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Fernand N. Dutile

Notre Dame Law School, fernand.n.dutile.1@nd.edu

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STUDENTS AND DUE PROCESS IN HIGHER EDUCATION: OF INTERESTS
AND PROCEDURES

Fernand N. Dutille*

I. INTRODUCTION

In the process of enforcing their academic and disciplinary standards, colleges and universities increasingly find themselves confronting the possibility and even the reality of litigation. At public institutions, of course, the strictures of the due process clause of the Fourteenth Amendment¹ loom especially large. Meeting the complex needs of their institutions and students as well as the expectations of American courts presents an ongoing and daunting challenge to higher education personnel.

For both internal and external reasons, institutional dealings with aberrant students in public higher education has, over the years, developed on a dual track. Courts themselves have generally treated disciplinary action against students as subject to significant procedural due process although, in typical due process fashion, the quantum of process has varied according to the student interest threatened by institutional action. Academic sanctions have occasioned greater deference from the courts. In such situations, courts, though acknowledging that even here institutional action might be judicially trumped, have accorded universities great leeway in determining both the need for and the extent of any sanction.

This Article will discuss the (relatively few) building blocks provided by the U.S. Supreme Court for this area of the law. It will then assess the interests that come within the protection of due process and describe the procedures enforceable against state institutions.²

Professor of Law, Notre Dame Law School. A.B., Assumption College, 1962; J.D., Notre Dame Law School, 1965. Admitted to the Maine Bar, 1965.

¹ "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, §1.

² Since this Article addresses the requirements of due process, its lessons reflect the minimum that state institutions may provide their students. Of course, colleges and universities should seek to do the wise and the right, in addition to the compelled. For a "document that can serve as a starting point for code revisions at a broad range of campuses," see Gary Pavela, *Applying the Power of Association on Campus: A Model Code of Student Conduct*, 11 SYNTHESIS: LAW & POLICY IN HIGHER EDUC. 817 (2000) [hereinafter Pavela]. See also Gary Pavela, *Applying the Power of Association on Campus: A Model Code of*

II. THE SUPREME COURT'S GUIDELINES: *GOSS*, *INGRAHAM*, *HOROWITZ*, AND *EWING*

A. The Disciplinary Cases: *Goss* and *Ingraham*

The U.S. Supreme Court's first major pronouncement on the relationship of due process to institutional dealings with students occurred in *Goss v. Lopez*.³ In *Goss*, students subjected to short suspensions for a variety of miscreance brought a class action against school officials, arguing that due process guaranteed hearings prior to such suspensions. The U.S. Supreme Court, in a five-to-four decision, agreed.

The Court found both a property interest and a liberty interest implicated by the suspensions. Noting that independent sources such as state statutes and rules usually create and define constitutionally protected property interests,⁴ the Court saw such an interest in Ohio's statutorily granted right to a free public education.⁵ The Court, observing that due process looks not to the weight of the interest but to its nature,⁶ declined to view the students' temporary banishment from school as *de minimis*.⁷ Any property interest that is not *de minimis*, the Court continued, garners due process protection.⁸ The liberty interest stemmed from the potential impact of the suspensions on the

Academic Integrity, 24 J.C. & U.L. 97 (1997). Both the student conduct and the academic integrity codes "are designed to facilitate ethical dialogue in an educational setting, and emphasize clear language, informal procedures, and procedural fairness. They also incorporate significant student involvement in the disciplinary process, reflecting the view that the campus community is a contractual association, committed to participatory governance . . ." *Id.* at 817.

³ See 419 U.S. 565 (1975).

⁴ See *id.* at 572-73 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)), See *Tobias v. Univ. of Tex. at Arlington*, 824 S.W.2d 201, 208 (Tex. App. 1991). Such an interest presupposes a claim of entitlement, not a mere abstract need or desire, or unilateral expectation. See *id.*

⁵ See 419 U.S. at 573 (citing OHIO REV. CODE ANN. § 3313.64 (1972)). In his dissent, Justice Powell argued that since the State of Ohio qualified the grant of a free education with a specific provision for such suspensions, the students had not lost anything beyond the package to which state law entitled them. See *id.* at 586-87.

⁶ See *id.* at 575.

⁷ The Court stressed that the *nature* of an interest, not its *weight*, controls whether constitutional protections under the Fourteenth Amendment apply. See *id.* at 575 (citing *Roth*, 408 U.S. at 570-71).

⁸ See *id.* at 576.

students' reputation among teachers and other students and on later educational and employment opportunities.⁹

Critical to any understanding of the Court's pronouncement, however, is the simplicity of the hearing required in such cases. Said the Court: "The fundamental requisite of due process is the opportunity to be heard."¹⁰ Accordingly, the Court loosely added, the students were entitled to "some kind of notice" and "some kind of hearing."¹¹ Nonetheless, the requirements of due process are fully met in such cases when the disciplinarian informs the student, even orally, of the charge and, if the student denies the charge, provides an explanation of the evidence supporting it and an opportunity for presentation of the student's version of the incident.¹² The Court pointed out that these requirements afford, "if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."¹³ Adding to the simplicity, the Court made clear that there need be no delay between notice and hearing.¹⁴ Interestingly, in this disciplinary case the Court emphasized a point thematic to academic situations—judicial restraint: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint By and large, public education in our Nation is committed to the control of state and local authorities."¹⁵

The Court, true to its word, focused on "fundamentally fair procedures to determine *whether* the misconduct has occurred."¹⁶ Although the word "hearing" conjures up in the popular mind a complex and lengthy panoply of procedural devices, it is instructive to focus on what *Goss* does not require: the *production* of the evidence against the student; opportunity for cross-examination; legal or other representation for the student; transcript; or appeal. Some of these, though clearly not all, might become constitutionally requisite in cases threatening more serious consequences, for example suspensions for more than ten days or expulsions.¹⁷

⁹ See *id.* at 575.

¹⁰ *Id.* at 579 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

¹¹ *Id.* at 579 (emphasis in original).

¹² See *id.* at 581.

¹³ *Id.* at 583.

¹⁴ See *id.* at 582. In the usual case, however, notice and hearing should precede any suspension. See *id.*

¹⁵ *Id.* at 578 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹⁶ *Id.* at 574 (citing *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (emphasis added)).

¹⁷ *Id.* at 584.

Curiously, though one might see excessive corporal punishment as one official sanction that might trigger still more due process protections than those outlined in *Goss*, the Court has exempted physical punishment in schools from any requirement of notice or a hearing.¹⁸ In *Ingraham v. Wright*,¹⁹ the Court concluded that the bodily restraint and "appreciable physical pain" entailed by corporal punishment implicated a liberty interest under the Fourteenth Amendment.²⁰ Nonetheless, despite a record indicating that junior-high-school students had suffered "severe" and "exceptionally harsh" physical beatings,²¹ the Court found that the traditional common law constraints and remedies provided by the Florida scheme at issue adequately provided due process.²²

To assess what process was due, the Court looked through the prism constructed in *Mathews v. Eldridge*.²³ *Mathews* set out three factors for such inquiries: 1) the nature of the private interest; 2) the risk of error and the probable value of additional or substitute procedures; and 3) the burden such procedures would present to the state, both in fiscal and administrative terms. With regard to the first, the students did have a strong interest in procedural safeguards to minimize the chance of wrongful punishment and to resolve disputes concerning justification.²⁴ With regard to the second, the Court noted that the usual case reflected an insignificant risk of error since the teacher witnessed the conduct subject to punishment. And, in any event, the Florida arrangement at issue, especially in the context of the openness of the school environment, provided substantial protection against wrongfully imposed corporal punishment.²⁵ With regard to the third, the Court found

¹⁸ See *Ingraham v. Wright*, 430 U.S. 651, 682 (1977).

¹⁹ See 430 U.S. 651 (1977).

²⁰ *Id.* at 674. Although the record showed that corporal punishment kept one child out of school for several days, see *id.* at 657, the Court found no state created property interest at stake: Corporal punishment is designed to correct without any interruption of the student's education. That the occasional student might in fact be deprived of some educational time in no way supports the conclusion that the "practice" of corporal punishment deprives students of property under the Due Process Clause. *Id.* at 674 n.43.

²¹ *Id.* at 657.

²² See *id.* at 683. The Court also held that the Eighth Amendment's prohibition against cruel and unusual punishment applied only to those convicted of crime and not, therefore, to schoolchildren. *Id.* at 664.

²³ See 424 U.S. 319 (1976).

²⁴ See *Ingraham*, 430 U.S. at 676.

²⁵ See *id.* at 676-78. Under that arrangement, the teacher and principal were required to exercise prudence and restraint in deciding upon corporal punishment. Moreover, should such punishment turn out to be excessive, the possibility of civil damages or criminal penalties arose. See *id.* at 676-77.

that imposing additional significant safeguards would intrude unduly upon the educational responsibility vested primarily in public-school officials.²⁶

B. The Academic Cases: *Horowitz* and *Ewing*

The U.S. Supreme Court addressed academic sanctions in two separate cases, both involving medical students. In the first, *Board of Curators of the University of Missouri v. Horowitz*,²⁷ the Court let stand a dismissal based on failure to meet institutional standards. A Council of Evaluation, a group of faculty members and students charged with assessing academic performance, recommended that Ms. Horowitz be placed on probation for her final year. This action followed expressions of dissatisfaction from several faculty members concerning her clinical performance during a pediatric rotation. After further unhappiness with her clinical achievement, the Council concluded that she should not graduate that year and moreover, absent "radical improvement," should be dropped from the program.

She was allowed, as an "appeal," to undergo oral and practical examinations under the supervision of seven practicing physicians. Her results disappointed yet again: Only two of the reviewers recommended timely graduation; three recommended continued probation; the remaining two urged immediate dismissal. As a result, the Council reaffirmed its position. At a subsequent meeting, the Council, noting that she had generated a "low-satisfactory" rating in a recent surgery rotation, concluded that, barring reports of radical improvement, she should not be allowed to re-enroll. At last, when still another negative report on a rotation appeared, the Council unanimously recommended that she be dropped from the program. The coordinating committee, a group of faculty members mandated to review the actions of the Council, affirmed, as did the dean. The student, who had not been allowed to appear before either the Council or the coordinating committee, then appealed to the provost for health services who, after reviewing the matter, sustained the dismissal.²⁸

Alas, as the dissent pointed out, damages or criminal prosecution took place only after the injury and, in any event, provided no remedy for errors made in reasonable good faith. *See id.* at 694-95 (dissenting opinion).

²⁶ *See id.* at 680, 682.

²⁷ *See* 435 U.S. 78 (1978).

²⁸ *See id.* at 80-82.

Assuming that she asserted a sufficient constitutional interest,²⁹ the U.S. Supreme Court found no violation of her procedural due process rights. Indeed, she received *more* than the "careful and deliberate" assessment to which she was entitled.³⁰ Her dismissal, the Court said, required no hearing before the institution's decision making body.³¹

Despite some unqualified statements that academic cases require no hearing,³² however, the Court's opinion is not without ambiguity on this point. At times the Court seems to be saying that Ms. Horowitz did not get, and was not entitled to, a hearing.³³ At other times, the Court seems to be distinguishing not between having and not having a hearing, but between a formal hearing and an informal one,³⁴ thus suggesting that she received the latter. Conceivably, the Court meant that she received an informal hearing, but was not entitled to one, thus making the latter statement a *dictum*.³⁵

²⁹ Ms. Horowitz had argued only a liberty interest, based upon the likely diminution of her educational or employment opportunities in the medical field. *See id.* at 82.

³⁰ *Id.* at 85.

³¹ *See id.* at 86 n.3.

³² "[C]onsidering all relevant factors . . . a hearing is not required by the Due Process Clause of the Fourteenth Amendment." *Id.* "[W]e decline to . . . formalize the academic dismissal process by requiring a hearing." *Id.* at 90.

³³ After noting that *Goss* required a hearing, though only an "informal give-and-take," the Court distinguished the disciplinary, involved in *Goss*, from the academic, involved in *Horowitz*. *Id.* at 85. The Court concluded that the latter called for "far less stringent procedures," thus suggesting that Ms. Horowitz was not entitled even to an informal hearing. *Id.* at 85. But why say all this if the Court felt she had gotten such a hearing?

³⁴ "The Court of Appeals apparently read *Goss* as requiring some type of formal hearing at which respondent could defend her academic ability and performance. All that *Goss* required was an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'" *Id.* at 85-86 (quoting *Goss*, 419 U.S. at 584) (emphasis added). "These prior decisions of state and federal courts . . . unanimously holding that *formal* hearings before decision making bodies need not be held in the case of academic dismissals, cannot be rejected lightly." *Id.* at 88. "Even in the context of a school disciplinary proceeding, however, the Court stopped short of requiring a *formal* hearing . . ." *Id.* at 89 (emphasis added). "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact finding proceedings to which we have traditionally attached a *full-hearing* requirement." *Id.* at 89 (emphasis added).

³⁵ The Court agreed with the district court that, in providing Ms. Horowitz the chance to be assessed by seven independent physicians, the institution afforded her more procedural due process than constitutionally required. *See id.* at 85. Justice Marshall, in his separate opinion in *Horowitz*, stated:

These meetings and letters plainly gave respondent all that *Goss* requires: several notices and explanations, and at least three opportunities 'to present her side of the story.' I do

Nonetheless, other courts have clearly read *Horowitz* to exempt academic matters from any requirement of a "hearing"³⁶—however that term might be understood.

Recognizing the precedential thrust of *Goss*, the Court labored to distinguish Ms. Horowitz's case as academic, rather than disciplinary; an academic case, the Court stressed, "calls for far less stringent procedural requirements . . ."³⁷ Many of the Court's observations on the reduced need for procedure in academic cases seem conclusory.³⁸ For example, the Court asserts that *Goss*, dealing as it did with allegations of disruptive demonstrations, an attack on a police officer and vandalism, involved "factual conclusions."³⁹ But clearly *Horowitz* too involved factual conclusions: the student's performance in a variety of contexts and, ultimately, her fitness for the practice of medicine. At another point the Court says, "A school is an academic institution, not a courtroom or administrative hearing room."⁴⁰ But of course this obvious point applies as well to disciplinary matters.

At bottom, three rationales seemed to underlie the Court's efforts to distance *Horowitz* from *Goss*: 1) the flexibility needed by educational institutions to deal with a panoply of situations;⁴¹ 2) the supposed greater subjectivity involved in "academic" decisions, a subjectivity not given to

not read the Court's opinion to disagree with this conclusion. Hence I do not understand why the Court indicates that even the 'informal give-and-take' mandated by *Goss* need not have been provided here. See *id.* at 99 (concurring and dissenting opinion) (citations omitted).

Justice Marshall refers to the Court's *dicta* "suggesting that respondent was entitled to even less procedural protection than she received," and "to the effect that even the minimum procedures required in *Goss* need not have been provided to respondent." See *id.* at 97, 99.

³⁶ See text accompanying note 300.

³⁷ *Horowitz*, 435 U.S. at 86.

³⁸ The Court referred to the "distinct differences between decisions to suspend or dismiss . . . for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter." *Id.* at 87. "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact finding proceedings to which we have traditionally attached a full-hearing requirement." *Id.* at 89.

³⁹ *Id.* at 89.

⁴⁰ *Id.* at 88.

⁴¹ "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Id.* at 86.

effective judicial review;⁴² and 3) the decreased adversariness typifying the teacher-student relationship in "academic" matters.⁴³

Although the issue had not been addressed by the Court of Appeals,⁴⁴ the Court ruled that the student's substantive due process rights, even if applicable to this context, had not been violated; the conduct of the institution was neither arbitrary nor capricious. Here too the "academic" nature of the matter proved persuasive: "Courts are particularly ill-equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decision making."⁴⁵

The Court made judicial attacks on "academic" decisions still more difficult in the second of the two cases, *Regents of the University of Michigan v. Ewing*.⁴⁶ Mr. Ewing found himself dismissed from Inteflex, a six-year program that allowed students to garner both an undergraduate and a medical degree in six years. In order to qualify for the final two years, students were required to take the NBME-Part I examination. On this examination, he earned the lowest score in the program's brief history. Denied readmission and the opportunity to re-take the test, he sued, alleging a violation of substantive due process.⁴⁷ Part of his case relied on the assertion that others had routinely been allowed to re-take the NMBE.⁴⁸ Echoing its thoughts in *Horowitz*, the Court declined to decide whether Ewing's interest in continued enrollment in the Program constituted a property right entitled to substantive

⁴² *Id.* at 90 (holding that "academic" decisions are "more subjective and evaluative," and "not readily adapted to the procedural tools of judicial or administrative decision making."). See also *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 931 (D.N.J. 1997). "In *Goss*, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative fact finding to call for a 'hearing' before the relevant school authority." *Horowitz*, 435 U.S. at 88-89.

⁴³ "Influencing this conclusion [in *Goss*] was clearly the belief that disciplinary proceedings . . . may automatically bring an adversary flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context." *Horowitz*, 435 U.S. at 90.

⁴⁴ See *id.* at 107 (Marshall, J., dissenting in part and concurring in part).

⁴⁵ *Id.* at 92.

⁴⁶ 474 U.S. 214 (1985).

⁴⁷ See *id.* at 215-17. He also alleged that state law claims are irrelevant here. See *id.* at 217.

⁴⁸ See *id.* Indeed, of thirty-nine students, in both the Inteflex and the standard programs, who had failed the exam, all but Ewing were allowed to re-sit for the exam, many more than once. See *id.* at 219. The Court rejoined that nineteen Inteflex students had been dismissed without any opportunity to take the exam. These data, said the Court, demonstrate the "insusceptibility of promotion decisions . . . to rigorous judicial review." *Id.* at 228 n.14.

protection under the Fourteenth Amendment. But assuming such a right, the Court unanimously held that it had not been violated: The institution's action was not arbitrary, but rather had been taken conscientiously and with careful deliberation.⁴⁹ The decision makers had considered his entire record, including his "singularly low score" on the NMBE.⁵⁰

Emphasizing a "narrow avenue" for judicial review of the substance of "academic" decisions,⁵¹ the Court made clear that federal judges should eschew second-guessing the decision makers in such cases:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.⁵²

Two factors add special interest to the Court's approach in *Ewing*. First, the Court seemed very mindful that greater willingness to take on such cases could inundate the Court with matters brought to it from America's educational arena. The judiciary, the Court noted, is ill-suited to "evaluate the substance of the *multitude* of academic decisions that are made *daily* by faculty members of public educational institutions."⁵³

Second, and related, the Court stressed its concern for the academic freedom of such institutions. Said the Court: "Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university."⁵⁴ Whether a student like Mr. Ewing remained at the medical school thus implicated that institution's academic freedom, a concept

⁴⁹ All nine members of the promotion and review board voted to dismiss him. At his request, the board reconvened, but reached the same result. The executive committee of the medical school, after providing him an opportunity to appear before it, unanimously denied his appeal for a retake. The following year, and to no avail, he twice appeared before the executive committee. See *id.* at 216-17.

⁵⁰ *Id.* at 225 and 228. Aside from his dismal performance on the NMBE, Ewing's record revealed marginal grades, seven incompletes, and a number of make-up exams, some occurring even as he carried a reduced course load. See *id.* at 218-19.

⁵¹ *Id.* at 227.

⁵² See *id.* at 225 (citations omitted).

⁵³ *Id.* at 226 (emphasis added).

⁵⁴ *Id.* at 226 n.12 (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (internal quotations omitted)).

of "special concern" to the First Amendment,⁵⁵ and gave the institution a constitutional interest to pit against the student's. Ironically perhaps, in *Ewing*, the institution's constitutional interest trumped the student's.

III. THE INTERESTS PROTECTED

Students adversely affected by university decisions have invoked both procedural and substantive due process. With regard to procedural due process, "little theoretical complaint exists about a court's active role in reviewing the fairness of a governmental decision-making process as the judiciary seems uniquely suited for such a task."⁵⁶ Substantive challenges, which "strike at the decision itself and not at the procedures afforded,"⁵⁷ call forth more controversy since, after all, the Due Process Clause itself targets process. Justice White has observed that "[a]lthough the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history. . . ."⁵⁸ Professor Tribe has alluded to the "textual gymnastics arguably necessary to find protection of *substantive* rights in a provision whose words seem most apparently concerned with *process*."⁵⁹ Nonetheless, the words "of law" do follow the phrase "due process"⁶⁰ and, in any event, the notion of substantive due process serves a practical purpose in light of the prevailing assumption that some actions transcend "any proper sphere of governmental activity."⁶¹ Despite the occasional suggestion that substantive due process is an oxymoron,⁶² substantive due process remains the principal device for enforcing individual rights against state encroachment. Furthermore, within this arena, the Court's ability to assess the

⁵⁵ *Id.* at 226.

⁵⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 346 (5th ed. 1995). See generally William G. Buss, *Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process*, 65 IOWA L. REV. 1 (1979).

⁵⁷ *Brown v. Univ. of Tex. Health Ctr. at Tyler*, 957 S.W.2d 911, 916 (1997).

⁵⁸ *Moore v. City of E. Cleveland*, 431 U.S. 494, 543 (1977) (dissenting opinion).

⁵⁹ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1, 1317 (3d ed. 2000). See also NOWAK & ROTUNDA, *supra* note 56, at 347 ("Although the effect of a substantive due process decision is readily apparent, the basis on which a court justifiably can reach such a decision has been a source of continuing controversy.").

⁶⁰ TRIBE, *supra* note 59, at 1333.

⁶¹ NOWAK & ROTUNDA, *supra* note 56, at 347. With regard to practicality, Professor Black called substantive due process "an invention that now and then works a little bit in practice, but *does not work* intellectually." CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED 105-06 (1997), *quoted in* TRIBE, *supra* note 59, at 1317.

⁶² See JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980), *quoted in* TRIBE, *supra* note 59, at 1333.

constitutionality of federal and state legislative and executive action draws greater criticism than does substantive review under specific provisions of, or amendments to, the Constitution.⁶³

In any event, the language of the Clause makes clear that claims under either procedural or substantive due process require that life, liberty or property be at stake.⁶⁴ Clearly, not all interests a citizen might claim fall under these rubrics and, despite a "virtually all-encompassing" interpretation in earlier cases, "[t]oday these concepts are being defined so as to exclude a variety of personal interests from their scope and protection. . . ."⁶⁵

The Supreme Court made clear in *Goss* that a student attending public school under state entitlement enjoys both a property interest and a liberty interest justifying procedural protection under the Due Process Clause of the Fourteenth Amendment.⁶⁶ The Court made clear in *Ingraham* that a public-school student facing the bodily restraint and pain of corporal punishment enjoys a liberty interest but, since no loss of school time usually depends on the matter, no property right is at stake.⁶⁷ Neither of these cases, of course, provides sure guidance with regard to property or liberty interests in higher education. The nature of the relationship between the student and the college or university differs markedly from that between a K-12 student and the public school, including with regard to the nature of any state guarantee of an education.

Both *Horowitz* and *Ewing*, to be sure, did involve higher education. But in *Horowitz*, in which the student argued only a liberty interest, the Court avoided the issue by assuming she had a constitutionally protectible interest.⁶⁸ With regard to the

⁶³ See NOWAK & ROTUNDA, *supra* note 56, at 347.

⁶⁴ See *id.* See *Wheeler v. Miller*, 168 F.3d 241, 249 (5th Cir. 1999); *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 931 (D.N.J. 1997); *Lewin v. Med. Coll. of Hampton Roads*, 910 F. Supp. 1161, 1164 (E.D. Va. 1996); *Siblerud v. Colo. State Bd. of Agric.*, 896 F. Supp. 1506, 1512 (D. Colo. 1995) (*dictum*); *Lucas v. Hahn*, 648 A.2d 839, 841 (Vt. 1994); *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 52 (Alaska 1999); *Tobias v. Univ. of Tex. at Arlington*, 824 S.W.2d 201, 208 (Tex. Ct. App. 1991). But see *Tobin v. Univ. of Me. Sys.*, 59 F. Supp. 2d 87, 89 (D. Me. 1999) (stating in *dictum* that one could prevail on a substantive due process claim by showing state action that "shocks the conscience," regardless of the existence of a liberty or property interest.).

⁶⁵ NOWAK & ROTUNDA, *supra* note 56, at 347. "The distinction is now between life, recognized liberty interests and property 'entitlements' as opposed to unprotected interests or 'mere expectations.'" *Id.*

⁶⁶ See text accompanying notes 4 and 5.

⁶⁷ See note 20 and text accompanying note 20.

⁶⁸ See text accompanying note 29.

still trickier notion of a sufficient interest under substantive due process, the Court, in both *Horowitz* and *Ewing*, merely assumed such an interest in deciding that, in any event, the students' rights had not been violated.⁶⁹ In the context of college and university disputes, therefore, other courts have been left to speculate with regard to the nature and extent of protectible interests under the Due Process Clause. Not surprisingly, the results have been mixed and unpredictable.

A. Property Interests

Property interests under the Fourteenth Amendment presume more than an expectancy, an abstract need, or a desire; there must be a claim of entitlement.⁷⁰ Such interests arise not from the Constitution itself, but rather from an independent source such as state law.⁷¹ In the context of higher education, the threatened loss of an already-awarded degree presents the best case for procedural protection as "property" under the Due Process Clause.⁷² Dismissals and similar adverse determinations, whether academic or disciplinary, also would seem to present strong cases for such protection.⁷³ Even here, however, certainty proves elusive: "Courts are split on the question whether a graduate level student has a constitutionally protected interest in completing his education."⁷⁴ Still, in *Harris v. Blake*,⁷⁵ the Tenth Circuit referred to the graduate student's "property interest in continued

⁶⁹ See text accompanying note 45.

⁷⁰ See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 931 (D. N.J. 1997); *Jenkins v. Hutton*, 967 F. Supp. 277, 281 (S.D. Ohio 1997). See generally Tonya Robinson, *Property Interests and Due Process in Public University and Community College Student Disciplinary Proceedings*, 30 SCH. L. BULL. 10 (1999).

⁷¹ See *Roth*, 408 U.S. at 577; *Jenkins*, 967 F. Supp. at 281; *Qvyjt v. Lin*, 932 F. Supp. 1100, 1108 (N.D. Ill. 1997); *Siblerud v. Colo. State Bd. of Agric.*, 896 F. Supp. 1506, 1512 (D. Colo. 1995) (*dictum*). In *Qvyjt*, the court found that Illinois law gave the student a contractual right to a degree. It went on to hold, however, that any random and unauthorized conduct by state actors in this case did not violate due process because Illinois law provided a post-deprivation remedy. See 932 F. Supp. at 1108.

⁷² *Crook v. Baker*, 813 F.2d 88, 97-99 (6th Cir. 1987); *Waliga v. Bd. of Trustees of Kent State Univ.*, 488 N.E.2d 850, 853 (Ohio 1986).

⁷³ See *Siblerud*, 896 F. Supp. at 1512, 1516 (holding dismissal threatens an "exceptionally robust" property interest (*dictum*)); *Adibi-Sadeh v. Bee County Coll.*, 454 F. Supp. 552, 557 (S.D. Tex. 1978); *Gagne v. Trustees of Ind. Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998) (stating student facing expulsion has property interest in pursuing education); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (holding suspension or expulsion threatens student's property interest in pursuing education); *Smith v. Denton*, 895 S.W.2d 550, 554 (Ark. 1995); *Knapp v. Jr. Coll. Dist. of St. Louis County, Mo.*, 879 S.W.2d 588, 592 (Mo. Ct. App. 1994); *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951, 953 (Ark. Ct. App. 1993).

⁷⁴ *Jenkins*, 967 F. Supp. at 282.

⁷⁵ See 798 F.2d 419 (10th Cir. 1986).

enrollment.”⁷⁶ In *Herbert v. Reinstein*,⁷⁷ a federal district court clothed a suspended law student with such an interest: “Once a state undertakes to provide educational services, students attending the school acquire a constitutionally protected property interest in obtaining an education.”⁷⁸ The Ninth Circuit has deemed a medical residency a property interest worthy of constitutional protection.⁷⁹ Indeed, even academic credits, since they constitute the building blocks of academic degrees, may themselves be property under the Fourteenth Amendment.⁸⁰

A few courts have been willing to find protected interests elsewhere. In *Evans v. West Virginia Board of Regents*,⁸¹ a former student applied for readmission a mere two months following the expiration of the leave of absence he had taken after two-and-a-half years of study. The court found a property interest in the completion of his medical education sufficient to justify imposition of “minimal” due process protection on the review of his application by the Board of Regents.⁸² In 1991 the Second Circuit invested a student with the right to good-faith dealing by looking to New York’s recognition of an implied contract between students and their college or university: “Such an implied contract, recognized under state law, provides the basis for a property interest that would be entitled to constitutional protection.”⁸³ Similarly, in *Ikepaazu v. University of Nebraska*,⁸⁴ the Eighth Circuit indicated its openness to bringing fair grading within the category of interests protected under the procedural mantle of the Due Process Clause: Here, the University of Nebraska promulgated a publication setting forth a grievance procedure for student appeals of allegedly capricious or improper grades. This procedure does appear to imply a contractual expectation in students that they will not be graded capriciously, and thus

⁷⁶ *Id.* at 423 (noting student’s tuition payment cemented the entitlement). *Accord* Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988); Stoller v. Coll. of Med., 562 F. Supp. 403, 412 (M.D. Pa. 1983); Hart v. Ferris State Coll., 557 F. Supp. 1379, 1382 (W.D. Mich. 1983); Shuman v. Univ. of Minn. Law Sch., 451 N.W.2d 71, 74 (Minn. Ct. App. 1990); Univ. of Houston v. Sabeti, 676 S.W.2d 685, 687-88 (Tex. App. 1984) (citing *Goss*, 419 U.S. 565, 576 (1967)).

⁷⁷ See No. 94-5765, 1994 U.S. Dist. LEXIS 15234 (E.D. Pa. Oct. 20, 1994).

⁷⁸ *Id.* at *8. *Accord* Foo v. Ala. Univ., 88 F. Supp. 2d 937, 947 (S.D. Ind. 1999) (holding threat of expulsion or suspension enough to trigger protections under Fourteenth Amendment); Ross v. Pa. State Univ., 445 F. Supp. 147 (M.D. Pa. 1978).

⁷⁹ See *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361 (9th Cir. 1976).

⁸⁰ See *Morrow v. Goldberg*, 672 F. Supp. 766, 771 (D. Vt. 1987) (“It seems clear . . . that public college and university graduates have protected property interests in their degrees. Since degrees are awarded as the result of accumulated credits, the parties agree that credits should be entitled to protection similar to that afforded degrees.”).

⁸¹ 271 S.E.2d 778 (W. Va. 1980).

⁸² *Id.* at 782.

⁸³ *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991).

⁸⁴ 775 F.2d 250 (8th Cir. 1985).

to create a cognizable property right in nonarbitrary grading. That the publication only sets forth a procedure for appealing a grade, and not an express promise that grading shall not be arbitrary, arguably should not alter our conclusion.⁸⁵

One court brought a student's good standing under the umbrella of the Due Process Clause, though deeming it immaterial whether that interest be labeled "property" or "liberty."⁸⁶ In 1991, in *Ezekwe v. NYC Health & Hospitals Ass'n*,⁸⁷ the Second Circuit confirmed an ophthalmology resident's property interest in the position of "Chief Resident, a prestigious position normally rotated among third-year residents on an alphabetical basis."⁸⁸ In doing so, however, the court assessed the interest largely from the perspective of an employee—as opposed to a student.⁸⁹ An athletic scholarship, granted under promises of renewal upon satisfaction of specified conditions, also engenders the type of entitlement protected by due process.⁹⁰

Despite such pronouncements, courts have often rejected assertions of property interests in the higher education context. In some courts, even the interest in continued enrollment has failed to garner constitutional protection.⁹¹ Still more easily, obviously, can courts resist constitutional protection in connection with

⁸⁵ *Id.* at 253.

⁸⁶ *Picozzi v. Sandalow*, 623 F. Supp. 1571, 1576 n.4 (E.D. Mich. 1986).

⁸⁷ 940 F.2d 775 (2d Cir. 1991).

⁸⁸ *See id.* at 782, 783. Two weeks before her scheduled time to serve as chief resident, her professors, apparently irked by her complaints, met to discuss her assumption of the position. That very day came the decision to supplant the rotational system with a merit-based system. *See id.* at 778-79.

⁸⁹ *See id.* at 782-83. The court's conclusion occasioned a vigorous disagreement: "The majority points to no court which has yet held that such an interest rises to the level of a protectible property interest." *Id.* at 789 (concurring and dissenting opinion). Quoting the Supreme Court's pronouncement in *Bishop v. Wood*, 426 U.S. 341, 349 (1976), that federal courts cannot review "the multitude of personnel decisions that are made daily by public agencies," Judge Timbers argued that employment results short of termination implicate no property rights. *Id.* Recognizing the academic aspect of the case, he stressed that finding property rights in every change in academic policy would instill timidity in administrators of educational institutions. *Id.*

⁹⁰ *See Conard v. Washington*, 814 P.2d 1242, 1246 (Wash. Ct. App. 1991).

⁹¹ *See Fernandez v. Rosenzweig*, No. 95-241-FR, 1996 U.S. Dist. LEXIS 11509, at *9 (D. Or. Aug. 8, 1996) ("There is no case holding that a student has a federally-protected due process, property or liberty interest in continued enrollment in or graduation from a state university. This court will not so hold."); *Phillipeaux v. Fashion Inst. of Tech.*, No. 93CIV4438(SAS), 1996 WL 164462 (S.D.N.Y. April 9, 1996), *aff'd* by 104 F.3d 356 (2d Cir. 1996). *See Soong v. Univ. of Haw.*, 825 P.2d 1060 (Haw. 1992).

probation,⁹² a "suspended suspension"⁹³ or one's interest in a particular program within the institution.⁹⁴ Although a student accepted for admission may, prior to matriculation, carry a "slight" property interest,⁹⁵ possible admission into the institution, at least for graduate or professional education, presents a mere expectancy not entitled to constitutional protection.⁹⁶ In *Tobin v. University of Maine*,⁹⁷ the plaintiff, a law-school applicant, sought to avoid this problem by framing his benefit as an entitlement to professional education at reduced tuition, available to him as a Maine resident. The court would have none of it:

[T]he reduced tuition rates are a benefit enjoyed by in-state residents *who have been deemed qualified for admission and have been so admitted*. Indeed, several courts have recognized that reduced tuition rates for in-state residents give rise to a property right, but each did so in the context of matriculated students who wished to change their status from nonresident to resident for tuition purposes.⁹⁸

⁹² See *Szejner v. Univ. of Alaska*, 944 P.2d 481, 486-87 (Alaska 1997) (recognizing, in such cases, therefore, not even minimal procedures required).

⁹³ *Beaver v. Ortenzi*, 524 A.2d 1022, 1024 (Pa. Commw. Ct. 1987) (framing the issue in terms of standing).

⁹⁴ See *Paoli v. Univ. of Del.*, 695 F. Supp. 171, 173 (D. Del. 1988). See *Hennessy v. City of Melrose*, 194 F.3d 237, 249-50 (1st Cir. 1999) (holding that a claim to a constitutionally protected property right "especially tenuous because Salem State did not expel the appellant, but merely precluded him from continuing in a particular program."). In "an abundance of caution," however, the court assumed such an interest on its way to denying relief. *Id.*

⁹⁵ *Martin v. Helstad*, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983).

⁹⁶ See *Tobin v. Univ. of Me.*, 59 F. Supp. 2d 87, 90 (D. Me. 1999); *Szejner*, 944 P.2d at 486. But see *Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982). In *Hall*, the plaintiff, an athlete who aspired to play professionally, was denied admission to a baccalaureate program in the University after completing a non-baccalaureate program. His grades were good and no similarly situated student had been rejected. The court noted that, because the plaintiff had lost a scholarship for a year, the case smacked more of an expulsion case than a non-admission case; accordingly, the plaintiff had a constitutionally protected property interest. See *id.* at 107-08. Once an application for admission has been accepted, however, revocation of that acceptance might implicate a property interest. See *Martin*, 699 F.2d at 389.

⁹⁷ 59 F. Supp. 2d at 87.

⁹⁸ *Id.* at 91 (emphasis in original).

Interests in readmission have met the same fate.⁹⁹ Rejected as well have been assertions of constitutionally protected interests concerning grades.¹⁰⁰ Not surprisingly, one's interest in a proposed theme for an oral examination does not rise to a constitutionally protected level.¹⁰¹ Imposition upon a student, as the result of a disciplinary proceeding, of a contract whose violation *could* yield expulsion is not itself an expulsion for these purposes.¹⁰² A graduate student also employed to teach at the university has no property interest in a particular course assignment, at least absent some contractual or other guarantee.¹⁰³ Although student-athletes may have a property interest in the scholarship funds promised in their agreement with the college or university, they hold no property interest in actually participating in athletics at the institution—at least unless the agreement so specifies.¹⁰⁴ Finally, courts have disagreed regarding whether the failure of an institution to adhere to its own rules implicates a constitutionally protected interest.¹⁰⁵

⁹⁹ See *Anderson v. Univ. of Wis.*, 665 F. Supp. 1372, 1396 (W.D. Wis. 1987). The court in *Waller v. Southern Illinois University*, 125 F.3d 541 (7th Cir. 1997), strongly doubted that one's interest in being considered for readmission warranted protection under the Due Process Clause, but assumed as much in deciding that in any event the student's rights were not violated. Of course, once the student is granted admission or readmission, a public institution violating the resulting contract might well transgress upon a constitutionally protected interest. See *id.* at 541.

¹⁰⁰ See *Redman v. Mich. State Univ.*, No. G85-1073-CA5, 1987 U.S. Dist. LEXIS 15619 (W.D. Mich. Mar. 24, 1987) (holding that a student who twice failed exam but nonetheless remained in the program was not denied property interest).

¹⁰¹ See *Ndefru v. Sherwood*, No. 93-4127-SAC, 1993 U.S. Dist. LEXIS 18621 (D. Kan. Dec. 29, 1993). In *Lightsey v. King*, 567 F. Supp. 645 (E.D.N.Y. 1983), the court declined to decide whether the student, who had been acquitted of an honor code violation, had a property interest at stake when the institution nonetheless refused to change his grade of "zero" in the course, as the result of which he could not take a promotional examination. The court did conclude he had a liberty interest. See *id.* at 648.

¹⁰² See *Foo v. Ind. Univ.*, 88 F. Supp. 2d 937, 950 (S.D. Ind. 1999).

¹⁰³ See *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1985); *accord* *Naragon v. Wharton*, 572 F. Supp. 1117, 1123 (M.D. La. 1983).

¹⁰⁴ See *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 944 (D. Kan. 1987). See also *Fluitt v. Univ. of Neb.*, 489 F. Supp. 1194, 1203 (D. Neb. 1980) (noting there is no property interest in college athletics absent scholarship or notification of one).

¹⁰⁵ Compare *Skehan v. Bd. of Trustees*, 501 F.2d 31, 38-39 (3d Cir. 1974) (holding the right to have published procedures applied has been deemed a property interest that must be honored) with *Bergstrom v. Buettner*, 697 F. Supp. 1098, 1101 (D.N.D. 1987) (holding that medical school's regulation stating that written grading criteria would issue on the first day of a rotation did not rise to level of constitutionally protected interest). Cf. *Carboni v. Meldrum*, 949 F. Supp. 427, 437 (W.D. Va. 1996) ("At best, Plaintiff's claims lead to a conclusion that defendants may have violated her procedural rights as guaranteed by state law. Such violations do not give rise to federal constitutional concern.").

B. Liberty Interests

A strong case for asserting a liberty interest arises in connection with an expulsion.¹⁰⁶ In *Donohue v. Baker*,¹⁰⁷ for example, the federal district court observed: "It is well settled that an expulsion from college is a stigmatizing event which implicates a student's protected liberty interest."¹⁰⁸ To be sure, in *Donohue* the institution expelled the plaintiff following his conviction for rape, but the court did not condition its statement on that specific. So too, in *Nickerson v. University of Alaska Anchorage*,¹⁰⁹ a state court deemed sufficiently stigmatizing to trigger a liberty interest the student's dismissal from a graduate program for hostile, intimidating and unprofessional conduct.¹¹⁰ Suspension too raises a liberty interest.¹¹¹ In *Thomas v. Gee*,¹¹² the Southern District of Ohio concluded that the freedom to pursue one's education free from governmental racial discrimination did constitute a liberty interest within the protection of the Fourteenth Amendment.¹¹³ Since a liberty interest does arise whenever "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," a student charged with cheating may rightfully claim such an interest.¹¹⁴ A Michigan federal court held that one's interest in continued good standing at the institution also creates a constitutionally protected interest, but refused to characterize that interest more specifically as either "property" or "liberty."¹¹⁵

¹⁰⁶ See *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (noting that an expulsion threatens student's liberty interest in pursuing education); cf. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) (applying Texas parallel to Due Process Clause).

¹⁰⁷ 976 F. Supp. 136 (D.N.Y. 1997).

¹⁰⁸ *Id.* at 145; accord *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (finding that expulsion or suspension is protected); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1382 (W.D. Mich. 1983) (holding suspension or expulsion protected); *Gagne v. Trustees of Ind. Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998); *Univ. of Houston v. Sabeti*, 676 S.W.2d 685, 687-88 (Tex. App. 1984) (citing *Goss*). See also *Thomas v. Gee*, 850 F. Supp. 665, 676 (S.D. Ohio 1994) (stating that student's only liberty interest in continued enrollment was right not to be discriminated against because of her race).

¹⁰⁹ 75 P.2d 46 (Alaska 1999).

¹¹⁰ See *id.* at 52.

¹¹¹ See *Gorman*, 837 F.2d at 12; *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1247 (E.D. Mich. 1984); *Hart*, 557 F. Supp. at 1382; *Reilly*, 666 N.E.2d at 444 (holding suspension threatens student's liberty interest in pursuing education).

¹¹² 850 F. Supp. 665 (S.D. Ohio 1994).

¹¹³ See *id.* at 676.

¹¹⁴ See *Lightsey v. King*, 567 F. Supp. 645, 648 (E.D.N.Y. 1983).

¹¹⁵ *Picozzi v. Sandalow*, 623 F. Supp. 1571, 1576 n.4 (E.D. Mich. 1986).

Other judicial pronouncements have been less generous in finding a liberty interest in continued enrollment or in graduation.¹¹⁶ In 1976, for example, the Ninth Circuit refused to find a liberty interest at stake in the termination of a resident physician in pathology due to charges of an inability to perform satisfactorily.¹¹⁷ *A fortiori*, one threatened with probation has no liberty interest at stake; some interruption of the student's education must be in play.¹¹⁸ The Second Circuit found no liberty interest implicated when faculty members entered allegedly false, misleading, and stigmatizing "anecdotal records" that did not constitute part of the official record; the student would have to show dissemination to the public.¹¹⁹ In any event, defamation alone, unaccompanied by a change in student status or damage to reputation caused by publicizing the defamation, does not rise (or lower!) to the level of stigma.¹²⁰

Applications for admission create no liberty interest. In *Tobin*,¹²¹ a sixty-five-year-old applicant was denied admission to law school. Said the court:

Plaintiff's allegations do not implicate a liberty interest. . . . He does not allege that any conduct on the part of the Law School affected any other applications he may have submitted, or intends to submit, to other law schools. Furthermore, he does not allege that he is foreclosed from pursuing a legal education and career.¹²²

Of course, one has no liberty interest involved in the rejection of a proposed theme for an oral examination.¹²³ The mere non-renewal of a graduate student's teaching appointment, unaccompanied by any stigma resulting from charges

¹¹⁶ See *Fernandez v. Rosenzweig*, No. 95-241-FR, 1996 U.S. Dist. LEXIS 11509, at *9 (D. Or. Aug. 8, 1996); *Thomas*, 850 F. Supp. at 675 (stating that education is not a fundamental right implicitly protected by Constitution).

¹¹⁷ See *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361 (9th Cir. 1976). Plaintiff did have a property interest. See text accompanying note 79.

¹¹⁸ See *Szejner v. Univ. of Alaska*, 944 P.2d 481, 486-87 (Alaska 1997).

¹¹⁹ *Clements v. Nassau County*, 835 F.2d 1000, 1006 (2d Cir. 1987).

¹²⁰ See *Wheeler v. Miller*, 168 F.3d 241, 250-51 (5th Cir. 1999) (citing *Paul v. Davis*, 424 U.S. 693, 695, 702 (1976)). See *Alanis v. Univ. of Tex. Health Sci. Ctr.*, 843 S.W.2d 779, 787 (Tex. App. 1992) (holding that information made public must impose stigma or other disability foreclosing other employment opportunities).

¹²¹ 59 F. Supp. 2d 87 (D. Me. 1999) (memorandum opinion).

¹²² *Id.* at 93. Accord *Szejner*, 944 P.2d at 486 (holding no liberty interest in admission absent underlying charges or publicizing reasons for denial of admission).

¹²³ See *Ndefru v. Sherwood*, No. 93-4127-SAC, 1993 U.S. Dist. LEXIS 18621 (D. Kan. Dec. 29, 1993).

publicized by the employer, implicates no liberty interest.¹²⁴ Nor does one have such an interest in pursuing a career in college football.¹²⁵

Many courts at all levels, however, have avoided deciding the crucial issue of when an adverse academic or disciplinary decision on the part of university officials implicates a property or liberty interest. In both *Horowitz* and *Ewing* the Supreme Court itself, whose principal role it is to guide lower courts through the thickets of constitutional law, assumed without deciding that the plaintiffs asserted a sufficient interest to justify a judicial assessment of the decisional processes of the educational institutions involved. This failure of guidance, on a clearly threshold issue, may well have spawned, or at least lengthened, litigation against universities and others. Predictably, lower courts themselves, taking their cues (or more precisely their lack thereof) from the Supreme Court,¹²⁶ have often assumed the interest and gone on to review the decision-making process.¹²⁷ Several federal courts of appeals have assumed *arguendo* that a public-university student facing dismissal properly asserts a protectible interest.¹²⁸ Other courts have assumed that students have such interests in graduating,¹²⁹ in continuing their education,¹³⁰ in remaining in a particular program within the university,¹³¹ in becoming enrolled once accepted for

¹²⁴ See *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1985); *Accord Naragon v. Wharton*, 572 F. Supp. 1117, 1123 (M.D. La. 1983).

¹²⁵ See *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 945 (D. Kan. 1987).

¹²⁶ See *Hennessy v. City of Melrose*, 194 F.3d 237, 249 (1st Cir. 1999) ("The Supreme Court has not yet decided whether a student at a state university has a constitutionally protected property interest in continued enrollment."); *Megenity v. Stenger*, 27 F.3d 1120, 1125 (6th Cir. 1994) ("We see no need . . . to rush in where the Supreme Court feared to tread in *Ewing*"); *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46, 52 (3d Cir. 1986) ("[F]ollowing the lead of the Supreme Court, we will assume *arguendo* that a constitutional right is implicated."); *Schuler v. Univ. of Minn.*, 788 F.2d 510, 515 (8th Cir. 1986) ("*Horowitz* left open the question of whether a university student subject to academic dismissal may maintain a cause of action for the violation of his or her right to substantive due process."); See also *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983).

¹²⁷ See, e.g., *Salehpour v. Univ. of Tenn. at Memphis*, 159 F.3d 199, 207 (6th Cir. 1998); *Davis v. Mann*, 882 F.2d 967, 973 (5th Cir. 1989); *Jenkins v. Hutton*, 967 F. Supp. 277, 283 (S.D. Ohio 1997); *Thomas v. Gee*, 850 F. Supp. 665, 674 (S.D. Ohio 1994); *Lucas v. Hahn*, 648 A.2d 839, 841-42 (Vt. 1994); *Dillingham v. Univ. of Colo., Bd. of Regents*, 790 P.2d 851, 854 (Colo. Ct. App. 1989); *Ross v. Univ. of Minn.*, 439 N.W.2d 28, 34 (Minn. Ct. App. 1989).

¹²⁸ See *Disesa v. St. Louis Cmty. Coll.*, 79 F.3d 92, 95 (8th Cir. 1996); *Megenity*, 27 F.3d at 1124; *Schuler*, 788 F.2d at 513 n.6; *Mauriello*, 781 F.2d at 47; *Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981).

¹²⁹ See *Qvyjt v. Lin*, 932 F. Supp. 1100, 1106 (N.D. Ill. 1996); *Alexander v. Kennedy-King Coll.*, No. 88 C 2117, 1990 U.S. Dist. LEXIS 14997 (N.D. Ill. November 2, 1990).

¹³⁰ See *Jenkins*, 967 F. Supp. at 282; *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1537 (M.D. Ala. 1994); *Wilkenfield v. Powell*, 577 F. Supp. 579, 583-84 (D. Tex. 1983).

¹³¹ See *Hennessy*, 194 F.3d at 250; *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 932 (D.N.J.

admission,¹³² in receiving passing grades and access to transcripts,¹³³ and even in being *considered* for readmission.¹³⁴ To be sure, such assumptions get voiced in varying degrees of skepticism, with courts sometimes intimating how they might rule, if pressed, on the issue of protectible interests.¹³⁵ Finally, although the point has not been stressed in the cases, the student claiming a liberty interest may have to prove more than the stigma or other disability foreclosing educational or employment opportunities; a showing that the student had no opportunity to clear her name before the appropriate decision maker may be required.¹³⁶

C. Interests under substantive due process

Does substantive due process perchance require a different, or narrower, kind of underlying interest than those qualifying for protection under procedural due process? In *Ewing*, Justice Powell argued in his concurrence that the "property" sufficient for review procedurally under the clause would not do for substantive review: "While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."¹³⁷ *Ewing's* interest in continued enrollment, Justice Powell continued, "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution."¹³⁸ Consistent with this view, a federal district court rejected the

1997).

¹³² See *Martin v. Helstad*, 699 F.2d 387, 389-90 (7th Cir. 1983).

¹³³ See *Perez v. Univ. of Charleston*, No. 99-1745, 1999 U.S. App. LEXIS 29463 (4th Cir. Nov. 9, 1999) (per curiam) (memorandum).

¹³⁴ See *Waller v. S. Ill. Univ.*, 125 F.3d 541, 542 (7th Cir. 1997).

¹³⁵ See, e.g., *Hennessey*, 194 F.3d at 249-50 ("[T]he claim to such a property interest is dubious . . . and in this case it seems especially tenuous In an abundance of caution, however, we assume for argument's sake [such an interest]"); see *Waller*, 125 F.3d at 542 ("The contractual right claimed here, however, is not a right to admission or readmission; it is merely a right to be *considered* for readmission; and it may be doubted whether that right has sufficient value or definiteness to come within the concept of constitutional property. But . . . we shall assume for the sake of argument that even so nebulous and etiolated an 'entitlement' can be thought of as property."); *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46, 52 (3d Cir. 1986) ("We share Justice Powell's doubt [expressed in his *Ewing* concurrence] about the existence of such a substantive due process right in the circumstances here").

¹³⁶ See *Alanis v. Univ. of Tex. Health Sci. Ctr.*, 843 S.W.2d 779, 787 (Tex. App. 1992).

¹³⁷ *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (concurring opinion) (citation omitted). In *Jenkins v. Hutton*, 967 F. Supp. 277 (S.D. Ohio 1997), the court noted that substantive due process protects specific, fundamental rights of individual freedom and liberty. These rights, the court added, stem from the Constitution itself and are "implicit in the concept of ordered liberty." *Id.* at 282 (citing *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988)).

¹³⁸ 474 U.S. at 229-30.

argument that substantive due process protected a student's property interest in continued enrollment at a state medical school:

Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. The substantive Due Process Clause is not concerned with the garden-variety issues of common law contract. Its concerns are far narrower, but at the same time, far more important. Substantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental.¹³⁹

The same court, acting within this principle, concluded that the freedom to pursue an education without governmental racial discrimination did constitute a liberty interest within the protection of substantive due process.¹⁴⁰

Other courts also have suggested a meaningful distinction between interests protected by substantive due process and those protected by procedural due process.¹⁴¹ *Mauriello v. University of Medicine and Dentistry of New Jersey*¹⁴² involved the dismissal of a doctoral student for, *inter alia*, doing poor research. After dealing with the procedural due process issue, the court observed: "We share Justice Powell's doubt about the existence of such a substantive due process right in the circumstances here. . . ."¹⁴³ Still other courts seem to have made little of this distinction. In *Hurst v. University of Washington*,¹⁴⁴ for example, the court noted that the plaintiff "arguably can state a substantive due process claim if his failing grades prevented his graduation or led to his academic dismissal."¹⁴⁵ This type of talk, of course, reflects that imbuing procedural due process cases.¹⁴⁶

In discussing substantive due process, it is crucial to distinguish the interest required—life, liberty, or property—from the criterion for its violation—arbitrariness or capriciousness. If alleging arbitrary and capricious decision making were itself

¹³⁹ *Thomas v. Gee*, 850 F. Supp. 665, 675 (S.D. Ohio 1994) (quoting *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (citations omitted)).

¹⁴⁰ *See id.* at 676. This, added the court, presented one of the situations in which the Due Process Clause overlapped the equal protection clause. *See id.*

¹⁴¹ *See* Pamela W. Fletcher & Stephen R. Ripps, *Rights of Students in Higher Education: A Due Process Emphasis*, 70 LAW LIBR. J. 277 (1977).

¹⁴² 781 F.2d 46 (3d Cir. 1986).

¹⁴³ *Id.* at 52. *See also* *Schuler v. Univ. of Minn.*, 788 F.2d 510, 515 (8th Cir. 1986); *Thomas*, 850 F. Supp. at 674 (holding state-created contract right not enough to trigger substantive due process).

¹⁴⁴ *See* No. 89-35645, 1991 U.S. App. LEXIS 7925 (9th Cir. Apr. 19, 1991).

¹⁴⁵ *Id.* at *6.

¹⁴⁶ *See* text accompanying note 108 *et seq.*

enough, then any loss—a three-minute banishment from the recreation room—could form the basis of federal litigation under substantive due process. Thus could substantive due process, contrary to Justice Powell's insistence, become, at least in one sense, more encompassing than procedural due process.

Alas, the Supreme Court has failed to pitch in meaningfully; it has disdained deciding not only whether substantive due process calls for a different or narrower interest in the higher education context, but also whether students in public higher education have either a procedural or a substantive due process interest at stake in their continued enrollment.¹⁴⁷

The language and judicial history of the Due Process Clause reflect a dilemma: On the one hand, the Due Process Clause seems so procedurally oriented that one should limit its substantive impact by limiting the interests substantively protected; on the other hand, the clause mentions "liberty and property" but once, with no suggestion that each of these terms has dual meanings, depending on the aspect of due process under consideration.

For purposes of the higher education context, happily, results will not likely turn on any such distinction. Any interest that would fall within Justice Powell's interpretation of liberty or property for purposes of substantive due process *a fortiori* would qualify for procedural due process. Moreover, as we shall see,¹⁴⁸ whenever the criterion for a violation of substantive due process would be met in the higher educational context, almost certainly too would that for a violation of procedural due process.

IV. THE PROCESS REQUIRED

The Supreme Court's "big four" made clear that disciplinary cases warrant an adjudication different from that in academic ones.¹⁴⁹ We turn now to consider how lower courts have dealt with this prescription. Of course, the "big four," while long on generalities, came up quite short on specifics. The two disciplinary cases,

¹⁴⁷ See text accompanying note 68 *et seq.* See NOWAK & ROTUNDA, *supra* note 56, at 541 (making no distinction between the nature of a property interest qualifying for protection under procedural due process and that qualifying for protection under substantive due process). See also *id.* at 579 n.114 (discussing *Ewing*). Cf. *Akins v. Bd. of Governors of State Coll. and Univ.*, 840 F.2d 1371, 1376-77 (7th Cir. 1988).

¹⁴⁸ See text accompanying note 318.

¹⁴⁹ See M. Michele Fournet, Note, *Due Process and the University Student: The Academic/Disciplinary Dichotomy*, 37 LA. L. REV. 939 (1977). See generally Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

Goss and *Ingraham*, dealt with K-12 education and not higher education. Moreover, the short suspension at issue in *Goss* mandated only the most summary of hearings; the corporal punishment in *Ingraham* required no hearing whatsoever. These cases, therefore, told us little of the procedures constitutionally requisite when colleges and universities hand down suspensions, especially long ones, or expulsions in disciplinary cases.¹⁵⁰

Both of the academic cases among the "big four" did involve higher education and therefore provided more help, although the criteria of constitutionality emanating from them left many questions. Taken together, the four cases seem to teach that, when liberty or property is at stake, procedural due process requires a hearing for disciplinary cases. Procedural due process requires no hearing for academic cases, though the decision must be "careful and deliberate."¹⁵¹ Substantive due process, even if applicable to the higher education context, largely overlaps the procedural requirement, decreeing that the result in academic matters be reached conscientiously and with careful deliberation; institutional judgments will not be overturned unless they represent "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."¹⁵²

A. Disciplinary

Although fundamental fairness remains crucial, the demands of due process with regard to disciplinary procedures are flexible.¹⁵³ In *Ingraham*, the U.S. Supreme Court noted that the extent of procedural protection in disciplinary cases depends upon three variables: 1) the nature of the interest protected; 2) the danger of error and the benefit of additional or other procedures; and 3) the burden on the government such procedures would present.¹⁵⁴ Lower courts have echoed each

¹⁵⁰ See *Bleicker v. Bd. of Trustees of Ohio State Univ.*, 485 F. Supp. 1381, 1387 (S.D. Ohio 1980) (requiring more formal procedures for suspension for several months and perhaps permanently than does a short high school suspension).

¹⁵¹ See *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978).

¹⁵² *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (citations omitted).

¹⁵³ See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988); *Gagne v. Trustees of Ind. Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998); *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951, 953 (Ark. Ct. App. 1993). Cf. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) (applying Texas parallel to Due Process Clause); *Lucas v. Hahn*, 648 A.2d 839, 842 (Vt. 1994). See generally William M. Beaney, *Fairness in University Disciplinary Proceedings*, 22 CASE W. RES. L. REV. 390 (1971).

¹⁵⁴ See text accompanying note 23 *et seq.*; *Siblerud v. Colo. State Bd. of Agric.*, 896 F. Supp. 1506, 1516 (D. Colo. 1995) (*dictum*). Cf. *Than*, 901 S.W.2d at 930 (applying Texas parallel to Due

specific of this pronouncement.¹⁵⁵ In *Donohue v. Baker*,¹⁵⁶ for example, the court, assessing whether a student charged with rape had the right to cross-examine witnesses against him, said: "The opportunity to make two statements to a disciplinary panel might suffice in the case of alleged misconduct that could result in a short suspension from school. But the plaintiff here faced expulsion and procedures necessarily had to take on a higher level of formality to ensure fairness."¹⁵⁷ In *Martin v. Helstad*,¹⁵⁸ an applicant's acceptance to law school was revoked due to his omitting to note on his application a conviction for securities fraud. The Seventh Circuit concluded that notice of the problem and the opportunity to explain the lapse satisfied due process; no oral, personal exchange was needed. The court found negligible both the risk of erroneous determination and any increased reliability that might flow from additional procedures. In *Osteen v. Henley*,¹⁵⁹ an expelled student argued that due process entitled him to representation by counsel at his disciplinary proceeding. The same court, though recognizing the student's large stake in this expulsion case, cited the inordinate cost to the university that would result from "judicializing disciplinary proceedings."¹⁶⁰

Nonetheless, elaborating upon the fundamental principles distilled from the "big four" remains difficult. The difficulty is compounded by the fact that in individual cases courts often tell us that the procedures followed by the institution satisfied due process, but do not specify which, singly or in combination, were essential. Many situations reaching the courts involve penalties much more serious than that involved in *Goss* and, accordingly, become candidates for more extensive protections.¹⁶¹

Process Clause). Such concerns affect academic cases too. See *Ezekwo v. NYC Health and Hosp. Corp.*, 940 F.2d 775, 785 (2d Cir. 1991) (holding that the financial and administrative burden that [notice] imposes would be minimal). See *id.* at 790 (dissenting opinion) (plaintiff had smaller interest at stake than *Horowitz* and therefore was due less process); *Qvyjt v. Lin*, 932 F. Supp. 1100, 1106 (N.D. Ill. 1996).

¹⁵⁵ See *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993); *Martin v. Helstad*, 699 F.2d 387 (7th Cir. 1983); *Gorman*, 837 F.2d 7 (holding that beyond notice and hearing, span of procedural protections depends on careful weighing of competing interests implicated in the particular case); *Donohue v. Baker*, 976 F. Supp. 136 (N.D.N.Y. 1997); *Haley v. Va. Commw. Univ.*, 948 F. Supp. 573 (E.D. Va. 1996); *Than*, 901 S.W.2d at 926; *Mary M. v. Clark*, 473 N.Y.S.2d 843 (N.Y. App. Div. 1984).

¹⁵⁶ 976 F. Supp. at 136.

¹⁵⁷ *Id.* at 147.

¹⁵⁸ 699 F.2d at 387.

¹⁵⁹ 13 F.3d 221.

¹⁶⁰ 13 F.3d at 226. The court also found it relatively unlikely that the university would unjustly expel the student. *Id.*

¹⁶¹ See *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 144 (W. Va. 1985) (requiring more process for permanent deprivations than for temporary ones).

Whatever the threatened sanctions, though, college and university disciplinary proceedings, while they require more process than academic cases,¹⁶² are not criminal trials. Students, therefore, are not entitled to all the procedural safeguards accorded criminal defendants.¹⁶³ (One court put it starkly: “[P]etitioner’s assignments of error . . . amount only to a complaint that he did not receive the same ‘due process’ during his disciplinary hearing that he would have received in a trial for treason . . .”).¹⁶⁴ This policy finds support not only in the idea that less is at risk in disciplinary matters than in criminal cases, but also in the notion that non-adversarial settings that stress the educational functions of disciplinary procedures best serve the student interest.¹⁶⁵ The Supreme Court itself stated in *Goss*, “[F]urther formalizing the suspension process and escalating its . . . adversary nature may . . . destroy its effectiveness as part of the teaching process.”¹⁶⁶ (One could wonder, however, how much of the educational aspect remains when a student at the college or university level faces expulsion—such situations reek of adversariness). Moreover, the Due Process Clause does not require that disciplinary proceedings be ideal, or even that they be the best possible, but that they be fair.¹⁶⁷ Even in relatively serious disciplinary cases, therefore, an “informal give-and-take” between student and university decision maker may suffice;¹⁶⁸ a “full-dress judicial hearing” is not required.¹⁶⁹

¹⁶² See text accompanying note 283. Cf. *Siblerud v. Colo. State Bd. of Agric.*, 896 F. Supp. 1506, 1513 n.13 (D. Colo. 1995) (*dictum*).

¹⁶³ See *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1250 (E.D. Mich. 1984); *Knapp v. Jr. Coll. Dist.*, 879 S.W.2d 588, 592 (Mo. Ct. App. 1994). Indeed, neither disciplinary nor academic cases require the level of procedural protection appropriate for loss-of-employment cases. *Davis v. Mann*, 882 F.2d 967, 973 (5th Cir. 1989). See generally Richard Maxwell, Note, *Rules of Evidence in Disciplinary Hearings in State-Supported Universities*, 1 TEX. TECH L. REV. 357 (1970).

¹⁶⁴ *North*, 332 S.E.2d at 144.

¹⁶⁵ See *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984).

¹⁶⁶ *Goss v. Lopez*, 419 U.S. 565, 583 (1967).

¹⁶⁷ See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988).

¹⁶⁸ *Amelunxen v. Univ. of P.R.*, 637 F. Supp. 426, 431 (D.P.R. 1986); *Gagne v. Trustees of Ind. Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996). See *Shuman v. Univ. of Minn. Law Sch.*, 451 N.W.2d 71, 74 (Minn. Ct. App. 1990) (holding that “notice and some opportunity to be heard” will do).

¹⁶⁹ See *Gorman*, 837 F.2d at 16 (1st Cir. 1988) (holding that hearings need not mirror common law trials); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Lipsett v. Univ. of P. R.*, 637 F. Supp. 789, 807 (D.P.R. 1986), *rev’d on other grounds*, 864 F.2d 881 (1st Cir. 1988) (citing *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 75 (4th Cir. 1983)); *Gagne*, 692 N.E.2d at 494; *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951, 953 (Ark. Ct. App. 1993). In *Henderson*, interestingly, the student sought a less formal procedure. He argued that restricting witnesses to answering questions rather than allowing them to say what they wanted violated procedural due process. The court rejected the argument, noting that the question-and-answer format typified judicial proceedings. *Id.* at 954.

In serious disciplinary cases, at least the basic protections called for in *Goss* will apply: notice¹⁷⁰ and, in the event of a denial by the student, a statement of the evidence relied upon, and a chance to rebut.¹⁷¹ Beyond these, courts have been understandably less sure¹⁷² and, accordingly, less consistent.

The very word "notice" implies specificity sufficient to inform the student of the charge,¹⁷³ including perhaps any lesser charges that might be substituted,¹⁷⁴ and

Clearly, too, officials conducting a hearing have the discretion to limit the hearing to relevant issues. See *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993).

¹⁷⁰ See *Gorman* 837 F.2d at 12; *Cobb v. Rector of Univ. of Va.*, 84 F. Supp. 2d 740, 749 (W.D. Va. 2000); *Carboni v. Meldrum*, 949 F. Supp. 427, 437 (W.D. Va. 1996); *Gagne*, 692 N.E.2d at 493; *Reilly*, 666 N.E.2d at 444; *Smith v. Denton*, 895 S.W.2d 550, 554 (Ark. 1995); *Shuman*, 451 N.W.2d at 74. Cf. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); and *Alcom v. Vaksman*, 877 S.W.2d 390, 397 (Tex. App. 1994) (applying Texas parallel to Due Process Clause).

Proof of actual notice may be inferred. In *Adibi-Sadeh v. Bee County College*, 454 F. Supp. 552, 558 (S.D. Tex. 1978), college officials sent notice of disruption charges to ninety-five Iranian students through certified mail. Though some of these letters were returned undelivered, the court found "fair and adequate" notice in light of the fact that copies of the letters were hand-delivered to many of the students, that notices were posted around campus, that the campus was relatively small, and that it was reasonable to assume that the Iranian community on campus was closely knit. *Id.* at 555-56.

¹⁷¹ See, e.g., *Roach v. Univ. of Utah*, 968 F. Supp. 1446, 1452 (D. Utah 1997) (calling for notice and some opportunity to be heard); *Carboni*, 949 F. Supp. at 437 (requiring reasonable opportunity to present her side of story); *Aubuchon v. Olsen*, 467 F. Supp. 568, 573 (E.D. Mo. 1979) (requiring notice, opportunity to present accused's version and to rebut opposing evidence); *Trahms v. Trustees of Columbia Univ.*, 666 N.Y.S.2d 150, 151 (N.Y. App. Div. 1997); *Than*, 901 S.W.2d at 930; *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984) (requiring inclusion of notice of sanctions). See also William R. Thierstein, Note, *College Student and Due Process in Disciplinary Proceedings*, 13 S.D. L. REV. 87 (1968); Diego L. Villarreal, *Student's Constitutional Rights and the University Disciplinary Committee*, 3 N.C. CENT. L.J. 53 (1971).

¹⁷² See *Gorman*, 837 F.2d at 14 (holding that beyond the right to notice and hearing, span of procedural protections mandated by due process becomes uncertain).

¹⁷³ See *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961). A different but related problem of "notice" arises with regard to the need to inform students beforehand of what conduct is prohibited. Of course, the proscriptions of educational institutions need not manifest the same definiteness as criminal statutes. See *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 438 (8th Cir. 1998); *Shamloo v. Miss. State Bd. of Trustees*, 620 F.2d 516, 522 (5th Cir. 1980). Nonetheless, such proscriptions must avoid both vagueness and overbreadth. See *Tigrett v. Rector of Univ. of Va.*, 97 F. Supp. 2d 752, 761 (W.D. Va. 2000); *Reliford v. Univ. of Akron*, 610 N.E.2d 521, 522 (Ohio Ct. App. 1991). Such a regulation is unconstitutionally vague if people of common intelligence must guess at its meaning and differ as to its applicability. Predictably, regulations regarding speech require more specificity than do others. See *Shamloo*, 620 F.2d at 523-24 (holding that "activities of 'wholesome' nature" too vague).

¹⁷⁴ Cf. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238 (D. Vt. 1994). In *Fellheimer*, the college charged the student with rape, but failed to notify him that, even if the rape charge should fail, he

the regulations underlying the charge.¹⁷⁵ Although notice, at least objectively considered,¹⁷⁶ must be "meaningful," it need not include, for example, specific code numbers.¹⁷⁷ Though oral notice might often suffice,¹⁷⁸ expulsion cases may require formal written notice.¹⁷⁹

In a seminal case regarding due process in disciplinary proceedings, *Dixon v. Alabama State Board of Education*,¹⁸⁰ the Fifth Circuit stated that the threatened expulsion required notice not only of the charges, but also of the names of witnesses and, in oral or written form, their expected testimony.¹⁸¹ Later, however, in *Nash v. Auburn University*,¹⁸² the Eleventh Circuit, successor to part of the Fifth Circuit, held that a student in a disciplinary hearing had no right even to a summary of the expected adverse testimony. The court distinguished *Dixon*, pointing out that the student in *Nash* attended the hearing at which the witnesses testified.¹⁸³

Perhaps because the situation arises rarely or because of concerns regarding over-formalization of disciplinary proceedings, virtually no litigation has addressed what would be called, in criminal law, problems of "misjoinder." Presumably there exist some limits, even in college and university proceedings, to the consolidation of charges—perhaps "manifest prejudice," but those limits have remained largely unstated. In *Turof v. Kibbee*,¹⁸⁴ a federal district court provided some guidance in

could be found to have violated a student-handbook provision prohibiting disrespect of persons. The court found that the college thus breached its contractual duty to inform him of the charges against him with particularity.

¹⁷⁵ See *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623 (D.P.R. 1974). J. Clinton Eudy, Note, *Colleges and Universities - Constitutional Law - Legality of Broad Rules Governing Student Behavior*, 48 N.C. L. REV. 943 (1970).

¹⁷⁶ See *Foo v. Ind. Univ.*, 88 F. Supp. 2d 937, 950-51 (S.D. Ind. 1999).

¹⁷⁷ *Tigrett*, 97 F. Supp. 2d at 759.

¹⁷⁸ See *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) (*dictum*).

¹⁷⁹ See *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 143 (W. Va. 1985). In *Barletta v. State*, 533 So. 2d 1037, 1040 (La. Ct. App. 1988), the court, while assuming the necessity of written notice in expulsion cases, found it sufficient that the student's attorney received written notice and student received actual notice of the particulars of the hearing.

¹⁸⁰ 294 F.2d 150 (5th Cir. 1961).

¹⁸¹ See *id.* at 158-59. See also *Gruen v. Chase*, 626 N.Y.S.2d 261, 262 (N.Y. App. Div. 1995) (requiring names of witnesses to be provided in expulsion case). Cf. *Alcorn v. Vaksman*, 877 S.W.2d 390, 397 (Tex. App. 1994). See generally JeRoyd Greene, Note, *Due Process in Public Colleges and Universities - Need For Trial-Type Hearings*, HOW. L.J. 414 (1967).

¹⁸² 812 F.2d 655 (11th Cir. 1987).

¹⁸³ *Id.* at 662-63 (giving the witnesses' names to the student). See *Knapp v. Jr. Coll. Dist.*, 879 S.W.2d 588, 593 (Mo. Ct. App. 1994) (holding there is no denial of due process when student not given copies of statements and other documents pre-hearing).

¹⁸⁴ 527 F. Supp. 880 (E.D.N.Y. 1981).

holding constitutional the joining of three unrelated charges against the student; the student showed no prejudice from the combining of the charges.¹⁸⁵

The concept of notice implies as well sufficient time between it and the hearing to allow the student to prepare a defense.¹⁸⁶ Of course, the student might waive any objection to the timing by insisting upon a particular date for the hearing.¹⁸⁷ Conversely, too much delay, if not occasioned by the student,¹⁸⁸ might deny due process, as well.¹⁸⁹

Although due process allows flexibility regarding disciplinary hearings,¹⁹⁰ courts find crucial the opportunity to be heard¹⁹¹ "at a meaningful time and in a meaningful manner."¹⁹² As the First Circuit has observed, "The hearing, to be fair in the due process sense, implies that the person adversely affected was afforded the

¹⁸⁵ See *id.* at 886.

¹⁸⁶ See *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 143 (W. Va. 1985). In assessing this point, courts will look to the totality of circumstances. In *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984), the court found both sufficient notice of charges and a meaningful opportunity to prepare for the hearing: The student received a copy of the letter to the academic judiciary accusing him of cheating, the dean met twice with him to discuss the charges and the disciplinary process, the dean gave the student a manual setting out those procedures, and the hearing took place about six weeks after notification of the charges.

¹⁸⁷ See *Donohue v. Baker*, 976 F. Supp. 136, 146 (N.D.N.Y. 1997).

¹⁸⁸ See *Picozzi v. Sandalow*, 623 F. Supp. 1571, 1581 (E.D. Mich. 1986).

¹⁸⁹ See *Marin v. Univ. of P.R.*, 377 F. Supp. 613 (D.P.R. 1974) (calling for expedited hearing); *Cobb v. Rector of Univ. of Va.*, 84 F. Supp. 2d 740 (W.D. Va. 2000). In *Cobb*, the student argued, unsuccessfully, that a seven-month delay precluded him from remembering matters crucial to his defense, for example where various people sat during the pertinent examination. See *id.* at 749-50 (discussing the relationship between delay and due process).

¹⁹⁰ See *Nash v. Auburn Univ.*, 812 F.2d 655, 663 (11th Cir. 1987).

¹⁹¹ See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988); *Hall v. Med. Coll. of Ohio*, 742 F.2d 299, 310 (6th Cir. 1984) (permitting him to offer evidence in his own behalf); *Cobb*, 84 F. Supp. 2d at 749; *Gagne v. Trustees of Ind. Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (opportunity for hearing appropriate to the case); *Gruen v. Chase*, 626 N.Y.S.2d 261, 262 (N.Y. App. Div. 1995); *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *Smith v. Denton*, 895 S.W.2d 550, 554 (Ark. 1995); *Alcorn v. Vaksman*, 877 S.W.2d 390, 397 (Tex. App. 1994); *Shuman v. Univ. of Minn. Law Sch.*, 451 N.W.2d 71, 74 (Minn. Ct. App. 1990); *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984) (offering chance to be heard and presentation of other evidence).

¹⁹² *Foo v. Ind. Univ.*, 88 F. Supp. 2d 937, 954 (S.D. Ind. 1999) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 932 (D.N.J. 1997); *Lipsett v. Univ. of P.R.*, 637 F. Supp. 789, 807 (D.P.R. 1986), *rev'd on other grounds*, 864 F.2d 881 (1st Cir. 1988). Cf. *Ho v. Univ. of Tex.*, 984 S.W.2d 672, 684 (Tex. App. 1998); *Than*, 901 S.W.2d at 930 (applying Texas parallel to Due Process Clause).

opportunity to respond, explain, and defend."¹⁹³ Nonetheless, the Fifth Amendment's privilege against self-incrimination gives the student no right to put off the campus hearing until a criminal trial, based on the same charges, has been held.¹⁹⁴ Nor may the student invoke the privilege at a disciplinary hearing and then complain of a denial of the opportunity to testify there.¹⁹⁵ He may remain silent at the hearing and his silence may not be held against him at the criminal trial; should he choose to testify on campus, his responses will be deemed voluntary and therefore admissible at trial. In the unlikely event that the student is *compelled* to testify on campus,¹⁹⁶ the privilege will make his answers inadmissible at any subsequent criminal trial.¹⁹⁷

Important, at least in most cases,¹⁹⁸ is the right to be present for all significant aspects of the hearing. In *University of Texas Medical School v. Than*,¹⁹⁹ a third-year medical student found himself charged with cheating on a standardized national examination. At one point during the hearing, the hearing officer, accompanied by university counsel, visited the room in which the alleged cheating had occurred in order to assess the layout of the room and to sit where the student allegedly had sat; the student's request to go along was denied.²⁰⁰ Recognizing that certain circumstances might justify the *ex parte* receipt of evidence in disciplinary cases, the court nonetheless concluded that the "unrecorded *ex parte* inspection of the testing site" had violated the student's "due course of law," the Texas constitution's parallel²⁰¹ to federal due process: The student was "denied an

¹⁹³ *Gorman*, 837 F.2d at 13; *Reilly*, 666 N.E.2d at 444; *Gagne*, 692 N.E.2d at 493.

¹⁹⁴ *See Nzuve v. Castleton State Coll.*, 335 A.2d 321, 325-26 (Vt. 1975). *Cf. Adibi-Sadeh v. Bee County Coll.*, 454 F. Supp. 552, 558 (S.D. Tex. 1978); A MODEL CODE OF STUDENT CONDUCT § 8, in Pavela, *supra* note 2, at 818.

¹⁹⁵ *See Adibi-Sadeh*, 454 F. Supp. at 558. *See* Paul E. Rosenthal, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241 (1997).

¹⁹⁶ *See* A MODEL CODE OF STUDENT CONDUCT § 32, in Pavela, *supra* note 2, at 823 ("an accused student *must* respond to inquiries from the presiding officer and the hearing board.") (emphasis added).

¹⁹⁷ *See Nzuve*, 335 A.2d at 326.

¹⁹⁸ *See Martin v. Helstad*, 699 F.2d 387 (7th Cir. 1983), discussed at text accompanying note 157. *Cf. Donohue v. Baker*, 976 F. Supp. 136 (N.D.N.Y. 1997) (turning largely on credibility, accused had right to hear all evidence against him in expulsion case). Of course, one could hear all evidence (for example, through close-circuit television) and still not be physically present.

¹⁹⁹ 901 S.W.2d 926 (Tex. 1995).

²⁰⁰ *See id.* at 932.

²⁰¹ *Id.* at 932. *See* TEX. CONST. art. I, § 19: "No citizen of this State shall be deprived of life, liberty, [or] property . . . except by the due course of the law of the land." Despite the textual differences between this clause and the Due Process Clause of the Fourteenth Amendment, the Texas Supreme Court has found no "meaningful distinction." *Id.* at 929.

opportunity to respond to a new piece of evidence against him, and the countervailing burden on the state [was] slight²⁰² Implicit in "presence," as *Than* itself suggests, is the opportunity to present evidence.²⁰³

However elaborate the hearing, its constitutional meaningfulness might still be negated. In *Lighsey v. King*,²⁰⁴ despite a midshipman's acquittal on a charge of cheating, the Merchant Marine Academy refused to change his grade of "zero" for the course. Stressed the court: "There is no difference between failing to provide a due process hearing and providing one but ignoring the outcome."²⁰⁵

Predictably, hearings need not be open to the public,²⁰⁶ formal rules of evidence need not be deployed,²⁰⁷ witnesses need not be put under oath,²⁰⁸ and the exclusionary rule need not be applied.²⁰⁹ Indeed, because the hearing board comprises lay members, one cannot expect it to administer highly technical evidentiary rules.²¹⁰

Usually the institution need not allow, let alone provide, active representation by legal counsel.²¹¹ (Some courts have stated that legal counsel's

²⁰² *Id.* at 932. The medical school then provided Mr. Than a new hearing, whose result he also challenged, this time in federal court. The Fifth Circuit upheld the result, finding no due process violation. *See Univ. of Tex. Med. Sch. v. Than*, 188 F.3d 633 (5th Cir. 1999).

²⁰³ *See Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623 (D.P.R. 1974); *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 143 (W. Va. 1985). *Cf. Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984).

²⁰⁴ 567 F. Supp. 645 (E.D.N.Y. 1983).

²⁰⁵ *Id.* at 649. The court called the hearing a "mere sham." *Id.* at 650.

²⁰⁶ *See Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983) (finding that an open hearing would more likely produce disruption than increased accuracy).

²⁰⁷ *See Nash v. Auburn Univ.*, 812 F.2d 655, 663 (11th Cir. 1987); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983). *Cf. A MODEL CODE OF STUDENT CONDUCT* §§ 19 & 30(I), in *Pavela*, *supra* note 2, at 820 ("Formal rules of evidence shall not be applied . . .," though rules of confidentiality and privilege will be).

²⁰⁸ *See Knapp v. Jr. Coll. Dist.*, 879 S.W.2d 588, 592 (Mo. Ct. App. 1994).

²⁰⁹ *See Morale v. Grigel*, 422 F. Supp. 988, 1000-01 (D.N.H. 1976); *Ekelund v. Sec'y of Commerce*, 418 F. Supp. 102, 106 (E.D.N.Y. 1976). *Contra Smyth v. Lubbers*, 398 F. Supp. 777, 794-95 (W.D. Mich. 1975).

²¹⁰ *See Smyth*, 398 F. Supp. at 800.

²¹¹ *See, e.g., Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988); *Henson*, 719 F.2d at 73; *Navato v. Sletten*, 560 F.2d 340, 345 (8th Cir. 1977); *Roach v. Univ. of Utah*, 968 F. Supp. 1446, 1452 (D. Utah 1997); *Turof v. Kibbee*, 527 F. Supp. 880, 885 (E.D.N.Y. 1981); *Haynes v. Dallas Cmty. Jr. Coll. Dist.*, 386 F. Supp. 208, 212 (N.D. Tex. 1974); *Gruen v. Chase*, 626 N.Y.S.2d 261, 262 (N.Y. App. Div. 1995) (holding that although university not required to provide legal representation to students, university did not prevent them from having an

participation might be mandated if the college or university proceeds through counsel).²¹² In *Donohue*,²¹³ a student who had been indicted for rape was expelled. Regarding his complaint that denial of counsel at the hearing violated procedural due process, the court stressed that there was no absolute right to counsel in such situations. To be sure, if the student had needed counsel in order to protect his Fifth Amendment privilege during the hearing, his argument might have succeeded. But here he sought counsel not for that purpose but to prevail at the disciplinary hearing.²¹⁴ Several courts have required that retained counsel be allowed.²¹⁵ In any event, allowing retained counsel²¹⁶ or appointing a non-attorney advisor for the student may play well with a court,²¹⁷ even though due process may not require that such counsel or advisor be allowed to cross-examine witnesses,²¹⁸ otherwise speak at the hearing,²¹⁹ or even attend.²²⁰

attorney serve as advisor); *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984). Cf. *Hall v. Med. Coll. of Ohio*, 742 F.2d 299, 309 (6th Cir. 1984) (failing to clearly establish right to counsel); *Garshman v. Pa. State Univ.*, 395 F. Supp. 912, 920-21 (M.D. Pa. 1975); A MODEL CODE OF STUDENT CONDUCT § 32, in Pavea, *supra* note 2, at 823 (allowing the accused student an advisor, "who may be an attorney"); *id.*, § 30 (m) (allowing the accused student, but not the "advisor," to question witnesses). State statutes granting the right to retained counsel before state agencies may apply to students appearing before college or university disciplinary committees. See *Kusnir v. Leach*, 439 A.2d 223, 227 (Pa. Commw. Ct. 1982). See generally Mark S. Blaskey, *University Student's Right to Retain Counsel for Disciplinary Proceedings*, 24 CAL. W.L. REV. 65 (1987); Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71 (1985); Douglas R. Richmond, *Student's Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289 (1989).

²¹² See *Gorman*, 837 F.2d at 16; *Turaf*, 527 F. Supp. at 885.

²¹³ 976 F. Supp. 136 (N.D.N.Y. 1997).

²¹⁴ See *id.* at 146 (citing *Gabrilowitz v. Newman*, 582 F.2d 100, 103, 106 (1st Cir. 1978)).

²¹⁵ See *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 624 (D.P.R. 1974); *French v. Bashful*, 303 F. Supp. 1333, 1338 (E.D. La. 1969); *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 143 (W. Va. 1985) (holding due process requires the opportunity to have retained counsel at hearing).

²¹⁶ See *Knapp v. Jr. Coll. Dist.*, 879 S.W.2d 588, 593 (Mo. Ct. App. 1994).

²¹⁷ See *Gruen v. Chase*, 626 N.Y.S.2d 261, 262 (N.Y. App. Div. 1995); *Mary M.*, 473 N.Y.S.2d at 845. Cf. A MODEL CODE OF STUDENT CONDUCT § 2(i), in Pavea, *supra* note 2, at 817 (granting students the right "[t]o be advised by a person of their choice").

²¹⁸ See *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1388-89 (W.D. Mich. 1983).

²¹⁹ See *Univ. of Houston v. Sabeti*, 676 S.W.2d 685, 688-89 (Tex. App. 1984) (suggesting that the result might differ if the institution had proceeded through counsel, attorney or otherwise). In *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987), a university moved to revoke a degree on the grounds of fraud. The court found no constitutional problem in denying the graduate's attorney the opportunity to examine or cross-examine witnesses or to make an oral presentation to the Committee. The lawyer did address the Board of Regents, to which the Committee reported. *Id.* at 99. Cf. A MODEL CODE OF STUDENT CONDUCT § 30(m) in Pavea, *supra* note 2, at 817 (allowing the accused student, but not the "advisor," to question witnesses); *id.* at § 32 (granting the advisor, subject to the presiding officer's discretion, the opportunity to make brief opening and closing statements, and to suggest to the panel questions that might be put to witnesses). A Code annotation states that the "active control" of

At least in serious cases, students should have the right to call exculpatory witnesses.²²¹ One hurdle faced by students in disciplinary hearings concerns the inability to compel the attendance of such witnesses. Of course, the institution may have more leverage in this regard, not only with students but especially with employees, such as members of the security department. This situation in itself probably will not violate due process, especially if the student has succeeded in attracting some witnesses to the hearing.²²² One might anticipate more litigation on this rarely raised point, however, especially if the institution makes no effort to enable the student to bring witnesses to the hearing. Institutions might be well advised to require the attendance of students and employees sought as witnesses by accused students in disciplinary hearings.²²³

Although the right to cross-examine opposing witnesses in disciplinary hearings is not constitutionally *de rigueur*,²²⁴ serious cases,²²⁵ especially when the credibility of a witness looms crucial, may require it. In *Donohue v. Baker*,²²⁶ a student was expelled for date rape. At his hearing, the chief magistrate, invoking an

disciplinary cases assumed by the decisionmaker reduces the role of counsel. *Id.* at § 32 n. 29.

²²⁰ See *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (noting that university did not proceed through counsel or other representative, and issues were not "unduly complex").

²²¹ See *De Prima v. Columbia-Greene Cmty. Coll.*, 392 N.Y.S.2d 348, 350 (N.Y. Sup. Ct. Spec. Term 1977) (expulsion). Cf. A MODEL CODE OF STUDENT CONDUCT § 2(e), in Pavela, *supra* note 2, at 817.

²²² See *Turof v. Kibbee*, 527 F. Supp. 880, 886 (E.D.N.Y. 1981). See also *Knapp v. Jr. Coll. Dist.*, 879 S.W.2d 588, 593 (Mo. Ct. App. 1994) (stating there is no denial of due process when student not allowed to compel testimony of person who investigated incident at issue).

²²³ Cf. A MODEL CODE OF STUDENT CONDUCT § 30(c), in Pavela, *supra* note 2, at 822-23. ("University students and employees are expected to comply with subpoenas issued pursuant to this [code], unless compliance would result in significant and unavoidable personal hardship, or substantial interference with normal University activities . . .").

²²⁴ See *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (allowing student's admission of presence at site of disruption); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997); *Lipsett v. Univ. of P.R.*, 637 F. Supp. 789, 813 (D.P.R. 1986), *rev'd on other grounds*, 864 F.2d 881 (1st Cir. 1988) (finding that right to cross-examine important but not absolute; context important); *Jaksa*, 597 F. Supp. at 1252; *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996); *Knapp*, 879 S.W.2d at 592. But see *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623 (D.P.R. 1974) (requiring right to cross-examine in suspension case); *De Prima*, 392 N.Y.S.2d at 350 (expulsion); *North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 417 (W. Va. 1977) (finding that expulsion case carries right to confront witnesses). Cf. A MODEL CODE OF STUDENT CONDUCT §§ 2(e) & 30 (mm), in Pavela, *supra* note 2, at 817.

²²⁵ See *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 143 (noting expulsion carries with it right to confront witnesses). Presumably this confrontation includes cross-examination of adverse witnesses, not merely presence during their testimony.

²²⁶ 976 F. Supp. 136.

exception in the Student Conduct Code for *very sensitive situations*,²²⁷ denied the student the opportunity to cross-examine the alleged victim. The federal district court made clear that the distress such cases can cause complaining witnesses does not inevitably trump constitutional concerns:

It is understandable that the panel would wish to alter the proceedings in an effort to protect the alleged victim from additional trauma. However, this concern, and the presence of provisions in the Conduct Code permitting [dispensation with] cross-examination, does not end this Court's inquiry into the fundamental fairness of the hearing. Regardless of how "sensitive" the proceeding was deemed to be, the defendants remained bound to observe the plaintiff's constitutional rights.²²⁸

The court stressed that the case turned largely on credibility—the alleged rapist's versus the alleged victim's. Some form of confrontation became indispensable: "At the very least . . . due process required that the panel permit the [accused] to . . . direct questions to his accuser through the panel."²²⁹ (The court conceded that the hearing might have sufficed had the resulting penalty been a short suspension).²³⁰ In *Gorman v. University of Rhode Island*,²³¹ the First Circuit found no constitutional violation when a student, though allowed to cross-examine adverse witnesses regarding the alleged incident itself, was prohibited from probing their possible bias.²³²

In any event, institutions clearly may impose reasonable limits on cross-examination. In *Abidi-Sadeh v. Bee County College*,²³³ ninety-five Iranian students were charged with campus disruption. The institution proceeded in two separate stages. The first involved a presentation of the evidence against the entire group. The second involved a series of individualized hearings at which each charged student could present exculpatory evidence. The attorney for the students refused to cross-examine adverse witnesses at the group segment of the hearing, insisting instead on cross-examination of these witnesses at each individualized hearing. The court not

²²⁷ *Id.* at 147.

²²⁸ *Id.* at 147.

²²⁹ *Id.* (leaving unclear the extent whether the panel had allowed the accused this opportunity). See also *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (directing questions to witnesses unnecessary; questioning through panel sufficed).

²³⁰ See *Donohue*, 976 F. Supp. at 147.

²³¹ 837 F.2d 7 (1st Cir. 1988).

²³² See *id.* at 16.

²³³ 454 F. Supp. 552 (S.D. Tex. 1978).

only found this demand unreasonable, but also concluded that rejection of the opportunity to cross-examine at the group segment constituted a waiver.²³⁴

Although one might waive the point by failing to object,²³⁵ a fair hearing obviously requires a fair decisionmaker.²³⁶ In this context, however, "fair" does not mean "ultimate." In *Smith v. Rector of University of Virginia*²³⁷ a federal court rejected the argument that a sanctioned student had the right to appear before the university president, who had the final word in the matter. The student's "meaningful" hearing before the disciplinary panel satisfied due process. To rule otherwise, the court noted, would preclude all appeals.²³⁸

Nor does "fair" mean the absence of every possible conflict of interest. Just as a judge, though paid by the state, may decide controversies between citizens and the state, so too may employees of universities, even if selected by university officials,²³⁹ sit in judgment when those very universities bring charges against students.²⁴⁰

While an unbiased tribunal remains essential²⁴¹ and those sitting in judgment, therefore, should normally have had no previous involvement in the matter,²⁴² not all such involvement will taint the result. In *Henderson State University v. Spadoni*,²⁴³ the court found unobjectionable the presence on the disciplinary committee of a student from the same fraternity as the victim of the alleged assault.²⁴⁴ *A fortiori*, mere prior knowledge of the incident at issue does not disqualify a decisionmaker.²⁴⁵

In *Jackson v. Indiana University of Pennsylvania*,²⁴⁶ a student unsuccessfully argued the impropriety of her suspension on the ground that the prosecutorial and adjudicatory functions had been wrongly commingled. Said the court: "[T]he mere

²³⁴ See *id.* at 556.

²³⁵ See *Tigrett v. Rector of Univ. of Va.*, 97 F. Supp. 2d 752, 761-62 (W.D. Va. 2000).

²³⁶ See *Jenkins v. La. State Bd. of Educ.*, 506 F.2d 992, 1003 (5th Cir. 1975); *Carboni v. Meldrum*, 949 F. Supp. 427, 437 (W.D. Va. 1996) (requiring neutral decisionmaker).

²³⁷ 78 F. Supp. 2d 533 (W.D. Va. 1999).

²³⁸ See *id.* at 540-41.

²³⁹ See *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 145 (W. Va. 1985).

²⁴⁰ See *Jenkins*, 506 F.2d at 1003.

²⁴¹ See *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623 (D.P.R. 1974); *North*, 332 S.E.2d at 143 (at least for expulsion cases).

²⁴² See *Marin*, 377 F. Supp. at 623.

²⁴³ 848 S.W.2d 951 (Ark. Ct. App. 1993).

²⁴⁴ See *id.* at 954.

²⁴⁵ See *Nash v. Auburn Univ.*, 812 F.2d 655, 666 (11th Cir. 1987).

²⁴⁶ 695 A.2d 980 (Pa. Commw. Ct. 1997).

tangential involvement of an adjudicator in the decision to initiate proceeding[s] is not enough to raise the red flag of procedural due process."²⁴⁷ So too may a dean, absent overt bias or previous involvement, conduct a hearing despite his position as a member of the administrative office that formally initiates disciplinary proceedings.²⁴⁸ In *Gorman*,²⁴⁹ a staff member provided advice to the disciplinary board, participated with the board as a non-voting member, served as a witness in another hearing, prepared records of hearings, and represented the board in internal appeals. The First Circuit concluded that these multiple roles did not compromise the independence of the disciplinary board.²⁵⁰ Nor does holding the hearing in the office of the dean of students, who filed the charge, constitutionally taint the proceeding.²⁵¹ Of course, one who chaired the hearing committee should not also hear the appeal from that committee's findings and recommendations.²⁵² In court, students asserting bias may bear the burden of producing evidence sufficient to overcome the presumption of integrity and objectivity with which the judicial process may clothe institutional decisionmakers.²⁵³

Judicial opinion varies concerning the extent of the need for—as opposed to the wisdom²⁵⁴ of—a record of the hearing; a complete record of the proceedings may be unnecessary.²⁵⁵ A record becomes especially important, of course, with regard to any portions of the hearing to which the student has not been privy.²⁵⁶ In any event, even courts requiring an "adequate record"²⁵⁷ likely will not insist on a stenographic record; a tape recording will do.²⁵⁸ In fact, even a tape recording may

²⁴⁷ *Id.* at 982 (quoting *Lyness v. State Bd. of Med.*, 605 A.2d 1204, 1209 (1992)).

²⁴⁸ *See Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972).

²⁴⁹ 837 F.2d 7 (1st Cir. 1988).

²⁵⁰ *See id.* at 15.

²⁵¹ *See Haynes v. Dallas Cmty. Jr. Coll. Dist.*, 386 F. Supp. 208, 211-12 (N.D. Tex. 1974).

²⁵² *See Marshall v. Maguire*, 424 N.Y.S.2d 89, 91-92 (N.Y. Sup. Ct. Spec. Term 1980).

²⁵³ *See Gorman*, 837 F.2d at 15.

²⁵⁴ *See Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) ("I am not persuaded that the Due Process Clause requires the University to provide a verbatim transcript of the hearing. While this case illustrates the wisdom of recording such hearings, it is clear that the Constitution does not impose such a requirement.").

²⁵⁵ *See id.* *See also Trahms v. Trustees of Columbia Univ.*, 666 N.Y.S.2d 150, 151 (N.Y. App. Div. 1997).

²⁵⁶ *See Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926 (Tex. 1995), discussed in text accompanying note 194.

²⁵⁷ *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 143 (W. Va. 1985) (finding that the record was sufficient to support expulsion).

²⁵⁸ *See Navato v. Sletten*, 560 F.2d 340, 345 (8th Cir. 1977); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975) (allowing student to tape-record the hearing). *Cf. Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984) (finding that a written record was not required); A MODEL CODE OF STUDENT CONDUCT § 30(g), in Pavela, *supra* note 2, at 823 ("Hearings shall be tape

not be necessary. The First Circuit found no constitutional infirmity when a university prohibited the charged student from tape recording the hearing himself; the written summary of the testimony, evidence and decision the university provided him sufficed.²⁵⁹ Of course, the Constitution does not mandate a record of any hearing from which the appeal itself is *de novo*.²⁶⁰

Results adverse to the student should be supported by at least "substantial evidence."²⁶¹ Students should learn in a timely fashion how things turned out. Accordingly, they should receive a record of the decisionmaker's findings,²⁶² the evidence supporting those findings²⁶³ and perhaps the reasoning involved.²⁶⁴ Statements setting out factual findings and the evidence supporting them play a crucial role in assuring a result based on evidence in the record and in allowing the

recorded or transcribed.").

²⁵⁹ See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 15-16 (1st Cir. 1988).

²⁶⁰ See *Morale v. Grigel*, 422 F. Supp. 988, 1003 (D.N.H. 1976).

²⁶¹ *Gagne v. Trustees of Ind. Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998); *Reilly v. Daly*, 666 N.E.2d 439, 445 (Ind. Ct. App. 1996) (holding "substantial evidence" suffices; "clear and convincing" unnecessary); *Fain v. Brooklyn Coll. Univ. of N.Y.*, 493 N.Y.S.2d 13, 15 (N.Y. App. Div. 1985). Cf. *Kalinsky v. State Univ. of N.Y.*, 557 N.Y.S.2d 577, 579 (N.Y. App. Div. 1990) (stating that "clear and convincing" evidence is unnecessary to establish plagiarism); A MODEL CODE OF STUDENT CONDUCT §§ 2(h) & 30(k), in Pavela, *supra* note 2, at 817 (calling for "clear and convincing evidence"). Many colleges and universities apply a "preponderance of the evidence" standard. *Id.* at § 2(h) n.4 (citing Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 80-81 (1985)). On questions of fact concerning which conflicting evidence arises, courts should defer to the disciplinary committee. *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951, 954 (Ark. Ct. App. 1993). Moreover, on appeal, a court need find only "some evidence to support the decision of the school or college disciplinary board." *Reilly*, 666 N.E.2d at 446.

²⁶² See *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623 (D.P.R. 1974); *French v. Bashful*, 303 F. Supp. 1333, 1339 (E.D. La. 1969); *Gruen v. Chase*, 626 N.Y.S.2d 261, 262 (N.Y. App. Div. 1995). Cf. *Slaughter*, 514 F.2d at 625 (holding due process entitles student to notice of committee's decision, including its decision to expel student). Cf. *Kalinsky*, 557 N.Y.S.2d at 578; *Mary M.*, 473 N.Y.S.2d at 845 (holding student should be informed of finding and have access to decision and written report of penalty). Findings may have to be relatively specific. See *Hardison v. Fla. Agric. and Mech. Univ.*, 706 So. 2d 111, 112 (Fla. Dist. Ct. App. 1998) (finding must specify unlawfulness of touching in order to preclude self-defense, since student charged with "assault and battery"). Cf. A MODEL CODE OF STUDENT CONDUCT § 30(p), in Pavela, *supra* note 2, at 823 (entitling the student to "brief written findings," but not the evidence supporting those findings or the panel's reasoning).

²⁶³ See *Hall v. Med. Coll. of Ohio*, 742 F.2d 299, 310 (6th Cir. 1984); *Morale*, 422 F. Supp. at 1004; *Marin*, 377 F. Supp. at 623. Cf. *Kalinsky*, 557 N.Y.S.2d at 578.

²⁶⁴ Compare *Morale*, 422 F. Supp. at 1004; and *Marin*, 377 F. Supp. at 623 (stating that student should receive decisionmaker's reasoning) with *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1253-54 (E.D. Mich. 1984) (denying student the right to detailed statement of reasons supporting guilt since in this case such a statement would add little to student's knowledge).

student effectively to challenge that result both within the institution and in the courts.²⁶⁵

In conducting disciplinary proceedings, colleges and universities are well advised to follow whatever internal rules have been established, even if those rules do not themselves reflect constitutional requisites. Conceivably, significant deviations may constitute a violation of procedural due process, at least if the lapses induced the student's reasonable and detrimental reliance.²⁶⁶ To be sure, courts generally find no constitutional problem in the failure itself to honor such rules.²⁶⁷ In *Carboni v. Meldrum*,²⁶⁸ for example, departure from its own rules by a state veterinary college gave rise to no federal concern. The federal district court stressed that alleged due process violations must be measured against federal requirements; requirements that cannot be defined by state-created procedures.²⁶⁹

Nonetheless, state courts may deem fatal to the institution's case significant variance from internal constraints.²⁷⁰ New York's courts have been especially vigilant in enforcing regulations appearing in the handbooks of in-state institutions.²⁷¹ In

²⁶⁵ See *Kalinsky*, 557 N.Y.S.2d at 578.

²⁶⁶ See *Cobb v. Rector of Univ. of Va.*, 69 F. Supp. 2d 815, 830 (W.D. Va. 1999). As it turns out, the court found no deviations, significant or otherwise. 84 F. Supp. 2d 740, 748 (W.D. Va. 2000). Cf. A MODEL CODE OF STUDENT CONDUCT §19, in Pavela, *supra* note 2, at 820 (providing that deviation from the code's provisions "necessarily" invalidate a decision absent the possibility of "significant prejudice to the student or to the University").

²⁶⁷ See *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993); *Hall*, 742 F.2d at 309 ("[A] violation of internal rules does not establish a cognizable constitutional violation . . ."); *Tigrett v. Rector of Univ. of Va.*, 97 F. Supp. 2d 752, 758 (W.D. Va. 2000); *Foo v. Ind. Univ.*, 88 F. Supp. 2d 937, 952 (S.D. Ind. 1999); *Carboni v. Meldrum*, 949 F. Supp. 427, 437 (E.D. Va. 1996); *Picozzi v. Sandalow*, 623 F. Supp. 1571, 1579-1580 (E.D. Mich. 1986); *Jaksa*, 597 F. Supp. at 1251; *Wilkenfield v. Powell*, 577 F. Supp. 579, 583 (W.D. Tex. 1983) (citing *Hill v. Trustees of Ind. Univ.*, 537 F.2d 248, 252 (7th Cir. 1976)); *Edwards v. Bd. of Regents of Northwest Miss. State Univ.*, 397 F. Supp. 822, 830 (W.D. Mo. 1975). The Supreme Court has dealt obliquely with the issue in an academic case. See *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, at 92, n.8; *id.* at 108, n.22. But see *Smith v. Denton*, 895 S.W.2d 550, 555 (Ark. 1995) (holding that institution's failure to follow its own rules violates due process).

²⁶⁸ 949 F. Supp. 427 (E.D. Va. 1996).

²⁶⁹ *Id.* at 437.

²⁷⁰ See *Morrison v. Univ. of Or. Health Sci. Ctr.*, 685 P.2d 439, 441 (Or. Ct. App. 1984).

²⁷¹ See *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1306 (N.Y. 1980); *Gruen v. Chase*, 626 N.Y.S.2d 261, 262 (N.Y. App. Div. 1995); *Weidemann v. State Univ. of N.Y. Coll.*, 592 N.Y.S.2d 99, 101 (N.Y. App. Div. 1992) (requiring substantial compliance at both public and private institutions); *Heisler v. N.Y. Med. Coll.*, 449 N.Y.S.2d 834, 837 (N.Y. App. Div. 1982). See also *Trahms v. Trustees of Columbia Univ.*, 666 N.Y.S.2d 150 (N.Y. App. Div. 1997) (upholding the disciplinary action taken against the student-plaintiff, the court cited the university's substantial compliance with its own

Tedeschi v. Wagner College,²⁷² the institution expelled the plaintiff without adhering to its own procedural edicts.²⁷³ The New York court needed no federal constitutional proclamations to void the college's action:

Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual . . . when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.²⁷⁴

Moreover, all courts, state and federal, will likely be less inclined to credit the institution's efforts when it fails to live up to its own procedures.²⁷⁵ Of course, failure to follow local rules that themselves enshrine due process requirements will violate the federal Constitution.²⁷⁶

Finally, due process does not require institutions to provide internal appeals from adverse determinations reached through a constitutionally acceptable hearing.²⁷⁷ Nonetheless, most colleges and universities wisely provide for such recourse.

Courts seem more willing to interpose their judgments in disciplinary cases than in academic ones, presumably on the grounds that the former "involve determinations quite closely akin to the day-to-day work of the judiciary."²⁷⁸ Even

published guidelines for such procedures); *Harris v. Trustees of Columbia Univ.*, 470 N.Y.S.2d 368 (N.Y. App. Div. 1983) (dissenting opinion's reasoning adopted on appeal to New York Court of Appeals, 468 N.E.2d 54 (N.Y. 1984)). In disciplinary cases, "operative standard requires that the educational institution proceed in accordance with its own rules and guidelines." *Id.* at 370.

²⁷² 404 N.E.2d 1302 (N.Y. 1980).

²⁷³ *See id.* at 1306.

²⁷⁴ *Id.* One state court concluded that due process requires adherence to such internal rules if they affect individual rights. *Armesto v. Weidner*, 615 So. 2d 707, 709 (Fla. Dist. Ct. App. 1992).

²⁷⁵ *See Lightsey v. King*, 567 F. Supp. 645, 650 (E.D.N.Y. 1983) ("[S]ubmission . . . of a charge of cheating to the Honor Board, followed by [a] refusal to abide by their verdict, prompts the Court to question the [institution's] good faith as to this entire affair.").

²⁷⁶ *See id.* at 648.

²⁷⁷ *See Foo v. Ind. Univ.*, 88 F. Supp. 2d 937, 952 (S.D. Ind. 1999).

²⁷⁸ *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1304 (N.Y. 1980). *See* text accompanying note 269 *et seq.* Academic decisions, on the other hand, involve more evaluative and subjective judgments less adapted to administrative and judicial factfinding. *See Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978); *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 932 (D.N.J. 1997); *Disesa v. St. Louis Cmty. Coll.*, 79 F.3d 92, 95 (8th Cir. 1996); *Frabotta v. Meridia Huron Hosp. Sch. of Nursing*, 657 N.E.2d 816, 819 (Ohio Ct. App. 1995); *Lucas v. Hahn*, 648 A.2d 839, 842 (Vt. 1994); *Dillingham v. Univ. of Colo., Bd. of Regents*, 790 P.2d 851, 854 (Colo. Ct. App. 1989).

in disciplinary cases, however, courts remain sensitive to excessive interference with the decisions of educational officials and will not void such decisions merely because they lack wisdom or compassion.²⁷⁹ Such sensitivity pervades not only the assessment of whether a violation occurred, but also the determination of any remedy.²⁸⁰ One federal district court has urged that judicial intervention be sought, if possible, when equitable remedies could preclude the irreparable injury that might otherwise occasion damage claims; equitable relief, said the court, better protects both the student and the functioning of the institution.²⁸¹

After all is said and done, then, what process should an institution prescribe for dealing with student miscreance? In his unusual memorandum order in the mysteriously named *A. v. C. College*,²⁸² Judge Vincent Broderick, after informing the reader that the case had been settled, offered his advice. For cases threatening a permanent record entry, suspension, or expulsion, colleges and universities should consider the following procedures: 1) an impartial decisionmaker—the person may be an employee of the institution so long as not previously involved in the case; 2) notice to the accused student of the substance of the allegations and of the possible penalties; 3) provision to the student of an opportunity to appear at the hearing and to provide, reasonably in advance of the hearing, evidence the student intends to offer at the hearing; 4) an opportunity on the part of the student to suggest witnesses whom the decisionmaker might interview and possible questions that might be

²⁷⁹ See *Foo*, 88 F. Supp. 2d at 957 (citing *Wood v. Strickland*, 420 U.S. 308, 326 (1975)). When the focus is on the act of a governmental official, as opposed to legislation, "only the most egregious official conduct" is arbitrary in the constitutional sense." *Id.* at 960 (quoting *Dunn v. Fairfield Cmty. High Sch. Dist. No. 225*, 158 F.3d 962, 965 (7th Cir. 1998)) (quoting in turn *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). See generally Robert Gilbert Johnston & Jane Curtis Oswald, *Academic Dishonesty: Revoking Academic Credentials*, 32 J. MARSHALL L. REV. 67 (1998); Audrey Wolfson LaTourette & Robert D. King, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199 (1988); David M. Rabban, Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95 (1973).

²⁸⁰ See *A. v. C. Coll.*, 863 F. Supp. 156 (S.D.N.Y. 1994); *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 931 (Tex. 1995) (finding that the case was disciplinary, not academic, the federal district court noted, "The courts should tread lightly in fashioning remedies for due process violations that affect the academic decisions of state-supported universities." *Id.* at 934.); *Harris v. Trustees of Columbia Univ.*, 470 N.Y.S.2d 368, 375 (N.Y. App. Div. 1983) (dissenting opinion, adopted by court of appeals in 468 N.E.2d 54 (N.Y. 1984)). Cf. *Olsson v. Bd. of Higher Educ.*, 402 N.E.2d 1150, 1154 (1980). In this academic case, the court inveighed against "diploma by estoppel," at least when a less drastic remedy like re-testing might be employed without seriously disrupting the student's academic or professional development. "[T]he judicial awarding of an academic diploma is an extreme remedy which should be reserved for the most egregious of circumstances." *Id.*

²⁸¹ See *C. Coll.*, 863 F. Supp. at 158 (noting that damage suits might intimidate academic decisionmakers).

²⁸² See *id.* at 156.

addressed to them; 5) avoidance of sanctions against witnesses merely because of the implausibility of, or inconsistency in, their testimony—such discipline may deter “unpopular” though “truthful” testimony; and 6) an option for the accused student to accept discipline voluntarily or, after sufficient time to secure pertinent advice, to request a ruling from the decisionmaker.²⁸³ Judge Broderick wielded a nice mix of carrot and stick in concluding:

It is not intended to be suggested here that these possible aspects of fair procedure should be mandated by judicial decision in public or private sector institutions, but rather [that] their adoption might be relevant to judicial willingness to accept institutional decisions if found subject to challenge notwithstanding the drawbacks of judicial intervention.²⁸⁴

In our litigious society, institutions too often think only of what the law requires them to do. But the law sets only the minimal standard of human behavior, not the preferred.²⁸⁵ Institutions, acting in this context through their lawyers and student-affairs personnel, should focus as well on doing what is right, whether or not specifically mandated by law. Students, after all, are decidedly not the enemy, but rather the core of the institution.

B. Academic

As indicated earlier, the U.S. Supreme Court seems to have dispensed with the requirement of a hearing for academic cases, though the decision involved must be “careful and deliberate.”²⁸⁶ Substantive due process, even if applicable to the higher education context, largely overlaps the procedural requirement, decreeing that the result in academic matters be reached conscientiously and with careful deliberation; institutional judgments will not be overturned unless they represent “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”²⁸⁷

²⁸³ See *id.* at 158-59.

²⁸⁴ *Id.* at 159.

²⁸⁵ Cf. *Hennessey v. City of Melrose*, 194 F.3d 237, 252 n.5 (1st Cir. 1999). After noting that the Constitution does not require a hearing in academic cases, the court added: “This is not to say that a hearing of some sort might not have provided [the institution] with a slightly different gloss on what exactly had transpired at Horace Mann. Our concern, however, is with constitutional imperatives, not with best practices.”

²⁸⁶ *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 87 (1978).

²⁸⁷ *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

How have the lower courts implemented these sentiments? They in turn have consistently set a rather low threshold for institutions in such cases.²⁸⁸ As the Fourth Circuit has said, "The limit of judicial inquiry into academic administration is early reached."²⁸⁹ Another federal court, noting that procedural requirements for academic cases remain "so minimal," concluded that in "only extremely rare situations" would an institution's actions violate procedural due process under the Fourteenth Amendment.²⁹⁰ Referring to academic controversies, the Georgia Supreme Court has said, "Absent plain necessity impelled by a deprivation of major proportion, the hand of the judicial branch . . . must be withheld."²⁹¹ Such pronouncements, echoing the U.S. Supreme Court, have stressed that the institution's academic judgment yields only if not "careful and deliberate,"²⁹² or if "arbitrary or capricious,"²⁹³ irrational,²⁹⁴ motivated by bad faith or ill will,²⁹⁵ "beyond

²⁸⁸ Some courts have reached similar results without allusion to the U.S. Constitution. See, e.g., *Bhandari v. Trustees of Columbia Univ.*, No. 00.CIV.1735-JGK, 2000 WL 310344 (S.D.N.Y. Mar. 27, 2000); *Garg v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, 747 F. Supp. 231, 236 (S.D.N.Y. 1990) (state law); *Hernandez v. Overlook Hosp.*, 692 A.2d 971, 973 (N.J. 1997) (contract); and *Shuman v. Univ. of Minn. Law Sch.*, 451 N.W.2d 71, 74 (Minn. Ct. App. 1990) (holding that academic cases require less process than disciplinary ones).

²⁸⁹ *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 (4th Cir. 1983).

²⁹⁰ *Amelunxen v. Univ. of P.R.*, 637 F. Supp. 426, 431 (D.P.R. 1986). The court continued that any reversal in such cases would come under the aegis of substantive due process. See *id.* See also *Harris v. Blake*, 798 F.2d 419, 423 (10th Cir. 1986) (requiring only "minimal procedures" due); *Qvyjt v. Lin*, 932 F. Supp. 1100, 1106 (N.D. Ill. 1997) (only "minimal" process required); *Lewin v. Med. Coll. of Hampton Roads*, 910 F. Supp. 1161, 1165 (E.D. Va. 1996) (noting that procedures in academic cases far less stringent than in disciplinary ones); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (holding that only the "barest procedural protections" needed for academic dismissal); *Frabotta v. Meridia Huron Hosp. Sch. of Nursing*, 657 N.E.2d 816, 819 (Ohio Ct. App. 1995) (holding less process required in academic cases than in disciplinary). Cf. *Alcorn v. Vaksman*, 877 S.W.2d 390, 397 (Tex. App. 1994) (noting that less stringent procedures in academic matter) (applying Texas parallel to Due Process Clause). In *Alcorn*, the court noted that if evidence supports the trial court's finding of institutional bad faith or ill will, the deferential standard for academic dismissals does not apply on appeal. See *id.*

²⁹¹ *Woodruff v. Ga. State Univ.*, 304 S.E.2d 697, 699 (Ga. 1983).

²⁹² *Perez v. Univ. of Charleston*, 201 F.3d 436 (4th Cir. 1999) (*per curiam*) (unpublished); *Wilde v. Komar*, 185 F.3d 872 (9th Cir. 1999) (unpublished); *Wheeler v. Miller*, 168 F.3d 241, 248 (5th Cir. 1999); *Disesa v. St. Louis Cmty. Coll.*, 79 F.3d 92, 95 (8th Cir. 1996); *Harris*, 798 F.2d at 423; *Schuler v. Univ. of Minn.*, 788 F.2d 510, 513 (8th Cir. 1986); *Rossomando v. Bd. of Regents of Univ. of Neb.*, 2 F. Supp. 2d 1223, 1229 (D. Neb. 1998); *Lewin*, 910 F. Supp. at 1167; *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1537 (M.D. Ala. 1994); *Mohammed v. Mathog*, 635 F. Supp. 748, 752 (E.D. Mich. 1986).

²⁹³ *Wilde*, 185 F.3d 872; *Crook v. Baker*, 813 F.2d 88, 100 (6th Cir. 1987); *Schuler*, 788 F.2d at 515; *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981); *Stoller v. Coll. of Med.*, 562 F. Supp. 403, 412 (M.D. Pa. 1983); *Amelunxen*, 637 F. Supp. at 431; *Hubbard v. John Tyler Cmty. Coll.*, 455 F. Supp. 753, 755 (E.D. Va. 1978); *Williams v. State Univ. of N. Y.—Health Sci. Ctr.*, 674 N.Y.S.2d 702 (N.Y.

the pale of reasoned academic decisionmaking,²⁹⁶ “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment,”²⁹⁷ or in violation of a statute or the Constitution.²⁹⁸ Moreover, the burden of proof in such cases normally lies with the student.²⁹⁹ (One layer of deference may get superimposed on another: In close cases a court may accede even to the institution’s determination that a matter is academic rather than disciplinary!)³⁰⁰ Nonetheless, as the Second Circuit reminds

App. Div. 1998); *Moukarzel v. Montefiore Med. Ctr.*, 662 N.Y.S.2d 281, 282 (N.Y. App. Div. 1997); *Illickal v. Roman*, 653 N.Y.S.2d 562, 563 (N.Y. App. Div. 1997); *Frabotta*, 657 N.E.2d at 819; *Rafman v. Brooklyn Coll.*, 623 N.Y.S.2d 281, 282 (N.Y. App. Div. 1995); *Alanis v. Univ. of Tex. Health Sci. Ctr.*, 843 S.W.2d 779, 784 (Tex. App. 1992); *Tobias v. Univ. of Tex.*, 824 S.W.2d 201, 210 (Tex. App. 1991); *cf. Ross v. Univ. of Minn.*, 439 N.W.2d 28, 34 (Minn. Ct. App. 1989). “Arbitrary or capricious” means an institutional decision lacking a rational basis or motivated by bad faith or ill will unrelated to academic performance. *Schuler*, 788 F.2d at 515; *Stevens*, 646 F.2d at 1170.

²⁹⁴ See *Disesa*, 79 F.3d at 95; *Rossomando*, 2 F. Supp. 2d at 1229; *Doe v. Wash. Univ.*, 780 F. Supp. 628, 631 (E.D. Mo. 1991); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1371 (E.D. Pa. 1985); *Williams*, 674 N.Y.S.2d 702; *Moukarzel*, 662 N.Y.S.2d at 282; *Illickal*, 653 N.Y.S.2d at 563; *Rafman*, 623 N.Y.S.2d at 282; *Alanis*, 843 S.W.2d at 789; *Tobias*, 824 S.W.2d at 210 (ending substantive due process inquiry when any evidence of a rational basis is presented).

²⁹⁵ See *Disesa*, 79 F.3d at 95; *Haberle v. Univ. of Ala.*, 803 F.2d 1536, 1540 (11th Cir. 1986); *Schuler*, 788 F.2d at 515; *Rossomando*, 2 F. Supp. 2d at 1229; *Doe*, 780 F. Supp. at 631; *Moukarzel*, 662 N.Y.S.2d at 282; *Illickal*, 653 N.Y.S.2d at 563; *Rafman*, 623 N.Y.S.2d at 282; *Alanis*, 843 S.W.2d at 784. *Cf. Williams*, 674 N.Y.S.2d 702; *Alcorn*, 877 S.W.2d at 412-13 (holding that expulsion motivated by bad faith and ill will violated Texas Constitution’s parallel to federal Due Process Clause).

²⁹⁶ *Hennessy v. City of Melrose*, 194 F.3d 237, 252 (1st Cir. 1999) (citing *Ewing*, 474 U.S. at 227-28); *Cobb v. Rector of Univ. of Va.*, 84 F. Supp. 2d 740, 748-49 (W.D. Va. 2000).

²⁹⁷ *Wheeler*, 168 F.3d at 250 (citing *Ewing*, 474 U.S. at 225); *Haberle*, 803 F.2d at 1540; *Harris*, 798 F.2d at 425; *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 934 (D.N.J. 1997); *Carboni v. Meldrum*, 949 F. Supp. 427, 438 (W.D. Va. 1996); *Lewin*, 910 F. Supp. at 1167; *Saville*, 852 F. Supp. at 1537; *Doe*, 780 F. Supp. at 631; *Amelunxen*, 637 F. Supp. at 431; *Bruner v. Petersen*, 944 P.2d 43, 48 (Alaska 1997); *Lekutis v. Univ. of Osteopathic Med. and Health Sciences*, 524 N.W.2d 410, 413 (Iowa 1994); *Dillingham v. Univ. of Colo., Bd. of Regents*, 790 P.2d 851, 854 (Colo. App. 1989); *cf. Ho v. Univ. of Tex.*, 984 S.W.2d 672, 684 (Tex. App. 1998); *Brown v. Univ. of Tex. Health Ctr.*, 957 S.W.2d 911, 916 (Tex. 1997) (calling minimal professional judgment enough); *Alanis*, 843 S.W.2d at 789; *Tobias*, 824 S.W.2d at 211; *Ross*, 439 N.W.2d at 34; *Eiland v. Wolf*, 764 S.W.2d 827, 835 (Tex. App. 1989) (finding evidence of minimal professional judgment must rule against student as matter of law).

²⁹⁸ See *Amelunxen*, 637 F. Supp. at 431; *cf. Williams*, 674 N.Y.S.2d 702; *Moukarzel*, 662 N.Y.S.2d at 282 (citation omitted); *Illickal*, 653 N.Y.S.2d at 563; *Rafman*, 623 N.Y.S.2d at 282.

²⁹⁹ See *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46, 51 (3d Cir. 1986) (“[A] student bears a heavy burden in persuading the courts to set aside a faculty’s judgment of academic performance.”); *Frabotta v. Meridia Huron Hosp. Sch. of Nursing*, 657 N.E.2d 816, 819 (Ohio Ct. App. 1995).

³⁰⁰ See *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 53 (Alaska 1999).

us, *Horowitz* did not put even academic cases beyond the reach of judicial intervention; "at least some modicum of process" is due.³⁰¹

The ultimate judgment in these cases may really reflect whether the reviewing court feels that, all things considered, the institution treated the student fairly.³⁰² In fact, perhaps because in so many cases the institution's treatment of the student has seemed fundamentally fair, the courts have not had to wrestle with the slender but real differences among the standards used. To consider just two of those standards, "careful and deliberate" does not mean the same as "not arbitrary and capricious." To be sure, in most situations, including many that have reached the courts, treatment of the student is both or neither. Nonetheless, some level of attention paid by a professor to the student's bluebook or research paper, for example, might fall short of being "careful and deliberate" without being "arbitrary and capricious;" these do not seem to be contiguous on the spectrum of concern manifested by the institutional decisionmaker. "Careful and deliberate" conveys a significantly higher level of consideration than does any of the other standards referred to in the academic due process cases.

Not surprisingly, in cases labeled academic, virtually all courts have found a hearing unnecessary³⁰³—if not useless and harmful³⁰⁴—although some courts have

³⁰¹ *Ezekwo v. NYC Health and Hosp. Corp.*, 940 F.2d 775, 784 (2d Cir. 1991). Of course, even a courtroom victory does not guarantee the student academic success. One federal court, though denying the institution summary judgment, candidly acknowledged the daunting challenge students may face in such cases: "Ms. Bergstrom is engaged in a war which cannot be won. If the medical school faculty has in fact determined that she should not be a graduate of the school, no performance level on the remaining courses will prove to be satisfactory. No coerced unilateral resolution appears possible." *Bergstrom v. Buettner*, 697 F. Supp. 1098, 1102 (D.N.D. 1987).

³⁰² See *Harris*, 798 F.2d at 424; *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 (4th Cir. 1983).

³⁰³ See *Hennessy v. City of Melrose*, 194 F.3d 237, 250 (1st Cir. 1999); *Hankins v. Temple Univ. Health Sciences Ctr.*, 829 F.2d 437, 445 (3d Cir. 1987) (finding that informal faculty evaluation suffices); *Mauriello*, 781 F.2d at 51 (informal faculty evaluation suffices); *Haberle v. Univ. of Ala.*, 803 F.2d 1536, 1539 (11th Cir. 1986) ("The fact that the procedures used were ad hoc does not violate the *Horowitz* standard; no formal hearing is required."); *Cobb v. Rector of Univ. of Va.*, 84 F. Supp. 2d 740, 749 (W.D. Va. 2000) (*dictum*); *Van de Zilver*, 971 F. Supp. at 931 (*dictum*); *Lewin*, 910 F. Supp. at 1165 (holding that since no hearing was needed, neither was counsel); *Saville*, 852 F. Supp. at 1537 (no formal hearing required); *Alexander v. Kennedy-King Coll.*, No. 88 C 2117, 1990 U.S. Dist. LEXIS 14997 (N.D. Ill., Nov. 2, 1990); *Mohammed v. Mathog*, 635 F. Supp. 748, 752 (E.D. Mich. 1986) (holding that student need not have attended meeting at which his dismissal for academic reasons was decided upon); *Rafman*, 623 N.Y.S.2d at 283 (no "full hearing" needed); *Lucas v. Hahn*, 648 A.2d 839, 842 (Vt. 1994) (requiring no formal hearing); *Dillingham*, 790 P.2d at 854 (requiring no formal hearing); *Ross*, 439 N.W.2d at 34. Cf. *Davis v. Mann*, 882 F.2d 967, 974 (5th Cir. 1989) (holding that full procedural protections of Fourteenth Amendment unnecessary even though dismissal from residency

alluded approvingly to the fact that a hearing, however unnecessary, had taken place in the case at bar.³⁰⁵ Obviously, even though constitutionally superfluous, a hearing, and other forms of administrative review,³⁰⁶ make it still more likely that the institution will overcome the low hurdle represented by the criteria cited above. Since a hearing need not be provided in academic cases, it would be, as the Eighth Circuit has pointed out, anomalous to require institutions to preserve a record of the oral exam whose failure occasioned the graduate student's dismissal.³⁰⁷ The lack of any need for a hearing equally precludes the student's right to be present when others testify before the grade-appeals committee.³⁰⁸ Just as in disciplinary cases, courts, in dealing with academic matters, may shield decisionmakers with a presumption of integrity.³⁰⁹ The fact that the dean selected the members of a committee called upon to deal with such matters raises no constitutional problem.³¹⁰

program also amounted to dismissal from employment; primary purpose of program was academic training and academic certification); *Miller v. Hamline Univ. Sch. of Law*, 601 F.2d 970, 972 (8th Cir. 1979); *Dietz v. Am. Dental Ass'n*, 479 F. Supp. 554, 558 (E.D. Mich. 1979); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 684 (Tex. App. 1998). *Hernandez v. Overlook Hosp.*, 692 A.2d 971, 976 (N.J. 1997) (holding that contract between private hospital and resident required only a "fair procedure"); *Tobias*, 824 S.W.2d at 209-10.

³⁰⁴ See *Amelunxen*, 637 F. Supp. at 431 ("[A] hearing may be helpful to ascertain a student's misconduct but is useless or harmful to find out the truth as to scholarship.").

³⁰⁵ See *Haberle*, 803 F.2d at 1539; *Harris*, 798 F.2d at 423; *Rossomando v. Bd. of Regents of Univ. of Neb.*, 2 F. Supp. 2d 1223, 1229 n.2 (D. Neb. 1998); *Van de Zilver*, 971 F. Supp. at 934; *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1374-75 (E.D. Pa. 1985).

³⁰⁶ See *Disesa v. St. Louis Cmty. Coll.*, 79 F.3d 92, 95 (8th Cir. 1996); *Harris*, 798 F.2d at 423; *Wilkenfield v. Powell*, 577 F. Supp. 579, 583-84 (W.D. Tex. 1983).

³⁰⁷ See *Schuler v. Univ. of Minn.*, 788 F.2d 510, 514 (8th Cir. 1986) (noting that the university did in fact provide a hearing, though not required).

³⁰⁸ See *Ikpazu v. Univ. of Neb.*, 775 F.2d 250, 254 (8th Cir. 1985). Cf. *Moukarzel v. Montefiore Med. Ctr.*, 662 N.Y.S.2d 281, 283 (N.Y. App. Div. 1997) (holding that academic cases, which require less process than disciplinary ones, entail no right to question the academic committee, to introduce evidence, or to present witnesses); *Hall v. Johnstone*, 620 N.Y.S.2d 630, 631 (N.Y. App. Div. 1994) (holding that in academic case, no right to cross-examine witness or to a transcript of proceeding before appellate faculty panel).

³⁰⁹ See *Ikpazu*, 775 F.2d at 254; *Kashani v. Purdue Univ.*, 763 F. Supp. 995, 999 (N.D. Ind. 1991) (holding that absent establishment of actual bias, school officials in highly sophisticated academic discipline entitled to presumption of honesty and integrity).

³¹⁰ See *Ikpazu*, 775 F.2d at 254.

The concept of notice has played a prominent role in these cases.³¹¹ In *Schuler v. University of Minnesota*,³¹² the Eighth Circuit required that the student have prior notice of both the institutional unhappiness with her performance and the threat of dismissal.³¹³ This requirement has been tied to the very notion of the academic: "If the university's interests are truly academic rather than disciplinary in nature, its emphasis should be on correcting behavior through faculty suggestion, coercion, and forewarning rather than punishing behavior after the fact."³¹⁴ Such an approach requires that notice come early enough to give the student a "reasonable opportunity" to correct any deficient performance before dismissal becomes inevitable.³¹⁵ That notice might come from the receipt of unsatisfactory grades during the course.³¹⁶

Most institutions give students second, and even further, chances to redress their academic performances. In so doing, these institutions convey the very kind of notice—the rehabilitative notice—discussed by the courts. Nonetheless, there presumably remain cases where notice—preliminary and final—comes before *any* performance by the student. May not a law school, for example, set out in its bulletin a rule requiring immediate dismissal of anyone falling short of a 1.0 grade point average at the end of the first semester (with probation, say, for those between 1.0 and 2.0)? Surely the clear warning in the rule—together with the assessment occurring through the four or five end-of-semester examinations—provides enough protection to meet the "careful and deliberate" criterion and, *a fortiori*, the other due process standards as well. The chance to reform talk, though, suggests that even students running afoul of the 1.0 minimum constitutionally merit another chance.

³¹¹ See *Ezekwo v. NYC Health and Hosp. Corp.*, 940 F.2d 775, 785 (2d Cir. 1991) (entitling ophthalmology resident to notice of change in criteria for selecting "Chief Resident"); *cf. Hernandez v. Overlook Hosp.*, 692 A.2d 971, 976 (N.J. 1997) (requiring notice of charges by contract); *cf. Miller v. Hamline Univ. Sch. of Law*, 601 F.2d 970 (8th Cir. 1979).

³¹² 788 F.2d 510 (8th Cir. 1986).

³¹³ See *id.* at 514. *Accord* *Wilde v. Komar*, 185 F.3d 872 (9th Cir. 1999) (unreported); *Rossomando v. Bd. of Regents of Univ. of Neb.*, 2 F. Supp. 2d 1223, 1229 (D. Neb. 1998); *Nickerson v. Alaska Anchorage*, 975 P.2d 46, 53 (Alaska 1999) (holding that *Horowitz* requires "more than mere perfunctory notice rendered with or after the decision to dismiss").

³¹⁴ *Id.*

³¹⁵ *Id.* See also *Wilkenfield v. Powell*, 577 F. Supp. 579, 584 (W.D. Tex. 1983) (noting that student learned of faculty's dissatisfaction well before decision to drop him from doctoral psychology program).

³¹⁶ See *Disesa v. St. Louis Cmty. Coll.*, 79 F.3d 92, 95 (8th Cir. 1996) (holding that notice of deficient performance provided the student by five quizzes making up seventy-five percent of her grade, combined with administrative review of that grade, more than satisfied procedural due process).

Horowitz and *Ewing*, it is submitted, anticipate no such strait jacketing of the institution. Indeed, to deny that option may well, under the law of unintended consequences, cause the institution to reduce its number of risky admissions—so some applicants who would have had one chance under the 1.0 rule would get none. It may be that cases setting out a requirement that students be given an opportunity to reform academically arose in a context that anticipates such second opportunities, or that the fact of a second chance proved helpful in buttressing the court's conclusion that the institution had been careful and deliberate. The Supreme Court of South Dakota put the point well, concluding that the student in academic-sanction cases need only be given notice, in any form, of his failure or pending failure.³¹⁷

As in disciplinary cases, courts in academic situations have been constitutionally unmoved by the failure of a college or university to follow its internal rules.³¹⁸ In *Rossomando v. Board of Regents of University of Nebraska*,³¹⁹ for example, a student dismissed from a postgraduate dental program complained that her hearing, in violation of the university's internal rules, had not been recorded. The court replied: "The failure to record was an oversight In any event, she was given more process than she was due and the failure to follow the internal rules is not itself actionable as a federal constitutional claim."³²⁰

V. CONCLUSION

The Supreme Court has done a disservice to both lower courts and higher education in failing to specify, at least in broad strokes, the nature of the interest that qualifies for due process protection. This lapse, as we have seen, has led many courts to assume such an interest and, in the bargain, to decide the constitutional adequacy of the process applied to the student. Perhaps the Court should clearly and finally

³¹⁷ See *Delaney v. Heimstra*, 288 N.W.2d 769, 772 (S.D. 1980) (citing *Gaspar v. Burton*, 513 F.2d 843, 851 (10th Cir. 1975)). See *Frabotta v. Meridia Huron Hosp. Sch. of Nursing*, 657 N.E.2d 816, 819 (Ohio Ct. App. 1995) (denying a student the chance to improve was not violation of due process); cf. *Van de Zilver v. Rutgers Univ.*, 971 F. Supp. 925, 933 (D. N.J. 1997) (holding that, in academic cases, due process requires no more than an informal faculty evaluation with the student prior to dismissal) (citing *Hankins v. Temple Univ. Health Sciences Ctr.*, 829 F.2d 437, 445 (3d Cir. 1987)).

³¹⁸ See *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. at 92, n.8; *Disesa*, 79 F.3d at 95; *Schuler*, 788 F.2d at 515; *Rossomando*, 2 F. Supp. 2d at 1228; *Amelunxen v. Univ. of P.R.*, 637 F. Supp. 426, 432-33 (D.P.R. 1986); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1376 (E.D. Pa. 1985) (*dictum*). But failure to follow internal rules might breach the contract between institution and student. See *Garg v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, 747 F. Supp. 231, 236 (S.D.N.Y. 1990). But see *Horowitz*, 435 U.S. at 108, n.22 (opinion of Justice Marshall, concurring and dissenting).

³¹⁹ 2 F. Supp. 2d 1223 (D. Neb. 1998).

³²⁰ *Id.* at 1229.

hold that the liberty or property triggering protection under procedural due process also prompts protection under substantive due process; this would seem to reflect most clearly the specific language of the clause. The Court could then limit liberty or property to substantial invasions of state protected interests—long suspensions, dismissals, loss of significant financial aid, serious stigma, and the like.

If disinclined toward this resolution, the Court should adopt the position set out by Justice Powell, concurring in *Ewing*, that substantive due process rights are created only by the federal Constitution, not by state law.³²¹ Such an approach would remove substantive due process formally from the typical academic or disciplinary case, even when serious sanctions such as suspension and dismissal are in play. Such a change would have little significant impact on such cases, of course. As we have seen, violations of substantive due process require, besides a suitable interest, a decision reflecting such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Though the Court has made clear that procedural due process does not require “hearings” regarding adverse academic decisions, it is difficult—at least without edging into fantasy—to hypothesize an institutional decision that would violate substantive due process even as it satisfies procedural due process. Perhaps an obviously arbitrary rule—for example, only those students of a certain height may graduate—attended by elaborate procedures to determine that the student comes within the rule, might be such a situation. In the real world, even rules easily disagreed with will inevitably fall short of reflecting such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Telling is the rarity with which substantive due process challenges succeed independently of procedural due process. Ironically, then, the distinction itself turns out to be . . . academic. The modification would cleanse the constitutional law in this area of a lingering uncertainty that has caused confusion, needless briefing, argument and judicial decision making, and perhaps even additional federal litigation. (In *Ewing*, for example, the student’s federal claim relied only on an alleged violation of substantive due process).³²²

With regard to the procedures institutions deploy for aberrant students, contested disciplinary cases that threaten serious sanctions warrant appropriate notice of the charged misconduct and of the rules allegedly violated; a hearing, conducted by unbiased decisionmakers and allowing the student to confront adverse evidence and present favorable evidence; and formal findings and conclusions. The

³²¹ See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

³²² See *id.*

opportunity for at least one appeal challenging the conduct of the hearing should be required. Such a process, though rudimentary, meets the constitutional requirements specified or implied by the courts. Of course, nothing prevents an institution from employing more sophisticated procedures.

With regard to academic cases, the courts have taken an essentially *hands-off* approach, deferring to the academic expertise of campus officials. Given the rules typically controlling academic probation, suspension, and dismissal at American colleges and universities, and the large number of judgments that normally must concur in such cases, the judicial overturning of campus decisions will rarely occur. The overwhelming number of such matters will easily clear the "careful and deliberate" bar, let alone the other, still less demanding criteria of due process.