burdensome for colleges to provide more careful procedures at least in those instances which *are* serious.

There are, of course, other considerations involved. One of these proceeds from "the balance of hurt complained of and good accomplished,"[53] a partial contextual formulation of which might read:

B. *The Extent of Protection to Which a Student Is Entitled Is Inversely Related to the Harm Which Would Result to Others by Providing Such Protection.*

The word "harm," of course, embraces more than personal hurt to third parties and includes some consideration of administrative burdens. A recent case, *Local 473, Cafeteria Workers v. McElroy*,[54] illustrates the balancing of administrative convenience against the interests of the plaintiff. The case concerned the exclusion of a short order cook from a military installation where she had worked for some time. The employee was barred allegedly for failure to meet base security requirements, but she was denied a hearing with the base officials to review the fairness of the decision. Five of the Supreme Court Justices held that the failure to provide a hearing was not fatal to the decision, but the careful manner in which the majority limited the case is more instructive than the particular holding itself. The majority assessed the competing interests as

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52 See text accompanying note 37 *supra*.

53 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951). See text accompanying note 47 *supra*.

54 367 U.S. 886, *rehearing denied*, 368 U.S. 869 (1961). The case arose under the fifth amendment rather than the fourteenth.

including: (a) the involvement of national security as part of the broader problem; (b) prospective difficulties in providing review in all similar cases; (c) the traditional prerogatives of military commanders over military installations; (d) the ability of the plaintiff to secure equivalent employment elsewhere;[55] and, (e) an alleged lack of any stigma resulting from her discharge. Even here, however, the vigor of the dissent by four of the Justices indicated the closeness of the question.[56] It would be difficult, if not impossible, to find a suitable analogy justifying summary expulsion from a state university; neither the administrative inconvenience nor the risk to anything of the magnitude of whatever is understood by national security could be shown to be so great, while the enduring harm to the student involved in such a decision could usually be shown to be considerably greater.

Perhaps the closest analogy, however, would involve a student suspected of repeated criminal assault or homosexual activity in a college dormitory, where considerable harm could result to other students through observing a procedure so replete with guarantees for the accused as to make acquittal of the guilty quite likely. Surely it is not the case, however, with even serious instances of vandalism, unpermitted use of intoxicating beverages, cheating on examinations or theft, which comprise the majority of offenses for which students may currently be suspended or expelled. Moreover, since the harm to the student dismissed for criminal assault or homosexual activity may be measurably greater than the loss of a low-skilled job at one installation in the *McElroy* case, arguably the balance still strongly favors the most careful kind of procedural due process.

Additionally, one must take into account the "available alternative[s] to the procedure that was followed,"[57] in determining whether a given procedure squares with the fourteenth amendment. In the context of our present discussion, the suggestion is that:

C. *Among Alternative Procedures Which Are Reasonably Equal in Feasibility, the Procedure Offering the Accused the Greatest Measure of Protection Must Be Followed.*

Even in the rare case of a student suspected of homosexual activity which he is believed likely to repeat if not immediately

[55] The cafeteria corporation offered to engage her at another location and the majority of the Court felt that "all that was denied her was the opportunity to work at one isolated and specific military installation." 367 U.S. at 896.

[56] *Id.* at 899. Compare Wieman v. Updegraff, 344 U.S. 183 (1952); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). See also Hannah v. Larche, 363 U.S. 420 (1960); Bailey v. Richardson, 182 F.2d 46, *aff'd by an equally divided Court*, 341 U.S. 918 (1951).

[57] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951).

removed from contact with other students, there are surely feasible alternatives to summary dismissal without a fair hearing. As an interim measure in the extreme case, it would be possible to suspend the student for the balance of the semester to remove any immediate danger to other students on campus, without, however, prejudicing the final determination to be made in a regular hearing.[58]

College administrators may still object that in the great majority of serious cases a formal procedure would be unnecessary even from the students' point of view, essentially because there are very few students each year who take exception to the manner in which they were tried, or to the penalty which was imposed. Consequently, it may be argued, an extension of the *Dixon* case would require an elaborate procedural apparatus far exceeding what is currently required by the felt needs of the students themselves. The superfluity of such an apparatus itself argues against its feasibility, and can thus be used to argue further that such an apparatus is not required by the fourteenth amendment.

Again, however, there are easy alternatives to the mandatory use of a regular procedure in every case, for it is entirely feasible to retain the informality of present practices in the first instance, while reserving the use of a more regularized hearing board for those students who express dissatisfaction with the initial, informal procedure. So long as the hearing board proceeding would be de novo and without reference to any finding, admission or other matter elicited in the informal proceeding, the student would still be fully protected. By restricting the use of the hearing board to serious cases where the student is obliged to take the initiative in seeking de novo review, the college would not be encumbered with a formal proceeding in every case, nor would it be obliged to make a transcript of every informal session for use by an ordinary appellate body.

To be specific, I would suppose that the establishment and publication of the following procedure in state universities would satisfy the demand for fundamental fairness under the fourteenth amendment, without unduly burdening efficient college administration:

PROCEDURE IN CASES OF ALLEGED STUDENT MISCONDUCT

A. The determination of student misconduct is primarily the responsibility of the Dean of Students and the Deans of the several colleges to administer according to procedures established in their

[58] See GELLHORN & BYSE, ADMINISTRATIVE LAW 764-67 (4th ed. 1960).

discretion as will best promote the overall interests of this university.

B. Students who are disciplined by a sanction as serious as expulsion, suspension for longer than one semester or entry of a permanent notation on any record currently or prospectively available to any person outside the university, have the right to appeal to the Hearing Board. Students receiving a less severe sanction may be heard at the discretion of the Board.

1. The Hearing Board consists of five faculty members, serving staggered five year terms, and elected by the faculty senate.
2. Students appearing before the Hearing Board have the right to be accompanied and represented by an adviser of their choice during all stages of the proceeding before the Board.
3. The Hearing Board proceeding is de novo, without reference to any matter developed previously in an informal proceeding in which disciplinary action was considered. No member of the Hearing Board who has previously participated in the particular case or who would appear as a participant before the Board itself, shall sit in judgment during that particular proceeding.
4. At least ten days prior to the Hearing Board proceeding, the student immediately involved shall be given a written statement indicating the nature and bases of the charge and the penalties which may attach thereto.
5. During the proceeding, the student shall be given an opportunity to testify and to present other evidence and witnesses relevant to the charge or the possible penalties involved. Whenever possible, he shall be given an opportunity to cross-examine adverse witnesses, and in no case shall the Board consider statements against him unless he has been advised of their content and the names of those who gave them, and unless he has been given an opportunity to rebut unfavorable inferences which might otherwise be drawn. A transcript of the hearing shall be made, and, subject to the student's waiver, the proceeding before the Hearing Board shall be public.
6. Decisions of the Hearing Board shall be final, subject only to such review by the President and Trustees as may be required by state law.
7. The Hearing Board is empowered to formulate additional

procedures and policies for its own operation, subject to approval by the Faculty Senate.

This suggested procedure generally embraces the recommendations of the American Civil Liberties Union[59] which have met with "general agreement" in the pronouncements of the American Association of University Professors.[60] To the extent that particular features of this procedure may exceed current fourteenth amendment requirements, they do so in reasonable anticipation of the Supreme Court.

Indeed, in some respects the above procedure may even now not be keeping pace with judicial developments. For instance, since a student clearly has a sufficient possessory interest in his college dormitory room to assert a right of privacy,[61] by analogy to a petty offender in a state criminal proceeding it is arguable that he may not be expelled on the strength of evidence improperly taken from his room.[62] At least one state court has suggested that students should not be compelled to give evidence incriminating themselves.[63] Coupled with recent developments in the Supreme Court,[64] this may mean that the time is not far off when the investigative techniques, as well as the hearing procedures, employed by college administrators may be a matter of constitutional significance.

The fourteenth amendment seemingly applies only to state universities, however, and the perspicacious undergraduate of a private university may therefore feel that all of this discussion is of no value to him whatsoever. Nevertheless, just as the perimeter of due process has expanded, so the perimeter of "state action" has also expanded.[65] The abundance of literature on this subject makes it quite unnecessary to develop the point here,[66] but it is surely safe

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[59] AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES (1961).

[60] 44 A.A.U.P. BULL. 110 (1962).

[61] See the discussion in Jones v. United States, 362 U.S. 257 (1960). *Compare* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955), *with* People v. Perry, 1 Ill. 2d 482, 116 N.E.2d 360 (1953).

[62] *Compare* Mapp v. Ohio, 367 U.S. 643 (1961), *with* Wolf v. Colorado, 338 U.S. 25 (1949). *But see* Frank v. Maryland, 359 U.S. 300 (1959).

[63] State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942), *cert. denied*, 319 U.S. 748 (1943).

[64] See Gallegos v. Colorado, 370 U.S. 49 (1962). This case is otherwise readily distinguishable, however, in view of the extreme gravity of the offense involved.

[65] See, *e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962).

[66] See, *e.g.*, Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Alfange, *"Under Color of Law": Classic and Screws Revisited*, 47 CORNELL L.Q. 395 (1962); Barnett, *What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Con-*

to predict that as college-level education is coming to be recognized as a fundamental interest,[67] and as universities increasingly participate in public subsidies, hitherto "private" universities will find themselves correspondingly circumscribed by an increasing number of constitutional restraints.[68] Additionally, it should not be overlooked that some state courts have already determined that certain procedural guarantees must be present even in the absence of constitutional considerations.[69]

Quite aside from exaggerating the fading differences between private and state universities, students may still complain that even the most scrupulous observance of procedural due process in American universities will be of little value if it is not coupled with an equal observance of substantive due process. The point is not without merit; while the courts have gradually moved to require reasonableness in the procedures observed by universities, virtually no judicial pronouncements limiting the nature of activities which universities may make punishable have yet appeared. As students tend increasingly to demonstrate their political concerns through sit-in demonstrations, rallies and similar activities, they may feel that even a fair trial is of little value should it mean only that students who have stayed clear of all which the university arbitrarily defines as "contrary to its best interests" shall not be punished.

Eventually, of course, the judiciary will determine that certain types of student activity are beyond the legitimate concern of the colleges. While we may have no problem with run-of-the-mill matters such as cheating, attendance or varieties of criminal conduct when committed on campus, it may be a different matter when the university attempts to extend its jurisdiction over students to what they do "downtown." The disciplining of students for off-campus political expression will once again present the question of the right of a college to treat its students as children in need of paternalistic guidance. It will doubtless also challenge the right of a college to discipline students where the real concern is only to protect the college itself from unwarranted censure by a community which has misconstrued the college's true responsibility.

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stitution?, 24 ORE. L. REV. 227 (1945); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

[67] See Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399, 413-16 (1962).

[68] See MILLER, RACIAL DISCRIMINATION AND PRIVATE EDUCATION (1957); Miller, *supra* note 67.

[69] See cases cited note 27 *supra*.

Without attempting to draw a line the law is likely to follow in resolving these substantive issues, one can safely predict that the observance of reasonable procedures will surely contribute to their resolution. For one thing, a procedure which requires a certain amount of time in its operation, and a considerable opportunity for the student to defend his conduct, will lessen the likelihood of hasty disciplinary action being taken on the basis of community pique. Also, it will be found that many so-called substantive issues are at least equally procedural in essence, and will probably be resolved according to an analysis similar to that presented in this article. For instance, the usual embracive college rule, that a student must not act so as to reflect dishonor and discredit upon his college, might properly be challenged either because it attempts to reach matters beyond the university's legitimate prerogative, or because it fails to provide sufficient notice of proscribed misconduct in advance, and thus operates as an ex post facto law. The latter objection is probably procedural, in contemplation of ordinary legal taxonomy, but in the process of its clarification university officials will necessarily have to consider the substantive issue as well.[70] Thus, whether it is literally true that "the history of liberty has largely been the history of observance of procedural safeguards,"[71] due respect for procedural guarantees surely is not irrelevant in determining the proper liberties of university students.

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[70] See Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 196-97 (1955).

[71] McNabb v. United States, 318 U.S. 332, 347 (1943).