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Expulsion of College and Professional Students -- Rights and Remedies

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Introduction

College students of all ages have had at least one thing in common — a certain number of them are bound to get into trouble. In fact, much of our knowledge of the students of medieval universities comes from the records of police courts, to which the extracurricular activities of the students often led them.[1] Modern students, too, often find themselves subjects of disciplinary action, as evidenced by three recent cases — *Dixon v. Alabama State Board of Education*,[2] in which six Negro students were expelled from the Alabama State Teachers College for allegedly participating in a "sit-in" demonstration; *Knight v. State Board of Education*,[3] in which a group of students was expelled for being arrested in connection with a "freedom ride"; and *Carr v. St. John's University*,[4] in which four students were expelled from a Catholic university for participating in a civil marriage ceremony.

The problem in this area is a familiar one: colleges and universities must have the power to establish and enforce rules, both disciplinary and academic, in order to further their interests, while the student charged with a violation of these rules has the opposing interest of protecting himself from being arbitrarily deprived of educational opportunities.

It will be the purpose of this note to examine the rights of students when faced with lengthy suspensions or expulsion on grounds of misconduct, and the remedies available to them when these rights are violated. Of particular concern is the right of the student to notice and hearing before the infliction of severe penalties.

Reluctance of Courts to Intervene in School Discipline

The first obstacle to face a student complaining of an injustice in his dismissal is the extreme reluctance of the courts to enter into the area of college discipline. A typical position is that taken by the court in *Frank v. Marquette University*,[5] in holding that university officials could not be compelled to produce records to justify dismissal of a student for certain conduct although others had not incurred a similar penalty for the same conduct. "So long as they [university officials] act in response to sufficient reasons and not arbitrarily or capriciously, their acts may not be interfered with by the courts."[6] Judicial cautiousness was also shown by the District Court of Massachusetts in *Dehaan v. Brandeis University*[7] in saying that "The court is in a poor position indeed to substitute its judgment for that of the university. . . ."[8] This judicial reluctance has not been confined to the American courts. In *University of Ceylon v. Fernando*[9] the Privy Council upheld the procedure employed in the dismissal of a student as being a matter entirely within the discretion of the vice-chancellor in the absence of a clear showing of an abuse of authority.

Although most courts appear reluctant to intervene in behalf of an expelled student, this reluctance can be overcome, and dismissal of students without notice and the opportunity to be heard has been held an abuse for which the courts will grant relief. For example, in the early English case of *The King v. Chancellor of the University of Cambridge*,[10] where a master was deprived of his academic degrees without notice or hearing, the court condemned the procedure as "contrary to

1 La Monte, The World of the Middle Ages 573 (1949).
2 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).
3 200 F. Supp. 174 (M.D. Tenn. 1961).
4 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd*, N.Y. (1962).
5 209 Wis. 372, 245 N.W. 125 (1932).
6 *Id.* at 127; *but see*, on the question of unequal treatment, State *ex rel.* Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N.W. 294 (1908).
7 150 F. Supp. 626 (D. Mass. 1957).
8 *Id.* at 627.
9 1 Weekly L.R. 223 (P.C. 1960).
10 2 Ld. Raym. 1334, 92 Eng. Rep. 370 (K.B. 1732).

natural justice." A student dismissed under similar circumstances was reinstated in *Gleason v. University of Minnesota*[11] because of abuse of discretion on the part of the university officials.

In most of the cases where some sort of hearing, however brief and informal, has been held, the courts have deferred to the discretion of the school officials. In *State ex rel. Ingersoll v. Clapp*[12] it was held that any method adopted by the university president, except where such is a clear abuse of his authority, would not be interfered with. No abuse of discretion was found where a student nurse was dismissed on one hour's notice and without any opportunity to hear the evidence against her,[13] and a similar result was reached where the only hearing consisted of an interview with the dean of women.[14]

One reason advanced for the court's reluctance in this area is that given in *Gott v. Berea College*.[15] College officials, according to this view, stand in loco parentis with regard to the physical, mental, and moral training of their students and may make any rules or regulations which parents might make for the same purpose and, presumably, enforce them as parents might. Though this view seems to be implicit in a number of the decisions,[16] the argument seems to falter with regard to present-day students, large numbers of whom have reached their majority, are married, and are paying for their own education; when used to justify the dismissal of students without notice or hearing, the analogy breaks down completely.[17]

The reluctance of courts to interfere in cases of college disciplinary action is founded on the historical independence of universities from intervention by outsiders in their internal affairs — an independence which continues to be guarded jealously by the universities.[18] Admittedly college officials are in a better position than the courts to administer discipline, but the attitude of judicial self-restraint in such matters should not be allowed to countenance an injustice to the dismissed student.

Attendance — Right or Privilege?

School officials sometimes rationalize their asserted authority to dismiss students summarily on the grounds that attendance is a privilege which is revocable at will by the grantor. Such an argument raises the question of whether attendance is a privilege or a right and the further question: does it make any difference?

Some courts have based their analysis of the rights of dismissed students on this right-privilege question; others have disregarded this categorization and looked

11 104 Minn. 359, 116 N.W. 650 (1908).

12 81 Mont. 200, 263 Pac. 433 (1928).

13 Beatty v. Bd. of Managers of Binghamton City Hosp., 130 Misc. 181, 224 N.Y.Supp. 201 (Sup. Ct. 1927).

14 Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).

15 156 Ky. 376, 161 S.W. 204 (1913).

16 *E.g.*, John B. Stetson Univ. v. Hunt, 55 Fla. 510, 102 So. 637 (1924); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).

17 Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77, 87-88 (1887).

> It might well be a subject of discussion what is meant by parental discipline when applied to a man who has attained his majority; and, even in the case of a minor son, the circumstances would be rare, which could demand an expulsion from the parental roof and the hospitalities and associations of home. Nor even if such circumstances existed, would any prudent parent impose so serious a penalty, without first consulting the primary sources of his information, and freely communicating them to his accused son, and according to him the amplest time and opportunity to exculpate himself.

18 This was illustrated by the recent action of the Southern Association of Colleges and Secondary Schools in the aftermath of the intervention of state officials in the University of Mississippi integration controversy. All of the state colleges in Mississippi were warned that any further interference by state officials in student discipline would result in loss of accreditation. N.Y. Times, Dec. 5, 1962, p. 39, col. 3.

instead at the hearing afforded the student. In *State ex rel. Sherman v. Hyman*[19] the court chose the former approach and, although it conceded the study of medicine to be a property right, it held the due process clause of the Fourteenth Amendment not applicable where the school enforces its rules of conduct in a reasonable manner. The latter approach was taken by the courts in *Dixon v. Alabama State Board of Education*[20] and *Knight v. State Board of Education*,[21] both cases involving state-supported schools. The courts felt that categorization was irrelevant in these cases, for both privileges and rights are entitled to the protection of due process of law. The *Dixon* court stated that when the revocation of a privilege granted by the government necessarily involves injury to the individual, the Constitution requires such action to be in accordance with due process, and the court in *Knight* said that "Private interests are to be evaluated under the due process clause . . . , not in terms of labels or fictions, but in terms of their true significance and worth."[22] These courts find their foundation in *Cafeteria and Restaurant Workers Union v. McElroy*,[23] where the Supreme Court upheld the proposition that due process protects more than judicially-defined "rights," and in *Weiman v. Updegraff*,[24] where the Supreme Court said, with regard to a government employee's dismissal:

> We do not pause to consider whether an abstract right to public employment exists. It is sufficient to say that Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[25]

School Officials — Types of Authority — In General

No discussion can be made of the limits of the discretion of college officials without first considering the nature of the authority exercised by such officials.[26] Two types of authority are exercised by administrative bodies — here, by the school boards and officials. On the one hand, the body acts in a *legislative* capacity in establishing rules and regulations for governing a college or university in general, while its function in enforcing such regulations is essentially *judicial* in character. To establish, for example, a rule that any student who participates in unauthorized public demonstrations will be liable to expulsion is quite a different matter from determining that a particular student has violated this rule by participation in a public demonstration and is therefore subject to dismissal. In the former case, the officials are creating general policy and rely on arguments concerning the wisdom of the proposed rule, while when acting judicially, they are gathering facts, often in dispute, to prove or disprove an accusation.

Whenever an administrative body acts in a legislative capacity, as found in *Bi-Metallic Investment Co. v. State Board of Equalization*,[27] the Fourteenth Amendment does not require a hearing for each individual affected before the general ruling is made. When administrative officials act in a judicial capacity, however, "under the requirements of procedural due process there must be notice to affected parties and an opportunity to be heard."[28]

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19 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943).
20 294 F.2d 150 (5th Cir. 1961).
21 200 F. Supp. 174 (M.D. Tenn. 1961).
22 *Id.* at 178.
23 367 U.S. 886 (1961).
24 344 U.S. 183 (1952).
25 *Id.* at 192.
26 For a general discussion of the authority of state college officials see Ray, *Powers and Authorities of the Governing Bodies of State Colleges and Universities*, 17 KY. L.J. 15 (1928). A discussion of legislative authority of school boards in a particular situation is found in Kissick v. Garland Independent School District, 330 S.W.2d 708 (Tex. Civ. App. 1959). See treatment, 36 NOTRE DAME LAW. 89 (1960).
27 239 U.S. 441 (1915).
28 United States v. McCrillis, 200 F.2d 884, 888 (1st Cir. 1952).

Limitations on Rule-Making Powers of School Officials

Although school officials are allowed wide discretion in establishing the rules and regulations which govern their schools, there must be limits placed on this power. Any rule, the violation of which may entail so severe a punishment as expulsion from a college or professional school, should be specific enough to forewarn the student of the consequences of his action. This is not to say, however, that university regulations must meet the standards of specificity required of a penal code. The regulation in question in *Carr v. St. John's University*[29] required "conformity with the ideals of Christian education and conduct." It was condemned by the trial court as "so vague and indefinite that men of common intelligence must necessarily conjecture as to its meaning and differ as to its application."[30] Even a moral theologian might be hard put to apply such a standard to every activity of student life.

The court in *Knight v. State Board of Education*[31] suggested a possible limitation on the rule-making discretion. There must be a reasonable connection between the misconduct proscribed by a rule and the interest which the school is seeking to protect under the rule before students can be dismissed. In *Knight,* a directive of the Tennessee Commissioner of Education called for dismissal of any student arrested and convicted on charges involving personal misconduct on the ground that such misconduct reflects discredit upon the institution in which the student is enrolled. From this the court concluded that not only must the college president determine that a student has been arrested and convicted, but also that the misconduct in question was of a type and of such gravity that it would reflect discredit and dishonor upon the school.

Another limitation on the rule-making authority of school officials should be a requirement that the punishment fit the offense. Since there is a wide array of penalties, including various types of probation, suspension, and expulsion, open to college officials, it is not too difficult to match the punishment to the offense.

An example of a seemingly overharsh penalty is found in *People ex rel. O'Sullivan v. New York Law School.*[32] There a student member of a committee assisting in making arrangements for commencement became incensed over what he considered an instance of bad faith on the part of the school officials in regard to the arrangements. In a private interview with the dean of the law school, the student allegedly was contumacious. The dean expelled him. The court held that the student was not entitled to mandamus to compel the award of his diploma, but that he was entitled to a certificate of attendance and successful passage of examinations. There were other, not so drastic, courses open to the dean in this situation: the awarding of the degree might have been postponed; or adverse recommendations, based on this incident, might be given to employers and others who might inquire about the student's law school record.

In some isolated instances the courts have attacked the regulations themselves, as in *State ex rel. Clark v. Osborne*[33] where the court held that the school had exceeded its authority in making and enforcing a regulation requiring students to obtain permission from the school before attending social affairs. The case arose when a student was expelled after attending a party with her father's permission and in the company of her brother, but without the requisite permission of the school. The court ordered reinstatement.[34]

29 231 N.Y.S.2d 403 (Sup. Ct.), *rev'd,* 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd* N.Y., N.Y.S.2d (1962).
30 *Id.* at 413.
31 200 F. Supp. 174 (M.D. Tenn. 1961).
32 68 Hun 118, 22 N.Y.Supp. 663 (Sup. Ct. 1893).
33 24 Mo. App. 309 (1887).
34 *But cf.* United States *ex rel.* Gannon v. Georgetown College, 28 App. D.C. 87 (1908).

Requirement of Notice and Hearing Before Dismissal

Generally it can be said that schools are required to give notice and hold a hearing before dismissing students from school, and this is true whether the school is tax-supported or a private institution. The genesis of this rule is found in a 1732 case in which the King's Bench condemned the deprivation, without notice or hearing, of a master's academic degrees.[35] An early case in this country extended the rule, the court holding that a student is entitled to a hearing with the incidents of a trial before expulsion.[36]

With regard to tax-supported institutions, this rule might be considered unanimous, the only possible exception being *People ex rel. Bluett v. Board of Trustees*,[37] in which a woman medical student was expelled from the University of Illinois for allegedly cheating in examinations. But even in this case the opinion is somewhat ambiguous, and perhaps the inference can be made from the holding that though no "formal" hearing was required, at least some sort of fact-finding is necessary. This inference is supported by the court's citation of *Smith v. Board of Education*,[38] in which it was said that "the Board of Education is authorized in a reasonable and parliamentary way to investigate charges of disobedience or misconduct. . . ."[39]

A number of cases strongly imply that notice and hearing are required before dismissal because of the discussions of the adequacy of the hearing which was held.[40] Necessity of a hearing also seems to have been implied where a student was held not to have exhausted his recourse to the school officials before appealing to the court,[41] and in cases where he was held to be seeking the wrong remedy.[42]

Although the general rule has not been as universally applied in the case of private schools as with tax-supported schools, some courts have required more than minimal hearings when students have been dismissed from private institutions. The court in *State ex rel. Arbour v. Board of Managers of Presbyterian Hospital*[43] said that if the student had not made any agreement to submit controversies to a particular body and be bound by its decisions, she was entitled to notice and a public trial and hearing, including the right to be confronted by witnesses against her and to be heard in her own defense and through witnesses. In *Koblitz v. Western Reserve University*[44] less emphasis was placed upon the procedural requirements, but the court held that the faculty should allow a dismissed law student every fair opportunity of showing his innocence and act upon evidence received against him with the fairness expected of jurors. In *Baltimore University v. Colton*,[45] a law student denied permission to take his final examinations was held to be entitled to mandamus, on the grounds that he had not been given sufficient notice.

In cases in which it was held that private schools were under no obligation to afford a hearing to students before dismissal, the courts have usually found that the university reserved a contractual right of summary dismissal, or that the student had otherwise waived his right to a hearing. In *Dehaan v. Brandeis Uni-*

35 The King v. Chancellor of the University of Cambridge, 2 Ld. Raym. 1334, 92 Eng. Rep. 370 (K.B. 1732).

36 Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887).

37 10 Ill. App. 2d 207, 134 N.E. 635 (1956).

38 182 Ill. App. 342 (1913).

39 *Id.* at 346.

40 See Steier v. New York Educ. Comm'r, 161 F. Supp. 549 (E.D.N.Y. 1958); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928); Beatty v. Bd. of Managers of Binghamton City Hosp., 130 Misc. 181, 224 N.Y.Supp. 201 (Sup. Ct. 1927); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); University of Ceylon v. Fernando, 1 Weekly L.R. 223 (P.C. 1960).

41 See State *ex rel.* Dodd v. Tison, 175 La. 235, 143 So. 59 (1932).

42 See State *ex. rel.* Arbour v. Bd. of Managers of Presbyterian Hosp., 131 La. 163, 59 So. 108 (1912); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909).

43 131 La. 163, 59 So. 108 (1912).

44 21 Ohio C.C.R. 144 (1901).

45 48 Md. 623, 57 Atl. 14 (1904).

versity,[46] where the university had reserved the power of dismissal without showing cause, the court said "While it might be a better policy to hold a hearing whenever any disciplinary action is contemplated by the university, I hold as a matter of law that the defendant is not required to do so."[47] In *Robinson v. University of Miami*,[48] the court stated what it considered to be a general principle that a private university may exercise a reserved right to dismiss summarily as long as the action is taken in good faith and without malice; and in *Barker v. Trustees of Bryn Mawr College*,[49] it was held that a private college need not prefer charges and prove them at a trial before expelling a student if its regulations so allowed.

The most extreme case involving a dismissal under the university's reservation of summary dismissal is *Anthony v. Syracuse University*.[50] A woman student was held to have waived her right to a hearing before dismissal by signing registration cards which referred to that section of the university catalogue which stated that "attendance at the University is a privilege and not a right" and that the school, in order to protect its ideals of scholarship and its moral atmosphere, reserved the right to dismiss students without giving any reason therefor. The court's opinion illustrates the impossible situation in which an expelled student is placed by such a provision.

> The University may only dismiss a student for reasons falling within two classes, one in connection with safeguarding the University's ideals of scholarship, and the other in connection with safeguarding the University's moral atmosphere. When dismissing a student, no reason for dismissing need be given. The University must, however, have a reason, and that reason must fall within one of the two classes mentioned above. Of course, the University authorities have wide discretion in determining what situation does and what does not fall within the classes mentioned, and the courts would be slow indeed in disturbing any decision of the University authorities in this respect.
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> When the plaintiff comes into court and alleges a breach of contract, the burden rests upon her to establish such breach. She must show that her dismissal was not for a reason within the terms of the regulation. The record here is meager on this subject. While no adequate reason was assigned by the University authorities for the dismissal, I find nothing in the record on which to base a finding that no such reason existed. She offered no testimony, either as to her character and relation with her college associates, or as to her scholarship and attention to her academic duties. The evidence discloses no reason for her dismissal not falling within the terms of the regulation. It follows, therefore, that the action fails.[51]

If the court means what it says, it is difficult to see what benefit the plaintiff would have derived from introducing evidence as to her character and scholarship; indeed, it is difficult to conceive of any method short of mind reading by which the plaintiff could have sustained the burden of proof cast upon her.

When one considers the relative bargaining power of the parties and the ability of the student to effect any change in the terms of his admission, the analogy to the yellow dog labor contract is obvious. If such waiver provisions are not so outrageous as to be unenforceable as opposed to public policy and traditional standards of fairness, the courts might well refuse to enforce them on grounds of unconscionability.

Although the courts have had more difficulty, where they have been so inclined, in finding an obligation on the part of private educational institutions to afford a student faced with a charge of misconduct notice and a fair hearing, elementary fairness seems to dictate that this obligation should exist. Professor Seavey finds it shocking for courts to uphold state-supported schools in denying to students "the

46 150 F. Supp. 626 (D. Mass. 1957).
47 *Id.* at 627.
48 100 So. 2d 442 (Fla. 1958).
49 278 Pa. 121, 122 Atl. 220 (1923). *Cf.* John B. Stetson Univ. v. Hunt, 55 Fla. 510, 102 So. 637 (1924).
50 224 App. Div. 487, 231 N.Y.Supp. 435 (1928).
51 *Id.* at 440.

protection given to a pickpocket,"[52] and it is hardly less shocking in the case of private schools.

The position of faculty members is somewhat of an anomoly with regard to school discipline. On the one hand they are often charged with enforcing student discipline, reaching such results as in *Anthony*. On the other hand they have banded together in the American Association of University Professors, in an effort to enforce their own rights. The Association's 1940 Statement of Principles on Academic Freedom and Tenure[53] calls, in cases where facts concerning dismissal are in dispute, for notice in writing of the charge, an opportunity to be heard by all bodies that pass judgment on the case, representation by counsel, and a full stenographic record of the hearing available to all of the parties concerned. Universities found guilty of violating these rights of faculty members are subject to censure by the A.A.U.P.

Nature of Hearing Required

The courts have displayed little agreement in discussing the nature of the hearing which is required before a school may impose disciplinary sanctions against a student. They have varied between the extremes of requiring a full trial-type hearing to upholding an appearance before a single official as sufficient. In *Commonwealth ex rel. Hill v. McCauley*[54] a school which received state benefits expelled a student for allegedly participating in riotous conduct. He was reinstated because none of the witnesses against him had appeared at the hearing. The court held that the student was entitled to notice of the exact nature of the charge against him, and further:

> He was entitled to know what testimony had been given against him, and by whom it had been delivered, and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses and to call others to explain or contradict their testimony.[55]

The court pointed out that the evidence received against the student in the hearing from a janitor of known incredibility and from a student who was never identified "ought not to be and would not be received as competent testimony in the determination of the most trivial rights in the most petty tribunal in the land."[56]

The view just described, unfortunately, is in the minority. The reluctance of the judiciary to interfere with the discretion of school officials, as previously developed, is reflected in the more widely held view that almost any sort of hearing will suffice.[57]

When a state-supported school, as in *Dixon,* is required by the due process clause of the Fourteenth Amendment to give hearings to students before dismissing them, the question arises as to what type of hearing will suffice. The *Dixon* court recognized the principle enunciated by Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath:*[58]

> Due process is not a mechanical instrument. It is not a yardstick. It is a process. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations which must enter into the judicial judgment.[59]

Mr. Justice Frankfurter in the same opinion indicates his belief that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."[60]

52 Seavey, *Dismissal of Students:* "Due Process," 70 HARV. L. REV. 1406, 1407 (1957).
53 Bulletin of the American Association of University Professors, March, 1952, pp. 116-24.
54 3 Pa. County Ct. 77 (1887).
55 *Id.* at 82.
56 *Id.* at 83.
57 Cases cited notes 5-9 *supra.*
58 341 U.S. 123 (1951).
59 *Id.* at 163 (concurring opinion).
60 *Id.* at 170 (concurring opinion).

What seems to be a result of the application of the Frankfurter test of due process was the decision reached by the Privy Council, in *University of Ceylon v. Fernando.*[61] A student who was allegedly cheating was expelled following a hearing in which he was not allowed to confront, or cross-examine, the witnesses against him. The expulsion was upheld. The Privy Council admitted that "the plaintiff might have fared better if the charge against him had been tried in accordance with the more meticulous procedure of a court of law,"[62] including cross-examination of the chief witness against him, but this was not the question as the Privy Council saw it. "The question is whether, on the facts and in the circumstances of this particular case, the mode of procedure adopted by the Vice-Chancellor, in bona fide exercise of the wide discretion as to procedure reposed in him under clause 8, [of the university charter] sufficiently complied with the requirements of natural justice."[63] In this case, since the procedure which was adopted admittedly might have been the cause of the loss of a valuable right or privilege, what assurance is there that "natural justice" is satisfied? Perhaps the solution to the problem is to be reached only by adhering to strict procedural safeguards, as proposed by Mr. Justice Douglas:

> It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.[64]

In the face of the almost universal reluctance of the courts to question the exercise of the broad discretionary power allowed college administrators in *establishing* regulations, it would seem that the procedures for *enforcing* such regulations ought to be more rigidly scrutinized.[65]

The procedural device most often discussed by the courts in relation to the elements of a fair hearing, and the one most often held not essential in student dismissal cases, is the confrontation and cross-examination of witnesses.[66] One court observed that students should not be subjected to cross-examination, because "honorable students do not like to be known as snoopers and informers against their fellows."[67] According to this court, then, the honorable course is to remain a nameless informer — a course of action which has been characterized as:

> [A] field for rumor, for malice, for prejudice, for falsehood, to roam in, leading to conduct on the part of the University which might be entirely honest, but at the same time based upon a total lack or misapprehension of facts![68]

Another court objected to any requirement of production or cross-examination of witnesses on grounds that the university president had no authority to compel the presence or testimony of witnesses.[69] There seems, on the contrary, to be no reason why students, at least, could not be compelled to appear and testify. The fact that students would be testifying under compulsion would also serve to remove the stigma attached to "informing."

The *McCauley* court warned against giving school officials a completely free hand in setting up hearing procedures. Although the administrators may be learned

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61 1 Weekly L.R. 223 (P.C. 1960).
62 *Id.* at 236.
63 *Ibid.*
64 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (concurring opinion).
65 See De Smith, *University Discipline and Natural Justice,* 23 MODERN L. REV. 428, 431 (1960).

> [T]he importance of imposing such duties becomes greater, not less, where the discretion of the deciding authority is so wide as to be almost unreviewable on its merits.

66 *E.g.,* State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928).
67 State *ex. rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, 826 (1942).
68 130 Misc. 181, 223 N.Y.Supp. 796 (Sup. Ct.) *rev'd,* 224 App. Div. 487, 231 N.Y.Supp. 435 (1928).
69 State *ex. rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928).

in other fields, "their conceptions of what would be competent evidence of guilt may be at variance with all established legal principles."[70] As an example of this possibility, the court quoted the testimony of one of the faculty members to the effect that the fact of the student's turning pale when called before the committee was evidence that he understood, without being told, that he was being called upon to deny his guilt.

In the *Dixon* case, the court said that something more is required than an informal interview with a college official, but not a full dress judicial hearing with the right to cross-examine witnesses. The court found no balancing interest such as danger to the public or to national security which would justify college authorities in refusing at least to give students adequate notice and the opportunity to be heard in their own defense. Two reasons were given to justify less than a full judicial hearing — the possible disruption of the college's educational atmosphere, and the impracticality of carrying out such a proceeding. In any case, the court said that *as a minimum,* a student faced with dismissal should be given the names of the witnesses against him, a report of facts to which the witnesses have testified, an opportunity to present his defense, and the right to produce witnesses in his own behalf.[71] It would also seem only fair that in dismissal hearings, where the college officials are acting as judge, jury, and prosecutor, any official who is a party to a dispute which is involved in the misconduct charge should be obliged to disqualify himself from any part in passing upon the case.

Remedies for Unjust Dismissal

Several remedies may be available in the courts to the student who has been expelled unjustly, after he has first exhausted the internal remedies available to him,[72] provided such appeals would not be futile[73] or unreasonably protracted. One remedy is statutory. New York provides by statute[74] for a system of internal appeals to the state commissioner of education, whose decision, when sought, is final and unreviewable. In *Steier v. New York State Education Commissioner,*[75] where a student appealed the decision of a commission which passed on his case to the United States District Court without first going to the commissioner of education or to the state courts,[76] the complaint was dismissed for failure to exhaust internal remedies and for lack of federal jurisdiction.

The most commonly sought remedy is mandamus, which can be used either to require school officials to hold a hearing,[77] for outright reinstatement,[78] or to compel award of a diploma.[79] Since this legal remedy is ordinarily used to compel public officials and those of public or private corporations to perform some official duty, it is an appropriate remedy in cases involving both public and private incorporated schools. This remedy, however, has been held not to lie to enforce what were called private contract rights against an incorporated college[80] and not at all

70 3 Pa. County Ct. at 88.
71 294 F.2d at 159.
72 State *ex rel.* Dodd v. Tison, 175 La. 235, 143 So. 59 (1923); *In re* Dunn, 9 Pa. County Ct. 417 (1891).
73 State *ex rel.* Clark v. Osborne, 24 Mo. App. 309 (1887).
74 N.Y. EDUCATION LAW § 310 (McKinney 1953).
75 161 F. Supp. 549 (E.D.N.Y. 1958), *aff'd,* 271 F.2d 13 (2d Cir. 1959), *cert. denied,* 361 U.S. 966 (1960).
76 These seem to be alternative remedies, and the statute making the commissioner's decision final and unreviewable has been upheld in the New York courts. Bullock v. Cooley, 225 N.Y. 566, 122 N.E. 630 (1919).
77 People *ex rel.* Goldenkoff v. Albany Law School, 198 App. Div. 460, 191 N.Y.Supp. 349 (1921) (dictum).
78 Baltimore Univ. v. Colton, 48 Md. 623, 57 Atl. 14 (1904).
79 People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 60 Hun 107, 14 N.Y.Supp. 490 (Sup. Ct.), *aff'd* 128 N.Y. 621, 28 N.E. 253 (1891).
80 State *ex rel.* Burg v. Milwaukee Medical College, 128 Wis. 7, 106 N.W. 116 (1906).

against an unincorporated private college.[81] In *State ex rel. Arbour v. Board of Managers of Presbyterian Hospital*[82] the remedy was held not to lie where the student was suing as a dismissed member of a corporation, on the grounds that students are not members of the corporation.[83] Since mandamus is an extraordinary legal remedy, it was held in *State ex rel. Burg v. Milwaukee Medical College*[84] that the remedy would not lie where damages or specific performance are available.

Relief by way of injunction is the same as that afforded by mandamus, *i.e.*, requirement of a hearing[85] or outright reinstatement.[86] The remedy has been held to lie in cases of both public[87] and private schools,[88] but an injunction probably would not issue where mandamus is available, since in this case the remedy at law would be adequate.

Two available remedies, damages and specific performance, are based on the contractual relation between the student and the school. This contract is conceived of as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school's disciplinary regulations, in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof.[89] Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications;[90] custom and usages can also become specific terms by implication.[91] This contract has been upheld against attacks based upon lack of consideration, the statute of frauds, and lack of mutuality of obligation.[92] Remedies based on this contract may be available where some of the other remedies would fail, *e.g.*, in jurisdictions which would not award mandamus or injunctive relief against a private corporation, or in instances where the school is not incorporated.

Damages would seem to be a suitable remedy where the school has breached its contract by expelling a student without a proper showing of cause and the student, for various reasons, does not wish to return to that institution. But where the student does wish to be reinstated, or where he has completed his courses and is suing to obtain his diploma, damages would not be adequate. In this case specific performance would be appropriate, subject to the same limitations as the injunction, *viz.*, that it will not lie where the legal remedy of mandamus is available.

Wrongful discharge of a student would also seem to be a prima facie tort for which damages may be awarded, subject to the limitation noted by Mechem in his treatise on public officers,[93] that school officials, who are required by law to exercise their judgment and discretion in the management of schools, act as "quasi-judicial" officers and as such are not liable to individuals for any injuries sustained

81 State *ex rel.* Dodd v. Tison, 175 La. 235, 143 So. 59 (1932).
82 131 La. 163, 59 So. 108 (1912).
83 The court failed to substantiate this contention, however, and historically the conception of the student's status has been otherwise. See MURRAY & CRAIGE, THE OXFORD DICTIONARY (1926).

> University — The whole body of teachers and scholars engaged, at a particular place, in giving and receiving instruction in the higher branches of learning; such persons associated together as a society or *corporate body* with a definite organization and acknowledged powers and privileges. . . . (emphasis added.)

Baltimore Univ. v. Colton, 48 Md. 623, 57 Atl. 14 (1904).
84 128 Wis. 7, 106 N.W. 116 (1906).
85 Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).
86 Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).
87 *Ibid.*
88 Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144 (1901) (by implication).
89 See, *e.g.*, Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962).
90 *E. g.*, Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 149 (1901).
91 Baltimore Univ. v. Colton, 48 Md. 623, 57 Atl. 14 (1904).
92 Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909).
93 MECHEM, PUBLIC OFFICERS § 718 (1890).

by reason of any error of judgment, however great, committed by such officials acting within their jurisdiction and in good faith. This principle is applied to private school officials also by the courts in holding that the actions of such officials will not be questioned provided there has not been bad faith or an abuse of discretion in the carrying out of an official duty.[94] Adoption of a procedure that is patently arbitrary, or the conduct of an otherwise correct proceeding in an arbitrary manner, would seem to satisfy the proviso. In *Englehart v. Serena*,[95] a tort action for damages based on an alleged wrongful dismissal of a student from a dormitory, the plaintiff found his action dismissed on grounds that he was not a tenant of the dormitory and had not even the full and unrestricted rights of a lodger — an interesting application of the "privilege" theory.

Factors Influencing Courts' Decisions

There is always a possibility that the nature of the alleged offense may have had some bearing on the reaction of the court which decided it, but there is little evidence that such has been the case in the area of school discipline.

The racial issue has been present in three cases dealing with dismissal. *Dixon v. Alabama State Board of Education*[96] was concerned with a group of Negro students who were dismissed from Alabama State College for participating in "sit-in" demonstrations, and in *Knight v. State Board of Education*,[97] the charge was that the students had been arrested in connection with a "freedom ride." The courts in both of these cases were careful not to concern themselves with the alleged offense, but with the question of whether the expulsion procedure had met the test of due process, and the court in *Knight* specifically denied that any prejudice had been established on the part of the university officials in their conduct of the case.

The third case involving a racial issue was *Booker v. Grand Rapids Medical College*,[98] in which the plaintiffs were denied readmission solely on the basis of their Negro race. The court found a valid and enforceable contract here, but denied recovery on grounds that the wrong remedy had been pursued. In this 1909 case the court said that the school was free to exclude persons on the basis of race if to do otherwise would mean the loss of some of the other students.

The case of *Carr v. St. John's University*,[99] in which four Catholic students were expelled from a Catholic university for participating in a civil marriage ceremony, seems to illustrate what may be an increased reluctance to interfere with discretion of college officials where a religious question is involved. Although the Supreme Court of New York ordered reinstatement on grounds that a regulation which provides for dismissal for conduct not in "conformity with the ideals of Christian education and conduct" was too vague and indefinite,[100] the Appellate Division reversed and held that such a regulation when applied in a Catholic university to Catholic students is sufficiently definite. This decision was affirmed without opinion by the Court of Appeals. The Appellate Division found also that the students had been given adequate opportunity to explain their actions. Since the facts were not in dispute, this procedure would seem to be adequate.

Two cases in which it appears that the decisions may have been affected by the judges' attitudes toward the alleged misconduct of the student arose out of the "Red Scare" of World War I. In *People ex rel. Goldenkoff v. Albany Law School*,[101] where a student was expelled on charges of holding and expressing

94 John B. Stetson Univ. v. Hunt, 55 Fla. 510, 102 So. 637 (1924).
95 318 Mo. 263, 300 S.W. 268 (1927).
96 294 F.2d 150 (5th Cir. 1961).
97 200 F. Supp. 174 (M.D. Tenn. 1961).
98 156 Mich. 95, 120 N.W. 589 (1909).
99 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962).
100 231 N.Y.S.2d 403 (Sup. Ct.), *rev'd*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962).
101 198 App. Div. 460, 191 N.Y.Supp. 349 (1921).

Socialistic, anarchistic, and unpatriotic views, the court said that there was no dispute of facts in the case raised by the student's denial that he was a Socialist. "Moreover, it is to be noted that the assertion of the absence of a statement that he held such views is a mere conclusion. The mental processes of this petitioner may be such that he would view expressions of a desire that our form of government be overthrown as highly patriotic."[102] It would seem that a denial by a party charged with holding certain views that he had ever expressed such views raises a question of fact. The suspicion is that in this case, decided in 1921 in the midst of the "Red Scare," the petitioner was being presumed guilty.

The other seeming "Red Scare" case was *Samson v. Trustees of Columbia University*,[103] in which the student was charged with making a publicly-reported speech advocating resistance to the World War I draft. The language of the court in speaking of the plaintiff "infecting" the rest of the students indicates the approach of the court to the case.

One further case in which the court appears to have allowed its own predilections to show through is *Tanton v. McKenney*,[104] a case in which an eighteen-year-old girl was expelled after an interview with the dean of women of the college on a charge of being seen in town smoking, drinking, and seated on the laps of young men in moving automobiles. The court said that the dean should be commended rather than condemned for upholding old-fashioned ideals of womanhood and upheld her decision.

Dismissal on Academic Grounds

A case which will be treated separately, since it seems to stand almost alone in this area of the law, is *State ex rel. Nelson v. Lincoln Medical College*,[105] a privately incorporated medical school. In this case, which is unique on its facts, the award of a peremptory writ of mandamus to compel the directors to grant a diploma to the relator was affirmed. The relator had completed all of her courses, but the directors refused to grant her a diploma, three of them claiming that she had failed to achieve the required grades. According to the articles of incorporation of the school, the board of directors was to issue diplomas upon recommendation of the dean or the faculty, but in this case the faculty had not been consulted and the dean's recommendation was overruled by the other directors. The student took the dispute to court, where mandamus was granted to compel production of the test papers in question for examination. All of the papers were produced except that of the director who was the leader of the faction refusing the diploma, the director claiming that the paper had been destroyed before the trial. Experts for both sides examined the test papers, and their assessments of the grades which should have been given ranged from 54% to 94% depending on the side for which the expert was testifying. In these circumstances the lower court concluded that it could not decide what the grades should be, but that the abuse of discretion was clear. The dean was then ordered to pass on the relator's qualifications and to award the diploma if he should conclude that she was qualified.

The other faction of the directors, however, had anticipated the court's action and called a stockholders' meeting at which the board of directors was reorganized and a new dean (the chief antagonist of the relator) was elected. This attempt was held by the lower court to be too late, however, and a peremptory writ of mandamus was awarded, upon the former dean's recommendation, to compel the issuance of the diploma. In affirming this decision, the Supreme Court of Nebraska said that the attempted reorganization only emphasized the defendants' bad faith

102 *Id.* at 352.
103 101 Misc. 146, 167 N.Y.Supp. 202 (Sup. Ct. 1917).
104 226 Mich. 245, 197 N.W. 510 (1924).
105 81 Neb. 533, 116 N.W. 294 (1908).

and contempt for law and its enforcement. A later petition for rehearing by the directors was denied as being untimely.[106]

The case stands almost alone not only because of the bitterness with which the struggle was carried on, but also because it involved dismissal on academic grounds rather than on a charge of misconduct. Ordinarily, as *Dixon* indicates, the former is not included among the class of cases requiring a hearing,[107] since it is not dependent upon collection and proof of facts. But it is difficult to argue with the result in the *Nelson* case if, as a matter of fact, there was an abuse of discretion and bad faith in the grading of test papers. The unjustified harm to the student is no less in this case than if the wrongful dismissal is on grounds of misconduct. That the case is unique is evidence that such a situation probably does not often arise, but when and if it does there is at least some precedent for the protection of the student.

In another case involving dismissal on academic grounds, *Miller v. Dailey*,[108] mandamus was issued to compel reinstatement of a student excluded from a state normal school after the local board found that he was mentally unfit to become a teacher and dismissed him without permitting him to complete the student teaching requirements. The court held that the student, who had successfully completed all of his courses except the student teaching, could not, under these circumstances, be deprived by the board of the right to an education granted by the state — especially since others had been allowed to repeat the student teaching several times. The board was also told that it could not anticipate the failure of the student. This case seems to be strictly limited to its facts, for there was involved not only the abuse of the local board's discretion, but a question of whether it had jurisdiction at all, and it is doubtful that the result would have been the same had the student not already completed all of the other courses.

Conclusion

Colleges and universities would seem to have little to fear from the adoption of a systematic and fair procedure for the treatment of student dismissal cases. In actual practice, a procedure such as that outlined in *Dixon v. Alabama State Board of Education*,[109] or an even more trial-like procedure, would probably have to be utilized only rarely, for a student will usually know the grounds for his threatened expulsion and will acquiesce when faced with the charge. But where the student demands a hearing and challenges the existence of grounds for expulsion, he should be entitled to be heard.

Part of the purpose of a college or university is to train its students for life in a democracy under the rule of law, and summary dismissals which deprive persons of valuable rights and privileges are incompatible with this goal and with our heritage. College administrators might also bear in mind that the disruption of college routine and the resentment among the student body which can follow from making martyrs of students expelled by summary procedures will probably outweigh any undesirable effects of practicing elementary fairness.

Galen, J., dissenting in *State ex rel. Ingersoll v. Clapp*,[110] pointed out another important and desirable result to be achieved by following the procedures suggested.

> A case of this character should never be before the courts, and would not therein be given serious consideration were administrative officers disposed to perform this simple duty in the premises. Their determination made on facts presented ordinarily should never be disturbed by the courts; but

106 81 Neb. 545, 118 N.W. 122 (1908).
107 294 F.2d at 158-59; *cf.* West v. Bd. of Trustees of Miami Univ, 40 Ohio App. 367, 181 N.E. 144 (1931).
108 136 Cal. 212, 68 Pac. 1029 (1902).
109 294 F.2d 150 (5th Cir. 1961).
110 81 Mont. 200, 263 Pac. 433 (1928).

> where, as here, they act arbitrarily, it presents a proper case for judicial interference.[111]

The lesson is clear. The treasured independence of the universities will not readily be interfered with if no cause is given for the interference.

Eugene L. Kramer

111 *Id.* at 439 (dissenting opinion). *But see* N.Y. Times, Dec. 5, 1962, p. 39, col. 3, quoting the chairman of the Mississippi State Board of Trustees of Higher Learning commenting on the order of the Chancery Court of Jackson reinstating a student expelled on charges which were based on unlawful search and seizure:

> If the action of the court stands to the point where the university can't expel because of technicalities of defense that common criminals can demand, then the board of trustees and the institutions are in for a hard time in running decently disciplined places of learning.