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STUDENTS HAVE RIGHTS, TOO: THE DRAFTING OF
STUDENT CONDUCT CODES

Jason J. Bach*

"[P]erhaps the best advice that can be given is that it is
safer to err on the side of giving students too many
rights, rather than too few."1

I. INTRODUCTION

College and university student conduct codes2 serve two
distinct purposes: (1) to guide student behavior and (2) to
establish procedural mechanisms that safeguard the rights of
students accused of conduct that violates a campus code. The
level of protection afforded students varies greatly and depends
on several factors. This article reviews the factors that those
who draft or revise student conduct codes must consider,
whether the institution is public or private.3 Certain
inalienable rights are so fundamental to fairness that they
must be observed in the rules governing student disciplinary
hearings. To deny a student these rights is to deny the student
a fair hearing.

Not surprisingly, however, college and university judicial
affairs administrators have organized to limit the rights of

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2. The term “Student Conduct Code” is used throughout this article to refer to the
principal body of rules and policies regulating student conduct, whether it is called an
“Honor Code,” “Students Rights and Responsibilities,” “Student Code of Conduct,” or
some other title.

3. This article will often cite to previous and current student conduct codes
adopted by the U. of Nev., Las Vegas (UNLV). The current UNLV policy, adopted in
Aug. 2000, is one of three student conduct codes in which the author has participated
in either drafting or redrafting.
students. The Association of Student Judicial Affairs (ASJA) maintains that due process is not required in campus hearings and must yield to the "educational" and "developmental mission" of the institution. Additionally, the ASJA advocates that schools provide only "the bare minimum of 'process' to satisfy a judge," but fails to consider the rights of the student. This article flatly rejects such an approach. The ASJA chooses to ignore well-established law that students hold a property and/or contractual interest in their education and are entitled to the fundamental fairness embodied in due process, whether they are at public or private institutions.

As much as the ASJA would like to deny a student his rights, neither principles of fairness nor the rule of law are on its side. In fact, schools that take steps to recognize students' rights find that procedures designed to protect students' rights protect the schools themselves, as those procedures reveal the relevant facts underlying the disciplinary action, and insulate the school from lawsuits alleging a breach of the student's rights.

This article begins with a general explanation in section II of the rights and responsibilities of students. Section III examines the legal principles that govern both public and private institutions. Next, procedural due process is reviewed in section IV by looking at the constitutional requirements for public institutions and the aspirational objectives of private institutions. Finally, in section V, the article analyzes the substantive due process rights of students.

II. STUDENT RIGHTS AND RESPONSIBILITIES

A. Student Bill of Rights

Whether an institution is public or private, it should adopt a student bill of rights that includes the rights protected by the


United States Constitution and the constitution of the particular state in which the institution resides. In addition, rights may be added or elaborated upon to meet the particular purposes of a college or university environment. Those rights to be considered include:

- Due process, guaranteeing substantive and procedural fairness;
- Freedom from discrimination on the basis of race, sex, age, religion, creed, national origin, disability, or sexual orientation;
- The right to engage in inquiry and discussion, to exchange thought and opinion, and to speak, write, and print freely on any subject;
- The right to exercise one's rights and freedoms without fear of university interference;
- The opportunity to participate in the formulation of policy directly affecting students through membership on appropriate committees and in student organizations;
- Ready access to established university policies and procedures;
- The right to engage in peaceful and orderly speech, protest, demonstration, and picketing within the public forum which does not disrupt the educational functions of the university;
- The right to adequate notice of charges alleged;
- Protection from unreasonable searches and seizures;
- The right to be represented by an attorney or other advisor;
- The right to cross-examine witnesses; and
- The right to an open hearing.  

These are just examples of the basic rights that any student conduct code should expressly protect. Institutions should go further to afford students other rights, such as the general right to a fair and speedy resolution after due notice has been provided. In addition, to ensure a fair process, the accused student should have full discovery privileges, including access to all of the evidence that may be used against him, and should

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have ample time to review and investigate the evidence.

It is not enough, however, for a school to go through the motions of enacting a student conduct code. For any such code to have credibility, the institution must abide by it. In *Lightsey v. King*, a student was given a grade of “zero” for cheating, even after the institution’s Honor Board found him “not guilty” of the allegations. The court held that, “there was no difference between failing to provide a due process hearing and providing one but ignoring the outcome. By holding the Honor Board hearing and then disregarding its result, the Academy violated Lightsey’s right to due process.”

The procedural protections necessary to preserve students’ rights will be discussed in greater detail throughout this article. Each institution should evaluate the need for additional protections which assure that students obtain and receive a fair process that leads to a reliable determination of the issues.

**B. Institutional Duties to Inform Students of Their Responsibilities**

Institutions owe students a duty to inform them of the actions for which they will be held accountable. Descriptions of actions that will violate the student conduct code may vary from a simple statement of responsibility, such as “any conduct unbecoming of a student,” to a laundry list of possible infractions. The ideal code lies somewhere in the middle.

Code drafters must be cautious not to prohibit any activity that is protected by other sections of the conduct code, or is an otherwise protected right of students. Additionally, overly broad codes fail to serve one of the central purposes of a student conduct code, which is to put students on notice of the conduct expected of them.

Among the many issues for a school to consider is whether the procedures established in the student conduct code apply to accusations that a student violated a federal, state, or local law. Concerns about interfering with the criminal justice process, and thereby violating students’ rights, led former Boston University President John Silber to determine that colleges should not attempt to discipline students for alleged

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10. *Id.* at 649.
crimes, but instead should report them to the police. The responsibilities imposed on students, however, will depend greatly on the type of institution they are attending, whether public or private.  

III. LEGAL PRINCIPLES THAT GOVERN BOTH PUBLIC AND PRIVATE INSTITUTIONS

A. Constitutional Law

Public institutions are required to provide a certain level of due process and other constitutional rights to their students because they act as an arm of the state. Private institutions, however, are not bound by the United States Constitution to provide the same level of safeguards. The courts have consistently set private schools apart, despite the fact that the vast majority of private colleges and universities receive loans, grants, and scholarships from the federal government, and thus appear to be quasi-public institutions. The United States Supreme Court held in *Rendell-Baker v. Kohn*, that an otherwise private school does not engage in "state action," even when public funds account for as much as 99% of the school's operating budget. The Court compared the fiscal relationship between the private school and the state to private contractors who use state funds to build roads, but are not state actors. Had the Court ruled otherwise, private schools receiving substantial public funds would have been constitutionally required to protect the rights of their students.

However, both private and public institutions have moral, ethical, and educational duties to treat accused students with respect, dignity, and fairness, regardless of legal duties. While students at private schools may not have a constitutionally protected property interest, they nonetheless hold important contractual interests and deserve to be treated with the fundamental fairness that is at the heart of the due process.

12. See e.g. UNLV Student Conduct Code.
15. *Id. at 844* (White, concurring).
16. *Id. at 832*.
17. *Id. at 840-841*. 
protections of the United States Constitution. That said, it would be disingenuous to suggest that private institutions will voluntarily consent to be held to the same standards for application of rights afforded to public school students. But even if private institutions are not persuaded by fairness and justice, other issues must be considered.

B. Contract Law

Both public and private institutions establish a contractual relationship between themselves and their students. Most universities have adopted written student conduct codes, or general policies of fairness, which are distributed to students. Courts have held that schools may not deviate from the express due process protections established in their student conduct codes, whether they are public or private institutions, as such deviations would violate the implied contractual interests of the student.\(^\text{18}\)

To understand whether a contract exists between a student and an institution, one must examine the elements of a contract. A contract requires that there be a bargain, which includes both a manifestation of mutual assent to the exchange and "consideration." In contract law parlance, consideration\(^\text{19}\) is the returned promise or performance bargained for. For example, a student pays tuition in consideration for an education. An institution provides education in consideration for tuition.

The terms of a contract need not be fully expressed and contained within a formal document, but may be implied by law, or by the parties' conduct, or by other evidence of mutual assent.\(^\text{20}\) There are two types of implied contracts, implied-in-fact and implied-in-law.\(^\text{21}\) An implied-in-fact contract "is one that is inferred from the statements or conduct of the parties. It is not a promise defined by the law, but one made by the parties, though not expressly."\(^\text{22}\) Student conduct codes, for example, are implied-in-fact contracts. In contrast, an implied-in-law duty arises when the contract is silent, but the law

\(^{18}\) Tedeschi, 404 N.E.2d at 1306.
\(^{19}\) Restatement (Second) of Contracts §17(1)(1981).
\(^{21}\) Wagenseller, 710 P.2d at 1036.
\(^{22}\) Id.
requires that a duty be imposed even though the parties may not have intended it. 23

A contractual relationship begins when the institution accepts the student’s application for admission. 24 The effect of the acceptance is to make an irrevocable offer to the successful applicant, usually for a limited period of time, for a seat in the entering class. By making a deposit before the offer expires, the applicant extends the offer until the beginning of the school year. Before classes start, the applicant will arrive on campus and register, thereby becoming an enrolled student. If the student is a degree candidate, he expects to be offered a curriculum which, if completed satisfactorily, will lead to the degree. The student further expects that the school will treat him fairly, including not being subjected to arbitrary grading or dismissal, extreme tuition hikes, or a sizable escalation of the degree requirements. These expectations are implied-in-law terms of the contract that the student enters into with the institution. Though not explicitly spelled out, they are essential to the student’s ability to benefit from the bargain he entered into with the institution, and are thus implied as part of the contract. Payment of a student’s tuition constitutes consideration for these expectations. 25

In return, the school expects payment of tuition and fees and compliance by the student with a set of rules, both academic and non-academic, as a member of the university community. The school’s expectations, like those of the student, are implied-in-law terms of the contract. These mutual understandings and expectations form the essence of a contractual relationship. 26

An additional, and essential, part of the student-university relationship is the implied-in-fact contract created by a written student conduct code. Usually issued annually, the student conduct code is one of the primary documents used by the school to describe to students the academic and non-academic requirements and limitations placed upon them. The student conduct code puts students on notice that their continued

23. Id. (citing Arthur Linton Corbin, Contracts vol. 1, § 17, 38 (West Publg. Co. 1960)).
25. Id. at 319.
26. Id.
enrollment is subject to their obedience of the school’s rules, and also informs them of the procedures to be followed in the event of any alleged disobedience. The written code provides the terms and conditions to be followed by both the school and the student, thus creating an implied-in-fact contract between the school and the student.

In *Tedeschi v. Wagner College*, a private college suspended a part-time student because of her alleged disruptive and abusive conduct during and outside class. The student filed suit seeking monetary damages and reinstatement in the college. She alleged that the school had not given her a hearing or any opportunity to defend herself. The New York state trial court entered judgment for the defendant, holding that the United States Constitution did not apply because the private college was not “state involved,” and because the school’s informal procedure was carried out in good faith and was not arbitrary. After a split Appellate Division affirmed, the New York Court of Appeals reversed, ordering that the student be conditionally reinstated.

The court pointed to a college brochure, “1976-1977 Guidelines of Wagner College,” which outlined Wagner’s procedure for adjudicating academic and non-academic suspension or dismissal. The college had failed to convene the Student-Faculty Hearing Board, which the guidelines required, prior to suspending the student. On appeal, she argued that the student-private college relationship is contractual and that an implied term of the contract is that the school will observe its own rules.

In short, New York’s highest court held:

> 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, we hold that when a university has adopted a rule or guideline establishing

27. 404 N.E.2d at 1302.
28. Id. at 1304.
29. Id.
30. Id.
31. Id. at 1307.
32. Id. at 1304.
33. Id. at 1306.
34. Id. at 1305.
the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.\textsuperscript{35}

Since Tedeschi, a number of other courts have required that private schools act in accordance with their published policies.\textsuperscript{36} For example, in Fellheimer v. Middlebury College, the United States District Court for the District of Vermont held that Middlebury College was contractually bound to provide students with the procedural safeguards and rights it promised in its publications.\textsuperscript{37} To deviate from those published procedures would make the hearing fundamentally unfair.\textsuperscript{38}

In addition, a university's suspension or other punishment of a student without good cause violates the covenant of good faith and fair dealing, which is an implied-in-law term of the contract.\textsuperscript{39} The covenant of good faith and fair dealing requires that neither contracting party do anything that will injure the right of the other to receive the benefits of their agreement.\textsuperscript{40} In this case, the right of the student to receive an education, and the right of the university to educate others. It imposes on the school a good faith duty, at a minimum, to substantially adhere to its published disciplinary procedures. "In certain circumstances, breach of contract, including breach of the covenant of good faith and fair dealing, may provide the basis for a tort claim."\textsuperscript{41}

\textsuperscript{35} Id. at 1306. (emphasis added)

\textsuperscript{36} Fellheimer v. Middlebury College, 869 F. Supp. 238, 244 (D. Vt. 1994) (college breached its contractual duty when it failed to put student on notice of all charges against him); Holert v. U. of Chi., 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (student is entitled to the procedural safeguards that the school agreed to provide); Schaer v. Brandeis U., 735 N.E.2d 373, 381 (Mass. 2000) (a university should follow its established rules); Anderson v. Mass. Inst. of Tech., 1995 WL 813188, 1, 4 (Mass. Super. 1995) (courts may intervene when school's action was arbitrary and capricious).

\textsuperscript{37} 869 F. Supp. 238 at 242.

\textsuperscript{38} Id. at 246.


In *Napolitano v. Trustees of Princeton University*, a New Jersey state court held that a university disciplinary hearing that resulted in the withholding of the student's degree for one year failed to comply with the university's own rules because the student was not informed in a timely manner that she had the right to cross-examine witnesses. The court ordered the disciplinary committee to rehear the matter and, at that hearing, to allow the student to call any witnesses she wished and to cross-examine any witnesses presented against her, as the school rules provided.

Princeton had not refused to allow the student to cross-examine adverse witnesses, but had failed to inform her in a timely fashion that she had such a right. While the term "good faith" was not used by the court, the court appears to have been saying that the university had a good faith contractual duty to timely inform the student that she had a right to cross-examine witnesses, in addition to its duty to protect the student's rights as expressly stated in the student handbook.

C. Basic Fairness

In addition to reviewing students' allegations of breach of contract, courts review private schools' disciplinary decisions to ensure that they are not arbitrary and capricious and to ensure that their processes are conducted with basic fairness. In *Anderson v. Mass. Inst. of Tech.*, the Massachusetts Superior Court went so far as to adopt a rule that the court may only intervene in the student-private school relationship when the student demonstrates that the school's action was arbitrary and capricious, when the student demonstrates that the school failed to follow its own disciplinary rules, or when the student demonstrates that the school did not afford the student a hearing that was fundamentally fair.

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43. Id. at 281-282.
44. Id. at 281.
Students have rights, too.

Such hearings at the very least should provide the student with written notice of the charges against him or her; a written description of the evidence upon which the charges are based; the names of the witnesses which the university intends to call at the hearing; an unbiased disciplinary committee or tribunal; an opportunity to be heard and present witnesses in his behalf; and the right to confront and controvert the evidence presented by the university.\(^\text{48}\)

These contractual rights found by the *Anderson* court are precisely the same as the due process rights afforded students at public institutions.\(^\text{49}\)

Another issue to consider is the bargaining strength of the contracting parties. The contract between a student and a school is almost always prescribed by the institution, with the student having virtually no bargaining power. Contracts with such power imbalances are commonly referred to as contracts of adhesion, because one party has no bargaining power or ability to participate in the drafting of the contract, making that party weaker. The Restatement of Contracts, dealing with standardized agreements, allows courts to consider the "reasonable expectations" of the weaker party.\(^\text{50}\) Moreover, if a private entity performs a service of "great importance to the public," the courts must give greater than usual scrutiny to the terms of the entity's standardized contract with a weaker party.\(^\text{51}\) This power imbalance goes to the very essence of the "one-sided relationship" described by the *Tedeschi* court in reinstating a part-time student based on the school's failure to

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\(^{48}\) Id.

\(^{49}\) But see *Schaer*, 735 N.E.2d at 380 ("basic fairness" in school disciplinary hearings is not the equivalent of constitutional rights, or even procedural safeguards afforded by the rules of evidence).

\(^{50}\) Restatement (Second) of Contracts, §211 (1981). Standardized Agreements.

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing. (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

\(^{51}\) Restatement (Second) of Contracts, §195 (1981).
follow its own procedures.  
Accreditation requirements give schools another incentive to adopt and abide by fair conduct codes. Both private and public institutions hold some form of accreditation to lend integrity to the degrees they award. Many accrediting bodies require that their institutional members provide at least a minimal degree of fairness to their students. One large accrediting organization, for example, requires that the school's "policies on student rights and responsibilities, including grievance procedures, are clearly stated, well publicized and readily available, and fairly and consistently administered." Accrediting bodies also provide mechanisms for students, or others, to file complaints against a school and claim that they are in violation of the accreditation standards.

Whether a student attends a public or private university, he is entitled to certain fundamental rights by the United States Constitution, by a contract, or by both. The recognition and protection of those rights are not only just and beneficial to an educational environment, but ensures that an accused student is treated fairly and given an opportunity to adequately defend himself, while not compromising the institutional interests of the university.

IV. PROCEDURAL DUE PROCESS: CONSTITUTIONAL REQUIREMENTS FOR PUBLIC INSTITUTIONS; ASPIRATIONAL OBJECTIVES FOR PRIVATE INSTITUTIONS

A. History

Under the Fourteenth Amendment to the United States Constitution, by a contract, or by both. The recognition and protection of those rights are not only just and beneficial to an educational environment, but ensures that an accused student is treated fairly and given an opportunity to adequately defend himself, while not compromising the institutional interests of the university.

52. Tedeschi, 404 N.E.2d at 1306.
54. Along with denying that students are entitled to due process, the ASJA contends that student disciplinary hearings should never be compared to criminal proceedings, and that rights afforded accused criminals are not applicable to students. See Stoner, supra n. 5, at 2, 7-10. While those accused of crimes are entitled to greater due process than students, the most fundamental due process rights of any person encountering coercive governmental action are rooted in criminal law. For that reason, it is useful to look at criminal law as an analogy when determining students' rights. Comparatively, an accused student and a criminal defendant hold many similarities. In each instance, a significant and valuable interest is in jeopardy, while the individual must defend against the nearly unlimited resources of the institution or state. In addition, public institutions are state actors and, as such, are required to act within the scope and strictures of the United States Constitution. Goss, 419 U.S. at 574.
Constitution, no state may “deprive any person of life, liberty, or property, without due process of law.”\(^{55}\) The United States Supreme Court has established that students have a property interest in their education.\(^{56}\) “[A] student’s legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”\(^{57}\)

The first case to recognize a university student’s right to due process in a disciplinary hearing was Dixon v. Alabama State Board of Education.\(^{58}\) In this case from the civil rights era, Alabama State College expelled nine black students, without notice and without the benefit of a hearing,\(^{59}\) after the students conducted a sit-in demonstration at a public courthouse lunch grill that refused service to blacks.\(^{60}\) The Fifth Circuit Court of Appeals held that due process required notice and a hearing before a student at a tax-supported college could be expelled for misconduct.\(^{61}\)

Furthermore, the Court made clear that a state institution may not circumvent the fundamental right to due process by conditioning a grant of admission upon students’ agreeing to give up their constitutional right to due process.\(^{62}\) The school must establish some reasonable grounds for its disciplinary actions and must do so procedurally through “fundamental principles of fairness.”\(^{63}\) The court would test fairness by examining the sufficiency of the hearing and the notice preceding it.\(^{64}\)

The Dixon court broadly defined the notice and hearing required in cases of student expulsion: “[A]n opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress

\(^{55}\) U.S. Const. amend. XIV § 1.

\(^{56}\) Goss, 419 U.S. at 574.

\(^{57}\) Id.


\(^{59}\) Id. at 158.

\(^{60}\) Id. at 152, n. 3.

\(^{61}\) Id. at 158.

\(^{62}\) Id. at 156 (citing Slochower v. Bd. of Educ., 350 U.S. 551, 555 (1956), overruled).

\(^{63}\) Dixon, 294 F.2d at 157.

\(^{64}\) Id. at 158-159.
judicial hearing, with the right to cross-examine witnesses, is required.\textsuperscript{65}

More than a decade later, the federal District Court for the District of Puerto Rico took due process a step further.\textsuperscript{66} In \textit{Marin v. University of Puerto Rico}, the court held that students are entitled to:

(1) adequate advance notice . . . of (a) the charges, (b) the specific, previously promulgated regulations under which the charges are brought, and (c) the evidence against the student; (2) a full, expedited evidentiary hearing (a) presided over by an impartial, previously uninvolved official, (b) the proceedings of which are transcribed, at which the student (c) can present evidence and (d) cross-examine opposing witnesses, (e) with the assistance of retained counsel; and (3) a written decision by the presiding official encompassing (a) findings of fact, (b) the substantial evidence on which the findings rest, and, (c) the reasons for the official’s conclusion.\textsuperscript{67}

The \textit{Marin} court held that these due process protections must be guarded most scrupulously when the university’s action may damage the student’s standing in the community, or may impose a stigma or “mark on one’s record that may well preclude further study at any public and many private institutions and limit the positions one can qualify for after termination of one’s studies.”\textsuperscript{68} To date, \textit{Marin} marks the outer limit of rights recognized for students.

Until the United States Supreme Court’s \textit{Goss v. Lopez}\textsuperscript{69} decision in 1975, jurisdictions remained split as to whether students were entitled to any due process by public educational institutions. In \textit{Goss}, the Court set aside the summary 10-day suspensions of nine high school students charged with various acts of disruptive conduct during school hours.\textsuperscript{70} “At the very minimum,” the Court held, “due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he

\begin{footnotes}
\item[65] Id. at 159.
\item[67] Id. at 623.
\item[68] Id. at 622 (citing \textit{Bd. of Regents of St. Colleges v. Roth}, 408 U.S. 564, 573 (1972)).
\item[69] 419 U.S. 565.
\item[70] Id.
\end{footnotes}
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denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. Had the suspension exceeded 10 days, the Court might have required "more formal procedures." The Court concluded that the adequacy of the notice and the nature of the hearing sufficient to satisfy due process would vary according to an "appropriate accommodation of the competing interests involved."

A landmark decision, Goss opened the gates for cases brought by students at all educational levels. In one example of Goss's application, Crook v. Baker, the federal District Court for the Eastern District of Michigan held that a university student was entitled to notice and a hearing before the University of Michigan could rescind a graduate's master's degree on the grounds that he had fabricated data underlying his thesis. After Goss, schools could no longer deny students their procedural due process, and expect to get away with it.

Procedural due process begins with adequate notice and a hearing, as established by Goss. In addition, several other factors must be considered. For example, accused students should have the option to cross-examine witnesses, to be represented by counsel, to elect to have an open hearing, and to have a fair evidentiary standard of proof. While these considerations may seem basic and essential to achieving due process, many institutions deny them to students. The following sections explore each of these considerations.

B. Adequate Notice

The Goss Court determined that high school students facing deprivation of a property right by suspension from school must, at a minimum, "be given some kind of notice and afforded some kind of hearing." In an earlier decision, the Supreme Court had established that "[a]n elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

71. Id. at 581.
72. Id. at 584.
73. Id. at 579.
75. Id.
76. 419 U.S. at 579 (emphasis added).
present their objections." Applying that standard in *Goldberg v. Kelly*, the Supreme Court held that a few days notice is generally inadequate for the termination of welfare benefits. Lower courts have specifically held that notice of five days or less for an employment termination hearing is insufficient notice.

In a case involving a private college, the United States District Court for the District of Vermont reversed Middlebury College's one year suspension of a student, holding that the school deviated from its published notice policy by informing the accused student of only one of the two charges that had been brought against him. The court held that the college must "state the nature of the charges with sufficient particularity to permit the accused party to meet the charges," as expressed in the school's policy.

What constitutes adequate notice may be difficult to measure, but colleges and universities are clearly at an advantage over a student who may have limited or no resources with which to prepare for a hearing. The guiding principle should be that students have ample time to secure and obtain the advice of counsel, to review and investigate the claims against them, and to prepare a defense to the accusations made against them. Considering the limited resources of students, a notice of fewer than ten working days likely does not allow an accused student time to adequately defend himself.

A sufficient notice policy not only must provide for ample time to prepare, but also must define the method by which notice is to be served and the information to be provided to the accused. The University of Nevada, Las Vegas, has adopted the following notice policy in its student conduct code:

A. A notice of hearing letter from the Administrative Officer must be provided to the charged student and the


78. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (fairness in some cases may require more than seven days' notice of the termination of welfare benefits).


81. *Id.* at 246.
complainant a minimum of ten (10) college working days prior to any hearing. A letter of charge includes the following information:

1. Date, time, place of hearing;
2. Specification of the misconduct charged;
3. Name of complainant;
4. Specification, to the extent possible, of the time, place, person(s) involved and circumstances of alleged prohibited conduct and name(s) of possible witnesses; names of persons who may have witnessed the alleged prohibited conduct.
5. Notification that the person charged may be accompanied by an advisor of the charged person's choice;
6. A copy of the applicable disciplinary hearing procedures; and
7. Such other information as the Administrative Officer may wish to include.

B. Notices shall be either hand-delivered directly to the person charged or sent by certified or registered mail. Notices delivered by mail are considered delivered when sent, provided that three (3) additional college working days shall be added to the time period set forth for minimum notice.

C. If the person charged intends to have an attorney or other representative present, he or she must notify the Administrative Officer no later than five (5) college working days before the hearing of the name and address of the advisor, if any, and whether the advisor is an attorney. If, at any time during the proceeding, the student desires a representative or a change of representative, that right may be invoked. The proceeding will be stayed for a period of no fewer than five (5) and no more than fifteen (15) college working days. This right may be invoked only once during any disciplinary proceeding, unless the Administrative Officer agrees to any additional requests for changes of representation or unless the student's attorney withdraws.82

To summarize, the UNLV code achieves fairness by

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82. UNLV Student Conduct Code, supra n. 8, Section VII.
notifying the accused student at least ten days prior to the hearing; by providing the date, time, and place of the hearing; by specifying the misconduct alleged; and by disclosing the names of the complainant and witnesses who may testify. The accused student is also provided with a copy of the applicable hearing procedures. Additionally, the UNLV code specifies that the accused student is to be notified by certified or registered mail.83

C. Hearing

Goss held that an accused student is entitled to a basic hearing, even when the punishment is minimal.84 When the possible sanction is greater than the 10-day suspensions in Goss, a greater amount of due process may be owed.85 In Mathews v. Eldridge,86 the United States Supreme Court held that three factors are important when considering the constitutional adequacy of the procedures afforded in a given situation and whether due process requires additional procedures:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.87

Institutions, both public and private, have developed many types of disciplinary hearings. Most commonly, student disciplinary hearings are conducted by committees. These committees often consist of student, faculty, and administrative members, and are chaired by a predetermined member. Conventional wisdom seems to be that this type of committee, made up of a cross-section of the campus community, at least gives the perception of being unbiased and fair. Whether this

83. Id.
84. Goss, at 419 U.S. at 581 (holding that high school students suspended for 10 days or less are entitled to notice and a hearing).
85. Id. at 584.
87. Id. at 335.
is true depends on the committee selection process and the opinions and beliefs of the individual committee members.

The selection of members for the committee is often left up to a sole administrator or delegated to organized bodies, such as the student council and faculty senate. Selection of the members, however chosen, should be closely scrutinized, similar to a court's screening of a potential jury member. At a minimum, such scrutiny should require that the committee members not be directly or indirectly biased against the accused student. Committee members should also be competent to weigh the evidence against the applicable evidentiary standard. An accused student should always have the right to challenge any committee member for cause.

Some schools provide the accused student with a variety of hearing options. These options may include the choice between a hearing committee or a single hearing officer. Other institutions also offer students the opportunity to select a hearing conducted by a "special hearing officer," who is an attorney or has professional experience in presiding over judicial or quasi-judicial adversary proceedings and who has no contractual relationship with the institution.88

The most troubling type of hearing is one in which a single hearing officer, usually a dean or appointed administrator, determines the fate of the accused student, almost always behind closed doors, with the student having no other options. In their book, The Shadow University, Alan Charles Kors and Harvey A. Silverglate state:

There is virtually no place left in the United States where kangaroo courts and Star Chambers are the rule rather than the exception—except on college and university campuses . . . where not only is arbitrariness widespread, but where fair procedures and rational fact-finding mechanisms, with disturbing and surprising frequency, are actually precluded by regulations.89

These flawed types of hearings lack integrity and sophistication because they make no attempt to bring together a cross-section from the academic community and are very often just an administrative tool used to quickly dispense with students who are looked upon unfavorably.

An impartial and complete hearing is an essential

88. UNLV Student Conduct Code, supra n. 8.
89. Kors & Silverglate, supra n. 7, at 276.
guarantee of due process.\textsuperscript{90} As the Fifth Circuit Court of Appeals stated in \textit{Boykins v. Fairfield Board of Education},\textsuperscript{91} "[b]asic fairness and integrity of the fact-finding process are the guiding stars."\textsuperscript{92} The failure of public institutions, in particular, to adopt and administer procedures that provide a fair and impartial proceeding subjects those institutions to liability. Ensuring basic fairness in hearings is good policy for both students and university administrations.

\textit{D. Cross-Examination}

Cross-examination of adverse witnesses is a fundamental constitutional right enjoyed by an accused. This right is essential to an accused's ability to elicit unfavorable information from the opposing party's witnesses and to show that a witness is biased, prejudiced, or untrustworthy for any reason. Denial of this basic right short-changes and discredits any disciplinary hearing process.

In \textit{Davis v. Alaska},\textsuperscript{93} the United States Supreme Court held that the goals of cross-examination could not be achieved "except by the direct and personal putting of questions."\textsuperscript{94} Professor Wigmore reasoned in his classic treatise on evidence: "Cross-examination is a right, because of its efficacy in securing more than could have been expected from a direct examination by a friendly examiner."\textsuperscript{95} As the United States Supreme Court held in \textit{Pointer v. Texas},\textsuperscript{96} "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."\textsuperscript{97} A full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege, of the party against whom the witness is called.\textsuperscript{98}

\begin{itemize}
    \item \textsuperscript{90} Withrow v. Larkin, 421 U.S. 35, 46-47 (1975).
    \item \textsuperscript{91} Boykins v. Fairfield Bd. of Educ., 492 F.2d 697 (5th Cir. 1974).
    \item \textsuperscript{92} Id. at 701.
    \item \textsuperscript{93} Davis v. Alaska, 415 U.S. 308 (1974).
    \item \textsuperscript{94} Id. at 316, quoting John H. Wigmore, \textit{Evidence} vol. 5, § 1395, 123 (3d ed. 1942).
    \item \textsuperscript{95} John H. Wigmore, \textit{Evidence} vol. 3 § 944 (Chadbourn rev. 1970).
    \item \textsuperscript{96} Pointer v. Tex., 380 U.S. 400 (1965).
    \item \textsuperscript{97} Id. at 405.
    \item \textsuperscript{98} Lindsey, 133 F.2d at 369 (D.C. Cir. 1942), overruled; Heard v. U. S., 255 F.
It may not be an exaggeration to claim, as Wigmore does, that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." Its effectiveness in testing the accuracy and completeness of testimony is so well understood that the right of cross-examination is "one of the safeguards essential to a fair trial." Evidence supplied through witnesses is subject not only to the possible inaccuracies of falsification or bias, but it is also subject to the inaccuracies which unintentionally flow from the flaws of human observation, memory, and description. "The annals of the legal profession are filled with instances in which testimony, plausible when supplied on examination in chief, has by cross-examination been shown to be, for one or more of the reasons mentioned, faulty or worthless." Certainly, no one experienced in procedural due process would deny the value of cross-examination in bringing out the truth if indeed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."

The theory of cross-examination supports what has been learned from years of practical experience. On direct examination, a witness, even if completely unbiased, only discloses part of the necessary facts, chiefly because his testimony is given only by way of answers to specific questions, and the party producing him will usually ask only for the facts favorable to his side of the case. Someone must probe for the remaining facts and qualifying circumstances, and ensure that the testimony is accurate, complete, and clearly understood. The best person to do that is the one most vitally interested, namely the opponent.

For these reasons, cross-examination is "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most, if not all, the States composing


100. Alford, at 692.
101. Lindsey, 133 F.2d at 369; See Wigmore, supra n. 99, at § 782(3), (4).
102. Davis, 415 U.S. at 316.
103. Wigmore, supra n. 99, at § 1368.
A second major function of cross-examination is to show that the witness is biased, prejudiced, or untrustworthy. "The facts which diminish the personal trustworthiness or credit of the witness will also, in every likelihood, have remained undisclosed on the direct examination."

Cross-examination is as vital to the establishment of truth in student discipline hearings as in court proceedings. In *Donohue v. Baker*, the federal District Court for the Northern District of New York ruled that the Constitution entitled a SUNY-Cobleskill student to cross-examine his accuser at a suspension hearing. Because the accused student had not been permitted to cross-examine the student who accused him of sexual assault, neither directly nor indirectly, the judge denied summary judgment to the defendants. Like many colleges and universities, SUNY attempted to protect the alleged victim of sexual assault by sparing her from the mental anguish of being questioned by her alleged attacker. In *Donohue*, both the accused and the accuser acknowledged that they had sexual intercourse, but disagreed as to whether it was consensual. Therefore, witness credibility played a large role in determining the facts of the case.

The court held, "[f]rom the record, it appears that the only evidence that was before the panel came in the form of [the complainant’s] two statements alleging sexual misconduct and the plaintiff’s two statements denying the same." The court continued by saying that "the disciplinary hearing became a test of the credibility of the [respondent’s] testimony versus the testimony of [the complainant]." The court determined that the fundamental right of the accused to cross-examine witnesses outweighed any protection owed to the alleged victim. "Regardless of how ‘sensitive’ the proceeding was deemed to be,” the court concluded, “the [SUNY] defendants remained bound to observe the plaintiff’s constitutional

105. Wigmore, supra n. 99, § 1368, at 37.
107. Id. at 149.
108. Id. at 147.
109. Id. at 139.
110. Id. at 147.
111. Id.
rights.\textsuperscript{112}

Under the principle of fundamental fairness in education, both public and private universities should provide accused students the opportunity to cross-examine witnesses, whether legally required or not. It is important that student conduct codes not only stress fairness in the schools’ educational and enforcement functions, but also present an “appearance” of fairness.\textsuperscript{113} Denying an accused student his right to cross-examine witnesses diminishes that “appearance.”\textsuperscript{114} As the Fifth Circuit noted in Dixon, “[i]t is shocking that the officials of a[n]... educational institution... should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.”\textsuperscript{115} Thus, as a matter of simple fairness, all institutions should afford students accused of misconduct the right to cross-examine their accusers.

\textbf{E. Right to Counsel}

While colleges and universities vary in the degree of representation afforded students in disciplinary hearings, most permit some level of assistance by counsel.\textsuperscript{116} It is not reasonable to expect a college student to adequately represent himself before a disciplinary hearing panel. The obviously stressful event of a disciplinary hearing is further complicated for the student by the participation of a college administrator or another student, who acts as the “prosecutor” of the charges alleged. This “prosecutor” usually has far more experience in the process, and is certainly under far less stress. Although many administrators complain of a student’s lawyers “infringing upon” the hearing process, considering the adversarial nature and the potentially damning consequences of such hearings, an accused student should be afforded the full representation of counsel in disciplinary hearings.

In \textit{Gideon v. Wainwright},\textsuperscript{117} the United States Supreme

\begin{itemize}
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Larry A. Di Matteo & Don Wiesner, \textit{Academic Honor Codes: A Legal and Ethical Analysis}, 19 S. Ill. U. L.J. 49, 92 (Fall, 1994).
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Dixon, 294 F.2d at 158 (citing Warren A. Seavey, \textit{Dismissal of Students: "Due Process,"} 70 Harv. L. Rev. 1406, 1407 (1957)).
  \item \textsuperscript{116} Fox, \textit{supra} n. 1, at 683.
  \item \textsuperscript{117} \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963).
\end{itemize}
Court held that the Sixth Amendment right to counsel was "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." Gideon rests upon the "obvious truth" that lawyers are "necessities, not luxuries" in adversarial systems of truth finding. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." The accused's life or liberty depends on his ability to present his defense in the face of "the intricacies of the law and the advocacy of the public prosecutor." While a student disciplinary hearing is not a criminal trial, it is not conducted in accordance with due process, and thus is not fair, unless the accused has the right to representation by counsel.

Court decisions vary dramatically on the issue of representation by counsel at student disciplinary hearings, but courts consistently have held that students have the right to an attorney's participation in a disciplinary hearing when the university itself is represented by an attorney. Relying upon Wasson v. Townbridge, the court in French v. Bashful held that a group of students who participated in a series of campus disturbances not only had a right to an attorney, but they also had the right to the full participation of an attorney because the university had a third-year law student prosecute the case.

Courts have also frequently guaranteed students the right to an attorney in college disciplinary hearings involving criminal matters. In Gabrilowitz v. Newman, the University of Rhode Island charged a student with assault with the intent to rape, a violation of the University's "Community Standards of Behavior." The student also faced similar criminal charges from the alleged incident. In this case, the First Circuit Court of Appeals held that when a disciplinary hearing concerns

119. 372 U.S. at 344.
122. Wasson v. Townbridge, 382 F.2d 807 (2d Cir. 1967).
124. Id. at 1338.
allegations surrounding a pending criminal case, the student has a right to the advice of counsel. 126

Courts also have recognized that students have the right to have an attorney participate in a disciplinary hearing even when non-criminal matters are at issue. In Crook v. Baker, 127 the court held that the University of Michigan had to provide a graduate student, who was accused of fabricating data for his thesis, the opportunity to be meaningfully represented by counsel, and to have that counsel fully participate in all proceedings. 128 The court explained: "Although the rescission of an advanced academic degree is not unprecedented, fortunately it is an event which occurs infrequently. The procedures that due process requires in this context could possibly be burdensome in other more frequently occurring contexts, but not here." 129

An adverse outcome in a disciplinary hearing can result in damage to a student's reputation and career. This damage could limit the student's ability to practice in his chosen profession. Additionally, the courts have recognized that students have a vested liberty or property right that could be affected by a disciplinary hearing. 130 To protect those rights, accused students must be allowed to be fully represented by counsel at a disciplinary hearing.

F. Right to an Open Hearing

One right enjoyed by those accused of crimes, the right to an open hearing, is not generally recognized for accused students. Even so, the right to an open hearing is historically rooted as a fundamental right essential to achieving fairness. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 131 What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances. 132

126. Id. at 106.
128. Id. at 1559.
129. Id. at 1557.
130. Goss, 419 U.S. at 574.
131. Mathews, 424 U.S. at 333.
The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This constitutional guarantee and cherished right is derived from the English common law. As John Lilburne declared in 1649 during his trial for high treason, a public trial is "the first fundamental liberty" of a free people. Lilburne continued, "[b]y the laws of England, all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear, and have free access unto; and no man whatsoever ought to be tried in holes or corners, or in any place, where the gates are shut and barred, and guarded with armed men."

When Blackstone drafted his Commentaries on the Common Laws of England in 1765, openness had become the rule. In the conduct of a criminal proceeding, as he explains, "all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all by-standers; and before the judge and jury." The reason for this, Blackstone continues, is that "[t]his open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law."

Openness in formal proceedings not only facilitates arriving at the truth more readily, but also results in all parties connected with the proceeding performing their functions more conscientiously. Hearings conducted in secret have a scent of grave injustice reminiscent of the Spanish Inquisition and the English Star Chamber. In 17th century England, the Lords of the Star Chamber proceeded as inquisitors. An accused's trial was based on charges made by accusers unknown and not disclosed to the accused. In addition, the accused could be

133. U.S. Const. amend. VI.
134. IV Cobbett's Complete Collection of State Trials, 1270, 1273 (T.B. Howell ed., 1816).
135. Id.
137. Id. at 373.
139. See Geoffrey Radcliffe & Geoffrey Cross, The English Legal System 107-108 (5th ed. 1971); John H. Wigmore, On Evidence vol. 8 § 2250, 282-284 (Little Brown &
examined under torture, with the ultimate decision left to a court sitting without a jury. Thus, the right of the accused to have his hearings open to the public is rooted in history and derived from English common law in response to the Star Chamber.

In addition to historical precedents, there are other compelling functional reasons for assuring openness of student conduct code proceedings. The alleged victim and the community have an interest in seeing that offenders are brought forward to face responsibility. In addition, the community has an interest in knowing that fair standards are followed in the conduct of such proceedings and that variance from established norms will become known.

In *Press-Enterprise Co. v. Superior Court*, the United States Supreme Court ruled that the constitutional right to an open, public trial is one shared by the accused and the public and that the right to access attaches as well to pretrial proceedings. The rationale for such a First Amendment right is found in the history of the English common law and the constructive function of the public's presence in criminal proceedings.

The right of access is the rule, and it is a rare and exceptional case where it does not apply. A court must make "specific, on the record findings . . . demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" Even in those rare cases, it is the rights of the accused, not the victim or witness, which require protection from an open hearing. The only proceedings that courts have consistently held closed are grand jury proceedings.

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140. Radelffe, at 107-108.
143. *Id.* at 7.
144. *See id.* at 8-9.
where "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Absent an overriding interest carefully articulated by the trial court for closure, the Court has stated that hearings should be open to the public. When the accused desires an open and public hearing to answer charges against him, courts are nearly unanimous in determining that this fundamental right may not be abridged.

It should be noted that while an open hearing is preferable in reaching a just and fair conclusion, this commentary in no way suggests that an institution should forego its responsibilities under the Family Education Rights and Privacy Act (FERPA) of 1974. FERPA protects the confidentiality of a student's educational records, including disciplinary records, and thus prohibits an institution from holding an open hearing, unless the accused student consents to it. A student conduct code should include the option of an open hearing upon the request of the accused. For example, UNLV's student conduct code provides, "[t]he hearing is closed unless the person charged requests an open hearing."

In this era of elevated enlightenment of "victims' rights," many institutions have mandated that all disciplinary hearings be closed to protect the alleged victim from any embarrassment, ridicule, or retaliation. This is especially true when sexual assault is alleged. While any hearing process is difficult for victims, the victims' discomfort does not negate the rights of the accused or lessen the jeopardy the accused face.

G. Evidentiary Standard of Proof

At a minimum, university officials should grant an accused student the presumption of innocence and should bear the burden in a university disciplinary proceeding of proving by "substantial evidence" that the student violated a provision of the established code of conduct. Many federal courts have held, however, that such a standard is insufficient because no

151. UNLV Student Conduct Code, supra n. 8.
152. *Slaughter v. Brigham Young U.*, 514 F.2d 622, 625 (10th Cir.), *cert denied*, 423 U.S. 898 (1975) (some weight must be given to determining the facts when there is substantial evidence of a violation).
clear level of proof can be inferred from the standard. In Smyth v. Lubber, accused students were suspended after the All-College Judiciary found the students guilty of marijuana possession. The federal District Court for the Western District of Michigan held that due process required the university to set a standard of proof greater than "substantial evidence" when the alleged conduct was also a crime. "The court is certain that the standard cannot be lower than 'preponderance of the evidence.' In addition, "given the nature of the charges and the serious consequences of the conviction, the court believes that the higher standard of 'clear and convincing evidence' may be required."

Many institutions have adopted higher standards of proof than that of "substantial evidence." The University of Miami requires a finding of "clear and convincing evidence." The University of Virginia and the United States Air Force


156. Saurack (citing Nicholas Trott Long, The Standard of Proof in Student Disciplinary Cases, 12 J.C. & U.L. 71 (1985)) (supporting the "clear and convincing" standard because the "beyond a reasonable doubt" standard is unnecessarily stringent and the "by a preponderance" standard is unnecessarily lax).

157. Di Matteo & Wiesner, supra n. 117, at 94-95. ("We have chosen to review what we considered the three most important procedural due process concerns: (1) the right to cross-examination, (2) the right to representation, and (3) the standard of review. However, a number of other 'less important' due process issues have been addressed by the courts."). See, e.g., Gorman v. U. of R. I., 837 F.2d 7, 15-16 (1st Cir. 1988) (lack of a written transcript is not fatal; however, the student may have a right to tape record proceedings); U. of Tex. Med. Sch. v. Than, 834 S.W.2d 425, 431 (Tex. App. 1992) (university's failure to follow its own procedures does "not per se violate due process"); Birdwell, 403 F. Supp. 715 (Air Force Cadet has no privilege against self-incrimination).

158. Di Matteo & Wiesner, supra n. 117, at 94 (citing U. of Miami, U. of Miami Undergraduate Student Honor Code 1, 8 (1986)).

159. Id. ("The Virginia Judicial System only provides that there 'must be agreement of 2/3 of the trial panel' to assess guilt." University of Virginia, The Judicial System 8 (1989). "However, the separate Honor Committee System requires a finding of guilt 'beyond a reasonable doubt' by a '4/5ths [vote] of the committee members.' Henson v. Honor Comm. of U. Va., 719 F.2d 69, 73 (4th Cir. 1983).")
Academy require a finding of guilt “beyond a reasonable doubt.” Requiring a higher degree of proof “supplies added protection to a process lacking some of the procedural protections found in more adversarial proceedings.” The severity of possible sanctions and notation upon the academic record make a higher degree of evidence a reasonable and fair accommodation.

H. Conclusion

A student conduct code which provides adequate procedural due process must ensure that an accused student receives adequate notice, a fair hearing, the right to cross-examine witnesses, the right to be represented by counsel, the right to an open hearing, and a fair evidentiary standard of proof. A failure to protect any of these rights results in a flawed system that prevents the discovery of truth at the expense of the student’s rights.

V. SUBSTANTIVE DUE PROCESS

A. In General

In addition to the procedural protections outlined above, the Due Process Clause of the Fourteenth Amendment provides a guarantee against arbitrary decisions that would impair appellants’ constitutionally protected interests. This guarantee is called “substantive due process,” and it protects certain fundamental “substantive” rights we all share. The Supreme Court has said of substantive due process that, “the Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical

160. Id. (citing Birdwell v. Schlesinger, 403 F. Supp. 710, 715 (D. Colo. 1975)) (“The standard for determination of guilt is that of reasonable doubt and a unanimous vote of the board.”).

161. Id. (“We have chosen to review what we considered the three most important procedural due process concerns: (1) the right to cross-examination, (2) the right to representation, and (3) the standard of review. However, a number of other ‘less important’ due process issues have been addressed by the courts.”). See, e.g., Gorman v. U. of R. I., 837 F.2d 7, 15-16 (1st Cir. 1988) (lack of a written transcript is not fatal; however, the student may have a right to tape record proceedings); U. of Tex. Med. Sch. v. Than, 834 S.W.2d 425, 431 (Tex. App. 1992) (university’s failure to follow its own procedures does “not per se violate due process”); Birdwell, 403 F. Supp. at 715 (Air Force Cadet has no privilege against self-incrimination).

162. Dixon, 294 F.2d at 157.
restraint." It provides "heightened protection against government interference with certain fundamental rights and liberty interests." As the court stated in Dixon, "the governmental power to expel the plaintiffs... is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement." Under principles of substantive due process, students cannot be disciplined for constitutionally protected actions, or for actions which the government has no legitimate interest in punishing.

Private schools are also bound by a similar requirement. Courts will review the disciplinary decisions of private schools to ensure that they are not arbitrary and capricious, and that the process is conducted with basic fairness.

While it may seem obvious that constitutionally protected activities may not be forbidden, it is not always obvious what specific activities are actually protected. Prior to being redrafted in 2000, the UNLV student conduct code banned several acts that were arguably constitutionally protected, including "[t]he repeated use of obscene or abusive language in a public setting where such usage is beyond the bounds of generally accepted good taste"; "[c]reating a situation... which produces mental or physical discomfort, injury or stress, or embarrassment, or ridicule"; and "[a]ny actions, including those of a sexual nature or involving sexual activities, which are intimidating, demeaning, harassing, coercive, or abusive to another person, or which invade the right to privacy of another person." These provisions, while designed to control abusive behavior, arguably infringed upon the First Amendment rights of students by prohibiting protected speech, and potentially restricting consensual acts between adults. These provisions were eliminated in the 2000 revision.

B. Free Speech

The First Amendment provides the basis for much of the
case law arising out of school disciplinary actions. The courts have consistently held that free speech is not a right restricted to adults. In *Klein v. Smith*, the plaintiff was suspended from high school for giving a teacher "the finger" after school hours and off school grounds. The student filed suit. Granting an application for a permanent injunction against school officials, the court concluded that giving "the finger" constituted speech, and that the suspension violated the student's First Amendment rights.

Schools also may not interfere with protected religious speech. The federal District Court for the Southern District of Texas held in *Chalifoux v. New Caney Indep. Sch. Dist.* that absent evidence of actual disruption, a school policy prohibiting a Catholic student from wearing a rosary to school on the ground that some gangs had adopted the rosary as their identifying symbol, violated the student's religiously-motivated speech.

In a recent trend, schools have attempted to take disciplinary action against students who have used their home computers to engage in speech that school officials find offensive. A Missouri school district suspended a student for posting a webpage criticizing school administrators. The webpage used vulgar language to convey the student's opinion of teachers and the principal. In addition, the webpage contained a hyper-link to the school's website and invited others to contact the school principal to convey their criticism. The court held that the student's homepage did not materially and substantially interfere with school discipline and enjoined the school district from restricting the student's use of his home computer to repost the homepage.

In another case involving home computer usage, Zachariah Paul, a Pennsylvania high school student and member of the track team, composed a "Top Ten" list about the school's

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170. *Id.* at 1442, n. 3.
171. *Id.* at 1442.
173. *Id.* at 665.
175. *Id.* at 1177.
176. *Id.*
177. *Id.* at 1181-1182.
athletic director, Robert Bozzuto. The list, drafted by Paul at home on his home computer, contained statements regarding Bozzuto’s appearance, including the size of his genitals. Paul then e-mailed the list to friends from his home computer. A recipient of the e-mail printed the list which was ultimately posted in the school’s faculty lounge. Paul admitted to creating the list and consequently was suspended from school for 10 days. The court overruled the suspension, holding that even though Paul received procedural due process, the school district violated his First Amendment right to engage in speech in his own home.

C. Rational Relationship to Legitimate Interest

In addition to protecting such fundamental rights as free speech, substantive due process assures that any government action must bear, at a minimum, a rational relationship to a legitimate governmental interest. In *Alabama & Coushatta Tribes v. Big Sandy School District*, the federal District Court for the Eastern District of Texas provided two theories upon which a successful substantive due process claim may be made. First, “[i]f the suspensions were patently unreasonable or disproportionate to the offense, the [students] would be entitled to relief.” Second, if there was a “substantial departure from accepted academic norms,” the student would also be entitled to relief.

The so-called “zero tolerance” policies, enacted by many schools in response to the publicity of school violence in the late 1990’s, provide a potent example of the wholesale denial of substantive due process. These rules usually exact immediate and substantial penalties when students are found to be in possession of any drug or weapon. However, the “zero tolerance” nature of these policies prohibits school officials from making individualized determinations when a violation occurs. Dustin Seal, a student at a Knox County, Tennessee high

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179. *Id.* at 448.
180. *Id.* at 457.
182. *Id.* at 1335.
183. *Id.*
school, drove his mother’s car to a home football game in the fall of 1996. When Seal arrived in the school parking lot, school officials requested that Seal consent to a voluntary vehicle search for alcohol. Believing that he had nothing to hide, Seal consented. The school officials found a hunting knife in the glove compartment of the vehicle. Seal argued, and there was evidence that suggested, that he was not aware of the knife’s presence in the vehicle. Based on the school’s “zero tolerance” policy toward weapons, however, Seal was expelled. The Seal family filed suit in federal court.

After the federal district court ruled in Seal’s favor, the United States Court of Appeals for the Sixth Circuit reviewed the case. The Sixth Circuit held that the school board’s decision could not survive a legitimate state interest because expelling Seal for unknowingly possessing a knife was not rationally related to any legitimate state interest. Reversing the district court, the Sixth Circuit explained, “[n]o student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its presence. Indeed, the entire concept of possession—in the sense of possession for which the state can legitimately prescribe and mete out punishment—ordinarily implies knowing or conscious possession.” Clearly addressing supporters of “zero tolerance” policies, the court stated: “the Board may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a Zero Tolerance Policy that purports to make the student’s knowledge a non-issue.”

Zero tolerance policies, such as those practiced in Knox County, Tennessee, are irrational and unfair because they trample on the due process rights of students. There appears

185. Id.
186. Id.
187. Id.
188. Id.
189. Id. at 834.
190. Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000).
191. Id. at 575.
192. Id. at 575-576.
193. Id. at 581.
to be a growing sentiment, in the courts and in society, that these policies violate students' rights. In February 2001, the American Bar Association (ABA) passed a resolution condemning "zero tolerance" policies. The ABA hopes to influence schools and lawmakers to rethink the issue.

Providing an adequate procedural due process system does not give a blank check to the institution to bring charges against a student for any reason. The school's disciplinary action must be rationally related to a legitimate state interest and must not infringe on an established substantive right of the student.

VI. CONCLUSION

University administrators are quick to point out that a student disciplinary hearing is not a criminal trial or any other type of legal proceeding. For that reason, many institutions deny accused students some of their most basic and fundamental rights. The longer schools thumb their noses at due process and fundamental fairness, however, the more likely it is that courts will intervene in their actions.

Many of the rights discussed in this article were established throughout history as the result of controlling powers determining the fate of individuals with the swoop of one heavy hand. Society eventually realized that the powerful, with their unlimited resources, were often too much for the weak to overcome. To strike a balance, the courts began to recognize certain rights as inalienable.

The position of power held by universities and colleges is remarkably similar to that of the government in criminal matters. College students are often away from home for the first time and are forced to depend on their respective university or college to provide food, shelter, and other basic accommodations. In essence, the student lives at the mercy of the school. If a student is accused of violating a school regulation, the institution usually has a staff member or a full department solely devoted to investigating and, if necessary,


bringing charges against the student. Unless the student has access to substantial financial resources, he is often left to fend for himself.

The extension of fundamental due process rights to an accused student does not in any way provide an advantage to the student; rather, it establishes fairness in a process which may have serious and life-changing ramifications for the student. A student who is expelled is often unable to enroll in a different school due to his inability to demonstrate to the new school that he left his former school in good standing. A university or college degree is required for employment in many fields and for admission to graduate and professional schools. In addition, employees with a university or college degree generally earn higher salaries than those who are not graduates. Therefore, an expulsion made in error may significantly affect a student's future economic opportunities for the remainder of the student's life.

It is the role of our institutions of higher learning to educate the members of our communities. Perhaps there is no greater lesson than fairness and justice for all, starting in their own backyards.