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PROCEDURAL DUE PROCESS FOR SCHOOL DISCIPLINE: PROBING THE CONSTITUTIONAL OUTLINE

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I. INTRODUCTION

School discipline¹ and procedures for imposing sanctions against erring students are easily shrugged off as peripheral or even frivolous concerns. What counts is the education provided by schools, for education is the great equalizer in the United States, the port of entry to wealth, status, and the good life. Education is the foundation of democracy, the *sine qua non* for a literate and enlightened electorate. Educational inequalities associated with race and poverty do exist, to be sure, but they are to be regretted and overcome. With sufficient dedication equal educational opportunity can be made a reality. Any problems related to the procedures for regulating student conduct pale by comparison.

And yet . . . it might all be stated differently. The educational inequalities of race² and poverty³ remain truly massive. And the *Coleman Report*,⁴ which so depressingly chronicled our intuitive suspicions concerning the gaps separating the educational achievement of different ethnic and socioeconomic groups, has strongly suggested that very little of the education which is susceptible to measurement can be attributed to what school provides.⁵ This and other sources have prompted searching questions about the meaning of educational opportunity.⁶ Even sharper questions point up a still darker side of

¹ Throughout this Article the term "discipline" is used in a simple and general sense to refer to action taken by the school authorities (the "school") against a student because his conduct, as distinct from his academic performance, has failed to conform to some school standard. "Discipline," "sanction," and "punishment" will be used interchangeably and without any suggestion of different nuances.

² See U.S. COMM'N ON CIVIL RIGHTS, FEDERAL ENFORCEMENT OF SCHOOL DESEGREGATION 4-9 (1969). "[T]here are many places still in this country where the schools are either 'white' or 'Negro' and not just schools for all children as the Constitution requires." *Alexander v. Holmes Bd. of Educ.*, 396 U.S. 1218, 1222 (Black, Circuit Justice, 1969).

³ See, e.g., Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969); authorities cited in *id.* 307 n.2; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment, The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7 (1969).

⁴ OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) [hereinafter cited as *COLEMAN REPORT*].

⁵ See *id.* 302-19.

⁶ See 1 U.S. COMM'N ON CIVIL RIGHTS, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* (1967); *Equal Educational Opportunity*, 38 HARV. EDUC. REV. 3-175 (Special Issue, Winter 1968); cf. Cohen, *Defining Racial Equality in Education*, 16 U.C.L.A.L. REV. 255 (1969); Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A.L. REV. 787 (1968); Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147 (1966); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968).

the school's afflictions: Are schools repressive? Do they stress getting into college too much and realizing one's individual potential too little? Do they reward conformity and suffocate creativity? Do they teach children that life is stultifying and arbitrary, and that one must accommodate himself to these hard "facts of life"? The affirmative answers frequently given to these and similar questions portray school as too often a positively harmful force in the lives of children.⁷

The variety and frequency of the criticisms of public schools do not demonstrate that school should be let out for good or that the effort to equalize educational opportunity should be abandoned. Such persistent criticism does indicate, however, that generally accepted assumptions underlying our nearly monolithic compulsory school system⁸ should be reassessed more thoroughly than has thus far occurred.⁹ But the problems of educational quality and equality are gargantuan and will not be solved tomorrow.

Meanwhile, the student attends school under the command of the law and, as a result, suffers a considerable diminution of the freedom he would enjoy if left to his own and his parents' regulation. For millions of students spending large portions of their lives under the power of public school authorities, the fairness of discipline procedures has a daily impact. The school's control over its student is even more complete because the high school diploma is infused with enormous

⁷ See, e.g., G. DENNISON, *THE LIVES OF CHILDREN* (1969); E. FRIEDENBERG, *COMING OF AGE IN AMERICA* (1965); P. GOODMAN, *COMPULSORY MIS-EDUCATION* (1964); J. HOLT, *THE UNDERACHIEVING SCHOOL* (1969); H. KOHL, *36 CHILDREN* (1967); J. KOZOL, *DEATH AT AN EARLY AGE* (1967); G. LEONARD, *EDUCATION AND ECSTASY* (1968); C. SILBERMAN, *CRISIS IN THE CLASSROOM* (1970); Cunningham, *Hey, Man, You Our Principal*, 51 PHI DELTA KAPPAN 123 (1969); Illich, *Commencement at the University of Puerto Rico*, N.Y. REV. OF BOOKS, Oct. 9, 1969, at 12; Schrag, *Gloom at the Top*, SAT. REV., Aug. 16, 1969, at 50; Taylor, Book Review, N.Y. Times, Feb. 8, 1970, § 7, at 6. A number of works detailing the students' criticisms have recently appeared. *HOW OLD WILL YOU BE IN 1984?* (D. Divoky ed. 1969); *OUR TIME IS NOW—NOTES FROM THE HIGH SCHOOL UNDERGROUND* (J. Birmingham ed. 1970); *THE HIGH SCHOOL REVOLUTIONARIES* (M. Libarle & T. Flesion ed. 1970).

⁸ Some variety is provided by the constitutionally protected option to attend private school. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Approximately 6,489,000 children, or 13% of the school-attending population, availed themselves of this alternative in the 1967-68 school year. See BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 103 (1969). Requirements of money and/or religious affiliation make private school a viable option for only a small minority of children. Cf. *School Dist. v. Schempp*, 374 U.S. 203, 312-13 (1963) (Stewart, J., dissenting). Of course, compulsory education laws also assist private schools in obtaining their clientele. Cf. *Zorach v. Clauson*, 343 U.S. 306, 323 (1952) (Jackson, J., dissenting).

⁹ For various reasons many of the critics of public school education have urged or implied that compulsory attendance requirements should be qualified or eliminated. See G. DENNISON, *supra* note 7, at 88; J. HOLT, *supra* note 7, at 28; G. LEONARD, *supra* note 7, at 102; Illich, *Education Without School: How It Can Be Done*, 15 N.Y. REV. OF BOOKS, Jan. 7, 1971, at 25. See also Cunningham, *supra* note 7, at 128.

power as a pass card to decent jobs and college. In short, school discipline imposes potentially pervasive restrictions on the student's school-related life, and may impair his future life chances by excluding him from school.

School discipline procedures may also be vitally important insofar as they project an image of a fair society to school children. In contrast to the many negative faces society shows its younger members, fair procedures in disciplinary proceedings represent a virtue with immediate impact—on students in trouble and on those who merely watch. To insist upon fair treatment before passing judgment against a student accused of wrongdoing is to demonstrate that society has high principles and the conviction to honor them. Speaking of procedural due process, Justice Frankfurter once said:

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by a secret, one-sided determination of facts decisive of rights.¹⁰

A public school student will tend to learn that "democracy implies respect for the elementary rights of men," or that it does not, depending on whether his "government"—the school—treats him and his classmates fairly or unfairly.

Procedural regularity in administering school discipline is particularly critical today. Student activism has spilled over from colleges to high schools and even junior high schools.¹¹ Crime and violence, often associated with racial tension, are becoming problems of frightening proportions in many school systems.¹² These phenomena are likely to be accompanied by an increase in the number of discipline cases and, inevitably, by pressure for "toughness."¹³ Popular impatience with

¹⁰ Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (concurring opinion).

¹¹ "Sixty percent of all the high schools of America have experienced some kind of student protest within the past year, according to reports from over 1,000 principals queried at random by the National Association of Secondary School Principals." Pileggi, *Revolutionaries Who Have To Be Home* by 7:30, 50 PHI DELTA KAPPAN 561 (1969).

¹² See N.Y. Times, Feb. 9, 1970, at 1, col. 4 (racially based); TIME, Nov. 14, 1969, at 49; U.S. NEWS & WORLD REP., May 20, 1968, at 36-38. Independent preliminary studies by Senator Thomas S. Dodd and by the U.S. Office of Education have resulted in reports of staggering conditions: millions of dollars being spent to insure security in schools; teachers carrying guns; dramatic increases in such statistics as student assaults on teachers, student assaults on students, and expulsion of "incorrigible" students. See NAT'L CATHOLIC REP., Jan. 28, 1970, at 1, col. 4.

¹³ See N.Y. Times, Aug. 17, 1969, §1, at 1, col. 2 (Gallup poll reveals 49% believe school discipline is too lax). An attitude of concern about "law and order" in the public schools has already found its way into judicial statements. For instance, "groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 525 (1969) (Black, J., dissenting); see *Madera v. Board of Educ.*, 386 F.2d 778, 788 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

the activities of students increases the possibility of unfair treatment and heightens the importance of providing an accused student with procedural safeguards designed to secure a fair determination that misconduct has occurred and that a particular disciplinary sanction is appropriate.

Important as they are, however, fair procedures do not insure wise policies or just results. The substance of in-school rules is often more critical to a student than the procedures governing their enforcement. No procedure will protect a child from tyranny if regulations govern his religion, his speech, his thought, or his style of hair and dress. Yet when rules of conduct violate the Federal Constitution or a state constitution, statute, or regulation, appropriate procedures are essential to reveal these substantive infirmities. And although rules may offend or humiliate the child without being illegal, fair procedures will tend to force the rules and the reasons for punishment into the open, subjecting the wisdom of the rules to the scrutiny of all.

Until recently, the overwhelming thrust of the law dealing with school discipline left the discretion of the school authorities virtually uncontrolled by the limitations of procedural due process.¹⁴ It is now hard to avoid concluding that this virtual absence of procedural protection was always wrong in principle and no longer rests on viable legal authority. The student has a high order interest in obtaining an education and in avoiding any loss of freedom beyond that essential for implementation of compulsory education laws. Any substantial impairment of this interest by reason of sanctions for misconduct should result only after the utilization of procedures satisfying the requirements of due process of law. But the specific content of these requirements varies widely with circumstances, including the effect upon the potentially competing school interests. Accordingly, in this Article I will devote primary attention to the relevant constitutional standards for school discipline, examining at length four "rights" closely identified with procedural fairness—impartial tribunal, counsel, cross-examination, and record for review. First, however, it is necessary to consider the current trends in judicial treatment of cases involving youth, the attitude of the courts toward school discipline, and the interests involved in the identified disciplinary proceedings. In Part III these general considerations will be brought to bear upon the problem of determining whether a student should be entitled to the identified procedural rights in a disciplinary proceeding entailing the possibility of serious punishment.

¹⁴ See Annot., 58 A.L.R.2d 903, 908-09, 916-20 (1958); N. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* ch. 14 (rev. ed. 1955); L. PETERSON, R. ROSS-MILLER & M. VOLZ, *THE LAW AND PUBLIC SCHOOL OPERATION* ch. 13 (1968) [hereinafter cited as *PUBLIC SCHOOL OPERATION*].

II. GENERAL CONSIDERATIONS AFFECTING THE AVAILABILITY OF DUE PROCESS PROTECTION IN SCHOOL DISCIPLINE CASES

Although the Supreme Court and most other courts have yet to require adherence to due process standards in school discipline proceedings, the general basis for applying these standards is easily outlined. A logical beginning point is the language of the fourteenth amendment: "No state shall . . . deprive any person of life, liberty, or property, without due process of law" It is well established that action by a school district is "state action."¹⁵ And "liberty" has been construed to encompass a student's interest in obtaining an education.¹⁶ Certainly excluding the student from school would entail at least a temporary impairment of that interest. Alternatively, unless the effect of any particular disciplinary sanction is considered de minimis, confining a child in school and then subjecting him to further physical restraint seems to present a straightforward case of liberty deprivation. Thus, inquiry must focus on whether the disciplinary infringement involved in any particular case has been imposed without due process of law.

Consistent with the meaning given to it in many different settings, procedural due process in school discipline must be tested by the extent to which the procedures available to the student conform with fundamental fairness.¹⁷ According to language recently repeated by the Supreme Court in *Jenkins v. McKeithen*,¹⁸

"[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

The elements of the standard suggested by the Court are not claimed to be the only relevant considerations.¹⁹ The essence of all such verbal

¹⁵ See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

¹⁶ See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁷ See *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161-74 (1951) (Frankfurter, J., concurring); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963); *Byse, The University and Due Process: A Somewhat Different View*, 54 A.A.U.P. BULL. 143 (1968); *Van Alstyne, Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368 (1963); *Wright, The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1060, 1082 (1969).

¹⁸ 395 U.S. 411, 426 (1969) (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960)).

¹⁹ 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 alter-

attempts to characterize procedural due process is open-endedness. In short, giving content to the due process clause requires a sensitive balancing of competing interests, and much depends upon individual judgments of the weight to be assigned to the various interests. In the words of Justice Frankfurter: "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."²⁰ School authorities should not be too niggardly in determining what fundamental fairness requires; nor should courts be too deferential in satisfying themselves through hindsight that fundamental fairness was provided. Hopefully, enlightened administrators will realize that the due process clause sets only minimal, not ideal, standards of fairness.

A. Present Framework: Due Process for Youth

Prior to 1961 the student's rights played a negligible role in school and college discipline cases.²¹ In that year the Fifth Circuit decided *Dixon v. Alabama State Board of Education*,²² prohibiting a state college from expelling students without providing any of the procedural safeguards required by due process. The expelled students, who sought injunctive relief, had participated in a sit-in demonstration at a local restaurant and a large demonstration at the county court house. At the suggestion of the state governor, they were summarily expelled.²³ After rejecting as irrelevant the argument that the students had no constitutional right to attend the state college, noting the potential for arbitrariness, and establishing the absence of any interest to justify failing to afford fundamental fairness, the court held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."²⁴ Writing for the court,

natives 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.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

²⁰ *Id.*

²¹ See Annot., 58 A.L.R.2d 903 (1956); 47 AM. JUR. *Schools* §§ 173-88 (1943); 79 C.J.S. *Schools and School Districts* §§ 493-505 (1952); N. EDWARDS, *supra* note 14, ch. 22; PUBLIC SCHOOL OPERATION ch. 13.

²² 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). An excellent bibliography of the literature spawned by the *Dixon* case, most of it dealing with the rights of college students, may be found in Van Alstyne, *A Suggested Seminar in Student Rights*, 21 J. LEGAL ED. 547 (1969).

²³ 294 F.2d at 154.

²⁴ *Id.* at 158.

Judge Rives quoted Professor Seavey's famous statement that: "It is . . . shocking to find that a court supports [educational officials] in denying to a student the protection given a pickpocket."²⁵ As Professor Wright has said: "The opinion . . . had the force of an idea whose time had come and it has swept the field."²⁶

Although *Dixon* has not yet "swept the field" below the college level,²⁷ the case will inevitably lead to profound changes in the law of public school discipline. The speed with which and the extent to which *Dixon* will eventually alter public school discipline law will be affected by several significant differences and similarities between the college and public school situations. First, the college cases have been influenced by the value of a college education.²⁸ Below the college level, however, education is even more indispensable to the student's welfare.²⁹ Second, high school education is compulsory whereas college education is optional, a distinction often remarked upon by the courts.³⁰ This difference alone dramatically alters the context of public school discipline, for two of the pre-*Dixon* justifications for constitutional immunity at the college level—privilege and contractual consent³¹—have no applicability to students attending school under compulsion of law. Third, the daily pattern of life in public schools contrasts sharply to that of college life.³² The college student controls a greater portion of his time, enjoying freedom commensurate with his age. The public school student chafes under greater confinement and restrictions. Fourth, unlike his college counterpart, the public school student lives at home and generally receives more parental protection and super-

²⁵ *Id.* (quoting Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957)).

²⁶ See Wright, *supra* note 17, at 1032.

²⁷ The *Dixon* decision has been followed with respect to public school as well as college discipline cases. See *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964); *cf. Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D.N.Y.), *rev'd*, 386 F.2d 788 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); *Goldwyn v. Allen*, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967).

²⁸ See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Soglin v. Kauffman*, 295 F. Supp. 978, 988-90 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

²⁹ See text accompanying notes 139-143 *infra*.

³⁰ See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 631-32 (1943); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 141 (W.D. Mo. 1968) (en banc); *cf. Board of Educ. v. Purse*, 101 Ga. 422, 433-35, 28 S.E. 896, 900-01 (1897). See also *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 156-57 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

³¹ See Van Alstyne, *supra* note 17, at 370; Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1363, 1369 (1963). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

³² See *Banks v. Board of Public Instruction*, 314 F. Supp. 285, 292 (S.D. Fla. 1970), *vacated sub nom. Board of Public Instruction v. Richardson*, 39 U.S.L.W. 3420 (U.S. Mar. 30, 1971) (No. 888).

vision. The parent bears more responsibility for the child than for the young adult,³³ and the public school student is usually thought of as a "child." Finally, public school students are more numerous and encompass a greater span of ages and development than college students. Consequently, maintaining a disciplinary system involves a greater commitment of resources at the public school than the college level, and the courts are more likely to be cautious about intervening in public school discipline.³⁴

These differences argue variously for public school procedures which are either more or less complete than those required at the college level—or just different. On balance, however, they suggest an even more compelling case for procedural due process at the public school level. In short, these differences support rather than contravene the view that *Dixon* is a landmark for public school students no less than for college students.

This conclusion is strongly reinforced by *Tinker v. Des Moines Independent Community School District*,³⁵ in which the Supreme Court held that school authorities were prohibited by the first and fourteenth amendments from suspending students who wore black armbands to protest the Vietnam war. The Court noted: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate."³⁶ The school claimed that students wearing armbands disrupted the educational process, and the district court found its claim sufficient. The Supreme Court looked for proof of disruption and found it wanting:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . .

. . . [W]here there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.³⁷

Of course, the facts of the *Tinker* case were loaded. A first amendment right was involved. The armband, nearly "pure" symbolic speech,

³³ See RESTATEMENT (SECOND) OF TORTS § 316 (1965); cf. Board of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959) (\$344,000 judgment against parent for child's negligent act setting fire to school building).

³⁴ See *Stevenson v. Board of Educ.*, 426 F.2d 1154, 1156-57 (5th Cir.), cert. denied, 400 U.S. 957 (1970); cf. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 160 (5th Cir.) (dissenting opinion), cert. denied, 368 U.S. 930 (1961).

³⁵ 393 U.S. 503 (1969).

³⁶ *Id.* at 506.

³⁷ *Id.* at 508-09.

was also political speech, arguably entitled to special protection.³⁸ Furthermore, the circumstances amply indicated that the anti-Vietnam war message of the armband had been singled out for suppression.³⁹ Also, as Justice Fortas' majority opinion specifically noted, the case involved neither disruptive conduct nor hair or dress regulations.⁴⁰ In view of Justice Black's intemperate dissent⁴¹ and the public opinion it presumably represents, for the Court to disclaim doing more than it did is understandable. Yet the Court did not disclaim jurisdiction over questions involving disruption or suspect regulations; it simply declared that they were not raised by the case.⁴²

The student's interest in freedom from hair regulation is arguably entitled to less protection than is his interest in freedom of speech and, assuming that the Court will apply a sliding-scale calculus of the type used in the equal protection area,⁴³ perhaps more deference is owed to the "reasonable" fears of school authorities when lower order interests are at stake. But there is no reason to conclude that the regulation of either dress or disruption may be enforced without minimal procedural regularity. On the constitutional scales, fair procedure would seem nearly as weighty as free speech.⁴⁴ Thus, as long as the student's interest may be embraced by the constitutional phrase "life, liberty, and property," the Court's opinion seems to make clear that the student threatened with disciplinary sanctions may claim the protection of the due process clause.

³⁸ See A. MEIKLEJOHN, *POLITICAL FREEDOM* pt. 1 (1960).

³⁹ 393 U.S. at 510-11.

⁴⁰ *Id.* at 507-08.

⁴¹ Justice Black concluded in part:

Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.

Id. at 525.

⁴² *Id.* at 509. Justice Fortas' special concurrence to the denial of certiorari in *Barker v. Hardway*, 394 U.S. 905 (1969), slightly undercuts this statement. In agreeing that certiorari was properly denied, Justice Fortas explained that "[a]n adequate hearing was afforded them on the issue of suspension." *Id.* at 905. This sentence may mean that he does not believe that students have a right to counsel in these cases, but a more likely interpretation is that he found the procedure, including the full hearing provided in the district court, sufficient. Any conscious judgment concerning the hearing procedures in *Barker* was probably heavily influenced by the students' "violent and destructive interference with the rights of others," emphasized in Justice Fortas' opinion. See *id.*

⁴³ See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120-21 (1969) [hereinafter cited as *Equal Protection*].

⁴⁴ "Due process is perhaps the most majestic concept in our whole constitutional system." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

The *Tinker* opinion does recognize "the comprehensive authority" of school authorities "to prescribe and control conduct in the schools."⁴⁵ Nevertheless, the tone of the opinion is not overly deferential to the judgments or interests of these officials. The Court stressed that education includes the entire school-related experience, not simply formal classroom teachings. According to the Court, such nonclassroom learning experiences include "personal intercommunication among the students."⁴⁶ Moreover, the Court expressed deep concern that the student's experience in school might be shaped by the school's arbitrary power.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State.⁴⁷

Although *Dixon* has not yet received formal approval from the Court, it did receive passing approval in *Tinker*. In limiting the significance of *Hamilton v. Regents of the University of California*,⁴⁸ which had held that requiring a state university student to participate in military training did not infringe the due process clause, the Court stated in *Tinker*: "The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees."⁴⁹ In support of this statement, the Court cited *Dixon* together with two college discipline cases⁵⁰ and *West Virginia State Board of Education v. Barnette*,⁵¹ the elementary school flag salute case. In addition, there may be significance in the Court's rejection of Justice Harlan's dissenting position in *Tinker*. Justice Harlan urged that the complaining student should have "the burden of showing that a particular school measure was motivated by other than legitimate school concerns"⁵²—a position

⁴⁵ 393 U.S. at 507.

⁴⁶ *Id.* at 512 (footnote omitted).

⁴⁷ *Id.* at 511.

⁴⁸ 293 U.S. 245 (1934).

⁴⁹ 393 U.S. at 506 n.2.

⁵⁰ *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), modified, 394 F.2d 490 (5th Cir.), vacated as moot sub nom. *Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961).

⁵¹ 319 U.S. 624 (1943).

⁵² 393 U.S. at 526 (dissenting opinion).

strikingly reminiscent of the open-ended discretion historically allowed to college and school officials prior to *Dixon*.⁵³

A student's claim to due process protection in school disciplinary proceedings is further strengthened by the Court's decision in *In re Gault*.⁵⁴ The *Gault* case involved a juvenile proceeding against a fifteen-year-old boy for "delinquent" behavior—participating in an obscene telephone call. The proceeding afforded the accused boy was drastically lacking in ordinary procedural safeguards: there was no adequate advance notice or statement of the charges; the evidence was largely hearsay; the boy was not advised of his right to remain silent; participation by counsel and cross-examination were both denied.⁵⁵ Following this proceeding, the boy was committed to reform school for a maximum of six years, although an adult would have received a maximum fine of five to fifty dollars or imprisonment for not more than two months. The Court held that, in a juvenile court proceeding, an accused youth is entitled as a constitutional minimum to counsel, to cross-examination and confrontation, and to remain silent after appropriate warning.

Although *Gault* heralded a constitutional revolution in juvenile proceedings, several considerations urge caution in analogizing to the school discipline area. *Gault*, although technically not a criminal case, is at least "quasi-criminal." The offense charged would have been a crime if committed by an adult and carried a comparable stigma; a "delinquency" determination meant a jail-like sentence at a detention home.⁵⁶ Consequently, the Court relied heavily on the criminal law and the Bill of Rights. The Court's rationale in *Gault* may not amount to "selective incorporation," but it came close.⁵⁷ Plainly the wholesale adoption of various fifth and sixth amendment criminal procedures would have been impossible in a case that did not have the appearance of a criminal prosecution. A second limiting consideration is that the Court was responding in *Gault* to widespread recognition that the juvenile system had not fulfilled its promise and needed major overhaul.⁵⁸

⁵³ See, e.g., *Steier v. New York State Educ. Comm'r*, 271 F.2d 13, 20 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960); *Dixon v. Alabama State Bd. of Educ.*, 186 F. Supp. 945, 951 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

⁵⁴ 387 U.S. 1 (1967).

⁵⁵ *Id.* at 4-10.

⁵⁶ *Id.* at 23-24, 27.

⁵⁷ Compare Dorsen & Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAMILY L.Q., Dec. 1967, at 1, 10-13, with Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 246-47.

⁵⁸ Sources critical of the juvenile system are cited throughout the Court's opinion. Much of the material is collected in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

No equivalent accumulation of knowledge or general condemnation exists concerning the workings of school discipline, although criticism has been growing.⁵⁹ Finally, one dimension of school discipline appears to be missing from the juvenile court system. The juvenile process is solely concerned with preventing antisocial or criminal conduct and rehabilitating juveniles who "go wrong." The schools, on the other hand, are chartered to provide education. They have an interest not only in preserving the educational process, but also in protecting all those persons who are, by command of law, physically involved in it. Furthermore, a student charged with misconduct has a relationship connecting him with the school and its personnel prior to and independently of the initiation of disciplinary proceedings. Unless the student is expelled, this relationship will continue after the proceeding is completed. Thus, the offense causing the student to be threatened with punishment may be seen as only a part of a complex relationship, and this may accordingly reduce the air-clearing benefits of "having it out."

Yet despite these limiting considerations, *Gault* contains some important lessons for the school discipline context. The Court consciously chose to base its decision demanding procedural safeguards on the serious deprivation of liberty involved, and explicitly refrained from classifying the case as "criminal" or "civil," minimizing the relevance of the distinction.⁶⁰ This emphasis on the severity of the deprivation suggests that the application of due process standards to school discipline proceedings depends upon the nature of the threat to a student's liberty and not upon the "character" of the discipline. The *Gault* opinion also dismissed the arguments that the state's action in juvenile court is taken as "parens patriae" rather than as an adversary, and that the informality made possible by the absence of procedural safeguards is beneficial to the child's rehabilitation. The Court concluded that the paternal role of the juvenile courts was historically dubious and practically ineffective as a substitute for procedural safeguards, and that the claimed benefits of informality were either nonexistent or preservable under a due process regime.⁶¹ Throughout runs the theme that the good motives and the alleged achievements of the state's procedures are not enough when a serious threat to individual liberty, even a child's liberty,⁶² is involved.

⁵⁹ See authorities cited note 7 *supra*.

⁶⁰ See 387 U.S. at 49-50; *id.* at 68 (Harlan, J., concurring).

⁶¹ See *id.* at 16-28.

⁶² "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

All three cases in the trilogy of *Dixon*, *Tinker*, and *Gault* involve the application of the due process clause of the fourteenth amendment to protect the liberty of young people. Taken together, the three cases indicate that when significant deprivations of liberty may result from school disciplinary proceedings, the courts should not be deferential in determining the procedural safeguards required by due process.

B. *The Hands-Off Approach of the Courts*

To argue that the broad themes of *Dixon*, *Tinker*, and *Gault* have already established a new due process regime in school discipline would overstate the case, for such a development does not take hold immediately. The historical hands-off approach of the courts in school discipline cases is deeply ingrained and likely to reappear in future cases.⁶³ Therefore, before dealing in detail with due process requirements in school disciplinary proceedings, some major bases for judicial abstention must be noted.

1. Traditional Avoidance: The Doctrine of In Loco Parentis

The antecedents of the American doctrine of in loco parentis are found in Blackstone's *Commentaries*:

He may also delegate part of his parental authority, during his life, to the tutor or school master of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.⁶⁴

In time this doctrine was transplanted wholesale and without question into the compulsory education system. Some commentators have noted that the compulsory attendance law rather than parental delegation provided the school its unusual authority over the child,⁶⁵ and the implications of the difference between the parent's and the teacher's relationship to the child have occasionally been observed by the courts.⁶⁶ In general, however, the doctrine continues to be applied routinely, most frequently when raised by a teacher as a defense in a criminal or

⁶³ A particularly interesting illustration of blending the old and the new is *Barker v. Hardway*, 283 F. Supp. 228 (S.D.W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); see note 361 *infra*.

⁶⁴ 1 W. BLACKSTONE, *COMMENTARIES* *453.

⁶⁵ See, e.g., Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 384 & n.44 (1969); Sumpton, *Responsibility of Principal for Planning and Supervision in Connection With Field Trips and Errands*, in *LAW AND THE SCHOOL PRINCIPAL* 137, 138 (R. Seitz ed. 1961).

⁶⁶ See *Marlar v. Bill*, 181 Tenn. 100, 178 S.W.2d 634 (1944); *Lander v. Seaver*, 32 Vt. 114 (1859).

personal injury suit growing out of his use of corporal punishment.⁶⁷

Although the effect of this change has never dissuaded courts from applying the doctrine, the enactment of compulsory attendance laws⁶⁸ drastically altered the parent-pupil-teacher relationship upon which the doctrine was founded. As long as the relationship between parent and tutor was consensual, the parent directly controlled by selection the person holding disciplinary control over his child and could terminate the appointment if he became dissatisfied with the delegate. But when a parent sends a child to school because the law so directs, he delegates no power. And to suggest that the parent delegates unrestricted power, especially when he objects to the discipline imposed, is patently absurd.⁶⁹ Even ignoring the transplantation from private education to public compulsory education, a doctrine supporting the right to beat a child is unquestionably inconsistent with current values.⁷⁰

Furthermore, although many teachers obviously care deeply about their students, the student-teacher relationship is significantly different from the parental one. In the modern school setting, the teacher does not and perhaps cannot have an individual, parent-like concern for the child's welfare.⁷¹ A close home-school community that might bring the teacher within the ambit of family trust rarely develops. Indeed, in some areas cataclysmic breakdowns in relations between parents and

⁶⁷ "[O]ne standing in loco parentis, exercising the parent's delegated authority, may administer reasonable chastisement to a child or pupil to the same extent as the parent himself" *Holmes v. State*, 39 So. 569, 570 (Ala. 1905) (dictum) (quoting from another case, but not case cited); *accord*, *State v. Lutz*, 113 N.E.2d 757 (C.P. Ohio 1953). See generally M. NOLTE & J. LINN, *SCHOOL LAW FOR TEACHERS* 206-08 (1963); *PUBLIC SCHOOL OPERATION*, *supra* note 14, at 404.

⁶⁸ Massachusetts enacted the first modern compulsory attendance law in 1852. Most states followed this example by 1900, and all did so before 1929, although Mississippi and South Carolina repealed their compulsory attendance statutes following the Supreme Court's desegregation decisions. A. STEINHILBER, *STATE LAW ON COMPULSORY ATTENDANCE* 2-3 (1966); see R. BUTTS & L. CREMIN, *A HISTORY OF EDUCATION IN AMERICAN CULTURE* 100-08, 357-67 (1953).

⁶⁹ See *Lander v. Seaver*, 32 Vt. 114 (1859); cf. *Casey County Bd. of Educ. v. Luster*, 282 S.W.2d 333 (Ky. 1955) (suspension). See also *RESTATEMENT (SECOND) OF TORTS* §153 (1965) (in contrast to private school teacher, parent cannot limit the public school teacher's privilege to use force on a child).

⁷⁰ The dangers have long been recognized by some observers. Over one hundred years ago, a judge warned that "[s]uch a system of petty tyranny cannot be watched too cautiously nor guarded too strictly." *Cooper v. McJunkin*, 4 Ind. 290, 292 (1853).

⁷¹ See NATIONAL ASS'N OF SECONDARY SCHOOL PRINCIPALS, *THE REASONABLE EXERCISE OF AUTHORITY* 5 (1969). The following view of the teacher-student relationship hardly typifies the modern situation:

Our public schools were created to make, not scholars simply, but men and women. . . . The true teacher will know his pupils as individuals, and will feel in each an interest which only the term parental describes.

. . . . He notices a girl too showily dressed, and, choosing his time, appeals to her kindness not to make her less wealthy neighbors uncomfortable. . . . He overhears the coarse expressions of a good-natured, stable-bred young fellow, and finds occasion to point out to him that the only sure indication of culture is the language one uses.

C. BARDEEN, *A MANUAL OF COMMON SCHOOL LAW* 213-14 (1890).

school authorities have occurred.⁷² The case for broad discretionary school power seems especially weak when differences in race and social class underline the impersonal aspects of the student's relationship with school authorities.⁷³ Although a closely knit home-school community is a desirable ideal, the student's rights should be protected by procedures adapted to reality.

When the sanction in question is exclusion from school, the doctrine of *in loco parentis* seems a peculiarly inappropriate justification for refusing to hear a student's plea for fundamental due process. Parents cannot take disciplinary action parallel to excluding a student from school, for they generally have a state-imposed duty to support and care for their children.⁷⁴ Nevertheless, the school's authority *in loco parentis* has sometimes been offered as a justification for allowing expulsion without a hearing,⁷⁵ and even when not explicitly advanced, the doctrine looms hazily in the background. *In loco parentis* has also been an important bar to the application of due process standards to disciplinary proceedings resulting in the imposition of other sanctions, particularly corporal punishment.⁷⁶

Yet the doctrine has never freed school discipline from all restraint. For example, when a student shows abuse of discretion, he can recover in tort or obtain his reinstatement.⁷⁷ To recover, however, the student must prove that the teacher acted unreasonably⁷⁸—with malice,⁷⁹ with punishment disproportionate to the offense,⁸⁰ or with punishment insufficiently accounting for the age, size, sex, or physical condition of

⁷² See, e.g., D. ROGERS, 110 LIVINGSTON STREET 363-94, 500-01 (1968); Brooks, *Tragedy at Ocean Hill*, DISSENT, Jan.-Feb. 1969, at 28; Roberts, *The Battle for Urban Schools*, SAT. REV., Nov. 16, 1968, at 97.

⁷³ See Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378, 381-82, 387-88 (1969). See generally K. CLARK, DARK GHETTO 111-53 (1965); P. SCHRAG, VILLAGE SCHOOL DOWNTOWN 74-117, 154-68 (1967).

⁷⁴ See generally *State v. Moran*, 99 Conn. 115, 121 A. 277 (1923); *Hummel v. State*, 73 Ind. App. 12, 126 N.E. 444 (1920); *State v. Waller*, 90 Kan. 829, 136 P. 215 (1913); *In re Custodian*, 39 U.S.L.W. 2354 (N.Y. Fam. Ct. Dec. 24, 1970).

⁷⁵ See *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Vermillion v. State ex rel. Englehardt*, 78 Neb. 107, 110 N.W. 736 (1907); *State ex rel. Burpee v. Burton*, 45 Wis. 150 (1878).

⁷⁶ See N. EDWARDS, *supra* note 14, at 610; M. NOLTE & J. LINN, *supra* note 67, at 206-10; PUBLIC SCHOOL OPERATION, *supra* note 14, at 404-09; M. REMMLEIN, SCHOOL LAW 267 (2d ed. 1962).

⁷⁷ See *Smith v. Board of Educ.*, 182 Ill. App. 342, 347 (1913) (failed to show "oppression or gross injustice"); *Morrison v. Lawrence*, 186 Mass. 456, 72 N.E. 91 (1904) (damages for abuse of discretion).

⁷⁸ See Annot., 43 A.L.R.2d 469, 476-85 (1954); RESTATEMENT (SECOND) OF TORTS § 147 (1965); Note, *Right of a Teacher to Administer Corporal Punishment to a Student*, 5 WASHBURN L.J. 75, 78 (1965).

⁷⁹ See, e.g., *Suits v. Glover*, 260 Ala. 449, 71 So. 2d 49 (1954).

⁸⁰ See *Calway v. Williamson*, 130 Conn. 575, 36 A.2d 377 (1944); *Cooper v. McJunkin*, 4 Ind. 290 (1853); *Rupp v. Zinter*, 29 Pa. D. & C. 625 (C. P. Montgomery County 1937).

the student.⁸¹ By imposing a very heavy burden on the student, the courts have greatly indulged the school authorities. Moreover, even were the standard less exacting, no convincing reason exists for substituting after-the-fact relief for before-the-punishment procedural safeguards.⁸² Schools need disciplinary power, but that power properly develops from necessity, not from a misleading Latin phrase. The doctrine of *in loco parentis* should not bar procedural safeguards. Due process requires that schools achieve their legitimate ends only through procedures striking a fair balance between the schools' needs and the students' interests.

2. Avoiding Due Process Issues: "Prematurity" and "Investigation"

If *in loco parentis* seems an inadequate basis for dismissing challenges to student disciplinary procedures, courts have at their disposal two related tactics to avoid due process issues. First, they could refuse to pass upon prematurely raised issues, and second, they could treat students' claims to due process as they treat claims raised by witnesses in administrative investigations, according them little or no constitutional recognition. In some circumstances, neither of these judicial responses would be exceptionable, but they lend themselves to abuse in the school discipline context.

a. Prematurity

*Madera v. Board of Education*⁸³ arose when Victor Madera, a fourteen-year-old student, was suspended. Under the applicable statute, a suspended student receives a Guidance Conference in "an effort to solve his school problems."⁸⁴ As a direct result of the conference, the District Superintendent of Schools might direct that the student be readmitted to his former school, assigned to a comparable school, or assigned to a school for socially maladjusted children—sometimes known in New York City as a "600 school."⁸⁵ In addition, the superintendent might make recommendations ultimately leading to

⁸¹ See *Sheehan v. Sturges*, 53 Conn. 481, 2 A. 841 (1885) (age, size, and physical condition); *Melen v. McLaughlin*, 107 Vt. 111, 116, 176 A. 297, 299 (1935) ("sex, age, size and strength").

⁸² Even the argument that discipline, and particularly corporal punishment, teaches "respect for authority," see *Indiana St. Personnel Bd. v. Jackson*, 244 Ind. 321, 337, 192 N.E.2d 740, 748 (1963) (concurring opinion), does not legitimately suggest that respecting authority for authority's sake is valuable. Authority must be placed within the framework of justice. Cf. *Griffin v. Tatum*, 300 F. Supp. 60, 63 (M.D. Ala. 1969).

⁸³ 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

⁸⁴ *Id.* at 782.

⁸⁵ *Id.*

proceedings in the Family Court, assignment to a detention school, or exclusion from the public schools altogether.⁸⁶ Madera requested permission to have a lawyer present at this conference, but the rules clearly forbade this⁸⁷ and the superintendent denied the request. Federal District Judge Constance Baker Motley upheld the student's constitutional right to counsel at the conference,⁸⁸ but her decision was reversed by the Second Circuit in an opinion written by Judge Moore. Because *Madera* gives the illusion of deciding more than it does, the case is important and merits thorough treatment.⁸⁹

In denying the right to counsel, the Second Circuit sharply distinguished between those actions which might "directly result" from the Guidance Conference and those which might "ultimately result." The less serious direct results would not, in the court's view, constitute a constitutionally cognizable loss of liberty.⁹⁰ The court then concluded that any due process claims with regard to the more serious ultimate results were premature. The court explained that before any serious consequences—including expulsion—could result, "[a] whole series of further investigations, hearings and decisions must occur" ⁹¹ Support for this explanation was drawn from a footnote in the Supreme Court's *Gault* decision, distinguishing adjudication from pre- and post-adjudication proceedings.⁹² Despite the court's assertion, it is open to question whether the Guidance Conference was preliminary in nature, or, assuming that it was, whether any subsequent proceeding would adequately protect the student's interests.

⁸⁶ *Id.* at 783. The New York statute does not specifically provide for expulsion, but school authorities are authorized to "exempt" certain students from attending school. In the district court opinion Judge Motley described this procedure as "sophisticated expulsion." *Madera v. Board of Educ.*, 267 F. Supp. 356, 371-72 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

⁸⁷ 386 F.2d at 779-80.

⁸⁸ *Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

⁸⁹ Subsequent to *Madera*, the right to counsel at the Guidance Conference has been established by statute, N.Y. EDUC. LAW § 3214(6)(c) (McKinney 1970), but that development does not reduce the significance of the case with respect to the law of school discipline generally.

⁹⁰ 386 F.2d at 783; *see note 169 infra*.

⁹¹ 386 F.2d at 785.

⁹² *Id.* at 788 (quoting *In re Gault*, 387 U.S. 1, 31 n.48 (1967)). This is a curiously selective use of *Gault*, particularly in view of Judge Moore's rejection of the district court's reliance on *Powell v. Alabama*, 287 U.S. 45 (1932), and his related conclusion that a criminal trial is the "polar opposite" of the Guidance Conference. Both District Judge Motley and Judge Moore quoted the following language from *Powell*: "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." 287 U.S. at 69. Judge Motley italicized the words "civil or criminal," 267 F. Supp. at 369; Judge Moore italicized "case" and "court," 386 F.2d at 786. A fuller reading of *Gault* in conjunction with the *Powell* language could have provided a link between purely civil and purely criminal cases.

Nothing in the *Madera* opinion provides any concrete basis for concluding that a subsequent proceeding would be available at which the student could fully protect his interests. For expulsion, the contemplated chain of events was (a) referral to the Bureau of Child Guidance as a result of the Guidance Conference, (b) recommendation for or against expulsion by the Bureau, and (c) final decision by the superintendent. The court failed to identify what additional hearings follow the Guidance Conference, what issues are then open, what procedural safeguards are then afforded the student, what recommendations are likely, and what decision on the recommendation is most probable.⁹³ The court did state, in connection with referral to the Family Court for proceedings on truancy violations, that "there would seem to be adequate safeguards . . . for preservation of . . . constitutional rights, including the right to counsel."⁹⁴ But even this limited assurance is undermined by an unexplained discrepancy between the district court and the Second Circuit concerning the student's protection against self-incrimination in the Family Court proceeding.⁹⁵

The court's distinction between direct and ultimate consequences of a Conference leaves unanswered the basic question whether the suspension was lawful in the first place. The New York statute authorizes suspension only for certain reasons.⁹⁶ It would seem that the student should have a right to challenge the existence of those reasons in some hearing. The Guidance Conference provides a logical point for such a challenge, as any subsequent disposition—whatever

⁹³ According to the district court, the grounds for expulsion are unspecified, but recommendations of the Bureau of Child Guidance urging expulsion "are invariably accepted." 267 F. Supp. at 368.

⁹⁴ 386 F.2d at 785.

⁹⁵ Compare the following excerpts, the first from the circuit court's opinion and the second from the district court's:

[T]here is no showing that any attempt is ever made to use any statement at the Conference in any subsequent criminal proceeding. The record is to the contrary . . . and the district court so found. . . . Therefore, there is no need for counsel to protect the child in his Fifth Amendment privilege against self-incrimination.

Id. at 780 (citation omitted).

[T]he admissibility [in subsequent Family Court proceedings] of any statement made during the Guidance Conference as presently conducted is now the subject of considerable doubt. . . .

. . . [Enforcement] of the "no attorneys provision" of [the school rules] may deprive plaintiffs of their right against self incrimination but this court finds it unnecessary to so hold.

267 F. Supp. at 372.

⁹⁶ The following types of students may be suspended under the statute:

(1) A minor who is insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others; (2) A minor whose physical or mental condition endangers the health, safety, or morals of himself or of other minors; (3) A minor who, as determined in accordance with the provisions of part one of this article, is feeble-minded to the extent that he cannot benefit from instruction.

N.Y. EDUC. LAW § 3214(6) (a) (McKinney 1970).

the intervening steps—proceeds on the assumption that the suspension was appropriate. This inference is reinforced by the apparent concession in the Second Circuit's opinion that the school's statement of the student's misbehavior was a relevant issue at the Guidance Conference.⁹⁷ Furthermore, the opinion betrays a tacit assumption that no challenge will ever be considered: "In the present case, the child has already been suspended and the determination for the District Superintendent's Guidance [*sic*] is how that child may best be returned to the educational system."⁹⁸ This statement suggests that the Guidance Conference is not a preliminary proceeding to be followed by a subsequent stage at which a "full panoply of due process safeguards" would be available;⁹⁹ rather, it suggests an adjudication on the merits followed by what appears to be a sentencing hearing.

Even on the assumption that the Guidance Conference could be properly regarded as a preliminary hearing, it does not follow that the student's due process claim is premature. The cautionary footnote from the *Gault* opinion does not support the court's prematurity argument. In that footnote, the Court carefully reserved judgment on guaranteeing procedural safeguards at pre- and post-adjudication proceedings in the juvenile process:

Since this "consent decree" procedure would involve neither adjudication of delinquency nor institutionalization, nothing we say in this opinion should be construed as expressing any views with respect to such procedure. The problems of pre-adjudication treatment of juveniles, and the post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process.¹⁰⁰

To argue that the Guidance Conference is comparable to the "consent decree" procedure can hardly end the discussion. The Supreme Court's caution in leaving open a difficult issue not raised in the case at bar is understandable. As the Court itself seemed to suggest, hopeful experimentation was being carried out in the areas on which the Court refused to rule.¹⁰¹ Also, the Court wisely wanted to avoid incorporating the far-reaching implications of *Miranda v. Arizona*¹⁰² and its progeny without hearing thorough argument.¹⁰³ To observe in a foot-

⁹⁷ See 386 F.2d at 788.

⁹⁸ *Id.* at 784.

⁹⁹ *Id.* at 785.

¹⁰⁰ 387 U.S. at 31 n.48.

¹⁰¹ See *id.*; Dorsen & Rezneck, *supra* note 57, at 5-6.

¹⁰² 384 U.S. 436 (1966).

¹⁰³ But *cf.* Dorsen & Rezneck, *supra* note 57, at 37-41.

note, with respect to a matter not in issue, that the Court's decision has "no necessary applicability" is entirely different from failing to grapple with an issue decisive in the case at hand. That the Court did not decide these issues in *Gault* is further illustrated by the continuous litigation and argument over the applicability of *Gault* to pre-trial proceedings. The right to counsel at both the pre-adjudication¹⁰⁴ and post-adjudication¹⁰⁵ stages of the juvenile process has received strong support.

Furthermore, in some contexts the Supreme Court has expressly rejected the argument that procedural safeguards may be deferred to some subsequent, more critical, proceeding. The issue in *Kent v. United States*,¹⁰⁶ the immediate progenitor of *Gault*, was the transfer of a juvenile's case from juvenile to criminal jurisdiction. Although the decision was based upon the District of Columbia Juvenile Court Act,¹⁰⁷ the constitutional overtones were clear.¹⁰⁸ Once the case was transferred, all of the procedural protections of the criminal process would have been available, but the Court regarded the first step toward criminal punishment as sufficiently grave to require extensive procedural safeguards.¹⁰⁹ More recently, the Court made the same point in a different context. In dealing with an investigation that might lead to criminal action, the Court said, "Finally, in the circumstances of the present case, we do not regard appellant's opportunity to defend any [subsequent] criminal prosecutions as sufficient to deprive him of standing to challenge the Act."¹¹⁰ Although both of these cases involved potential criminal liability, the underlying principle is not limited to criminal or quasi-criminal cases. A loss of liberty may occur in progressive steps in any type of proceeding, and reversing the process may become increasingly difficult. The important question is, in view of the potential deprivation of liberty and the likelihood of effective protection at a subsequent proceeding, must the full panoply of due process safeguards apply at the present proceeding to accomplish fundamental fairness? If—because of the nature or lack of subsequent proceedings—

¹⁰⁴ See *In re William*, 29 App. Div. 2d 182, 287 N.Y.S.2d 218 (1968); Dorsen & Reznick, *supra* note 57, at 41-42; Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558, 566-69 (1968). See also *Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wis. 1969); *In re Creek*, 243 A.2d 49 (D.C. Ct. App. 1968).

¹⁰⁵ See Dorsen & Reznick, *supra* note 57, at 43; Paulsen, *supra* note 57, at 256-57; Skoler, *supra* note 104, at 569.

¹⁰⁶ 383 U.S. 541 (1966).

¹⁰⁷ D.C. CODE ANN. § 11-1553 (1967).

¹⁰⁸ See Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 179, 182-83; Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 585-88 (1968).

¹⁰⁹ See 383 U.S. at 554.

¹¹⁰ *Jenkins v. McKeithen*, 395 U.S. 411, 424 (1969).

an adverse decision before the Guidance Conference will probably lead directly to an adverse recommendation from the Bureau of Child Guidance and virtually automatic expulsion by the superintendent, then the process of deprivation of liberty occurs beginning with the Guidance Conference, and the student must be afforded due process at that stage if his constitutional rights are to have any meaning.

b. School Disciplinary Hearings as Administrative Investigations

The *Madera* court presented the prematurity argument in another guise, drawing support from the Supreme Court's opinion in *In re Groban*.¹¹¹ The *Groban* case held that a witness testifying before a fire marshal was not constitutionally entitled to be represented by counsel. The decision was firmly based upon the distinction between the rights of a witness in an administrative investigation and the rights of a defendant in an accusatory judicial proceeding. Although in *Madera* Judge Moore stressed the preliminary nature of any threat to the liberty of a witness in an investigation, he did not expressly argue that a student discipline proceeding was an investigation. This argument was explicitly made, however, in *Barker v. Hardway*,¹¹² a college discipline case. Relying heavily upon the Supreme Court's decision in *Hannah v. Larche*,¹¹³ the *Barker* court equated the discipline hearing with an administrative investigation, and concluded that the students' claims to certain procedural safeguards should be rejected.

The *Hannah* case grew out of the Commission on Civil Rights' investigation of voting rights violations. Certain Louisiana registrars, subpoenaed to appear as witnesses before the Commission, requested that they be given the names of persons who had filed complaints against them, a description of the evidence given by these persons, and the right to cross-examine. The registrars argued that Congress had not authorized the Commission's rules against disclosing the information, and that the rules denied their constitutional right to procedural due process. The Court rejected both contentions.¹¹⁴ The due process argument was rejected on the ground that the Commission was engaged only in investigation with the sole purpose of reporting facts to Congress and perhaps recommending remedial legislation. The Commission pro-

¹¹¹ 352 U.S. 330 (1957). The court also cited two other investigation cases, *Anonymous v. Baker*, 360 U.S. 287 (1959), and *Nason v. Immigration & Naturalization Serv.*, 370 F.2d 865 (2d Cir. 1967). The primary thrust of all three references, however, was to support denial of counsel at the conference. See 386 F.2d at 787.

¹¹² 283 F. Supp. 228, 237-38 (S.D.W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 905 (1969).

¹¹³ 363 U.S. 420 (1960). Although *Hannah* and *Groban* are similar in reasoning and holdings, the *Hannah* Court explicitly refrained from relying on *Groban*. *Id.* at 451 n.31.

¹¹⁴ See *id.* at 430-39.

ceeding would not result in any adjudication of the registrars' rights. The Court emphasized the devastating effect on an investigation of allowing all witnesses to convert the proceeding into an adversary contest.¹¹⁵ Permitting cross-examination and disclosure of witnesses' names would have opened the possibility of intimidation of black registration candidates and other potential sources of information, greatly limiting the capacity of the Commission to investigate deprivations of the right to vote. Despite these considerations, Justices Douglas and Black felt that the likelihood of criminal liability growing out of the investigation was sufficiently great to permit the right of cross-examination, and accordingly dissented.¹¹⁶

The inapplicability of the administrative investigation cases to the school discipline area—and the frailty of the investigation-adjudication distinction—is demonstrated by analysis of *Jenkins v. McKeithen*,¹¹⁷ decided by the Supreme Court after *Hannah*. The Louisiana statute involved in *Jenkins* was consciously patterned after the federal statute upheld in *Hannah*. Under the statute, a commission was established to investigate criminal activity arising out of labor-management relations. The constitutionality of the statute was challenged on several grounds, including restrictions upon the right to confront and cross-examine witnesses. On this basis, the Court held that the commission's procedures did "not meet the minimal requirements" of due process.¹¹⁸ In contrast to the investigation in *Hannah*, the Court perceived the procedure in *Jenkins* as the first step in criminal prosecution focusing on particular persons and itself involving punishment to the extent that those named would be exposed to public condemnation. Even the three dissenting Justices, speaking through Justice Harlan, conceded the difficulty of quarrelling with the majority opinion if the Louisiana commission was considered an agency of exposure.¹¹⁹

Taken together, *Jenkins*, *Hannah*, and *Groban* point in the direction of insuring due process for students in expulsion hearings. Even when the due process claim is asserted by a witness in an investigation, the Supreme Court has shown reluctance in foreclosing the right when a deprivation of liberty may grow directly out of the investigatory proceeding. A fortiori, a student directly threatened with expulsion or some other substantial sanction should have the right to demand procedural due process. The absence of any disadvantage in school disciplinary proceedings comparable to the obstruction of the investigation

¹¹⁵ *Id.* at 443, 448, 451.

¹¹⁶ *See id.* at 495 (Douglas, J., dissenting).

¹¹⁷ 395 U.S. 411 (1969) (opinion of Marshall, J.).

¹¹⁸ *Id.* at 428.

¹¹⁹ *Id.* at 438.

in *Hannah* and *Groban* reinforces this conclusion. Cases such as *Hannah* and *Jenkins* are made difficult by uncertainty concerning the threat to a participant's liberty, the extent of the burden on the proceeding, and the danger of defeating the goals of the investigation if the demand for procedural protection is recognized. In the school discipline cases, however, the threat to the student's liberty is direct, the burden on the proceeding is minimal, and the proceeding's only goals are to determine whether the student is guilty of misconduct and to apply sanctions. The student is not merely a witness in a proceeding which has another focal point; he is the only focus. The potential loss of liberty is not simply a possible outgrowth of the disciplinary proceeding; it is the subject of the proceeding.

In *Barker*, the court concluded that the proceeding was merely an investigation because the committee before which the students appeared had no dispositive power, but only made recommendations to the college president.¹²⁰ The court was evidently misled by language in *Hannah* referring to the fact-gathering function of the Civil Rights Commission, because in *Hannah* the Court was speaking of legislative fact-finding,¹²¹ not adjudicatory fact-finding like that involved in school discipline cases in which the student's misconduct is the focus of the proceeding. If there were any validity to the *Barker* court's conclusion that the student has no procedural rights before the committee, it would have to be because his rights would be recognized at some other stage, and not because the committee was conducting an "investigation" as that term was used in *Hannah*. Yet a prematurity argument also fails to rationalize the denial of the right to counsel, for the recommendations of the committee in *Barker* were intended to have an important bearing on the ultimate decision. Furthermore, there was no suggestion that the president would subsequently hold a *de novo* hearing, nor any suggestion of other further hearings. The proceeding before the committee was clearly the most appropriate point at which to afford the student due process.

Characterization of a school disciplinary proceeding as an administrative investigation is a spurious ground for failing to recognize the applicability of procedural due process. Although instances may arise in which school authorities wish to investigate massive unrest in their schools by calling student witnesses, disciplinary proceedings always

¹²⁰ This reasoning would logically lead to the conclusion that an unfair labor practice hearing before a trial examiner is an investigation because the examiner's conclusions are only recommendations to the National Labor Relations Board—hardly a tenable result. See also Administrative Procedure Act § 557(b), 5 U.S.C. § 557(b) (Supp. V, 1970).

¹²¹ For a discussion of the distinction between legislative and adjudicative fact-finding, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.02, 7.06 (1958).

focus on the alleged offenders. Because their liberty is at stake, accused students must be afforded due process of law. Similarly, situations may arise in which procedural due process claims are raised prematurely. Whenever a student's liberty is jeopardized as a consequence of the hearing, however, even if only in the future, his rights must be protected at the original fact-finding hearing.

3. The Mystique of the Educational Institution

Transcending all of the particular reasons given to explain the refusal to hear student due process claims is a pervasive reluctance by the courts to intrude into educational matters. Educational institutions seem to be enshrouded with a mystical immunity from judicial interference. This attitude can be seen in Judge Cameron's dissent in *Dixon*:

Everyone who has dealt with schools knows that it is necessary to make many rules governing the conduct of those who attend them, which do not reach the concept of criminality but which are designed to regulate the relationship between school management and the student based upon practical and ethical considerations which the courts know very little about and with which they are not equipped to deal.¹²²

Judge Moore's *Madera* opinion reveals a similar predisposition:

To [grant rights accorded in adversary proceedings] would be destructive of the original purpose of the Guidance Conference—to provide for the future education of the child. The conference is not a judicial or even a quasi-judicial hearing. . . . Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspension, into criminal adversary proceedings—which they definitely are not.¹²³

Judge Cameron's dissent suggests that the courts should not intervene because of their incompetence. Judge Moore stresses that these educational judgments were entrusted to officials other than the courts. Both views lead to the conclusion that judicial intervention will frustrate educational purposes and thus do more harm than good.

Although these arguments for judicial nonintervention are understandable and valid up to a point, they do not justify the exaggerated deference that often results. Fundamental educational policy for public schools in the United States is uniformly made by *lay* boards of education, entitled to no more judicial respect—on grounds of expertise—than any other subordinate political body. Moreover, any

¹²² 294 F.2d at 160.

¹²³ 386 F.2d at 788-89.

inclination to indulge educational wisdom should take into account the widespread recognition among educators of the serious failings of American schools.¹²⁴ The tendency toward judicial timidity reflected in the statements by Judges Cameron and Moore can be questioned on more narrow grounds as well.

As Judge Cameron suggests, a school is indeed a unique institution. Some discipline is required to maintain the well-being of that institution and perhaps only the school authorities understand the institution well enough to determine its disciplinary requirements. These factors provide a solid basis for allowing school authorities some discretion in determining what disciplinary regulations are necessary. As an argument for denying the student all procedural safeguards, however, the idea topples of its own weight. However little courts may know about education or school discipline, they do know about factfinding, decisionmaking, fairness, and procedure. Although the public school context may require special latitude for educational or administrative judgment, punishment for student misconduct seems clearly inappropriate without a decision that: the student acted, what he did was forbidden by some rule, the rule was valid, there were no exonerating circumstances, and the punishment was appropriate under the circumstances. Making such determinations would under any ordinary definition be regarded as "adjudication,"¹²⁵ the field in which courts are most competent.

In like fashion, the *Madera* opinion abdicates too much responsibility to educational judgments and purposes. The plea that the superintendent regarded the proceeding as nonadversary is strikingly reminiscent of one defense of the juvenile system rejected in *Gault*:

The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.

These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*.¹²⁶

The Court found this justification wanting:

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been

¹²⁴ See, e.g., Stevens, *Reform Drive Now Key Issue in Education*, N.Y. Times, Jan. 11, 1971, at 47, col. 1; authorities cited note 7 *supra*.

¹²⁵ See 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 119-27 (1965); 1 K. DAVIS, *supra* note 121, at §7.02.

¹²⁶ 387 U.S. at 15-16.

avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.¹²⁷

The characterization of the disciplinary proceeding by the school authority in *Madera* is certainly no more compelling than the characterization of the juvenile proceeding offered by the state in *Gault*. Similarly, an obvious parallel exists between the original purpose of juvenile delinquency proceedings—to rehabilitate the unfortunate child—and the claimed purpose of the Guidance Conference—to facilitate a disposition of the disrupting child which will be in his best interest.¹²⁸ In *Gault* the Court doubted whether juvenile proceedings achieve their intended purpose,¹²⁹ observed that failing to follow procedures regarded as essential for adults had probably led to serious abuses,¹³⁰ and announced that the alleged purposes were not legitimate grounds for depriving the child of constitutional rights.¹³¹ The inappropriateness of displacing constitutional rights by laudable purposes seems equally applicable in the school setting; the possibility of abuse or failed purposes should not be assumed away.¹³²

In further contrast to the school authorities' view echoed by the *Madera* court, the *Gault* opinion suggests that fair procedures would be psychologically beneficial to the student.¹³³ One of the motivating ideals of the founders of the juvenile system was a desire to spare children the trauma of indictment and trial in criminal court.¹³⁴ The unremitting harshness of criminal process was to be replaced by the friendly and understanding judge with an arm around the misbehaving boy. But this ideal is often flawed by an inherent inconsistency. When the arm around the shoulder is followed by confinement in a hostile institution, the child is likely to see the entire process—and through it society—as arbitrary, hypocritical, and untrustworthy. It might be

¹²⁷ *Id.* at 19-20.

¹²⁸ The *Madera* court relied heavily on the purpose it attributed to the Guidance Conference's program—"to provide for the future education of the child." 386 F.2d at 788. Yet, however much one patches over the unpleasantness of many of the alternatives considered, three of the "ultimate" educational options—detention school, juvenile court proceedings, and total exclusion from the public schools—do not forbode an educational future that most children and parents would find desirable.

¹²⁹ See 387 U.S. at 21-22.

¹³⁰ *Id.* at 18-20.

¹³¹ *Id.* at 27-28.

¹³² See generally Schafer & Polk, *Delinquency and the Schools*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 222 (1967).

¹³³ See 387 U.S. at 26; cf. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 85 (1967); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 9-21.

¹³⁴ See Paulsen, *supra* note 108, at 168-75.

far more beneficial for the child to participate in a fair and regular, even if adversary, proceeding.¹³⁵ Perhaps the case for the psychologically purifying effect of the regularized adversary system is overdone. Still, if it is valid for the juvenile offender, it may also be valid for the student threatened with expulsion, suspension, or other discipline.

Introducing an adversarial character into disciplinary proceedings arguably would not entail these benefits because of the greater complexity of the student's multifaceted, continuing relationship with his school. But that distinction may be insignificant because a student normally comes into contact with school authorities other than his teachers only when he is in trouble. In fact, the links between school discipline and the juvenile process tend to be strong. In New York, for example, the Guidance Conference hearing is characterized as "[c]ommitment and parole of a school delinquent."¹³⁶ Under this statute, a student suspended as "insubordinate or disorderly" (the standard ground for suspension) is automatically classified as a "school delinquent."¹³⁷ Moreover, two of the possible measures contemplated by the suspension statute are confinement and prosecution in the Family Court for truancy. This interrelationship between truancy and delinquency is a staple of the compulsory education system.¹³⁸ A child in trouble with one system is often in trouble with both. Consequently, a child brought to bar in the educational system will probably not regard the proceeding against him in a totally different light from a juvenile proceeding. Thus, much would probably be gained by giving the student the dignity and self-respect which would result from clearly drawing sides, stating frankly that a serious matter is at issue, and indicating that the student must take some responsibility for the outcome and will be given a fair opportunity to do so.

C. *The Interests in the Balance*

1. School Interests: The "Burden" on the Proceeding

The school's most obvious interest in limiting the procedural complexity of disciplinary proceedings lies in maintaining the integrity of the educational process: the conditions necessary for educating must be preserved. Students must be brought to a single location in large numbers; teachers must be available; books and other equipment must

¹³⁵ See Note, *A Balancing Approach to the Grant of Procedural Rights in the Juvenile Court*, 64 NW. U.L. REV. 87, 96-102 (1969).

¹³⁶ N.Y. EDUC. LAW § 3214(5) (McKinney 1970).

¹³⁷ *Id.* § 3214(1).

¹³⁸ See, e.g., ALA. CODE tit. 52, § 304 (1958); COLO. REV. STAT. ANN. § 123-20-9 (6) (1964); UTAH CODE ANN. § 53-25-1 (1970). See also Shafer & Polk, *supra* note 132, at 250, 255-56.

be provided; appropriate physical conditions such as warmth, light, chairs, rest rooms, and quiet must exist to facilitate reading, writing, lecturing, discussing, and experimenting. Providing procedural protection in school disciplinary proceedings may affect these conditions by drawing off resources or the time of educational personnel. Additionally, the school has an interest in protecting the welfare of the other students who, no less than the accused, are required by law to attend school. In like fashion the school must protect teachers to enable them to carry out the school's educational functions. As a slightly lesser concern, the school has an interest in preventing damage to or loss of the physical property of the school and of the members of the school community. The cost of supporting discipline proceedings cannot be dismissed lightly by contrasting its "economic" character to the "human" dimension represented by the threat to the student's liberty, for the economic costs of fairer disciplinary procedures necessarily result in a shifting of scarce resources from the purposes to which they would otherwise be put.

Akin to cost and efficiency is the possible effect upon the academic atmosphere. Disciplinary proceedings could intrude upon the rhythms of the life of the school in ways more elusive (but perhaps more fundamental) than taking up the time of teachers and administrators or the money allocated for books. If disciplinary proceedings are frequent or lengthy, and if they are conducted publicly or sensationally, students and their teachers are likely to be distracted from other pursuits and thoughts. School interests are also affected in a different way if the procedural system utilized for discipline proceedings consistently fails to prevent misconduct either because the procedural protection exonerates those who have engaged in misconduct or because the procedures are so burdensome that condoning misconduct may seem more convenient to those involved than invoking them.

On a different tack, the school has an interest in providing fair procedures. Although procedural due process is only one educational value of many, its importance is especially great at a time when serious questions are being raised about the validity of much of what the school offers. From a more pragmatic point of view, providing fair procedures for school discipline may actually eliminate the distracting effect of disciplinary proceedings that do not give the student a fair opportunity to defend himself against the authorities or that leave the students with a feeling that they have been dealt with unfairly. Moreover, significant as the school's other interests are, they must be kept in perspective, for they are not always affected to the same extent by providing procedural safeguards for students subjected to school dis-

cipline. As in society at large, fear for the interests of the majority does not justify elimination of the rights of the minority. The school has no legitimate interest in disciplining a student who has not been given a minimal opportunity to establish his innocence or the inappropriateness of a particular sanction.

2. Student Interests: The Liberty at Stake

a. Education

Because the importance of education has often been asserted,¹³⁹ only the highlights of the argument need be mentioned. The Supreme Court has paid its respects to education on numerous occasions¹⁴⁰—never more clearly than in its memorable statement in *Brown v. Board of Education*:¹⁴¹

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In 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.

At the very least, there is evidence of a strong correlation between years of schooling and income.¹⁴² And the child is told by everyone from the Supreme Court to his classroom teacher that he must have a formal education—usually the more the better. In part then, education is important because society says it is. Moreover, despite attacks denigrating the quality or performance of public schools, they often offer academic, social, and cultural benefits which are unavailable elsewhere to many students. Furthermore, schools are supposed to prepare students to be informed participants in public affairs and enable them to protect their self-interest by competing on fair terms for positions

¹³⁹ See generally *THE RIGHT TO BE EDUCATED* (R. Drinan ed. 1968).

¹⁴⁰ See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

¹⁴¹ 347 U.S. 483, 493 (1954).

¹⁴² See BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 108 (1969). It may be asked to what extent the correlation exists because of the intrinsic value of what school provides, because the personal characteristics producing high income are apt to induce staying in school as well, or because employment yielding high income is available only to those capable of producing evidence of their longevity in school. For present purposes, however, the answer is unimportant.

in the job market or for college admission. Similarly, because of the dominant role of schools in the United States, a child's sense of "identity" with his society may be impaired, possibly imperiling his mental and emotional growth, if he is estranged from the schools and the students attending them.¹⁴³

b. Physical Freedom

Apart from prison and the military, nothing in American society compares to public schools in establishing state-imposed control over a person's life. Despite the deprivation of liberty brought about by that control, compulsory attendance laws have been uniformly held constitutional because of the state's paramount interest in an educated citizenry.¹⁴⁴ Evidently this rationale excites little response even though it celebrates the primacy of the state in a manner which seems counter to our usual assumptions about individual freedom.¹⁴⁵ At the least, it is ironic that enforced attendance is the starting point for justifying the extensive regulation of students' school-related life. Of course, once they are physically present, something must be done to protect students from each other and to maintain the integrity of the educational process. Yet, because school discipline is an infringement of liberty built upon an infringement of liberty, special care should be used to reduce the possibility of unfairness to students.¹⁴⁶ Hopefully,

¹⁴³ See R. CRARY, *HUMANIZING THE SCHOOL* 276-83 (1969); E. ERIKSON, *CHILDHOOD AND SOCIETY* *passim* (2d ed. 1963).

¹⁴⁴ *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (1929); *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (1937); *Commonwealth v. Bey*, 166 Pa. Super. 136, 70 A.2d 693 (1950). The theory of these cases is not that compulsory education involves no deprivation of liberty but that the deprivation is a reasonable means of achieving a legitimate state goal. See generally A. STEINHEILBER, *supra* note 68.

¹⁴⁵ A student for whom education is positively harmful, especially physically harmful, would seem to have an even stronger constitutional claim for relief. Cf. *In re Skipwith*, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958) (lower ratio of licensed teachers in schools with predominantly Negro and Puerto Rican enrollments a denial of equal protection). But cf. *State v. Vaughn*, 44 N.J. 142, 207 A.2d 537 (1965).

¹⁴⁶ Several legal theories support the adoption of an especially solicitous concern for students because of the restrictions placed upon them. For example, the doctrine of "fair representation" in labor law has been largely constructed on the premise that the withdrawal by law of a basic freedom creates a compensating duty upon those who have gained new power correlative to the loss of freedom. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202 (1944); Note, *supra* note 31, at 1382. Also, it has been argued that college officials have a fiduciary duty to their students because of the dominant-dependent relationship existing between them. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L. REV. 643 (1966). Plainly that argument applies much more forcefully when the student is younger and the school relationship is imposed on him by the law. Even the doctrine of *in loco parentis*, which has historically protected the school more than the child, may create a special duty benefiting the student. See *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1145 (1968) [hereinafter cited as *Academic Freedom*]. It could plausibly be argued that those who have the parent's power over the child should be ultrasensitive to encroachments upon the child's freedom and should have a special duty to protect the child's individuality from the collective pressures of school.

courts and school authorities can be convinced of the potential magnitude of the restrictions placed upon students, beginning with confinement in a particular building for substantial periods of his waking life and elaborately supplemented by a pervasive variety of rules covering everything from sitting in a chair and walking in the halls to the length of his hair.

Humiliation, embarrassment, and loss of status are the inevitable and probably intentional results of any punishment.¹⁴⁷ With respect to in-school restraints, disciplinary sanctions are especially galling because they grow out of the compelled attendance context. Much "misconduct" would not occur but for the physically confining conditions or the educational pressures forced upon all students without regard to their individual capacity or temperament. Compulsory attendance also gives exclusion from school a special sting. Sacrificing the benefits of school voluntarily is quite different from being forced to stay away, especially when others continue to attend. The student is told through expulsion that he is unfit to be where society has determined all acceptable citizens of his age should be. Furthermore, the stigma and humiliation attaching to the expulsion may be "lifelong."¹⁴⁸

D. *The Variables*

1. The Disciplinary Sanctions

The seriousness of the sanction imposed upon a student for misconduct will determine the extent of the invasion of the student's interest in obtaining an education, being free from physical restraint, and avoiding stigmatization. Thus, the appropriate procedural requirements will vary with the relative severity of the applicable disciplinary sanction. At some point the sanction becomes a sufficiently innocuous part of the daily pattern that the adjudicatory character requiring due process becomes imperceptible, and disciplining the student becomes solely a matter of school or classroom administration. Teachers must be allowed to make immediate good faith judgments in imposing minor sanctions to deal with instances of minor misbehavior.¹⁴⁹ Discipline at this level continues to constitute a deprivation of liberty, but the deprivation, imposed under conditions making it tolerable, is only fleeting.

Teachers must also have emergency authority to deal temporarily with serious disciplinary problems.¹⁵⁰ An unruly student may have

¹⁴⁷ Cf. T. HONDERICH, PUNISHMENT 77-81 (1969).

¹⁴⁸ See *Vought v. Van Buren Pub. Schools*, 306 F. Supp. 1388, 1392-93 (E.D. Mich. 1969).

¹⁴⁹ See text accompanying notes 181-82 *infra*.

¹⁵⁰ See generally 1 F. COOPER, *supra* note 125, at 142-44 (1965); 1 K. DAVIS, *supra* note 121, at §7.08.

to be ejected from the classroom or from school to prevent physical harm or to avoid extensive disruption. A teacher may even have to defend himself against physical assaults and would be entitled to use reasonable force to do so. But an exercise of emergency power would be justified only when an emergency was reasonably believed to exist. An emergency would never justify failing to provide procedural regularity as soon as the crisis had passed.¹⁵¹

a. Expulsion

Expulsion is the most serious sanction imposed as a matter of public school discipline because of its dramatic impact on the student's interest in obtaining an education.¹⁵² When the student is totally excluded from the public school system, he may lose his only chance to obtain an education; the consequences of this loss will have a life-long impact. Even if he can afford to attend a private school (and if the private school will accept him in light of the expulsion), the expelled student has been deprived of the right to attend public school at the public's expense.

b. Suspension

An indefinite suspension has essentially the same effect on the student's liberty as an expulsion. Courts have frequently ruled that expulsions cannot be extended into subsequent school years.¹⁵³ Whether such a rule is generally followed in practice seems doubtful.¹⁵⁴ Nevertheless, the belief that even an expulsion cannot be permanent serves to underline the minimal difference between expulsions and prolonged suspensions. Many recent decisions have simply assumed that equating lengthy suspensions with expulsions requires no explanation.¹⁵⁵

In determining the appropriate procedural requirements for a hearing on whether to impose a suspension, the length of the proposed suspension is important. Other considerations include the stigma

¹⁵¹ See Wright, *supra* note 17, at 1074-75; note 159 *infra* & accompanying text.

¹⁵² Because of the seriousness of this sanction, many states have statutory provisions stipulating procedures which must be followed in expelling students. For an exhaustive summary of procedural rights contained in statutes, regulations, and Attorney Generals' opinions, see S. Voelz, *The Legal Status of Pupil Suspension and Expulsion and Due Process*, Aug. 1970 (unpublished doctoral dissertation in College of Education Library, University of Iowa).

¹⁵³ See, e.g., PUBLIC SCHOOL OPERATION, *supra* note 14, at 410.

¹⁵⁴ Although some statutes expressly limit an expulsion to 1 school year or less, see, e.g., KAN. STAT. ANN. § 72-1029b (1964); LA. REV. STAT. ANN. § 17:416 (1963), others leave the question to the discretion of the expelling authority, see, e.g., IDAHO CODE ANN. § 33-205 (1963) (upon meeting school board's reasonable conditions); ME. REV. STAT. ANN. tit. 20, § 473(5) (1964) (on evidence of repentance).

¹⁵⁵ E.g., Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Scott v. Alabama State Bd. of Educ., 300 F. Supp. 163 (M.D. Ala. 1969); Stricklin v. Regents, 297 F. Supp. 416 (W.D. Wis. 1969); Scoggin v. Lincoln Univ., 291 F. Supp. 161 (W.D. Mo. 1968).

attached to being suspended, the likelihood that the suspension will become permanent through the inertia of the student or other factors,¹⁵⁶ the suspension's effect on the student's education, and the indirect effect on the student's potential for educational success—a negative attitude, a poor self-image,¹⁵⁷ and isolation from classmates. Together these considerations reveal that any lengthy suspension can have a sufficiently deleterious effect to justify requiring procedures essentially similar to those provided in expulsion proceedings. If the suspension begins as an emergency measure, these procedures should be made available while the student is temporarily excluded from school with the understanding that a decision favorable to the student will leave no blemish on his record, and that the school will assist the exonerated student in making up any educational disadvantages suffered in the interim.¹⁵⁸ In some cases courts have even required a preliminary hearing to determine the validity of the suspension pending a more complete investigation.¹⁵⁹

When the suspension is for a short period,¹⁶⁰ the student's interest in escaping it is reduced, while the school's interest in avoiding complicated proceedings is increased by the possible frequency of these short-term suspensions. In many cases the school might reasonably assume that a brief cooling-off period is the best means of dealing with minor disruptive behavior. If the short-suspension device is used with relative frequency to deal with one student, however, the cumulative effect might be equivalent to a lengthy suspension or an expulsion. Therefore, the student should be afforded a hearing with procedural safeguards after two or three short suspensions in rapid succession before the school may further penalize him.¹⁶¹

¹⁵⁶ In *Madera*, Judge Motley noted the likelihood that children above the school-leaving age would not return to school after being excluded for a substantial period. 267 F. Supp. at 371. For statistics indicating that a significant number of students are effectively excluded from school under the New York procedures, see Comment, 22 RUTGERS L. REV. 342, 346 n.33 (1968).

¹⁵⁷ Cf. COLEMAN REPORT, *supra* note 4, at 281.

¹⁵⁸ See *R.R. v. Board of Educ.*, 109 N.J. Super. 337, 350, 263 A.2d 180, 188 (1970) (high school student); cf. *Buck v. Carter*, 308 F. Supp. 1246 (W.D. Wis. 1970).

¹⁵⁹ *Buck v. Carter*, 308 F. Supp. 1246 (W.D. Wis. 1970); *Stricklin v. Regents*, 297 F. Supp. 416 (W.D. Wis. 1969); *R.R. v. Board of Educ.*, 109 N.J. Super. 337, 263 A.2d 180 (1970).

¹⁶⁰ State statutes distinguish between different kinds of powers to exclude students on the basis of specified periods of time. See, e.g., COLO. REV. STAT. ANN. § 123-20-6(b) (1963) (board of education may delegate to principal power to suspend for up to 5 days); FLA. STAT. ANN. § 232.26 (1961) (principal may suspend for up to 10 days).

¹⁶¹ Even when a brief suspension is used and not converted into an expulsion by repetition, a special problem is created if the suspension is entered in the student's file for potential future use. In *Madera*, for instance, the case against the student included eleven incidents of misbehavior reported by seven different teachers. 386 F.2d at 788. In *Gault* the finding of delinquency rested upon the juvenile court judge's conclusion that Gault was a delinquent in part because he was "habitually

The length of the suspension frequently turns on the performance of some act by the student.¹⁶² Suppose a student is suspended for violating a hair-length regulation. The key to readmission—cutting his hair—is in the student's possession, and the length of his suspension will be determined by his decision whether or not to have it cut. How should the suspension be characterized or its length be measured? On balance such a conditional suspension should entitle the student to expulsion-type procedural protection. In part this conclusion grows out of concern over the potential length of the exclusion from school. In all such cases, however, the student also has an independent interest which he is being asked to sacrifice as the price for readmission. The nature of the particular interest will undoubtedly influence a reviewing court's view of the procedures required; wearing an armband might lead to greater protection than wearing long hair, whereas hair preference would merit more protection than smoking marijuana.¹⁶³ Despite this variable, in all these cases the student has a double justification for receiving a full hearing.

c. *Disciplinary Transfers*

A board of education has broad authority to assign students to particular schools,¹⁶⁴ provided that the authority is exercised within legal limits.¹⁶⁵ Unlike general school-assignment decisions, which may be regarded as legislative actions,¹⁶⁶ a decision to transfer a student from school *A* to school *B* because of his misconduct is an adjudicatory action. Like any other disciplinary sanction, a misconduct transfer involves determinations which the student should be permitted to influence in an appropriate hearing.

involved in immoral matters." The only immorality cited by the judge was a "referral" for stealing a baseball glove—a referral that resulted in no action because of "lack of material foundation." 387 U.S. at 9. Cf. FLA. STAT. ANN. § 232.26 (Supp. 1970), amending FLA. STAT. ANN. § 232.26 (1961) (brief suspension for "repeated misconduct"). To deal fairly with this problem, the school should present the student with a copy of the proposed entry in his record, inform him and his parents that future use of the record is possible, and permit him to add to the record his view of the incident. The school's failure to do this should be one consideration in determining the fairness of any future use.

¹⁶² See, e.g., *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

¹⁶³ Cf. Weiss & Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709 (1969).

¹⁶⁴ See M. NOLTE & J. LINN, *supra* note 67, at 215-16; PUBLIC SCHOOL OPERATION, *supra* note 14, at 333.

¹⁶⁵ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1968).

¹⁶⁶ See *O'Neal v. School Dist. No. 15 School Bd.*, 451 P.2d 791 (Wyo. 1969). The *O'Neal* court may have been misled in its characterization by concentrating on the request for a transfer. Cf. *Ravenna Pub. School Dist. No. 24 v. Big Springs School Dist.*, 6F, 17 Mich. App. 106, 169 N.W.2d 183 (1969).

The school may argue that the student's interest in procedural safeguards is insubstantial because the student's liberty is only peripherally affected.¹⁶⁷ According to this argument, the student is merely transferred from one school to another; if he suffers any loss of liberty, it results from the compulsory attendance law, not the transfer. But schools differ widely despite superficial similarities. Intangibles such as the principal's reputation affect the school's image and may in turn affect its drawing power for teachers and students (through their parents' choice of residence). Subtle differences shape the brand and quality of the education offered by each school. In addition, the transferred student can nearly always point to certain objective advantages provided by school *A* but not by *B*. The student bodies will be different, and to a certain extent the composition of the student body influences the individual student's academic performance.¹⁶⁸ Finally, a school has other attributes that matter to the student (even if not educationally). Change in itself involves hardship—the distance or means of traveling to school will be different and possibly more burdensome; old friends and teachers will be lost. Since the school attendance area is often regarded as an incident of residence, a certain portion of the parental real estate investment would be lost because of the transfer. In total, the liberty deprivation resulting from a transfer is substantial although not ordinarily as great as that resulting from expulsion: the sanction is comparable in terms of the effect on the parties involved. On the other side, the school's interest in denying the student procedural safeguards, based mainly on minimizing costs and administrative inconveniences, are no more impressive than with respect to expulsion proceedings. Disciplinary transfers usually involve some administrative deliberation which could easily be converted into a hearing.

When the transferee school is a school for problem children rather than one interchangeable with the transferor school, the loss of liberty resulting from the transfer is even less debatable.¹⁶⁹ Such a

¹⁶⁷ See, e.g., *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

¹⁶⁸ See COLEMAN REPORT, *supra* note 4, at 302.

¹⁶⁹ But see *Madera v. Board of Educ.*, 386 F.2d 778, 783 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). The *Madera* court's conclusion that assignment to a "600" school does not present a serious threat to the student's liberty is unpersuasive. The court acknowledged evidence that such schools were "presently inadequate," 386 F.2d at 782, and that "a certain social stigma" may attach to children placed in them, *id.* at 782-83. Furthermore, the three reasons offered by the court for its outcome—that "[n]o practical alternative has been offered," *id.* at 782, that stigma would attach to this child's poor performance in any case, *id.* at 783, and that the transfer occurred only after the parents consented, *id.*—do not justify denying procedural due process in the decisionmaking process. Since Family Court proceedings would be brought to force parental consent, this was, as Judge Motley observed, consent only in name. 267 F. Supp. at 372.

reassignment, leading to forced attendance at a stigmatizing, inferior, or restrictive school, may entail a greater deprivation than expulsion. Once transfer to a detention school becomes an alternative, the distinction between juvenile court proceedings and school disciplinary proceedings virtually vanishes. The student's interest in physical freedom is so severely threatened when transfer to a detention school is possible that the proceeding becomes quasi-criminal.¹⁷⁰ Detention schools are also generally academically inferior; the student's interest in obtaining an education is thus threatened. Incarceration through transfer to a detention school is the one disciplinary sanction threatening a more severe deprivation of liberty than expulsion. Thus, in any disciplinary proceeding that might result in a detention school assignment, the student should be entitled to all of the procedural safeguards discussed in this Article.

d. Corporal Punishment

The law of corporal punishment, an outgrowth of the doctrine of *in loco parentis*, has not changed significantly for one hundred years. Fortunately, the practices of schools in administering corporal punishment have not been similarly stagnant. Physical punishment of misbehaving students has not yet disappeared from American schools,¹⁷¹ especially from many large urban school systems, but the dominant thinking among educators has apparently turned away from physical punishment.¹⁷² In this light the unchanging nature of the legal doctrine is all the more remarkable.

The importance of determining guilt in advance of the imposition of corporal punishment can be dramatized by looking at one of the tests long used to determine whether the punishment is "reasonable": Was the punishment commensurate with the offense to be corrected?¹⁷³ This test assumes that some offense was committed. But the student could most easily establish unreasonableness by proving either that he had not engaged in the alleged conduct or that the conduct was not a punishable offense. Similarly, courts have stated that physical punishment of a student pursuant to an invalid rule is impermissible.¹⁷⁴ In either case the adjudication of the critical issue comes too late. The

¹⁷⁰ Because of the possibility that incarceration will result from the hearing, the analogy to *In re Gault*, 387 U.S. 1 (1968), is particularly strong. All the safeguards the Court declared available in that situation should also be afforded to a student facing transfer to a detention school.

¹⁷¹ See K. JAMES, CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS 82-85 (1963); J. KOZOL, *supra* note 7, at 9-18.

¹⁷² See K. JAMES, *supra* note 171, at 84. But see NEWSWEEK, May 17, 1971, at 99.

¹⁷³ See text accompanying note 80 *supra*.

¹⁷⁴ *Berry v. Arnold School Dist.*, 199 Ark. 1118, 137 S.W.2d 256 (1940) (dictum); see *Rulison v. Post*, 79 Ill. 567 (1875); cf. N. EDWARDS, *supra* note 14, at 15-17.

result is comparable to incarcerating a man and permitting him to disprove the allegation only after serving his sentence. A judgment for damages is small consolation for the improper punishment.

Furthermore, no apparent justification exists for ignoring more civilized ways of proceeding. If the student is disrupting the classroom or endangering others, school authorities may use reasonable force to remove him. But deliberately inflicting physical pain is not emergency action. This conclusion is reinforced by the existence of statutes and school regulations prescribing requirements which must be satisfied before imposing physical punishment. These rules cover the nature of the striking instrument,¹⁷⁵ the method of administering the blows,¹⁷⁶ and the presence of another adult.¹⁷⁷ Such rules are evidently designed to prevent excessive physical abuse and to provide the teacher with a favorable witness; they are not designed to protect the student from undeserved punishment. Furthermore, the existence of these rules reveals that, whatever purpose is served by striking students, it would not inevitably be subverted by requiring formal procedural prerequisites.

The student's principal legal protection from unjust physical punishment should be a prior hearing rather than a subsequent action for damages. Corporal punishment differs from criminal punishment only in that it has long been considered unthinkable to pillory criminals or to lock them in stocks in the public square.¹⁷⁸ Even though the injury to the student's education interest is not equal to that caused by expulsion from the school system, the deprivation of liberty may, in cases of severe corporal punishment, rise to a point at which procedural due process will entitle the student to the full range of safeguards available in expulsion proceedings.

This argument will strike many as absurd, some as outrageous. A *de minimis* level exists here as elsewhere; a swat on the bottom is not inherently harmful to either the anatomy or the psyche. Even for the arguably *de minimis* swat, however, the required procedures must be

¹⁷⁵ OKLA. STAT. ANN. tit. 21, §§ 843-44 (Supp. 1970) (beating forbidden but spanking, switching, or paddling permissible). Concerning the rules and practices of the Boston Public Schools, see J. Kozol, *supra* note 7, at 9 (rattan).

¹⁷⁶ See FLA. STAT. ANN. § 232.27 (1961) (not degrading or unduly severe); MONT. REV. CODES ANN. § 75-2407 (1949) ("without undue anger"); J. Kozol, *supra* note 7, at 10 (without holding child's hand).

¹⁷⁷ "In cases where corporal punishment is deemed necessary it shall be administered by the Chief School Officer or by the principal in the presence of another adult." DEL. CODE ANN. tit. 14, § 752 (Supp. 1968); *accord*, MONT. REV. CODES ANN. § 75-2407 (1949).

¹⁷⁸ *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (use of strap held to be cruel and unusual punishment); see *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966); *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).

determined in accordance with the motives and demeanor of the punishing adult, and on the relationship before and after the punishment between him and the student. Imposing procedural requisites will undoubtedly result in fewer instances of corporal punishment, for in many cases the procedures will be too great a nuisance. Yet in the end, the question must be whether this chilling effect on corporal punishment is to be regretted—in short, whether the school has a strong interest in administering such punishment which offsets the student's interest in obtaining procedural protection.

*e. Withdrawal of Privileges*¹⁷⁹

In *Scott v. Alabama State Board of Education*,¹⁸⁰ the student plaintiffs alleged that, in addition to suspending them for participating in a demonstration, state college authorities were withholding campus jobs and the opportunity to engage in practice-teaching programs. The court observed that "the issue of whether due process requires a hearing before participation" in those activities could be terminated was "a question of first impression" but found the question moot with regard to some students and premature with regard to others.¹⁸¹ Eventually the courts will have to resolve these and comparable questions concerning withdrawal of privileges as a means of punishing student misbehavior.

At the lower end of the scale of seriousness, withdrawing privileges from students to punish misconduct is comparable to imposing a short suspension (or a good-hearted spanking). If Mary talks too often or too loudly to Ann, the teacher may have to move Mary's seat, and the decision to do so—isolated from any cumulative pattern of punishment based on Mary's misconduct—must remain largely in the teacher's control. As the duration of the deprivation or the importance of the privilege or both increase, the net effect of the punishment will come to approximate that of expulsion. At some point procedural protection for the student will be necessary and a hearing must be held before further privileges are withdrawn. In some cases withdrawing a privilege will appear to be a more serious sanction than the milder forms of corporal punishment and will entail important future consequences comparable to those resulting from expulsion. For example, withdrawing the privilege of playing basketball could seriously affect a talented athlete's prospects for entering college and obtaining gainful

¹⁷⁹ In this discussion the term "privilege" is used to mean any normal incident of school life generally available to all students. In *Kelley v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485 (M.D. Tenn. 1968), the court noted that students can be denied neither rights nor privileges without due process of law. *Id.* at 491-92.

¹⁸⁰ 300 F. Supp. 163 (M.D. Ala. 1969).

¹⁸¹ *Id.* at 168.

employment.¹⁸² Seriousness of the punishment is the central consideration—from either the student's or the school's perspective—in determining which procedures must be available in a hearing preceding imposition of the punishment. Fortunately, the concept of due process is sufficiently flexible to be molded to the needs of the student and the school.

f. *Academic Penalties*

The school must be given broad discretion with regard to all matters of academic evaluation. The school has a legitimate claim to expertise in this area, and the courts are ill-equipped to examine academic judgments. These considerations do not necessarily dictate, however, that all decisions concerning grades, promotion, and graduation are exempt from judicial inquiry.¹⁸³ Courts have intervened to prevent school boards from withholding high school diplomas¹⁸⁴ or denying promotion from one grade to another¹⁸⁵ as a sanction for disobeying a school rule. If a failing grade is given because of misconduct rather than poor academic performance, the student should have a right to a hearing to determine whether he is guilty of the alleged misconduct and, if so, whether a failing grade is a reasonable sanction. At the hearing the student might be given the heavy burden of first coming forward with evidence that the claimed misconduct caused the grade to be assigned. Nevertheless, the sanction of a failing grade significantly affects the student's educational interest. Therefore, the student should receive a procedurally sound hearing into the questions of misconduct and the relationship between misconduct and the grade.

2. The Student's Age

Discussion of public school disciplinary practices has focused almost exclusively upon the secondary student.¹⁸⁶ Although no ex-

¹⁸² Cf. *Kelley v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485, 492 (M.D. Tenn. 1968) (basketball team suspended from interscholastic competition).

¹⁸³ The difficulty lies in drawing a workable line between permitting broad discretion for academic judgments and preventing schools from using the grade-giving power to punish students. Conceptually, an arbitrary assignment of a failing grade is a deprivation of the student's right to be free from arbitrary state action. Compare *Wright*, *supra* note 17, at 1069-70, with *Academic Freedom*, *supra* note 146, at 1137, 1139.

¹⁸⁴ See *Valentine v. Independent School Dist.*, 191 Iowa 1100, 183 N.W. 434 (1921).

¹⁸⁵ See *Haddad v. Board of Educ.*, (N.J. Comm'r of Educ., Apr. 26, 1968), upholding suspension but requiring that student be given an opportunity to take exams and have his grades recomputed. But see *Humphrey v. Adkins*, 18 Ohio App. 2d 101, 247 N.E.2d 330 (1969). See also *Pittman v. Board of Educ.*, 56 Misc. 2d 51, 287 N.Y.S.2d 551 (Sup. Ct. 1967), rejecting challenge to demotion from first grade to kindergarten on the ground that the child was unable to do first-grade work.

¹⁸⁶ See, e.g., AMERICAN CIVIL LIBERTIES UNION, *ACADEMIC FREEDOM IN SECONDARY SCHOOLS* (1968); NATIONAL ASS'N OF SECONDARY SCHOOL PRINCIPALS, *THE*

planations have been offered for this implicit primary-secondary school distinction, at least two suggest themselves: serious discipline problems tend to involve older students, and a relevant difference is generally sensed between the youngest and oldest public school students. Neither suggestion indicates that students in the primary grades do not have substantial school-related interests capable of being seriously affected by school discipline. In fact, the education provided during the early school years is probably more indispensable than that provided in the later grades. Younger children have no less interest in freedom from physical restraint than their older counterparts, and perhaps less capacity to suffer restraints. Furthermore, younger children are arguably less hardened by experience, making the same sanction more severe when visited upon a younger student.

In any event, the likelihood of less serious punishment should not lead inevitably to the conclusion that different legal procedures should result. Insofar as younger students are, in fact, disciplined only through "minor" sanctions, the problem of dealing with younger children may be treated as a problem of dealing with minor discipline generally. But if a second grader is to be expelled, transferred to a detention school, or physically punished, his right to procedural protection cannot be so readily dismissed.

Even when a young student is threatened by a serious punishment, the "feeling" persists that there is a difference, but identifying either the proper or likely effect of this vague difference on the procedures is difficult. Students of child development generally agree that a significant change in a child's development usually begins to be evident at the age of ten or eleven.¹⁸⁷ In gross terms, this change is revealed in patterns of language, thought, self-control, social relations, ethical attitudes, and physical attributes. Some or all of these characteristics may influence judgments of what, under the circumstances, satisfies the fundamental fairness requirement. For example, concrete rather than abstract reasoning characterizes children in the younger age segment.¹⁸⁸ This characteristic might suggest that certain types of proceedings would be beyond the child's comprehension and thereby of questionable value as a "lesson in democracy."¹⁸⁹ Consequently, in these circumstances, a simple, informal proceeding might be appropriate. The

REASONABLE EXERCISE OF AUTHORITY (1969); Abbott, *supra* note 73; *Academic Freedom*, *supra* note 146, *passim*. But see *id.* 1154.

¹⁸⁷ See E. ERIKSON, *supra* note 143; A. GESELL & F. ILG, *THE CHILD FROM FIVE TO TEN* (1946); A. GESELL, F. ILG & L. AMES, *YOUTH: THE YEARS FROM TEN TO SIXTEEN* (1956); J. PIAGET, *SIX PSYCHOLOGICAL STUDIES* 38-60 (1967).

¹⁸⁸ See J. PIAGET, *supra* note 187, at 41-48, 61-63.

¹⁸⁹ One must be extremely careful in drawing conclusions about specifics. It has been pointed out, for example, that Piaget's theory about capacity for abstract reasoning has been applied to solve particular pedagogical or child-rearing problems by others, not by Piaget himself. See D. Elkind, *Editor's Introduction* to J. PIAGET,

fundamental fairness evaluation must be geared to the gradual, subtle transitions in the individual student from kindergarten to high school graduation, recognizing that the participation of the student's parent will tend to neutralize the impact of the age variable.

E. *The Parents' Role*

A student's parents may be affected in a variety of ways by the school's regulation and discipline of the student, all of which dictate that the parent participate in the hearing. First, parents' interests may be directly affected by a student's adherence to a school rule of "conduct" or by a sanction imposed against him.¹⁹⁰ For example, if a student is required to wear a coat and tie, dressing him for school will cost more than if a T-shirt were acceptable attire. If a student is transferred to another school as a result of misconduct, parental expense or inconvenience is likely to result and, if the transferee school is custodial, the impact on the parent as well as the student will be profound.¹⁹¹ Nonschool activities—everything from dancing class to household chores to a part-time job—may be thwarted by either school conduct rules or school discipline. Homework may cut heavily into the student's time, and a student failing to satisfy homework requirements will be subjected to informal or indirect sanctions and may even be disciplined as for breaking other school rules.¹⁹² Furthermore, the school's regulatory and disciplinary scheme may inculcate values inconsistent with those the parents attempt to teach the student. For example, a parent may believe that corporal punishment is an unacceptable method of inducing a child to obey, or that an elaborate system of hall passes or a restrictive dress code teaches rigidity and conformity when he is attempting to teach flexibility and individuality.

Second, a parent has an obvious claim to be involved in student discipline proceedings based on his presumably strong interest in the

supra note 187, at xv-xvi. Nevertheless, it is interesting that a strong feeling of justice is said to develop during the stage prior to the child's becoming an abstract thinker. *See id.* at 56-57.

¹⁹⁰ Some statutory rules, moreover, are directly addressed to parents. For example, the parent shall send the child to school, *see, e.g.*, MASS. ANN. LAWS ch. 76, § 2 (Supp. 1969); N.C. GEN. STAT. § 115-166 (Supp. 1969), have the child vaccinated, *see, e.g.*, CONN. GEN. STAT. ANN. § 10-204 (Supp. 1970); HAWAII REV. LAWS § 325-36 (1968), and appear at the school, *see, e.g.*, MICH. COMP. LAWS ANN. § 340.739 (1967). In addition, a violation of school conduct regulations can lead to an expulsion and consequently to a violation of the compulsory attendance laws by the parent.

¹⁹¹ Although the primary impact is presumptively the negative effect on the family unit, a disciplinary transfer to a detention school may have an economic impact as well. *See, e.g.*, N.Y. EDUC. LAW § 3214(7)(b) (McKinney 1970) (parents "able to contribute" may be ordered to do so by the court).

¹⁹² *See* *Balding v. State*, 23 Tex. App. 172, 4 S.W. 579 (1887); *cf. Magnum v. Keith*, 147 Ga. 603, 95 S.E. 1 (1918); *Gentry v. Memphis Fed'n of Musicians*, 177 Tenn. 506, 151 S.W.2d 1081, 1082 (1941). *But see Hobbs v. Germany*, 94 Miss. 469, 49 So. 515 (1909); *Dritt v. Snodgrass*, 66 Mo. 286 (1877).

child's welfare. The parent may be aligned with the student simply because of a natural emotional response, or because the school is unresponsive to community views, or because the school's rules reflect the values of the community but the parent disagrees with those values, or because the parent believes the school has made an improper factual determination concerning the existence of a violation or the proper punishment.

Third, in some situations—for instance, when parent and student have directly and openly conflicting interests—the parent will identify with the school rather than with the student. The parent may be delighted to have the school enforce rules concerning dress, hair, smoking, or homework, that he is unable or unwilling to set or enforce. Or he may prefer to save face in the community—perhaps by acquiescing in a student's transfer to a new school—rather than resist a charge based on possession of marijuana or pornography. Or, just as he may be emotionally drawn to the student's side, the parent may be so encumbered with feelings of guilt about his child's behavior that he is unable to act in his child's best interest.

No matter how consistent the school-parent rules or approaches to discipline, parental discipline and school discipline cannot be equated. Somewhat similarly, it must be recognized that there is always at least a low-level conflict between the interests of parent and student. The parent is not the student, and it is the student who is in jeopardy of suffering a sanction for misconduct. The possibility of and the need to guard against parent-child conflicts of interest has been noted in connection with juvenile court proceedings,¹⁹³ and the same care should be taken in school disciplinary proceedings.

The one clear conclusion to be drawn is that the student disciplinary proceeding is at least potentially a three-party proceeding. Because the student is more directly affected by the school's discipline, he should always be a participant in some form. Because of the parent's distinct interest and his potentially salutary role as mediator, the parent also should always be a participant in his own right in some form. And, because of the likely coincidence of parent-student interests, the parent should participate to some extent on the student's behalf.

In narrower terms, the central question concerns the allocation of the exercise or control of procedural rights between parent and student. Ideally, both should have a full and independent measure of procedural protection.¹⁹⁴ Yet cost and time will tend to dictate other-

¹⁹³ See Paulsen, *supra* note 57, at 250; Skoler, *supra* note 104, at 572.

¹⁹⁴ See Note, *Basic Rights for Juveniles in Juvenile Proceedings under the Minnesota Juvenile Court Rules: A Response to Gault*, 54 MINN. L. REV. 335, 343 (1969); cf. *In re William L.*, 29 App. Div. 2d 182, 287 N.Y.S.2d 218 (1968).

wise; quite often dual, independent participation by parent and student would be clumsy as well as wasteful. Besides, if the focus is one of judging fundamental fairness as a matter of hindsight, proceedings will rarely be found wanting for lack of unqualified double participation. Whenever a choice is appropriate to ensure an efficient and orderly proceeding, the parent should tend to direct the exercise of procedural rights when the accused student is in the primary grades, and the student should tend to be in control by the time he is in high school. In between, control should gradually shift to the student. Whenever evidence of a conflict of interests arises, both parent and student should be afforded independent procedural safeguards.

A proper blending of parent and student participation in a discipline proceeding is an extremely delicate matter. The suggested roles of parent and child put forward here are not advanced as constitutional standards, but they do bear upon the application of the constitutionally required procedural safeguards discussed in this Article insofar as they are relevant to the process of determining whether a particular proceeding has conformed with minimal standards of fairness. Except for occasional instances distinguishing the procedures available to parent and student, references in this Article to the interest of the student—or child—should be interpreted to mean the interest of both the student and his parent, or either.

III. DUE PROCESS SAFEGUARDS: A BILL OF PARTICULARS FOR SCHOOL DISCIPLINE CASES

*Dixon v. Alabama State Board of Education*¹⁹⁵ offers a convenient starting point for examining the procedural safeguards required to satisfy the demands of due process in school discipline cases. According to *Dixon*, a student subject to expulsion for misconduct is entitled to notice and a hearing at which he knows the witnesses and evidence against him and is given an opportunity to make his own defense—including the opportunity to produce witnesses and affidavits.¹⁹⁶ In other recent school and college cases, various procedures have been provided¹⁹⁷ or required.¹⁹⁸ When application of the due

¹⁹⁵ 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

¹⁹⁶ See *id.* at 159.

¹⁹⁷ See *Scott v. Alabama State Bd. of Educ.*, 300 F. Supp. 163 (M.D. Ala. 1969) (counsel); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968) (counsel, cross-examination); *Buttney v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968) (counsel, cross-examination, transcript); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970) (counsel, cross-examination, transcript).

¹⁹⁸ See *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967) (impartial tribunal, cross-examination); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968) (substantial evidence); *Esteban v. Central Mo. State College*, 277 F. Supp. 649

process standard is not entirely avoided, the decided cases seem to agree that, as a minimum, due process requires notice and an opportunity for the student to be heard.

Notice implies giving the student a statement of the charge in sufficient detail and sufficiently in advance of the hearing to enable him to prepare a defense.¹⁹⁹ What is "sufficient" for either purpose depends upon the circumstances.²⁰⁰ The time needed depends upon such variables as the nature of the charge, the source and kind of evidence needed to answer it, and whether legal counsel participates on behalf of the student. In evaluating these circumstances, the crucial determinant may be whether the court believes the student was substantially disadvantaged. In *Due v. Florida Agricultural and Mechanical University*,²⁰¹ the students were advised by telephone to appear the morning of the hearing and notified of the charges against them only at the beginning of the hearing. The court concluded that adequate notice had been given because the student spoke in his own defense at the hearing "to the point where each said he had nothing more to say."²⁰² That the student is not struck dumb, however, falls short of demonstrating that more time would not have enabled him to present other essential evidence or to speak more effectively. The lack of preparation time makes especially doubtful the significance of the failure, noted by the court, of the students to request counsel or call witnesses.

Whether the charge has been communicated to a student with sufficient specificity will be difficult to judge. In *Jones v. State Board of Education*,²⁰³ the students argued that the evidence presented against them at a disciplinary hearing included conduct occurring during the summer although the notice of the proposed suspension was given in June. Arguably, this meant that they came to the hearing prepared only to defend against the conduct claimed to be improper as of June. If that were the case, the notice would be of doubtful adequacy. But the students did not claim surprise so much as a kind of technical

(W.D. Mo. 1967) (counsel); *Goldwyn v. Allen*, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967) (counsel).

¹⁹⁹ 1 K. DAVIS, *supra* note 121, at §§ 8.04-.05 (1958); W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 837-59 (4th ed. 1960). See also *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

²⁰⁰ See *Wasson v. Trowbridge*, 382 F.2d 813 (2d Cir. 1967) (3 days may be insufficient); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969) (2 days), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970); *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (10 days).

²⁰¹ 233 F. Supp. 396 (N.D. Fla. 1963) (indefinite suspension).

²⁰² *Id.* at 403.

²⁰³ 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970).

variance. The summer conduct was related to the prior conduct and, based on the transcript, the court said that the students "understood fully the nature of the charges against them."²⁰⁴ Yet in *Hobson v. Bailey*,²⁰⁵ even though the charges had been read to the student and her parents, the court found the notice defective because the record did not reveal that the charges had been explained or understood. The minimal test for adequacy of notice should be whether the student understood the substance of the charge against him, rather than some more formal criteria. The application of the test will depend upon case-by-case judgments weighing the notice actually given against that which might have been given, and the presentation actually made by the student against the presentation that he claims might have been made. The parent and student should each receive separate notice,²⁰⁶ at least whenever the threatened discipline rises above a minimal threshold of seriousness.²⁰⁷

What requiring a "hearing" means may also be elusive,²⁰⁸ since determining the content of "hearing" may scarcely differ from determining the content of "due process" itself. In its most rudimentary form, the hearing requirement demands that the hearing body "hear" the charged party²⁰⁹ and implies that the party be present to "hear" an official pronouncement concerning the charge.²¹⁰ In the latter sense, requiring a hearing suggests that knowing why one is being punished, however correct or erroneous the grounds, is an element of fundamental

²⁰⁴ *Id.* at 199.

²⁰⁵ 309 F. Supp. 1393 (W.D. Tenn. 1970).

²⁰⁶ See, e.g., CONN. GEN. STAT. ANN. §10-234 (1957); Act of Mar. 23, 1970, ch. 300, §2(a), [1970] Kan. Laws 884; N.Y. EDUC. LAW §3214(a) (McKinney 1970). Existing expulsion statutes more commonly require that notice be given only to the parents (if any individuals are specified). See, e.g., ILL. ANN. STAT. ch. 122, §10-22.6(a) (Smith-Hurd 1970); Mo. REV. STAT. §167.161 (1959); WIS. STAT. ANN. §120.13(1)(c) (1970). In *Whitfield v. Simpson*, 312 F. Supp. 889 (E.D. Ill. 1970), the court held that two-day notice to the parents was adequate. The student's counsel argued unsuccessfully that the student had in effect received no notice and had not been advised of her right to produce witnesses. See Plaintiff's Memorandum in Support of Motion for a Temporary Restraining Order at 1-2, *Whitfield v. Simpson*, 312 F. Supp. 889 (E.D. Ill. 1970).

²⁰⁷ In borderline cases, determining a critical level of seriousness at which to give notice to the parent has a built-in dilemma: giving notice to the parent may be construed as additional punishment in itself and may result in additional punishment administered by the parent. Because of this added element, the school should have wider latitude in deciding when to send notice home.

²⁰⁸ See 1 K. DAVIS, *supra* note 121, at §7.01; W. GELLHORN & C. BYSE, *supra* note 199, at ch. 6.

²⁰⁹ See 1 K. DAVIS, *supra* note 121, at §§7.01-02.

²¹⁰ A right to be present may be inferred from the Supreme Court's statement that: "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent v. United States*, 383 U.S. 541, 554 (1966) (emphasis added). Another analogy may be found in the right of criminal defendants to be present at the sentencing hearing. See *United States v. Behrens*, 375 U.S. 162 (1963); *Lewis v. United States*, 146 U.S. 370 (1892); *Homer v. Page*, 441 P.2d 473 (Crim. App. Okla. 1968).

fairness. Thus, a student should be permitted to appear before the disciplining body or official whenever serious sanctions may be imposed.

Dixon and the cases following it plainly assume, however, that due process requires more than merely an opportunity to appear and to learn the charges. A student threatened with discipline should have a right to deny or explain the conduct upon which the charge against him is premised.²¹¹ Beyond that remain questions concerning the form that the student's affirmative case should take, and how and by whom it should be offered. A student is entitled to insist that a decision adverse to his interests be supported by substantial evidence.²¹² Fairness may require a trial-type hearing in one case,²¹³ an "argument" in another²¹⁴—determined largely by what is charged and what is challenged in each case. If the student is charged with fighting, he should be permitted to show, if such is his claim, that he did not fight or that his involvement was provoked or merely defensive. Establishing each of these defenses requires submitting evidence—mainly his testimony and the testimony of others—to prove his factual contention.

When issue is joined over law or policy, the student's rights may be more uncertain. Schools must have a broad range of freedom in formulating the rules to regulate student conduct. Nevertheless, students should be allowed to challenge regulations on the ground that they violate state or federal constitutions or laws, or that they are inconsistent with other regulations or institutional policies.²¹⁵ For example, a student should be allowed to challenge a rule as overly vague.²¹⁶ Law and policy determinations often depend upon the particular facts of the case. The opportunity to appeal directly to the body given the power to exercise discretion may be important in such

²¹¹ See *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) (dictum); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926).

²¹² See *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161, 166-70 (W.D. Mo. 1968); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970); *Wright, supra* note 17, at 1073; *cf. Healy v. James*, 311 F. Supp. 1275, 1281-82 (D. Conn. 1970). *But see Esteban v. Central Mo. State College*, 415 F.2d 1077, 1090-92 (8th Cir. 1969) (Lay, J., dissenting).

²¹³ See 1 K. DAVIS, *supra* note 121, at §§ 7.01-.02, 7.04.

²¹⁴ See *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 274 (1949); 1 K. DAVIS, *supra* note 121, at §§ 7.01, 7.07.

²¹⁵ See *Vought v. Van Buren Pub. Schools*, 306 F. Supp. 1388 (E.D. Mich. 1969) (discriminatory application of obscenity rule).

²¹⁶ See *Sullivan v. Houston Independent School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969); *Scott v. Alabama State Bd. of Educ.*, 300 F. Supp. 163 (M.D. Ala. 1969); *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968); *Wright, supra* note 17, at 1060-67; *Van Alstyne, The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 295 (1968). *But see Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

cases; and, at a minimum, exclusion of evidence or argument necessary to a proper exercise of discretion denies fundamental fairness.²¹⁷

Beyond the right to notice and a hearing at which the student may present his own case, the scope of due process protection becomes more uncertain. I have identified for extensive treatment four procedural safeguards—cross-examination, counsel, impartial tribunal, and record for review.²¹⁸ These safeguards play critical roles in securing a fair hearing, but they have not yet gained general acceptance as due process requirements in college or school discipline cases. In carrying out this analysis, the factors to be weighed in determining whether a student has been afforded fundamental fairness are: (1) the potential sanction;²¹⁹ (2) the procedural right claimed; (3) the procedural rights afforded other than the one claimed; (4) the benefit to the student of having a particular right and the disadvantage of not having it; and (5) the “burden on the proceeding” if the right is recognized.

A. Cross-Examination

Like other safeguards claimed as a matter of procedural due process, cross-examination is not guaranteed to all participants in all proceedings,²²⁰ but its fundamental importance in determining truth has been widely recognized. Cross-examination, according to Wigmore, “is beyond any doubt the greatest legal engine ever invented for the discovery of truth. . . . If we omit political considerations of

²¹⁷ Knight v. State Bd. of Educ., 200 F. Supp. 174, 180 (M.D. Tenn. 1961).

²¹⁸ In addition to these due process safeguards, several other procedural rights characteristic of the criminal process have been claimed in school disciplinary proceedings. See, e.g., Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969) (unsuccessful attempt to postpone disciplinary proceeding because testimony might be used in criminal trial); Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968) (right to remain silent); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967) (dictum) (court questions efficacy of statements included in “confession” to principal); cf. People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969) (challenging validity of consent to official locker search). Because school disciplinary proceedings will probably not be labeled “criminal”—except perhaps in the rare instance when the proceedings lead directly to the imposition of criminal sanctions—procedural safeguards such as the privilege against self-incrimination, cf. *In re Gault*, 387 U.S. 1, 43-57 (1967), trial by jury, cf. Note, *supra* note 135 at 112-15, and proof beyond a reasonable doubt, cf. Note, *Standards of Proof and Admissibility in Juvenile Court Proceedings*, 54 MINN. L. REV. 362, 363-78 (1969), will not be incorporated into school discipline law. Nevertheless, these protections might be claimed in those instances in which the sanctions flowing from disciplinary proceedings become equivalent in kind and seriousness to those administered through the criminal process. See, e.g., N.Y. EDUC. LAW § 3214(5)(a) (McKinney 1970) (authorizing school authorities to commit students to detention schools).

²¹⁹ Another possible variable is the alleged misconduct; *Gault* may be read to suggest that juvenile proceedings differ depending on whether they arise out of criminal or other behavior. See 387 U.S. at 13. But see Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527, 535-36 (1968). My general assumption is that differences in the seriousness of misconduct will be reflected in differences in the severity of the sanction, and that it is the sanction that counts.

²²⁰ See *Hannah v. Larche*, 363 U.S. 420 (1960); cf. *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886 (1961).

broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure."²²¹ And the Supreme Court has "frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process."²²² Yet in requiring that college expulsion hearings comply with minimal due process standards, the *Dixon* court stated:

This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college.²²³

An evaluation of the *Dixon* court's reluctance to allow "full-dress" cross-examination in expulsion proceedings requires a more careful examination of the *Dixon* opinion, an accounting of other school discipline litigation, and a broader look at the constitutional dimensions of the right to cross-examine.

1. The *Dixon* Rationale and Its Limits

The statement quoted from *Dixon* was dictum, however well considered, delivered in a decision generally regarded as achieving a stunning breakthrough in the student discipline area. Conciliatory assurances to prevent overreaction are foreseeable in such decisions.²²⁴ And on closer reading, Judge Rives' cautioning dictum may leave open more than appears at first glance. Judge Rives introduced his procedural prescription with the reservation that the "nature of the hearing should vary depending upon the circumstances of the particular case," and limited its application to the "case before us."²²⁵ Furthermore, throughout the quoted passage the judge used indefinite verbs such as "might" and "may." This language prompts a number of questions: Suppose the rudiments of an adversary proceeding cannot be preserved

²²¹ 5 J. WIGMORE, EVIDENCE §1367, at 29 (3d ed. 1940); cf. 1 K. DAVIS, *supra* note 121, at §§7.05-20; C. McCORMICK, EVIDENCE §31, at 59-60 (1954); McKay, *The Right of Confrontation*, 1959 WASH. U.L.Q. 122, 128-30.

²²² *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969); *accord*, *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963); *Forman v. Creighton School Dist.*, 87 Ariz. 329, 351 P.2d 165 (1960); *Severn v. City of Baltimore*, 230 Md. 160, 186 A.2d 199 (1962); *Civil Serv. Comm'n v. Polito*, 397 Pa. 538, 156 A.2d 99, 101 (1959).

²²³ 294 F.2d at 159.

²²⁴ See Braden, *The Search for Objectivity in Constitutional Law*, in JUDICIAL REVIEW AND THE SUPREME COURT 172 (L. Levy ed. 1967).

²²⁵ 294 F.2d at 158.

without encroaching upon the college's interests? Suppose cross-examination turns out to be compatible with the college atmosphere after all? Caution may have been urged in opening the cross-examination question simply because of the court's intuitive judgment that the costs would outweigh the benefits. The opinion might be read to say that a due process hearing for college discipline is not inevitably equivalent to a full-dress judicial hearing with full-dress cross-examination. Because it admits this reading, *Dixon* does not present as much of a hurdle to recognition of a cross-examination right as might at first be assumed.

Publicity, disturbance of college activities, and detriment to educational atmosphere can be lumped together as one kind of disadvantage. What do they amount to? First, in terms of the time and attention of students, teachers, and administrators, cross-examination arguably diverts too much time from the primary educational goals of the school. As a generalization, however, that argument is unpersuasive. No doubt adversary proceedings distract school personnel from their regular pursuits, and an uncontrolled right to cross-examine could lead to substantially prolonged proceedings. Therefore, cross-examination should only be permitted subject to reasonable restraints. Second, adversary proceedings may tend to engender a spirit inconsistent with an atmosphere of inquiry and openness, and cross-examination may heighten this effect. But cross-examination cannot be routinely assumed to make a dramatic difference in this regard. Third, expanding upon the previous consideration, cross-examination may create hostility between the student and his teachers, or his fellow students.²²⁶ Similar views have been reflected in some of the cases;²²⁷ their validity can be tested in several ways.

If it is assumed, as *Dixon* specified, that the student should know the names of the witnesses²²⁸ and the nature of the evidence against him, animosity will probably develop out of the student's feeling that X is "against him" or that X has betrayed a trust, has lied, or was wrong. It is hard to believe, from the point of view of the student

²²⁶ The danger of provoking hostility through cross-examination is likely to be more significant with younger students. A court might feel that cross-examination of school authorities or teachers by students is out of place—that the younger student especially would be in the position to "talk back" or be disrespectful to his elders. Pitting student against student might also be thought to generate a kind of inter-student tension that classmates in lower grades are less able to cope with than an older student would be.

²²⁷ See *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 759 (W.D. La. 1968); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943).

²²⁸ But see *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (not entitled to see confidential opinions of the faculty). In imposing this restriction, the *Wasson* court may have been influenced by the military setting of the Merchant Marine Academy.

charged, that withholding the opportunity to confront and question the antagonist would make him feel better; it is easy to suspect that it would make him feel worse. Moreover, the possibility of a tension-producing confrontation between a student and his teachers or classmates would ordinarily be reduced if the questioning were done by the student's parent (or his lawyer) rather than by the student himself. Particularly when expulsion might result from the proceeding, preserving the quality of relationship between the student and his teachers and peers is an unpersuasive reason for denying cross-examination. Once the student has been expelled, no relationship remains. Even without cross-examination the charge against him may fail or he may ultimately be readmitted; but these possibilities do not alter the ethical and logical weakness of using in-school relationships as a ground for making more difficult the student's struggle to preserve his right to attend school. If cross-examination causes unbearable rancor, the student can usually be transferred to another school.²²⁹

Insofar as the danger of permitting cross-examination (or adversarial proceedings generally) lies in publicizing a possibly hostile confrontation between a witness and the student charged, the danger can be reduced by holding private hearings. Sometimes the student's interest, the school's, or both will call for a public hearing, but only rarely.²³⁰ If in a particular case cross-examination seems incompatible with a public hearing, a deliberate choice should be made between the two, occasionally resulting in barring cross-examination. If a case is serious enough to require a public hearing, however, it is far more likely to call for greater rather than fewer procedural safeguards. Perhaps the most important concern is the danger that the student or teacher witness will be severely "attacked" with words by the cross-examiner. But the choice need not be either no cross-examination or unrestrained cross-examination, even when the kinds of issues involved make cross-examination vital. Interrogation may be terminated when it becomes personally threatening to witnesses and strays from the controlling issues.²³¹ Placing limits upon the scope and manner of cross-examination would be a peculiarly appropriate way of manifesting the flexibility of the fundamental fairness standard.

The *Dixon* dictum also offered impracticability as a ground for denying cross-examination. The court might have meant simply that time and energy expenditures would cut into other school functions;

²²⁹ Although transfer to a school of equal quality can be a serious sanction, it is clearly less serious than expulsion. See text accompanying notes 164-70 *supra*.

²³⁰ See *Buttny v. Smiley*, 281 F. Supp. 280, 288 (D. Colo. 1968); Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 79 (1966).

²³¹ See *Freidel v. Board of Regents*, 296 N.Y. 347, 73 N.E.2d 545 (1947).

but requiring cross-examination might also be regarded as impractical because neither a college nor a public school hearing body can be relied upon to enforce the right. The public school authorities, like their college counterparts, have no general power to issue compulsory process. Several courts have offered this inability as a reason for disallowing cross-examination.²³² The subpoena power could be legislatively conferred on tribunals hearing school discipline cases, and careful consideration should be given to that possibility when establishing tribunals to hear these cases. The absence of subpoena power does not, however, dictate the denial of cross-examination. Witnesses will often appear even without compulsion.²³³ Although some potential witnesses might withhold information about student misconduct rather than "get involved" and subject themselves to cross-examination, the risk seems worth taking in view of the seriousness of the sanctions.

A more difficult question is whether the school should be forced to choose between excluding direct testimony and admitting it subject to cross-examination. The federal government has, in effect, been forced to make this choice even when both alternatives arguably endangered national security.²³⁴ Even if great weight were allotted to the witnesses' interest in remaining anonymous, a limitation on rather than a bar to cross-examination should be adopted wherever possible. The tribunal should hear the testimony (or read the affidavit) and make a preliminary determination weighing the significance of the testimony, the disadvantage to the student charged with misconduct if he is not allowed to cross-examine, and the disadvantage likely to result from permitting cross-examination. On the basis of this determination, the tribunal could exclude evidence against the student, admit evidence but permit cross-examination (subject to appropriate limitations), or admit evidence and prohibit cross-examination.

²³² See *People ex rel. Bluett v. Board of Trustees*, 10 Ill. App. 2d 207, 210, 134 N.E.2d 635, 637 (1956); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 215-16, 263 P. 433, 437, *cert. denied*, 277 U.S. 591 (1927). But cf. *Brown v. Macy*, 222 F. Supp. 639, 641 (E.D. La. 1963), *aff'd*, 340 F.2d 115 (5th Cir. 1965); *Morrison v. City of Lawrence*, 186 Mass. 456, 459-60, 72 N.E. 91, 92-93 (1904). See generally *Van Alstyne*, *supra* note 17, at 382. Professor Van Alstyne has suggested that college admission be made conditional upon the student's willingness to appear as a witness. Yet, if testifying and subjecting oneself to cross-examination is a hardship, an implied consent of this kind is arguably objectionable on the same ground as an implied consent to permit the college to expel the student at will. See *id.* 370; Note, *supra* note 31, at 1377-79. Perhaps such a limited use of the implied consent is justifiable because of the vital importance of having cross-examination. Subject to comparable objections, compulsory attendance laws and teacher contracts might also be used as a technical basis for overcoming the lack of power to compel attendance of student and teacher witnesses.

²³³ That numerous disciplinary proceedings have been successfully conducted makes the point rather obvious. For an interesting example of a tribunal preventing voluntary witnesses from testifying, see *Morrison v. City of Lawrence*, 186 Mass. 456, 72 N.E. 91 (1904).

²³⁴ See *Greene v. McElroy*, 360 U.S. 474 (1959); *id.* at 510-12 (Clark, J., dissenting); McKay, *supra* note 221.

2. The Right to Cross-Examine in College and Public School Discipline Cases

Nothing in *Dixon* persuasively bars cross-examination of witnesses in student discipline hearings, and the arguments in favor of allowing it are powerful. The only possible conclusion supported by the other cases involving school and college expulsion is that the existence of a right to cross-examine is still an open question. Cross-examination has been permitted in the proceedings reported in several cases.²³⁵ Although these decisions do not hold that a right to cross-examination exists,²³⁶ allowing cross-examination in these instances did not result in any notable calamity and was not criticized by the courts. In *Esteban v. Central Missouri State College*,²³⁷ the court order included cross-examination among the required procedural features of a student expulsion proceeding to be repeated on remand.²³⁸ In this case, the court limited the right by making it available to the student himself but not to his counsel, apparently intending to protect student and teacher witnesses from a skillful lawyer. It seems doubtful that the court made the right choice. Cross-examination will be much less effective if conducted by a college student instead of by his lawyer; presumably it will be an even less effective tool in the hands of a public school student.

Although the *Dixon* dictum concerning cross-examination has been repeated without question,²³⁹ the issue has seldom been joined. Of the few recent public school cases, only *Madera v. Board of Education*²⁴⁰ addresses the question, and then only incidentally. In denying the right to counsel, the court asserted that counsel would be of little value, since cross-examination would be unavailable.²⁴¹ The court

²³⁵ See *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 753 (W.D. La. 1968); *Buttny v. Smiley*, 281 F. Supp. 280, 288 (D. Colo. 1968); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 199 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970).

²³⁶ The court in *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968), reported with seeming approval that cross-examination had been available to its student petitioners, but it also quoted with apparent approval the language from *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943), disapproving of cross-examination because "honorable students do not like to be known as snoopers and informers against their fellows" 281 F. Supp. at 759.

²³⁷ 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

²³⁸ *Id.* at 652; *accord*, *Healy v. James*, 311 F. Supp. 1275, 1283 (D. Conn. 1970) (cross-examination ordered for hearing to be held on petition for recognition as campus organization).

²³⁹ See, e.g., *Davis v. Ann Arbor Pub. Schools*, 313 F. Supp. 1217, 1227 (E.D. Mich. 1970); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396, 402 (N.D. Fla. 1963).

²⁴⁰ 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); see text accompanying notes 83-99 *supra*.

²⁴¹ 386 F.2d at 788.

simply assumed this conclusion without supporting it with reason or precedent. Moreover, the *Madera* court made the questionable assumption that something less than an expulsion was involved and the erroneous assumption that the student faced no serious loss of liberty. In *Wasson v. Trowbridge*,²⁴² a college expulsion case following the misconceived *Barker v. Hardway* tack of treating the expulsion proceeding as investigative rather than adversarial,²⁴³ the court specifically stated that the student was "not entitled to see the confidential opinions of members of the faculty."²⁴⁴ The court did not clarify whether all or only some faculty opinions were to be regarded as "confidential" and, if only some, how the confidential opinions were to be identified.

The cross-examination issue also received attention when the Federal District Court for the Western District of Missouri issued its general order on school disciplinary proceedings, stating:

There is no general requirement that procedural due process in student disciplinary cases provide for legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence. Rare and exceptional circumstances, however, may require provision of one or more of these features in a particular case to guarantee the fundamental concepts of fair play.²⁴⁵

This order may say less than appears. "Rare and exceptional circumstances" sounds like an imposing standard, but it is impossible to predict what interpretation it will receive. For example, the *Esteban* opinion requiring cross-examination was written by one of the judges on the bench which promulgated the general order. If strictly interpreted, the standard could not fit the flexible demands of "fundamental concepts of fair play." Furthermore, the statement fails to differentiate between cross-examination and other safeguards. Some of these safeguards seem much more peripheral to due process, arguably requiring the court to draw distinctions it failed to provide. Finally, the general order links the several procedures together as features of "federal criminal jurisprudence." Yet, as the following discussion indicates, the right to cross-examination is not limited to criminal defendants.

²⁴² 382 F.2d 807 (2d Cir. 1967).

²⁴³ *Id.* at 812.

²⁴⁴ *Id.* at 813.

²⁴⁵ General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968) (footnote omitted).

3. The Right to Cross-Examine in a Broader Context

Recent Supreme Court cases leave no doubt that cross-examination is regarded as a fundamental aspect of due process. At the same time, these cases compel the conclusion that, outside the criminal area, cross-examination is not an absolute right but depends upon a case-by-case assessment of circumstances. In *Pointer v. Texas*²⁴⁶ the Supreme Court held that a state court criminal defendant is entitled to confront witnesses and accusers as guaranteed by the sixth amendment. Although this decision, relying on the selective incorporation doctrine, treats a situation not closely analogous to a disciplinary proceeding, it nonetheless indicates the fundamental importance given cross-examination. The Court emphasized the unanimity of "this Court and other courts . . . in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."²⁴⁷ Furthermore, the opinion linked the holding with decisions under the due process clause (unabettled by the sixth amendment) upholding the right of cross-examination for criminal defendants²⁴⁸ and parties to administrative proceedings.²⁴⁹ Justices Harlan and Stewart based their concurring opinions directly upon the due process clause without incorporating sixth amendment rights.²⁵⁰

The central importance of cross-examination in civil as well as criminal proceedings was reasserted last year in *Goldberg v. Kelly*,²⁵¹ and the Court responded by including it among the necessary ingredients of the constitutionally required hearing prior to termination of government payments to assist families with dependent children.²⁵² Moreover, the Court has recognized the right to cross-examine in administrative proceedings in which the interest at stake was no greater than that of a student threatened with expulsion or other serious sanction. In *Willner v. Committee on Character and Fitness*,²⁵³ the right was recognized in favor of a lawyer whose application for admission to the bar was denied on the basis of an unfavorable letter.

²⁴⁶ 380 U.S. 400 (1965).

²⁴⁷ *Id.* at 405.

²⁴⁸ *Id.* at 405 (citing *In re Oliver*, 333 U.S. 257 (1948)).

²⁴⁹ *Id.* at 404-05 (citing *Greene v. McElroy*, 360 U.S. 474 (1959)); *id.* at 407 (citing *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963)).

²⁵⁰ See 380 U.S. at 408 (Harlan, J., concurring); *id.* at 410 (Stewart, J., concurring).

²⁵¹ 397 U.S. 254 (1970).

²⁵² "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269.

²⁵³ 373 U.S. 96 (1963).

The applicant was promised but never received an opportunity to confront the author and rebut his testimony before the character committee. The Court's holding was carefully worded:

We have emphasized in recent years that procedural due process *often* requires confrontation and cross-examination of those whose word deprives a person of his livelihood. . . . We think the need for confrontation is a necessary conclusion from the requirements of procedural due process *in a situation such as this*.²⁵⁴

A student's interest in receiving a basic education compares favorably with a lawyer's interest in gaining admission to the state bar. Although an expulsion does not directly deprive "a person of his livelihood," it limits his opportunities by depriving him of the prerequisites for many jobs. The lawyer, on the other hand, may still be able to profit from his legal training in business or in other fields of employment. Although the lawyer will not be able to practice his profession in the state of his choice, he could move to another state hoping to gain admission to that Bar. The student, however, will be penalized throughout the country if he fails to obtain an education. On balance, the student suffers the more serious and lasting deprivation.

The same comparative analysis of interests also applies to *Greene v. McElroy*,²⁵⁵ a case involving an employee discharged by his private employer after losing his federal security clearance. To protect the anonymity of government informers in the interest of national security, Defense Department regulations denied the employee any opportunity to respond to or cross-examine witnesses whose testimony supported revoking his clearance. Without security clearance, Greene was practically disqualified from working as an aeronautical engineer. The Court, although concluding only that the regulations were not authorized by statute, showed concern over the possibility that the statute might be unconstitutional if given the opposite construction.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. . . . [This Court] has spoken out not only in criminal cases . . . but

²⁵⁴ *Id.* at 103-04 (emphasis added).

²⁵⁵ 360 U.S. 474 (1959).

also in all types of cases where administrative and regulatory actions were under scrutiny.²⁵⁶

Although *Greene* was a statutory rather than a constitutional decision²⁵⁷ and although the inability to cross-examine was only one aspect of a sweeping deprivation of due process,²⁵⁸ the Court's decision in that case represents a ringing endorsement of the right to cross-examine as part of "our long-accepted notions of fair procedures."²⁵⁹ Not only does the student's interest in not being expelled compare favorably with the employee's interest in not losing his security clearance, but also the school has no interest comparable to national security to justify denying the right to cross-examine.

Comparison of the *Hannah v. Larche* and *Jenkins v. McKeithen* decisions²⁶⁰ further illustrates the importance attached by the Supreme Court to the right to cross-examine even for a witness who is not the focus of an adjudicatory proceeding. In *Hannah* the Court characterized the proceeding as investigatory, yet the potential threat to the liberty of a witness drew a dissenting opinion from two Justices because of the denial of cross-examination protection. In the parallel *Jenkins* case, the majority believed that serious consequences to a witness followed directly enough from the proceeding to hold that the denial of cross-examination was a denial of due process. These cases support requiring cross-examination in expulsion proceedings, which are adjudicatory rather than investigatory, because the possible deprivation of liberty outweighs the potential burden on the proceedings or disadvantage to the school.

4. Conclusion

A student's claim for an abstract right to a trial-type hearing with unlimited cross-examination will probably fall on deaf ears. The claim may be unimpressive because of the issues or evidence involved. Or fundamental fairness may be achieved through other procedural safeguards. Affidavits may be substituted for personal testimony when the testimony is of minor importance, peripheral to the main issues, or repetitive of other testimony.²⁶¹ When cross-examination is required,

²⁵⁶ *Id.* at 496 (citations omitted).

²⁵⁷ "We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Id.* at 508. Despite the disclaimers in the majority opinion, Justice Harlan concurred specially because "it unnecessarily deals with the very issue it disclaims deciding." *Id.* at 509.

²⁵⁸ *Id.* at 496.

²⁵⁹ *Id.* at 506-07 (footnote omitted).

²⁶⁰ Text accompanying notes 113-121 *supra*.

²⁶¹ See *Byse*, *supra* note 17, at 145; *Wright*, *supra* note 17, at 1076.

it can be tailored to protect the school's interests by holding the hearing in private and by limiting the scope of cross-examination to prevent the student or his lawyer from badgering witnesses. In weighing the burden on the proceeding, the school's interest should be squarely taken into account. Consideration should be given to the expenditure of time and money, the possible negative effect of drying up sources of information, and the potential for poisoning in-school relationships.

But whenever cross-examination would have been useful but was unavailable, the proceeding should be examined with considerable suspicion. When the student lacked the opportunity to cross-examine the witnesses supplying the factual basis for the allegation, or when certain testimony might have been vulnerable—because the witness may have lacked direct knowledge or may have had some hostility toward the student—the suspicion of unfairness should be strongest. For example, when the outcome turns on the credibility of two witnesses (possibly including the student threatened with punishment) who supply directly conflicting testimony, cross-examination is imperative to establishing the truth. In evaluating a claim for cross-examination, a reviewing court or disciplinary tribunal should hesitate before placing on the student the burden of demonstrating how denial affects his rights.²⁶² This would be an unfair burden since much of the genius of cross-examination lies in its capacity to expose latent truth unknown by all until it surfaces. When cross-examination appears essential for the student's protection, however, the disadvantages will ordinarily be outweighed by the student's interest in avoiding an unnecessary deprivation of liberty. This balancing process should be undertaken in every instance. In making the judgment for each witness and piece of evidence, the question must always be, does fundamental fairness require that cross-examination be permitted.

B. *The Right to Counsel*

The right to counsel has come to receive protection at nearly all stages of criminal proceedings.²⁶³ This development extends to proceedings which, although associated with the criminal law, are administrative rather than criminal,²⁶⁴ and to civil proceedings leading to

²⁶² *But see* Brown v. Macy, 222 F. Supp. 639, 642 (E.D. La. 1963), *aff'd*, 340 F.2d 115 (5th Cir. 1965).

²⁶³ *See* Mempa v. Rhay, 389 U.S. 128 (1967); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Townsend v. Burke, 334 U.S. 736 (1948); Powell v. Alabama, 287 U.S. 45 (1932); *cf.* Johnson v. Avery, 393 U.S. 483 (1969).

²⁶⁴ *See* Mempa v. Rhay, 389 U.S. 128 (1967); *cf.* Johnson v. Avery, 393 U.S. 483 (1969); Kent v. United States, 383 U.S. 541 (1966). *See also* Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); Reed v. Butterworth, 297 F.2d 776 (D.C. Cir. 1961).

incarceration²⁶⁵ or other serious restrictions.²⁶⁶ The extension of the right to counsel into areas not involving conviction or sentencing of criminals can be explained, in part, as a recognition that a proceeding may be criminal notwithstanding a more innocuous formal characterization.²⁶⁷ At bottom, however, the surge toward a right to counsel in civil proceedings appears to be based upon a recognition that fundamental rights should depend upon the existence of a serious threat to an individual's liberty and not upon characterization of the case as "criminal" or "civil."²⁶⁸

The need in student expulsion cases for procedures that satisfy the fundamental fairness standard is closely parallel to the need in juvenile proceedings. Some of the sanctions imposed as a result of college disciplinary proceedings "may involve consequences for a particular student more grave than those involved in some criminal court proceedings."²⁶⁹ And a certain compelling logic leads to Professor Wright's conclusion that:

If "fairness, impartiality and orderliness—in short, the essentials of due process" require . . . both the right to counsel and, where it is needed, to appointed counsel in proceedings for determination of juvenile delinquency, I do not see why they do not require recognition of similar rights in major disciplinary proceedings.²⁷⁰

²⁶⁵ See *In re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968) (civil arrest after default on payment); *People v. Potter*, 85 Ill. App. 2d 151, 228 N.E.2d 238 (1967) (civil commitment as a "sexually dangerous person"); *In re James*, 54 Misc. 2d 514, 283 N.Y.S.2d 126 (Sup. Ct. 1967), *rev'd*, 29 App. Div. 2d 72, 285 N.Y.S.2d 793 (1967), *rev'd*, 22 N.Y.2d 545, 240 N.E.2d 29, 293 N.Y.S.2d 531 (1968).

²⁶⁶ See *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (termination of welfare benefits); *United States v. Weller*, 309 F. Supp. 50 (N.D. Cal. 1969) (revocation of selective service deferment), *appeal dismissed for lack of jurisdiction*, 39 U.S.L.W. 4261 (U.S. Feb. 24, 1971) (remanded to Ninth Circuit); *Cardinal v. Munyan*, 30 App. Div. 2d 444, 294 N.Y.S.2d 180 (1968) (neglected child removed from parental control); *State v. Jamison*, 251 Ore. 114, 444 P.2d 15 (1968) (termination of parental rights); cf. *Fusco v. Moses*, 304 N.Y. 424, 107 N.E.2d 581 (1952) (statutory right of dismissed public employee to a hearing). See generally Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

²⁶⁷ See, e.g., *In re Gault*, 387 U.S. 1 (1967).

²⁶⁸ See *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970); *In re Gault*, 387 U.S. 1, 27-29 (1967); *Brown v. Chastain*, 416 F.2d 1012, 1028 (5th Cir. 1969) (Rives, J., dissenting, *cert. denied*, 397 U.S. 951 (1970)); *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

²⁶⁹ *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). Judge Doyle noted:

[E]xpulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding.

Id.

²⁷⁰ Wright, *supra* note 17, at 1075 (footnotes omitted) (quoting *In re Gault*, 387 U.S. 1, 26 (1967)). Professor Wright reaches this conclusion while remaining fully conscious of the potential pitfall of drawing "analogies from criminal law or administrative law or elsewhere." *Id.* 1082; see *id.* 1060.

Although Professor Wright was referring to major disciplinary proceedings at the college level, the reasoning applies with equal force to major public school disciplinary proceedings.

The appropriate question seems to be whether something about college or school disciplinary proceedings makes a lawyer's presence peculiarly inappropriate or unhelpful. Will denial of counsel in school disciplinary proceedings be an example of the Supreme Court's maxim that "what is unfair in one situation may be fair in another"?²⁷¹ Professor Wright believes that "most major universities" permit a student to be assisted by counsel.²⁷² The cases at both college and public school levels are divided. After examining these cases, the possible benefits and disadvantages of allowing counsel to participate in school disciplinary proceedings will be assessed.

1. College and Public School Discipline Cases

As a group, school and college discipline cases since *Dixon* leave the right-to-counsel question open. Representation by counsel has been considered by several courts in determining whether particular disciplinary hearings met the due process requirement of "fundamental fairness,"²⁷³ but none of them even intimated that a right to counsel exists.²⁷⁴ Although two courts have recently held that representation by counsel at a discipline hearing must be permitted, neither case qualifies as solid authority for a right to counsel. In *Esteban v. Central Missouri State College*,²⁷⁵ two suspended college students claimed a right to a hearing satisfying due process standards. In holding that the students had a right to such a hearing, the court outlined the procedures to be followed by the college authorities: the student plaintiffs were entitled

to have counsel present with them at the hearing to advise them . . . to present their version as to the charges and to

²⁷¹ *Hannah v. Larche*, 363 U.S. 420, 487 (1960) (Frankfurter, J., concurring).

²⁷² Wright, *supra* note 17, at 1075.

²⁷³ *Scott v. Alabama State Bd. of Educ.*, 300 F. Supp. 163, 167 (M.D. Ala. 1969); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 766 (W.D. La. 1968); *Buttny v. Smiley*, 281 F. Supp. 280, 288 (D. Colo. 1968); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 199 (M.D. Tenn. 1968) (by implication), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970).

²⁷⁴ The *Jones* opinion may be read as more than a mere approval of the availability of counsel in the disciplinary proceeding. The impartiality of the deciding tribunal was attacked by the students, and support for this attack was drawn from *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967), in which the court had acknowledged a possible due process defect resulting from the tribunal's partiality. In distinguishing *Wasson*, the *Jones* court pointed out that the possible absence of impartiality was more significant in *Wasson*—in which the right to counsel was denied—because the student had been denied the "full evidentiary hearing" he received in *Jones*. See 279 F. Supp. at 200.

²⁷⁵ 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

make such showing by way of affidavits, exhibits, and witnesses as they desire . . . to hear the evidence presented against them, and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them²⁷⁶

This language leaves uncertain whether counsel's function extends to putting in the student's version of the case. Taken literally, the court's language permits the lawyer to be "present" to "advise" the student who may present his own case. On the other hand, perhaps a more reasonable inference is that the lawyer can participate in all respects other than cross-examination, since the bar against cross-examination by counsel was apparently a compromise between no cross-examination and protection of student and teacher witnesses.

Goldwyn v. Allen,²⁷⁷ the second case requiring that a student be permitted to be accompanied by counsel, involved a high school senior's request for reinstatement of her privilege to take New York's Regents Exam (a prerequisite to obtaining a high school diploma) and elimination from her record of any references to cheating. The court granted the petition, relying upon the *Gault* rationale and the seriousness of the sanction.²⁷⁸ Although the court affirmed the petitioner's right to counsel, the narrow holding of the case was based upon withdrawal of the examination privileges by the State Department of Education without a hearing, contrary to state regulations. Aside from the general discussion of *Gault*, the opinion does not deal with the possible benefits or detriments of recognizing a right to counsel.²⁷⁹

The cases denying the right to counsel²⁸⁰ are even more inconclusive. *Madera v. Board of Education*,²⁸¹ *Wasson v. Trowbridge*,²⁸²

²⁷⁶ *Id.* at 651-52.

²⁷⁷ 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967).

²⁷⁸ See *id.* at 97, 281 N.Y.S.2d at 904-06.

²⁷⁹ In referring to the student's "confession" to the principal, the opinion noted the relevance of fifth amendment rights in administrative proceedings, see *id.* at 98, 281 N.Y.S.2d at 905-06, but disclaimed the applicability of *Miranda v. Arizona*, 384 U.S. 436 (1966), and did not directly link these rights to assistance of counsel. Furthermore, the *Goldwyn* decision was not appealed and thus has never been approved by either New York's Appellate Division or Court of Appeals.

²⁸⁰ *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Barker v. Hardway*, 283 F. Supp. 228 (S.D.W. Va.), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); *Cosme v. Board of Educ.*, 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 905, 281 N.Y.S.2d 970, *motion for leave to appeal denied on ground that appeal lies as a matter of right*, 19 N.Y.2d 972, 228 N.E.2d 418, 281 N.Y.S.2d 368 (1967); see General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147 (W.D. Mo. 1968); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963).

²⁸¹ 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

²⁸² 382 F.2d 807 (2d Cir. 1967).

and *Barker v. Hardway*²⁸³ were all influenced in various degrees by erroneous treatment of a student discipline proceeding as an investigation.²⁸⁴ The *Madera* decision was also based on two other highly questionable conclusions: that the student's claims were premature²⁸⁵ and that the suspended student was not directly threatened with any significant deprivation of liberty.²⁸⁶ Both *Madera* and *Barker* relied upon language from the *Dixon* opinion. *Dixon*, however, is of limited value for determining whether there is a right to counsel in disciplinary proceedings because the *Dixon* court did not give deliberate treatment to the right-to-counsel question, nor was that right specifically claimed.²⁸⁷

Madera and *Wasson* attached significance to the fact that the educational administrators were not represented by a lawyer. The appropriateness of this consideration seems dubious in light of *Gault*, for in general no lawyer-prosecutors were present in pre-*Gault* juvenile court proceedings.²⁸⁸ Of course, the presence or absence of a school lawyer is relevant. The school will often be represented by legal counsel, and then the student's claim to legal representation will be stronger. Even when the school is not represented by counsel, the student is hardly a match for the adults appearing in the proceeding. In *Madera*, for instance, the student was fourteen years old. He was accompanied by his mother, who spoke no English. He was also permitted to have with him a representative of a social agency "to whom the family may be known."²⁸⁹ Also present at the conference were the superintendent, her assistant, her guidance counselor, the guidance counselor from the student's school, the principal, and the school-court coordinator.²⁹⁰ All of these officials will not inevitably be hostile, but only rarely will they not appear so to the student. They are all part of the school's officialdom; they are not chosen by the student or his parents; none of them has responsibility for representing the student's interest against the interests of the school. Thus, the student's defense is left to him and his parents, possibly with an assist

²⁸³ 283 F. Supp. 228 (S.D.W. Va.), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

²⁸⁴ See text accompanying notes 111-21 *supra*.

²⁸⁵ See text accompanying notes 83-110 *supra*.

²⁸⁶ See note 169 *supra*.

²⁸⁷ See 294 F.2d at 151 n.1 (setting forth plaintiffs' allegations); *United States v. Weller*, 309 F. Supp. 50, 55 (N.D. Cal. 1969) (*Dixon* plaintiffs did not claim a right to counsel), *appeal dismissed for lack of jurisdiction*, 39 U.S.L.W. 4261 (U.S. Feb. 24, 1971) (remanded to Ninth Circuit).

²⁸⁸ The absence of a "prosecuting" attorney could seriously disadvantage the school if the student were represented by counsel. See Paulsen, *supra* note 57, at 259-60.

²⁸⁹ 386 F.2d at 781.

²⁹⁰ *Id.*

from a social worker, who will ordinarily not be prepared to represent the child's interests.²⁹¹ Yet long before the right to counsel received unqualified recognition in criminal cases, the inexperience and inability of some defendants to defend themselves were emphasized in determining whether they had a right to counsel:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.²⁹²

The crucial question is whether, without counsel, the student is so disadvantaged that he cannot obtain a fair hearing.²⁹³ Although the presence of counsel for the school makes the student's claim for legal representation even stronger, the basic strength of that claim is not dependent upon the presence of prosecuting counsel.

Despite denying counsel on their facts, *Madera* and *Wasson* contain some indications that the right to counsel in an expulsion proceeding would be upheld in appropriate circumstances. In *Madera* the sign is faint and essentially negative—an explicit disclaimer that the court was not facing an expulsion case.²⁹⁴ In *Wasson*, decided by the same panel of judges, the signs are more positive. In the first place, the court concluded that the student was “mature and educated.”²⁹⁵ To the extent that this is a factor—and perhaps it explains why the court in *Madera* did not rely on *Wasson*—it argues in favor of counsel for public school students who are younger, less educated, and less experienced than their college counterparts. In the second place, the

²⁹¹ See Cook & Cook, *The Lawyer and the Social Worker—Compatible Conflict*, 12 BUFF. L. REV. 410 (1963).

²⁹² Powell v. Alabama, 287 U.S. 45, 69 (1932).

²⁹³ The presence of a parent will sometimes compensate for the student's disadvantage more than was apparently the case in *Madera*, thereby diluting the student's claim to be represented by counsel. In fact, the parent may sometimes have a much greater influence on the fairness of the proceeding than would a lawyer. The parent, however, speaks for himself and does not always represent the student's interests as a lawyer would. Thus despite parents' involvement, the student's inability to handle his own case continues to be an important reason for permitting him the assistance of counsel.

²⁹⁴ 386 F.2d at 788. The *Madera* decision discourages a prediction that a student's right to counsel would be recognized in an expulsion proceeding. In part the court rested its negative conclusion on three cases denying a constitutional right to counsel in selective service proceedings. See *id.* at 787. In one recent selective service decision, however, the court recognized a right to counsel. *United States v. Weller*, 309 F. Supp. 50 (N.D. Cal. 1969), *appeal dismissed for lack of jurisdiction*, 39 U.S.L.W. 4261 (U.S. Feb. 24, 1971) (remanded to Ninth Circuit). Draft cases have traditionally been compared to national security and immigration cases as examples of proceedings in which the Supreme Court has found a broad constitutional grant of congressional power and limited protection for the adjudicating party. See McKay, *supra* note 221, at 140-42. It is remarkable that these cases should have been thought worth citing at all—evidence either of the dearth of authority for the court's position or a limited view of the rights of students in disciplinary proceedings.

²⁹⁵ 382 F.2d at 812.

Wasson court explicitly adopted the balancing approach demanded by the fundamental fairness test. Although the court did not exhaust this approach,²⁹⁶ it carefully limited the denial of counsel to those cases in which "other aspects of the hearing taken as a whole are fair"²⁹⁷ and remanded the case to the district court for an evidentiary hearing to determine whether the expelled student had been afforded a sufficient opportunity to present his case before an impartial tribunal.²⁹⁸ Moreover, the court clearly felt that the military character of the Merchant Marine Academy, from which the student was expelled, augmented the government's interest and shifted the balance away from the student.²⁹⁹

2. Advantages and Disadvantages of Recognizing the Right to Counsel

The case for counsel in school disciplinary proceedings closely parallels the role assigned to counsel in juvenile delinquency proceedings by the Court in *Gault*:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.³⁰⁰

In a disciplinary proceeding, the student is likely to be charged under the authority of a generally-worded statute or rule.³⁰¹ To meet the charge the student must present legal arguments concerning the reach of that authority³⁰² and legal defenses to the charge. In addition, establishing the charge against the student is likely to turn on factual issues. Suppose the student is expelled for insubordination. Is an expulsion on that ground authorized by statute or valid regulation? What does insubordination mean? Is the term impermissibly vague?

²⁹⁶ See note 313 *infra* & accompanying text.

²⁹⁷ 382 F.2d at 812.

²⁹⁸ Because the student failed to obtain a thorough reconsideration on remand in *Wasson*, 285 F. Supp. 936 (E.D.N.Y. 1968), the significance of the court of appeals decision is reduced.

²⁹⁹ See 382 F.2d at 809-10, 812.

³⁰⁰ 387 U.S. at 36 (footnote omitted).

³⁰¹ See, e.g., HAWAII REV. LAWS §298-11 (1968) ("a detriment to the morals or discipline of any school"); IDAHO CODE ANN. §33-205 (1963) ("an habitual truant, or who is incorrigible, or whose conduct . . . is such as to be continuously disruptive of school discipline, or of the instructional effectiveness of the school"); ME. REV. STAT. ANN. tit. 20, §473(5) (1964) ("obstinately disobedient and disorderly scholar"); VA. CODE ANN. §22-231 (1969) ("when the welfare and efficiency of the schools make [expulsion] necessary").

³⁰² See, e.g., *Howard v. Clark*, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (Sup. Ct. 1969) (possession of hypodermic instrument off school grounds not justification for suspension).

Did the student do what was alleged? Lawyers are equipped to make such arguments and test the related facts; laymen and children are generally not. The lawyer is able to challenge the relevance of evidence offered and the basis of conclusions reached. He will be at home in a proceeding likely to be inhibiting to the student. That lawyers have professional standing is also valuable to the student who faces (or feels he faces) the school establishment. The lawyer's presence will lend moral support to the student and prevent any abuses by the otherwise unrestrained tribunal.

The danger that a child will make admissions contrary to his interest in the juvenile court process³⁰³ is also present in a disciplinary proceeding. A lawyer can assist the student in making only well-considered statements.³⁰⁴ If the student gains a right to cross-examine, that right will be greatly diminished if it is not exercised by a lawyer. And if cross-examination is denied, participation by a lawyer becomes even more imperative to reveal weaknesses in hostile testimony and to identify weaknesses in the testimony that cross-examination might have exposed. By focusing attention on issues relevant to deciding the case, counsel could prevent the hearing from exacerbating animosity between the student and his teachers, administrators, or members of the board of education.³⁰⁵ Finally, the lawyer could interpret the proceedings for the student and his parents, and relate the student's position to the school authorities.³⁰⁶

To arrive at a balance of fairness these potential benefits must be weighed against the burden upon the proceeding resulting from permitting representation by counsel. Although the danger of adverse consequences has been suggested in several opinions, the nature of the disadvantage is almost uniformly unspecified. Acting in view of what was characterized as "foresight of consequences," the *Barker* court frankly voiced its "reluctance to grant adversary judicial status to student disciplinary hearings" by recognizing a right to counsel.³⁰⁷

³⁰³ See *In re Gault*, 387 U.S. 1, 48 (1967).

³⁰⁴ The possibility that a lawyer may advise the student to remain silent raises an especially difficult question but does not present a valid argument for preventing lawyers from participating. See Paulsen, *supra* note 57, at 262.

³⁰⁵ Cf. *United States v. Weller*, 309 F. Supp. 50, 55 (N.D. Cal. 1969), *appeal dismissed for lack of jurisdiction*, 39 U.S.L.W. 4261 (U.S. Feb. 24, 1971) (remanded to Ninth Circuit).

³⁰⁶ See Rosenheim & Skoler, *The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings*, in *CHILDREN IN THE COURTS—THE QUESTION OF REPRESENTATION* 380, 384 (G. Newman ed. 1967). The social worker might have performed this role, but a person known to both the student and to the school authorities to be representing the student's interests seems preferable.

³⁰⁷ 283 F. Supp. at 237. The *Barker* decision is enigmatic. Although the court purported to follow *Dixon*, *id.* at 236, and balance private and public interests, *id.* at 237, it cited pre-*Dixon* authority, *id.* at 236; refused to grant disciplinary pro-

The *Wasson* court viewed counsel as unnecessary in the circumstances,³⁰⁸ but did not explain why presence of counsel would have burdened the proceedings. The *Madera* court said that granting a right to counsel would do little to solve the problems of such proceedings unless the other rights accorded in an adversary proceeding were also granted, a step which would "be destructive of the original purpose of the Guidance Conference—to provide for the future education of the child."³⁰⁹

Participation by a lawyer is likely to make a disciplinary hearing more formal, more lengthy, and more expensive. The presence of a lawyer representing the student will tend to make school authorities feel that they should have a lawyer as well, an added expense if they would not otherwise have retained one. By increasing the formalities and length of the proceeding, adding counsel may increase the time school personnel spend away from their normal activities. This increase will probably not, however, appreciably detract from their performance of their primary educational tasks. Although time and money costs have some importance, they do not seem weighty in comparison to the student's stake in the proceeding. In a sense an expulsion hearing is not a diversion from but central to the school's task of educating. If serious proceedings are relatively infrequent, the time-and-money argument disappears. On the other hand, frequent proceedings may signal a deeper conflict between the students and their school, revealing a need for regular and formalized disciplinary proceedings.

Despite the strength of the cost argument, apprehension about these burdens is not generally responsible for the courts' reluctance to insert a right to counsel into serious disciplinary proceedings. What troubles the courts (and probably the schools) is adversariness—at the heart of which stands the lawyer. In short, the fear is apparently widespread that involving a lawyer will tend to make the proceedings contentious. When the proceeding has the sole purpose of excluding the student from the school, however, the plea to avoid hardening positions along adversarial lines is singularly weak, even assuming that the exclusion is to be temporary. A student facing expulsion will usually be sufficiently at odds with those running the school that he will be aware of his involvement in an adversarial proceeding even without a lawyer to convince him. Precisely because the student has

ceedings "adversary" status (contrary to *Dixon*, see 294 F.2d at 159); and recited the rule denying any relief unless the student proves abuse of discretion, 283 F. Supp. at 237-38.

³⁰⁸ 382 F.2d at 812.

³⁰⁹ 386 F.2d at 788.

everything to lose and because these proceedings are more adversarial than is usually admitted, little is lost by increasing the student's ability to help himself. The presence of counsel may even tend to defuse an acrimonious situation.

To assume that the presence of counsel inevitably converts an otherwise noncontentious proceeding into an ugly dispute seems unreasonable.³¹⁰ The Court's opinion in *Gault* perhaps paints too pretty a picture of the harmonious merger of the advantages of criminal due process and those of the informal juvenile process,³¹¹ but both kinds of advantages can be preserved. Lawyers are not by nature indisposed to compromise. Plea bargaining is common. Lawyers participating in juvenile proceedings seem to have been conciliatory, perhaps to a fault.³¹² In school disciplinary proceedings, a lawyer is also likely to be sensitive to the solution which will be most advantageous to his client, because his primary concern will be to protect the student's interests. To accomplish this purpose he cannot afford to alienate those in whose hands the student's future rests. Even if his presence produces some unpleasant abrasiveness, that seems a small price to pay for procedural fairness.

The potential benefits of counsel seem so indisputable that denying the right to counsel should be presumed to disadvantage the student. The presumption should lead to a judgment that denial of the right to be represented by retained counsel produces an unconstitutionally unfair hearing unless the school comes forward with an affirmative showing that serious adverse consequences would result from counsel's participation or that the potential advantages of legal representation were clearly supplied through other procedural safeguards. The burden on the school to show that the benefits of counsel have been supplied through alternative procedures should be particularly heavy.³¹³ If the student voluntarily retains counsel, his judgment that legal aid will be beneficial should be conclusive. When the school excludes retained counsel, it is in a weak position to argue that the student is not prejudiced by its decision.

³¹⁰ As the Supreme Court has recently stated: "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

³¹¹ See 387 U.S. at 21-26.

³¹² See Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1176-81, 1183 (1968).

³¹³ Merely observing that other procedures were available, as was done by the *Wasson* court, see 382 F.2d at 812, would not adequately establish that advantages normally deriving from representation by counsel were provided.

3. A Right to State-Appointed Counsel?

If a student has a right to be represented by counsel, do indigent students have a right to be represented by state-appointed counsel? Recognition of the student's constitutional right to counsel will no doubt be influenced by the existence of this question. A judge, seeing no easy solution to this vexing problem, may decide to avoid ever having to face it by denying that fundamental fairness dictates representation by counsel under the circumstances. For this reason an analysis of the student's right to counsel must include at least tentative consideration of this question.

An attempt to determine whether an indigent student³¹⁴ is entitled to appointed counsel must initially focus on the requirements of fundamental fairness. The balance of fairness cannot be assumed to be the same as that struck when the question is whether a student with requisite means may be represented by his own lawyer. In terms of the analysis developed in the preceding section, the presumption of harm remains unchanged, but the school may be in a stronger position to show adverse consequences to overcome that presumption.

Exclusion of retained counsel seems to elicit a stronger feeling that the school is being unfair than does refusal to appoint counsel. In case one, the student arrives with his lawyer and is told, "No lawyers allowed." The student feels (as the objective observer tends to feel) that the board of education is taking unfair advantage. In case two, the student appears, asking for a lawyer. The board answers that it has neither lawyers nor the funds to provide them. On the surface, the answer is credible, manifesting no intent to gain unconscionable advantage. Requiring legal representation places financial and administrative burdens on the school system which exceed those resulting from permitting retained counsel to participate. Legal fees must be paid, and an effective system for appointing and assigning counsel must be developed. The existing organization of education, characterized by decentralization, local autonomy, and considerable diversity of resources, makes solving such problems difficult. Moreover, operation of an assigned counsel system would probably be more difficult for the schools than for the criminal and juvenile courts because schools are more removed from the legal profession. The difficulty of recruiting lawyers would in itself pose a considerable problem, exacerbated because the pool of legal talent cannot be assumed to grow at

³¹⁴ Identifying "indigent" students may present problems not immediately apparent. For example, when a student and his parents have a conflict of interest, each has a distinct need for legal counsel. Yet without his parents' support, the student will usually lack sufficient funds to hire a lawyer.

a pace commensurate with that of the expanding right to counsel.³¹⁵ Insofar as serious disciplinary proceedings are relatively infrequent, problems such as cost and recruitment are diminished; but the difficulty of delivering lawyers when needed might be compounded.

Although these problems are soluble, they are sufficiently substantial to offset the presumption that the student is always disadvantaged if he lacks counsel in a serious disciplinary proceeding. Thus, when a student claims the right to be provided counsel, a close examination of benefits and detriments will always be required to determine whether the proceeding failed to achieve fundamental fairness.

Short of guaranteeing the right to counsel—including appointed counsel if necessary—the Constitution may require that school authorities take reasonable steps to facilitate the student's utilization of available legal resources. This solution would still entail financial and administrative burdens greater than those stemming from merely allowing counsel to participate. It would also present potential questions concerning the reasonableness and good faith of the school's efforts. On the other hand, it would save schools from becoming an appendage of the judicial system; the primary burden of preventing injustices to indigent students would fall on institutions better able to bear it. Legal service programs will often be able to provide appropriate services.³¹⁶ Despite difficulties in obtaining lawyers, many students would receive legal assistance as a result of placing this affirmative duty on the school authorities.³¹⁷

Following this analysis, appointed counsel would sometimes be an essential ingredient of fundamental fairness, but an indigent student would also sometimes receive a lower measure of procedural protection than a student financially able to retain counsel. Doubtless, a position resulting in even occasional and minor disadvantages to poor students is likely to be unpopular.³¹⁸ Recent constitutional decisions

³¹⁵ See Paulsen, *supra* note 219, at 528-36; Skoler, *supra* note 104, at 574-76.

³¹⁶ See Paulsen, *supra* note 219, at 530; cf. Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. Rev. 445 (1965).

³¹⁷ Sufficient notice is a constitutionally required prerequisite to the effective exercise or waiver of the right to counsel for rich and poor alike. See *In re Gault*, 387 U.S. 1, 42 (1967); *Orcutt v. State*, 173 N.W.2d 66 (Iowa 1969); Paulsen, *supra* note 57, at 250; Skoler, *supra* note 104, at 571-73. See also Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133 (1965). None of the public school or college cases deals explicitly with advising the student of a right to counsel. In *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968), however, the court said: "We know of no legal authority that requires university officials to advise a student involved in disciplinary proceedings of his right to remain silent and to be provided with counsel." *Id.* at 287. Perhaps this statement means no more than a disavowal of the *Miranda* warnings for discipline cases with an emphasis on the self-incrimination aspects, see Wright, *supra* note 17, at 1077, but the context indicates otherwise.

³¹⁸ See *Madera v. Board of Educ.*, 267 F. Supp. 356, 374 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Paulsen, *supra* note 57, at 242-43, 252-53.

leave no doubt that even unintentional discriminations against the poor will receive careful judicial scrutiny.³¹⁹ Yet despite current trends, the equal protection clause does not and cannot demand mathematical equality even when fundamental interests are at stake. For example, no one seriously suggests that indigent criminal defendants have a right to the best lawyer money can buy.³²⁰ In addition, courts have recognized the right to retained counsel, but not to state-provided counsel, in other contexts.³²¹ It has been persuasively argued that equal protection has taken over ground that should be occupied by due process—without inevitably producing desirable results.³²² Under a due process standard, the rights (or resources) possessed by others are relevant to determining what is minimally required,³²³ but no rigid rule ensues. The balancing judgment undertaken under the due process clause should not result in gross disparities. Perhaps these points will not halt the rolling Juggernaut of equal protection,³²⁴ but they may slow it down so that the prospective difficulty of appointed counsel will not be used at the outset as a ground for rejecting all claims that due process requires participation of counsel provided by the student or his parents.

C. Impartial Tribunal

A male high school student has been suspended from school by his principal for violating dress regulations prohibiting "extreme haircuts." A professional musician of considerable renown and success, he wears his hair long in the fashion of certain types of performers. As he enters a hearing before the board of education—at which he challenges the regulation on the ground that it is unnecessary to the operation of the school and interferes with his private life and ability to follow his chosen profession—he spies a pair of barber's clippers

³¹⁹ See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Coons, Clune & Sugarman*, *supra* note 3, at 346-51; *Equal Protection*, *supra* note 43.

³²⁰ See *Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1, 9-14 (1964); cf. *Douglas v. California*, 372 U.S. 353, 363 (1963) (Harlan, J., dissenting).

³²¹ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963); *Reed v. Butterworth*, 297 F.2d 776 (D.C. Cir. 1961); *Bancroft v. Board of Governors*, 202 Okla. 108, 109, 210 P.2d 666, 668 (1949).

³²² *Michelman*, *supra* note 3, *passim*; *Equal Protection*, *supra* note 43, at 1131-32; see *Boddie v. Connecticut*, 39 U.S.L.W. 4294 (U.S. Mar. 2, 1971).

³²³ See *Gerard, The Right to Counsel on Appeal in Missouri: A Limited Inquiry Into the Factual and Theoretical Underpinnings of Douglas v. California*, 1965 WASH. U.L.Q. 463, 481; *Michelman*, *supra* note 3, at 18.

³²⁴ Perhaps the momentum is already dissipating. See *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding maximum limits on family welfare grants not a violation of the equal protection clause); *Goodpaster, The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970).

on the table before one board member. During the hearing another board member asks him in an insinuating manner why he did not buy wigs of different colors. The student's challenge is rejected by the board. Has he received a fair hearing?

In *Leonard v. School Committee*,³²⁵ the Massachusetts Supreme Judicial Court concluded that he had. Agreeing that the student had a right to a hearing conducted fairly by "an impartial tribunal 'actuated by a spirit of judicial fairness,'" ³²⁶ the court stated:

We do not condone the acts of the two committee members which occurred during the plaintiff's hearing. The display of the barber's clippers reveals a regrettable lack of appreciation for the gravity of the hearing. . . . [T]he decorum of the hearing is not to be commended. However, the acts complained of were perpetrated by only two members of the committee. . . . [T]he plaintiff was otherwise accorded ample opportunity to present his case.³²⁷

Assuming that the student is entitled to an impartial tribunal, however, the court's ruling seems questionable. The committee decided against the student on a divided vote³²⁸ without indicating whether the votes of the two nonneutral members were decisive. Even if they were not, the student is entitled to an entirely impartial tribunal.³²⁹ Yet the evidence showed that some of the committee members were personally antagonistic to the student or had become actively aligned with the principal's side of the case.

Under the standard administrative law terminology adopted by Professor Davis,³³⁰ a board member's hostility toward a student would be termed "personal bias"—the predisposition of an adjudicating official to decide for or against a party on the basis of considerations irrelevant to the issues being decided. The word "personal" emphasizes that the partiality is directed for or against a party to the proceeding and probably encompasses an emotional involvement inconsistent with judicial detachment. The requirement of impartiality does not, however, demand total abstention from holding views on matters coming before an administrative agency. For example, in *FTC v. Cement Institute*,³³¹ the Federal Trade Commission had made public

³²⁵ 349 Mass. 704, 212 N.E.2d 468 (1965). In Massachusetts the board of education is called the school committee.

³²⁶ *Id.* at 711, 212 N.E.2d at 473.

³²⁷ *Id.*

³²⁸ *Id.* at 705, 212 N.E.2d at 470.

³²⁹ *Cf., e.g., American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966).

³³⁰ The definitions offered in this section are taken from 2 K. DAVIS, *supra* note 121, at §§ 12.01-.03, 13.01-.03, 13.10-.11. See 1 F. COOPER, *supra* note 125, at 338-46; W. GELLHORN & C. BYSE, *supra* note 199, at 935-50 (1960).

³³¹ 333 U.S. 683 (1948).

its views concerning the legal and economic implications of a particular pricing system, and yet the Supreme Court rejected the argument that these views were disqualifying.³³² The line between the acceptability of strong publicized positions on general issues and the impropriety of predetermined views on particular parties or the narrow issues of a particular controversy is a fine one. A member of a board of education may generally advocate student neatness, but he may not announce that a specific student has violated the dress code before the board passes upon a charge that the student should be suspended for lack of "good grooming."

In addition to personal bias, a basis for disqualification exists if a member of a board of education acquires a personal stake in the outcome of a controversy—usually termed an "interest." One form of improper interest results from a "combination of functions" in which the decisionmaker plays one or more roles in addition to acting as judge. Participation as an advocate on one side gives the participant an interest in a victory by that side. The combination-of-functions doctrine embraces both the dual involvement of an individual decisionmaker—such as a board member also actively involved in investigating or prosecuting a violation—and the dual involvement of an agency resulting from the activities of its members.

Convenient as the bias-interest distinction is, these categories are to some extent artificial. The ultimate question raised by either a bias or an interest challenge is whether the adjudicating official or tribunal will (or did) reach a decision free of improper influences and on the basis of the facts presented and arguments made at the hearing. Personal bias suggests that a lack of impartiality has been established. Improper interest suggests the presence of factors making impartiality difficult. But disqualification under either category depends upon the strength of the evidence. Thus, a case seemingly involving the strongest sort of hostility toward a party does not per se demonstrate that an unfair decision will be made. The evidence merely convinces objective observers that, in the light of experience, the risk of an unfair decision is too great. An interest in the outcome similarly leads to disqualification because of the likelihood of an unfair decision. Thus, the appearance as well as the fact of impartiality is

³³² If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. . . . Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress.

Id. at 702.

of considerable importance.³³³ The courts often blur the distinction between the categories to concentrate on the fundamental question of impartiality.

Unfortunately for the student desiring a neutral tribunal to adjudicate his case, the *Leonard* case is probably typical in giving little encouragement for any attack based upon lack of impartiality. A strong case must be made to establish personal bias. Combination of functions also rarely succeeds as a constitutional argument. Courts have occasionally held that combination of functions resulted in a deprivation of liberty or property without due process of law, but usually on the basis of aggravated factual situations.³³⁴ If an administrative agency is subdivided so that different functions are performed by different persons and the agency maintains a modicum of insulation between these subdivisions, the agency's actions appear to be almost invulnerable to a due process attack.³³⁵ That this approach predominates today does not, however, rule out the possibility of a successful constitutional challenge.³³⁶ Not only are the *Leonard* court's views concerning the validity of school hair regulations going out of style,³³⁷ but its views concerning minimum standards of impartiality may be similarly destined. Furthermore, because procedural due process depends primarily on the facts of each case, when the right combination of circumstances is found, all precedent to the contrary may fall by the way.

1. Characteristics Affecting the Impartiality of a School Discipline Tribunal

Like most administrative agencies with any adjudicating function, a board of education inevitably faces the problem of inconsistent func-

³³³ See *In re Murchison*, 349 U.S. 133, 136 (1955); *Offut v. United States*, 348 U.S. 11, 14 (1954); *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966).

³³⁴ See *In re Murchison*, 349 U.S. 133 (1955) (one person acted as judge-grandjuror-accuser-witness-prosecutor); *Tumey v. Ohio*, 273 U.S. 510 (1927) (judge received fee for convictions); *Sandahl v. City of Des Moines*, 227 Iowa 1310, 1313, 290 N.W. 697, 699 (1940) (Civil Service Commission both brought charge against employee and heard his case).

³³⁵ See 2 K. DAVIS, *supra* note 121, at § 13.05; W. GELLHORN & C. BYSE, *supra* note 199, at 1018-32.

³³⁶ In a few recent instances courts have enjoined enforcement of expulsion orders because the tribunal before which he appeared was biased or had prejudged his case. See *Sullivan v. Houston Independent School Dist.*, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969); *Perlman v. Shasta Joint Jr. College Joint Bd. of Trustees*, 9 Cal. App. 3d 873, 882-83, 88 Cal. Rptr. 563, 569-70 (Ct. App. 1970).

³³⁷ See, e.g., *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *Griffin v. Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969); Comment, *Public Schools, Long Hair, and the Constitution*, 55 IOWA L. REV. 707 (1970). But see *Stevenson v. Board of Educ.*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

tions, performed either by the board members or by the school officials and employees for whom the board is responsible. In the abstract, combination of functions will presumably not lead to constitutional infirmity under the due process clause, but a combination of functions coupled with various aggravating factors may result in a proceeding lacking in fundamental fairness. When the board performs the judging function, the greatest threat to the fairness of the proceeding will generally derive from the board's identification with subordinate school personnel. If administrators or teachers perform the judging function, the risk that the same individual will be involved in performing two or more functions and that he will be personally interested in the outcome increases as the locus of judgment moves from top administrators down to teachers and others closely associated with the student.

There are many possible combinations. Besides performing the judging function, the board (or one of its members or employees) might make the formal accusation,³³⁸ conduct an investigation,³³⁹ present the case against the student at the expulsion hearing,³⁴⁰ or testify against the student.³⁴¹ In addition, the board might permit other persons, such as the superintendent³⁴² or school attorney,³⁴³ who have performed one or more of these adversary functions, to participate in the decisionmaking. All of these possible combinations are capable of producing an interest in the result undermining the impartiality of judgment.

The characteristics of boards of education make them particularly susceptible to partiality in student disciplinary proceedings. These boards are ordinarily composed of lay citizens performing their duties without compensation.³⁴⁴ Although they are formally considered officers of the state elected or appointed to carry out its educational policies,³⁴⁵ they possess broad authority to establish educational policy for their school district.³⁴⁶ Adjudication, a common function of many administrative agencies, is not central to their task, and board members are likely to consider it as peripheral. In the unusual event that

³³⁸ Cf. *Mackler v. Board of Educ.*, 16 N.J. 362, 108 A.2d 854 (1954).

³³⁹ Cf. *Griggs v. Board of Trustees*, 61 Cal. 2d 93, 389 P.2d 722, 37 Cal. Rptr. 194 (1964).

³⁴⁰ Cf. *United Airlines, Inc. v. CAB*, 309 F.2d 238 (D.C. Cir. 1962).

³⁴¹ Cf. *Moran v. School Comm.*, 317 Mass. 591, 59 N.E.2d 279 (1945).

³⁴² Cf. *Griggs v. Board of Trustees*, 61 Cal. 2d 93, 389 P.2d 722, 37 Cal. Rptr. 194 (1964).

³⁴³ Cf. *Gigger v. Board of Fire & Police Comm'rs*, 23 Ill. App. 2d 433, 163 N.E.2d 541 (1959).

³⁴⁴ See R. CAMPBELL, L. CUNNINGHAM & R. MCPHEE, *THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS* 157-87 (1965); H. HUNT, *THE PRACTICE OF SCHOOL ADMINISTRATION* 326 (1958).

³⁴⁵ See *PUBLIC SCHOOL OPERATION*, *supra* note 14, at 260.

³⁴⁶ See *id.* 225, 228-30.

adjudication is required, board members will probably be unprepared by experience, training, or predisposition to exercise the disciplined neutrality and observe the procedural regularity necessary for a fair hearing. Furthermore, since board members receive no remuneration for their services, they may be unenthusiastic or annoyed about the time-consuming, "legalistic" detour from their principal concerns. That a student's action precipitated this detour may actually decrease the board members' interest in neutrality and an orderly, fair proceeding.

The structure and authority of the board of education may also constitute an obstacle to impartiality in student disciplinary proceedings. Except for broad enabling legislation,³⁴⁷ the substance and administration of student discipline is generally left to each local school district. The specific details of the challenged rule or policy will ordinarily be the creation of the local board or its subordinates. As a result, the legal and factual issues involved in a student misconduct case will often appear to entail challenges to the authority of the board or to the teachers and administrators serving under the board.

A tendency to feel this personal stake in the outcome of the proceeding may be strengthened by the board's identification with the persons likely to be directly involved as the student's antagonists—superintendent, principal, or teacher. Identification with the superintendent is likely to be the most powerful,³⁴⁸ for the superintendent is not only the board's appointee but also the man on whom the board must rely to implement its policies. Unless the board is ready to discharge the superintendent,³⁴⁹ it will hesitate to undermine his position. Conversely, by upholding his position in an adjudication, they give him a vote of confidence. Although the links are less direct, the same instincts tend to be present when a lower-level administrator or a teacher is involved. And regardless of the position of the charging party, to the student and to many disinterested observers a discipline hearing matches student against the school establishment. The sympathies of the board of education will clearly lie with the latter "party."

³⁴⁷ The legislation may be in the form of a general grant of power to establish regulations dealing with excluding students from school, *see, e.g.*, CONN. GEN. STAT. ANN. § 10-233 (1967) (suspension); MONT. REV. CODE ANN. § 75-1632(10) (1962), or, as is most often the case, specifications for expulsion procedures or grounds for expulsion—usually in broad terms. *See* statutes cited note 301 *supra*.

³⁴⁸ *See* R. CAMPBELL, L. CUNNINGHAM & R. MCPHEE, *supra* note 344, at 215-17, 223-24; H. HUNT, *supra* note 344, at 329-32; J. KOERNER, WHO CONTROLS AMERICAN EDUCATION? 127, 137-44 (1968). If the superintendent is a "strong" executive, he will speak his mind freely and forcefully. The board or some of its members will often have a close working relationship with him, and his position in the case gives him an interest which may influence the board's deliberations and decision. In addition, the superintendent communicates to the board *ex parte*, and thus the student has no opportunity to respond to the superintendent's statements and arguments.

³⁴⁹ *See* PUBLIC SCHOOL OPERATION, *supra* note 14, at 537-38.

Unfairness may also arise from the participation of the school's attorney, who may both prosecute the student and advise the board on legal issues. The board is entitled to call upon an attorney for legal advice during or after the hearing to aid in its judging role, but it should always attempt to consult a disinterested attorney. Any number of these characteristics may exist to varying degrees in a particular school discipline case. Compounding any lack of impartiality resulting from combination of functions, these characteristics may severely jeopardize the student's chances of receiving a fair hearing.

2. A Brief Review of the Law of Combination of Functions

The Supreme Court has decided relatively little in the area of due process limitations upon combining functions. Yet three important although unsurprising generalizations may be made: impartiality is a fundamental component of due process; combining inconsistent functions may amount to an unconstitutional lack of impartiality; and combination of functions does not automatically demonstrate failure to afford due process.

In *re Murchison*,³⁵⁰ the central case, involved an extraordinary procedural sequence in which the same judge conducted a secret grand jury investigation, charged the petitioner with contempt for committing perjury in his grand jury testimony, and subsequently tried and convicted the petitioner of contempt. The Supreme Court balked at this extreme combination of functions.

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . .

[N]o man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.

. . .

. . . Having been a part of that [accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.³⁵¹

The Court pointed out that the judge would inevitably bring forward his impressions from the secret grand jury hearing, while the petitioner could cross-examine the presiding judge only with extreme difficulty.³⁵²

³⁵⁰ 349 U.S. 133 (1955).

³⁵¹ *Id.* at 136-37.

³⁵² *Id.* at 138-39.

Murchison involved criminal sanctions and an especially objectionable combination of functions, but when school authorities accuse a student of misconduct and then participate in the resulting adjudicatory hearing, the analogy is apt. Also, the language of *Murchison* is broad. In more conventional contempt settings involving judge-prosecution combinations, the Court has held that due process requires that post-trial contempt proceedings be conducted by a judge other than the one who made the contempt charges if they arise from highly personal aspersions.³⁵³

Balanced against *Murchison* is a limiting constitutional decision in *Marcello v. Bonds*,³⁵⁴ involving an allegedly improper combination of functions within the Immigration and Naturalization Service. Prior to *Marcello*, the Court in *Wong Yang Sung v. McGrath*³⁵⁵ had read the newly enacted Administrative Procedure Act (APA)³⁵⁶ to apply to deportation proceedings and found a violation on the ground that the deportation hearing was conducted by an immigration inspector performing as investigator and presiding officer. The *Wong Yang Sung* Court read section 5(c) of the APA as precluding a procedure under which hearing officers and investigators, who frequently alternate roles, would have a strong interest in accommodating each other. The Court's decision contained powerful constitutional overtones:

When the constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.³⁵⁷

³⁵³ *Mayberry v. Pennsylvania*, 39 U.S.L.W. 4133, 4136 (U.S. Jan. 19, 1971) (No. 121). In other cases the Court has declined to set aside contempt convictions, without discussing the constitutional argument. See *Nilva v. United States*, 352 U.S. 385 (1957); *Sacher v. United States*, 343 U.S. 1 (1952). In these cases the majority opinions were based upon an interpretation of FED. R. CRIM. P. 42. The Court held that each case was properly tried by the trial judge under the rule although plaintiffs argued that the punishment was not designed to remedy a contempt committed in the judge's presence. In neither case did the majority discuss the constitutional argument. In *Sacher*, Justices Frankfurter and Douglas dissented on the ground that actual bias had been shown. See 343 U.S. at 14, 23, 89. When a majority of the Court is convinced that personal bias does exist, a different result will follow. See *Offutt v. United States*, 348 U.S. 11, 14 (1954). In *Nilva* four justices dissented, relying partially on *Murchison*. 352 U.S. at 396.

³⁵⁴ 349 U.S. 302 (1955).

³⁵⁵ 339 U.S. 33 (1950).

³⁵⁶ 5 U.S.C. §§ 551-59, 701-06, 3105, 3344, 5362, 7521 (Supp. V, 1970).

³⁵⁷ 339 U.S. at 50-51.

Subsequent to *Wong Yang Sung*, Congress exempted the Immigration Act from the APA,³⁵⁸ and the Court evidently concurred that the "prevailing standards of impartiality" fell short of what Congress was willing to establish for administrative agencies covered by the APA.³⁵⁹ The only direct constitutional ruling following the congressional action came in *Marcello*, in which the procedure rejected under the APA in *Wong Yang Sung* was found acceptable. The Court said:

The contention [of a due process violation] is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.³⁶⁰

On its face, this statement warns that deportation is unique and that the holding should not automatically be extended to other areas. The Court also limited its holding by pointing out that the presiding officer had not undertaken the functions of prosecutor and that "no allegation" had been made "that he engaged in investigative or prosecuting functions in this or any factually related case."³⁶¹ Although this situation differs from *Murchison's* judge-prosecutor, *Marcello* did not leave the brave words of *Wong Yang Sung* untouched. Yet in cautiously creating an exception for deportation cases, the Court did not rescind the general principle of impartiality stated in *Wong Yang Sung* and echoed in *Murchison*. In addition, only last term the Court strongly reaffirmed this principle in *Goldberg v. Kelly*.³⁶²

Another aspect of this principle is illustrated by *Morgan v. United States*,³⁶³ in which the Court held it a "vital defect" for the Secretary of Agriculture to base a decision on "findings prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity"³⁶⁴ to the parties to challenge these findings. In the contempt cases, the danger was that the direct involvement of the judge would give him an adversary's interest in the outcome, necessarily influencing his decision.

³⁵⁸ See Supplemental Appropriation Act of 1951, ch. 1052, 64 Stat. 1044, 1048.

³⁵⁹ See *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 580 (1955); *Harisiades v. Shaughnessy*, 342 U.S. 500 (1952).

³⁶⁰ 349 U.S. at 311.

³⁶¹ *Id.* at 306.

³⁶² 397 U.S. 254, 271 (1970).

³⁶³ 304 U.S. 1 (1937).

³⁶⁴ *Id.* at 22. The Court explained the hearing requirement as embodying the "fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Id.* at 19.

In the deportation cases, the danger was that a decision would be influenced by the decisionmaker's desire to accommodate his superior or a prosecutor with whom he alternated roles. In *Morgan*, the problem was that a prosecutor, clearly possessing a stake in the outcome, would influence the decision by participating in the decisionmaking process.

Beyond these few Supreme Court threads, the cases are voluminous and multifarious.³⁶⁵ The principle of impartiality as stated in *Murchison* is frequently reiterated with general agreement that combining functions creates a risk of undermining the principle.³⁶⁶ Yet many cases (sometimes the same cases) hold that combining judging with other functions does not deny a fair hearing. The decisions justify this conclusion on a variety of grounds. The standard position, usually claiming more support from Professor Davis' treatise than is there,³⁶⁷ is that combining functions is simply not constitutionally prohibited.³⁶⁸ Some cases recite the standard position but also indicate that the court has carefully examined the record to see whether the complainant's arguments are compelling.³⁶⁹ A third group of cases contains lofty rhetoric showing concern for the petitioner's position before a body which may lack impartiality, but nevertheless denying relief.³⁷⁰ Fourth, some cases strongly suggest the existence of a broad, controlling constitutional principle, but only remand for correction of a narrow defect in the hearing.³⁷¹ Fifth, some cases prohibit combining functions because of a statutory hearing provision, but add dictum recognizing the existence of a parallel constitutional principle.³⁷² Finally, some cases hold that combining functions amounts to or contributes to a denial of due process.³⁷³

³⁶⁵ For exhaustive treatment of these cases, see 2 K. DAVIS, *supra* note 121, ch. 13; see 1 F. COOPER, *supra* note 125, at 339-43.

³⁶⁶ See, e.g., *Reynolds v. United States ex rel. Dean*, 68 F.2d 346, 348 (7th Cir. 1934); *In re Larsen*, 17 N.J. Super. 564, 574, 86 A.2d 430, 436 (1952) (Brennan, J., concurring); *Sharkey v. Thurston*, 268 N.Y. 123, 196 N.E. 766 (1935).

³⁶⁷ "Even though the problem is at bottom one of procedural due process, the courts have largely failed to provide the leadership in working out solutions." 2 K. DAVIS, *supra* note 121, at 248.

³⁶⁸ See, e.g., *Pangburn v. CAB*, 311 F.2d 345, 356 (1st Cir. 1962); *Griggs v. Board of Trustees*, 61 Cal. 2d 93, 98, 389 P.2d 722, 726, 37 Cal. Rptr. 194, 198 (1964).

³⁶⁹ See, e.g., *Hanna v. Board of Aldermen*, 54 R.I. 392, 173 A. 358 (1934). Compare *Mackler v. Board of Educ.*, 16 N.J. 362, 108 A.2d 854 (1954), with *New Jersey Bd. of Optometrists v. Nemitz*, 21 N.J. Super. 18, 90 A.2d 740 (1952).

³⁷⁰ See, e.g., *Board of Educ. v. Shockley*, 52 Del. 277, 156 A.2d 214 (1959); *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965); cf. *Citta v. Delaware Valley Hosp.*, 313 F. Supp. 301, 310-12 (E.D. Pa. 1970) (suit for reinstatement of physician's operating privileges).

³⁷¹ See, e.g., *State ex rel. Steele v. Board of Educ.*, 252 Ala. 254, 40 So. 2d 689 (1949) (refusal of witness to submit to cross-examination).

³⁷² See, e.g., *Reardon v. Dental Comm'n*, 128 Conn. 116, 20 A.2d 622 (1941).

³⁷³ See, e.g., *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966); *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964); *Amos Treat & Co. v. SEC*,

The cases condoning a combination of functions can be explained in one of two ways: either the claim of unfairness does not impress the court,³⁷⁴ or the court is unwilling to take the steps required to protect the claimant from the possible unfairness because of the great cost of doing so. The first reason is consistent with the general approach, advocated in this Article, that fundamental fairness requires an evaluation of a variety of factors in each particular case.³⁷⁵ The second suggested explanation, denying relief from combining of functions because the cost of granting it is too high, is ordinarily phrased in terms of the rule of necessity.³⁷⁶ This doctrine is conceptually simple: A court determines that a fair hearing cannot be held without disqualifying the judge, but disqualification appears to leave no one else to decide; therefore, by "necessity," that judge is permitted to decide the case. The rule of necessity is especially important because it purports to sweep aside the disqualifying significance of every breach in impartiality—whether based on combined functions or personal bias. Accommodating the rule of necessity to the requirements of due process therefore deserves careful elaboration.

3. The Rule of Necessity

The first thing to notice about the rule of necessity as a response to a due process claim is its remarkable circuitry. The circle is easily

306 F.2d 260 (D.C. Cir. 1962); *Trans World Airlines, Inc. v. CAB*, 254 F.2d 90 (D.C. Cir. 1958). See also *Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees*, 9 Cal. App. 3d 873, 883, 88 Cal. Rptr. 563, 570 (Ct. App. 1970).

³⁷⁴ Challenges to the impartiality of an expulsion tribunal have been rejected in three different college cases in part because the court was satisfied that the proceeding was fair. In *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970), two members of the faculty advisory committee, which recommended expulsion to the college president, testified against the student. Although the complaint was not rejected out of hand, the court regarded this as a "limited combination" and was convinced that the record "demonstrated clearly" that there was no bias or prejudice. *Id.* at 199, 200. The court in *Scott v. Alabama State Bd. of Educ.*, 300 F. Supp. 163 (M.D. Ala. 1969), concluded "with the advantage of hindsight" that the Ad Hoc Faculty-Student Committee "appears to have dealt fairly with the students involved." *Id.* at 167. The impartiality of the tribunal was challenged in *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968), because the board's legal adviser participated as prosecutor in the hearing. *Id.* at 768-69. Besides ruling that normal court standards were not controlling for the proceeding, the court stated that no evidence "in the record" showed that counsel "exerted any biased influence upon the Board in its consideration of the matter," and that the student's counsel conceded the fairness of the hearing. *Id.* at 769.

³⁷⁵ Because this approach requires careful assessment of all the circumstances, some courts have explicitly stated that the danger of unfairness resulting from a combination of functions necessitates an especially exacting standard of review. See *Gigger v. Board of Fire & Police Comm'rs*, 23 Ill. App. 2d 433, 163 N.E.2d 541 (1959); *State ex rel. Steele v. Board of Educ.*, 252 Ala. 254, 40 So. 2d 689 (1949); *cf. In re Larsen*, 17 N.J. Super. 564, 574, 86 A.2d 430, 436 (1952); 2 K. DAVIS, *supra* note 121, at 181.

³⁷⁶ See 1 F. COOPER, *supra* note 125, at 348-50; 2 K. DAVIS, *supra* note 121, at § 13.02; W. GELLHORN & C. BYSE, *supra* note 199, at 945-48.

drawn: The statutory framework sets up official *X* (and no one else) to perform functions *A* (prosecution) and *B* (decision); performance of *A* gives *X* an interest in the outcome of *B*; if *X* performs *A*, therefore, his performance of *B* may not be impartial; but *X* must perform *B* because no other entity is authorized to perform it. If the rule of necessity simply means that if only a partial tribunal can decide the question the disadvantage to a party to the proceeding is irrelevant, then the doctrine is defective for purposes of constitutional law. When the choice is between dismissing the charges and a deprivation of liberty or property without due process of law, the solution is dismissal.³⁷⁷ In short, if the doctrine of necessity were read as a conclusive answer to a due process claim, it would be wrong. If, however, the rule means only that the necessity resulting from the limitations of the state's administrative machinery is one factor to be taken into account, then the rule is not inherently incompatible with due process. Under that reading of the doctrine, a balancing test including due regard for the student's interest is required.³⁷⁸

Apart from treating the doctrine as a conclusive answer to an individual's constitutional objection, the courts frequently apply the rule of necessity as if it had constitutional standing itself. For example, in *Board of Education v. Shockley*,³⁷⁹ the court said that the rule of necessity "compelled" the court to permit a board of education to pass upon its own bias. "[T]he decisions of the United States Supreme Court and the highest courts in a number of states are clear that it *must sit* where, as here, there is no other tribunal to decide the matter."³⁸⁰ The only Supreme Court decision cited by the *Shockley* court was *Evans v. Gore*.³⁸¹ Although *Evans* may be a significant rule-of-necessity case, its scope is limited and it did not deal in any way with a denial of due process of law.

The question in *Evans* was whether article III of the Constitution, providing that the compensation of the federal judiciary may not be "diminished during their Continuance in Office,"³⁸² prohibited application of the federal income tax to a federal judge's salary. Resolving this question necessarily affected the members of the Supreme Court, and this unfortunate aspect of the case was duly regretted at the outset of Justice Van Devanter's opinion. Evidently the Court's jurisdiction

³⁷⁷ Cf. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Greene v. McElroy*, 360 U.S. 474 (1959).

³⁷⁸ Cf. *State ex rel. Miller v. Aldridge*, 212 Fla. 660, 103 So. 835 (1925).

³⁷⁹ 52 Del. 277, 156 A.2d 214 (1959).

³⁸⁰ *Id.* at 279, 156 A.2d at 215 (emphasis added).

³⁸¹ 253 U.S. 245 (1920).

³⁸² U.S. CONST. art. III, § 1.

went unchallenged.³⁸³ Certainly the plaintiff, a federal judge, was not challenging the Court's power to decide; he was attempting to set aside the unfavorable judgment of the court below and wanted some court to decide that the tax could not be collected from him. Consequently, because the plaintiff had no occasion to invoke it and because the federal government has no rights protected by the due process clause, the protection of the due process clause was not involved. Moreover, had the Court been influenced by its personal stake in the case before it, the bias would have operated in favor of the individual litigant and against the government. In a school discipline hearing, however, the lack of impartiality would be likely to have an adverse effect only upon a student whose liberty is threatened by the proceedings. Although an impartial decision is always desirable, it is most important when individual liberty may be affected.

Finally, the Court's position as the "court of last resort" may have influenced its decision to exercise jurisdiction in *Evans* despite the existence of personal interest. In most cases in which the rule of necessity is invoked, the conclusion is simply that the pertinent legislative scheme left decisionmaking to the challenged tribunal and to no other. In these cases, it is not argued that the provisions of the state constitution—let alone the federal constitution—prevent decision by any other body. The legislature has simply not chosen to provide an alternative. In *Evans*, however, only the Supreme Court could render an authoritative decision on the constitutional question raised. Thus, its exercise of jurisdiction was highly "necessary."³⁸⁴

The rule of necessity is not quite a "rule" and the "necessity" which calls it into play is relative, not absolute. Thus, reduced to realistic stature, the rule of necessity has an important role to play in setting the constitutional minimum of fairness required by due process. It becomes another tool for making the complicated balancing judgments essential to proper determinations in this area.

4. Conclusion

As part of a total balancing process, the rule of necessity suggests two main considerations: the urgency of taking the action considered in an expulsion proceeding, and the absence of a suitable alternative tribunal. The urgency of making a decision to discipline would depend

³⁸³ See 253 U.S. at 248.

³⁸⁴ The Court's opinion also suggests that it had no power to decline jurisdiction invoked by the plaintiff under controlling law, see *id.* at 247-48; but this view is offset by the Court's statement, after noting that both parties wished a decision, that: "In this situation, the only course open to us is to consider and decide the cause" *Id.* at 248.

in turn upon a balancing of three distinct factors: the significance of the interest affected; the degree of unfairness stemming from the potential or actual partiality; and the importance of the purpose achieved through the disciplinary action. The student has a strong interest in being free from serious disciplinary sanctions. Combining functions may constitute unfairness of relatively low order, but due to the characteristics of a school disciplinary hearing substantial unfairness is likely to result because combining functions will probably be accompanied by aggravating circumstances. The possibility of unfairness will be particularly strong whenever a decision is made by subordinate school personnel who are most likely to be personally involved in the performance of inconsistent functions or in the controversy itself.

Presumably the purposes served by the disciplinary action are preservation of the educational process and protection of students and educational personnel. The urgency that action be taken, even if by a tribunal suffering from a lack of impartiality, is proportionately heightened as the educational goals that might be served increase in importance. If a student threatens a teacher with a knife, expulsion may be justified even though the tribunal lacks impartiality; at the same time, expulsion of the student on the ground that his shoulder-length hair causes disruption may be permissible only if the tribunal is impartial. Similarly, if the sanction employed is not reasonably calculated to achieve important educational purposes, a decision to impose the sanction by a biased tribunal may not conform with due process. Finally, with respect to a breach in impartiality caused by combining functions, the urgency of both functions must be great. However important the purposes of adjudicating an expulsion, there is only a weak justification for participation in the adjudication by a board member who chooses to write a letter to the newspaper concerning the case.³⁸⁵ In a truly egregious instance of combining functions, the rule of necessity ought not be accepted as a justification for acting. The inability to discipline a particular student will not entail wholesale frustration of the school's legitimate interests, but will simply mean that the school's interest must yield in that instance.

The second consideration suggested by the rule of necessity justifying action by a partial decisionmaker is the absence of an impartial one. As long as a more impartial alternative tribunal is available under the statutory scheme, a rule-of-necessity argument should never be permitted to justify action by the less impartial tribunal.³⁸⁶ School

³⁸⁵ Cf. *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 209-10, 94 N.W.2d 711, 721-22 (1959).

³⁸⁶ See *Smith v. Department of Registration & Educ.*, 412 Ill. 332, 106 N.E.2d 722 (1952), cited in 1 F. COOPER, *supra* note 125, at 350.

discipline is administered by teachers, principals, district superintendents, superintendents, and boards of education. Given this framework, the most unqualifiedly impartial office or person should be chosen to decide disciplinary questions. When a particular body, such as the board of education, is expressly required to adjudicate, the board members should avoid performing other functions in the proceeding whenever possible. Only when the statute requires board members to perform inconsistent functions will this goal be difficult to achieve,³⁸⁷ and then one or more board members might be disqualified without depriving the board of the power to act. When an impartial tribunal would result from this disqualification, no rule-of-necessity argument would justify action taken by the full board.³⁸⁸

The board is immune from attack for lack of neutrality if it refrains from acting in an overtly biased manner and if it insulates decisionmaking from adversary functions such as prosecuting and investigating. Insulation could be achieved by assigning some persons to perform the nonadjudicatory tasks and rigorously excluding these persons from the board's decisionmaking process. If no other means of purging a disqualifying bias were available, the board of education could create a continuing or ad hoc committee to perform some of the board's functions, such as investigating or even compiling a record.³⁸⁹ Although reserving ultimate decisionmaking power to itself, the board could receive recommendations from this committee. As long as creating such an independent body is possible, the board may arguably not claim the shelter of the rule of necessity when it fails to create a substitute. Objections will be made that this would be an illegal delegation³⁹⁰ or that the board has power to do only those things expressly authorized or "necessarily implied" by statute.³⁹¹ Yet boards of education could not function without a great variety of employees and contractors. Expulsion statutes do not appear to require that the board take the evidence or hear the witnesses.³⁹² Setting up

³⁸⁷ Cf. *Trans World Airlines, Inc. v. CAB*, 254 F.2d 90, 91 (D.C. Cir. 1958) (signing brief).

³⁸⁸ See, e.g., *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966); *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964).

³⁸⁹ See *Sill v. Pennsylvania State Univ.*, 315 F. Supp. 125 (M.D. Pa. 1970); 1 F. COOPER, *supra* note 125, at 350.

³⁹⁰ See 1 F. COOPER, *supra* note 125, at 92-93; *PUBLIC SCHOOL OPERATION*, *supra* note 14, at 231-33.

³⁹¹ See *PUBLIC SCHOOL OPERATION*, *supra* note 14, at 228; N. EDWARDS, *supra* note 14, at 146.

³⁹² Connecticut's statute is representative: "The board of education of any town may expel from school any pupil regardless of age who after a full hearing is found guilty of conduct inimical to the best interests of the school." CONN. GEN. STAT. ANN. §10-234 (1958). Nothing in this language requires the board to hold a hearing and hear the witnesses; but official action may be taken only after the hearing, implicitly in a manner consistent with acceptable administrative practices.

The validity of institutional decisions by bodies created through legislative dele-

a separate agency to perform certain functions related to a disciplinary proceeding seems to be a reasonable and orderly way of carrying out the duty to guarantee an impartial tribunal.³⁹³

Establishing an agency truly independent of the board will be difficult, but even a division of responsibility clearly separating functions within a school system would be a considerable improvement. Furthermore, creating a special agency to make the decisionmaking process impartial would entail some disadvantages—possibly added cost and certainly added time and formality. Consequently, the resources of the special agency should be reserved for relatively important discipline matters such as expulsion.³⁹⁴ In instances involving serious sanctions, the burden of additional time and formalization do not outweigh the gains from greater impartiality in the decisionmaking process.

The student's strongest case challenging the impartiality of the board of education would be presented if all of the board members participated in both a prosecutorial and an adjudicatory capacity although a more impartial tribunal was authorized to perform one or both functions, and those board members revealed evidence of actual bias at the hearing. A parallel case challenging a decision by a superintendent or a principal may be even stronger. The student's case weakens as fewer board members participate in inconsistent capacities; the statute expressly requires the board to perform the inconsistent functions; the nondecisionmaking function is less adversarial; the adversarial role is performed by a nonboard member—such as the superintendent or board attorney—who does not participate in the board's decisionmaking process or participates only as an advisor; the record shows that the board conducted the hearing in a fair and disinterested manner; and other safeguards such as cross-examination and assistance of counsel are permitted.

gation is generally well established. See *United States v. Morgan*, 313 U.S. 409 (1941); *Braniff Airways, Inc. v. CAB*, 379 F.2d 453 (D.C. Cir. 1967); *Cooper v. State Bd. of Medical Examiners*, 35 Cal. 2d 242, 217 P.2d 630 (1950); 2 F. COOPER, *supra* note 125, at 445-65; 1 K. DAVIS, *supra* note 121, at ch. 2. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967), contains some ambiguous language to the contrary, but a close reading of the opinion, *id.* at 651 n.1, and subsequent action by that district court, *e.g.*, *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968), erases any possible suggestion that "he who hears must decide" college discipline cases. Certainly the increasing recognition of power in boards of education to engage in collective bargaining, *see, e.g.*, *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951), involves more extensive limitations upon the boards' prerogatives than the present suggestion.

³⁹³ Such a step is arguably "necessarily implied." The school board is duty-bound to determine whether to expel. Because of dual involvement as judge and perhaps prosecutor, however, it may be unable to make an impartial determination. If the board cannot perform its task impartially, the Constitution may prohibit it from acting at all. Therefore, steps to insulate the board from certain types of improper involvement may be constitutionally required to enable it to perform its statutorily-imposed duties.

³⁹⁴ See Heyman, *supra* note 230, at 75-78.

D. Review and Record

Without judicial review, the student's enjoyment of all other rights required by due process—including the basic rights to notice, a hearing, and to present an affirmative case—is dependent upon the good faith, competence, and wisdom of the tribunal with primary responsibility for the decision. Without a record, the efficacy of judicial review as a safeguard for those rights will depend upon the creative speculation of court and counsel; and the danger of losing those rights, through presumption of the validity of the tribunal's decision, will be multiplied. Recognizing a parallel problem in monitoring the juvenile process, Justice Harlan argued in his separate opinion in *Gault* that "the court must maintain a written record, or its equivalent, adequate to permit effective review on appeal or in collateral proceedings."³⁹⁵ The required record should enable the reviewing court to determine whether the student has received adequate notice and whether the student has had a fundamentally fair hearing, taking into account whether certain procedural safeguards were available to him.

1. Judicial Review of School Discipline Decisions

In the past when a student wished to protest against the procedures employed at a disciplinary hearing, mandamus was frequently assumed to be his proper remedy.³⁹⁶ Mandamus, however, has often provided rather circumscribed review of the administrative action because it has been held to apply only to ministerial (in contrast to discretionary) acts or because the reviewed action must be upheld in the absence of abuse of discretion.³⁹⁷ Mandamus need not, however, be the exclusive remedy,³⁹⁸ nor need it provide only narrowly restricted

³⁹⁵ *In re Gault*, 387 U.S. 1, 72 (1967) (concurring opinion); cf. *Lane v. Brown*, 372 U.S. 477, 485-86 (1963) (Harlan, J., concurring) (Public Defender's discretion to determine whether to appeal should be reviewable). The majority in *Gault* chose to defer consideration of the claimed right to review and a record. 387 U.S. at 58. Justice Harlan used the terms "record" and "review" in the broadest sense. For the present analysis, it is unnecessary to choose between the wide variety of procedures which may be available to provide judicial review, see 3 K. DAVIS, *supra* note 121, at 388-433; L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 152-196 (1965), or to identify precisely what a "record" or "its equivalent" should include, see 1 K. DAVIS, *supra* note 121, at §8.14. It is sufficient to state the requirement in admittedly question-begging terms: Due process should require such review and record as will secure a fair hearing for the student.

³⁹⁶ See, e.g., Annot., 39 A.L.R. 1019 (1925).

³⁹⁷ See 3 K. DAVIS, *supra* note 121, at §24.03; L. JAFFE, *supra* note 395, at 176-92.

³⁹⁸ In *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965), an exclusion of a student from school was challenged in an action for an injunction. The case was decided on the merits against the student, and the court expressly disclaimed deciding whether mandamus or recovery in tort for wrongful exclusion were the exclusive remedies. *Id.* at 706-08, 212 N.E.2d at 470-71. If mandamus were regarded as being limited to informal review without a record, it would not be an adequate remedy. See L. JAFFE, *supra* note 395, at 186-87.

review.³⁹⁹ Today most states have statutory provisions making judicial review of the disciplinary decision available to the injured student.⁴⁰⁰ Yet only a few of the recent challenges to the substance or procedure of college and public school misconduct proceedings have come through the state courts.⁴⁰¹ Instead, most recent suits⁴⁰² have arisen in the federal courts under section 1983 of the Civil Rights Act of 1871.⁴⁰³ Even in the absence of free speech, equal protection, or other substantive constitutional issues, the federal courts have taken jurisdiction to determine the constitutional validity of the procedures utilized in imposing disciplinary sanctions.⁴⁰⁴ A claim under section 1983 is an independent action rather than review of a state or local administrative decision,⁴⁰⁵ but the practical effect to date has been to provide a judicial forum for obtaining effective review of questions arising out of public school disciplinary proceedings.⁴⁰⁶

If the student should choose to bring suit in state court or if relief available under section 1983 should be curtailed by further appli-

³⁹⁹ See *Woody v. Burns*, 188 So. 2d 56 (Fla. Dist. Ct. App. 1966); L. JAFFE, *supra* note 395, at 176-92.

⁴⁰⁰ See, e.g., COLO. REV. STAT. ANN. § 123-20-9(2) (1963); N.Y. CIV. PRAC. LAW §§ 7801-06 (McKinney 1963); R.I. GEN. LAWS ANN. § 16-39-4 (1969).

⁴⁰¹ See, e.g., *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965); *Cosme v. Board of Educ.*, 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), *aff'd without opinion*, 27 App. Div. 2d 905, 281 N.Y.S.2d 970 (1967).

⁴⁰² See, e.g., *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

⁴⁰³ 42 U.S.C. § 1983 (1964); see *Van Alstyne*, *supra* note 17, at 378 n.34.

⁴⁰⁴ See *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D.N.Y.), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 143 (W.D. Mo. 1968). Section 1983 would arguably also provide a jurisdictional basis for a state court action. See Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1497 & n.62 (1969).

⁴⁰⁵ Compare *Esteban v. Central Mo. State College*, 415 F.2d 1077 (8th Cir. 1969), *with id.* at 1090 (Lay, J., concurring & dissenting). A number of questions concerning the scope of the federal action and its relationship to state court review remain unanswered. Is the exhaustion doctrine applicable to § 1983? See *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Stevenson v. Board of Educ.*, 426 F.2d 1154, 1157 (5th Cir. 1970); Note, *supra* note 404, at 1498-1501; Comment, *Exhaustion of State Remedies under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968). What is the proper standard of proof or scope of review? See *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1090-92 (8th Cir. 1969) (Lay, J., concurring & dissenting); *Freeman v. Gould Special School Dist.*, 405 F.2d 1153, 1161-67 & n.9 (8th Cir. 1969) (Lay, J., dissenting), *cert. denied*, 396 U.S. 843 (1969). Would a state court decision on the constitutionality of a challenged procedure be res judicata in a federal court action? See Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158, 187-88.

⁴⁰⁶ See, e.g., *Brown v. Strickler*, 422 F.2d 1000 (6th Cir. 1970). But see *Stevenson v. Board of Educ.*, 426 F.2d 1154 (5th Cir. 1970) (dictum) (exhaustion); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970); *King-Smith v. Aaron*, 317 F. Supp. 164 (W.D. Pa. 1970) (abstention); *Rose Chalet Functions Corp. v. Evans*, 264 F. Supp. 790, 796 (D. Mass. 1967), *noted in* 55 GEO. L.J. 1168 (1967).

cation of the abstention doctrine,⁴⁰⁷ the disciplined student might be confronted with the frequently repeated admonition that he has no right to judicial review of administrative decisions.⁴⁰⁸ Yet in the administrative law area there are scattered suggestions that due process may require some form of judicial determination to protect individuals from arbitrary administrative actions.⁴⁰⁹ Professor Jaffe argues that, in some contexts, "due process may require judicial process."⁴¹⁰ At common law, as he points out, reviewability of administrative action is presumed,⁴¹¹ and as a general rule statutory review is provided either explicitly⁴¹² or by judicial interpretation drawing upon the common law presumption.⁴¹³ In view of this background, the absence of clear authority supporting a constitutional right to judicial review does not appear to be a weighty consideration. Most of the Supreme Court cases denying review can be explained as invoking what the Court apparently considered to be special considerations,⁴¹⁴ none of which seem applicable to school discipline cases.⁴¹⁵ Even those decisions denying review as of right have ordinarily involved a question of timing or proper procedure rather than an absolute bar to review of the particular issues raised,⁴¹⁶ and in areas in which administrative

⁴⁰⁷ We note that the United States District Courts are flooded with claims allegedly arising under the Civil Rights Act. . . . Using the federal Civil Rights Act as a vehicle to threaten every exercise of discretion in matters legitimately within the area of a state's competence is not the purpose of this grant of jurisdiction to the federal courts.

King-Smith v. Aaron, 317 F. Supp. 164, 166 (W.D. Pa. 1970).

⁴⁰⁸ See 4 K. DAVIS, *supra* note 121, at ch. 28.

⁴⁰⁹ See, e.g., Yakus v. United States, 321 U.S. 414, 444 (1944); Ng Fung Ho v. White, 259 U.S. 276 (1922). But see 4 K. DAVIS, *supra* note 121, at 107 n.24.

⁴¹⁰ L. JAFFE, *supra* note 395, at 388.

⁴¹¹ See Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 420 (1958); cf. 4 K. DAVIS, *supra* note 121, at 25.

⁴¹² Cf. L. JAFFE, *supra* note 395, at 353.

⁴¹³ See *Oestereich v. Selective Serv. Bd. No. 11*, 393 U.S. 233, 238 (1968); *Stark v. Wickard*, 321 U.S. 288 (1944); *Ross v. Wilson*, 308 N.Y. 605, 127 N.E.2d 697 (1955); *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 199, 94 N.W.2d 711, 716 (1959); 4 K. DAVIS, *supra* note 121, at §§ 28.01, 28.08-16; L. JAFFE, *supra* note 395, at 353-63.

⁴¹⁴ See 4 K. DAVIS, *supra* note 121, at 32.

⁴¹⁵ Professors Davis and Jaffe have both offered tentative explanations for this apparently inconsistent web of decisions. See 4 K. DAVIS, *supra* note 121, at 103-07 (benefit-obligation scale); L. JAFFE, *supra* note 395, at 381-89 (right exists when person is the "object of enforcement"). Perhaps focusing on the students as beneficiaries of a government program would suggest the lack of a right to review under the Davis rationale, but in view of the importance of the educational interest, even this conclusion is doubtful. Focusing upon the compulsory nature of the educational system and the coercive nature of all discipline would suggest that the right does exist under the Jaffe rationale.

⁴¹⁶ For example, although an order certifying a bargaining representative could not be directly reviewed in *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943), the employer could challenge the order in a refusal-to-bargain proceeding from which he has a statutory right to review.

decisions have been held unreviewable, procedural irregularity has tended to be an exception.⁴¹⁷

The importance of the juvenile court analogy for school discipline procedures prompts recognition that the existence of a right to review has also repeatedly been rejected in the criminal law area. The leading case for the proposition that due process does not provide review as of right from a criminal conviction is *McKane v. Durston*.⁴¹⁸ General changes in appellate practice making the right of appeal a part of the ever-developing concept of fundamental fairness⁴¹⁹ may, however, have made *McKane* obsolete.⁴²⁰ Although all members of the Court speaking in *Griffin v. Illinois*⁴²¹ repeated the *McKane* rule, the Court's insistence that a transcript be provided those who could not afford one need not be read simply as an equal protection ruling. The cases following *Griffin* were influenced in part by the Court's view that indigent defendants suffered a fundamental loss through various restrictions on their opportunity to obtain judicial review.⁴²² Moreover, in deferring any decision on the petitioner's claim to a transcript and review in *Gault*, the Court did not cite *McKane* and cited *Griffin* only for the cautious proposition that "this Court has not held that a State is required by the Federal Constitution" to provide appellate review.⁴²³

Thus the statements and holdings to the contrary do not necessarily preclude recognition of a constitutional right of review under appropriate circumstances. That due process does not require judicial review in all cases at all stages is not inconsistent with the conclusion that due process will often require a record and an opportunity to appeal in school discipline cases. Because judicial review may be constitutionally required and has generally been available, focusing on the requirement of providing an appropriate record of the discipline proceeding seems desirable. To place that discussion in proper perspective, however, three collateral issues must be considered.

First, what should be the impact on judicial review of previous administrative review? If a school principal is the initial decision-

⁴¹⁷ See *Ellerd v. Southern P.R.R.*, 241 F.2d 541 (7th Cir. 1957); *Chambers v. Robertson*, 183 F.2d 144 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 37 (1951), *noted in* 64 HARV. L. REV. 490 (1951); L. JAFFE, *supra* note 395, at 355.

⁴¹⁸ 153 U.S. 684 (1894).

⁴¹⁹ See *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 108 (1963).

⁴²⁰ See HALL, KAMISAR, LAFAYE & ISRAEL, *MODERN CRIMINAL PROCEDURE* 1244-45 (3d ed. 1969).

⁴²¹ 351 U.S. 12, 18 (1956); *id.* at 21 (Frankfurter, J., concurring); *id.* at 27 (Burton, J., dissenting); *id.* at 36 (Harlan, J., dissenting).

⁴²² "Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." *Id.* at 18-19 (footnote omitted). See *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 105-08 (1963).

⁴²³ 387 U.S. at 58.

maker, his decision might be reviewed by the superintendent or the board of education;⁴²⁴ or decisions of the district board of education might be reviewed by the county board of education,⁴²⁵ the state commissioner,⁴²⁶ or the state board of education.⁴²⁷ Any review of the original decision tends to provide additional assurance that the student is being dealt with fairly, but the extent of the protective effect is questionable, depending primarily upon the independence and competence of the reviewing body. The review is usually more meaningful when performed by an agency which has no continuing contact or institutional identification with the body being reviewed. In some instances administrative review of local decisions by state educational bodies has been vigorous and independent.⁴²⁸ If the reviewing agency is an educational body, it may be unencumbered by the courts' overly deferential attitude toward educators' decisions. Nevertheless, intramural administrative reviews involve institutional and individual members of the educational establishment.⁴²⁹ The courts, on the other hand, have a certain detachment from the educational system. Also, they have a particular competence for evaluating legal claims—particularly procedural claims—and a special duty to protect individual, and especially constitutional rights. For these reasons, administrative review is not a substitute for judicial review.

Secondly, the court's function should be to review what the educational administrative agency has done, not to grant a trial de novo. Yet a court may purport to grant a de novo review, in which case it will be argued that the court's hearing renders moot any departure from due process in the disciplinary proceeding.⁴³⁰ For example, in *Barker v. Hardway*⁴³¹ the suspended college students had refused to appear at the disciplinary hearing without counsel. The court of appeals said that the claimed absence of procedural due process was rendered moot because the district court had given the students a de

⁴²⁴ See, e.g., HAWAII REV. LAW § 298-11 (1968).

⁴²⁵ Cf. IOWA CODE ANN. § 290.1 (1949).

⁴²⁶ See, e.g., N.Y. EDUC. LAW § 310 (McKinney 1969).

⁴²⁷ See N.J. STAT. ANN. § 18A:6-27 (1969) (appeal from state commissioner to state board of education).

⁴²⁸ See, e.g., *In re Myers* (N.Y. Commissioner of Education, July 25, 1969, No. 8021) (short hair rule for basketball team invalid); *In re Cossey* (N.Y. Commissioner of Education, July 25, 1969, No. 8022) (short hair rule invalid); *In re Johnson* (N.Y. Commissioner of Education, July 25, 1969, No. 8023) (no-slacks-for-girls rule invalid).

⁴²⁹ See J. CONANT, *SHAPING EDUCATIONAL POLICY* 7, 37 (1964).

⁴³⁰ See *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934); *Phillips v. Commissioner*, 283 U.S. 589, 596-98 (1931); *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708-10 (1884); 1 K. DAVIS, *supra* note 121, at § 7.10 (1958). But see *Bishop v. Rowley*, 165 Mass. 460, 43 N.E. 191 (1896) (when facts are in dispute, hearing must be granted).

⁴³¹ 399 F.2d 638 (4th Cir. 1968) (alternative holding), *cert. denied* 394 U.S. 905 (1969).

novo hearing. But an examination of the district court's opinion leaves no doubt that this view is erroneous.⁴³² The district court correctly observed its duty to exercise restraint and recognize a broad discretionary power in the college authorities. Although the district court gave the students ample opportunity to prove that they had been wronged, it did not in any sense relitigate the fundamental question whether the students should have been suspended. Curing administrative procedural defects through a de novo hearing seems completely sound in principle, but a de novo hearing is unlikely to be given in fact,⁴³³ particularly because of the critical importance of discretion in the school discipline area.⁴³⁴ As a consequence the student, as in *Barker*, receives due process from neither the disciplinary hearing nor the judicial trial.⁴³⁵

Thirdly, review based upon a record must be distinguished from some courts' practice of issuing general guidelines for student disciplinary proceedings. In *Dixon*, for example, the court held that the students could not be expelled without notice or a hearing, and then concluded: "For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process" ⁴³⁶ Important as such guidelines are, they represent a prediction of what fundamental fairness will

⁴³² See 283 F. Supp. 228 (S.D.W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied* 394 U.S. 905 (1969).

⁴³³ See 1 K. DAVIS, *supra* note 121, at §7.10; *cf.* *Armstrong v. Manzo*, 380 U.S. 545, 551-52 (1965). The principle of cure by de novo hearing had its origin in a tax assessment case, *Hagar v. Reclamation Dist.*, 111 U.S. 701 (1884), and its application has generally been limited to cases involving property interests. See, e.g., *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931) (postponement "not a denial of due process" when "only property rights are involved"). When the issue is the correctness of a land tax assessment, the issue is presumably determined by the court on the basis of fresh evidence and a complete hearing.

⁴³⁴ See, e.g., *Hobson v. Bailey*, 309 F. Supp. 1393 (W.D. Tenn. 1970); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174, 180 (M.D. Tenn. 1961); *Bishop v. Rowley*, 165 Mass. 460, 43 N.E. 191 (1896); *cf.* *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

⁴³⁵ Suppose a student is expelled for attacking a fellow student. The student is denied a right to be represented by counsel and to cross-examine witnesses before the board of education but is permitted to make a statement; somewhat ambiguously, he states that his action was taken in self-defense and was provoked. The board of education gives no reason for its decision to expel. Assume that as a matter of law an expulsion would not be justified if the student acted in self-defense but that provocation is only one circumstance to be considered in determining the legality of an expulsion. In a "de novo hearing" the court permits legal representation and cross-examination. The student's lawyer brings out testimony that convinces the court that the student was not attacked but was maliciously provoked, yet the evidence is sufficiently confused by conflicting statements and questions of credibility that a reasonable fact-finder could make the opposite determination on either point. The court will probably not set its judgment as fact-finder against that of the board of education. Even if it would, however, the court would not determine that the student should not have been expelled. Furthermore, even a remand for reconsideration would be ineffective for the student unless it includes a directive that he be permitted to have counsel and cross-examination. The student needs an opportunity to show the most favorable facts to the body exercising discretion. This illustration is based upon a comparable example in *L. JAFFE, supra* note 395, at 188.

⁴³⁶ 294 F.2d at 158.

require rather than a determination after the fact whether fundamental fairness was satisfied. Such predictions may result in lower or higher standards—lower because of a reluctance to exceed established practice without a convincing showing of need, higher because of the absence of the burden of a rehearing on the school.

That issuing guidelines is different from reviewing and that the resulting standards may not be identical does not mean that guidelines are inappropriate. On the contrary, especially during the initial stages of giving content to the requirements of due process in disciplinary proceedings, guidelines are highly desirable to avoid forcing school authorities to guess blindly at what is expected. Because they are issued without the benefit of a record, however, guidelines should be announced as tentative and noncontrolling. The approach of the District Court for the Western District of Missouri is highly commendable.⁴³⁷ That district court's guidelines were issued after a rulemaking-type hearing in which interested parties participated.⁴³⁸ The resulting guidelines were not directly tied to a particular litigation and were formulated in language sufficiently broad and qualified to permit the court to add and subtract as future circumstances might require.

2. The Requirement of a Record for Review

One pitfall in evaluating the constitutional decisions concerning review and record is the frustrating circularity of much of the discussion. The absence of a right to review has been offered to justify the denial of a record appropriate for review,⁴³⁹ and the absence of a record has in turn been used to explain the refusal to review.⁴⁴⁰ None of the college discipline cases has isolated the requirement of a hearing record for explicit discussion, but several have mentioned the existence of a transcript, apparently as a circumstance bearing favorably upon the fairness of the hearing.⁴⁴¹

A hearing record would be desirable, of course, even in the absence of judicial review if administrative review were available. Even with no formal review, a record of the hearing would give the student an opportunity to identify potential errors for the school authorities, and

⁴³⁷ General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

⁴³⁸ *Id.* at 134.

⁴³⁹ See *In re Gault*, 99 Ariz. 181, 192, 407 P.2d 760, 768 (1965), *rev'd*, 387 U.S. 1 (1967).

⁴⁴⁰ See L. JAFFE, *supra* note 395, at 165-92.

⁴⁴¹ See *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970). In *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967), the court stated that "either side" should be permitted to "make a record of the events at the hearing" at its own expense. *Id.* at 652.

they might reexamine the record for errors. Knowing that subsequent checks may be made by the student or those acting for him, the initial decisionmaker will make his decision more carefully in the first place.

Judicial review serves a number of related functions: ascertaining the sufficiency of evidence; determining whether discretion was properly exercised; seeing that the correct rule of law was applied; confining the administrative body within its jurisdictional limits; and requiring procedural regularity. Some form of record is necessary for the reviewing court to know accurately what took place at the hearing. This information could be brought before the reviewing court through the testimony of those participating in the hearing. Although this procedure does not necessarily require *de novo* review, it does entail considerable inefficiency and a high risk of inaccuracy through lapse in memory and self-interested distortions. It also has the disadvantage of making witnesses of the school authorities who were the judges at the hearing—always an awkward practice.⁴⁴²

The ideal record would include transcripts and written opinions, but neither is likely to be required. Rather than asking school authorities to write judicial opinions, courts will probably require no more than a brief statement linking the factual record with the legal basis of decision.⁴⁴³ Transcripts are expensive, and the presence of a stenographer arguably adds to the formality of the hearing. Nevertheless, the right of a party to a transcript for which he is willing to pay has been recognized in many contexts.⁴⁴⁴ Granting this right would place no financial burden on the school. Naturally, if a verbatim transcript is made available to those students willing to pay for it, problems concerning the unequal treatment of indigent students are raised. These problems are comparable to the right-to-counsel problems,⁴⁴⁵ with some differences. On the one hand, the burden on the school is almost exclusively financial, with no comparable problems of organization and logistics. The cost, although significant, is likely to be less than lawyers' fees. On the other hand, being deprived of a transcript may be less oppressive than being without a lawyer.⁴⁴⁶

In a few situations the availability of review will not automatically require a record. For example, if it is conceded that the student re-

⁴⁴² See *In re Gault*, 387 U.S. 1, 58 (1967).

⁴⁴³ Cf. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (if the hearing is not before the decisionmaker, the "results and findings" of the hearing should be presented in a report open to the student).

⁴⁴⁴ See 1 F. COOPER, *supra* note 125, at 431-32; 1 K. DAVIS, *supra* note 121, at § 8.14.

⁴⁴⁵ See text accompanying notes 314-24 *supra*.

⁴⁴⁶ Tape recordings have been suggested as an alternative to transcripts. See Abbott, *supra* note 73, at 398.

ceived no notice whatsoever of the charges on which he is being disciplined, a reviewing court might be justified in reversing on due process grounds without looking further. Similarly, failure to permit a student to answer charges of misconduct would conclusively establish a lack of due process. In the majority of cases, however, a record would be necessary for effective judicial review.

E. Recapitulation: The Interrelationship of Procedural Safeguards in Securing a Fair Hearing

The thesis of this Article is that procedural safeguards are not absolute constitutional requirements but may be required to satisfy due process under the circumstances of particular cases. Whether a court will decide that the denial of a specific safeguard resulted in a fundamentally unfair hearing will be influenced by the availability of other safeguards. Thus, the case for requiring cross-examination is much stronger when the tribunal is lacking in experience or impartiality, since a professional, impartial tribunal may achieve some of the goals of cross-examination. Or, a student may need cross-examination most when he is denied legal representation, and the absence of counsel will make it much more difficult to establish prejudice resulting from lack of cross-examination; under these circumstances a court would likely require and carefully peruse a hearing record to ascertain whether the hearing was fair. Conversely, a court might determine from a careful examination of the record that the benefits associated with representation by counsel were supplied by other procedural safeguards. Of course, this would require a determination that the other procedures did compensate for the lack of counsel; mere existence of other procedures would be inadequate. Did the tribunal help the student to present his case? Did the student develop an orderly and complete line of questioning? If the student did not suffer by being denied counsel, then the court would be justified in concluding that fundamental fairness had been afforded.

If this balancing approach is adopted in the school discipline area, the task of the reviewing court is to examine all of the relevant circumstances and then to exercise a judgment concerning the fairness of the hearing. Performing this task necessitates a hearing record, and hence the right to a transcript may properly be thought of as a derivative right indispensable to the preservation of other rights. On this theory, even the absence of all other safeguards—cross-examination, counsel, impartial tribunal—would not automatically constitute a denial of due process. Cumulative denials of procedural safeguards

could, however, foster skepticism on the part of the court. A skeptical court would demand convincing evidence of fairness in the record.

As a protective device for the student's interests, the record is both the least and the most important single safeguard. If the other three safeguards are granted, the student has most likely received a fair hearing; if he did not receive a fair hearing, nothing would be more likely to reveal the deficiency to the reviewing court than an adequate record. With an adequate record, the court might be able to determine the effect of a hearing with no counsel or right to cross-examine before an improperly interested or biased tribunal.⁴⁴⁷ The presumption would certainly be that due process was denied under these conditions, but the court might determine from the record that the student did receive a fair hearing. Although none of the student discipline cases have involved proceedings so weighted against the student as this, courts have occasionally looked to the record and been convinced of fairness despite substantial procedural handicaps.⁴⁴⁸ Of course, when a fair hearing has been denied, a good record cannot supply the missing fairness.

IV. CONCLUSION

The teacher is writing on the blackboard. He hears the sound of paper ripping and whirls to see Johnny jump back into his seat. Upon investigation he finds that the western half of the United States has seceded from the atlas. Confronted by the teacher's angry eyes, Johnny flushes. "No gym for the next two weeks, Johnny." "But" "No gym for two weeks!" A denial of due process? Johnny had a hearing of sorts. But he did not have adequate notice, an opportunity to present his own case, a right to cross-examine, or representation by counsel; no record was made, and the decision was rendered by a biased tribunal acting as investigator, prosecutor, and judge. Due process of law makes weak demands in a case like this, but neither because the student's liberty is unaffected nor because the procedure afforded is particularly "fair." Due process requires relatively little in this situation because the injury is de minimis or because requiring more would unduly burden school administrations. As this

⁴⁴⁷ But see Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 540-47 (1969); Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 820-24 (1970).

⁴⁴⁸ See cases cited note 374 *supra*; *Davis v. Ann Arbor Pub. Schools*, 313 F. Supp. 1217, 1226-27 (E.D. Mich. 1970). But see *Gardner v. California*, 393 U.S. 367, 369 (1969); *Hardy v. United States*, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring). The disadvantage of a lack of transcript for the indigent defendant's lawyer is somewhat offset by the reviewing court's ability to look through the transcript; this possibility would not exist, of course, if there were no transcript at all.

vignette reminds us, the peculiar tension between what a constitutional principle seems to demand of school authorities and what the courts will actively enforce changes in degree and probably also in character as the disciplinary sanction becomes less and less serious. Johnny may have been wronged, but we do not expect him to be able to obtain redress in court. Yet, even if the enforcing arm of the courts does not extend to this situation, surely the shadow of constitutionally required due process is present. Johnny's interest in a system of discipline that meets the requirements of fundamental fairness does not depend upon the involvement of the judiciary.

This brings me to two simple, concluding thoughts. First, the courts will not be anxious to intervene in school discipline disputes, especially when the threatened sanction is something other than expulsion or a long-term suspension. The possible impact of expulsion upon a student's life is now generally regarded as sufficiently grave to warrant judicial involvement, but the courts did not arrive at this point without considerable apprehension and long hesitation. The evidence to date suggests that they will be no more eager to extend their jurisdiction beyond expulsion to lesser forms of discipline. Nevertheless, the courts will occasionally intervene when the injustice to the student appears to be compelling and there is no tenable basis for avoiding judicial action. It seems desirable for the courts to intervene periodically to stimulate a regime of due process within the schools—a state of affairs not likely to be arrived at without prompting. Second, with a minimum of prodding from the courts, the main task of upholding fundamentally fair student discipline procedures necessarily rests with those directly responsible for the operation of the school. This implementation of due process by the schools must proceed with a sensitive awareness of the student's interests and with the fullest possible utilization of the procedures considered in this Article. Recognition of these requirements will not entail converting the schools into a formal judicial system. Because the essence of due process is flexibility, the content and form of required procedures may be tailored to fit the scale and informality appropriate to the circumstances of school discipline.