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**The Right to Counsel in Campus
Disciplinary Hearings: How Much
Process Is Due?**

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THE RIGHT TO COUNSEL IN CAMPUS
DISCIPLINARY HEARINGS:
HOW MUCH PROCESS IS DUE?

BY: BRETT A. SOKOLOW, JD

Whether an accused student in a campus disciplinary hearing has a right to counsel is an unsettled question in the federal courts. While some courts have held that the fourteenth amendment due process clause guarantees the right to counsel at campus adjudications,¹ most courts echo the Seventh Circuit case, *Osteen v. Henley*,² which held that the Constitution's due process protections do not include the right to counsel. A few of these cases, while following the general rule, have carved out some significant exceptions.³ Given the intense pace with which lawsuits are being filed against universities for hearing board decisions,⁴ this issue is primed for the Supreme Court to address the varying results in appellate and district court cases.

Addressing the issue requires attention to two different questions. First, does the fourteenth amendment due process clause guarantee the right to counsel to accused students in a campus disciplinary hearing? Second, should due process in the campus milieu include the right to counsel? This article will address the first question in Part One, beginning with a discussion of campus due process rights as presently conferred by federal court decisions. Part One will then focus on the *Roth*⁵ test and the *Eldridge*⁶ factors, the Supreme Court's two-step analytical framework for according due process rights. Lastly, Part One will examine cases that have both carved out significant exceptions to the general rule, and limited the level of involvement of attorneys in hearings where their presence is allowed.

¹ See *Esteban v. Central Mo. State College*, 277 F. Supp. 649, *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Marin v. Univ. of P.R.*, 377 F. Supp. 613 (D.P.R. 1973).

² *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993) (student's due process rights did not include right to representation by counsel in university disciplinary proceedings); *Gorman v. Univ. of R.I.*, 646 F. Supp. 799, 806 (D.R.I. 1986) (no right to legal counsel in campus disciplinary hearing), *aff'd in part, rev'd in part*, 837 F.2d 7 (1st Cir. 1988); see also *Nash v. Auburn Univ.*, 812 F.2d 655 (11th Cir. 1987) (student accused of cheating in disciplinary hearing did not have right to counsel); *Kolesa v. Lehman*, 534 F. Supp. 590, 594 (N.D.N.Y. 1982) (due process protections do not include right to counsel in campus disciplinary hearings).

³ *Jaska v. Regents of Univ. of Mich.*, 587 F. Supp. 1245, 1252 (E.D. Mich. 1984) (if attorney prosecuted case for university, or hearing was conducted according to complex rules of procedure and/or evidence, right to counsel might have attached); *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir. 1970), *cert. denied*, 400 U.S. 941 (1970) (use of law student to prosecute hearing invoked due process protections because law student was sufficiently akin to lawyer to cause imbalance in power between adjudicator and accused student); *McLaughlin v. Mass. Maritime Acad.*, 564 F. Supp. 809 (D. Mass. 1983) (where criminal charges were also pending against student, hearing without assistance of counsel violated due process).

⁴ See e.g., *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, C. A. No. 95-1358-R (W.D.Va. 1995); Robert King and Audrey Wolfson Latourette, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 200 (1988); Lisa Swem, *Due Process Right in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 361 (1987).

⁵ *Board of Regents v. Roth*, 408 U.S. 564 (1972).

⁶ *Matthews v. Eldridge*, 424 U.S. 319 (1976).

In Part Two, this monograph will answer the question of whether due process rights to counsel *should* be accorded on college campuses, and to what extent. Part Two will begin by surveying some of the commentators on this issue, and their approaches to the solution. Part Two will then offer a novel, yet familiar, solution by arguing that the exception to the general rule in *Gabrilowitz v. Newman*,⁷ when taken to its logical conclusion, should, and must, require that this exception engulf the general rule. In conclusion, Part Two will discuss the fifth amendment protection against self-incrimination and the inferences that campus adjudicators should make with regard to the silence of a participant in a disciplinary hearing, in light of the role of counsel that this article advocates.

At the outset, it is important to clarify the boundaries of this monograph. The discussion of the right to counsel herein pertains only to disciplinary, not academic, hearings on college campuses.⁸ Further, the accused student in the disciplinary hearing must be facing an allegation of serious misconduct, tantamount to a misdemeanor or felony in a criminal prosecution through the courts. This monograph refers to rights to counsel in the public university context only, where state action is unquestioned for purposes of invoking fourteenth amendment due process protections.⁹ Finally, this monograph does not factor in the myriad of state administrative procedures acts, which may or may not govern counsel issues in campus hearings.

PART ONE

A. Campus due process rights as presently conferred by federal court decisions.

Due process analysis should begin with recognition by the Supreme Court that protections afforded by the Fourteenth Amendment extend to the university setting. Such recognition, however, exists only by analogy and extrapolation. The Supreme Court has never addressed the question of whether liberty or property interests, within the meaning of the fourteenth amendment, are at stake for an accused student in

⁷ *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978) (where criminal charges arise out of same set of facts at issue in campus disciplinary hearing, accused student entitled to assistance of, but not representation by, counsel).

⁸ Because courts generally show greater deference to academic decisionmaking and discretion, even though serious liberty and property interests are involved, due process rights in academic hearings are minimal. Disciplinary actions, however, share greater similarities to criminal trials, and thus invite more searching review by courts and heightened levels of due process protection, especially where concurrent criminal proceedings arise out of the same set of facts. See, e.g., *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (far less stringent procedural requirements in academic dismissal cases than in cases of misconduct); *Gabrilowitz* at 103.

⁹ Douglas Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289 (1989).

a collegiate disciplinary hearing.¹⁰ The case of *Goss v. Lopez*¹¹ is instructive, even though it pertains to high school students, because rights similar to those conferred by *Goss* attach, by analogy, to college students.

In *Goss*, the Court concluded that high school students, whose regular attendance at school was required by Ohio law, had a property interest created by statutory entitlement.¹² "At the very minimum," the Court wrote, "students facing some kind of suspension must be given *some* kind of notice and *some* kind of hearing."¹³ The Court then added that "more formal procedures" should obtain for serious disciplinary cases.¹⁴ The *Goss* dictum then, signaled a ratification by the Court of the landmark Fifth Circuit case, *Dixon v. Alabama State Board of Education*.¹⁵ *Dixon* mandated that publicly-funded colleges must give notice of the charge, and an opportunity for a hearing, in cases where disciplinary hearings may result in expulsion. There has been broad-based acceptance of the *Dixon* standard throughout the federal courts, and most courts also require a third due process guarantee that there be substantial evidence presented at the hearing in order to find that a policy was violated.¹⁶

B. The *Roth* test and the *Eldridge* factors: a framework for determining how much process is due.

The command of the due process clause of the fourteenth amendment is that no state shall deprive any person of life, liberty or property without due process of law.¹⁷ The Supreme Court, in *Board of Regents v. Roth*¹⁸ and *Matthews v. Eldridge*,¹⁹ laid out the framework for determining when the protections of due process are applicable. The *Roth* test addresses the threshold question of whether the nature of the interest at stake invokes the due process clause at all. The inquiry, then, is "to see if the interest is within the Fourteenth Amendment's protection of liberty and property."²⁰ The Supreme Court has never decided the issue of whether college students have liberty or property interests at stake in a campus disciplinary

¹⁰ Edward J. Golden, *College Student Dismissals and The Eldridge Factors: What Process is Due?* 8 J.C & U.L. 495, (1981-82).

¹¹ *Goss v. Lopez*, 419 U.S. 565 (1975).

¹² *Id.*

¹³ *Id.* at 579.

¹⁴ *Id.* at 584.

¹⁵ *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).

¹⁶ Lisa Swem, *Due Process Rights in Student Disciplinary Matters*, 14 J.C & U.L. 359, 366 (1987).

¹⁷ U.S. CONST. amend. XIV, §1.

¹⁸ *Board of Regents v. Roth*, 408 U.S. 564 (1972).

¹⁹ *Matthews v. Eldridge*, 424 U.S. 319 (1976).

²⁰ *Roth* at 571.

hearing, but it is possible to extrapolate Supreme Court assent through the case of *Board of Curators of the University of Missouri v. Horowitz*.²¹ In *Horowitz*, the majority, by adjudicating the merits of the case, assumed that a student could assert a liberty or property interest where a campus academic hearing might result in dismissal from college.²² The Court has generally found liberty interests to include "freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."²³ The pursuit of an academic degree at a college unquestionably falls into several of these categories, as the right to pursue happiness, the right to contract for enrollment, and the right to acquire useful knowledge.

A nexus is formed between liberty and property interests because, while the freedom of contract is a liberty interest, the contract produced creates a property-based right. Support for the proposition that students have a property interest in their education can also be found in numerous federal court cases, usually based upon the contractual exchange of tuition for education.²⁴ With respect to liberty interests, a persuasive analogy comes from *Wisconsin v. Constantineau*,²⁵ a Supreme Court case which held that liberty interests are invoked "[w]here a person's good name, reputation, honor, or integrity is at stake"²⁶ However, the Court seemed to narrow this stigma concept five years later when it wrote in *Paul v. Davis*,²⁷ that "reputation alone, apart from some more tangible interest such as employment, is neither 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."²⁸ It is important to note, though, that the stigma of disciplinary action is frequently accompanied by other, more palpable deprivations. In fact, courts have been of one voice in holding that campus disciplinary hearings

²¹ *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

²² *Id.* at 84-85.

²³ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²⁴ See *Gorman v. University of Rhode Island*, 837 F.2d 7 (1st Cir. 1988) ("It is also not questioned that student's interest in pursuing education is included within fourteenth amendment's protection of liberty and property."); *Ewing v. Board of Regents of Univ. of Mich.*, 742 F.2d 913, 915 (6th Cir. 1984) ("[A]n implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest."); *rev'd on other grounds*, 106 S. Ct. 507 (1985); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) ("a property right must be recognized to have vested and the more prominently so in that she paid a separate fee for enrollment and attendance."); *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983) (medical student had property interest in continued enrollment in medical school program), *aff'd per curiam*, 727 F.2d 1101 (3d Cir. 1984); *Hall v. University of Minn.*, 530 F. Supp. 104, 107 (D. Minn. 1982) ("A student's interest in attending a university is a property right protected by due process."); *Ross v. Pennsylvania State Univ.*, 445 F. Supp. 147 (M.D. Pa. 1977) (contract-based property interest arises out of enrollment relationship of college and student).

²⁵ *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

²⁶ *Id.* at 437.

²⁷ *Paul v. Davis*, 424 U.S. 693 (1976).

provide the opportunity for significant deprivation, and thus a nexus of liberty and property interests is clearly present.²⁹

Suspensions or expulsions produce two different types of liberty deprivations. The first type, identified in *Constantineau*,³⁰ comes from a finding of guilt or responsibility. It is not hard to see how a campus hearing, in which the outcome might be suspension or dismissal, could result in long-term or permanent damage to a student's honor or reputation. While disciplinary actions on college campuses are usually closed to the public, it is a rare event when the results of a hearing are not known to the students to some extent.

The second type of liberty deprivation is the type of stigma identified in *Roth*,³¹ which occurs when a suspended or expelled student attempts to transfer to or temporarily attend another school, or apply to graduate school. Most college and graduate school applications require disclosure of serious disciplinary infractions. Such candor will result at most schools in a denial of the application.³² Thus, students who have been suspended or expelled may, in fact, be wholly deprived of the liberty to complete their undergraduate education at another school, to pursue later graduate study, or even their chosen careers.³³ Even probation, used as a punishment in many campus hearings for first offenses, often involves limiting a student's participation in various campus activities, restricting a student's access to certain university buildings, or requiring participation in some type of community service or education program.³⁴ This is a

²⁸ *Id.*

²⁹ *Herman v. Univ. of S.C.*, 457 F.2d 902, 903 (4th Cir. 1972) ("Expulsion is the 'capital punishment' of university discipline."); *Esteban v. Central Mo. State College*, 277 F. Supp 649 (W.D. Mo. 1967) (suspension or dismissal is serious deprivation that mandates heightened due process protections), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Dixon v. Alabama State Bd. of Education*, 294 F.2d 150, 157 (5th Cir. 1961) ("Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value."); *Marin v. University of P.R.*, 377 F. Supp 613 (D.P.R.1973) (holding that due process interests were important enough to require right to counsel).

³⁰ *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (liberty interests involved "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.").

³¹ *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (liberty interest invoked by imposition of a "stigma or other disability that foreclose[s] [the] freedom to take advantage of other opportunities.").

³² James Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2138-39 n.40 (1987) (citing AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS AND ADMISSION OFFICERS, ACADEMIC RECORD AND TRANSCRIPT GUIDE (1984)).

³³ Warren Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957) ("A student . . . dismissed from a medical school not only is defamed . . . but is probably barred from becoming a physician. A law-school student dismissed for cheating will not be admitted to practice even if he is able to complete his legal education.").

³⁴ Lisa Swem, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 365 (1987).

deprivation of liberty, though of a different punitive order than suspension or expulsion. Probation can also give rise to deprivation of property, because some schools include payment of a fine, or reimbursement for a victim's medical and counseling expenses, within the range of punishments possible for disciplinary infractions.³⁵

Once satisfied that the *Roth* test has been met and due process protections are warranted, courts then are faced with the question of how much process is due.³⁶ In *Eldridge*, the Supreme Court created a three-part test, which balances the potential liberty and property deprivations of the accused against the efficient adjudicatory interests of the hearing body.³⁷ The Court wrote:

Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³⁸

Courts, in applying *Roth* and *Eldridge*, have reached inconsistent results on whether there is a right to counsel.³⁹ At issue is not the threshold question posed by *Roth*, but the subjective balancing of interests called for in *Eldridge*. The First and Seventh Circuits have both held that the *Eldridge* factors, when applied, do not create a sufficient need for the presence of counsel in campus disciplinary hearings to warrant the additional administrative burdens.

In *Osteen v. Henley*⁴⁰, Judge Posner used the *Eldridge* factors to conclude that the cost of greater adversarial participation in hearings was "nontrivial," against a risk of erroneous deprivation for Osteen that

³⁵ *Id.*

³⁶ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

³⁷ *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

³⁸ *Id.*

³⁹ *See Gorman v. Univ of R.I.*, 837 F.2d 7 (1st Cir. 1988) (procedural protections of full-blown criminal trial not required in campus disciplinary hearing); *Nash v. Auburn Univ.*, 812 F.2d 655, 660 (11th Cir. 1987) (in disciplinary hearing, rights of students accused of cheating not coextensive with rights of defendant in criminal trial); *Gabrilowitz v. Newman*, 582 F.2d 100, 105 (1st Cir. 1978) (student in disciplinary hearing had right to presence of counsel in limited circumstances); *Hart v. Ferris State College*, 557 F. Supp. 1381, 1397-88 (S.D. Ohio 1980) (approving of presence of counsel at campus disciplinary hearing, but not requiring it).

⁴⁰ *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993).

was "trivial," given that other procedural safeguards were afforded.⁴¹ Posner explained that Osteen's nonpermanent expulsion was not as grave as other liberty or property deprivations might be, and therefore did not require heightened protections.⁴² Finally, Posner considered the risk of the proceeding being jerry-rigged and Osteen's loss of scholarship assistance, but decided that, on balance, all of the factors did not sway in favor of a right to counsel.⁴³

Similarly, in *Gorman v. University of Rhode Island*,⁴⁴ the First Circuit held that if the accused student had an opportunity to answer, explain, and defend himself, a fair trial could be had without adherence to an adversarial hearing.⁴⁵ The court balanced Gorman's interest in an education against the need to "promote and protect the primary function of institutions that exist to provide education."⁴⁶ It concluded that the undue judicialization of a disciplinary hearing could be counter-productive, and result in the improper allocation of limited resources.⁴⁷ Since Gorman had the opportunity to consult with attorneys before and after his hearings, and was permitted to have an assistant from the University community during his hearing, full representation rights would not have accorded him a fairer hearing. The court did not require an ideal proceeding, only "an informal give-and-take between student and disciplinarian" with an opportunity for the student to explain his version of the facts.⁴⁸

C. *Gabrilowitz v. Newman* and *French v. Bashful*, two significant exceptions to the general rule

The first, and most important, exception to the general rule was created by the First Circuit in *Gabrilowitz v. Newman*.⁴⁹ The *Gabrilowitz* court held that because a criminal case was pending against the accused student, denial of a right to counsel would result in a deprivation of due process.⁵⁰ The court was careful, however, to confine the role of counsel to advisor, not advocate.⁵¹ The court reasoned that the Rules of Evidence created a conundrum; if the student testified at the hearing, any of his statements could

⁴¹ *Id.* at 226.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988).

⁴⁵ *Id.* at 13, 14.

⁴⁶ *Id.* at 14.

⁴⁷ *Id.* at 15.

⁴⁸ *Id.* at 16, quoting *Ingraham v. Wright*, 430 U.S. 651 (1977) (White, J., dissenting).

⁴⁹ *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978). See also, *McLaughlin v. Mass. Maritime Acad.*, 564 F. Supp. 809 (D. Mass. 1983).

⁵⁰ *Id.* at 105.

⁵¹ *Id.* at 101.

be used as evidence in the criminal trial,⁵² and if he did not testify, his silence could be used as an admission. Thus, the student was forced to walk a tightrope in terms of what he could or could not say in the disciplinary hearing, all without the benefit of a lawyer's knowledge of the Rules of Evidence. Where a student has the inability to evaluate the effect his statements may have in a criminal case, the court found the *Eldridge* risk of erroneous deprivation compelled it to grant the due process protection of the right to have the advice of counsel.⁵³

The cases of *French v. Bashful*⁵⁴ and *Jaska v. Regents of the University of Michigan*⁵⁵ provide the second exception to the general rule that students are not afforded the right to counsel in campus disciplinary hearings. The *French* court held that when a law student prosecuted the misconduct allegation for the college, the accused student was entitled to legal representation to offset the imbalance in skill and experience created by allowing a law student fill the prosecutorial role.⁵⁶ The Sixth Circuit decision in *Jaska* also lends credence to this exception by analogy, even though *Jaska* involved an academic disciplinary matter, because the protections afforded in serious misconduct-based disciplinary hearings are even greater than those in academic hearings.⁵⁷ The *Jaska* case did not involve a lawyer presenting the college's case, but the court addressed in dicta the fact that due process interests in a campus hearing might rise to the level of requiring the right to counsel when an attorney presented the college's case, or when complex rules or evidence or procedure were used in the hearing process.⁵⁸

PART TWO

- A. Several commentators' approaches to whether there should be a right to counsel in campus disciplinary proceedings.

⁵² They would not be excludable under *Garrity v. New Jersey*, 385 U.S. 493 (1967), because his testimony was not compelled. *See also*, *Furutani v. Ewigleben*, 297 F. Supp. 1163 (N.D. Cal. 1969); *Nzuve v. Castleton State College*, 133 Vt. 225 (1975).

⁵³ Gabrilowitz at 104, 105.

⁵⁴ *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir. 1970), *cert. denied*, 400 U.S. 941 (1970).

⁵⁵ *Jaska v. Regents of the Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986).

⁵⁶ *French* at 1337-38.

⁵⁷ *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (far less stringent procedural requirements in academic dismissal cases than in cases of misconduct).

⁵⁸ *Jaska* at 1245, 1252.

Walter Saurack, writing a student note on comparative English and American collegiate due process hearing rights, concluded that students should have a right to an "actively participating attorney" in a university disciplinary hearing.⁵⁹ Saurack cites *Powell v. Alabama*⁶⁰ for the proposition that "the right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel."⁶¹ While *Powell* refers to criminal trials in which the death penalty is applicable, Saurack extends the reasoning to include campus disciplinary hearings by analogy when he writes:

Many university students have a particularly strong need for an actively participating counsel because they have just reached adulthood, and some of them face fear, anger, and the inability to articulate their story. The assertion that students are literate and educated and should be able to defend themselves is simply false. On the other side, the university ordinarily will have experienced and articulate adults or students presenting its side of the case.⁶²

Similarly, James Picozzi, once on trial in a campus adjudication, advocates a full-blown adversarial proceeding, approximating a criminal trial, with a full-complement of due process protections.⁶³ He even goes so far as to incorporate Sixth Amendment rights to appointed counsel into his model.⁶⁴ Douglas Richmond's article, drawing on his experience as a student affairs administrator, reflects faith in the current balancing approach to provide "a blend of respect for universities' interest in maintaining discipline, concern for universities' administrative and financial resources, and a desire to protect students' rights."⁶⁵ He finds that conflict only arises from lapses of integrity by university administrators, who should not have a problem with the presence of attorneys in campus hearings at all.⁶⁶ He suggests that, for the most part university administrators have the students' best interests at heart and would naturally want to do what is best for them.⁶⁷

⁵⁹ Walter Saurack, *Protecting the Student: A Critique of The Procedural Protection Afforded to American and English Students In University Disciplinary Hearings*, 21 J.C. & U.L. 785, 820 (1995).

⁶⁰ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁶¹ *Id.* at 68-69.

⁶² Saurack at 820.

⁶³ James Picozzi, *Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L. J. 2132 (1987).

⁶⁴ *Id.* at 2161.

⁶⁵ Douglas Richmond, *Student's Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289 (1989).

⁶⁶ *Id.* at 310.

⁶⁷ *Id.*

None of these commentators offers a model that is practical, realistic, or capable of satisfying the *Eldridge* factors. The campus disciplinary hearing is a unique and carefully crafted format.⁶⁸ It is designed to determine if a policy violation has taken place, yet carefully melds the values of self-determination and justice with the creation of a learning experience without the cost, time, effort, and complication of a full-blown trial.

In his article, Mr. Saurack ignores one of the most important dimensions of a college hearing: that it is intended to be a learning experience. Self-determination is a core element at play in a campus judicial proceeding. Students are expected to prosecute and defend their cases persuasively and articulately. To suggest that a college student is not up to the task is both patronizing and insulting. If a college student is not capable of handling such a responsibility, who is? Defendants need attorneys, not because of an inability to speak, but because of the complexity of the rules, procedures, and trial structure through which they must navigate. It is the complexity of the proceeding that creates the need for representation. Citizens represent themselves in traffic court because the simplicity of the format does not require the assistance of counsel.

In campus hearings, where the process is simple and designed for student participants, active representation by counsel is not necessary to successfully defend oneself. To suggest that students are lacking in sufficient maturity and literacy to speak in public sidesteps the fact that even if they do not prosecute or defend, students will certainly be called on to provide witness testimony. Moreover, for many victims, the chance to prosecute their own attackers is a cathartic aspect of the healing process. Another significant facet of the college hearing process is the sense of justice it can produce. Mr. Saurack makes just such a point in his article, but for some reason discards it in concluding that representation by counsel is necessary:

One value associated with a procedurally adequate hearing is the value of human interaction in which the affected person experiences the [sic] "the

⁶⁸The unique character of campus hearings is enabled by two exceptional aspects: unlike a public criminal trial which can be intimidating and can discourage victims and witnesses from coming forward, neither the proceedings nor the outcome of campus hearings are usually made public; and, campus trials usually operate under a lesser standard of proof than criminal trials (usually preponderance of the evidence, though some campuses use the clear and convincing standard), which enhances the possibility of a successful prosecution. This presents campus victims with an opportunity for justice that may be unavailable in a criminal proceeding, and offers a route to resolve the problem without public scrutiny, which is a common concern for victims of violent crimes and sex crimes.

feeling . . . that justice has been done."⁶⁹ Research has suggested that a party's satisfaction with the fairness of a proceeding is influenced by several factors, including: "the opportunities for representation; the quality of the decisions; the opportunities for error correction; and the authorities' bias."⁷⁰ These factors were found to be at least as important as the favorability of the outcome itself in determining the satisfaction of the participant. Further, persons who participate, [sic] in procedurally adequate hearings experience the self-respect associated with controlling the events that affect them.⁷¹

James Picozzi has also neglected the aforementioned unique characteristics of college hearings by suggesting that courts should require campus hearings to be virtually indistinguishable from criminal trials. While having representation by counsel would undoubtedly be helpful to respondents, to make such a suggestion ignores the practical reality that courts, applying the *Eldridge* factors, would decline to require the due process right to representation by counsel. The burdens on colleges of providing such procedural and evidentiary formality would clearly outweigh the added benefits, if any, of such a hearing. While no court has used the *Eldridge* factors to weigh this precise question, evidence that courts would deny the right to representation by counsel in campus disciplinary hearings can be drawn from other cases. Some of these cases, which deny the right to counsel, involve interests similar to those at stake in campus hearings.⁷² Others provide the right to counsel in disciplinary or predeprivation hearings, but the significance of the interests involved far outweighs the importance of the liberty and property interests at stake in campus hearings.⁷³ Furthermore, many colleges, if faced with the financial, temporal, staffing, training, and legal requirements of a full-blown trial, would probably opt not to hold campus hearings at all. And, if the campus hearing apparatus is tantamount to a criminal trial anyway, why not just let the courts prosecute the matter?

⁶⁹ Walter Saurack, *Protecting the Student: A Critique of The Procedural Protection Afforded to American and English Students In University Disciplinary Hearings*, 21 J.C. & U.L. 785, 812 (1995), quoting, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951).

⁷⁰ *Id.*, quoting, Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103, 108 (1988).

⁷¹ *Id.*

⁷² *Goss v. Lopez*, 419 U.S. 565 (1975) ("further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."); *Ingraham v. Wright*, 430 U.S. 651 (1977) (White, J. dissenting) ("the Due Process Clause requires, not an 'elaborate hearing' before a neutral party, but simply 'an informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.'"); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (prisoners in disciplinary proceedings are not allowed counsel).

⁷³ *Mathis v. U.S.*, 391 U.S. 1 (1968) (where imprisonment is at stake (here for someone already imprisoned) due process right to counsel attach); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that welfare aid to dependent children is sufficient interest to allow representation by attorney at predeprivation hearings).

Also unworkable is Mr. Picozzi's suggestion that colleges provide appointed counsel to accused students. While many of the characteristics of a campus hearing may be analogous to a criminal trial, applying the Sixth Amendment right of appointed counsel would be inappropriate.⁷⁴ The requirement of appointed counsel would also fail the *Eldridge* balancing test. "[T]he cost to the school would be considerable. [T]his would be too high a price for a college to pay for the privilege of enforcing discipline among its students."⁷⁵ The possibility that a student who cannot afford counsel will risk incriminating himself can be avoided if the student simply refuses to testify in the campus hearing.⁷⁶ While this may seem a Hobson's choice for the student, the fact that the potential liberty and property deprivations at risk in a criminal trial far outweigh those in a campus trial should make clear that the safest path is not to testify in the campus hearing.⁷⁷

- B. Logical application of the *Gabrilowitz v. Newman* rule would require the presence of counsel at every campus disciplinary hearing at which suspension or expulsion is possible, if the policy violated may also be a criminal offense.

The *Gabrilowitz* case is puzzling for its compromises. Where a criminal trial looms, the significance of the liberty and property interest at risk in the campus hearing become inextricably interwoven by the rules of evidence into the potential deprivations of the criminal trial. Testimony during the campus hearing can become evidence in the criminal trial. The level of risk requires heightened due process protections, and the *Gabrilowitz* court achieved a successful balancing of interests by allowing the presence of an attorney as an advisor, but not as an advocate. This effects a skillful compromise, at once allowing the accused student needed access to legal expertise on what to say and what not to say, but at the same

⁷⁴ *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1980) (constitution does not require appointed counsel for indigents unless loss of *physical* liberty at stake) (emphasis added).

⁷⁵ *French v. Bashful*, 303 F. Supp. 1333, 1338 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir. 1970), *cert. denied*, 400 U.S. 941 (1970).

⁷⁶ This presupposes, as discussed in PART TWO, C., *infra*, that the college informs the student of his or her right to remain silent.

⁷⁷ Hopefully, though, students will not be faced with such a choice. Many college campuses currently offer free legal advice and services to students. Colleges with law schools often set up programs where law students provide legal services to undergraduates free of charge. Other campuses have trained peer advocates who can help both accused and accusing students through the hearing process. Still other schools have volunteer attorneys who work with students through local legal aid organizations. It is this author's fervent hope that if a campus hearing right to advisory counsel is ever broadly accepted by the courts, that independent, free legal counsel will be provided in some form or another on every college campus and will be available to students who cannot otherwise afford campus hearing advisors.

time, retaining the character of the campus proceeding to prevent it from become a full-blown adversarial trial.

The puzzling part of the decision is why it was so narrowly confined to only cases where criminal charges are pending, arising out of the same incident that has led to a campus complaint. The logical leap that must be made is that such protections must adhere at every suspension or expulsion-level campus proceeding that involves a potentially criminal incident. Under the solidly reasoned *Gabrilowitz* rationale, students must be allowed legal advisors in every disciplinary proceeding involving serious misconduct because there is always the possibility of a concurrent or subsequent criminal trial.⁷⁸ Often, victims will await the results of the campus hearing before deciding whether to file criminal charges. Or, the victim may decide years afterward to seek prosecution. Whatever the situation, it will usually be possible for the testimony of the accused student to be used against him or her in a subsequent criminal trial.⁷⁹ Thus, rights to counsel as advisor should attach, whether the threat of a criminal trial has been realized or not, because such a threat will continue to exist until the statute of limitations on the crime expires.

Some commentators have suggested that an alternative solution to the *Gabrilowitz* issue would be postponement of the campus hearing until after the criminal trial, so that there would be no possibility of self-incriminating evidentiary conflicts. This idea cannot be effectively implemented in most cases for several reasons. First, the college has a legitimate interest in seeking justice and closure through a misconduct hearing. There is no reason that the college's interest should be subservient to the criminal justice system's. There is no general requirement that when a civil proceeding and a criminal proceeding arise out of the same set of facts, the criminal trial must precede the civil suit. A college adjudication is analogous to the civil suit in this context, and the college should be able to pursue its hearing within a reasonable amount of time; in fact, due process demands it. Second, the victim has an interest in having the allegation heard by the college, and it would be manifestly unfair to him or her to have to await the results of a criminal trial. The third and final reason is that because the criminal justice system proceeds slowly, there is a very real possibility that the accused student will have graduated before the case goes to trial. Thus, postponement of the campus hearing will have effectively put the accused student outside the

⁷⁸ Unless there has been a criminal trial before the hearing, or the statute of limitations on the crime has run, rights to counsel should attach.

⁷⁹ There is an admissibility exception for testimony that has been compelled or coerced, under the doctrine of *Garrity v. New Jersey*, 385 U.S. 493 (1967) or *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

reach of college discipline, rendering the campus hearing a nullity. For all of these reasons, the *Gabrilowitz* approach provides a justice-based, outcome-oriented solution that is less intrusive and more protective, if taken to its logical application and extension.

- C. The right to remain silent at a campus disciplinary hearing; the inferences to be drawn from a student's silence, and the correlative rights of the complaining party.

If the conclusion of this article is correct, that due process mandates the right of accused students to confer with counsel during certain campus disciplinary hearings, it stands to reason that several other procedural safeguards must be put into place by colleges to make the actual communication with an attorney meaningful and useful to the student.

There are two alternative approaches. First, colleges can make it clear to students that they may invoke the fifth amendment right to remain silent in response to any question, the answer to which would be admissible in, and might jeopardize the student during, a subsequent criminal trial. That Fifth Amendment protections extend to campus hearings can be inferred from *Lefkowitz v. Turley*,⁸⁰ which held that a state entity may not in any way penalize a person for exercising the right against self-incrimination (though there is no right to refuse to answer questions unless you create it, it is a reasonable reading of this case that if you do afford that right voluntarily, you cannot punish its exercise). Public colleges, held to be state entities by the courts, must, by extension be bound by this holding.⁸¹ Thus, colleges must inform students that if they choose to remain silent, the hearing adjudicators may not draw any inference from a refusal to answer, be it positive or negative.⁸²

Some colleges take a second approach. They feel it is important that students answer the questions they are asked, in order not to frustrate the purposes of the hearing. For colleges that choose not to allow students to refuse to answer questions, in circumstances where a criminal trial is pending, there is one viable alternative. Accused students can be offered the opportunity to avoid self-incrimination by voluntarily withdrawing from the institution, pending the outcome of the criminal trial. This temporary withdrawal will

⁸⁰ *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

⁸¹ Douglas Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289 (1989).

⁸² *Lefkowitz* at 70.

often meet with the approval of the alleged victim, and offers a practical solution to the dilemma. In most such cases, the student will never return to campus. In rare instances where the accused is found not-guilty in the criminal trial, he or she may only return to campus once the hearing is held, and a non-responsible finding made. Thus, it is necessary to get all your ducks in a row, preserving evidence and testimony at the time of the incident, though it may be used several years later. This approach must be balanced against the fact the witnesses may be unavailable years later, and recollections will not be fresh. But, these circumstances are in fact quite rare. Most students never return after a voluntary withdrawal.

Finally, there is one last piece to the puzzle. Some hearings on college campuses are conducted by the administration against the accused student, such as in cases of theft, vandalism, or alcohol or drug-related offenses. But, at many colleges, especially in cases involving sexual assault, hearings are conducted on a student-adversary basis, where the accusing student must present the case.⁸³ If due process confers a right to counsel for the accused student, only, might that tip the scales against the accusing student? Should he or she have rights to counsel, too? The answer is that the accusing student should also have the right to the assistance of counsel, to balance the student-defendant's use of counsel. Such a right, however, is not conferred by due process, but by federal law. The Campus Sexual Assault Victim's Bill of Rights,⁸⁴ part of the 1992 Amendments to the Higher Education Act, guarantees the victim in a campus hearing the same right to representation as is granted by the school to the accused student. This can present some difficulties, such as the imbalance created when the accused can afford counsel, but the alleged victim cannot. Many colleges creatively address this need with law student participation, liaison with the local legal clinic, or at some schools, even providing legal assistance free of charge through the student government or student attorney general's office.

Some readers may bristle at the change in character the thesis of this monograph may represent to the campus judicial system. It is not the author's intent or desire to see college judicial hearings become more legalistic. It is however, the author's goal to ensure that colleges effectively protect the rights of students, in order to reduce the college's own potential liability in due process challenges to campus judicial

⁸³ Sexual assault seems to be unique among types of campus misconduct because it is adjudicated with a student-adversary format. Other felonies, such as theft and assault, often place the victim in the role of witness, but not prosecutor. The only parallel to the format of sexual assault hearings the author is aware of is that some colleges conduct academic proceedings, such as honor code infractions, in a student-adversary mode. Thus, the issue of representation for victims arises only in the sexual assault context.

⁸⁴ 20 U.S.C.A. §§1092, 1094, 104 Stat. 2381 (1990).

decisions. There are a few procedural safeguards that can help to ensure that attorneys do not overstep their advisory roles. One is to meet with the attorneys in advance of the hearing, to make it clear that they are there as "potted plants." They have no active role, and expressing zero tolerance for any greater involvement will help to lay effective ground rules. And, enforce them. If an attorney steps out of line, issue a warning, and don't be afraid to eject them from the hearing, if they are proving disruptive. Another important safeguard is to make sure that your own institution's counsel is present to provide assistance if needed.

The net result of the novel approach proposed by this monograph is that students involved in campus hearings will benefit from legal counsel in navigating whatever hearing procedures and rules of evidence are in place. They will have the assistance of a skilled advisor for direct and cross-examination. And, an attorney will be able to protect the accused student from making statements that might prove culpable in a criminal trial. This solution, therefore, offers public colleges a practical compromise to reconcile the tension between the rules of evidence, which, coupled with the significant liberty and property interests at stake, create the accused student's need for the advice of counsel, and the *Eldridge* factors, which do not require colleges to provide the full-blown due process protection of the right to representation by counsel.⁸⁵

⁸⁵ College and universities should be aware, however, that the rights conveyed by the Constitution are a floor rather than a ceiling. Courts have widely upheld a school's right to choose to extend greater protections to students than are afforded by the Constitution. *See, e.g.,* *Wimmer v. Lehman*, 705 F.2d 1402 (4th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983); *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992 (5th Cir. 1975); *Nash v. Auburn Univ.*, 812 F.2d 655 (11th Cir. 1987); *Adibi-Sadeh v. Bee County College*, 454 F. Supp. 552 (S.D. Tex. 1978).