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Student Due Process Rights in Academic Dismissals from the Public Schools

R. LAWRENCE DESSEM*

Introduction

Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹

This broad statement of the importance of education in Brown v. Board of Education "has lost none of its vitality with the passage of time."² The contemporary importance of education within our society is reflected perhaps most dramatically in the educational prerequisites to many jobs³ and the calculations made of the increased earning power to be gained from additional years of schooling.⁴ As the Supreme Court has itself noted,⁵ the value of education within our society can also be gauged by the fact that all of the fifty states have established public school systems, and all but one of the states have compulsory education laws.⁶ Although education is not a fundamental constitutional right,⁷ the educative process and the resultant degrees and


³ College or professional degrees are generally required by state law or regulation before one can become a public school teacher, physician, attorney, dentist or pharmacist. See, e.g., Mass. Gen. Laws ch. 71, sec. 38G (teachers); Mass. Gen. Laws ch. 112, sec. 2 (physicians); Mass. Supreme Judicial Ct. Rule 3.01(3) (b) (attorneys); Mass. Gen. Laws ch. 112, sec. 45 (dentists); Mass. Gen. Laws ch. 112, sec. 24 (pharmacists).
⁴ Social scientists have documented some of the quantifiable economic consequences of a college or graduate degree. Note: Common Law Rights for Private University Students: Beyond the State Action Principle, 84 Yale L. J. 120, 128 (1974). See also Table No. 200 ["Lifetime and Mean Income of Males in Current and Constant (1972 Dollars), by Years of School Completed: 1956 to 1972"] in U.S. Bureau of the Census, The U.S. Fact Book, 123 (1975), which shows the strong positive correlation, if not the causative link, between years of education and income level.
⁶ Children's Defense Fund, Children Out of School in America, Table 1, 57 (1974). Mississippi is the only state without a compulsory education law.
diplomas received have become extremely important within American society.

This article, however, goes beyond the argument that education is one of the most valuable benefits which government in this country provides. The thesis of the article is that education is not only very important to millions of Americans, but that students have constitutionally protected liberty and property interests in their public educations and the courts should therefore require notice and hearing prior to the deprivation of these interests, even when the deprivation is for strictly academic reasons. Although the article's analysis is restricted to a consideration of the duty of public institutions to provide fair hearing procedures, some courts have held, and several commentators have argued, that the mandates of the fifth and fourteenth amendments to the Constitution are equally applicable to today's "private" schools and universities.8

It should finally be noted that no discussion of student rights in academic dismissal decisions is complete without recognition of the student responsibility which must accompany such rights. The "Joint Statement of Rights and Freedoms of Students"—which has been endorsed by the American Association of University Professors, the U.S. National Student Association, and other groups of students and educators—makes the connection between student rights and responsibilities in the area of academic evaluation very clear:

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.9

The Constitution in the Classroom

Before moving on to a consideration of the particular issue at hand—judicial involvement in the decision to dismiss a student for academic reasons—it is important to lay the background of the traditional judicial deference to the educational process against which such an issue must be discussed.10 For, as the Supreme Court said in Epperson v. Arkansas, "Judicial

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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."

In recent years, however, the courts, and particularly the Supreme Court, have entered the area of public schooling in many extremely significant and far-reaching decisions. The public outcry at Supreme Court decisions such as *Brown v. Board of Education*,¹² *Engel v. Vitale*,¹³ and *School District of Abington Township v. Schempp*¹⁴ should not obscure the significance of other recent Court decisions which have also greatly influenced the everyday life of both student and teacher in the classroom.¹⁵

Thus a tension has arisen in attempts to balance the traditional notion of local control and autonomy in the functioning of the public schools and the Supreme Court's more recent realization that "Students in school as well as out of school are 'persons' under our Constitution."¹⁶ The premise which guides this article's resolution of the tension between school autonomy and student rights has been perhaps best put by Mr. Justice Jackson, speaking for the Supreme Court in *West Virginia Board of Education v. Barnette*:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . . That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.¹⁷

**Court Review of Academic Grading Decisions in the Public Schools**

Although the Supreme Court has decided many cases significantly affecting the daily routine in our nation's public-school classrooms, courts have traditionally been wary of any judicial involvement in or oversight of school grading decisions. Court challenges to school grading decisions stem from at least the early years of this century,¹⁸ but such cases have increased in recent years and rather uniformly draw upon the reasoning and standards enunciated in the 1965 decision of *Connelly v. University of Vermont and State Agricultural College*.¹⁹

The plaintiff in *Connelly* was a third-year medical student at the University of Vermont College of Medicine who had become ill during the school term and failed the make-up course which he took during the next summer. This failure led to the student's dismissal from the medical school, and he

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¹¹ 393 U.S. 97, 104 (1968).
¹⁷ 319 U.S. 624, 637 (1943).
¹⁸ See cases collected in 86 A.L.R. 484 (1933).
then brought suit in Vermont federal district court to challenge this dismissal, alleging that the professor involved had decided prior to the commencement of the course that the plaintiff would receive a failing grade. The court held that such an allegation was sufficient to withstand the University’s motion for summary judgment and that if the plaintiff could prove his allegation, he would be entitled to a university hearing concerning his dismissal order.

The Connelly court stressed that the ultimate grading decision must always remain with the school authorities: “Whether the plaintiff should or should not have received a passing grade for the period in question is a matter wholly within the jurisdiction of the school authorities, who alone are qualified to make such a determination.” The court’s holding was merely that if the student could show that the school officials had acted “arbitrarily, capriciously or in bad faith” in dismissing him, the court would then “order the defendant University to give the plaintiff a fair and impartial hearing on his dismissal order.” Thus in the absence of an arbitrary, capricious or bad faith decision on the part of the school officials, a predismissal hearing at the university would not be required.

Connelly has been followed by several cases which have adopted both its reasoning and its arbitrary, capricious or bad faith test for school grading decisions. Several medical students have followed Thomas Connelly to the courts, only to be stopped in their efforts to obtain school hearings on their dismissals because of their inability to meet the Connelly standard of arbitrariness.

The District Court of Appeal of Florida in Militana v. University of Miami refused to order any hearing concerning the dismissal of a third-year medical student, stating that “[n]otice of charges and an opportunity to be heard are certainly essential to due process and required when a student is dropped from school for disciplinary reasons; however, such is not required when the dismissal is for academic failure.” The Supreme Court of Alabama has also relied upon Connelly in refusing to order a hearing prior to the dismissal of a student from the University of Alabama Medical School, concluding that “[e]ven the federal courts have not yet gone so far as to require the notice and presence of the student when a decision is being reached to dismiss a student for failing to meet the required scholastic standards.”

Another case involving the dismissal of a third-year medical student is Wong v. Regents of the University of California, which also heavily relied upon Connelly, but which held that the plaintiff’s allegations were, in effect, allegations of arbitrary, capricious or bad faith action on the part of the school authorities and that the student’s petition for a hearing was therefore sufficient to withstand the university’s request for summary judgment.

20 Id. at 161.
21 Id.
23 Id. at 164.
One final case in which a student challenged his academic dismissal from medical school is *Lukacs v. Curators of the University of Missouri*, in which the federal district court quoted the *Connelly* standard and its statement that "It is only when the school authorities abuse... [their academic] discretion that a court may interfere with their decision to dismiss a student." In *Lukacs*, however, the student involved had been granted a hearing before the Promotions and Advisory Committee of the medical school, and reliance upon *Connelly* was therefore not essential to the court's decision to refuse the student any relief.

To substantiate its reliance upon *Connelly*, the court in *Lukacs* also cited the 1973 decision of *Brookins v. Bonnell*. In *Brookins* a nursing student challenged his dismissal from a community college nursing program on the basis of his alleged failure to attend classes regularly and to submit to the school a physical examination report and a transcript from a previous nursing school. The court stated that "[i]t is also established that 'due process' does not require notice and a hearing for a student expelled for scholastic failure" (citing *Connelly*), but went on to hold that Brookins' dismissal was not for scholastic deficiencies but rather for alleged disciplinary violations. The court therefore held that the student was entitled to notice and hearing prior to his dismissal.

The Tenth Circuit Court of Appeals reached a somewhat different resolution of the issue of dismissal of a student from nursing school in *Gaspar v. Bruton*. The student in *Gaspar* had actually been accorded very full hearing rights prior to her dismissal, but the court nevertheless went on to consider her claim that the hearing had been constitutionally deficient. The court first held that, under the Supreme Court's decision in *Goss v. Lopez*, Mrs. Gaspar had a property right within the terms of the due process clause in her continued attendance at the school. The court nonetheless thought that *Connelly's* "rule of judicial nonintervention in scholastic affairs" was applicable and that consequently "[t]he court may grant relief, as a practical matter, only in those cases where the student presents positive evidence of ill will or bad motive." The court then concluded that:

> [S]chool authorities, in order to satisfy Due Process prior to termination or suspension of a student for deficiencies in meeting minimum academic performance, need only advise that student with respect to such deficiencies in any form. All that is required is that the student be made aware prior to termination of his failure or impending failure to meet those standards.

Students in the health-care professions are not alone in their resort to the courts in recent years to challenge dismissals from public schools. In *Keys v.*
Sawyer\textsuperscript{35} a law student petitioned the federal courts to have failing grades in two of his courses changed. Although the case was decided on the basis of other issues, the court stated that an additional reason for its refusal to aid the student was its belief that "He [the professor] should be given the unfettered opportunity to assess a student's performance and determine if it attains a standard of scholarship required by that professor for a satisfactory grade."\textsuperscript{36} The court did not mention whether it would act in the presence of a proven allegation of arbitrary, capricious or bad faith action.

Doctoral students have been another group which have challenged educational evaluations of their work. The New York Supreme Court, Special Term, adopted a standard similar to the Connelly test in its holding in Edde \textit{v. Columbia University}\textsuperscript{37} that in the absence of an "arbitrary, capricious or unreasonable"\textsuperscript{38} refusal to accept plaintiff's doctoral thesis, the court could grant the student no relief. More recently, in Stevenson \textit{v. Board of Regents of the University of Texas},\textsuperscript{39} the federal district court for the Western District of Texas cited the standard established in Connelly, but did not have to determine whether the University of Texas had acted arbitrarily or in bad faith, since the student involved had, in fact, been granted a hearing prior to his dismissal from the school's doctoral program.

The final case which should be mentioned is Greenhill \textit{v. Bailey},\textsuperscript{40} in which a student challenged his dismissal from the University of Iowa medical school. The federal district court which initially heard the case held that it "[n]eed not decide whether the claimed status is 'liberty' or 'property' within the protection of the fourteenth amendment because the cases are clear that notice and hearing are not required when a student is dismissed for failure to meet academic standards."\textsuperscript{41} The plaintiff's failure to show that the decision was arbitrary, capricious or in bad faith thus resulted in the court rejecting his request for an order requiring a medical school hearing.

The Court of Appeals for the Eighth Circuit found this case to be outside the rationale of Connelly, however, since the university had done more than just dismiss Greenhill from its medical school. The university had also notified the Association of American Medical Colleges of Greenhill's dismissal, noting that the apparent reason for Greenhill's failure was "lack of intellectual ability or insufficient preparation." While recognizing that courts do not usually intervene in school grading decisions (and citing Connelly), the Court of Appeals thought that Greenhill's dismissal was not of the usual variety. The court noted that "The information communicated outside the medical school goes beyond a factual statement that Greenhill had failed his junior

\textsuperscript{36} Id. at 939-40.
\textsuperscript{38} Id. at 795, 168 N.Y.S. 2d at 644.
\textsuperscript{39} 393 F.Supp. 812 (W.D. Tex. 1975).
\textsuperscript{40} 519 F.2d 5 (8th Cir. 1975).
year, or a mere recitation of academic grades, and suggests that Greenhill is intellectually unfit to undertake the study of medicine at all.\textsuperscript{42}

The Court of Appeals never reached the issue of whether or not Greenhill had a constitutionally protected property interest in continued attendance at the medical school, but concluded that he did have a constitutional right to notice and hearing prior to being so stigmatized by the school’s letter that entry into any other medical school had become impossible.\textsuperscript{43} The court, however, did not believe that the dismissal of Greenhill absent this letter would have deprived him of any constitutionally protected liberty, its holding being a very narrow one:

We hold that the action by the school in denigrating Greenhill’s intellectual ability, as distinguished from his performance, deprived him of a significant interest in liberty, for it admittedly “imposed on him a stigma or other disability that foreclose[s] his freedom to take advantage of other . . . opportunities.”\textsuperscript{44}

Thus, although the Eighth Circuit in Greenhill v. Bailey has gone farther than any other court in requiring a due process hearing prior to academic dismissal, not even Greenhill stands for the proposition that students are, as a matter or course, entitled to notice and hearing before academic dismissal from a public university.\textsuperscript{45}

\textbf{Student Due Process Rights in School Disciplinary Decisions}

In contrast to “the rule of judicial nonintervention in scholastic affairs,”\textsuperscript{46} courts have not been nearly so deferential to disciplinary suspensions and dismissals from the public schools.\textsuperscript{47} Prior to the Supreme Court’s recent entry into the area of school discipline in \textit{Goss v. Lopez},\textsuperscript{48} the “landmark decision” in this area of constitutional law was the opinion of the Fifth Circuit in Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975). The Supreme Court’s recent narrowing and reinterpretation of the “liberty interest” protected by the due process clauses of the fifth and fourteenth Amendments in \textit{Paul v. Davis}, 44 U.S.L.W. 4337 (U.S. Mar. 23, 1976) should not undermine the validity of the Eighth Circuit’s decision as to the infringement of Greenhill’s interest in liberty. For not only was the student’s general reputation harmed, but a “right or status previously recognized by state law was distinctly altered or extinguished,” \textit{Id.}, at 4343, since Greenhill was both dismissed from the state medical school and would not be considered for readmission in the future. Appellant’s brief in Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) at 9, 51.

Accordingly, although it is the thesis of this article that the courts should require schools to hold due process hearings prior to all academic dismissals, it is possible that student rights could also be protected by a broader reading of the current “arbitrary, capricious or bad faith” standard of judicial review of such dismissals. To protect students to the full extent advocated in this article, however, every academic dismissal would have to be considered arbitrary or capricious, and it therefore seems wiser to develop a new theory for protecting student rights than to so stretch the present standard.

\textsuperscript{42} 519 F.2d 5, 8 (8th Cir. 1975).

\textsuperscript{43} The Supreme Court’s recent narrowing and reinterpretation of the “liberty interest” protected by the due process clauses of the fifth and fourteenth Amendments in Paul v. Davis, 44 U.S.L.W. 4337 (U.S. Mar. 23, 1976) should not undermine the validity of the Eighth Circuit’s decision as to the infringement of Greenhill’s interest in liberty. For not only was the student’s general reputation harmed, but a “right or status previously recognized by state law was distinctly altered or extinguished,” \textit{Id.}, at 4343, since Greenhill was both dismissed from the state medical school and would not be considered for readmission in the future. Appellant’s brief in Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) at 9, 51.

\textsuperscript{44} \textit{Id.}, quoting \textit{Board of Regents v. Roth}, 408 U.S. 564, 573 (1972).

\textsuperscript{45} Connelly 244 F.Supp. at 160.

\textsuperscript{46} For a bibliography of books and articles dealing with student disciplinary rights see HOGAN, supra note 10 at 205, 211–14.

\textsuperscript{47} 419 U.S. 565 (1975).
Court of Appeals in *Dixon v. Alabama State Board of Education.* The *Dixon* court held that “notice and some opportunity for hearing” are constitutionally mandated by the due process clause of the fourteenth amendment prior to the expulsion of students for disciplinary reasons from a state university.

The *Dixon* court refused to be bound by the notion of any right/privilege distinction inherent in the requirements of due process, stating that:

It is not enough to say, as did the district court in the present case, “The right to attend a public college or university is not in and of itself a constitutional right. [citation omitted] . . . [I]t is necessary to consider ‘the nature both of the private interest which has been impaired and the governmental power which has been exercised.’”

The *Dixon* decision was followed by a flood of other federal cases in which the rationale of *Dixon* was argued to be applicable to expulsions from public high schools and to both long and short-term suspensions from public universities and secondary schools. The varying results in the short-term suspension cases were at least partly resolved by the Supreme Court’s entry into this area with its 1975 decision in *Goss v. Lopez.*

The Supreme Court in *Goss* was faced with the suspensions of junior and senior high school students and held that “[d]ue 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 denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” The Court’s decision was based upon students’ “legitimate claims of entitlement to a public education” stemming from the Ohio laws which provide for free public education and make that education compulsory. Thus the Court did not have to confront the school system’s contention that there is no constitutional right to a secondary school education at public expense.

Since the students involved were found to have such a statutory entitlement to a public secondary education, the state could only deprive them of that property interest by adherence to the mandates of due process of law. In addition to this property interest, however, the Supreme Court held that the students had also been subject to an arbitrary deprivation of a constitutionally protected liberty. The Court here followed its earlier decisions in *Board of Regents v. Roth* and *Wisconsin v. Constantineau,* in which it was held that “[w]here a person’s name, reputation, honor, or integrity is at stake

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49 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).
50 Id. at 158.
52 See the cases collected in Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975).
54 Id. at 561.
55 Id. at 573 (1975).
56 408 U.S. 564 (1972).
57 400 U.S. 433 (1971).
because of what the government is doing to him, notice and an opportunity to be heard are essential." In Goss the Court said of the charges of misconduct, that "[i]f sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."

The majority opinion in Goss provoked a spirited dissent from Mr. Justice Powell, which was joined in by three other members of the Court. The dissent argued that "[t]he decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education." The dissent further predicted that "[t]oday's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process." Although justices often overstate the impact of an opinion with which they disagree, it is significant for the purposes of this article that Mr. Justice Powell included on his list of formerly discretionary decisions which may now be subject to judicial scrutiny "how to grade the student's work, whether a student passes or fails a course."

The Constitutional Right to a Hearing Prior to Academic Dismissal from the Public Schools

After consideration of the Supreme Court's decision in Goss v. Lopez, the traditional judicial refusal to require hearings prior to academic dismissals in the absence of arbitrary, capricious or bad faith action appears anomalous. It seems a strange system, indeed, in which a junior high school student must be granted notice and hearing prior to a disciplinary suspension of no more than ten days, while medical or doctoral students can be dismissed from school permanently without any of the protections of the due process clause coming into play.

Perhaps the contrast is a misleading one, however, since the applicability of the due process clause does not depend upon the seriousness of the loss which is threatened by the governmental action. The Supreme Court in Board of Regents v. Roth established the constitutional test to be used to determine whether an interest is protected as "property" or "liberty" under the due process clause: "[W]hether due process requirements apply in the first

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58 Id. at 437.
60 Goss, 419 U.S. at 585 (1975).
61 Id. at 597 (1975).
62 The Supreme Court itself, in the context of statutory interpretation, has described the tendency of the opponents of a proposal to overstate that proposal's impact: "[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the view of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstated its reach." National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 66 (1964).
64 408 U.S. 564 (1972).
place, we must look not to the 'weight' but to the nature of the interest at stake."

To be a protected property interest under the due process clause, interests need not be constitutionally created. "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." In Goss the Supreme Court found that the state statutes which established the state secondary school system gave the students "legitimate claims of entitlement to a public education," and therefore the students could not be excluded from the classroom for even ten days without a prior hearing on their alleged misconduct.

Since state statutes similar to the one invoked in Goss also provide for public higher education, the Goss analysis leads to the conclusion that university students at such schools have a property interest in their higher education comparable to the property interest found to exist in Goss. In fact, the lower courts—most notably the Fifth Circuit in Dixon v. Alabama State Board of Education—have held in the context of disciplinary dismissals that state university students do have such a protectable property interest.

In addition to a student's right to maintain his attendance at a public university, the property interest involved can be visualized as the student's right to receive the most tangible evidence of university attendance—the degrees and diplomas conferred by the state institution. These diplomas and degrees can be seen as state "licenses" which will allow the student to obtain further education, a larger lifetime earning power, or open the doors to certain otherwise restricted occupations. "Statistics have established beyond question the concrete value of all types of education both to the student and to the economy. Moreover, any degree or diploma can reasonably be regarded as a property interest. Though not a license required by law, they are prerequisites in fact for many occupations."

Not only do students at state universities have a property interest in their educations, but summary exclusion from higher education also arbitrarily deprives students of a constitutionally protected interest in "liberty." Prior to the Supreme Court's decision in Paul v. Davis, a dismissed student might have argued that her "interest in reputation alone" had been sufficiently injured by the expulsion so that a constitutional interest in liberty had been

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65 Id. at 570-71.
68 See, e.g., Ohio Rev. Code sec. 3345.011. The requirement of compulsory attendance found at the elementary and secondary school levels is not present in public higher education, however.
69 See also the expansive concept of property advocated in Reich, The New Property, 73 Yale L. J. 733 (1964).
70 294 F.2d 150 (5th Cir.), cert. den., 368 U.S. 930 (1961).
73 Id. at 4343.
implicated. This argument would have proceeded upon the damage to the student’s future educational, professional, and social status due to the university’s stigmatization of him or her as an academic failure.\(^7\)

The Supreme Court in \textit{Paul v. Davis}, however, rejected the argument that governmental stigmatization was by itself sufficient to bring due process protections into play. The \textit{Paul} Court held that the police’s circulation of a flyer to local merchants picturing petitioner as an “active shoplifter” did not deprive the petitioner of a constitutionally protected interest in liberty, since the stigmatization resulted in the alteration or extinguishment of no “right or status previously recognized by state law.”\(^7\)

\textit{Paul v. Davis} therefore apparently narrows the different theories which the

\(^7\)The \textit{Paul} majority’s insistence upon an “alteration of legal status,” 44 U.S.L.W. at 4342 may now make claims of reputational injury or stigmatization by the dismissed student mere surplusage. The Court seems to be saying that to establish a deprivation of liberty, a deprivation of property (“alteration of legal status”) must first be shown, but if a property interest can be proven the establishment of a liberty interest is unnecessary to the student’s cause of action.

“[I]nterest in reputation alone” deserves further mention, however, in light of the apparent confusion of the \textit{Paul} majority between the separate issues of whether reputation can be a protectable liberty interest and whether insufficient process was afforded Paul in his particular case so that 42 U.S.C. 1983 liability would lie. Mr. Justice Brennan sharply criticized the majority on this point, predicting the opinion would be “a short-lived aberration.” 44 U.S.L.W. at 4348, 4350.

If Mr. Justice Brennan’s prediction proves correct and injury to reputation alone is in the future held to be constitutionally protected in some circumstances, students should be among the first to receive the benefit of such protection. For what has been said about dismissals for disciplinary reasons is equally true of academic dismissals in today’s highly competitive educational market:

Now that admission to college is increasingly difficult, an expulsion from an institution of higher education significantly reduces a student’s chances of completing his educational program. Even at the lower levels of education, where alternative schools must be made available, a dismissal from one school may force the student to complete his education at an inferior institution. Furthermore, the dismissal always remains a part of his educational record. \textit{Developments in the Law—Academic Freedom}, 81 HARv. L. REV. 1045, 1154 (1968).

Since an academic dismissal remains part of a student’s educational record, educational opportunities may be foreclosed at many more schools or universities than the one from which the student was actually dismissed. One purpose of the “Dean’s Letter” required by many graduate and professional schools is to ascertain whether the student has ever been disciplined for academic or non-academic reasons. OFFICE OF CAREER SERVICES AND OFF-CAMPUS LEARNING, HARVARD UNIVERSITY, LAW AND LAW-RELATED FIELDS 57 (4th ed. 1974). Since student applications so greatly outnumber available openings in U.S. medical schools, it is the policy of some medical schools never to admit a student who has previously been dropped from another medical school for academic reasons. \textit{E.g.}, the University of Iowa College of Medicine—appellant’s brief in Greenhill v. Bailey, 519 F.2d 5, 9, 51 (8th Cir. 1975); the Harvard Medical School—conversation November 26, 1975 with John Cantrell of the Harvard Medical School Admissions Office.

An academic dismissal can also plague students once they leave the educational system; consider the reluctance of many people to go to a doctor or lawyer who had once been dismissed from medical or law school. The revelation of such dismissals is also both required and considered relevant to the admission to the practice of law in many states. See, \textit{e.g.}, question number seven on the Application for Registration as a Candidate for Admission to the Practice of Law in Ohio (1975); question number twelve on the Application for Permission to Take the Minnesota Bar Examination (1975).

\(^7\) 44 U.S.L.W. 4337, 4343 (U.S. Mar. 23, 1976).
dismissed student can plead in support of his claim for a due process hearing. The student will still be able to successfully establish that he has been arbitrarily denied an interest in liberty, however, since the denial of continued attendance at the state university not only injures a student's "interest in reputation alone," but must also be considered an "alteration of legal status" within the terms of Paul. In fact, the Supreme Court in Paul dealt with this issue directly by citing the student suspensions in Goss v. Lopez as involving such an "alteration of legal status," since "[O]hio law conferred a right upon all children to attend school, and . . . the act of the school official suspending the student there involved resulted in a denial or deprivation of that right." 

Since students do, then, have both property and liberty interests in their continued educations—interests which have been recognized in the context of student expulsions for disciplinary reasons—one must ask why these interests have not been protected by the courts when a student is dismissed from school for academic reasons. In fact, many of the principal reasons for this judicial abstention were also advanced in school disciplinary cases and rejected as invalid by such cases as Dixon and Goss.

Academic dismissals involve an additional basis for judicial abstention which is not present in the disciplinary dismissal cases, however, and that is the feeling that the decision to dismiss a student for academic reasons is an exercise of "academic expertise" that is not present in the decision to dismiss a student for misconduct. "In the nature of the educational process, teachers are more expert than students in assessing academic performance in the classroom and it is their function to judge this performance, not a rationalization of it in a hearing." 

Professor Charles Allen Wright, while arguing for due process hearings prior to student disciplinary dismissals, nevertheless believes that dismissals for alleged academic deficiency are another matter:

"[I]f the dean of students and the president are subject to being second-guessed by the court on their administrative decisions, why is the faculty member left undisturbed when he grades bluebooks or makes similar academic judgements. A partial answer is that courts are expert in applying the first amendment and the due process clause, but the persons on campus are the experts in deciding the academic value of a particular piece of work."

Any arguments based on academic expertise, however, are premised on a misconception of the thesis of this article, which is to require the schools themselves to grant students predismissal hearings. Since this article advocates no increased vigilance on the part of the courts in reviewing the actual
substance of grades given, the requirement of a school due process hearing results in no substantial "judicial intervention" into the operation of the public schools. Such a judicial holding as called for in this article would merely require the schools to bring their own academic expertise to play in determining whether or not a student should remain in academic good standing at that university.\footnote{Although this article does not advocate a more active judicial intervention into the merits of individual dismissals, there may be rare occasions when the remedy for the constitutional inadequacy of school dismissal procedures should be a judicial decision on the merits of the expulsion rather than a remand for another school hearing. Such a possibility is suggested by Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C.Cir. 1969), where the U.S. Court of Appeals for the District of Columbia Circuit itself denied an application for a television license renewal rather than remand for a procedurally correct renewal hearing (although the current licensee was allowed to reapply for the license in the less-advantageous position of a new applicant). Judges McGowan and Tamm explained then Judge Burger's opinion in the case as holding "[t]hat the proceedings on [the first] remand had been hopelessly bungled and that the public interest was best served by taking note of the early expiration date [of the current license] and getting on with a new hearing in which the Commission can decide who is best qualified to have this channel." Statement of Judges McGowan and Tamm accompanying vote to deny the petition of the FCC for rehearing en banc. \textit{Id.} at 551.}

It is thus the very recognition of academic expertise which should lead courts to require hearings prior to academic expulsions. The decision of the Fifth Circuit Court of Appeals in \textit{Sindermann v. Perry} expressed this same view in its consideration of the right of teachers to a due process hearing prior to dismissal from a state university:

\begin{quote}
School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.\footnote{430 F.2d 939, 944-45 (5th Cir. 1970), \textit{aff'd}, 408 U.S. 593 (1972).}
\end{quote}

Thus in requiring hearings prior to academic dismissals the courts will have remained within their own field of expertise (the enunciation and protection of procedural rights), the schools will be required to exercise their expertise in academics, and students' constitutional rights will be preserved.

One final argument which might be advanced against requiring hearings prior to academic expulsions from the public schools is that the nature of the issues at stake in such decisions—the fact that there may not be an underlying "factual dispute" as in the case of a disciplinary dismissal—makes such a hearing requirement meaningless in actual practice. This argument, however, is one which is actually addressed to the contours of any pred dismissal
hearing, rather than to the question of whether there are protectable property or liberty interests at stake. The argument will therefore be discussed in a latter portion of this article. It should be noted here briefly, though, that there often may indeed be underlying factual disputes (a student may not accept the grade he has been given) and that such a hearing can also provide the student an opportunity to "characterize his conduct" in an attempt to convince the school that a sanction less drastic than unconditional dismissal may be appropriate.

Student Due Process Rights in Other Public School Decisions
If a court does one day require public school authorities to hold due process hearings prior to dismissal of students from the school for academic deficiencies, will the way then be open for judicial intervention into other aspects of public school evaluation of students? Since this may be a real concern of courts faced with the possibility of requiring a hearing prior to academic dismissal, it should be made quite clear that the argument advanced in this article does not extend beyond the specific fact situation discussed in the article and that the requirement of a hearing prior to academic dismissal would not signal entry into a new judicial "thicket" with no logically discernible boundaries.

It should initially be stressed that a court holding adopting the argument of this article as to predismissal hearings would not compel courts to become involved in the normal award of classroom grades which are not the basis for a student's expulsion from the public institution. Although the receipt of a "B" rather than an "A" in a course could have a severe impact upon a particular student, the student has not lost the property right in his or her continued public education for which this article urges judicial protection.

Pp. 293-95, 297-98, and note 122, infra.

Goss v. Lopez, 419 U.S. 565, 584 (1975). "This opportunity [to be heard] is no less important when, as here, there is not a serious dispute over the factual basis for the charge, for ... things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context." Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975), quoting Goss v. Lopez, 419 U.S. 565, 584 (1975).

In another school disciplinary case in which the disciplinary infractions were admitted by the student, the Seventh Circuit Court of Appeals has recognized that due process may also guarantee the student a hearing to argue for mitigation of punishment. Betts v. Board of Education, 466 F.2d 629, 633 (7th Cir. 1972) (dictum). See also pp. 293-95, 297-98, and note 122, infra.

The analysis of this article would, however, extend to academic suspensions of students that are not de minimus in nature. See the disciplinary suspension cases collected in Goss v. Lopez, which itself dealt with disciplinary suspensions rather than expulsions. 419 U.S. 565, 576 n. 8 (1975). This article focuses on academic dismissals rather than suspensions because the few court challenges to academic evaluation have involved dismissals, see pp. 279-83, supra, and because the greater harm to students from dismissals makes legal change more necessary in that area.

Academic probations may also call for at least some of the protections advocated in this article if the "probation" is in effect a suspension or results in the immediate loss of academic rights. Challenges to probations which only create the possibility of major sanctions in the event of future student failings can perhaps best be postponed until the school actually moves to suspend or dismiss the student. See note 120, infra, for the conflicting views of two U.S. Courts of Appeal on the use of a dismissal hearing to challenge prior school demerits or probation.
Another fear which courts might have about this article's analysis is that it could lead to the requirement of hearings prior to the denial of admission to public schools and universities. Such a requirement does not necessarily follow from the argument advanced here, since a student's loss from expulsion will usually be much greater than the loss occasioned by the denial of initial entry into the school or university. Denial of admission could therefore be constitutionally classified as a de minimus deprivation, and thus outside the protections of the due process clause, by any court which desired to protect students from academic dismissals, yet did not wish to mandate across-the-board preadmission hearings.\textsuperscript{87}

Furthermore, since the denial of admission should not prejudice later applications for admission to that school or other schools as the dismissal from school may, the liberty interest of the student will generally not be impaired to the same extent as in the case of expulsion. State statutes or rules also sometimes specifically allow state institutions to establish selective admissions criteria,\textsuperscript{88} which, indeed, many institutions of higher education are forced to rely on today due to the larger number of applicants for admission than positions available within the school.

Hearings concerning the much more limited and focused issues at stake prior to dismissal would also most likely result in those hearings being of much greater benefit to the student than a hearing on admission could ever hope to be. Finally, although the administrative and economic burdens which hearing requirements impose upon the state should generally have no bearing on whether or not a person must receive a due process hearing,\textsuperscript{89} the number of preadmission hearings which students could demand would be tremendous and would result in the diversion of sorely-needed educational funds from educational to administrative functions.\textsuperscript{90}

\textsuperscript{87}"[I] would draw a distinction between cases in which government is seeking to take action against the citizen from those in which it is simply denying a citizen's request." Friendly, Some Kind of Hearing, 123 U. PA. L. Rev. 1267, 1295 (1975). It is important to note that Judge Friendly is not here merely invoking the now-discredited right/privilege distinction. \textit{Id.} But see Gelhorn & Hornby, Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action, 60 VA. L. Rev. 975 (1974).

\textsuperscript{88}See, e.g., \textit{Ohio Rev. Code} sec. 3345.06.


\textsuperscript{90}Medical and law schools would perhaps be the most inconvenienced by any requirement that rejected applicants could demand due process hearings, since only one-third of the nation's annual applicants to medical schools are accepted and in 1973 85,999 applicants competed for the 37,018 first-year openings in United States law schools. \textit{Association of American Medical Colleges, Medical School Admission Requirements: 1976–77} 17 (1975); \textit{White, Is that Burgeoning Law School Enrollment Ending?}, 61 A.B.A.J. 202, 203 (1975).

Under such a requirement the State University of New York at Buffalo School of Medicine would have been required to offer due process hearings to 5000 rejected applicants in choosing its 1974–75 entering class of 135, and the University of California at Davis Law School would...
Public schools should therefore not be required to follow any specific procedures in the selection of their initial student body, so long as the admissions' decisions are not based upon impermissible criteria such as race or sex.\(^9\)

The reach of the logic of this article should also not extend into the public elementary and secondary schools, since academic failure at that stage usually does not deprive a student of the right to continue his education or stigmatize the student so as to deprive him of so many future opportunities that a constitutional liberty is implicated. The traditional judicial noninterference in the elementary and secondary school promotional decision\(^9\) should therefore not be affected by the reasoning expressed here.

The rights to notice and hearing advocated in this article should thus be seen not only as rights which follow naturally from constitutional law precedent, but also as rights which would not precipitate any wholesale judicial intervention into other areas of life in the public schools. Mr. Justice Powell's criticism of the *Goss* decision, that it is "difficult to perceive any principled limit to the new reach of procedural due process,"\(^9\) is therefore inapplicable to the legal rule advocated in this article.

**What Process Is Due?**\(^{94}\)

"Once it is determined that due process applies, the question remains what process is due?"\(^9\) After an interest has been found to be a "liberty" or "property" interest for the purposes of the due process clause, the courts must still determine the procedures appropriate to protect that right. This second stage of the due process analysis is necessary, since, as the Supreme Court noted in *Goss v. Lopez*, "[t]he interpretation and application of the Due Process Clause are intensely practical matters and... the very nature of due

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\(^9\) For a recent case in which public school admissions policies were challenged as both racially and sexually discriminatory see Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264 (9th Cir. 1974), noted in 9 SUFFOLK U. L. REV. 930 (1975).


\(^{93}\) 419 U.S. at 600.

\(^{94}\) Although this section of the paper deals only with rights constitutionally mandated by the due process clause, it is important to keep in mind "the rule of law that an organization may create procedural rights in addition to the constitutional minimum where its own rules prescribe the additional safeguards." Warren v. National Ass'n of Secondary Sch. Principals, 375 F. Supp. 1043, 1048 (N.D. Tex. 1974). See also *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).


process negates any concept of inflexible procedures universally applicable to every imaginable situation.”

Since the requirements of due process in the school dismissal decision may differ from the requisites of due process in other situations, and, indeed, the necessary procedures will even differ among different dismissal decisions, no single list of required procedures can adequately cover all instances of academic dismissal. Instead, courts should require those procedures which are functionally necessary for the presentation of each particular case, basing decisions as to functional necessity upon the purposes the due process clause is thought to serve. The most often cited purposes of the requirement of governmental due process are three: (1) to ensure that the governmental decision-makers are proceeding upon a correct determination of the underlying facts; (2) to provide a basis for later judicial review of the administrative decision; and (3) “to legitimize the actions of government by generating the feeling that just procedures have been followed, even though the individual may disagree with the government's final decision.”

In the academic dismissal decision, there is rarely the underlying factual dispute which often is given as the main practical reason for a due process hearing. Academic dismissals therefore differ from school disciplinary situations, for which Dixon and Goss have attempted to provide procedures to prevent decisions based upon a mistaken view of the underlying facts. Thus, if resolution of an underlying factual dispute is seen as the only basis for the invocation of the protections of the due process clause, there would be a very minimal hearing necessary in many academic dismissal situations.

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87 For discussions of a functional approach to due process procedures see Note: Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 HARV. L. REV. 1510 (1975); Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111 (1972); Davis, The Requirement of a Trial-Type-Hearing, 70 HARV. L. REV. 193 (1956). This paper, however, goes beyond advocacy of only those procedures functionally necessary to ensure an accurate administrative decision. See the discussion of the other purposes of the due process clause starting on this page.

89 Note: Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 HARV. L. REV. 1510, 1540 (1975). See also Mr. Justice Harlan's “three criteria by which the procedural requirements of due process should be measured.” In Re Gault, 387 U.S. 1, 71-72 (1967) (Harlan, J., concurring). These criteria are: "[F]irst, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary." Id. at 72.

Roger Cramton has also suggested three criteria for evaluating due process procedures, which are accuracy, efficiency (cost and burden) and acceptability of the decision-making process. Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 VA. L. REV. 585, 591-93 (1972).

90 Note: Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 HARV. L. REV. 1510, 1540 (1975).

100 The Seventh Circuit Court of Appeals in Betts v. Board of Educ., 466 F.2d 629, 633 (7th...
The second major rationale for the requirement of a hearing, that of furnishing a basis for later judicial review, provides a stronger argument for requiring a fuller pred dismissal hearing. Since courts do review academic dismissal decisions to ascertain whether the official action was arbitrary, capricious or in bad faith, the scope and procedures of any hearing should be further expanded to facilitate this review and save the courts from having to hold their own factual hearings on the bases for the failing grade. One commentator has explained the Dixon decision in terms of this saving of judicial resources: "To avoid the necessity of holding federal trials in every school expulsion, the [Dixon] court held that due process attached to the student's interest in education and that notice, hearing, and statement of reasons were required before expulsion." The third rationale for due process hearings—that of legitimation of the governmental decision-making—has been described by Mr. Justice Frankfurter in the following terms:

The validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

This "fairness" rationale for due process protection seems particularly appropriate in the area of public school dismissal decisions, if, as Mr. Justice Jackson has warned, "[w]e are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." It is anomalous that in a system which stresses teacher-student communication as our educational system does, a student can be summarily dismissed from school without having any input into the dismissal decision or even knowing why he or she has failed. As one textbook on evaluation of pupil progress has said, "The main reason for reporting to pupils and parents is to facilitate the learning and development of the pupils." Mr. Justice White's comment in Goss upon the value of communication in the school disciplinary process could also be paraphrased so as to apply in the case of academic dismissal: "[I]t would be a strange [grading] system in an

Cir. 1972) has stated in the context of a school disciplinary case that the absence of an underlying factual dispute may affect the procedures constitutionally required at a due process hearing. The Fifth Circuit Court of Appeals expressed a similar sentiment in requiring more than informal hearing procedures in Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158–59 (5th Cir.), cert. denied, 368 U.S. 930 (1961): "By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses."

101 Connelly, 244 F.Supp. at 161.
educational institution if no communication was sought by the [teacher] with the student in an effort to inform him of his defalcation and to let him tell his side of the story in order to make sure that an injustice is not done."106

With these three main purposes of the due process clause in mind, and recognizing that no one set of procedures will be appropriate for all school dismissal decisions, specific procedural elements which have been required or requested in other due process hearings will now be considered and a determination will be made as to whether these procedures should be required in academic dismissal situations.107

**Notice**

Since due process is often described as notice and opportunity to be heard,108 it is appropriate to begin the formulation of the dimensions of a predismissal hearing by a consideration of these elements of due process. Kenneth Culp Davis has said that "[t]he key to ... notice in the administrative process is adequate opportunity to prepare ..."109 The notice must thus be sufficient both in terms of a detailed statement of the "charges" that the school authorities will proceed upon at the hearing and must be received by the student in sufficient time to allow him opportunity to prepare arguments and gather materials or witnesses to present at the hearing.

The determination of whether or not a notice is "adequate" in either particularity or timing cannot be abstractly decided apart from the particular facts of the dismissal situation.110 As for the contents of such notice, in the usual school dismissal situation there will normally be little more to tell the student than that he or she has received a specific grade and therefore stands

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106 419 U.S. at 580. One commentator on the Goss decision has said that, "The student's opportunity to confront the disciplinarian, guaranteed by Goss, not only is a minimum safeguard to factual accuracy, but is part of the process of education itself." Tribe, Structural Due Process, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269, 313 n. 128 (1975).

107 The specific procedures considered follow the "elements of a fair hearing" set forth in Friendly, supra note 87, at 1279-95.

108 "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972), quoting Baldwin v. Hiale, 1 Wall. 223, 233 (1863).

109 K. DAVIS, ADMINISTRATIVE LAW TREATISE sec. 8.05 at 530 (1958).

110 "Line drawing on the question whether a complaint or other notice fails adequately to particularize is done in close cases on the basis of an entire record." 1 K. DAVIS, supra note 109, at sec. 8.05, 531. "'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).
in jeopardy of being dismissed from the school, and to inform the student of the school’s appeal procedure and contours of the hearing which will be held upon the student’s request.

If the threatened dismissal is predicated upon matters other than performance on written examinations, the student’s right to know the evidence against him means that the notice will have to be somewhat more specific and set out these additional bases of evaluation. For example, if a medical school’s proposed dismissal of a student is based upon adverse clinical evaluations of the student, the student should be shown these evaluations in advance of the hearing. Since such evaluations are required to be made available to all students under the “Buckley Amendment” to the General Education Provisions Act of 1974, this additional notice requirement should not prove burdensome for schools to comply with.

The timing of the notice presents more difficult problems. Must the notice come only soon enough to give the student adequate time to prepare for the final dismissal hearing, or should the student receive notice at an earlier time in the school term so that she may take action to prevent even the initial entry of a failing grade against her? While it may be sound educational policy to notify students of any impending academic difficulties, and many schools in fact do so, the fifth and fourteenth amendments merely require that notice precede the due process hearing itself. Thus, although a student’s dismissal may be attributable to the failure of many individual examinations or courses during the term, the constitutionally mandated notice and hearing need only be given at the end of the term prior to the final decision to dismiss the student.

**Ability to Present Reasons Why the Proposed Action Should Not Be Taken**

The ability to present reasons why the proposed action should not be taken is merely another way of stating the requirement that there be a predismissal hearing on the student’s alleged academic deficiency. Thus all but one of the courts which have considered allegedly bad faith or capricious academic school dismissals have required the schools to allow the student a chance to

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111 "There can . . . be no fair dispute over the right to know the nature of the evidence on which the administrator relies." Friendly, *supra* note 87, at 1283. See also pp. 301-02, *infra.*


113 Conversation of November 26, 1975 with Noreen Koller, Registrar of the Harvard Medical School as to that school’s advance notice policy; conversation of January 28, 1976 with Mildred Healy, Registrar of the College of Arts and Sciences of Tufts University as to that school’s policy of predismissal counseling and academic probation.

114 "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-53 (1941).

This hearing must be held prior to the final determination as to dismissal and its terms, however, since "It is . . . fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’" Fuentes v. Shevin, 407 U.S. 67, 80 (1972), quoting Armstrong v. Manso, 380 U.S. 545, 552 (1965).
present his or her side of the matter—"characterize his conduct and put it in what he deems the proper context." Such a right to a hearing is indeed essential if due process is to affect the quality and correctness of the decision reached by the school authorities.

Although it can be stated unequivocally that such an opportunity to be heard must be provided,117 the scope of the issues to be considered at such a hearing is a more troubling problem. A student's dismissal may be based upon the failures of many separate examinations over the course of the term and a student may desire to challenge decisions as to the correctness of many individual examination answers. This should not be the usual situation, however, and in the case of objections to individual objective questions the challenges should not be too time-consuming to resolve. Challenges to subjective examinations will take longer to dispose of, but it is in these subjective evaluations that any capriciousness or bad faith on the part of the professor is most likely to manifest itself.118 A student should therefore be able to challenge any academic decisions which are "proximately related"119 to the student's threatened failure, interpreting that term broadly so as to preserve the maximum possible challenges for the student.120

The hearing must also provide the student with the right to bring forth any extenuating circumstances to excuse or explain an admitted academic failure. This latter right of explanation may be, in fact, the one which students will most frequently avail themselves of at such hearings, deciding not to challenge the underlying evaluations received, but merely to "characterize

115 The only court in the academic dismissal cases discussed earlier which refused to allow the student involved an opportunity to be heard (despite a holding that the due process clause was applicable to the situation) is Gaspar v. Bruton, 513 F.2d 843, 851 (10th Cir. 1975): "All that is required is that the student be made aware prior to termination of his failure or impending failure to meet those standards."

116 See note 108, supra.

118 Student evaluations are especially subjective in today's medical schools, where clinical work composes the bulk of the student's courses after the first two years. Conversation of November 26, 1975 with Noreen Koller, Registrar of the Harvard Medical School. The plaintiff in Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) was evaluated upon such factors as his relationship to others, attendance, attitude, appearance, initiative, fund of knowledge and dependability. Appellant's brief in Greenhill v. Bailey, Id. at 16-17. The medical student in Lukacs v. Curators of the Univ. of Missouri, No. 74 CV 109-C (W.D. Mo. July 23, 1974) was also evaluated on the basis of his "attitude." Lukacs, supra, at pp. 5-6.


120 One such holding in the school disciplinary area is Hagopian v. Knowlton, 470 F.2d 201, 211 (2d Cir. 1972), in which the Second Circuit Court of Appeals held that—although the receipt of individual demerits need not be preceded by due process hearings—when a cadet was threatened with dismissal from West Point due to the cumulative total of such demerits, the student was constitutionally entitled to a due process hearing at which the factual basis of earlier demerits could be challenged. But see Yench v. Stockmar, 463 F.2d 820 (10th Cir. 1973), where the court held in the context of a student's disciplinary dismissal predicated in part upon prior disciplinary infractions, "The fact that the total of all infractions may aggravate the ultimate penalty does not require the courts to go back into prior events and proceedings which, when they took place, were not such as to constitute an aggrievement in the constitutional sense." Id. at 824.
[their] conduct" and request a sanction less drastic than expulsion. A student whose failure stems from illness or family emergency might successfully use such a hearing to convince school authorities to allow him or her to retake the failed courses or examinations, do other remedial or make-up work, or at least be permitted to petition for later readmission.

Right to an Unbiased Tribunal

The right to an unbiased tribunal has been perceived by some courts as of less importance than many of the other procedural elements often associated with due process hearings, on the theory that later court review can correct any irregularities or abuses at the hearing. As one commentator has said in the context of the dismissal of employees from government jobs, "The biased employer can build a record for review as easily as an unbiased employer so long as procedural due process is afforded, assuming that procedural due process includes separation of functions and protection against personal animosity to ensure that reasons not in the record do not result in dismissal." Such a rationale, however, is contrary to two of the three main purposes of the due process clause, those of assuring a fair and accurate administrative decision and of assuring the person involved that he has been fairly treated by the governmental authority. Especially in the area of school dismissal decisions, where later court review is so narrowly limited, the due process

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121 Goss, 419 U.S. at 584.
122 Explanation by the student of his problem and discussion of the proper course of action for the student—whether dismissal with or without the possibility of later readmittance, a retake of the failed courses, or the possibility of taking any failed examinations a second time—is now the usual occurrence when such hearings are held at the Harvard Law School and Harvard Medical School. Conversation of November 26, 1975 with Mary Upton, Registrar of the Harvard Law School; conversation of November 26, 1975 with Noreen Koller, Registrar of the Harvard Medical School.

Two U.S. Courts of Appeal have specifically recognized the value of a due process hearing in allowing a student threatened with disciplinary dismissal to make arguments as to mitigation of punishment. Hagopian v. Knowlton, 470 F.2d 201, 211 (2d Cir. 1972); Betts v. Board of Educ., 466 F.2d 629, 633 (7th Cir. 1972) (dictum).

Commentators have also recognized that—despite the undisputed nature of the underlying facts—"[p]ermitting a party to speak also gives him an opportunity to bring himself within one of the exceptions that accompany any legal rule, or to draw distinctions, or to articulate a new exception. Hearing both sides allows, and probably encourages, refinement of the law, and even outright change. Further, the physical presence of a litigant or the totality of his story may be influential in more subtle ways. It may be more difficult for a judge to cause harm to people who are present; they are no longer merely names or numbers." Subrin & Dykstra, supra note 106, at 454. See also Tribe, supra note 106, on the constitutional need for individualized hearings rather than reliance on fixed rules to settle certain disputes, and note 85, supra.

123 McCormack, supra note 102, at 1269.
124 McCormack, supra note 102, at 1286.
125 See pp. 292-95, supra, for a discussion of the three major purposes of the due process clause.
126 The standard of review in Connelly, 244 F.Supp. at 161, is whether the school acted "arbitrarily, capriciously or in bad faith," the student's remedy for such proscribed action being a due process hearing.
clause will be gutted of much of its meaning if schools are permitted to hold due process hearings before a biased individual or group of individuals.

In concrete terms, the requirement of an unbiased decision-maker in school dismissal decisions should mean that the person to whom the student brings his or her appeal is someone other than the person who originally gave the student the failing mark which is the basis for the proposed dismissal. Thus in Warren v. National Association of Secondary School Principals the court ordered a new hearing to be held on a student's dismissal from the National Honor Society because, although there was no dispute as to the underlying conduct which constituted the basis for the student's dismissal, the teacher who had witnessed and testified concerning the student conduct also sat as a judge on the faculty council which decided to dismiss the student from the Honor Society. The Warren court felt that the student had not received a fair hearing since his chances to obtain more lenient punishment from the faculty council were threatened by the dual role of the teacher as prosecutor and judge. Such is also the case when a professor's academic evaluation of a student is challenged: the professor would much rather see her initial evaluation upheld rather than have to admit that that decision was in any way arbitrary or in bad faith.

Although in one case involving a vocational school failure the school system granted the student the chance to appear before the town's school board, the Constitution does not require a hearing so removed from the school setting. A hearing before a panel of disinterested teachers and school administrators would seem to strike an acceptable balance between the right of the student to an impartial arbitrator and the school's interest in keeping the expense and inconvenience of such hearings to a minimum. Many colleges and universities in fact have just such "promotion committees" to decide questions of student academic standing and the Tenth Circuit Court of Appeals recently upheld such a faculty and administrative committee against a charge of bias in a student disciplinary dismissal:

The argument is made that the committee and the Dean were not disinterested persons, but school disciplinary problems must first be resolved in the school and by its constituted authorities. This is a function of the educational process and has

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128 "[T]his natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known," is given by Lon Fuller as the reason for our legal system's preference for an adversarial case presentation instead of an inquisitorial system in which the roles of prosecutor and judge are merged. Fuller, The Adversary System, in TALKS ON AMERICAN LAW 35, 45 (H. Berman ed. 1972). Empirical support for Fuller's thesis that the results under an adversarial system may differ from those under an inquisitorial system is offered by Thibaut, Walker & Lind, Comment: Adversary Presentation and Bias in Legal Decisionmaking, 86 HARV. L. REV. 386 (1972).
130 Such committees are especially prevalent in medical schools and are used at the medical schools of the Universities of Iowa, Vermont, and Missouri-Columbia and Harvard University. Greenhill v. Bailey, 519 F.2d 5, 6 (8th Cir. 1975); Connelly, 244 F.Supp. at 158; Lukacs v. Curators of the Univ. of Missouri, No. 74 CV 109-C, 2 (W.D. Mo. July 23, 1974); conversation of November 26, 1975 with Noreen Koller, Registrar of the Harvard Medical School.
always been considered a basic element. The student places himself in the school community and traditionally those with immediate supervision plus one or more in an administrative position, or combined position, enforce the rules of discipline. This has to be the starting point at least.\footnote{Slaughter v. Brigham Young University, 514 F.2d 622, 625-26 (10th Cir. 1975).}

**Right to Call Witnesses**

The right to call witnesses to help the student present her case was one procedural due process element which the Supreme Court refused to require in *Goss v. Lopez*.\footnote{419 U.S. at 583.} The Supreme Court's rationale for refusing to mandate this and several other procedures\footnote{The other procedures the Supreme Court rejected were the rights to counsel, confrontation, and cross-examination. *Id.* at 583 (1975).} was that since "[b]rief disciplinary suspensions are almost countless,"\footnote{Id.} "[t]o impose in each such case even truncated trial type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness."\footnote{Id.} In contrast to brief disciplinary suspensions, however, dismissals for academic reasons are not "almost countless" and therefore this rationale of the Court is inapplicable to such academic dismissals.\footnote{Although there are no national statistics on the number of students dismissed for academic reasons from American institutions of higher education, the nation's medical schools graduate ninety-five percent of their original entering classes and the attrition rate from all causes in the first year of law school averages less than ten percent. *ASSOCIATION OF AMERICAN MEDICAL COLLEGES*, *supra* note 90, at 45; *OFFICE OF CAREER-SERVICES AND OFF-CAMPUS LEARNING, HARVARD UNIVERSITY*, *supra* note 74, at 28. These figures contrast with the statistics submitted to the Supreme Court in *Goss* v. Lopez, 419 U.S. 565 (1975), that in the 1972-73 school year there were 4000 short-term suspensions in the Cincinatti public school system and almost 15,000 short-term suspensions in the Cleveland public school system. Brief for Buckeye Association of School Administrators as Amicus Curiae at 2 in *Goss*.} An even stronger reason for rejection of this rationale in the context of academic failures, however, is that the sanction of dismissal is a much graver consequence for the student involved than that of a suspension from junior or senior high school for ten days or less. Due to the lack of an underlying factual controversy in many academic dismissal situations, the witnesses actually called should be few\footnote{Thus in two of the academic dismissal cases discussed previously, pp. 279-83, *supra*, the student involved called no witnesses in his or her behalf, although granted that right by their schools. *Lukacs v. Curators of the Univ. of Missouri*, No. 74 CV 109-C, 4 n. 1 (W.D. Mo. July 23, 1974); *Gaspar v. Bruten*, 513 F.2d 843, 848 (10th Cir. 1975).} (often perhaps only a witness or two to vouch for good work in other courses or to verify extenuating circumstances) and the administrative burden upon the schools thus minimal. Indeed, even in school disciplinary situations, where disputed factual issues may mean that large numbers of witnesses will actually be called, many courts have upheld
students' rights to call any witnesses necessary to the presentation of their cases.\(^{138}\)

**Right to a Record of the Proceedings and a Statement of Reasons for the Decision**

Since one of the reasons for requiring a predismissal hearing is to provide a basis for later judicial review of the school's action,\(^{139}\) both a record and a statement of reasons for the school's decision should be provided the dismissed student. The record requirement could easily be met by allowing the student to tape-record the hearing,\(^{140}\) while the reasons for the dismissal decision need not be lengthy and seem to be the least that the student is entitled to.

**Right to Have the Decision Based Only Upon the Evidence Presented**

The requirement that the school's decision be based only on the evidence presented at the dismissal hearing is a necessity if the other due process rights granted the student are to be meaningful. The Eighth Circuit Court of Appeals recently made exactly this observation in a student disciplinary case: "The plaintiffs were not given notice of this second charge. Ignorant of the scope of the matter under consideration, the plaintiffs' opportunity to present their side of the case was rendered meaningless."\(^{141}\) Since the "Buckley Amendment" to the General Education Provisions Act of 1974\(^{142}\) has now granted students access to their school files, revealing to students the underlying bases of their proposed dismissals should not unreasonably burden schools or universities.

The Eighth Circuit Court of Appeals decision in *Strickland v. Inlow*\(^{143}\) also suggests an additional restriction on the evidence presented at a school dismissal hearing. In *Strickland* the Court of Appeals found that there had not been any evidence of the alleged disciplinary violation introduced at the challenged disciplinary hearing and held that the students' rights to substantive due process required the introduction of at least some evidence in support of the decision.


\(^{139}\) See pp. 293–94, supra, and McCormack, supra note 102.

\(^{140}\) This suggestion of allowing the proceedings to be tape recorded has been made in Abbott, supra note 92, at 398, and such a tape recording of the school hearing was actually made and reviewed by the federal district court in Lukacs v. Curators of the Univ. of Missouri, No. 74 CV 109-C (W.D. Mo. July 23, 1974).

\(^{141}\) See also Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967), where the court specified as one of the requisites of due process in a school disciplinary proceeding the opportunity for either side to make a record of the hearing at their own expense.\(^{142}\)

\(^{143}\) Strickland v. Inlow, 519 F.2d 744, 747 (8th Cir. 1975).

\(^{142}\) 20 U.S.C.A. sec. 1232g.

of the school's position at the hearing.\textsuperscript{144} Such a requirement is also necessary to protect the usefulness of academic dismissal hearings and, as with the requirement that the school decide only upon the evidence actually presented at the hearing, the requirement should not be burdensome to comply with.

\section*{Right to Counsel}

The student's right to counsel is one of the most frequently litigated issues in the area of school disciplinary hearings today.\textsuperscript{145} Some commentators have been very enthusiastic about the benefits to be gained by the presence of counsel at disciplinary hearings: "The potential benefits of counsel seem so indisputable that denying the right to counsel should be presumed to disadvantage the student."\textsuperscript{146} Others have also been skeptical of the legitimacy of school interests said to outweigh the student's need for counsel: "The only colorable Administration interests in limiting counsel can be the fear of publicity harmful to it or the student, undue stress on legal technicality, or overly extensive attack on it by a lawyer unfeeling for the Administration's problems. These are not nearly justification to deny free choice of counsel to a student literally fighting for his academic life."\textsuperscript{147}

Both of the "landmark" cases in the school disciplinary area, \textit{Dixon v. Alabama State Bd. of Educ.}\textsuperscript{148} and \textit{Goss v. Lopez},\textsuperscript{149} have rejected such a requirement of counsel, however. It seems especially questionable whether an attorney will be (1) very helpful to all students facing academic dismissal, in light of the usual lack of an underlying factual dispute and absence of the strict procedural and evidentiary technicalities of the courtroom, or (2) conducive to the academic communication and discourse which should prevail at such an academic hearing.\textsuperscript{150}


\textsuperscript{146} \textit{Buss, supra} note 94, at 612.

\textsuperscript{147} \textit{Ryan v. Hofstra University}, 67 Misc. 2d 651, 673, 324 N.Y.S. 2d 964, 987 (Sup. Ct. 1971).

\textsuperscript{148} 294 F.2d 150, 159 (5th Cir.), \textit{cert. denied}, 368 U.S. 930 (1961).

\textsuperscript{149} 419 U.S. at 583.

\textsuperscript{150} One commentator has questioned whether such an ideal academic communicative process can ever exist at a school disciplinary hearing and therefore rejects arguments against counsel based on attempts to "preserve" such an atmosphere. "[M]uch would probably be gained by giving the student the dignity and self-respect which would result from clearly drawing sides, stating frankly that a serious matter is at issue, and indicating that the student must take
With a proper explanation of procedures and rights beforehand, and a tape of the proceedings to provide for meaningful judicial review,\textsuperscript{151} the “fundamental fairness” of many dismissal hearings can be preserved without the presence of an attorney. Although many schools do allow counsel to attend academic dismissal hearings,\textsuperscript{152} and there may be individual situations in which counsel is necessary to allow the student to adequately "characterize his conduct,"\textsuperscript{153} the fifth or fourteenth amendments do not mandate an across-the-board right to counsel in all academic dismissal hearings.

**Confrontation and Cross-Examination**

The rights to confrontation and cross-examination are two other hotly contested rights in school disciplinary cases\textsuperscript{154} which were both rejected as constitutionally mandated by Dixon and Goss.\textsuperscript{155} Those who argue that the right to cross-examination is essential to due process generally do so on the theory of Professor Wigmore that cross-examination is “[b]eyond any doubt the greatest legal engine ever invented for the discovery of truth.”\textsuperscript{156} However, as has been mentioned previously in the discussion of the right to counsel,\textsuperscript{157} the differences existent at an academic dismissal hearing are unlikely to involve disputed issues of fact. Thus the general relevance for

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\textsuperscript{151} See p. 37 and note 140, supra.

\textsuperscript{152} See, e.g., Lukacs v. Curators of the Univ. of Missouri, No. 74 CV 109-C, 8 (W.D. Mo. July 23, 1974). Counsel are also permitted to attend academic dismissal hearings at the Harvard Law School. Conversation of November 26, 1975 with Mary Upton, Registrar of the Harvard Law School.

\textsuperscript{153} Goss, 419 U.S. at 584. The Goss Supreme Court also recognized that unusual circumstances might demand fuller procedures than those specified in its opinion. Id. Such unusual circumstances might include the presence at the hearing of an attorney representing the school or an exclusionary hearing at the elementary or secondary school level of education where counsel or other representative may be essential to the coherence of the student’s presentation. On this later point see Mills v. Board of Educ., 348 F. Supp. 856, 881 (D.D.C. 1972).

\textsuperscript{154} See Buss, supra note 94, at 583–603 and cases collected therein.

\textsuperscript{155} The failure of the Goss majority to require such rights as confrontation, cross-examination, right to counsel and right to call witnesses have led some commentators to question the real significance of the decision: “Goss’ impact on educational practice should not be overestimated. ... [T]he majority emphasized that notice and hearing need amount to little more than informal student-administrator confrontation immediately after misconduct and immediately before suspension.” The Supreme Court, 1974 Term, 89 Harv. L. Rev. 86 (1975). Another commentator has said of Goss. “The student is guaranteed at least some type of informal hearing, generally to take place prior to suspension; but this is the only ‘guarantee’ the student possesses. This ‘guarantee’ might very easily be reduced to a mere formality void of meaningful due process protection.” 3 Fla. State U.L. Rev. 301, 308 (1975).

\textsuperscript{156} See p. 302–03, supra.
such hearings of cross-examination in its courtroom sense is questionable, although the student should certainly have the right to question all evaluations concerning him as part of the "informal give-and-take" of the proceedings.

The right of confrontation is a right which schools have sometimes argued is inapplicable to their proceedings because of their inability to subpoena witnesses. This argument has not, however, been held determinative by all the courts which have considered the issue in the context of school disciplinary hearings, and such decisions are indeed correct, since the teachers or professors involved are school employees and school subpoena power should therefore be unnecessary. In Gaspar v. Bruton, one of the recent court challenges to academic dismissals, the public school involved had itself granted the student the right to confront those upon whose evaluation the proposed dismissal was based. Such a decision is both educationally sound and constitutionally mandated, since any meaningful discussion of the actual merits of the evaluation received must include the teacher's own explanation of that evaluation. Thus students should have the right to require the presence at the dismissal hearing of the teachers upon whose evaluation the school has based its decision to dismiss the student.

**Right of Appeal**

The requirement of prediss dismissal hearings at the schools themselves will not in any way alter students' rights to challenge in the court dismissals which are believed to be arbitrary, capricious, or in bad faith. However, once prediss dismissal hearings are uniformly mandated, students must avail themselves of such hearings at their schools prior to resort to the courts. This division of functions is as it should be, for, as mentioned previously, the persons with the "academic expertise" will be making at least the initial determinations of fact. By so doing the school officials should help keep to a minimum the number of cases which the courts must hear and at the same time provide a record for review in those cases which do eventually reach the courts.

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158 Goss, 419 U.S. at 584.
161 "[T]eacher contracts might . . . be used as a technical basis for overcoming the lack of power to compel attendance of . . . teacher witnesses." Buss, supra note 94, at 597 n. 232.
162 513 F.2d 843 (10th Cir. 1975), discussed at p. 281, supra.
163 Id. at 846.
164 The standard for court review of academic dismissals established by Connelly, 244 F. Supp. at 161.
166 Pp. 288-89, supra.
A Concluding Comment Upon the Procedural Protections Required

Even if one believes that the courts should delineate very specific procedural guidelines with which to resolve future cases, a court could never be faced with the broad questions posed by this article as to whether there is ever a constitutional requirement of hearing prior to academic dismissal and the specific contours of any hearings which might be required. The preceding discussion of particular due process procedures should therefore be taken as the generalization that it is. For even the Goss Court—which lay down very specific procedural requirements—recognized the possibility that the procedures it mandated might have to be supplemented "in unusual situations." The generalized approach of this section of the article was adopted because of the difficulty in determining in the abstract what elements of due process may be functionally necessary in any particular hearing. It is also impossible to weigh in the abstract the seriousness of the consequences stemming from dismissal at the various levels of public education. Although this difficulty of abstract formulation of specific procedures remains, the approach adopted in this article—that of giving the student the procedures functionally necessary for the presentation of his case—should leave all of the hearing's participants with a feeling that justice has been done.

Conclusion

In the fifteen years since the decision in Dixon v. Alabama State Board of Education the courts of this country have increasingly come to realize that "However little courts may know about education or school discipline, they do know about fact-finding, decisionmaking, fairness, and procedure" and can thus formulate procedural protections for students which will not compromise the academic integrity or quality of our nation's public educational institutions. "Times—and the law—have changed," and student due process rights in academic dismissals—once labeled an "astonishing suggestion" by Professor Charles Allen Wright—must today be recognized as no less constitutionally mandated than student due process rights in dismissals for disciplinary reasons.

As educators themselves have stressed,

One of the purposes of colleges and universities is to seek the truth by objec-

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167 Judge Friendly has criticized such detailed judicial codes. Friendly, supra note 87, at 1301-03. Professor Henry Monaghan has recently stressed that any such implementations of constitutional provisions are subject to change and amendment by Congress. Monaghan, Forward: Constitutional Common Law, 89 HARV. L. REV. 1 (1975).
168 419 U.S. at 584.
169 See p. 27, supra.
170 294 F.2d 150 (5th Cir), cert. denied, 368 U.S. 930 (1961).
171 Buss, supra note 94, at 571.
172 Brief for the Children's Defense Fund and American Friends Service Committee as amici curiae at 19 in Goss.
173 Wright, supra note 81, at 1069.
tively weighing all the evidence before an evaluation is made. This is no more or
less than is required by the concept of due process. Certainly if ideas are worthy of
due process, then individual students should be worthy of the same. Anything less
is antithetical to the purpose and aim of higher education.174

 Anything less is also unconstitutional under the due process clauses of the
fifth and fourteenth amendments to the United States Constitution.

174 Young & Gehring, The Other Side of the Coin: Due Process in Academic Affairs, 1
NOLPE School L. J. 32, 37 (Spring, 1971).