

## AN OVERVIEW: THE PRIVATE UNIVERSITY AND DUE PROCESS

In affording students the constitutional protection of due process, courts have generally differentiated between those students who attend public colleges and universities and those who attend private, but otherwise similar, institutions.<sup>1</sup> Since public universities are considered to be instruments of the state, their students must be granted that degree of due process required by the fourteenth amendment.<sup>2</sup> In dealing with private universities, on the other hand, courts have refused to apply constitutional standards because of a lack of state action.<sup>3</sup> Thus, the procedural safeguards afforded a student by law at a private university generally are limited, if not eliminated, by the application of either a contractual theory<sup>4</sup> or the doctrine of *in loco parentis*.<sup>5</sup> Courts have determined that the private university student need receive no procedural safeguards since attendance at a private school is not a right but a privilege which may be discontinued at the option of the university.<sup>6</sup>

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1. Compare *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) with *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *rev'g*, 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct.), *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).

2. See *Wright v. Texas So. Univ.*, 392 F.2d 728 (5th Cir. 1968); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); 294 F.2d 150. See also Comment, *Procedural Limitations on the Expulsion of College and University Students*, 10 ST. LOUIS L.J. 542, 545 (1966). For an example of judicial standards in reviewing student discipline in public universities 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 (W.D. Mo. 1968) (en banc).

3. See 407 F.2d 73; *Groosner v. Trustees of Colum. Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968). See generally Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968).

4. See, e.g., *Robinson v. Univ. of Miami*, 100 So.2d 442 (Fla. App. 1958); *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928), *rev'g*, 130 Misc. 249, 223 N.Y.S. 796 (Sup. Ct. 1927). Cf. *Jones v. Vassar College*, 59 Misc. 2d 296, 299, 299 N.Y.S.2d 283, 286 (Broome County Ct. 1969).

5. See *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Gott v. Berea College*, 156 Ky. 376, 161 S.W.2d 204 (1913). For a discussion of *in loco parentis* and its fall into disrepute see notes 63-69 *infra* and accompanying text.

6. For a case holding that even a public college education is a privilege see *Board of Trustees v. Waugh*, 105 Miss. 623, 633-34, 62 So. 827, 830-31 (1914), *aff'd*, 237 U.S. 589 (1915).

For a statute which incorporates the privilege theory, see FLA. SESS. L. SERV. ch. 69-279 (1969), which provides that:

Any person who shall accept the privilege extended by the laws of this state of attendance . . . at any state college, state junior college or state university shall . . . be deemed to

Some commentators believe that no adequate justification has been offered for this distinction between public and private colleges.<sup>7</sup> Nevertheless, in recent years, not only have students at private universities been treated differently from students at public universities, but, in at least one case, students attending the same university were not granted equal access to the courts because they were enrolled in a "private" college of the university while others were enrolled in a "public" college of the same university.<sup>8</sup> This result, while perhaps defensible as an interpretation and application of existing constitutional law decisions, is "impractical" and "reflects imperfectly the realities of higher education."<sup>9</sup>

Notwithstanding the recent decisions reflecting the continued reluctance of the courts to apply constitutional standards to the disciplinary proceedings of private universities, commentators are virtually unanimous in agreeing that courts will soon be forced, under one or more of several theories, to afford equal procedural safeguards to students in private universities.

#### STATE ACTION

Several writers have attempted to show that the disciplinary proceedings of a private university involve a degree of state action sufficient to necessitate the application of the fourteenth amendment's due process clause due to the great expansion during the past decade of both the state action doctrine<sup>10</sup> and the degree of governmental

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have given his consent to the policies of that institution, the Board of Regents, and the laws of this state. Such policies shall include prohibition against disruptive activities at state institutions of higher learning.

If after it has been determined that a student . . . has participated in disruptive activities, the following penalties may be imposed . . . (2) Immediate expulsion . . . for a minimum of two years . . .

7. See O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155, 166-67 (1970) [hereinafter cited as O'Neil]; Note, *The College Student and Due Process in Disciplinary Proceedings*, 13 S.D.L. REV. 87, 90 (1968); Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 U. ILL. L.F. 438, 439.

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

9. See O'Neil 160; Note, *Constitutional Law-Student Academic Freedom—"State Action" and Private Universities*, 44 TUL. L. REV. 184 (1969). See also Note, *The Admissibility of Testimony Coerced by a University*, 55 CORNELL L. REV. 435, 440 (1970); Comment, *Student Due Process in the Private University: The State Action Doctrine*, 20 SYRACUSE L. REV. 911, 921 (1969).

10. See, e.g., *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966); *Burton v. Wilmington Parking Auth., Inc.*, 365 U.S. 715 (1961); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946).

involvement in private higher education.<sup>11</sup> Indeed, where a racially discriminatory admissions policy has been found, the courts have not been reluctant to apply the equal protection clause of the fourteenth amendment to private schools.<sup>12</sup> Thus, those cases which have held that the due process clause of the fourteenth amendment has no application to the disciplinary proceedings of a private university may no longer be authoritative.<sup>13</sup> The above factors and the increased awareness of the social importance of higher education have precipitated the development of several theories by which state action can arguably be found in the disciplinary proceedings of a private university.

### *Substantial State Involvement*

State action sufficient to require application of the fourteenth amendment will be found where the state or federal government becomes substantially involved in or exercises substantial control over an otherwise private enterprise.<sup>14</sup> Such state intervention in the area of private higher education can be shown in numerous ways.

*Financial Aid.*<sup>15</sup> Private colleges and universities receive financial aid from government treasuries in several forms including scholarships, fellowships, student loans, and government work-study programs.<sup>16</sup> In addition, private universities are often the recipients

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11. See, e.g., O'Neil 168-88; Van Alstyne, *supra* note 3, at 290; Note, *Scope of University Discipline*, 35 BROOKLYN L. REV. 486 (1969); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301 (1968); 20 SYRACUSE L. REV., *supra* note 9; Comment, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344 (1964); Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963).

12. See *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965); *Pennsylvania v. Brown*, 270 F. Supp. 782 (E.D. Pa. 1967). See also *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 854 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); *Griffin v. State Bd. of Educ.*, 239 F. Supp. 560 (E.D. Va. 1965). Cf. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 727 (1945).

13. See Kutner, *Habeas Scholastica: An Ombudsman for Academic Due Process—A Proposal*, 23 U. MIAMI L. REV. 107, 151 (1968); TEXAS L. REV., *supra* note 10, at 347-48.

14. See *Evans v. Newton*, 382 U.S. 296 (1966); *Burton v. Wilmington Parking Auth., Inc.*, 365 U.S. 715 (1961). See also 53 MINN. L. REV., *supra* note 11, at 305-06; 20 SYRACUSE L. REV., *supra* note 9, at 914-15.

15. For a case finding state action where a state provided financial aid to a private school see *Griffin v. State Bd. of Educ.*, 239 F. Supp. 560 (E.D. Va. 1965). Cf. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945).

16. See *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 854 (E.D.

of government research grants.<sup>17</sup> These schools also receive indirect financial aid in the form of tax-exemption, use or loan of public land and buildings, and the availability to some schools of the power of eminent domain.<sup>18</sup> Moreover, the building programs of private universities are occasionally underwritten by government loans and insurance programs.<sup>19</sup> That such financial aid breeds governmental control can be seen from the warning of one university educator-administrator that schools should accept government aid only where it is most necessary and after very careful reflection since such acceptance may result in the school's becoming tied to the purse strings of the government.<sup>20</sup>

*State Regulation.*<sup>21</sup> In addition to the governmental control and regulation which may result from the school's receipt of public funds, there may be more direct evidence of state regulation of private education. For example, the private university depends upon the state for its authority to award degrees<sup>22</sup> and is subject to state educational

La. 1967); Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLIAMETTE L. REV. 277, 290 (1969).

Several states award scholarship grants to qualified resident students attending either public or private universities within the state. *E.g.*, N.Y. EDUC. LAW § 601(4) (1969); OHIO REV. CODE ANN. § 3333.12 (Supp. 1969). In addition, several states loan monies or guarantee loans to resident students attending any accredited university. *E.g.*, ILL. ANN. STAT. ch. 144, § 201-11 (1964) (loans to both schools and students); N.Y. EDUC. LAW § 651 (1964). The federal government is now deeply involved in financing both students and the universities. Money is loaned to universities for the construction of academic facilities, 20 U.S.C. § 741 (1964); educational opportunity grants passing through universities to the students totaling \$140 million are authorized for the fiscal year ending June 30, 1971, *id.* § 1061 (Supp. 1V, 1969); loan programs are bolstered and encouraged through loan insurance, loan guarantees, and interest supplements, *id.* §§ 1071-82; direct loans are also available, *id.* at § 1083.

17. See Van Alstyne, *supra* note 3, at 291.

18. See generally O'Neil 185. In *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969), it was held that the granting of tax exempt status to a private university was not state action.

The power of eminent domain appears to be available to private universities in California. CAL. CIV. PRO. CODES § 1238(2), (8) (1955). Two leading cases, *Appeal of Rees*, 8 Sad. (Pa.) 582, 12 Atl. 427, 430 (1888), and *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 Atl. 633, 636 (1913), have held that, because education has a public purpose, state statutes granting the right of eminent domain to private universities are constitutional. See generally 4 So. CAL. L. REV. 137 (1931).

19. See, *e.g.*, 20 U.S.C. § 761 (1964). See generally Van Alstyne, *supra* note 3, at 291.

20. See Kirk, *Massive Subsidies and Academic Freedom*, 28 LAW & CONTEMP. PROB. 607 (1963).

21. In *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952), government action was found where the Commission had regulatory control over a bus line.

22. For example, Louisiana provides:

[The state board of education] has the authority to approve private schools and colleges . . . . [T]he certificates or degrees issued by such private schools or institutions so

standards.<sup>23</sup> Further, in some states the school's license or charter is granted by the state.<sup>24</sup>

*Public Function.*<sup>25</sup> Several authorities have noted that state action is present in the activities of a private university because these institutions fulfill a public function.<sup>26</sup> The importance of higher education in our present society hardly need be argued. Indeed, the Supreme Court has stated, "Today, education is perhaps the most important function of state and local governments."<sup>27</sup> Were private institutions not to provide this service, society would most surely demand that it be provided by the government.<sup>28</sup> Although a court need not under this public function theory make reference to governmental involvement in private higher education, an examination of the extent of government assistance channeled toward private colleges and universities will aid in demonstrating the public nature of higher education. The extensive financial aid granted by the government to private universities has been justified on the grounds that these expenditures were being applied for a public purpose.<sup>29</sup> It should also be noted that some private universities have received the benefit of the power of eminent domain, the power to take land for a public purpose.<sup>30</sup>

*Quasi-public or Quasi-governmental Powers.*<sup>31</sup> Because of the

approved shall carry the same privileges as those issued by state schools." LA. REV. STAT. § 17:411 (Supp. 1969).

See also CONN. GEN. STAT. ANN. § 10-330(b) (1967); ILL. ANN. STAT. ch. 144, § 234 (1964). See generally 72 YALE L.J., *supra* note 11, at 1384.

23. See, e.g., ARK. STAT. ANN. § 80-1615 (Replacement 1960) (no degree until successful completion of American history course). For an interesting case suggesting that state action can exist if a state intended that a college adopt a "hard line" toward protesters, see *Coleman v. Wagner College*, \_\_\_ F.2d \_\_\_ (2d Cir. 1970).

24. See, e.g., CONN. GEN. STAT. ANN. § 10-330(d) (1967); ILL. ANN. STAT. ch. 144, § 122 (1964). See also Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 650 (1966).

25. In *Terry v. Adams*, 345 U.S. 461 (1953), the Court held that a private political association which duplicated the function of the state in conducting a pre-primary election among its membership violated the fifteenth amendment by refusing to admit Negro members. The contention that the association was a private political club was rejected because it performed a public function.

26. See note 11 *supra*; Cohen, *The Private-Public Legal Aspects of Institutions of Higher Education*, 45 DENVER L.J. 643 (1968); 10 ST. LOUIS L.J., *supra* note 2.

27. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

28. See Goldman, *supra* note 24, at 650; 5 WILLAMETTE L. REV., *supra* note 16, at 285.

29. See *Yale Univ. v. Town of New Haven*, 71 Conn. 316, 317, 42 A. 87, 88 (1899); See also *New Haven v. Board of Trustees*, 59 Conn. 163, 167, 22 A. 157, 157 (1890). See note 18 *supra*.

30. See O'Neil 183-84. See note 18 *supra*.

31. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court held that residents of a company town were entitled to protection of the liberties guaranteed by the first and fourteenth

great power of a university over its students, each private university is functionally a government<sup>32</sup> and is analogous to a company town.<sup>33</sup> Students often live on the private school's property, conduct most of their daily business in university stores and with university representatives, and are expected to mold their personal conduct to comply with university rules. Thus, the private university holds a power vis-à-vis the student which is essentially governmental.<sup>34</sup> Moreover, as noted above, the private university is often granted the benefit of specific governmental powers,<sup>35</sup> and in some instances, the school may designate its students as members of a profession licensed by the state merely by conferring the appropriate degree.<sup>36</sup> In addition, private universities may also have the power to terminate government financial aid granted to its students.<sup>37</sup> Finally, at least one authority believes that the private university's power to grant or withhold a degree is in itself a sufficient governmental power to require that the institution be subject to the fourteenth amendment.<sup>38</sup>

*Indicia Approach.*<sup>39</sup> The indicia approach, which most arouses the optimism of those who advocate an expansion of the state action doctrine to the disciplinary proceedings of a private university, requires a "sifting and weighing" of all factors which concern the applicability of the fourteenth amendment to the private institution, including any factors which indicate state involvement in private higher education.<sup>40</sup> Thus, a court would not only consider the

amendments. It reasoned that where the state permits private interests to exercise what is normally thought to be governmental authority, those private interests are subject to the same restrictions as the state.

32. See O'Neil 178, 184. See generally 72 YALE L.J., *supra* note 11, at 1410.

33. See, e.g., O'Neil 187; 72 YALE L.J., *supra* note 11, at 1386.

34. See O'Neil 181.

35. *Id.* at 183-84. See note 18 *supra*.

36. See, e.g., WIS. STAT. ANN. § 256.28(1) (1957). This statute provides that the graduates of accredited Wisconsin law schools be admitted to practice law in Wisconsin without bar examination. See generally O'Neil 184.

37. *Id.*; see 35 BROOKLYN L. REV., *supra* note 11, at 491.

38. O'Neil 178.

39. See *Burton v. Wilmington Parking Auth., Inc.*, 365 U.S. 715 (1960), where the Court, after noting that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance," *id.* at 722, proceeded to evaluate such factors as public ownership of the land and building, public use of the building, and public maintenance of the building, in order to conclude that

[a]ddition of all these activities, obligations, and responsibilities . . . [and] the benefits mutually conferred . . . indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.

40. See, e.g., Kutner, *supra* note 13, at 150-53; 81 HARV. L. REV., *supra* note 11, at 1058-60.

indicators of both "state involvement" and "public function," but would also give these and any other factors relating the state to the private university a cumulative effect.<sup>41</sup> Where a court cannot justify a finding of state action in the activities of a private university based merely upon quasi-governmental powers, public function, or state involvement it could combine these and other factors to establish a degree of state action sufficient to require the application of the fourteenth amendment to the disciplinary proceedings.<sup>42</sup> Such other factors include a degree of interdependence between public and private schools, a particular course of study available only at a private school, and any special protection which the state grants a private university.<sup>43</sup>

It is possible that a court will apply one of these four theories of state action in order to require a private university to grant to its students that degree of procedural protection which the due process clause of the fourteenth amendment dictates. Judge J. Skelly Wright has observed:

At the outset one may question whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only "sure foundation . . . of freedom, without which no republic can maintain itself in strength" institutions of learning are not things of purely private concern. . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. . . . Clearly the administrators of a private college are performing a public function. They do the work of the state, often in place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action, to the same extent as private persons who govern a company town, or control a political party . . . or run a city street car and bus service . . . or operate a train terminal?<sup>44</sup>

Similarly, it has been noted that the character of the private university is molded by the governmental influence exerted over it and the governmental power which it exerts over its students. Arguably, this alone is a sufficient basis for applying the fourteenth amendment to

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See generally 20 SYRACUSE L. REV., *supra* note 9; 5 WILLAMETTE L. REV., *supra* note 16, at 285.

41. See 20 SYRACUSE L. REV., *supra* note 9, at 917; see generally Kutner, *supra* note 13, at 151-53.

42. Cf. O'Neil 182.

43. *Id.* at 182-87; Kutner, *supra* note 13, at 151.

44. *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855, 858-59 (E.D. La.), *rev'd*, 306 F.2d 489 (5th Cir. 1962) (citations omitted).

the private university.<sup>45</sup> Most writers agree that substantial expansion of the state action concept is unnecessary to require the application of fourteenth amendment procedural protection to a private university's disciplinary proceedings.<sup>46</sup> Therefore, as a college education becomes even more necessary and as private school dependence upon government financial support increases, courts will find it correspondingly more difficult to refuse to measure the private university's actions by fourteenth amendment standards.<sup>47</sup>

To date, attempts to apply the fourteenth amendment's due process clause to the disciplinary proceedings of a private university have been expressly rejected.<sup>48</sup> The Supreme Court has issued no opinion on the subject. In general, the courts have refused to find that higher education is a sufficiently public function to constitute state action,<sup>49</sup> or have required that the state be involved not merely with higher education in general, or with the school in particular, but directly in the disciplinary proceedings challenged.<sup>50</sup> Such decisions have received substantial criticism.<sup>51</sup> In most cases, courts considered each segment of state involvement, each public function, and each of the private university's quasi-governmental powers *individually* and find them to be an insufficient indication of state action. Judicial opinions in this area evidence a failure to combine these individual indicators in order to determine whether state action results from a cumulation.<sup>52</sup>

Since the fourteenth amendment is applicable to a private university for purposes of preventing a racially discriminatory admissions policy,<sup>53</sup> it arguably should also be applicable to a private university's dismissal of students without proper procedural

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45. See O'Neil 181.

46. See, e.g., Goldman, *supra* note 24, at 650; 35 BROOKLYN L. REV., *supra* note 11, at 491-92; 42 TEXAS L. REV. *supra* note 11, at 349.

47. See 53 MINN. L. REV., *supra* note 11, at 309; 5 WILLMETTE L. REV., *supra* note 16, at 287-88. See also REPORT OF THE A.B.A. COMMITTEE ON CAMPUS GOVERNMENT AND STUDENT DISSENT, 17-18 (1970) (statement of Commission members Clark, Dash, Long, Shestach, & Young).

48. See, e.g., Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Groosner v. Trustees of Colum. Univ. 287 F. Supp. 535 (S.D.N.Y. 1968).

49. See 287 F. Supp. at 548.

50. See 407 F.2d at 81. But see 55 CORNELL L. REV., *supra* note 9, at 439-40.

51. See, e.g., 55 CORNELL L. REV., *supra* note 9, at 440; 20 SYRACUSE L. REV., *supra* note 9, at 921-22; 44 TULANE L. REV., *supra* note 9, at 187-189.

52. See, e.g., Powe v. Miles, 407 F.2d 73, 80-83 (2d Cir. 1968).

53. See note 11 *supra*.

safeguards.<sup>54</sup> However, it is argued that the courts should draw the line after racial discrimination, and student discipline should not require private universities to comply fully with the provisions of the fourteenth amendment and the Bill of Rights.<sup>55</sup> For example, a Catholic university should be able to give religious instruction without being limited by the establishment clause of the first amendment.<sup>56</sup> Thus, a finding of state action for purposes of applying the due process clause to a private university's disciplinary proceedings does not mean that for all purposes the private university "becomes" the state.<sup>57</sup> Undoubtedly the private university would not be required to extend to its students that degree of procedural protection which the state is required to afford a criminal defendant.<sup>58</sup> Finally, those who advocate an extension of the state action concept to include the disciplinary proceedings insist that such an extension will not permit the courts to interfere with the academic freedom of the university, a matter heretofore respected and defended by the courts.<sup>59</sup>

#### *Other Theories of the Student-Private University Relationship*

While no court has yet applied fourteenth amendment limitations to the disciplinary proceedings of a private university, the student-private university relationship has been examined under several theories unrelated to constitutional law. Recent court decisions and the opinions of many authorities reveal that existing theories are either no longer acceptable<sup>60</sup> or should be reexamined in the light of recent developments in both the legal and the academic environment.<sup>62</sup> Most authorities agree that under the theories of the student-university relationship which remain viable the private university will be required to afford its students substantially the same procedural

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54. See generally 81 HARV. L. REV., *supra* note 11, at 1056; 20 SYRACUSE L. REV., *supra* note 9, at 921-22.

55. See Cohen, *supra* note 26, at 647-48; 72 YALE L.J., *supra* note 11, at 1386.

56. See Cohen, *supra* note 26, at 647-48; 72 YALE L.J., *supra* note 11, at 1386.

57. O'Neil 165.

58. See French v. Bashful, 303 F. Supp. 133 (E.D. La. 1969); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967). *But see* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967); Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (Sup. Ct. 1967). See also 72 YALE L.J., *supra* note 11, at 1386.

59. O'Neil 165-67.

60. See, e.g., 35 BROOKLYN L. REV., *supra* note 11, at 489-90, 495.

61. See, e.g., Van Alstyne, *supra* note 3, at 294.

safeguards that the fourteenth amendment requires the public university to afford its students.<sup>62</sup>

*In Loco Parentis.* After many years of consistent application<sup>63</sup> the vast majority of courts and scholars agree that the doctrine of *in loco parentis* no longer defines the student-university relationship.<sup>64</sup> It is doubtful that any court will use it to support a university's defense against judicial interference in a university disciplinary proceeding. A major factor contributing to the demise of the doctrine is the courts' awareness that the theory could not be applied to the thousands of students who have reached their majority<sup>65</sup> or who are married or otherwise free of parental control.<sup>66</sup> Moreover, the student-university arrangement is far more impersonal than the typical parent-child relationship.<sup>67</sup> With regard to student expulsion, it should also be realized that under no circumstances would parents be allowed to evict their child.<sup>68</sup> Finally, if the school's power over the student is based upon a delegation of power to it from the student's parents, it is not difficult to envision a breakdown in the school's authority should parents instruct the institution to act toward their child in a manner inconsistent with its own rules.<sup>69</sup>

*Contract.* Courts have frequently found that a contractual relationship exists between the student and the university.<sup>70</sup> Under this theory the student's rights are determined by the express and implied provisions of the student-university contract.<sup>71</sup> Contractual provisions are derived from admission applications; registration forms,

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62. See 5 WILLAMETTE L. REV., *supra* note 16, at 294; see also, Holland, *The Student and the Law*, 22 CURRENT LEGAL PROB. 61, 66 (1969); 81 HARV. L. REV., *supra* note 11, at 1143.

63. For a discussion of the application of *in loco parentis* see Holland, *supra* note 62.

64. See *Moore v. Student Affairs Comm.*, 284 F. Supp. 725, 729 (M.D. Ala. 1968); *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 756 (W.D. La. 1968). See generally Goldman, *supra* note 24, at 650; Van Alstyne, *Student Academic Freedom and Rule-Making Powers at Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS Q. 1, 17 (1965); 81 HARV. L. REV., *supra* note 11, at 1144; Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 U. ILL. L.F. 438; 5 WILLAMETTE L. REV., *supra* note 16, at 293.

65. See Holland, *supra* note 62, at 66; Van Alstyne, *supra* note 64, at 17-18.

66. 35 BROOKLYN L. REV., *supra* note 11, at 487.

67. Van Alstyne, *supra* note 3, at 294.

68. *Id.* at 295. But cf. 53 MINN. L. REV., *supra* note 11, at 311-12.

69. Holland, *supra* note 62, at 68.

70. See, e.g., *Carr v. St. Johns Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 403 (1962); Comment, *A Student Right to a Hearing on Dismissal from a University*, 10 STAN. L. REV. 746 (1958).

71. See 10 STAN. L. REV., *supra* note 70, at 746.

catalogues or bulletins, and the school's rules and regulations.<sup>72</sup> It is assumed that the student knew of and agreed to conform to these provisions.<sup>73</sup>

Unlike the courts, most scholars who have considered the subject agree that the contract theory, as it has been applied, is inappropriate for the student-university relationship.<sup>74</sup> The student should not be bound by terms buried within school catalogues, applications, or registration forms, which he could not reasonably have been expected to read carefully.<sup>75</sup> The writers generally believe that if a contract exists between the student and the university it is a contract of adhesion and should not be given full effect,<sup>76</sup> in part because the student is severely limited in his selection of a school for financial and geographical reasons,<sup>77</sup> and because there is no bargaining—the school dictates the terms of the contract.<sup>78</sup> In addition, perhaps neither the student nor the university views the relationship as contractual,<sup>79</sup> the student seldom conceiving that he is entering into a business arrangement. Thus, it is urged that the student-university relationship should not be governed by the law of the market place.<sup>80</sup>

Many of those conceding that the student-university relationship is contractual claim that the courts have not properly applied contract law.<sup>81</sup> They contend that in dismissing a student the school is, in effect, terminating the contract for the student's breach thereof and should, therefore, bear the burden of justifying its action.<sup>82</sup> The courts, on the other hand, have generally required the student to show that the school has acted arbitrarily in dismissing him<sup>83</sup> even though the university, not the student, generally possesses the information

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72. Goldman, *supra* note 24, at 651.

73. 5 WILLAMETTE L. REV., *supra* note 16, at 278. See also FLA. SESS. L. SERV. ch. 69-279 (1969) (reproduced at note 6 *supra*).

74. See, e.g., Goldman, *supra* note 24, at 652-53; Kutner, *supra* note 13, at 143; 53 MINN. L. REV., *supra* note 11, at 314. But see Wilkinson & Rolapp, *The Private College and Student Discipline*, 56 A.B.A.J. 121 (1970).

75. See Goldman, *supra* note 24, at 653.

76. Goldman, *supra* note 24, at 653-54; 35 BROOKLYN L. REV., *supra* note 10, at 487-88; 5 WILLAMETTE L. REV., *supra* note 16, at 281-82.

77. See Goldman, *supra* note 24, at 653; Kutner, *supra* note 13, at 143.

78. See 18 HARV. L. REV., *supra* note 11, at 1146.

79. *Id.*

80. See Goldman, *supra* note 24, at 652-53.

81. See, e.g., Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1408-09 (1957).

82. *Id.* at 1409.

83. *Id.*; 81 HARV. L. REV., *supra* note 11, at 1146.

concerning the basis of dismissal. Therefore, it is contended, a proper application of contract law would place the burden of proof on the university.<sup>84</sup>

*Fiduciary Relationship.* A recent theory of the student-university relationship suggested by several authorities postulates the existence of a fiduciary relationship between the student and university; thus, their disputes should be settled under the law of trust rather than contract.<sup>85</sup> It is contended that the student places a high degree of trust and confidence in the university which he attends and relies upon the university whose function and duty it is to educate the student and is in a position of dominance over the student,<sup>86</sup> to perform its duties in a manner benefiting him.<sup>87</sup>

Because of this fiduciary relationship, the courts should carefully examine the university's conduct and require of the university the highest standard of integrity.<sup>88</sup> In effect, the university as a fiduciary would have the burden of showing that any disciplinary action imposed was both reasonable and necessary in light of the university's function and that the disciplinary sanctions were imposed only after a fair and just proceeding.<sup>89</sup> It is not difficult to perceive that the university because of its fiduciary relationship to the student should be required to afford its students at least that degree of procedural protection required by the due process clause of the fourteenth amendment.<sup>90</sup>

### CONCLUSION

It is not at all unlikely that the courts may soon require that private colleges and universities afford their students that degree of procedural due process which the fourteenth amendment requires a public university to provide its students. One or more of the following theories might be utilized: an extension of the state action doctrine; a sensitive approach to the contract relationship between the student and the university; or an acceptance of the fiduciary nature of the

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84. 81 HARV. L. REV., *supra* note 11, at 1146; Cohen, *supra* note 26, at 645-46.

85. See, e.g., Kutner, *supra* note 13, at 152-53; 53 MINN. L. REV., *supra* note 11, at 331-33; 5 WILLAMETTE L. REV., *supra* note 16, at 293-94. For a critical view see Holland, *supra* note 62, at 71.

86. Goldman, *supra* note 24, at 672.

87. *Id.*; Seavey, *supra* note 81, at 1407 n.3.

88. Goldman, *supra* note 24, at 674.

89. *Id.*

90. See Seavey, *supra* note 81, at 1407 n.3; 72 YALE L.J., *supra* note 11, at 1382.

student-university relationship. There is no sound basis for the refusal of the courts to investigate any disciplinary proceeding which results in a student's dismissal from a private university especially since the same courts require procedural fairness for students expelled from a public university.<sup>91</sup> Expulsion from a private school has no less effect upon a student than expulsion from a public school and usually will have at least as much impact upon the student as the decisions of the local, state, or federal government.<sup>93</sup> Because of this impact many feel judicial intervention in the disciplinary proceedings of a private university is necessary.<sup>94</sup>

There are a number of theories under which a private university might be bound by the same or similar limitations applicable to a public university, but a court can first determine the standard by which it will judge the university's activity and then select a theory appropriate for imposing such a standard.<sup>95</sup> The central issue concerns the circumstances under which a court should interfere with the disciplinary proceedings of a private university in order to insure that the student is given fair and reasonable treatment.<sup>96</sup> The degree, if any, of judicial intervention depends upon the sanction imposed upon the student, his alleged offense, and the size and facilities of the university. In order to insure freedom from judicial interference and, more important, to uphold university integrity by insuring that students are subjected only to fair and just proceedings, the private universities should afford their students at least that degree of procedural protection which the courts require public universities to provide.

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91. 5 WILLAMETTE L. REV., *supra* note 16, at 294.

92. See 20 SYRACUSE L. REV., *supra* note 9, at 912. See also 72 YALE L.J., *supra* note 11, at 1387-90.

93. See 72 YALE L.J., *supra* note 11, at 1389.

94. *Id.* at 1387-90; 81 HARV. L. REV., *supra* note 11, at 1156-57.

95. See generally *id.* at 646, 648; 72 YALE L.J., *supra* note 11, at 1381.

96. See Cohen, *supra* note 26, at 646.