

Survival in a Litigious Academic World

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I. PURPOSES

- A. *Academic freedom*
- B. *Admissions: nondiscrimination*
 - a. Race-conscious decisions
 - b. Disability-sensitive decisions
- C. *Academic and non-academic progress: due process safeguards*
- D. *Criminal background checks*
- E. *Withholding or revoking degrees*
- F. *Main theme: avoiding liability*

II. ACADEMIC FREEDOM

A. *What is academic freedom?*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹

1. “It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²
2. To justify curtailing a university’s right to govern based on the First Amendment’s freedom of speech and assembly, the government must have a “compelling state interest” that “cannot be achieved by less restrictive means.”³

B. *Why is academic freedom important?*

1. “The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth....

¹ U.S. Constitution, 1st Amendment (1789). Site visited April 23, 2006. Available online: <http://caselaw.lp.findlaw.com/data/constitution/amendment01/>

² *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). See generally Olivas, M.A. (1997). *The law and higher education: Cases and materials on colleges in court* (2nd ed.). Durham, NC: Carolina Academic Press.

³ *White v. Davis*, 533 P.2d 222 (S. Ct. Cal. 1975) (covert police surveillance at a university poses “a grave threat to the freedom of expression necessary for the preservation of the university”; to prevail the government must demonstrate a compelling state interest that is narrowly tailored to meet the state’s needs).

2. “Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”⁴
3. The educational enterprise
 - a. Fosters learning and creativity.
 - b. Fosters political discourse and participation (serves democracy).
 - c. Adds vitality and maturity to our society.

C. *To whom does academic freedom apply?*

1. Faculty academic freedom

“[A] teacher’s out of class statements on matters of public concern are entitled to considerable constitutional protection. Nevertheless, a teacher’s rights are not absolute and must be balanced against the interests of the state as an employer.”⁵
2. Institutional academic freedom
 - a. Courts are “reluctan[t] to trench on the prerogatives of state and local educational institutions [due to the courts’] responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment.’”⁶
 - b. “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, ...but also, ...on autonomous decisionmaking by the academy itself....”⁷

D. *Are there limits to academic freedom?*

1. “The ‘rights’ of the speaker are [-] tempered by a consideration of the rights of the audience and the public purpose served, or disserved, by the speech.”⁸
2. “[T]hough a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.”⁹

⁴ *Sweezy v New Hampshire*, 354 U.S. 234 (1957) (reversing a contempt order for a professor charged with subversive activity because he would not answer questions about prior expressions and associations).

⁵ *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979) (upholding a professor’s right “to inform his students of his personal political and philosophical views”). See also *Pickering v. Board of Education*, 391 U.S. 563 (1968) (reversing the dismissal of a professor who spoke out on a matter of public concern).

⁶ *Keyishian v. Board of Regents*, 385 U.S. 489, 603 (1967).

⁷ *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.).

⁸ *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) (the First Amendment does not protect a professor’s profanity in the classroom).

3. Are First Amendment rights absolute? No. Constitutional analysis requires a balancing of interests, e.g.,
 - a. University – Government
 - b. University – Faculty
 - c. University – Students
 - d. Faculty – Students

4. For example, First Amendment jurisprudence holds
 - a. Covert police surveillance impermissible.¹⁰
 - b. Military recruitment on campus permissible.¹¹
 - c. Professor’s profanity in the classroom impermissible.¹²
 - d. Professor’s speech on matters of public concern permissible.¹³
 - e. NB: University’s interests may supersede the individual faculty member’s interests.

5. Balancing of interests
 - a. University may set standards for admission and progress, but university’s interests are not absolute.
 - b. Faculty academic freedom is not absolute, and must be balanced with the “academic norms” of the academy at large, as well as the university-as-employer, and students’ interests in learning.
 - c. Students do not ‘leave their constitutional rights at the schoolhouse door’; students have legally-protectible interests in their education, and universities must treat students fairly.

III. ADMISSIONS: NONDISCRIMINATION DURING THE ADMISSIONS PROCESS

A. *Educational pluralism (diversity): Equal protection clause*

1. U.S. Constitution, Equal Protection Clause

“Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

⁹ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (quota-based admissions policy favoring less-qualified minority candidates impermissibly infringed on the Fourteenth Amendment due process rights of qualified applicants).

¹⁰ *White v. Davis*, 533 P.2d 222 (S. Ct. Cal. 1975).

¹¹ *Rumsfeld v. Forum for Academic and Institutional Rights*. No. 04-1152 (S. Ct., March 6, 2006) (finding the “Solomon Amendment” 10 U.S.C. § 983 (Supp. 2005) constitutional and not violative of the academy’s First Amendment rights: “... the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do* – afford equal access to military recruiters—not what they may or may not *say*”; discussing “symbolic speech,” and “right of expressive association”).

¹² *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986).

¹³ *Pickering v. Board of Education*, 391 U.S. 563 (1968).

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.**¹⁴

2. The Civil Rights Act of 1964, as amended, applies to both public and private universities receiving federal monies.

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁵

3. Other relevant provisions of the United States Code articulate the nondiscrimination principle¹⁶

- a. § 1981. Equal rights under the law.¹⁷

- b. § 1983. Civil action for deprivation of rights.¹⁸

4. Judicial opinions

- a. Educational pluralism is a permissible goal; in fact, it is a “compelling state interest” (this means that the courts will examine the public university’s interests with “strict scrutiny,” i.e., will require that the *means* are “narrowly tailored” to the *interests/goals* of the academy).

- b. Considering race and ethnicity is permissible as long as race is not “decisive” and the system is “flexible enough to consider all pertinent

¹⁴ U.S. Constitution, XIVth Amendment (1868). Site visited April 19, 2006. Available online: <http://caselaw.lp.findlaw.com/data/constitution/amendments.html#f6>

¹⁵ Title VI, 42 U.S.C. §§ 2000d et seq., was enacted as part of the landmark Civil Rights Act of 1964. It prohibits discrimination on the basis of *race, color, and national origin* in programs and activities receiving federal financial assistance. Title IV of the Civil Rights Act addresses desegregation in public schools and colleges.

¹⁶ For an overview of enforcement of nondiscrimination in educational settings, see U.S. Department of Justice, Civil Rights Division, Educational Opportunities, Overview. Site visited April 24, 2006. Available online: <http://www.usdoj.gov/crt/edo/overview.htm>.

¹⁷ 42 U.S.C. §1981. Available online: http://www4.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00001981----000-.html “(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

¹⁸ 42 U.S.C. § 1983. Available online: http://www4.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00001983----000-.html “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

elements of diversity in light of the particular qualifications of each applicant.”¹⁹

- c. “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”²⁰
- d. The equal protection clause of the Fourteenth Amendment is violated if the applicant is “[unable] to compete on an equal footing...” To add points on the base of racial or ethnic classification is impermissible.²¹
- e. Narrowly tailored racial preference is constitutionally permissible under the Equal Protection Clause, as well as Title VI and § 1981 if race is *one factor among many* regarding an individualized review of applications. Quotas and separate admissions tracks are not permissible.²²

5. Avoiding liability

- a. Do not use quotas.
- b. Do not add “points” for the racial or ethnic classification of the applicant.
- c. Do not establish separate admission committees for subgroups.
- d. Identify “diversity factors” that advance the values of the university; for example, in addition to academic achievements, identify life experiences and challenges, special talents such as music, sports, language, community service, academic awards, travel experiences, or other evidence of personal or cultural breadth.²³
- e. Make case-by-case judgments.

¹⁹ *University of California Regents v. Bakke*, 438 U.S. 265, 317 (1978) (sustaining a qualified white student's challenge to the racial quota system used by Davis Medical School, where the medical school could not show Bakke would not have been admitted with a racially-blind program; the school may consider race but it is not permitted to have a separate admissions committee for minorities; the Court ordered Davis to admit Bakke). See also Garfield, L.Y. (2005). Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom. 83 *Nebraska Law Review* 631.

²⁰ *Bakke*, 438 U.S. at 307.

²¹ *Gratz v. Bollinger*, No. 02-516 (S. Ct., June 3, 2003) (invalidating the University of Michigan's undergraduate admissions policy that granted 20 points automatically to applicants representing underrepresented minorities).

²² *Grutter v. Bollinger*, No. 02-241 (S. Ct., June 23, 2003) (“The Court is [-] satisfied that, in the context of individualized consideration of the possible diversity contributions of each applicant, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.)

²³ The *Bakke* court, *supra* note 19, identified qualities that could potentially promote educational pluralism: “exceptional personal talents, unique work or serve experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”

B. *Disability access: Statutory protections for individuals with disability*²⁴

1. Federal law

- a. Section 504 of the Rehabilitation Act of 1973²⁵ prohibits discrimination based on disability regarding access to programs receiving federal funds, private or public.
- b. Title II of the Americans with Disabilities Act of 1990 prohibits discrimination based on disability by governmental (public) entities, including educational institutions.²⁶
- c. Title III of the Americans with Disabilities Act of 1990 prohibits discrimination based on disability considered to be public accommodations, including private educational institutions.²⁷
- d. Section 504, like the ADA, “does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications of their programs to allow disabled persons to participate.”

“Section 504 requires only that an ‘otherwise qualified handicapped individual’ not be excluded from participation in a federally funded program ‘solely by reason of his handicap,’ indicating that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.”²⁸

2. Statutory definitions 28 C.F.R. s. 35.104

- a. “Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”

²⁴ U.S. Department of Justice, Civil Rights Division, Disability Rights Section (2005, September). A Guide to Disability Rights Law. Available at: <http://www.ada.gov/cguide.htm> Site visited April 17, 2006. See generally Rothstein, L. (2004). Disability Law and Higher Education: A Road Map For Where We've Been and Where We May Be Headed. 63 *Maryland Law Review* 122.

²⁵ 29 U.S.C. § 794, as amended; 34 C.F.R. Part 104 (Department of Education). Site visited April 24, 2006. Available online: http://www.access.gpo.gov/nara/cfr/waisidx_01/34cfr104_01.html

²⁶ 42 U.S.C. §§ 12101 et seq.; Title II, 28 C.F.R. Part 35 (Department of Justice). Site visited April 24, 2006. Available online: http://www.access.gpo.gov/nara/cfr/waisidx_01/28cfr35_01.html

²⁷ 42 U.S.C. §§ 12101 et seq.; Title III, 28 C.F.R. Part 36 (Department of Justice). Site visited April 24, 2006. Available online: http://www.access.gpo.gov/nara/cfr/waisidx_01/28cfr36_01.html

²⁸ *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (finding that exclusion of an individual with a severe hearing loss from a nursing program did not violate Section 504. The term ‘handicapped individual’ under the act means “any person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.” 29 U.S.C. § 706(6)).

- b. Physical or mental impairment
 - (1)(i) “The phrase physical or mental impairment means –
 - A. “Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular...;
 - B. “Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

- c. Major life activity

(2) “The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”

- 3. Do all impairments qualify as a disability? No.

- a. In the absence of a diagnosis of physical or mental impairment that substantially limits a major life function, not all impairments qualify as a disability, e.g., difficulty conceptualizing material on an examination does not fall within the definition of a disability within the meaning of the ADA.²⁹

- 4. Do mitigated impairments qualify? (Recent line of cases (employment context))

“Looking at the (ADA) Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether a person is ‘substantially limited’ in a major life activity [SLMLA] and thus ‘disabled’ under the Act.”³⁰

- a. The *Sutton* court found no discrimination against two individuals who were denied jobs as pilots because they did not meet the minimum uncorrected visual acuity requirement of 20/100 or better.
- b. The mitigated state is relevant to determining whether the impairment causes a substantial limitation in a major life activity that substantially limits a major life activity.
- c. The two would-be pilots were not disabled under the ADA.

- 5. Who is qualified for the academic program?

The applicant who meets program’s academic and technical standards *and*:

²⁹ *Tips v. The Regents of Texas Tech University*, 921 F. Supp. 1515, 1516 (1996).
³⁰ *Sutton v United Air Lines*, No. 97-1943 (S. Ct., June 22, 1999).

- a. Has no impairment that substantially limits a major life activity (not disabled).
- b. Has an impairment that does not substantially limit a major life activity because it is mitigated (e.g., eyeglasses, medication) (not disabled).
- c. Has an impairment that substantially limits a major life activity (is disabled) but can achieve the requirements of the program with reasonable accommodations.

6. What are reasonable accommodations?

Reasonable accommodations are not expected, by law, to:

- a. Fundamentally alter the program (e.g., lower the standards of performance, or require substantial changes).
- b. Impose an undue burden on the program (e.g., financial).

7. Judicial opinions

- a. “A ‘[qualified] handicapped person’ is ...a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school’s] education program or activity...”³¹
- b. “[T]he inability to conceptually organize material on a[n examination] does not fall with[in] the definition of a ‘disability’ within the meaning of the ADA or the Rehabilitation Act of 1973 because that alleged ‘disability’ is not a physical or mental disability that substantially limits one or more major life functions.”³²
- c. “The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting.”³³
- d. “Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.”³⁴
- e. Institutions receiving federal funds are required to make reasonable accommodations, but are not required to make fundamental or substantial changes.³⁵

³¹ 45 C.F.R. § 84.3(k)(3) (1978). Site visited April 24, 2006. Available online:

http://www.access.gpo.gov/nara/cfr/waisidx_01/45cfr84_01.html

³² *Tips v. The Regents of Texas Tech University*, 921 F. Supp. 1515, 1516 (1996).

³³ The idea that “...persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether a person is ‘substantially limited’ in a major life activity and thus ‘disabled’ under the Act.” *Sutton v. United Air Lines*, U.S. Supreme Court, No. 97-1943 (June 22, 1999) (finding no discrimination against two individuals who were denied jobs as pilots because they did not meet the minimum uncorrected visual acuity requirement of 20/100 or better).

³⁴ *Southeastern Community College v. Davis*, 442 U.S. 397, 414 (1979).

- f. “Accommodation is not reasonable if it either imposes ‘undue financial and administrative burdens’ on a grantee or requires ‘a fundamental alteration in the nature of [the] program.’”³⁶
 - g. Although an affirmative “duty to investigate” whether accommodations would benefit the disabled applicant is not in the language of Section 504,³⁷ “...there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.”³⁸
 - h. “[C]onsiderable judicial deference must be paid to academic decisions made by the institution itself unless it is shown that the standards serve no purpose other than to deny an education to the handicapped.”³⁹
8. Each student’s responsibilities
 - a. Notify universities of their disability (unlike students governed by the IDEA).
 - b. Meet both academic and technical standards.
 - c. Request accommodations.
 9. Each university’s responsibilities

³⁵ [This line of cases strike] “a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interest of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make a ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, it may be required to make ‘reasonable’ ones.” *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712 (1985), cited in *Ohio Civil Rights Commission v. Case Western Reserve University*, 666 N.E.2d 1376 (Ohio, 1996) (upholding the university’s decision to deny a blind candidate’s application for admission to medical school). Applicants and matriculated students bear the responsibility of informing the institution that an accommodation is (or might) be needed. Inferred by the court in *Tips v. The Regents of Texas Tech University*, 921 F. Supp. 1515, 1518, citing 29 I.E. § 1630.9 App. (1992).

³⁶ *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 (1987) (to avoid deprivations “based on prejudice, stereotypes, or unfounded fear,” a candidate’s qualifications should in “most cases” be made as an “individualized inquiry into the relation between the requirements of the program and the abilities of the individual” *Arline*, 480 U.S. at 287)).

³⁷ The dissenting judge in *Case Western Reserve* wrote: “It should be obvious to any reasonable person that in order to give meaningful consideration to whether reasonable accommodations would enable a [handicapped person] to effectively complete the [educational] program, the [program] must explore the nature and benefit of available methods of accommodating [the disability in question].” [duty to investigate]. *Ohio Civil Rights Commission v. Case Western Reserve University*, 666 N.E.2d 1376, 1387, 1389 (Ohio, 1996) (Resnick, J., dissenting).

³⁸ *Wynne v. Tufts University School of Medicine*, 932 F. 2d 19, 20-21 (1st Cir. 1991) (“If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result in lowering academic standards or requiring substantial program alteration, the court could rule a as matter of law that the institution had met its duty of seeking reasonable accommodation,” at 23) (remanding a case involving a dyslexic medical student to the lower court, because the university’s record was insufficient as to possible alternatives, why Type K questions were necessary to evaluate essential knowledge and abilities, and when the decisions about reasonable accommodations had been made, or who made them).

³⁹ *Ohio Civil Rights Commission v. Case Western Reserve University*, 666 N.E.2d 1376 (Ohio, 1996), citing *Doe v. New York University*, 666 F.2d 761, 776 (C.A.2, 1981).

- a. Provide a procedure for disability review.
- b. Investigate available accommodations (duty to investigate).
- c. Provide accommodations if they are reasonable.
- d. Carry out its responsibilities conscientiously, and provide a factual record if challenged.

10. Avoiding liability

- a. Know applicable federal and state law.⁴⁰
- b. Disseminate accurate and truthful information to the public (brochures, websites) about minimum academic qualifications.
- c. Disseminate accurate and truthful information to the public (brochures, websites) about minimum technical requirements.
- d. Have explicit admissions policies and procedures, and follow them.
 - i. State objective benchmarks regarding minimum admissions criteria.
 - ii. Establish guidelines for weighing subjective features of each applicant, and a method of achieving a consensus of faculty examiners.
 - iii. Make an individualized inquiry as to applicants' qualifications.
 - iv. Ideally, examine qualifications without knowledge of disability.
- e. Notify applicants and matriculated students that they bear the responsibility for informing the institution that an accommodation is (or might) be needed
 - i. An impartial institutional official should verify the presence, nature and degree of disability determinations.
 - ii. Upon a finding of a disability, the disability officer and program should investigate possible alternatives for accommodating the disabled applicant, such as advanced technology, in light of the program's standards and requirements.
 - iii. Establish a policy regarding new or temporary activity limitations, including responsibility of student to notify the faculty; nature and duration of

⁴⁰ U.S. Department of Education (2005, 8 March). Disability Discrimination: Overview of the Laws. Available at: <http://www.ed.gov/print/about/offices/list/ocr/disabilityoverview.html> Site visited April 16, 2006. See also Cornell Law School's Legal Information Institute. (2005, 28 October). Category: Overview. Available at: <http://www.law.cornell.edu/wex/index.php/Category:Overview> .

the limitation; the need for medical documentation;
impact on attendance or progress.

IV. ACADEMIC AND NON-ACADEMIC PROGRESS: DUE PROCESS SAFEGUARDS

A. *What is “due process”?*

1. Right to notice and an opportunity to be heard,⁴¹ i.e., to “respond, explain, and defend.”⁴²
2. U.S. Constitution, Fourteenth Amendment.

“Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, **without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴³

B. *What factors are associated with due process in courts of law?*

1. The student’s interest potentially affected by official action (property interest⁴⁴; liberty interest⁴⁵).
2. The “magnitude of interference” with the student’s interest.⁴⁶
3. The risk of an erroneous decision.
4. The potential administrative burdens on the institution associated with due process proceedings.

⁴¹ See also *Goss v. Lopez*, 419 U.S. 565 (1975). “The Due Process Clause...forbids arbitrary deprivations of liberty” (e.g., a person’s good name, reputation, honor, or integrity); “[Y]oung people do not ‘shed their constitutional rights’ at the schoolhouse door...” (holding that students are entitled to due process in disciplinary proceedings).

⁴² *Gorman v. University of Rhode Island*, 837 F.2d 7, 13 (1st Cir. 1988). “Due process does not guarantee any particular form of procedure; it is only intended to protect substantial rights.” *Reilly v. Daly*, 666 N.E.2d 439 (Ind. 1996) (citing *Hill v. Trustees of Indiana University*, 537 F.2d 248, 252 (7th Cir. 1976)).

⁴³ U.S. Constitution, XIVth Amendment (1868). Site visited April 19, 2006. Available online: <http://caselaw.lp.findlaw.com/data/constitution/amendments.html#f6>

⁴⁴ *Goss v. Lopez*, 419 U.S. 565 (1975). If a state creates a compulsory public school system, students have a “property interest” in their education; therefore, the school board cannot suspend or expel a student for misconduct “without adherence to the minimum procedures required [by the due process clause],” namely notice and an opportunity at a hearing to challenge the information.

⁴⁵ *Goss v. Lopez*, 419 U.S. 565 (1975). “The Due Process Clause also forbids arbitrary deprivations of liberty. “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” the minimal requirements of the Clause must be satisfied.” *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

⁴⁶ *Clayton v. Trustees of Princeton University*, 608 F. Supp. 413 (1985).

5. Whether the institution follows its own rules; if not, whether the institution has good reasons for departing from its own rules.
6. The likelihood that the institution's established procedures will safeguard the student's interests.⁴⁷
7. Whether the decisions are made "conscientiously and with careful deliberation, based on an evaluation of the entirety of [the student's] career."⁴⁸

C. *Due process is more stringent regarding non-academic matters than academic matters*

1. Academic decisions: clear notice + fundamentally fair; not arbitrary or capricious.⁴⁹
2. Academic misconduct: same.
3. Non-academic (disciplinary) decisions: same; notice and opportunity to be heard; generally including an opportunity to appeal.⁵⁰

D. *Avoiding liability*

1. Have a "rational basis" for any decision (probation, suspension, dismissal).
2. Articulate procedures, and follow them.⁵¹
3. Avoid decisions motivated by bad faith or ill will unrelated to academic performance.

⁴⁷ *Id.*

⁴⁸ *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986) (citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 513 (1985)).

⁴⁹ "Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978). In an important case involving an academic dismissal, the U.S. Supreme Court explained that a property interest must be created by state law (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); the University of Michigan's refusal to allow Ewing to retake a board examination was not actionable as a property claim; nevertheless, the Court reviewed the decision to be sure it was not "a substantial departure from accepted academic norms," and that the academic promotions committee exercised professional judgment. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985).

⁵⁰ "Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978).

⁵¹ *Lightsey v. King*, 567 F. Supp. 645 (1983). "Although courts have declined to review the merits of decisions made within the area of discretion delegated to administrative agencies, they have also insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations must be followed even where discretionary decisions are involved." *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969)).

4. Use procedures that are consistent with accepted academic norms.
5. Exercise professional judgment.⁵²

V. CRIMINAL BACKGROUND CHECKS [CBCs] BEFORE AND AFTER MATRICULATION

A. *Issue*

The need to do criminal background checks on students, supervisors and certain licensed health care professionals depends on state law, or in response to institutional policy of clinical sites (as contractually agreed in affiliation agreements)⁵³ and implicates both academic progress and potentially, Honor Code violations and/or criminal law.

B. *Policy reasons to forgo initial enrollment, or revoke enrollment based on “CBCs”*

1. Provide safe student residence halls and campus environment.
2. Exclude from access to certain academic programs, particularly if the nature of the criminal history precludes placement at clinical sites or impairs ultimate credentialing or licensure.
3. Assure the safety and well-being of patients.
4. Reduce liability exposure for the institution and affiliated sites.⁵⁴

C. *Governing law, regulations and policies*

1. State law and regulations governing health care institutions.⁵⁵
2. Federal law, e.g., Drug-Free Workplace Act of 1988.⁵⁶

⁵² Complaint by student of “frivolous or malicious” dismissal for academic reasons was dismissed. *Ellison v. Bd. of Regents of the Univ. Sys. of Ga.*, 206 U.S. Dist. LEXIS 13658 (S.D. Ga., March 13, 2006) (relying on *Horowitz* and *Ewing*, *supra* note 49).

⁵³ National Association of College and University Attorneys. (2006, 10 March). Student Criminal Background Checks. NACUANOTES 4 (1). Site visited April 9, 2006. Available at <http://www.nacua.org/nacualert/memberversion/StudentCrimBckgndChks.asp>

⁵⁴ See, e.g., Association of American Medical Colleges. (2005). Group on Student Affairs Recommendations regarding Criminal Background Checks for Medical School Applicants. Site visited April 9, 2006. Available at: www.aamc.org

⁵⁵ E.g., S.C. Department of Health and Environmental Control, Division of Health Licensing. (2006, 12 January). Criminal Record Check Procedures. Site visited April 9, 2006. Available at: <http://www.scdhec.gov/hr/licen/memo1g.htm>

⁵⁶ Applicable to some Federal contractors and all Federal grantees, the Drug-Free Workplace Act of 1988 (Public Law 100-690, 41 U.S.C. §§ 701 to 707 (“employees of such entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance”). Available at http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000701----000-.html

3. Institutional policies, e.g., private and public universities; health care facilities.
4. Institutional accreditation and licensing.

*D. Judicial opinions regarding challenges to CBCs (?)*⁵⁷

E. Notes

1. “JCAHO standards currently do not independently require healthcare organizations to conduct criminal background checks of staff, volunteers, or students in order for a healthcare organization to attain accreditation. Only where law, regulation, or organization policy requires such checks on staff, students, or volunteers does JCAHO expect them to be conducted by the health care organization in compliance with that law, regulation, or policy.”⁵⁸
2. “Nothing in [the Federal Educational Rights to Privacy Act, FERPA] or the Higher Education Act of 1965 shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student (who is under the age of 21), information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student’s education record, ...”⁵⁹

F. Avoiding liability regarding criminal background checks (CBCs)

1. Know your state’s law regarding CBCs and licensure of individuals and facilities.
2. Know your state’s Department of Health jurisdiction and procedures regarding CBCs.
3. Write clear institutional policies about CBCs.⁶⁰
4. Notify students about the CBC policy at the time of application, and at the time of matriculation.

⁵⁷ The author of this presentation did not find cases involving student challenges to CBCs; it is possible that searches of legal databases in the pre-licensing or pre-employment context could be enlightening.

⁵⁸ National Association of College and University Attorneys, *supra* note 47, citing JCAHO, Requirements for Criminal Background Checks. Site visited: April 17, 2006. Available at: <http://www.jointcommission.org/AccreditationPrograms/Hospitals/Standards/FAQs/Manage+Human+Res/Planning/background.htm> .

⁵⁹ 1998 FERPA Amendments Regarding Alcohol and Drug Violation Disclosures, § 952(i)(1), 20 U.S.C. § 1232g(b). National Center for Higher Education Risk Management. Site visited May 2, 2006. Available at <http://www.nchem.org/legal-1998-ferpa2.html>

⁶⁰ *E.g.*, The University of Tennessee Health Science Center (2005, 15 September). Policy on Criminal Background Check UTHSC Students. Site visited April 9, 2006. Link to this policy available at: <http://www.nacua.org/nacualert/memberversion/StudentCrimBckqndChks.asp>

5. Review CBC information fairly.

“No information derived from a criminal background check [should] automatically disqualify any accepted applicant from [-] matriculation. A final decision about matriculation should be made only after a careful reviewed, based on institutional policies and procedures...”⁶¹
6. State your policy regarding CBCs in affiliation agreements.
7. Know the CBC policies of your affiliation sites.
8. Obtain written consent from the student before releasing summary of CBCs to affiliated sites.
9. Enforce the CBC policy rigorously and fairly.

VI. WITHHOLDING OR REVOKING DEGREES

A. *Courts have upheld universities decisions to withhold degrees for academic reasons (e.g., failure to fulfill a dissertation requirement)*⁶²

1. Academic deficiencies (e.g., failure to pass comprehensive examinations) provide a reasonable ground to withhold an academic degree.⁶³
2. Both public and private universities are required to use fair procedures (in the public university setting, constitutional “due process” is required to assure that decisions are not arbitrary or capricious; in the private university setting, basics principles of “good faith and fair dealing” are required).
3. Courts defer to the professional judgment of institutions, as long as institutions follows their own procedures and are fundamentally fair.
4. Requirements for procedural safeguards are less stringent in academic than in non-academic disputes.

B. *Courts have upheld universities’ decisions to withhold, delay, or revoke degrees for non-academic reasons.*

1. Rationale

“Academic degrees are a certification to the world at large of the recipient’s educational achievement and fulfillment of the institution’s standards. To hold that a university may never withdraw a degree, effectively requires the

⁶¹ See, e.g., Association of American Medical Colleges. (2005). Group on Student Affairs Recommendations regarding Criminal Background Checks for Medical School Applicants (Item 7.) Site visited April 9, 2006. Available at: www.aamc.org

⁶² *Cieboter v. O’Connell*, 236 So. 2d 470 (Fla. Dist. Ct. App. 1970).

⁶³ *Horowitz*, see *supra* note 49 and surrounding text.

university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified.”⁶⁴

2. Expulsion or withholding a degree after academic requirements have been achieved requires a higher standard of procedural protection than regular academic progress decisions.⁶⁵
3. Similarly, revocation of degrees requires a higher standard of procedural protection, including a hearing.⁶⁶ Revocation for non-academic reasons are new to the court, and based on prior cases involving suspension or dismissal for misconduct, “safeguards must be firmly in place to protect former students.”⁶⁷
4. Reasons universities have delayed or revoked degrees.
 - a. Failure to satisfy graduation requirements⁶⁸
 - b. Disciplinary violations⁶⁹
 - c. Plagiarism (academic fraud)⁷⁰
 - d. Embezzlement⁷¹
 - e. Murder⁷²
 - f. Alleged immoral conduct⁷³

⁶⁴ *Waliga v. Kent State University*, 488 N.E.2d 850, 872 (Ohio 1986), cited by the *Goodreau* court, and discussed by Butcher, J.L. (2001). *MIT v. Yoo: Revocation of Academic Degrees for NonAcademic Reasons*. 51 *Case Western Reserve Law Review* 749, at 758-759.

⁶⁵ *Corso v. Creighton University*, 731 F. 2d 529, 533 (1984) (finding that the expulsion for alleged cheating was improper because the university failed to provide the student a hearing, even though this was his right as articulated in the student handbook). Discussed by Butcher *supra* note 64.

⁶⁶ *Waliga v. Kent State University*, 488 N.E.2d 850 (Ohio 1986) (permitting the university to revoke degrees from two students who had not satisfied degree requirements). “The Waliga court held that a hearing must be held prior to the revocation, and it must be ‘a fair hearing at which [the student] can present evidence and protect his interest.’” Butcher *supra* note 64, at 758.

⁶⁷ Butcher, *see supra* note 64.

⁶⁸ *Waliga v. Kent State University*, 488 N.E.2d 850 (Ohio 1986) (revoking degrees after showing the students had not satisfied substantive degree requirements).

⁶⁹ *People ex rel. O’Sullivan v. New York Law School*, 22 N.Y.S. 663 (N.Y. Sup. Ct. 1983) (nature of offense unspecified).

⁷⁰ *Napolitano v. Princeton University*, 453 A.2d 263 (N.J. Super. Ct. 1982) (plagiarism); *Faulkner v. University of Tennessee*, No. 01-A-01-9405-CH-00237, 1994 Tenn. App. LEXIS 651, at 2 (Nov. 16, 1994) (revoking a doctorate from a student who had plagiarized), cited by Billings, R. (2004). Plagiarism in Academia and Beyond: What is the Role of the Courts? 38 *University of South Florida Law Review* 391 (note 25).

⁷¹ *Goodreau v. Rector, University of Virginia*, 116 F. Supp. 2d 694 (W.D. Va. 2000). After graduation, the university discovered that Goodreau had embezzled funds from a student organization; he later pled guilty to misdemeanor embezzlement; the Honor Committee’s bylaws stated that it had jurisdiction up to two years after the alleged offense. Importantly, the court stated: “...Goodreau has sufficiently alleged facts that would allow a reasonable jury to find that he did not receive proper notice from the University regarding degree revocation. In order for notice to be sufficient under the Constitution, it must inform not only of the charge, but also of the possible sanctions that may be imposed.” *Goodreau*, at 704.

⁷² See also *Harwood v. Johns Hopkins University*, 747 A.2d 205 (Md. App. 2000), appeal denied, 759 A.2d 231 (Md. 2000) (withholding a degree from a student after he pled to murder, even though he had fulfilled all academic requirements).

⁷³ Butcher, *supra* note 64 (reporting the case of Yoo, a fraternity brother allegedly involved in the death of a pledge; although never indicted, MIT revoked his degree for five years; Yoo filed suit in 1999 “claiming that the university violated its own rules as well as the concept of fundamental fairness in revoking his degree”).

VII. SUMMARY

A. *First Amendment.*

Courts are deferential to academic and administrative decisions.

B. *Fourteenth Amendment and related statutes.*

Due process and equal protection principles protect students' rights to liberty and property, and equal opportunity to access educational benefits.

C. *Liability can be minimized by taking precautions.*

1. Have written policies that properly balance academic freedom and individual rights.
2. Assure due process as required by the context, i.e., increasing the level of due process protection, from less to more, in order:
 - a. Academic progress;
 - b. Academic misconduct;
 - c. Non-academic disciplinary matters.
3. Know nondiscrimination and disability law.
4. Place students on notice as to academic progress and honor code issues, as well as non-academic disciplinary matters.
5. Place students on notice as to conduct that could lead to probation, suspension, expulsion, as well as delay, denial or revocation of an academic degree, as well as to the university's asserted jurisdictional reach, i.e., before, during, or after fulfillment of graduation requirements.
6. Apply all policies as written.
7. Be fundamentally fair in all dealings with students.
