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# Reasonable Rules, Reasonably Enforced-- Guidelines for University Disciplinary Proceedings

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## Notes

### Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings

In the wake of student activism and campus disorders, participating students have frequently sought judicial relief when subjected to adverse university disciplinary proceedings.<sup>1</sup> In some instances, the proceedings were precipitated by disruption of the university's functions.<sup>2</sup> In other cases, the university acted because of rule violations occasioned by "off-campus" activities.<sup>3</sup> In either situation, however, judicial review of the exercise of discretionary authority by university officials represents a departure from the earlier treatment afforded student claims for relief.<sup>4</sup> Prior to 1961, the courts would inquire only into the adequacy of the procedure afforded before suspension or expulsion.<sup>5</sup> Since attendance at an institution of higher learning was regarded as a privilege,<sup>6</sup> however, these inquiries in-

1. *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Grossner v. Trustees of Colum. Univ.*, 68 Civ. 1877 (S.D.N.Y. 1968); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967); S. LIPSET & S. WOLIN, *The Berkeley Student Revolt* (1965); *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1 (1966). See also E. WILLIAMSON & J. COWAN, *THE AMERICAN STUDENT'S FREEDOM OF EXPRESSION* 91 (1966), which indicates that university administrators are apt to be least tolerant of campus demonstrations.

2. *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W. Va. 1968); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Buttney v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967).

3. *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963); *Knight v. Tennessee State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961); *Dixon v. Alabama State Bd. of Educ.*, 186 F. Supp. 945 (D.C.M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir. 1961).

4. *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *North v. Board of Trustees*, 137 Ill. 296, 27 N.E. 54 (1891); *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

5. See 58 A.L.R.2d at 909. "The cases involving suspension or expulsion of a student from a public college or university all involve the question whether the hearing given to the student was adequate. In every instance, the sufficiency of the hearing was upheld." See also Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME LAW. 174, 175 (1962).

6. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934). See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 186 F. Supp. 945, 950 (D.C.M.D. 1960), *rev'd*, 294 F.2d 150 (1961), where the court held "[t]he right to attend a public college or university is not in and of itself a constitutional right."

A similar issue has been raised concerning the arbitrary dismissal

variably resulted in the upholding of the validity of any regulation, including those giving the institution power to dismiss a student at any time and for any reason.<sup>7</sup> Because of a presumption of "reasonableness," the assertion by responsible officials that a regulation tended to promote the general good of the institution was sufficient to satisfy the limited judicial standards.<sup>8</sup>

Recently, a reappraisal of the importance of education, coupled with expanding protection in other areas of law, has fostered more elaborate procedural and substantive safeguards than existed in the past. Every court has recognized that "[a] university has inherent general power to maintain order and to formulate and enforce reasonable rules of student conduct."<sup>9</sup> Beginning with *Dixon v. Alabama State Board of Education*,<sup>10</sup> they have defined the procedural protection that must be afforded and, to a lesser extent, have imposed limitations on the substance and scope of regulations.

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of a teacher from a public institution. The courts have held that procedural due process is a prerequisite regardless of the characterization of state employment as a "right" or a "privilege." See *Slochower v. Board of Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

7. *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928); *Barker v. Trustees of Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923). The court in *Gott v. Berea College*, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913) succinctly stated that "[w]hether the rules or regulations are wise, or their aims worthy, is a matter left solely to the discretion of the authorities. . . ." Other courts have simply concluded that the judiciary cannot consider the merits of a college's exercise of discretionary authority at all. *DeHaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1957); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 P. 433 (1927), *cert. denied*, 277 U.S. 591 (1928) (review only where action is arbitrary or abusive). "So long as they [college authorities] act in response to sufficient reasons and not arbitrarily or capriciously their acts may not be interfered with by the courts." *Frank v. Marquette Univ.*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932).

8. It is usually said that the dismissal may not be in bad faith, and should not be arbitrary or discriminatory; but what actually constitutes an abuse of discretion is left unstated. Note, *Expulsion of Students From Private Educational Institutions*, 35 COLUM. L. REV. 898, 899 (1935). But see, *State ex rel. Clark v. Osborne*, 24 Mo. App. 309 (1886); *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. Cty. Rpts. 77 (1887).

9. *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190, 202 (M.D. Tenn. 1968); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st Dist. Ct. App. 1967). See Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1395-1409 (1963).

10. 294 F.2d 150, 158 (5th Cir. 1961). See also Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957).

The purpose of this Note is to assess at the outset the present posture of the law towards the procedures employed in dismissal action. It will then consider current and proposed standards for evaluation of the substantive content of regulations. In short, it will seek to determine to what extent courts will undertake to decide whether university rules and their enforcement are reasonable.

## I. APPLICABILITY OF CONSTITUTIONAL SAFEGUARDS THROUGH STATE ACTION

Students who claim violations of their rights and freedoms generally invoke the fourteenth amendment, which provides that no state may deprive an individual of life, liberty or property without due process of law.<sup>11</sup> Its applicability to an academic setting depends upon the resolution of two threshold questions. The first is whether a student's continued presence in an academic institution is a judicially cognizable interest warranting constitutional protection. The second is the extent to which due process guarantees will be applied to "private" institutions.

### A. RIGHT V. PRIVILEGE

Not infrequently, university administrators have attempted to justify a student's dismissal by asserting that school attendance is a privilege, revocable at will, and not a legally protected right.<sup>12</sup> If attendance were in fact a privilege, then the due process clause would be inapplicable, since it requires either the infringement of a legally cognizable right or the involvement of a substantial interest. The question of whether procedural due process must be afforded before exclusion or dismissal has arisen in many contexts besides student-university relations: employees in Federal Government;<sup>13</sup> teachers in state universities;<sup>14</sup> and doctors in medical associations.<sup>15</sup> In these settings,

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11. "Nor shall any state deprive any person of life, liberty or property without due process of law. . . ." U.S. Const. amend. XIV, § 1.

12. *Hamilton v. Regents of Univ. of Cal.*, 294 U.S. 245 (1934); *North v. Board of Trustees*, 137 Ill. 296, 27 N.E. 54 (1891); *Board of Trustees v. Waugh*, 105 Miss. 623, 62 So. 827, *aff'd*, 237 U.S. 589 (1915).

13. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886 (1961); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court*, 341 U.S. 918 (1951).

14. *Slochower v. Board of Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952). The Court in *Wieman* reasoned that We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that consti-

if the court denied relief or reinstatement, it was on the ground that membership or employment was a *privilege* not a right, and hence not judicially protected.<sup>16</sup>

Courts have gradually recognized the central importance of education to future success. In *Brown v. Board of Education*,<sup>17</sup> the Court observed that "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>18</sup> Increasingly, the courts have held that a person's interest in preserving his educational opportunities is more than a privilege.<sup>19</sup>

It is a truism that in this country the luxuries of yesterday are the necessities of today, and it would seem that the matter of higher education, more than almost any other subject, equates itself completely and appropriately with [Mr.] Justice Holmes' "felt necessities of the time."<sup>20</sup>

Thus, the trend has been away from simple privilege analysis, which affords protection only under traditional concepts of property or contract rights, and towards a growing awareness of

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tutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

*Id.* at 192. In *Slochower*, the Court concluded that "[t]o state a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." 350 U.S. at 555.

15. *Falcone v. Middlesex Cty. Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961).

16. *Compare Dixon v. Alabama State Bd. of Educ.*, 186 F. Supp. 946 (1960) with *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961). See also Davis, *Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 222-33 (1956).

17. 347 U.S. 483 (1954).

18. *Id.* at 493. Although the *Brown* decision involved primary and secondary education, it is almost unquestionable that the Court's statement is equally applicable to a college degree today.

19. *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967).

20. *Crane v. Crane*, 45 Ill. App. 2d 316, 327, 196 N.E.2d 27, 33 (1964) (dissenting opinion). In considering the obligation of divorced parents to provide their children with the opportunity for a college education, the court in *Pass v. Pass*, 238 Miss. 449, 458-59, 118 So. 2d 769, 773 (1960), concluded:

It is a duty which the parent not only owes to his child, but to the state as well, since the stability of our government must depend upon a well-equipped, a well-trained, and well-educated citizenship. . . . The fact is that the importance of a college education is being more and more recognized in matters of commerce, society, government, and all human relations, and the college graduate is being more and more preferred over those who are not so fortunate.

educational opportunity as an emerging right.<sup>21</sup> The *Dixon* court considered the nature of the interests involved and the nature of the proceedings necessary to terminate those interests and stated that "the precise nature of the private interest involved in this case is the *right to remain* at a public institution of higher learning where the plaintiffs were students in good standing."<sup>22</sup> In *Knight v. State Board of Education*,<sup>23</sup> the court rejected the distinctions drawn between privileges and rights and held:

Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value. . . . Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth.<sup>24</sup>

## B. STATE ACTION THEORIES

Since attendance at a university is an interest worthy of constitutional protection, the question becomes to what extent constitutional safeguards will be applied to institutions not operated by the state. "State action" is not confined exclusively to actions taken within or by state established and administered institutions, but may include actions taken by state officials or agencies performing official functions under color of law or custom in other contexts.<sup>25</sup> In recent years, the doctrine of state action has undergone considerable expansion.<sup>26</sup> This has been matched by a corresponding increase in contacts—in the form of grants, tax exemptions, research funding, and the like<sup>27</sup>—between

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21. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (1961); *Knight v. Tennessee State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961).

22. 294 F.2d at 157.

23. *Knight v. Tennessee State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961).

24. *Id.* at 178.

25. See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), which held that "[t]he Fourteenth Amendment, as now applied to the states, protects the citizen against the state itself and all of its creatures—Boards of Education not excepted." See also *Slochower v. Board of Educ.*, 350 U.S. 551 (1956); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

26. The doctrine of "state action" has been stretched considerably by *United States v. Guest*, 383 U.S. 745 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Bell v. Maryland*, 378 U.S. 226 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946).

27. Higher Education Act of 1965, 79 Stat. 1219; Higher Education Facilities Act of 1963, 77 Stat. 363.

"private" institutions and state and federal governments. Accordingly, a number of grounds are now available on which to base findings that actions by officials in private institutions constitute state actions thereby requiring compliance with constitutional mandates.

The clearest example is when the relationship between the institution and the state is such that the state, or its officials, have direct or indirect control over the institution. This control may be present where the institution is funded by the state,<sup>28</sup> or where it is run by officials or agents of the state.<sup>29</sup> Even absent control through funding or administration, there may be sufficient state control over particular institutional activities to invoke constitutional limitations.<sup>30</sup>

When financial or administrative regulation is absent, courts have still found that the presence of certain relationships between state and private institutions may justify findings of state action. When certain levels of participation by the state are present in a private enterprise, courts may find an inter-relatedness that requires imposition of constitutional limitations.<sup>31</sup> The relationship may also derive from the appearance of state involvement.<sup>32</sup> Thus, where private schools receive

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28. In the case of state land-grant colleges, where the administrative officials are state officers, the requisite direct control is evident. Indirect control was present in *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1944), *cert. denied*, 326 U.S. 721 (1945), where a public library administered by an independent board of trustees was dependent upon the city for appropriations to meet expenses and salaries. In *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. Cty. Rpts. 77, 79 (1887), state funding of Dickinson College, a "private" school, was sufficient to impose procedural due process requirements, although the decision was not based on constitutional grounds.

29. In the first *Girard College* case, funds for the school were derived from a private endowment established by the will of Stephen Girard. However, because members of the institution's board of directors were also officials of Philadelphia or Pennsylvania, there was sufficient state involvement to prohibit implementation of the discriminatory terms of the will. *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957).

30. In *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952), government action was found when a bus company broadcast to its "captive" audience because a state commission had regulatory control over the bus and its broadcasts.

31. *Evans v. Newton*, 382 U.S. 296 (1966) (segregated park formerly run by the city and still dependent on city maintenance crews was "public" although administered by a private board of trustees); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (restaurant with parking facilities operated on property leased from state could not be used in a racially discriminatory manner).

32. In *Evans v. Newton*, 382 U.S. 296 (1966), the private park in question was adjacent to a public park and they had formerly been administered as one. A more recent case involving *Girard College*,

state and federal funds, tax immunities, or rights of eminent domain, an appearance of state involvement may be created which will lead to a finding of state action.<sup>33</sup>

An alternative method of finding state action is a determination that a "private" institution fulfills a "public function."<sup>34</sup> The public function doctrine has extended constitutional guarantees to citizens of towns wholly owned and administered by private companies,<sup>35</sup> and to segregated state primary elections run by "private" political clubs.<sup>36</sup> As the Court in *Brown v. Board of Education* observed, "Today, education is perhaps the most important function of state and local governments."<sup>37</sup> Thus, where a private institution undertakes to perform this function, it may be required to do so in a manner consistent with constitutional constraints. Judge J. Skelly Wright so held in finding that Tulane University, a "private" institution, had sufficient contacts with the state and performed enough of a public function to be subject to constitutional requirements.<sup>38</sup> He doubted

whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment. . . . [I]nstitutions of learning are not things of purely private concern. . . . 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. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action. . . .<sup>39</sup>

*Pennsylvania v. Brown*, 270 F. Supp. 782 (E.D. Pa. 1967), found state action even though the school was administered by a private board of trustees. The court based its decision on the same grounds as *Evans*: that there was both the appearance and the fact of state involvement.

33. In *Simkins v. Moses H. Cone Mem. Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), the court found state action from financial assistance provided by the state and federal governments, and from the finding that the hospital was chosen for its ability to carry out the state's policy of allocating medical resources.

34. Private ownership or operation of a facility impressed with a public interest does not ipso facto remove it from the reach of the fourteenth amendment. See, e.g., *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Nixon v. Condon*, 286 U.S. 73 (1932).

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

36. *Terry v. Adams*, 345 U.S. 461 (1953).

37. 347 U.S. 483, 493 (1954) (emphasis added).

38. *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La. 1962), *judgment vacated and new trial ordered*, 207 F. Supp. 554 (E.D. La. 1962), *aff'd per curiam*, 306 F.2d 489 (5th Cir. 1962), *rev'd on retrial*, 212 F. Supp. 674 (E.D. La. 1962).

39. 203 F. Supp. at 858-59.



The court in *Pennsylvania v. Brown*,<sup>40</sup> the most recent *Girard College* case, found state action on a public function theory, based on the finding that the "private" services rendered "would otherwise have to be performed by the public school system . . . ."

Despite the possibility of finding state action in the actions of private schools, the two most recent decisions have upheld the public-private distinction for constitutional purposes. In both *Greene v. Howard University*<sup>41</sup> and *Grossner v. Trustees of Columbia University*,<sup>42</sup> student demonstrators sought injunctive relief from school disciplinary actions in a Federal District Court. In *Greene*, Judge Holtzoff held that expulsion without notice or hearing was permissible because Howard University was a private school.<sup>43</sup> He found Howard University was a private corporation rather than a governmental body. The fact that "annual appropriations are made by Congress . . ." and "the Secretary of Health, Education, and Welfare is given authority to visit and inspect Howard University and to control and supervise the expenditure of those funds" did not change Howard's status as a "private" corporation, free of constitutional limitations.<sup>44</sup> The decision, presently on appeal, has been se-

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40. *Pennsylvania v. Brown*, 270 F. Supp. 782, 792 (E.D. Pa. 1967).

41. 271 F. Supp. 609 (D.D.C. 1967) (presently on appeal).

42. 68 Civ. 1877 (S.D.N.Y. 1968).

43. 271 F. Supp. 609 (D.D.C. 1967).

44. *Id.* at 612. It should be noted, however, that Howard University is a creature of the Federal Government. Howard University and the Federal Government are inseparably bound to each other by 20 U.S.C.A. ch. 8. For example, Howard University must file annual reports to the Secretary of Health, Education and Welfare (HEW) (20 U.S.C.A. § 121); it must report all receipts and disbursements to the Secretary of HEW, including those not derived from the Federal Government (20 U.S.C.A. § 121); it may not apply its federal appropriations to religious purposes (20 U.S.C.A. § 122); the Secretary of HEW has "authority to visit and inspect" Howard University and to "control and supervise the expenditure therein of all money" paid under congressional appropriations (20 U.S.C.A. § 122); Congress makes annual appropriations to Howard University for construction and maintenance (20 U.S.C.A. § 123); the Office of Education of the Federal Government may inspect Howard University at any time (20 U.S.C.A. § 123); in the application of the Civil Service Retirement Act and Federal Employees' Group Life Insurance Act, employees of Howard University's Freedman's Hospital are regarded as federal employees [20 U.S.C.A. § 125 (c)]. Howard receives direct "operating appropriations from Congress—\$13,334,000 in 1968; the University requires its faculty members to execute appointment affidavits on Standard Form 61, U.S. Civil Service Commission; it is connected to the Interdepartmental Dial System (IDS) which connects all Government agencies; the Department of Defense Telephone Directory includes Howard in the category of "other Government agencies (at xvii); the "Official Congressional Directory" lists

verely criticized for its disregard of all concepts of state action.<sup>45</sup>

In *Grossner*, a petition for a preliminary injunction restraining Columbia University, a private institution, from expelling students involved in campus disturbances<sup>46</sup> failed for lack of federal jurisdiction. Plaintiffs had sought to show that the degree of state involvement in Columbia, in the form of massive financial support, was sufficient to justify viewing university action as state action.<sup>47</sup> Speaking through Judge Frankel, the court rejected this argument on the basis of its finding that the requisite degree of state participation and involvement was lacking. The court was particularly impressed by the fact that Columbia is administered independently and autonomously by a private board of trustees.

It appears, therefore, that state action theories have not yet been extended to institutions of a private character.<sup>48</sup> At least in *Greene*, however, the court used different standards for determining state involvement than are used in other contexts, such as racial discrimination. As educational needs continue to expand, as private schools become increasingly dependent on state and federal resources for their continued existence, and as they continue to provide opportunities not offered by the state, their private status, presently a barrier to fourteenth amendment requirements, will gradually be eroded.<sup>49</sup> As this has not

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Howard University under the Department of HEW, Congressional Directory, 90th Cong., 1st Sess., March 1967, at 579.

Given these indicia of connection, involvement and control, the finding of a lack of federal involvement, resulting in the denial of due process safeguards, can only be viewed as ludicrous in the extreme.

45. 54 A.A.U.P. BULL. 145 (1968); *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1059 n.20 (1968).

46. See New York Times, April 27, 1968, at 1, col. 3-4; April 25, 1968, at 1, col. 7-8; April 24, 1968, at 1, col. 5-6.

47. In both 1966 and 1967, nearly half of Columbia's total income was derived from public sources. Plaintiffs also relied on other public benefits, such as research grants and a lease from New York City of public lands for the construction of the gymnasium that touched off the entire controversy. 68 Civ. 1877 (S.D.N.Y. 1968). See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

48. But see *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. Cty. Rpts. 77 (1887), which found that a college receiving financial aid from the state could not dismiss a student except after a hearing or trial in accordance with a lawful form of procedure.

49. See Byse, *The University and Due Process: A Somewhat Different View*, 54 A.A.U.P. BULL. 143, 146 (1968); *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1071 (1968); Comment, *Procedural Limitations on the Expulsion of College and University Students*, 10 ST. L.U.L.J. 542, 547 (1962). Professor Byse's analysis is that "although the concept of 'state action' is in the process of a development that eventually may make the due-process limitations applicable to dismissal

yet occurred, except as otherwise indicated, the remainder of this discussion will be confined to institutions of a clearly public nature.

## II. EARLIER THEORIES OF STUDENT-UNIVERSITY RELATIONS

The legal power to administer a public university may be found either in the state constitution,<sup>50</sup> or legislative enactments.<sup>51</sup> These measures generally provide broad authority and discretion for the management of educational institutions, and the courts have normally deferred to that discretion and refrained from intervening in internal university disciplinary proceedings. When cases have come before the courts, several theories have been employed to express the legal relationship between the student and the university. The most common theories supporting college disciplinary authority characterize the relationship as either *in loco parentis*<sup>52</sup> or contractual.<sup>53</sup>

### A. *In Loco Parentis*

According to the theory of *in loco parentis*, the university stands "in the place of the parents" and makes such rules for the well being and development of the student as the parents could make for the same purposes.<sup>54</sup> The merits of disciplinary reg-

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proceedings conducted by so-called 'private' colleges and universities, that development has not yet come to fruition."

50. *E.g.*, MINN. CONST. art. 8, § 4.

51. *E.g.*, ORE. REV. STAT. § 3520.010 (1965).

52. *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *North v. Board of Trustees*, 137 Ill. 296, 27 N.E. 54 (1891); *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913).

53. *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928); *Barker v. Trustees of Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923). See also Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 U. ILL. L.F. 438; Comment, *Administrative Law—Judicial Review—Procedural Due Process in Student Disciplinary Hearings*, 43 No. CAR. L. REV. 151, 152 (1964).

As a result of a student's reliance and investment of time and money, some courts have found an implied contract, wherein the university promises to award a degree in return for the student's satisfactory completion of the prescribed academic requirement and his compliance with school regulations to which he has impliedly consented as a precondition of admission and graduation. See, *e.g.*, *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909); *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct. 1891).

54. *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1924). The student in this case brought action against the president of the University for the economic tort resulting from his expulsion.

ulations are left to the discretion of the authorities or the parents as the case may be.<sup>55</sup> Institutional exercise of the parental control is also justified on the ground that it is vital to adequate performance of the institution's duties.<sup>56</sup> It is said that the institution must possess parental powers "to enable [it] to discharge these duties effectually, [since it] must necessarily have the power to enforce prompt obedience . . . ."<sup>57</sup> During the heyday of the *in loco parentis* rationale, the university was viewed as a surrogate parent, combining the functions of the home, the church, and the police.<sup>58</sup> Accordingly, broad powers were necessary. At present, however, as the trend toward "multi-versities"—with their large, self-contained settings and thousands of students—continues, it is doubtful that the assumptions upon which the doctrine was based are still valid.

Although courts have frequently overlooked them, there are limits to university disciplinary powers under *in loco parentis*. Since the restraints operative in a parental relationship are not present in the academic setting, the discipline should be subject to scrutiny as to the nature and extent of punishment and the methods adopted for its administration.<sup>59</sup> If the school's authority cannot exceed that of a parent, then the use of suspension or

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The court observed that "college authorities stand *in loco parentis* and . . . may make any regulation for their government [or betterment of their pupils that] a parent could make for the same purpose. . . ." In *North v. Board of Trustees*, 137 Ill. 296, 306, 27 N.E. 54, 56 (1891), the Illinois Supreme Court denied a student's claim for reinstatement on the ground that

By voluntarily entering the university, or being placed there by those having the right to control him, he necessarily surrenders very many of his individual rights. How his time shall be occupied; what his habits shall be; his general deportment; that he shall not visit certain places; his hours of study and recreation,—in all these matters, and many others, he must yield obedience to those who, for the time being, are his masters. . . .

55. *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913). See also *Pratt v. Wheaton College*, 40 Ill. 186 (1866), wherein the court stated, "we have no more authority to interfere than we have to control the domestic discipline of a father in his family." *Id.* at 187.

56. See, e.g., *Woods v. Simpson*, 146 Md. 547, 126 A. 882 (1924); *Goldstein v. New York Univ.*, 76 App. Div. 80, 78 N.Y.S. 739 (1902).

57. *State ex rel. Burpee v. Burton*, 45 Wis. 150, 156 (1878). See also *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968).

58. Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS. Q. 1, 3 (1965).

59. See, e.g., *Landers v. Seaver*, 32 Vt. 114, 122 (1859). "The school-master has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection."

expulsion as a mode of punishment would be almost entirely eliminated. Parental "expulsion" is the most extreme recourse in the family setting. Thus, the severance of relations with a student should be used by the university only under the most aggravated circumstances.<sup>60</sup> When adult students are involved, university disciplinary power is even more severely circumscribed, since the parents themselves could not legally exercise disciplinary authority.<sup>61</sup> Moreover, if a minor student acted with his parents' consent, there would be no basis for institutional regulation of conduct, either because no power had been delegated or because the parents had "occupied the field."<sup>62</sup>

Because of the inapplicability and inappropriateness of the doctrine of *in loco parentis* as a legal analogy, the judicial current has moved away from deciding cases on this basis. Notwithstanding the fact that the doctrine still has its staunch adherents,<sup>63</sup> it has been so thoroughly repudiated by the courts as to be presently devoid of any legal merit.<sup>64</sup>

## B. CONTRACT

Courts have also relied with some frequency on a contract

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60. ". . . [A] parent may not lawfully do the very act which the university frequently tries to accomplish in asserting its purported loco parentis authority—sever all ties." Goldman, *The University and the Liberty of its Students—A Fiduciary Theory*, 54 KY. L. REV. 643, 651 (1965). See also N.Y. DOM. REL. LAW §§ 32, 33 (McKinney 1964); *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1145 (1968); Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1380 (1963).

In *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. Cty. Rpts. 77, 87-88 (1887), the court specifically considered this fallacy. "It might well be a subject of discussion what is meant by parental discipline when applied to a man who has attained his majority; and even in the case of a minor son, the circumstances would be rare, which would demand an expulsion from the parental roof and the hospitalities and association of home."

61. E. BLACKWELL, *COLLEGE LAW* 101 (1961). See also Van Alstyne, *supra* note 58, at 17-18; Note, *supra* note 60, at 1380.

62. *State ex rel. Clark v. Osborne*, 24 Mo. App. Rep. 309 (1887). But see *Curry v. Lasell Seminary Co.*, 168 Mass. 7, 46 N.E. 110 (1897).

63. Williamson, *In Loco Parentis—That Wonderful Institution*, 7 STUD. GOV'T BULL. 18 (1962).

64. The courts in *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Goldberg v. Regents of Univ. of Calif.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967); have all considered the doctrine and rejected it summarily. In *Zanders*, the court concluded that ". . . the doctrine [of *in loco parentis*] is of little use in dealing with our modern 'student rights' problems." 281 F. Supp. at 756.

theory to describe the relationship between student and school.<sup>65</sup> When this approach is used, the terms are derived from the "traditional" relationship or long standing customs of the schools, and are considered as adopted by the student's act of enrollment.<sup>66</sup> Where possible, however, courts find an express contract, whose terms are contained in college catalogues, bulletins, or other university documents.<sup>67</sup> This type of literature usually reserves broad discretionary powers in the university.<sup>68</sup>

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65. *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

66. *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909); *People ex rel. Cecil v. Bellevue Hosp. Medical College*, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct. 1891).

The court in *Koblitz v. Western Reserve Univ.*, 11 Ohio Cir. Dec. 515, 522, 21 Ohio Cir. Ct. R. 144, 154-55 (1901) stated the terms of the contract.

He [the student], upon making that contract, agrees to submit himself to the *reasonable discipline* of the school. He agrees that his conduct and character shall be such as to in no manner be a detriment to the school; and this conduct and character he must bear in all his relations with the school and with the other students. He agrees that he will conform to the customs of the school; if it is the custom of the school that the professors shall discipline the scholars, reprimand and inflict such punishment as is proper under the circumstances, then he has agreed that he will conform to that custom. And he agrees that when he fails in any of the duties devolving upon him, the authorities over the school may discipline him in such manner as shall be proper under the circumstances.

The university agrees with him that it will impart to him instruction; that it will aid him in the ordinary ways of his studies; that it will treat him fairly; that it will give to him every opportunity to improve himself, and that it will not impose upon him penalties which he in no wise merits, and that it will deal with him impartially (emphasis added).

67. *Steier v. New York Educ. Comm'r*, 271 F.2d 13 (2d Cir. 1959); *DeHaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1957); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928); *Goldstein v. New York Univ.*, 76 App. Div. 80, 78 N.Y.S. 739 (1902); *Frank v. Marquette Univ.*, 209 Wis. 372, 245 N.W. 125 (1932).

68. In *Carr v. St. John's Univ.*, 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. 1962), where Catholic students were expelled for participating in or witnessing a civil marriage, the catalogue of St. John's University provided:

In conformity with the ideals of Christian education and conduct, the University reserves the right to dismiss a student at any time on whatever grounds the University judges advisable. Each student by his admission to the University recognizes this right. The continuance of any student on the roster of the University, the receipt of academic credit, graduation, the granting of a degree or a certificate, rests solely with the powers of the University.

See also *Barker v. Trustees of Bryn Mawr College*, 278 Pa. 122, 122 A. 220, 221 (1923). "The college reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable."

For example, a clause may be included which permits the institution to expel the student "at any time, for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given."<sup>69</sup>

The contract analogy distorts the true nature of the relationship between student and university. Contract rules were developed in a commercial context for the purpose of lending certainty to the relationships between persons with relatively equal bargaining strength. Application for admission to a university is far removed from the market place which contract law envisages. Because the "terms" are incorporated in catalogues and bulletins, there can be no negotiation. The result is contracts in which the dominant party dictates the terms, or reserves the right to perform or not perform at will. Under traditional contract doctrines, reservation of power to terminate at will may result in an illusory promise or a contract that is invalid for want of consideration. Moreover, inequality of bargaining power may result in contracts whose terms are unreasonable, unconscionable, or void as against public policy.<sup>70</sup> Such a view could be taken of a contract requiring, as a precondition of admission, waiver of all student rights.<sup>71</sup> This type of problem has given rise to a general doctrine of contracts of adhesion.<sup>72</sup> In a contract of adhesion, inequitable provisions may be disregarded since "it has been held as a matter of common law that unconscionable contracts are not enforceable."<sup>73</sup> Indeed, under

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69. *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928). The student-plaintiff was disciplined because she "was not a typical Syracuse girl." See also *DeHaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1967).

70. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942); *Jessel v. Lockwood Textile Corp.*, 276 App. Div. 378, 95 N.Y.S.2d 77 (1950); UNIFORM COMMERCIAL CODE § 2-302.

71. "When one considers the relative bargaining power of the parties and the ability of the student to effect any change in the terms of his admission, the analogy to the yellow dog labor contract is obvious. If such waiver provisions are not so outrageous as to be unenforceable as opposed to public policy and traditional standards of fairness, the courts might well refuse to enforce them on grounds of unconscionability." Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME LAW. 174, 179 (1962).

72. UNIFORM COMMERCIAL CODE § 2-302; RESTATEMENT, CONTRACTS § 230(d) (1932); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

In *Niedermeyer v. Curators of State Univ.*, 61 Mo. App. 654 (1895), the court recognized the inequality of bargaining positions and held that the school was required to deal fairly and in good faith with its students.

73. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448

strict contract law, the student might even stand to benefit. The school, by expelling the student, would be repudiating the contract or seeking rescission. The burden of proof would then be on the institution to show the student's breach, instead of the present requirement that the student prove he has not violated any university regulation.<sup>74</sup>

### III. JUDICIAL RELUCTANCE TO REVIEW

Until recently, the judiciary has been extremely reluctant to review university disciplinary proceedings.<sup>75</sup> Judicial passivity can be attributed to the fear that court intervention would undermine institutional authority and autonomy.<sup>76</sup> This fear derives from several sources. The first is the belief that the university must maintain certain conditions to fulfill its educational goals. The courts have wisely refrained from substituting their judgment for the educational expertise of the administrator.<sup>77</sup> Particularly in academic matters, schools have an ad-

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(D.C. Cir. 1965) (unconscionable); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (void as against public policy).

Perhaps the foremost authority in the field of students' rights, William Van Alstyne, has suggested that in coming years, boilerplate clauses in university bulletins will not stand as a defense against dismissed students:

The unconscionable quality of such a clause, the non-negotiable character of the contract, the evident inequality of bargaining power, and the importance of the student's interest in securing a degree under reasonable conditions—all these considerations increase the likelihood that typical boilerplate provisions may so antagonize the court as paradoxically to operate to the disadvantage of the college.

Van Alstyne, *Student Rights and University Authority*, 2 COL. COUNSEL 44, 55 (1967). See also Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS. Q. 1 (1965); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963).

74. *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1146 (1968).

75. Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS. Q. 1, 2 (1965).

76. General surveys of the bases for judicial non-intervention are contained in Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930); *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1148 (1968); *Developments—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 986-90 (1963). See also *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159-65 (1961) (dissenting opinion).

77. *Connelly v. University of Vt.*, 244 F. Supp. 156 (D. Vt. 1965). In *Greene v. Howard Univ.*, 271 F. Supp. 609, 615 (D.D.C. 1967), Judge



vantage in evaluating student conduct and performance.<sup>78</sup> A second and related reason is that judicial review of institutional decisions may lead courts into Professor Chafee's "dismal swamp" where judicial logic, applied to internal conflicts, may lead to extreme results. Historically, educational institutions have had a great deal of freedom and autonomy, derived from the notion that academic freedom is a *sine qua non* of intellectual advancement. Both legislatures and the judiciary have respected this feeling and accordingly have minimized their intervention.

Some educators have suggested that judicial review of exercises of discretion will result in a surfeit of frivolous cases flooding the courts.<sup>79</sup> In a recent address, Professor Clark Byse responded to that fear by stating 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 but which are bound to occur on *ex parte consideration*.<sup>80</sup>

He concluded by agreeing with the "general proposition that in appropriate instances students should seek judicial vindication of basic interests."<sup>81</sup>

Although institutional autonomy should be preserved, it does not follow that judicial review will defer indefinitely to internal academic "house-cleaning." As the court in *Zanders v. Louisiana State Board of Education*<sup>82</sup> declared:

If minimum standards of fairness, having been repeatedly articulated for over fifty years, are not afforded to students in dis-

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Holtzoff observed that "it would be a sad blow to institutions of higher learning and to the development of independent thought and culture if the courts were to step in and control and direct the administration of discipline. . . ."

Similar deference was accorded by the Court in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

The essentiality of freedom in the community of American Universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

78. *Edde v. Columbia Univ.*, 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Ct. 1957), *aff'd*, 5 N.Y.2d 777, 154 N.E.2d 448, *cert. denied*, 359 U.S. 956 (1959).

79. J. PERKINS, *THE UNIVERSITY AND DUE PROCESS*, SUBMITTED TO AMERICAN COUNCIL ON EDUCATION (1967).

80. Byse, *The University and Due Process: A Somewhat Different View*, 54 A.A.U.P. BULL. 143, 145 (1968), *citing* *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-25 (1953) (dissenting opinion).

81. 54 A.A.U.P. BULL. at 146.

82. 281 F. Supp. 747, 760 (D. La. 1968).

ciplinary cases, then, as is becoming the rule rather than the exception in all fields today, courts, state and federal, will draft rules on an *ad hoc*, case by case, basis to insure that rights of students adequately are protected.

#### IV. REASONABLY ENFORCED—PROCEDURAL LIMITATIONS

Growing judicial recognition of the importance of education and evolution in the protection of personal liberties have, together, contributed much to legal developments in the area of student rights.<sup>83</sup> Preservation of individual and civil liberties has become a preferred constitutional value<sup>84</sup> which can only be abridged by state action when there is a compelling counter-vailing state interest. In the context of the university, a student's freedom must include freedom to learn, and by derivation, freedom to hear,<sup>85</sup> to study, to write,<sup>86</sup> to explore,<sup>87</sup> and to exercise the rights of citizenship.<sup>88</sup> Incidental to all these is

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83 Compare *The Civil Rights Cases*, 109 U.S. 3 (1883), with *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzbach v. McClung*, 379 U.S. 294 (1964). See also *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Patterson v. Colorado*, 205 U.S. 454 (1907).

84. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Marsh v. Alabama*, 326 U.S. 501 (1946); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

"The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. at 637 (1943).

85. *Dickson v. Sitterson*, 280 F. Supp. 486 (D.N.C. 1968) (speaker bans); *Buckley v. Meng*, 230 N.Y.S.2d 924 (Sup. Ct. 1964); *Egan v. Moore*, 20 App. Div. 2d 150, 245 N.Y.S.2d 622 (1963), *aff'd*, 14 N.Y.S.2d 809, 199 N.E.2d 842 (1964) (speaker bans). See also Pollit, *Campus Censorship: Statutes Banning Speakers from State Educational Institution*, 42 No. CAR. L. REV. 179 (1963); Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963).

86. *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (N.D. Ala. 1967).

87. 50 A.A.U.P. BULL. 447 (1965); Monypenny, *Toward a Standard for Student Academic Freedom*, 28 LAW & CONTEMP. PROBS. 625 (1963); *Developments—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

88. It seems reasonable to assume that a university regulation which attempts to prohibit the exercise of a constitutional right would be void. Thus, an attempt by a university to dismiss a student for his participation in an off-campus political rally would violate the first amendment guarantee of freedom of speech. Cf. *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967); *Hammond v. South Car. State College*, 272 F. Supp. 947 (D.S.C. 1967).

Courts have held that teachers can engage in political activity without fear of reprisal or dismissal. See, e.g., *Johnson v. Branch*, 364 F.2d

the right of a free citizen to lead a life untrammelled by unnecessary external constraints and invasions of privacy. It is in the course of exercising these rights that the interests of the university and the student may conflict.

In situations where conflict is not easily resolved, certain legal formulas have been devised to protect the interests of the parties involved. Developed through judicial construction of the due process clause of the fourteenth amendment, the most common elements in the formulas are notice and a hearing. The due process clause, however, is not a rigid formulation of minimum elements necessary to safeguard an interest. The strictness of its requirements depends upon the nature of the interests affected, the balance between the injury complained of and result gained, and the availability of alternative procedures.<sup>89</sup> It should be noted at the outset that the safeguards described below are available only in disciplinary proceedings.<sup>90</sup> Moreover, since they lack educational expertise, courts should confine their review to the nature of the proceeding, and reverse only when it was manifestly unfair.<sup>91</sup> They should also avoid making independent academic evaluations.<sup>92</sup> However, even in the academic setting courts have held that a student seeking readmission must be told why his application is denied and "afforded an audience with the appropriate Administrative authorities."<sup>93</sup>

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177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Rackley v. School Dist.*, 258 F. Supp. 676 (D.S.C. 1966); *Williams v. Sumter School Dist.*, 255 F. Supp. 397 (D.S.C. 1966).

89. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951). The requisite elements of procedural due process are determined by balancing of such factors as 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—these are some of the considerations that must enter into the judicial judgment. As Mr. Justice Douglas noted in his concurring opinion, 341 U.S. 123, 179 (1951), "... it is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice."

90. It is clear the provision of quasi-legal hearings for the review of academic performance is uncalled for, although a modified hearing system has proved effective for this purpose. Reichstein & Pipkin, *Appeals Day—A Study of Academic Justice*, 2 LAW & Soc'y REV. 259 (1968).

91. *Connelly v. University of Vt.*, 244 F. Supp. 156 (D. Vt. 1965).

92. *Samson v. Trustees of Colum. Univ.*, 101 Misc. 146, 167 N.Y. Supp. 202 (1917).

93. *Schiff v. Hannah*, 282 F. Supp. 381 (W.D. Mich. 1968).

The landmark case in the area of student rights is *Dixon v. Alabama State Board of Education*,<sup>94</sup> which specifically enumerated the elements necessary to provide adequate due process in student disciplinary proceedings.<sup>95</sup> A rash of recent cases has greatly expanded and redefined these elements. Thus, a re-evaluation of the procedures established by *Dixon* is now warranted. The *Dixon* court held that there is a right to notice and a hearing in university disciplinary proceedings considering charges that could lead to suspension or expulsion. Although there was some early dispute as to whether the notice had to be in writing, or how timely it had to be,<sup>96</sup> recent decisions have held that notice must be in writing and must be served at least one week prior to the actual proceeding.<sup>97</sup> The court in *Jones v. State Board of Education*<sup>98</sup> held as fundamental "that the ac-

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94. 294 F.2d 150 (5th Cir. 1961).

95. *Id.* at 158-59.

. . . [W]e state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. . . . The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. . . . [A] hearing which gives the . . . administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. . . . [T]he rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. . . . [T]he 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. He should also be given the opportunity to present . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.

96. While the adequacy of notice is judged on a case by case basis, notice is generally defined as "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mul-lane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In *Wright v. Texas Southern Univ.*, 277 F. Supp. 110 (S.D. Tex. 1968), where the Dean of Students was unable to notify students of pending actions because they failed to provide the university with accurate addresses, as required by university rules, the court held that a good faith attempt was sufficient under the circumstances. *But see* *Wachtel v. Noah Widows & Orphans' Benevolent Soc'y*, 84 N.Y. 28 (1881), where the notice was held invalid even though the party's failure to furnish the association with his correct address was the reason he did not receive the notice.

97. *Schiff v. Hannah*, 282 F. Supp. 381, 383 (W.D. Mich. 1968) (written notice at least ten days in advance with an additional ten days provided for the student to respond); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 752 (W.D. La. 1968) (written notice at least one week in advance); *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 657 (W.D. Mo. 1968) (written notice at least ten days in advance).

98. 279 F. Supp. 190, 197 (M.D. Tenn. 1968).

cused be granted adequate and timely notice of the charges against him."<sup>99</sup> Since the purpose of notice is to advise the individual of the charges against him, a recitation of the factual allegations and "a written notice of the precise charge" is essential.<sup>100</sup> In addition, it has been held that the notice must refer to a specific rule or regulation, the violation of which would justify disciplinary sanctions.<sup>101</sup> Notice, in the broader sense of promulgation and publication of regulations, has also been a recent subject of judicial consideration. In *Zanders v. Louisiana State Board of Education*,<sup>102</sup> the court strongly recommended that "disciplinary rules and regulations adopted by a school board should be set forth in writing and promulgated in such manner as to reach all parties subjected to their effects."

Disciplinary rules must also define proscribed conduct with some precision. Student-plaintiffs have attacked certain regulations on the ground of vagueness, arguing that a rule "forbidding or requiring conduct in terms so vague that men of intelligence must necessarily guess at its meaning and differ as to its application violates due process."<sup>103</sup> The court in *Jones* held that "a university has inherent general power to maintain order and to formulate and enforce reasonable rules of student conduct,"<sup>104</sup> and concluded that school regulations could not be held to the standard of precision required of criminal regulations. In *Dickson v. Sitterson*,<sup>105</sup> however, the court squarely faced the issue of vagueness in overturning the University of North Carolina's speaker ban.

Illustrative of the general problem of vagueness is the case of *Carr v. St. John's University*,<sup>106</sup> where students were expelled from a Roman Catholic institution for participating in a civil

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99. *Id.* See also *Frisbie v. Collins*, 342 U.S. 519 (1952); *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1968).

100. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1968).

101. *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968).

102. *Id.*

103. *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190, 201 (M.D. Tenn. 1968).

104. 279 F. Supp. at 202. See also *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

105. 280 F. Supp. 486 (M.D.N.C. 1968). See also Pollitt, *Campus Censorship: Statute Barring Speakers from State Educational Institutions*, 42 No. CAR. L. REV. 179 (1963).

106. 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18 (1962), *rev'd*, 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. 1962).

marriage. The regulation in question stated that "in conformity with the ideals of Christian education and conduct, the University reserves the right to dismiss a student at any time on whatever grounds the University judges advisable."<sup>107</sup> The lower court ordered reinstatement on the ground that a civil marriage did not violate "Christian ideals," but the appellate court reversed, reasoning that it was implicit that Roman Catholic standards should be applied to the students.

In addition to notice, the *Dixon* court held that a hearing was a prerequisite of due process. Its reference to a hearing that preserves the "rudiments of an adversary proceeding" has been the topic of continuing judicial exploration. One question is whether the hearing has to be public. The main reason for imposing such a requirement is the increased likelihood that the results would be accepted both by the individuals in question and the student body.<sup>108</sup> The universities, on the other hand, have argued that open hearings would turn each case into a *cause célèbre*, resulting in disruption of the educational process.<sup>109</sup> If, in a given case, it appears that the university's fears are justified, it should at least insure public dissemination of the issues, arguments and resolutions.

The actual make-up of the hearing board has also been a topic of discussion. The commentators have uniformly suggested that the board should consist of students as well as faculty.<sup>110</sup> The courts, while not as egalitarian, have held that the board should not include administrators or deans directly involved in the case, nor should they be allowed to sit on the tribunal making the final determination.<sup>111</sup>

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107. 34 Misc. 2d 319, 321, 231 N.Y.S.2d 403, 407 (Sup. Ct. 1962).

108. *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

109. *Id.* See also *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968).

110. See, e.g., Van Alstyne, *Student Academic Freedom and The Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS Q. 1 (1965).

111. But see *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967), where a fair hearing was denied because of this commingling of prosecutorial and adjudicatory functions. See also *Morey v. School Bd.*, 276 Minn. 48, 148 N.W.2d 370 (1967); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968) (dictum). Administrative tribunals have been invalidated where members have a direct interest in the litigation. *Johnson v. Milk Marketing Control Bd.*, 295 Mich. 644, 295 N.W. 346 (1940). Courts have held that a tribunal will be found biased if it can be shown that the person who originally brought the charges was also a member of the tribunal. *Gaestel v. Brotherhood of Painters*, 120 N.J. Eq. 358, 185 A. 36 (Ch. 1936); *Blenko v. Schmeltz*, 362

Increasing consideration has also been given to the actual conduct of the hearing itself. Substantial questions have been raised regarding the use of witnesses, the right to confront accusers, discovery, cross-examination, and assistance of counsel. Schools have argued against allowing the student to present witnesses on his own behalf on the ground that they would not be subject to compulsory process and hence could not be compelled to testify.<sup>112</sup> Schools have also argued that they could not sanction perjured testimony.<sup>113</sup> Neither of these arguments is persuasive. The school could clearly require the presence of faculty members or students at such a proceeding and the threat of suspension or expulsion would adequately protect against perjury.<sup>114</sup> If an outside witness were unwilling to appear then the student or university would be without recourse; but this does not justify failing to request attendance. Moreover, if the outside witness had made the complaint in the first place, as is often the case, his subsequent failure to appear would be grounds for dismissal if no other evidence were available.

Similar resistance has been voiced against the right to confront the accuser. The argument against confrontation was upheld in *State ex rel. Sherman v. Hyman*,<sup>115</sup> where the court found that "honorable students do not like to be known as snoopers and informers against their fellows . . ." Subsequent courts, however, have uniformly held that such confrontation is essential to due process and fair play.<sup>116</sup>

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Pa. 365, 67 A.2d 99 (1949). See Administrative Procedure Act § 5(c), 5 U.S.C. § 1001 (1967).

112. *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 P. 433 (1928); *State ex rel. Englehardt v. Vermillion*, 78 Neb. 107, 110 N.W. 736 (1907). The arguments in favor of the right of confrontation are far more persuasive. See Johnson, *The Constitutional Rights of Students*, 42 TEX. L. REV. 344, 352-53 (1963); *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1139-40 (1968).

113. In point of fact, courts have upheld suspensions of students refusing to testify or doing so falsely. See, e.g., *Board of Educ. v. Helston*, 32 Ill. App. 300 (1890); *Goldstein v. New York Univ.*, 76 App. Div. 80, 78 N.Y.S. 739 (1902).

114. *Goldstein v. New York Univ.*, 76 App. Div. 80, 78 N.Y.S. 739 (1902).

115. 180 Tenn. 99, 171 S.W.2d 822 (1942).

116. See, e.g., *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (1967). As early as 1887, courts had recognized the desirability of affording these procedures. In *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. County Ct. 77, 82 (1887), the court said the student was entitled to know what testimony had been given against him, and by whom it had been delivered, and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses and to call others to explain or contradict their testimony.

Because the right to witnesses and confrontation are now uniformly afforded, the question has now become whether cross-examination should be permitted. Cross-examination has been characterized as central to an adversary system of justice and a great discoverer of truth.<sup>117</sup> It is in recognition of this that most courts have permitted cross-examination.<sup>118</sup> Where students have been aided by counsel, some courts have held that the cross-examination must be conducted by the students, thus barring the lawyer from participating in the actual interrogation.

There has also been increasing judicial recognition of the right to counsel in disciplinary proceedings.<sup>119</sup> It has been held that when governmental agencies act as judicial bodies in dealing with individuals they must use procedures traditionally associated with the judicial process.<sup>120</sup> Thus, universities, as governmental agencies, have come to accept the importance of assistance by counsel. The sole exception to this widespread university and judicial acceptance of such assistance in disciplinary hearings is the recent case of *Barker v. Hardway*.<sup>121</sup> In that case, the court denied the student-plaintiff's request for counsel on the ground that an expulsion hearing was not a criminal proceeding,<sup>122</sup> thus rendering the sixth amendment inapplicable. The decision is in conflict with the general trend in this area.

Courts have also required the allowance of a simple discovery procedure. Generally, if the student is accused of misconduct, courts demand that he be "permitted to inspect in advance of any such hearing any affidavits or exhibits which the college intends to submit at the hearing."<sup>123</sup> This has been

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117. J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

118. *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (N.D. Mo. 1967); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

119. *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967).

120. *Hannah v. Larche*, 363 U.S. 420, 442 (1960). See also W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW (4th ed. 1960).

121. 283 F. Supp. 228 (S.D.W. Va. 1968).

122. *Id.* at 237. See also *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

123. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).



construed to mean not only the evidence to be employed, but also a list of all witnesses and copies of their complaints and statements.

Difficulties may also arise regarding the evidentiary standards to be employed and the use of evidence obtained through a search of student residences. In *Goldberg v. Regents of the University of California*,<sup>124</sup> the court held that "there was no merit to the contention that plaintiffs were deprived of procedural due process because the [disciplinary] committee did not follow the rules of evidence . . . ." While strict conformity to the rules of evidence is probably not possible in a proceeding conducted by educators, some standard of relevance should be required. At the very least, inquiry should be confined to ascertainment of facts germane to resolution of the case. Moreover, some limits should be set on admissibility and the use of "hearsay" evidence.

Much more serious questions are raised by searches and seizures in dormitory rooms. Commentators have suggested that a student's relationship to the university in matters of housing should be that of landlord and tenant, thus insuring equality of rights between students residing in dormitories and those living in dwellings not under the control of the university.<sup>125</sup> The most recent decision on this question, however, held that a reasonable infringement of the student's right of privacy would be upheld.<sup>126</sup> The court rejected the argument that the relationship was one of landlord and tenant, finding instead that "college students who reside in dormitories have a special relationship with the college involved."<sup>127</sup> The court felt that the student's right to privacy must be subordinated to the institution's interest in fulfilling its educational responsibilities. In this case, the search was conducted at the request of state police officers to investigate "the possibility of there being marijuana on the campus." The court condoned the search without warrant, requiring as the standard for search, not "probable cause," but a lower standard of "reasonable cause to believe."<sup>128</sup> Even

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124. 57 Cal. Rptr. 463, 475 (1st D. Ct. App. 1967).

125. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 Ky. L.J. 643, 681 (1966).

126. *Moore v. Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968).

127. *Id.* at 729.

128. See also *People v. Overton*, 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967). In this case, a high school principal, suspecting the presence of marijuana, consented to the search of a student's locker over the student's objections. Obvious distinctions can be drawn, however, between searching a locker as opposed to a dwelling place, and

recognizing the university's interest in preventing health or fire hazards, several problems remain. To allow university administrators who are agents of the state to search on less than "probable cause" is to permit them to do what officers of the law cannot. Moreover, since the search in this case resulted in the filing of criminal charges, the court effectively relegated students to "second-class citizenship," at least as respects the fourth amendment.<sup>129</sup>

The courts have also prescribed an appellate review process for hearings not held before the university president or a board given the ultimate power of dismissal. In these cases, a tape recording or transcript is usually made to provide a record of the proceedings.<sup>130</sup> In the event of an appeal, this allows the court to determine whether the evidence presented was sufficient to support the board's determination.

As evidenced by the foregoing, compliance with the requirements of procedural due process requires university disciplinary proceedings to afford students a trial-type hearing safeguarded by the following guarantees:

- (1) A written notice must be provided at least one week in advance of any hearing; the notice should specify the factual allegations of misconduct and refer to the specific institutional rule which the facts, as alleged, call into play.
- (2) Prior to the hearing students must be afforded an opportunity to inspect any affidavits or other evidence that the institution intends to submit against him. He must also be provided with a list of witnesses and copies of any statements or complaints they have made.
- (3) A hearing must be conducted by an appropriate tribunal. It is not necessary that students be impanelled on such a board,

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between the levels of supervision required in high school as opposed to college. Moreover, in *Overton*, a search warrant, albeit defective, had been obtained whereas in *Moore* there had not even been an attempt to secure one.

129. It may, however, be possible for the student to suppress the seized evidence. *Mapp v. Ohio*, 367 U.S. 643 (1960), applies the fourth amendment to the states, and *Jones v. United States*, 362 U.S. 257, 267 (1960) held that "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him." The two cases together seem to impose some limitations on a school's right to enter and obtain evidence. See also *Chapman v. United States*, 365 U.S. 610 (1960); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (search of a secretary's desk, without her permission, but with the consent of her superior was unreasonable).

130. *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

but deans or administrators representing the institution's cases should not be allowed to sit on the tribunal either.

(4) The student must be permitted to have counsel present at the hearing and to seek legal advice during the course of the proceedings.

(5) The student must be permitted to confront his accusers and all witnesses.

(6) The student must be granted the opportunity to present his own case, including his version of the facts, and any affidavits, exhibits, or witnesses in support thereof.

(7) The student must be allowed to hear all evidence presented against him and to cross-examine all adverse witnesses.

(8) The tribunal must make its decision solely on the basis of facts presented to it and must provide a written finding of guilt or innocence.

(9) Appellate procedures must be guaranteed and for that purpose, a record of the hearing must be preserved.

Observance of these rules would greatly reduce the likelihood that a court would overturn a university disciplinary determination on procedural grounds.

## V. REASONABLE RULES—SUBSTANTIVE LIMITATIONS

The requirements of procedural due process have enabled the courts to safeguard student interests while avoiding substantive questions concerning the nature of the regulated conduct. It is clear, however, that procedural guarantees alone do not adequately safeguard student rights. Some attempt must be made to inquire into the reasonableness, and indeed, constitutionality of university rules. Obviously, problems of academic performance and academic dishonesty such as cheating and plagiarism are unique to educational institutions. These evaluations should be left to educators because of their experience and expertise in such matters. This is not true, however, when academic sanctions, suspension or expulsion are employed to punish non-academic offenses. Indeed, the courts have already entered into these areas.<sup>131</sup> General limits on the rule making powers of institutions are imposed by the doctrine of unconstitutional conditions and by concepts of equal protection. Substantive limitations would also result if courts were to view the student-university relationship as similar to that between a beneficiary and his fiduciary, or if an analogy were to be drawn to municipal corporations.

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131. *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967); *Hammond v. South Car. State College*, 272 F. Supp. 947 (D.S.C. 1967).

## A. UNCONSTITUTIONAL CONDITIONS

The doctrine of unconstitutional conditions limits the restrictions a university can place on a student's exercise of constitutionally guaranteed rights. It states that the enjoyment of a benefit or privilege provided by government may not be conditioned upon the waiver or relinquishment of a constitutional right except where justified by an overriding societal interest.<sup>132</sup> Applied to the educational context, this means that once a state establishes a university, it may not condition attendance on the abandonment of constitutionally protected rights.<sup>133</sup> Where a limitation is imposed on a constitutional right as a precondition to the receipt of some benefit, the restriction must be justified by a countervailing interest that is substantially and directly connected with the restriction.<sup>134</sup> If, for example, the exercise of a constitutional right could be shown to interfere materially and substantially with the educational function of the university, a regulation abridging that exercise could be condoned.<sup>135</sup>

Thus, the doctrine of unconstitutional conditions provides the student with a minimum area of freedom which the institution may not invade. It is clear, for example, that a university regulation prohibiting students from attending an orderly off-campus political rally would violate the doctrine because it would condition attendance on relinquishment of the first amendment protections of freedom of speech and association.<sup>136</sup>

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132. *Id.* See also *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

133. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). See also *Slochower v. Board of Educ.*, 350 U.S. 551, 555 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

134. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

135. Compare *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) with *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).

136. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *De Jonge v. Oregon*, 299 U.S. 353 (1937). A regulation which required or prohibited student attendance at religious services would violate substantive due process respecting the establishment or separation of religion. *School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

A public institution could neither prevent a student from traveling where he desires when out of class, nor from choosing his own associates. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964);

Several recent decisions have invoked the doctrine in similar circumstances. In *Dickey v. Alabama State Board of Education*,<sup>137</sup> a student editor was suspended for attempting to publish an editorial which offended the faculty advisor. Although it was said that he was suspended for "insubordination," the only rule he actually violated was one that prohibited editorial criticism of officers of the state. The court, in ordering reinstatement, held that a state could not require a college student to forfeit his constitutional right to freedom of speech as a condition to his attending a state-supported institution.

State school officials cannot infringe on their students' right of free and unrestricted expression . . . where the exercise of such right does not *materially* and *substantially* interfere with the requirements of appropriate discipline in the operations of the school.<sup>138</sup>

In *Goldberg v. Regents of the University of California*,<sup>139</sup> the court recognized that where the exercise of first amendment freedoms would interfere with order and discipline, a restriction on freedom of expression could validly be imposed. In that case, student members of the "Filthy Speech Movement" were suspended for conducting a loud, obscene, and disorderly rally on campus. The court upheld the suspension on the ground that the rally was calculated to disrupt the educational functions of the university, a purpose which the university can legitimately proscribe. The *Goldberg* court suggested that

the test is whether conditions annexed to the benefit reasonably tend to further the purposes sought by conferment of that benefit and whether the utility of imposing the conditions manifestly outweighs any resulting impairment of constitutional rights.<sup>140</sup>

In this case, the benefit conferred was the educational opportunity, and the limitation on loudspeakers and rallies in close proximity to the library and classrooms was reasonably calculated to "further the purpose sought by conferment of that benefit."

In *Hammond v. South Carolina State College*,<sup>141</sup> the college prohibited all "parades, celebrations and demonstrations" with-

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NAACP v. Button, 371 U.S. 415 (1963); *Edwards v. California*, 314 U.S. 160 (1941).

137. 273 F. Supp. 613 (M.D. Ala. 1967).

138. *Id.* at 618 (emphasis added).

139. 57 Cal. Rptr. 463 (Ct. App. 1967).

140. *Id.* at 471. The case was actually decided on the rationale of the Sound Truck Case, *Kovacs v. Cooper*, 336 U.S. 777 (1941), that the restriction was necessary to the maintenance of minimum standards of order and propriety.

141. 272 F. Supp. 947 (D.S.C. 1967).

out the prior approval of the college's administrative officials. Students suspended for conducting an unapproved demonstration were reinstated when the court found that "the rule under which these students were suspended was incompatible with the constitutional guarantees and is invalid."<sup>142</sup> The court held that the approval requirement was a prior restraint on the exercise of a first amendment right.<sup>143</sup> In response to the college's objection that they had the same right as a private citizen to control the use of their property, and that the campus was dedicated to scholarship and learning, the court held that

assembling at the site of government for peaceful expression of grievances constituted exercise of first amendment rights in their pristine form. [We are] not persuaded that the campus of a state college is not similarly available for the same purposes for its students.<sup>144</sup>

Thus, when universities impose limitations on "preferred" liberties, courts place the burden on the institutions to demonstrate the overriding need for subordination by showing that the interest they are trying to protect is materially and substantially related to their educational functions.<sup>145</sup>

## B. EQUAL PROTECTION

The doctrine of unconstitutional conditions protects the student only in his exercise of constitutional rights. It does not protect him from dismissal for conduct which is not constitutionally protected, or which may be in violation of state or federal law.<sup>146</sup> To some extent, however, dismissal for such

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142. *Id.* at 950.

143. See, e.g., *Thomas v. Collins*, 323 U.S. 516 (1945); *Near v. Minnesota*, 283 U.S. 697 (1931). *Hammond* may actually stand for the proposition that students have a right to demonstrate on campus. *Edwards v. South Carolina*, 372 U.S. 229 (1963). The Court rejected the defendant school's argument that they could control the use of their property like a private owner and could therefore legitimately prohibit demonstrations. *Adderley v. Florida*, 385 U.S. 39 (1966). The Court held, rather, that students, like citizens, could assemble at the seat of government and petition for redress of grievances.

144. *Hammond v. South Carolina State College*, 272 F. Supp. 947, 951 (D.S.C. 1967).

145. *Adderley v. Florida*, 385 U.S. 39 (1966). See also *Burnside v. Byars*, 363 F.2d 744 (1966); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

146 See, e.g., Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS. Q. 1, 25-26 (1965). See also *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396, 399 (N.D. Fla. 1963) (school catalogue specifically provided disciplinary sanctions for violations of

conduct may be limited by requirements of equal protection. Simply stated, equal protection "insulates individuals from arbitrary limitations on opportunities supplied by government as well as from arbitrary limitations on opportunities individuals or groups are otherwise capable of providing for themselves."<sup>147</sup> Thus, when the state undertakes to provide a benefit, such as education, it must do so equally for all. One example of an arbitrary limitation on a governmental educational opportunity is the situation in *Brown v. Board of Education*,<sup>148</sup> where state-sanctioned racial segregation was invalidated as an arbitrary classification. Even when a rule or classification does have some relationship to a legitimate state interest, it may still be invalidated as a violation of equal protection if it is found to be "comparatively" arbitrary, harsh or unessential.<sup>149</sup> The ultimate question is whether the classification is arbitrary or discriminatory.<sup>150</sup> The equal protection clause requires that the rule making power of the university be used only to control conduct within the scope of institutional authority and in

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state or federal law); *Knight v. Tennessee State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961) (students disciplined for trespass convictions arising out of "freedom rides").

147. Van Alstyne, *supra* note 146, at 27. See also *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1135 (1968).

148. 347 U.S. 483 (1954).

149. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956), where a state statute granting the opportunity to appeal criminal convictions required appellant to pay for the trial court transcript. The regulation was stricken as being a denial of equal protection to indigents despite the fact that it was reasonably related to the legitimate state interest of reducing the cost of the appellate process.

If an institution, for a reason unrelated to academic competence, denies admission or dismisses a student, that too would be arbitrary and a violation of equal protection. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950). See also Kellett, *The Expansion of Equality*, 37 So. CAL. L. REV. 400 (1964).

150. Professor Van Alstyne, *supra* note 146, at 33, suggests that when evaluating an institutional regulation which carries the sanction of dismissal, comparative or absolute denial of equal protection may be found by reference to several criteria:

(1) the legitimacy of the purpose served by the rule; (2) the relative significance of that purpose in discharging the lawful functions of the university; (3) the substantiality of the connection between that purpose and the general or particular conduct forbidden by the rule; (4) the substantiality of the connection between that purpose and the punishment prescribed by the rule; (5) the relative importance to the individual student-citizen of the activity which he is forbidden to pursue; (6) the relative importance of the interest which will be denied him if he violates the rule; (7) the availability of alternative means for protecting the university's legitimate interests, without so adversely affecting the student's educational opportunities.

furtherance of the educational goals of the university. Thus, if a student were sanctioned under a rule requiring expulsion for violation of the criminal law, reinstatement would be justified unless, at the same time, the student had abused a privilege extended to him by the university.<sup>151</sup> Moreover, if a properly punishable offense were committed against the university by a group of students, equal protection would require identical disposition of each student's case.<sup>152</sup>

### C. FIDUCIARY RELATIONSHIP

Protection of students' rights may also be secured as a result of a reappraisal of the relationship between the student and the university. As indicated previously, *in loco parentis* and contract theories have proven inadequate to the task of protecting the university's interest while at the same time preserving students' rights and opportunities. Several commentators have suggested the student-university relationship should be viewed as a fiduciary relationship, a "benevolent *in loco parentis*."<sup>153</sup> A fiduciary is defined as "a person having a duty, created by

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151. When students choose to participate in activities that result in police action . . . it is an infringement on their liberty for the college to punish such activity. . . . [N]ot every conviction under law is . . . an offense with which an educational institution must concern itself. . . .

A.C.L.U., *ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES* 11 (1961); see Monypenny, *Toward a Standard for Student Academic Freedom*, 28 *LAW & CONTEMP. PROB.* 625, 629 (1963); Van Alstyne, *supra* note 146, at 27. Professor Monypenny finds it ". . . doubtful whether even ordinary criminal offenses off campus should carry any automatic academic penalty. The particular concern of the scholarly community is offenses against scholarship and against the conditions of scholarship." 28 *LAW & CONTEMP. PROB.* at 629.

152. See, e.g., *Buttny v. Smiley*, 281 F. Supp. 280, 287 (D. Colo. 1968); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190, 203 (M.D. Tenn. 1968). "Equal protection of the law guarantees against invidious discrimination between persons in similar circumstances. The law may not lay an unequal hand on those who have committed intrinsically the same quality of offense." *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

As the court in *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 766-67 (W.D. La. 1968), noted, however, equal protection would not require a university to suspend its entire student body in order to dismiss the ringleaders of a student demonstration. By analogy to employers firing the leaders of "wild-cat" labor strikes without violating equal protection, university administrators could single out student leaders. See, e.g., *Packers Hide Ass'n v. NLRB*, 360 F.2d 59 (8th Cir. 1966); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953).

153. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 *KY. L.J.* 643 (1965); Seavey, *Dismissal of Students: Due Process*, 70 *HARV. L. REV.* 1406, 1407 (1957).



his undertaking, to act primarily for the benefit of another in matters connected with his undertaking."<sup>154</sup> The relationship arises when one party reasonably places confidence in and reliance upon the integrity of the other party to act on his behalf and for his benefit.<sup>155</sup> It may also arise when by virtue of their relationship, one party has control of and dominion over the other.<sup>156</sup> When the relationship exists, equity imposes an obligation on the fiduciary to act for the best interests of the beneficiary regardless of his own preference or advantage. In the student-university context, the argument is that the student places his trust and confidence in the educators, and relies on the institution to perform satisfactorily the duties owed him. The fiduciary relationship derives either from the reliance of the student on the university or from the university's domination and control of the student's present and future activities.<sup>157</sup> As Professor Seavey observes,

a fiduciary is one whose function it is to act for the benefit of another as to matters relevant to the relation between them. Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students.<sup>158</sup>

The attractiveness of this analysis lies in its applicability to both public and private institutions. When confronted with student misconduct, the university could maintain the necessary degree of order and discipline by reference to its fiduciary obligations to the student body as a whole. This view would confine the activities of the universities to those areas consistent with their fiduciary obligations, namely supplying the facilities, faculty and means of providing a higher education. It would require the courts to review disciplinary actions of a serious nature to determine whether the university conducted itself as a fiduciary in dealing with the accused students.<sup>159</sup> Moreover,

154. RESTATEMENT OF AGENCY (SECOND) § 13, comment *a* (1958).

155. See, e.g., *Vargas v. Esquire, Inc.*, 166 F.2d 651 (7th Cir. 1948); *In re Cover's Estate*, 188 Cal. 133, 204 P. 583 (1922); *Higgins v. Chicago Title & Trust Co.*, 312 Ill. 11, 143 N.E. 482 (1924).

156. See, e.g., *Roberts v. Parsons*, 195 Ky. 274, 242 S.W. 594 (1922). See generally H. BALLANTINE, *CORPORATIONS* §§ 62, 63 (1947); G. BOGERT, *TRUSTS & TRUSTEES* §§ 12-14 (2d ed. 1965).

157. Goldman, *supra* note 153, at 671.

158. Seavey, *supra* note 153, at 1407 n.3. This statement does not entirely reflect the nature of the relationship. A beneficiary is necessarily passive, owing no obligation to his fiduciary. There is considerably more mutuality in the student-university relationship than in a true fiduciary relationship.

159. G. BOGERT, *TRUSTS & TRUSTEES* § 544; RESTATEMENT OF CONTRACTS § 570 (1932); Goldman, *supra* note 153, at 674.

it would place the burden on the university to demonstrate that its procedures and sanctions were appropriate. The combination of these features would provide universities with all powers necessary to perform their educational functions. Any limitations on present powers would be in those areas where university action is unjustified because unrelated to the educational process. Thus, under the fiduciary theory, a violation of law which does not involve an interference with the institution's educational function would not require university involvement.

#### D. MUNICIPAL CORPORATIONS—ULTRA VIRES

An analogy can be drawn between limitations imposed on the regulatory powers of public educational institutions and on those of municipal corporations or other administrative agencies. As branches of state government, all are designed to perform designated tasks by means of delegations of state power.<sup>160</sup> The delegations, whether to city councils or school boards, must be for relatively specific purposes and all administrative acts must be designed to achieve those purposes.<sup>161</sup> In the case of municipalities, the courts require that ordinances passed under delegated authority must bear a "clear, reasonable, and substantial relation to the public health, safety, morals or welfare and must be reasonably appropriate for the police power objectives sought to be attained. . . ."<sup>162</sup> If an act is designed to achieve these ends and is addressed to an objective *intra vires*, or within its power, it will be presumptively valid, although courts will still inquire whether there is a substantial relation between the ordinance and the police power purposes.<sup>163</sup> Every ordinance based on the police power may be challenged on the grounds of its reasonableness and may be "invalidated if it has no substantial relation" to the objectives it is designed to achieve.<sup>164</sup>

160. See, e.g., *Trenton v. New Jersey*, 262 U.S. 182 (1923); *United States v. New Orleans*, 98 U.S. 381 (1879); *Barnes v. District of Columbia*, 91 U.S. 540 (1876).

161. K. DAVIS, *ADMINISTRATIVE LAW* § 2 (3d ed. 1959).

162. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Bryan v. Birmingham*, 154 Ala. 447, 45 So. 922 (1908); C. RHYNE, *MUNICIPAL LAW* 538 (3d ed. 1957).

163. RHYNE, *supra* note 162, at 540. See, e.g., *Warren v. Philadelphia*, 382 Pa. 380, 115 A.2d 218 (1955); *Adams v. New Kensington*, 357 Pa. 557, 55 A.2d 392 (1947); *Rapid City v. Schmitt*, 75 S.D. 636, 71 N.W.2d 297 (1955).

164. RHYNE, *supra* note 162, at 539 (emphasis added); see *Atlantic Coast Line R.R. v. Goldsboro*, 232 U.S. 548 (1914); *Daly v. Elton*, 195 U.S. 242 (1904).

The mandate to a university's board of trustees, although for a different purpose, is as broad as the delegation of power to a municipality. An institutional grant of power is usually couched in terms of the "rights, privileges, powers and duties customarily . . . exercised by governing boards of institutions of higher learning,"<sup>165</sup> thus giving the board full power to administer the institution. Despite their specialized objectives, universities exercise discretionary powers which are strikingly similar to those exercised by municipalities. Many schools have their own police forces and traffic ordinances. They provide for the health, safety, and welfare of the student by furnishing medical centers, traffic controls and job placement centers. The court in *Grossner v. Trustees of Columbia University*,<sup>166</sup> although rejecting it as a basis for federal jurisdiction, noted plaintiff's argument that "insofar as the powers it exercises over students . . . defendant Columbia University . . . may be likened to a 'company town' . . ."<sup>167</sup> Because of the similarities between the powers of municipal corporations and universities, it seems that the standards employed by the judiciary in construing the validity of municipal exercises of power could logically be applied to those of a university.

Courts have created a presumption of reasonableness for exercises of discretion by school administrators.<sup>168</sup> Nonetheless, courts have, on occasion, applied standards similar to those employed in evaluating municipal police power ordinances. Essentially, the inquiry seeks to determine whether promulgation of a given rule is reasonably related to the achievement of an objective sought by the delegation of power. In *Knight v. Tennessee State Board of Education*,<sup>169</sup> the court stated that there must be a reasonable connection between the conduct condemned by the rule and the educational interests the school is trying to protect before a student can be dismissed for violation of the rule. In *State ex rel. Clark v. Osborne*,<sup>170</sup> the court

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165. MASS GEN. LAW ANN. ch. 75, § 1 (1966). See also PA. STAT. ANN. tit. 24, § 5-510 (1962), which authorized the governing board to "adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs. . . ."

166. 68 Civ. 1877 (S.D.N.Y. 1968).

167. *Id.*

168. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Barker v. Hardway*, 283 F. Supp. 228, 237 (S.D. W. Va. 1968); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

169. 200 F. Supp. 174 (M.D. Tenn. 1961).

170. 24 Mo. App. 309 (1887).

found that the school had exceeded its rule making authority when it required students to obtain institutional permission before attending any social function. The court in *Burnside v. Byars*<sup>171</sup> held that a reasonable regulation is one which measurably contributes to the maintenance of order and discipline in the school.

If the analogy is extended to private corporations or associations, similar limitations on university regulatory powers can be extrapolated. A private corporation's activities are limited by its articles of incorporation. Any activities not provided for in the articles are ultra vires and void.<sup>172</sup> A university, viewed as a corporation, is only empowered to "provide" education. Thus, regulations made for purposes other than education are void. If the institution were viewed as a private association, it could be restricted by substantive limitations on the kinds of disciplinary sanctions it can impose on its members. The validity of a group's sanctions are measured by reference to the group's purposes or objectives.<sup>173</sup> If the punishment imposed—suspension or expulsion—cannot be justified by reference to the group's essential purpose—education—judicial relief is appropriate.

Many courts, however, have ignored the reasonableness of the relationship between a university regulation and the objectives it is designed to foster. Instead of inquiring whether a rule "measurably contributes" to educational objectives, courts have been prone to regard disciplinary rules as having independent educational value, apart from their relevance to the educational process.<sup>174</sup>

## VI. JUDICIAL STANDARD FOR EVALUATION— SUBSTANTIAL AND MATERIAL RELATION

In formulating a judicial test for university regulations, it is first necessary to resolve questions of jurisdiction.<sup>175</sup> There are a number of obvious areas which are the exclusive concern

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171. 363 F.2d 744 (5th Cir. 1966).

172. See, e.g., R. BAKER & W. CARY, CORPORATIONS 362 (3d ed. 1959); H. BALLANTINE, CORPORATIONS § 42 (1949).

173. See, e.g., Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930); *Developments—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1006-20 (1963).

174. *Developments—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1014 (1963).

175. See *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1, 29-32 (1966).

of the institution or the civil authorities. Academic matters, such as cheating or plagiarism, should be dealt with by the university. Criminal conduct should be left to the civil authorities. There are, however, areas of jurisdictional overlap in which the academic sanctions of suspension or expulsion may properly be imposed for non-academic conduct which interferes with educational activities. An extreme example of this would be participation in a campus riot.<sup>176</sup> It would be appropriate in these areas of concurrent and overlapping civil and institutional interest that the university allow civil prosecution and still take steps to protect its own functions and facilities.<sup>177</sup>

In assessing the relationship between a rule that carries the threat of dismissal and an institution's educational mission, a university could clearly condition continued enrollment upon satisfactory performance of academic responsibilities. Since it provides educational facilities, the university could also take appropriate disciplinary steps to ensure their proper utilization. Where, however, the conduct in question is neither related to nor disruptive of academic activities, university-imposed punishment is uncalled for.<sup>178</sup> Students who violate the law will, and should incur whatever penalties are prescribed. The university, however, should not exercise its power of dismissal simply because it disapproves of the proscribed conduct where that conduct does not involve an abuse of institutional facilities or

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176. *Grossner v. Trustees of Colum. Univ.*, 68 Civ. 1877 (S.D.N.Y. 1968); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

177. *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1, 43 (1966). The author there stated that

The University's basic purpose is the transmission of knowledge and understanding and the development of intellectual and rational capacity. . . . The University should clearly distinguish disciplinary action to protect university functions from general law enforcement, and should treat students as being separately accountable to the two.

*Accord*, *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Jones v. Tennessee State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

178. *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1132 (1968).

The student's conduct off campus should justify expulsion only if it indicates his unfitness to be a member of the academic community. School discipline should have as its only aim the deterrence of conduct, or removal of persons, harmful to the university, and not mere duplication of civil and criminal penalties.

See also *Statement on The Academic Freedom of Students*, 51 A.A.U.P. BULL. 447, 449 (1965); *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1, 38 (1966).

opportunities.<sup>179</sup> The schools should confine their disciplinary activities to conduct strongly related to academic interests.

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179. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 Kx. L.J. 643, 676 (1965); Monypenny, *Toward a Standard for Student Academic Freedom*, 28 LAW & CONTEMP. PROB. 625, 629 (1963); Van Alstyne, *Student Rights and University Authority*, 2 COLLEGE COUNSEL 44, 54 (1967).

Absent comprehensive decisions in this area, fact hypotheticals will have to illustrate the relation of rules, propounded under a substantial and material interest standard, to various forms of student behavior. At one extreme is conduct which has a substantial and material impact on educational functions. University regulations proscribing such conduct would clearly be in order. An example would be a disruptive and disorderly demonstration "on-campus" which directly interferes with on-going classroom activities. At the other extreme would be a rule prohibiting all "off-campus" criminal activity and providing for dismissal. A student's conviction for violation of a traffic ordinance would not normally have any impact on the institution, so as to justify such sanctions. It is between these poles, significant disruption on-campus, and non-existent interference off-campus, that the line must be drawn.

A university regulation, designed to protect university property and educational resources, could be framed to prohibit the theft of library books or laboratory equipment. The deprivation caused by such theft would engender a material interference with the educational opportunities of others. On the other hand, theft of books from a privately owned, "off-campus" bookstore would be irrelevant to the university's educational mission. It might even be questionable whether theft from a university owned and operated bookstore would be a basis for imposing academic sanctions. In these situations, a complaint by the store owner or by the university, instigating criminal prosecution would be the appropriate recourse. Since the university has no educational basis for sanctioning the specific conduct in question, it follows that disciplinary action based on the criminal conviction would be equally unwarranted.

A similar, if more controversial, type of situation might be presented in institutional attempts to regulate student morals, such as the off-campus "social" activities of its students. Where the students' off-campus, extra-curricular activities do not interfere with the university's educational function, there would be no basis for sanctions. Another example in this realm might involve student use of marijuana. The legality or illegality of this conduct is irrelevant to the university disciplinary functions. Rather, the judgment should be based solely on whether there is a substantial and material relation between the conduct proscribed and a university goal. Thus, if a student simply indulges privately, then it is a matter between him and the civil authorities. On the other hand, if the student is distributing to other students and using the campus as a place to make contacts, then the university has a material interest.

In summary, this standard requires that conduct a university regulates must have a substantial and material relation to the educational mission. In most instances, it is unlikely that off-campus behavior will have such an impact as to require regulation. Even as to on-campus behavior, there may be many situations that do not interfere with education. In such instances, institutional rules which merely duplicate existing civil sanctions without affording any additional protections would be mere surplusage.

In light of the caveats discussed above, when should universities exercise disciplinary powers? The most frequent and problematical situation involves off-campus conduct which may or may not have violated a law. The court in *Buttny v. Smiley*<sup>180</sup> recognized that "the doctrine of 'In Loco Parentis' is no longer tenable in a university community," and noted the increasing trend "to reject the authority of university officials to regulate 'off-campus' activity of students." At the same time, however, the court said that conduct tending to disrupt the order and discipline of a campus should be subject to disciplinary control, and that the institution could make regulations to this end.<sup>181</sup> In achieving objectives of an educational institution, a rule should measurably contribute to a material and substantial interest of the university. A material and substantial interest exists where the behavior proscribed would directly interfere with the educational process which the university is attempting to foster.<sup>182</sup> One author has stated that

violations of certain rules of the outside community . . . are of little significance to the University's functions and objectives. Similarly, certain conduct that violates no laws of the external community . . . is properly proscribed by and disciplined by the University as it interferes with the University's basic educational purpose.<sup>183</sup>

It is only infrequently that off-campus misconduct interferes with the university's educational role.<sup>184</sup>

180. 281 F. Supp. 280, 286 (1968).

181. *Id.*

182. See, e.g., *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463, 472 (1st D. Ct. App. 1967): "The University has the power to formulate and enforce rules of student conduct that are appropriate and necessary to the maintenance of order and propriety . . . where such rules are reasonably necessary to further the University's educational goals."

183. *Id.* at 476.

184. Monypenny, *Toward A Standard For Student Academic Freedom*, 28 LAW & CONTEMP. PROB. 625, 629 (1963). Professor Monypenny suggests that

The particular concern of the scholarly community is offenses against scholarship and against the conditions of scholarship. . . . It would seem to promote maturity to let [criminal] offenses be a private matter between the student and civil authority.

Goldman, *supra* note 179, at 675, would require that the university "demonstrate that its exercise of disciplinary powers constitutes conduct necessary and proper to the process of providing higher education." In the *Statement on The Academic Freedom of Students*, 51 A.A.U.P. BULL. 447, 449 (1965), the American Association of University Professors stated that

Institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct from those of the general community should the special authority of the institution be asserted.

Even when there is no direct relationship between misconduct and academic affairs, the university may still feel some compulsion to discipline the "offending" student. This may stem from a feeling of obligation to the community derived from previous institutional policies which may have led the community to expect such retribution.<sup>185</sup> It would be straining the meaning of education, however, to establish a rule designed solely to protect the "good name" of the institution, or the harmony of alumni or community relations.<sup>186</sup> The university should undertake to educate both its students and the community. The best way students can learn responsible citizenship is by being responsible for their actions. Thus, if students violate the law, they should be punished by the civil authorities, not the university. Consistent adherence to such a policy would, in turn, teach the non-academic community that the university cannot and will not assume responsibility for the actions of its students outside the educational environment.

In terms of court review, the burden of proof in the first instance should be on the student to establish a *prima facie* case of deprivation of some significant interest. An expulsion or suspension, with the concomitant difficulty of re-enrollment or transfer, and the economic and social consequences, would certainly sustain this burden.<sup>187</sup> The university should then be required to show how the conduct in question materially and substantially infringed on the educational interests of the university:

An institution, in formulating and enforcing rules, must be able to justify those rules on the merits; on the merits as being distinctly related to a proper concern of an educational institution and not "on the merits" in the strained sense that while

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185. See, e.g., *Symposium, supra* note 175, at 57-62, for a report of such an instance.

186. See, e.g., Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. at 1402-03 (1963). *Darrow v. Briggs*, 261 Mo. 244, 273, 169 S.W. 118, 124 (1914), stands for the proposition that a school may dismiss a student to protect the "good name" of the institution.

But see Goldman *supra* note 179, at 677; *Symposium, supra* note 175, at 30, 38. Van Alstyne, *supra* note 179, at 53 feels that

The adverse reaction of third parties to the coincidental identification of the persons in trouble does not entitle a particular State Agency to attempt to protect what it regards as its interest by yielding to the misunderstanding; the false attribution of responsibility made by the community at large which may take vengeful action against a public university does not justify a university in turn to take vengeful action against its students.

Accord, *Aaron v. Cooper*, 358 U.S. 1 (1958).

187. *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1152-53 (1968).



we cannot show how a given rule really contributed to enhancing educational opportunities or maximizing the educational advancement of our students, we defend it only in the sense that if we do not have such a rule, the community will think ill of us. . . .<sup>188</sup>

The requirement of a demonstration of substantial and material interest may, by itself, deter institutions from formulating rules which only duplicate those of enforcement agencies without protecting any separate interests or responsibilities. This, in turn, would prevent infliction of multiple punishments for a single offense, as may presently occur when civil authorities and the institutions impose sanctions simultaneously. Finally, and most importantly, this approach would free resources now wasted on policing activities to be used for the overall improvement of the educational process.

## VII. CONCLUSION

Recent decisions have cited with approval the definition of a university and its rule making power offered in a symposium entitled *Student Rights and Campus Rules*.<sup>189</sup> Balancing the interests and needs of all concerned, one author suggested the following:

Broadly stated, the mission of the university is to impart learning and to advance the boundaries of knowledge. This carries with it the administrative responsibility to control and regulate whatever conduct and behavior of the members of the university family impedes, obstructs, or threatens the achievement of its educational goals. In turn, it is the responsibility of students and faculty to refrain from conduct that obstructs or interferes with the educational and research objectives of the university, which impairs the full development of the mutual process of teaching and learning, or which imposes restraints upon the advancement of knowledge. . . .<sup>190</sup>

This simple statement at once delimits the purposes of a university, the objectives toward which its regulatory powers may be applied, and the responsibilities of every member of the academic community to respect these objectives. University rules, written with specificity, and substantially and materially related to fostering the educational goals of the institution, would be readily accepted by students, faculty and adminis-

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188. Van Alstyne, *supra* note 179, at 54.

189. *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1 (1966). See, e.g., *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

190. Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23, 27 (1966).

trators alike as a part of their mutual responsibility in securing and providing an education.

It is clear, however, that if administrators and institutions are unwilling to adopt a standard of "reasonableness" measured by the directness of the relationship to education; if universities continue to rely on vague references to "misconduct unbecoming a student" as their touchstone for disciplinary action; and if institutions insist on imposing regulations designed to silence the emerging generation and stifle their political participation; such rules and regulations will be met by continuing campus unrest, confrontation, and "intense reaction that goes almost to the point of rejecting the authority of the university to make any rules at all."<sup>191</sup> The choice now lies with the universities.

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191. *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 755 (W.D. La. 1968).