UNIVERSITY DISCIPLINARY HEARINGS: A MISCARRIAGE OF JUSTICE

By

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I. HYPOTHETICAL ANALOGY

You feel a slight pain in your left side and you go to the doctor. Kidney stones run in your family and you fit the profile of someone who may have them. You'd like to verify this and see if there is any treatment. Instead of talking with the doctor, the receptionist makes an appointment with his medical assistant for you, a person with no medical training. The medical assistant tells you, based on your symptoms, that he will schedule the operation to have your left kidney removed.

Naturally, you are alarmed. Aren't there medically-sound and time-tested protocols to go through to ensure that surgery is warranted? Shouldn't you be dealing with someone actually trained in the field? But, the medical assistant reassures you that this methodology saves time, money, and is far more efficient. It may not be as medically sound, but medical soundness is irrelevant and mere technicalities. Efficiency and expediency are far more important goals.

We wouldn't stand for this if our health and lives were at stake. Common-sense tells us that we want medical assurances. We want the protocols that have been developed in laboratories.

II. FACT PATTERNS

1. A police dispatcher is accused of dereliction of duty because he failed to dispatch an emergency medical vehicle to a location. He sent the emergency medical vehicle out to transport a person to a hospital but did not indicate that it was more than just a mere transport. He failed to state that it was a medical emergency. However, the transcripts of the incoming call to the dispatcher indicate that he ascertained the medical situation, repeatedly asked the caller (who was also the patient) if it were an emergency. The patient's response was always, "no, it is not an emergency; the hospital said I should come in to have it looked at.").

2. A student is accused of intentional or reckless acts resulting in physical or mental abuse or harm. An "of age" student is at a party; is drinking; flirts with a girl who flirts back; later on in the evening he propositions her (by taking her hand and moving it toward his groin area while fully clothed); she refuses; he immediately stops.[1]

At the resulting administrative disciplinary hearings for these two accused (one a university staff member and the second a full-time student), the accused were not permitted legal representation, were not permitted to cross exam accusing witnesses; were not permitted to bring

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in corroborating or even character witnesses. In the second case specifically, evidence indicating the accuser's prior flirtatious behavior with the accused was excluded as irrelevant; evidence that the accuser was drunk and had an incomplete recollection of the evening was also excluded as irrelevant; the defendant's being drunk was viewed as an offence, despite his legal age and that this was in an off-campus apartment. Further, in both cases, the burden of proof to find the defendants in violation of the appropriate code was the "greater weight of the evidence." The penalty being sought was dismissal of the dispatcher and suspension or expulsion of the student.

At the hearings, hearsay evidence was introduced, even double and triple hearsay evidence; character testimony not comporting to any legal evidentiary standard for character evidence was also permitted. The fundamental question here is "Are the procedural rules that ensure evidentiary fairness at a trial superfluous in administrative hearing?" If so (which appears to be the answer), then why?

III. INTRODUCTION

Due Process is a seminal concept in Anglo-American jurisprudence. The definition of due process is still in evolutionary flux and the particulars of that definition will be discussed below. However, "[I]n its English origin the guarantees of due process…was the restraint on the sovereign: before King John or his royal officers could take action against a person, certain procedures had to be followed, procedures designed to ensure fairness."[2] Fairness, whether procedural or substantive, has always been the basis for whatever evolving concept of due process is employed. Moreover, due process has evolved into a synonym for the "rule of law."[3]

Due process, though, has been recognized as having two components, or even more appropriately, three components: procedural due process; substantive due process, and the interfacing of the two as the third component as represented in the classic Venn diagram. Procedural due process recognizes that the manner in which legal decisions are made while substantive due process recognizes the ultimate justice or fairness inherent in the final resolution.

Legal procedures such as the right to a hearing presided over by an objective judge or the right to confront accusing witnesses or the right to utilize legal process to secure evidence favorable to one's case all fall within the "procedural" aspect of due process. Courts have acknowledged that while these various processes comprise the family of rights incorporated into procedural due process, they are not absolute but are subject to a balancing test which is context dependent.[4]

Substantive due process is more ambiguously defined and often relies upon illustration rather than definition. However, fundamentally, whereas procedural due process is focused on a process which leads to a favorable or unfavorable result (e.g. the right to a neutral judge may still lead to a favorable or unfavorable decision), substantive due process goes to the heart of the result itself. Substantive due process demands that the ultimate result be based on a fundamental fairness and protection of existing rights.

The well-known *Lochner* case provides the quintessential example (as perverse as that may be in light of *Lochner*'s well-deserved pejorative critical treatment for the past century).[5] The court struck the New York law prohibiting bakers from working more than ten hours per day or sixty hours per week. Enacted as workplace safety legislation, the law was struck as unconstitutional because it impinged unreasonably on the bakers' right to contract. In other words, the bakers' substantive due process rights were violated by this state statute. Not allowing the bakers the full extent of what the court would define as the bakers' right to freedom

of contract violated the bakers' substantive due process rights. The bakers' rights under freedom of contract had been *taken away* by the state and this *take away* violated substantive (rather than procedural) due process.

While a *Lochner* example may clearly demonstrate the difference between a substantive due process issue and a procedural due process issue, not all examples are so clearly articulated. Issues pertaining to the nature, for example, of evidentiary review contain both procedural and substantive elements. For example, a rule or regulation prohibiting the cross examination of an accusing victim of a sexual offense has both procedural implications (the prohibition of the "cross-examination" process itself) and substantive implications (the right to an ultimate determination of facts and to uncover evidence that leads to such a determination.) These kinds of illustrations create the third area of due process rights, the amalgam of both procedural and substantive issues characterized by a standard Venn diagram representation. As the Supreme Court has noted, "…where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated…"[6]

IV. HYPOTHESIS

Within the context of procedural and substantive dues process, the definitions and applications are still evolving within the formal legal constructs in courts of law. However, an additional dimension is added when these same issues are placed outside of the venue of formal courts of law and placed within the confines of administrative agencies' adjudicatory functions.

Courts have given great deference to the rulings of administrative agencies. Procedural due process rights utilized in formal courts may not be so sacrosanct in administrative adjudicatory settings. The Supreme Court has described the fundament or essence of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest."[7] In the context of employment by a state agency or political unit, this principle requires ***"some kind of a hearing"*** prior to the discharge of an employee who has a constitutionally protected property interest in his employment. [8] However, there is the rub—what constitutes ***some kind of hearing***?

Most of the due process cases rising to the Supreme Court level tend to take the issue of whether a hearing is required, not the nature of the hearing itself. Moreover, the Court has clearly indicated that a full evidentiary hearing akin to the procedures required in a court of law is not required under due process. "Something less" than a full evidentiary hearing is required to satisfy due process concerns.[9] Again,though, there is the rub---what constitutes ***something less.*** Within the context of educational/student disciplinary hearings, the Supreme Court left the door wide open for schools to essentially decimate basic due process by requiring only a cursory hearing and nothing else, In that 1975 case, the majority wrote (ironically upholding student due process rights):

> There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. Lower courts which have addressed the question of the *nature* of the procedures required in short suspension cases have reached the

same conclusion. *Tate* v. *Board of Education*, 453 F.2d 975, 979 (CA8 1972); *Vail* v. *Board of Education*, 354 F.Supp. 592, 603 (NH 1973). Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow [*583] as soon as practicable, as the District Court indicated.

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. Indeed, according to the testimony of the principal of Marion-Franklin High School, that school had an informal procedure, remarkably similar to that which we now require, applicable to suspensions generally but which was not followed in this case. Similarly, according to the most recent memorandum applicable to the entire CPSS, see n. [***740] 1, *supra*, school principals in the CPSS are now required by local rule to provide at least as much as the constitutional minimum which we have described.

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. [HN10] Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by [**741] diverting resources, cost more than it would save in educational effectiveness. Moreover, 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.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments [*584] about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.[10]

This extended quote seems to enforce the right of students in educational administrative hearings. Instead, both courts and educational institutions have used this reasoning to justify minimal due process rights provided students. This perverse reasoning brings back shades of Brown v. Board of Education when the language of "with all deliberate speed" was used to delay, delay, and delay implementation of desegregation.[11]

Phillip Selznick notes that the concept of "legality," a synonym for "rule of law," extends to administration as well as adjudication.[12] "Wherever there is official conduct, the possibility of arbitrary decisions arise. That conduct may be far removed from rule-making or adjudication, at least in spirit or purpose. It may be a practical effort to get a job done. Yet, the question of legitimacy—of power exercised in the light of governing norms—is always appropriate."[13]

This paper poses the hypothesis that the courts have been negligent in their role as the gatekeepers of due process rights as applied within agency adjudicatory hearings. It seems that the courts' willingness to permit administrative adjudicatory functions to field some watered-down version of due process rights goes beyond reducing or ignoring "legal technicalities." This approach has had a severely harmful effect on the "rule of law." It has become a dagger in the very heart of the essential concept of the rule of law.

V. THEORY

The historical theory behind the concept of due process is fundamental fairness. As one commentator has noted "[t]he essential guarantee of the due process clause is that of fairness."[14] The theoretical basis then is that the due process requirements ensure fairness and ultimately justice through both procedural and substantive rights.

The historical theory behind the concept of administrative law (and, by extension, administrative adjudication) is a bifurcated one: 1) administrative action must be cognizant of the tendency toward arbitrariness and thus must narrowly tailor administrative behavior, both in the legislative and judicial functions; 2) administrative action must reflect an economic efficiency.[15]

From this historical concept arose the notion of administrative agencies as possessing specialized knowledge or expertise and thus "knowing" more in their respective area than judges or legislators. The genesis of this theoretical foundation was the "brainchild of the New Dealers who offered science and economics as a solution to the market failures that created the Depression."[16]

This presumption of "expert" knowledge then gives rise to the presumption that within a given context, the decisions of an administrative agency, whether that decision is legislative or adjudicatory in nature, is presumptively valid. That "given context" is defined either statutorily or constitutionally.

VI. HYPOTHESIS REVISITED

This paper's hypothesis states that the courts have permitted administrative agencies to apply such a watered-down version of due process rights within administrative adjudicatory activities as to severely impede the concept of the "rule of law." In light of the underlying history and theories of administrative law, the hypothesis needs redefinition in that there is an inherent tension between the "rule of law" and administrative adjudication.

The "rule of law" (and its due process progeny) has an ultimate goal of fundamental fairness and justice. Administrative adjudication has the ultimate goal of advancing administrative policy efficiently, with expediency and efficiency oftentimes being the manifestation of that administrative policy.

The hypothesis revisited then is that the court system has permitted administrative agencies to allow efficiency and expediency to supercede justice and fairness, thus relegating due process and its progenitor "rule of law" to a secondary status below efficiency.

VII. CASE LAW EXAMPLES[17]

A number of, what appear to be, bizarre decisions in this area are coming out of secondary and even primary school situations. Consider the case of Benjamin Ratner[18], an eighth grader in Virginia. When a schoolmate told him that she was contemplating suicide and to that end had a knife with her on school grounds, Ratner was able to confiscate her binder with the knife and secured it in his locker. When he turned the binder with the knife in it over to school authorities, Ratner was suspended for ten days and then, after his administrative hearing, was suspended for the rest of the term for violating the zero-tolerance policy of the school regarding possessing weapons on school grounds.

In a per curiam opinion entirely devoid of any semblance of common sense and empathy, the appellate court ruled:

> In its memorandum opinion, the district court concluded Ratner's claim was, in essence, a claim of due process violations. The district court also concluded, correctly, that the school officials gave Ratner constitutionally sufficient, even if imperfect, process in the various notices and hearings it accorded him, and we agree. See Goss v. Lopez, 419 U.S. 565, 581, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975) (describing process due students in connection with suspensions from school).
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> However harsh the result in this case, the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy of the sort alleged to be in place at Blue Ridge Middle School or of its application to Ratner. Instead, our inquiry here is limited to whether Ratner's complaint alleges sufficient facts which if proved would show that the implementation of the school's policy in this case failed to comport with the United States Constitution. We conclude that the facts alleged in this case do not so demonstrate.[19]

To comment in one word on this decision: ridiculous!

Due Process and Discovery

Two students at the University of Maine were found guilty of sexually assaulting a female student during an administrative hearing.[20] The two students filed a complaint with the district court, including a contention that the defendants (the hearing board) deprived them of their procedural due process rights.

> By conducting a fundamentally unfair hearing which included depriving the Plaintiffs of critical and potentially exculpatory evidence gathered during the investigation, depriving the Plaintiffs of effective assistance of counsel, preventing the Plaintiffs from effectively cross-examining and confronting adverse witnesses, depriving the Plaintiffs of any effective administrative appeal, depriving the Plaintiffs of an impartial tribunal, and imposing severe punishment without substantial evidence.[21]

The plaintiffs claimed they were not provided with a summary statement the Complainant gave to the Old Town Police Department, a complete witness list, nor the complainant's medical records prior to the day of the hearing. Records of interviews with the complainant (where inconsistencies were found) were never made available in the hearing. In addition, medical records regarding the potential effect of alcohol on prescribed medication were never made available for the plaintiffs nor the hearing committee. Finally, the arresting officer (who also assumed the role of presenting the hearing with the case) had access to police reports – which had been provided to the complainant's attorney. The officer failed to turn these documents over to the plaintiffs when asked to do so.

The plaintiffs also claimed that because the appeals court did not review the evidence as it supported the sanctions, it violated the essential requirements of due process. What is the due process that must be given to a defendant in an administrative hearing in the university setting? Specifically, when the allegations "have a major immediate and life-long impact on [their] personal life, education, employment, and public engagement". In addition, what are the students' rights during the discovery phase or an administrative hearing? The minimum requirements of due process in an academic setting: The student must be advised of the charges against him; (2) he must be informed of the nature of the evidence against him; (3) he must be given an opportunity to be heard in his own defense; and (4) he must not be punished except on the basis of substantial evidence.\In a university setting, a formal right to discovery, a witness list, or prior acquisition of exhibits is not provided. With regards to the appeals process, the right of appeals is not a constitutional right.

The court granted the defendants' motion for summary judgment in favor of the defendants on all counts. In the university setting, there are no set requirements for the discovery phase. Nor are there requirements to provide the opposing party with a complete witness list or set of exhibits. The appeals process is not a constitutional right; therefore, it is not directly tied to due process.

Due Process and Notice

Plaintiff Hill participated in a riot after his school, MSU, lost an NCAA sport event.[22] Hill exhibited extensive danger by helping in tipping over a van and kicking a telephone booth. Because of his actions, and his status due to disciplinary probation with regards to a prior alcohol-related offense, Hill was selected for immediate suspension by June (Vice President for

Student Affairs and Services). Hill appealed the decision – which was denied after a hearing in which a video tape of Hill's offenses had been shown by the arresting officer. Hill claims that his constitutional rights were violated when Defendants disciplined him for off-campus behavior in contravention of school policy, failed to identify which policy or regulation he allegedly violated, and deprived him of the right to be heard by an unbiased judicial body.

Was Hill deprived of his constitutional rights to due process because he was not provided with adequate notice of his specific violation?

With regards to suspension due to off-campus events, "encouraging fires, rocking vehicles, and kicking telephone booths, even though occurring off-campus, shows a disregard for the property and safety of others that raises a legitimate concern as to the safety of the property and persons on-campus." With regards to prior notice, the court "concluded that the school's interest in safety and the necessity of immediate action outweighed the plaintiff's private interests in continuing his education". Because the fire and the riot posed substantial dangers to the physical facility, the decision did not amount to a due process violation. Summary judgment was granted to June, the defendant, on Hill's claims of procedural and substantive due process violations. In events that pose immediate danger to the university, the physical facilities, or its students, a defendant does not have to be provided with notice and a hearing before a decision is made. In this case, Hill was provided with a post-deprivation hearing. According to this court, the post-deprivation hearing was sufficient for procedural due process.

Due Process and Right to Counsel

Plaintiff Osteen assaulted and battered two students outside of a bar at Northern Illinois University.[23] The incident led to Osteen's expulsion for two years and to this lawsuit (dismissed by the district court), in which Osteen challenged the expulsion as a deprivation of property without due process of law, in violation of the Fourteenth Amendment. The hearing was held before an appeals board consisting of the university's assistant judicial officer (i.e., assistant to Bolles, the party presenting evidence against Bolles) presiding and in addition one faculty member and two students.

The suit attacks a number of features of the disciplinary proceeding. Bolles had played a dual role as judge and prosecutor. The presiding officer of the appellate tribunal was Bolles's assistant. She cut off Osteen's advocate on the ground that the issue of guilt was not before the board, just the issue of sanction, when the advocate was trying to give Osteen's version of the assaults. Osteen was not allowed to cross-examine. His lawyer (his real lawyer, not the student advocate) was not permitted to participate in the proceedings. At the oral argument before us Osteen's counsel repeated, what had been in his complaint but not in his briefs, the alarming further charge that Bolles had induced Osteen to plead guilty on the representation that on appeal the two-year expulsion would be rescinded--then (as we know) turned around and argued passionately to the appeals board for expulsion.

The issues raised are the defendants' failure to comply with all the requirements of the student judicial code, the interruption of himself and his advocate by the appeals board, and the denial of a right to counsel.

1st issue: a violation of state law (the student judicial code may be treated as a state law) is not a denial of due process, even if the state law confers a procedural right.

2nd issue: Osteen had by pleading guilty to the charges against him conceded his guilt, so the presiding officer was entitled to cut off what appeared to be an attempt to reopen the issue.

3rd issue: at most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal. "We don't think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation."

The court affirmed the dismissal of plaintiff former student's due process claim.

In university administrative hearings, students have a right to consult a lawyer, but do not have the right to representation. Bringing in attorneys to cross-examine accusing witnesses would bring in too much cost and complexity into the matter, which would prove to be a detriment of discipline.

Due Process and Cross-Examination

Plaintiff Gorman was involved in two altercations with two university employees.[24] Both women subsequently filed complaints with the University, charging Gorman with verbal abuse, harassment, and threats. Two separate administrative hearings ensued before the University Board on Student Conduct. The board for each hearing consisted of one faculty member, five students, and a staff member from the Office of Student Life (Weisinger). However, the student chair and the staff member from the Office of Student Life served in both trials. Gorman failed to comply with the second court's sanctions.

Gorman appealed to the University Appeals Board, which based its decision on the written record of the staff member from the Office of Student Life. The decision from the trials was upheld. Gorman later filed this action in the United States District Court for the district of Rhode Island. After a year's suspension, the case proceeded to trial, where the court held that the University procedures violated the due process clause of the fourteenth amendment, and that, "pursuant to 42 U.S.C. § 1983, the defendants are liable to the plaintiff for depriving him . . . of rights secured by the Constitution". The district court held that Gorman's request to tape record the hearings should have been granted, and Wesinger's involvement in deliberations compromised their independence to a degree that violates the requirements of due process.

The issue: Gorman contended that he did not receive due process because he was deprived of: (1) an impartial and independent decision-maker, (2) a transcript and/or a tape recording of the hearings, (3) cross-examination of any participant in the actions concerning possible bias, (4) representation by counsel at the hearings, and (5) review of the University's decision by a court under a "substantial evidence" standard

The appeals court held that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-productive. With regards to the biased decision-maker, the appeals court did not believe that Gorman met the required burden of proving prejudice. A written transcript was held to be sufficient in this case. The court also held that the University procedures are designed to give students an opportunity to respond and defend against the charges made, and there is no evidence which would show that Gorman was denied a fair hearing because of Weisinger's multiple roles. Finally, the court held that representation by counsel is not a requirement for disciplinary hearings, unless the student is also facing criminal charges stemming from the incident. Consultation with an attorney, both before and after the hearing, was never denied.

It is the holding of the court that the procedures employed in the disciplinary actions taken by the University of Rhode Island against Gorman did not violate the Due Process Clause of the fourteenth amendment. The judgment of the district court is, therefore, affirmed in part and reversed in part.

Unless the criminal charges stem from the disciplinary hearing, a student's due process does not entail him/her to legal representation. Due process is seen as giving the defendant an opportunity to be heard and to defend themselves. Many times, an enforcement of excessive rights (or "undue judicialization") for the purpose of due process would be unpractical given university resources.

Due Process and Hearsay

Plaintiff, Maciej Murakowski challenges the University's right to discipline him for posting allegedly threatening comments on a website maintained on the University's server.[25] In his verified complaint, Murakowski contends that his rights under the First and Fourteenth Amendments were violated as a result of disciplinary proceedings which concluded that Murakowski violated the University's Disruptive Conduct and Failure to Comply policies. As a result, he was suspended for one semester, banned from residence halls and place on Deferred Expulsion through graduation. On appeal, the University's Appellate Board upheld the hearing officer's decision and sanctions.

Murakowski contends that he was denied fundamental due process at the hearing because the hearing officer relied on double hearsay and Murakowski was unable to confront his accuser. In support of his argument, Murakowski compares the administrative hearing process to the procedural protections affording during criminal proceedings.

Due to the admission of double hearsay evidence, and an inability to cross examine his accuser, was Murakowski deprived of due process in the administrative hearing?

Using the case of *Goss v. Lopez*, , due process requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story". Although a hearing is required for disciplinary proceedings, a *formal* hearing is not since "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 a part of the teaching process."[26] A university's primary purpose is to educate students: "a school is an academic institution, not a courtroom or administrative hearing room."[27]

Furthermore, Murakowski received sufficient notice of the charges against him and a meaningful opportunity to prepare for the hearing. Murakowski presented a defense that included not only witnesses and documents, but his own testimony in which he explained why he felt authorized to return to his dorm room. He also was allowed to challenge the hearing officer's questions of him.

Since Murakowski received adequate notice of the charges and grounds, actively participated in the hearing where those charges and grounds were explored, and had the opportunity to present his side through his own statements and the statements of witnesses, his due process rights under the Fourteenth Amendment were not violated.

An administrative hearing in a university setting does not have the same requirements of a criminal procedure. Therefore, as long as the student is given an opportunity to understand the charges being brought against him/her, voice their opinion in court, and mount a defense, the

requirements of due process are served. In this case, while double hearsay statements were offered, the court held that the no due process violations occurred.

VIII. CONCLUSION

There are several layers of problems with the intersection of administrative law and due process.[28] We have recognized in centuries of the evolution of the common law that due process is the bedrock of this very common law system. Due process is the transformational concept introduced in Magna Carta.[29] Coupled with *stare decisis*, it provides both the procedural and substantive underpinning of our Anglo-American legal system. It creates a methodology of truth-finding, factual credibility, fairness, and most important of all, legitimacy in our adjudicatory functions. Why then should such concepts not apply in institutional decision-making as it does in adjudicatory ones?

The arguments given as to why it does not rest on claims of efficiency.[30] Administrative agencies should not be hamstrung by such "technical" rules. This is truly like the claim that authoritarian governments are "more efficient" than democracies. Thus, should we abandon democracy?

If hearsay evidence is inherently unreliable and thus not admissible in a court of law (all the exceptions notwithstanding), why would such evidence miraculously become reliable and credible in non-judicial hearings? If legal counsel is an inherent right of due process when one's liberty is at stake in a criminal proceedings, is it any less vital when one faces the dire consequences of expulsion from a college or university?

Clearly, every administrative decision cannot be conducted exactly like a trial by jury. But, fundamental concepts are being ignored, concepts that have been tested by time and practice: cross-examination, impartial hearing officer, discovery, notice, and the right to confront witnesses. These rights are not "technical." They are fundamental and crucial to issues of fairness and legitimacy. Selznick's assertion is vitally on point: the rule of law must be applied administratively as well as judicially.[31]

The courts have all but abdicated its gatekeeper role of due process. For the sake of economy and expediency, courts appear to have abandoned their fundamental role of the guardian of rights. Instead, courts have permitted these kind of administrative hearings to disregard most of our most cherished and fundamental legal concepts.

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[1] The facts of both events have been fictionalized to some degree to protect the anonymity of the parties but not sufficiently changed to alter the underlying issues.
[2] Orth, John V., Due Process of Law (Univ of Kansas Press 2003) p.8.
[3] Orth, John V., "Exporting the Rule of Law," North Carolina Journal of International Law 24 (1998): 71-82
[4] See generally Mathews v. Eldridge 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 18 (1976).
[5] Lochner v. New York, 198 U.S. 45 (1905).
[6] Cleveland Board of Education v. Loudermill 470 U.S. 532(1985) citing to Arnett v. Kennedy 416 U.S. 134 (1874) p. 152.
[7] Boddie v. Connecticut, 401 U.S. 371 (1971) p. 379.
[8] Board of Regents v. Roth, 408 U.S. 569-570; Perry v. Sindermann, 408 U.S. 593, 599(1972) (emphasis added).
[9] Mathews v. Eldridge, *supra*, p.343
[10] Goss v. Lopez 419 U.S. 565 (1975)
[11] Brown v. Board of Education of Topeka 347 U.S. 483 (1954)
[12] Selznick, Phillip *Law, Society, and Industrial Justice* (New York: Russel Sage Foundation, 1969), pp.11-18
[13] Id.
[14] Nowak, John E., *Constitutional Law*, 2d edition (St. Paul MN, West Publishing Co., 1983) p.557

[15] *The Myth of Due Process*, J. Rutherford 72 B.U.L. 1 (1992) pp. 56-57 "…the most conservative law and economics devotees would reduce all legal questions to one of efficiency. Efficiency seems attractive because it conjures up images of numerical calculations rather than subjective value choices. Of course, the decision to pursue efficiency itself represents [*57] a value choice which excludes other values such as compassion, participation, or equality. Even if we conclude that we want to reduce due process to serving the goals of efficiency, it is not clear whether providing any procedural or substantive due process right is efficient. Economists look to the open market to create efficiency, but because due process rights are within the monopoly power of government, there is no market to determine an efficient allocation. Thus, we are tempted to opt for the cheapest alternatives.
Once efficiency becomes the sole criterion, we need not limit it to sacrificing a few individuals for the greater good. Cost considerations can legitimate large-scale injustices. In*Schweicker v. Chilicky*, for example, the Court held that the government need not provide a remedy for 200,000 disabled persons who had been purposefully deprived of benefits without due process. The immense scale of the injustice -- the great cost -- became the excuse for failing to provide a remedy. Due process costs money that cannot be spent elsewhere. Hence, due process has opportunity costs. Whether the process is worth the cost is a value choice that no economic theory can answer. Certainly, the value of process cannot be measured in contractual efficiency." [citations omitted]

[16] Bressman, Lisa S., Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. Law Review 462 (2003) p. 471.

[17] See generally Pelliccioni, Christopher, I s Intent Required?: Zero Tolerance, Scienter, and the Substantive Due Process Rights of Students, 53 Case W. Res. 977 (2003).

[18] Ratner v. Loudoun County Public Schools, 16 Fed. App. 140; 2001 U.S. App. LEXIS 16941, *cert. denied* 534 U.S. 1114 (2002).

[19] Id.

[20] Gomes v. University of Maine System 365 F. Supp. 2d 6; 2005

[21] Id.

[22] Hill v. Board of Trustees of Michigan State University and Lee N. June 182 F. Supp. 2d 621; 2001 U.S. Dist

[23] Thomas Osteen, Plaintiff-Appellant, v. Barbara Heneley, in her personal capacity and also in her official capacity as Vice President for Student Affairs of Northern Illinois University, et al., Defendants-Appellees. 13 F.3d 221; 1993

[24] Raymond J. Gorman, III, Plaintiff, Appellee, v. University of Rhode Island, et al., Defendants, Appellants 837 F.2d 7; 1988

[25] Maciej Murakowski v. University of Delaware 575 F. Supp. 2d 571; 2008 U.S. Dist

[26] Cf. fn. 10

[27] The naivete of the court is almost laughable here; the primary purpose of a university disciplinary hearing is not an educational one, but a punitive one as well as deterrence for like behavior. To believe otherwise shows a utopian disposition that empirical data does not bear out. The court's rationale bears a striking resemblance to the *Lochner* court's insistence on upholding the non-existent rights of the bakers.

[28] See *The Myth of Due* Process, J. Rutherford 72 B.U.L. Rev. 1 (1992).

[29] From its inception in Magna Carta, due process of law has attempted to provide a standard, both as norm and as emblem, for resolving instances of the persisting confrontation between man and his government." Charles Miller, *The Forest of Due Process Law: The American Constitutional Tradition, in* NOMOS XVIII: DUE PROCESS 3 (J. Roland Pennock & John Chapman eds., 1977).

[30] Cf. Rutherford ,op cit. fn 265 citing to, *E.g.*, Mackey v. Montrym, 443 U.S. 1, 18 (1979) (holding that law requiring Registrar of Motor Vehicles to suspend license without a hearing after refusal to take a breath-analysis test did not violate due process and that to require a hearing would undermine public safety interests and would "impose a substantial fiscal and administrative burden on the Commonwealth"); Dixon v. Love, 431 U.S. 105, 114 (1977) (declining to require a hearing before revoking a drivers' license after repeated moving violations because it would impose too great an administrative burden); Ingraham v. Wright, 430 U.S. 651, 680 (1977) (holding that common law remedies meet due process requirements because notice and hearing in corporal punishment cases would be too costly in time, personnel, and attention); Goss v. Lopez, 419 U.S. 565, 583 (1975) (holding that to require full hearings in connection with all school suspensions "might well overwhelm administrative facilities in many places and by diverting resources, cost more than it would save in educational effectiveness").

[31] Selnzick, op.cit.