

DUE PROCESS ON CAMPUS: WHERE DO PROCEDURAL RIGHTS COME FROM, AND WHAT DO THEY REQUIRE?

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I. AN OVERVIEW OF THE CURRENT CONFUSION

Student discipline cases on public university campuses, whatever their specific nature, arise with remarkably great frequency.¹ Curiously, though, there is

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¹ For a sense of the frequency of campus sexual misconduct cases, whether proceeding to any formal investigation and sanctioning stage or not, see DAVID CANTOR ET AL., ASS'N OF AM. UNIV., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT vii–viii (2019), www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019 [perma.cc/KX93-D4FU]. There was, as well, the rise of campus disciplinary cases related to COVID-19 policy violations. See, e.g., Cleo Krejci, *Hundreds of Students Disciplined at the University of Iowa, in Some Cases over Conduct at Iowa City's Bars*, IOWA CITY PRESS-CITIZEN (Oct. 13, 2020, 8:40 PM), www.press-citizen.com/story/news/education/university-of-iowa/2020/10/13/university-iowa-student-discipline-coronavirus-violations/3560295001/ [perma.cc/YZ9M-KX8K]. For a response thereto by several suspended students at a private university, see Evan Simko-Bednarski, *NYU Students Sue to Reverse Coronavirus Discipline*, CNN (Oct. 16, 2020, 5:54 PM) www.cnn.com/2020/10/16/us/nyu-covid-suspension-suit/index.html [perma.cc/W433-68UU]. For a representative public campus COVID disciplinary policy, see the University of Virginia's distinctions among minor violations, serious violations, and widespread violations, as outlined at *SEC-045: COVID-19 Health & Safety Requirements—Vaccination, Prevalence Testing, Face Masks, Physical Distancing, Events and Gatherings, and Visitors*, POL'Y DIRECTORY UNIV. OF VA., <https://uva>

nothing approaching a consensus on the source of any possible procedural due process rights to which public university students may be entitled.² This Article considers first the competing views as to the source of any such due process hearing rights.³ As it turns out, the most defensible such view⁴ focuses on the most basic and most important functions of property rights in general. This functional approach provides valuable guidance not only in determining the circumstances under which any such due process rights should attach,⁵ but also in determining the proper character of any constitutionally required hearing under the particular circumstances in question.⁶

In all significant post-secondary public school discipline cases, it turns out, the absence of any state law, in any form, establishing any relevant property or liberty interest can and should be ignored. The public university's own nature and functions, in light of the most basic functions of any legitimate system of property rights, provide sufficient grounding for legitimate claims to some form of procedural due process. No further state law, of any sort, should be required to trigger a due process hearing. The basic functions of a broad institution of property, as held by accused persons and other affected members of the college community, then also provide guidance in applying the Court's judicial tests as to the nature and timing of any campus disciplinary hearing.

One might suppose that a question as fundamental and important as that of the source, or sources, of public university student procedural due process rights would by now have been long resolved. But as recent case law acknowledges, this is clearly not the case.⁷ The Supreme Court has, of late, been generally of limited help. For a sense of the competing approaches to the sources of due process rights, we must instead start with recent lower court cases such as

policy.virginia.edu/policy/SEC-045 [perma.cc/58VP-DM76] (Aug. 18, 2021). Of course, campus disciplinary cases in general comprise a wide range of subjects and contexts.

² See, for example, the federal circuit and state law-based differences in this regard surveyed in *Doe v. White*, 440 F. Supp. 3d 1074, 1085–88 (N.D. Cal. 2020) and *Doe v. Purdue Univ.*, 928 F.3d 652, 659 n.2 (7th Cir. 2019) (citing Dalton Mott, Comment, *The Due Process Clause and Students: The Road to a Single Approach of Determining Property Interests in Education*, 65 U. KAN. L. REV. 651, 659–60 (2017)). See also Trevor R. Byrd, Note, *Traversing the Due Process Tightrope: How Colleges and Universities Are Struggling to Implement Equitable Sexual Assault Adjudications*, 55 WILLAMETTE L. REV. 187, 196–98 (2018).

³ See *infra* Part II.

⁴ See discussion on the multiple fundamental purposes of property *infra* Part II.

⁵ See *infra* Parts II–III.

⁶ See *infra* Part III. See generally Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN STATE L. REV. 1001 (2016) (focusing on the nature and timing of such hearings).

⁷ See authorities cited *supra* note 2.

Doe v. White,⁸ a § 1983⁹ case arising from a university's Title IX¹⁰ investigation of the accused student's conduct.¹¹

The opinion in *White* observed that “the Ninth Circuit has not squarely addressed whether there is a property or liberty interest in continued attendance in higher education, under California law or the law of any other state.”¹² Some Ninth Circuit district courts have found a relevant property right on some theory,¹³ while others have not.¹⁴ Beyond the Ninth Circuit, *White* then notes, there are actually several dimensions of continuing murkiness in this context. In particular, while the First Circuit¹⁵ and the Sixth Circuit¹⁶ have agreed in finding the Due Process Clause applicable to public university and professional school disciplinary cases,¹⁷ the relevant decisions “do not specify whether the protected interest is a liberty interest or arises from a property right (and if the interest stems from property, the courts do not identify the source of that property right).”¹⁸

More determinately, on the other hand, the Tenth Circuit¹⁹ and the Eleventh Circuit²⁰ have found a protectable property interest, triggering due process, stemming from one form or another of state constitutional, statutory, or regulatory law.²¹ The court in *White* then noted the extension of this approach by the Second Circuit,²² which recognizes a relevant property interest arising from an

⁸ *Doe v. White*, 440 F. Supp. 3d 1074 (N.D. Cal. 2020).

⁹ See 42 U.S.C. § 1983.

¹⁰ See 20 U.S.C. § 1681.

¹¹ See *White*, 440 F. Supp. 3d at 1075–76.

¹² *Id.* at 1084–86 (citing, e.g., *Austin v. Univ. of Or.*, 925 F.3d 1133, 1139 (9th Cir. 2019) (merely assuming, without declaring, the presence of relevant student property and liberty interests)). The Supreme Court has taken this uninformative tack as well. See authorities cited *infra* note 18.

¹³ See *White*, 440 F. Supp. 3d at 1086.

¹⁴ See *id.*; see also *Conard v. Univ. of Wash.*, 834 P.2d 17, 24–26 (Wash. 1992) (en banc) (no relevant property interest, and thus no required hearing, where scholarships were awarded at the university's discretion).

¹⁵ See *White*, 440 F. Supp. 3d at 1087 (citing *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988)).

¹⁶ See *id.* (citing *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005)).

¹⁷ See *id.*

¹⁸ *Id.* Worse, the Supreme Court has bypassed the opportunity to provide guidance in this area by deciding cases on other grounds. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84–85 (1978).

¹⁹ *White*, 440 F. Supp. 3d at 1087 (citing *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986)).

²⁰ *Id.* (citing *Barnes v. Zaccari*, 669 F.3d 1295, 1303 (11th Cir. 2012)).

²¹ See *id.*; see also *Borrell v. Bloomsburg Univ.*, 955 F. Supp. 2d 390, 402 (M.D. Pa. 2013) (citing *Dee v. Borough of Dunmore*, 549 F.3d 225, 229 (3d Cir. 2008)).

²² See *White*, 440 F. Supp. 3d at 1087 (citing *Branum v. Clark*, 927 F.2d 698, 705 (2nd Cir. 1991)).

implied contract between the public university and its students,²³ requiring “good faith”²⁴ treatment of the latter by the former.

The *White* case then recognized further complications introduced into the law by the relevant Seventh Circuit cases.²⁵ *White* thus quoted the Seventh Circuit to the effect that “our circuit has rejected the proposition that an individual has a stand-alone property interest in an education at a state university, including a graduate education.”²⁶ And in the absence of any state constitutional, statutory, or regulation-based rights, or any “specific”²⁷ and “exact”²⁸ allegations as to the source and nature of any express or implied contractual right, the principles of due process require no such hearing.²⁹

And then, finally, the *White* case survey noted that the Fifth Circuit,³⁰ looking to state law,³¹ has taken yet a further distinct alternative approach by recognizing a liberty interest,³² but not a property interest,³³ under Texas state constitutional law in a student’s continuance of their higher education.³⁴ Underlying state laws could, however, vary considerably in this respect.³⁵

Many of these basic complications were also recognized in an opinion by then Seventh Circuit Judge Amy Coney Barrett.³⁶ Judge Barrett summarized the state of the relevant law in these terms:

The First, Sixth, and Tenth³⁷ Circuits have recognized a generalized property interest in higher education. . . . The Fifth and Eighth Circuits have assumed with-

²³ See *Branum*, 927 F.2d at 705. At the Supreme Court level, see, for example, *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

²⁴ See *Branum*, 927 F.2d at 705 (citing New York legal authority). Whether an implied requirement of mere “good faith,” in the absence of any further specification, would be considered sufficiently clear and determinate under Supreme Court precedent is unclear. For a start, consider the Court’s parsing of the vague university employment documents in *Perry v. Sindermann*, 408 U.S. 593 (1972).

²⁵ See *White*, 440 F. Supp. 3d at 1088 (citing *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 772 (7th Cir. 2013)); see also *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

²⁶ *White*, 440 F. Supp. 3d at 1088 (quoting *Charleston*, 741 F.3d at 772, in turn citing *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 601 (7th Cir. 2009) and *Williams v. Wendler*, 530 F.3d 584, 589 (7th Cir. 2008)).

²⁷ *White*, 440 F. Supp. 3d at 1088 (quoting *Charleston*, 741 F.3d at 773).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *id.* (citing *Plummer v. Univ. of Hous.*, 860 F.3d 767, 774, 774 n.6 (5th Cir. 2017)).

³¹ See *id.*

³² *Id.*

³³ *Id.* (quoting *Plummer*, 860 F.3d at 774).

³⁴ See *id.*; see also *Barnes v. Symeonides*, No. 94-30314, 1995 WL 10518, at *3 (5th Cir. 1995) (per curiam) (finding no Louisiana “statutory authority or university policy supporting [any] alleged property or liberty interests”).

³⁵ See *Symeonides*, 1995 WL 10518, at *3. This case involved an alleged failure to pay law school tuition and fees. *Id.* at *1.

³⁶ *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

out deciding that such a property interest exists.³⁸ . . . The Second, Third, Fourth, Ninth, and Eleventh Circuits join us in making a state-specific inquiry to determine whether a property interest exists.³⁹

Against this background of alternative approaches, Judge Barrett began with Seventh Circuit precedent, including the general principle that “[t]he Due Process Clause is not a general fairness guarantee; its protection kicks in only when a state actor deprives someone of ‘life, liberty, or property.’”⁴⁰ Questions of due process, in the sense of the sufficiency of the nature and timing of an actual hearing, arise only if an official university sanction in the case deprived, or would deprive, the plaintiff of some recognized liberty or property interest.⁴¹

As a matter of narrow colloquial use, a college education, and its continuing availability, is not ordinarily thought of as an item of property.⁴² And the Seventh Circuit has indeed rejected what might be called an independent, pre-existing, presumed, or “stand-alone” property interest in a public university education.⁴³

Whatever a so-called “stand-alone” property interest might involve, this legal category is thought to be distinguishable from the more encompassing idea of property as “a legally protected entitlement”⁴⁴ to a continuing public university education.⁴⁵ Thus, under Seventh Circuit precedent, the plaintiff’s lack of a stand-alone property right need not be fatal to a procedural due process claim, but only if it turns out that the plaintiff can show a legally protected entitlement to a continuing university education.⁴⁶ The reference to a legally protected entitlement may seem to suggest, logically, that there could somehow be an entitlement that is not legally protected. But this is misleading. There seem to be no

³⁷ Note that the *White* case, *see supra* note 19 and accompanying text, characterizes the Tenth Circuit approach as referring to the law of the particular state in question. *See Purdue Univ.*, 928 F.3d at 659 n.2; *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986) (recognizing interest on state statutory grounds); *Trotter v. Regents of Univ. of N.M.*, 219 F.3d 1179, 1184 (10th Cir. 2000) (recognizing interest through state statutory law).

³⁸ Note that the Fifth Circuit *Plummer* case, *see supra* notes 30–34 and accompanying text, tends to focus on state-specific inquiries into liberty interests as distinct from property interests, which seem to be treated more skeptically. *See Plummer*, 860 F.3d at 773. The Eighth Circuit has recently merely assumed the existence of some sufficient interest. *See Doe v. Univ. of Ark.*, 974 F.3d 858, 866 (8th Cir. 2020).

³⁹ *Purdue Univ.*, 928 F.3d at 659 n.2 (citations omitted).

⁴⁰ *Id.* at 659 (quoting U.S. CONST. amend. XIV, § 1).

⁴¹ *See id.*

⁴² *See id.* (first citing *Williams v. Wendler*, 530 F.3d 584, 589 (7th Cir. 2008); and then citing *Charleston v. Bd. of Trs. of the Univ. of Ill. at Chi.*, 741 F.3d 769, 772 (7th Cir. 2013)). For the status of an education degree as possible marital property in the divorce context, see, for example, *In re Marriage of Weinstein*, 128 Ill. App. 3d 234 (1984).

⁴³ *Purdue Univ.*, 928 F.3d at 659, as indicated in *supra* note 26 and accompanying text.

⁴⁴ *Purdue Univ.*, 928 F.3d at 659–60 (quoting *Charleston*, 741 F.3d at 773).

⁴⁵ *See id.*

⁴⁶ *Id.*

“entitlements,” in this context, that are not legally protected. Thus, “legally protected entitlement” seems to involve a redundancy.⁴⁷

More specifically, the Seventh Circuit distinguishes between the entitlements of elementary or secondary public school students on the one hand,⁴⁸ and of post-high school students on the other.⁴⁹ The former hold a relevant legal entitlement to a continuing public education, given the apparently universal state constitutional mandate that otherwise eligible persons have access to just such an early-level education.⁵⁰ The latter category, comprising post-secondary public school students, in contrast holds no such legally protected entitlement, at least at the level of the state’s own constitutional and statutory law.⁵¹

So, if post-secondary students within the Seventh Circuit, or at least in Indiana, are to show a legally protected entitlement that is sufficient to activate a procedural due process right, they must look elsewhere, beyond state statutes and constitutional provisions.⁵² In particular, any such legally protected entitlement—a non-stand-alone property interest—must then be “a matter of contract between the student and the university.”⁵³

Of course, there will inevitably be some sort of contractual relationship between a public university and all of its enrolled students. Crucially, though, not just any such contractual relationship will suffice to activate procedural due process rights.⁵⁴ Even general contractual assurances of fairness toward enrolled students will not suffice.⁵⁵ More is needed if any procedural due process rights are to be recognized.

In particular, any claim to an entitlement, or to a sufficient property interest, must be “specific”⁵⁶ as to the source or nature of the implied contract.⁵⁷ The student seeking a due process right must be able to cite, even in the case of an implied-in-fact contract,⁵⁸ “the exact promises the university made to the student, and the promises the student made in return.”⁵⁹

⁴⁷ The Supreme Court’s companion cases of *Roth* and *Perry* seem to suggest that an entitlement, in the relevant sense, can be contrasted with a mere unilateral expectation or a unilateral need or desire, however vital or desperate, on the part of a claimant who is seeking a hearing on a procedural due process theory. See *Bd. of Regents v. Roth*, 408 U.S. 564, 571–72 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972).

⁴⁸ *Purdue Univ.*, 928 F.3d at 660.

⁴⁹ *Id.*

⁵⁰ See *id.* (citing the pre-college level student behavioral discipline case of *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975)).

⁵¹ See *id.* at 660.

⁵² See *id.*

⁵³ *Id.* (citing *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 601 (7th Cir. 2009)).

⁵⁴ See *id.* at 660.

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ See *id.*; see also *Bissessur*, 581 F.3d at 601–02.

⁵⁸ See the authorities cited *supra* note 57.

⁵⁹ *Purdue Univ.*, 928 F.3d at 660 (quoting *Charleston v. Bd. of Trs. of the Univ. of Ill. at Chi.*, 741 F.3d 769, 773 (7th Cir. 2013)).

Thus, the Seventh Circuit holds to what we might call a “specificity and exactness” requirement even in cases of an implied-in-fact contract.⁶⁰ This is obviously a rather tall order in the absence of any express or explicit contractual assurance of due process. By its very nature, an implied-in-fact contract, however widely understood and intensively relied upon, will rarely attain specificity and exactness for purposes of triggering procedural due process rights.⁶¹ Specificity and exactness in implied-in-fact contracts between universities and their students seems inherently unlikely.

Certainly, we can imagine valid implied-in-fact contracts in other contexts that are specific to particular persons in their recurring, routine, simple transactions. And there can be long and widely recognized cultural practices generating implied-in-fact contracts, at least at the core of such routine cultural practices. But the complex, detailed, and rapidly evolving practices and expectations associated with contemporary college student life are experienced uniquely by the individual student, and they evolve, with or without any relevant student consent, in unpredictable ways.

Thus, in many public university student cases, where the university has not undertaken an express or explicit contractual obligation, no specifically ascertainable, clear and exact, implied-in-fact contractual understanding is likely to be available to generate any due process hearing rights.⁶²

In the Seventh Circuit, though, an alternative possible ground for invoking procedural rights may, in some cases, still be available. It remains possible that in the absence of any sufficient property interests,⁶³ a cognizable liberty interest may still be present.⁶⁴ This may take the form of a state-inflicted injury to the plaintiff’s reputation⁶⁵ that is accompanied by the state’s deprivation of some separate and distinct cognizable legal right held by the plaintiff.⁶⁶ These cases may, however, be relatively rare. And certainly, any extent to which liberty and property interests should be treated differently in the context of public university discipline cases should also be controversial. In our best understandings of

⁶⁰ *See id.*; *see also* Cairone v. McHenry Cnty. Coll., No. 17-CV-4247, 2019 WL 3766112, at *5 (N.D. Ill. Aug. 9, 2019).

⁶¹ For background on the formation of contracts through wordless conduct, *see*, for example, Farina v. Metro. Transp. Auth., 409 F. Supp. 3d 173, 216 (S.D.N.Y. 2019); Jemzura v. Jemzura, 330 N.E.2d 414, 420 (N.Y. 1975); 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:5, at 20 (4th ed. 1990).

⁶² *See, e.g.*, the case outcome on the property right theory in *Purdue*, 928 F.3d at 660–61.

⁶³ *See id.* at 660.

⁶⁴ *See id.* at 661.

⁶⁵ *See id.*

⁶⁶ *See id.* (first citing *Mann v. Vogel*, 707 F.3d 872, 878 (7th Cir. 2013); then citing *Paul v. Davis*, 424 U.S. 693, 708–09 (1976); and then citing *Hinkle v. White*, 793 F.3d 764, 767–68 (7th Cir. 2001)); *see also* *Bishop v. Wood*, 426 U.S. 341, 349 (1976) (no sufficient liberty interest implicated in a police officer’s discharge); *Kerry v. Din*, 576 U.S. 86, 91–96 (2015) (as cogently discussed in Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 855–59 (2016)); *Doe v. Trs. of Ind. Univ.*, 496 F. Supp. 3d 1210, 1216–18 (S.D. Ind. 2020).

property and liberty, the overlap between property and liberty, in our contexts, turns out to be dramatic.⁶⁷

The Seventh Circuit thus seems more amenable to liberty-based claims, at least within a narrow sphere, than to property-based claims to procedural due process in the public university cases.⁶⁸ This may be in part precisely because liberty-based claims to due process have been narrowly and demandingly construed.⁶⁹ Additionally, this reluctance to recognize a right to a hearing may reflect an implausible view of what due process would require in some cases that are brought on a property interest theory. In particular, the Seventh Circuit seems to have somehow convinced itself, oddly, that elaborate, trial-type hearings would be constitutionally required for a remarkable range of property-based claims.⁷⁰

Thus, the Seventh Circuit has oddly declared:

It cannot be the case . . . that any student who is suspended from college has suffered a deprivation of constitutional property, in part because this would imply that a student who flunked out would have a right to a trial-type hearing on whether his tests and papers were graded correctly and a student who was not admitted would have a right to a hearing on why he was not admitted.⁷¹

A concern for not unduly formalizing due process hearings is well taken. But as we note below,⁷² there is simply no basis in the current law⁷³ for imagining that, for example, routine academic standards cases, if thought to implicate a property interest, would require anything like a “trial-type hearing.”⁷⁴ Trial-type hearings for many public university discipline cases are not, and should not be, required.

Overall, then, the federal courts merely assume, reject, or find in a variety of different sources property interests sufficient to activate procedural due pro-

⁶⁷ Note the quite substantial basic functional overlap between property and liberty referred to *infra* notes 80–94 and accompanying text.

⁶⁸ See the cases cited *supra* note 66.

⁶⁹ See the cases cited *supra* note 66.

⁷⁰ See, e.g., *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 772–73 (7th Cir. 2013); *Williams v. Wendler*, 530 F.3d 584, 589–90 (7th Cir. 2008); *Busone v. Bd. of Regents of Univ. of Wis. Sys.*, No. 12–cv–671–bbc, 2014 WL 2508288, at *2 (W.D. Wis. June 4, 2014).

⁷¹ *Charleston*, 741 F.3d at 772–73 (quoting *Williams*, 530 F.3d at 589) (quotation marks omitted). See generally Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146, 166–67 (1983).

⁷² See generally *infra* Part III.

⁷³ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 97–100 (1978) (Marshall, J., concurring in part and dissenting in part). At the pre-college level, where a property interest is taken as established, see *Goss v. Lopez*, 419 U.S. 565, 584 (1975), as discussed in *Doe v. Purdue Univ.*, 928 F.3d 652, 665 (7th Cir. 2019).

⁷⁴ See the authorities cited *supra* note 71. The three factors relevant under the *Eldridge* balancing test, see *Eldridge*, 424 U.S. at 335, are discussed briefly in the public university student discipline cases of *Walsh v. Hodge*, 975 F.3d 475, 482 (5th Cir. 2020) and *Plummer v. Univ. of Hous.*, 860 F.3d 767, 773 (5th Cir. 2017).

cess rights in the broad range of public university cases. The key to bringing reasonable consistency to this area of the law, to optimizing the conflicting values at stake in such cases, and to improving the due process hearings themselves involves a better understanding of the idea of property. The courts should reflect anew on the idea of property interests and their value, basic functions, costs, and limitations. This reconsideration of the fundamental reasons for recognizing and limiting property interests should focus first on property interests in general, and then, as translated into the distinctive context of the public campus post-secondary student discipline and related cases.

II. THE VALUE FOUNDATIONS OF PROPERTY INTERESTS: IN GENERAL AND ON CAMPUS

Our understanding of the most basic purposes and functions of individual property interests has long been evolving. Consider but a few historical developments. Early on, Aristotle recognized favorable effects of individual property holdings on economic productivity.⁷⁵ Much later, important strands of thought focused on the idea of individuals' exercising a kind of property right over their own lives.⁷⁶ Famously, John Locke distinguished property from liberty⁷⁷ but used "property" in an important broader sense as well, in which property includes and encompasses liberty.⁷⁸ David Hume, in turn, focused on the idea of property as an artificial convention that contributes, fundamentally, to utility and well-being.⁷⁹

It was not unusual for broadly liberal writers at the time of the drafting of the Constitution to also link property and liberty.⁸⁰ James Madison in particular

⁷⁵ See ARISTOTLE, POLITICS bk. II § 5, at 47 (Ernest Barker trans., Oxford Univ. Press 2009) (c. 350 B.C.E.). For an updating, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967) ("A primary function of property rights is that of guiding incentives to . . . a greater internalization of externalities.").

⁷⁶ See RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 24 (1979) (referring to the idea of dominium).

⁷⁷ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 131, at 68 (C.B. MacPherson ed., Hackett Publ'g Co. 1980) (1690).

⁷⁸ See *id.* § 123, at 66; *id.* § 222, at 111; see also EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JURIDICAL CONCEPT 172 (1948); Sibyl Schwarzenbach, *Locke's Two Conceptions of Property*, 14 SOC. THEORY & PRAC. 141, 141 (1988) (Locke's broader conception of property as encompassing not only "material goods," but what Locke called "ideal benefits"); J.P. Day, *Locke on Property*, 16 PHIL. Q. 207, 207 (1966) (distinguishing Hume's, Bentham's, and Mill's more utilitarian justifications of property rights). For a reference to Locke's narrower usages, see Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200, 200 (1972).

⁷⁹ See DAVID HUME, A TREATISE OF HUMAN NATURE bk. III, part II, § 2 (L.A. Selby-Bigge ed., Oxford: Clarendon Press 1888) (1739).

⁸⁰ See, e.g., J.G. FICHTE, FOUNDATIONS OF NATURAL RIGHT 185 (Frederick Neuhouser ed., Michael Baur trans., Cambridge Univ. Press 2000) (1796–1797); IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 55 (John Ladd trans., Hackett Publ'g Co., 2d ed. 1999) (1797). See also Mary Gregor, *Kant's Theory of Property*, 41 REV. METAPHYSICS 757, 758 (1988).

emphasized this linkage, while again giving “property” a broad and inclusive meaning.⁸¹ Benjamin Constant saw property as conducive to well-being, prudence in collective governance, healthy social relations, tranquility, and happiness.⁸² G.W.F. Hegel then famously elaborated on the close relationships among property, freedom, personhood, and development.⁸³

Closer to our own time, the philosopher T.H. Green emphasized the role of property as foundational to the responsible exercise of the will by all persons.⁸⁴ L.T. Hobhouse then emphasized the role of property as “necessary to the full expression of personality,”⁸⁵ to “a purposeful life,”⁸⁶ and to “a rational and harmonious development of personality.”⁸⁷ More contemporary discussions of the basic roles and functions of property rights elaborate upon these very themes.

Thus, we have contemporary “freedom-promoting”⁸⁸ understandings of property.⁸⁹ Such theories require us to appreciate that increases in freedom in some respects inescapably imply limitations of freedom in other respects.⁹⁰ But

⁸¹ See James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, reprinted in JAMES MADISON: WRITINGS 515, 515–16 (Jack Rakove ed., 1999). See also Paul J. Larkin, Jr., *The Original Understanding of “Property” in the Constitution*, 100 MARQ. L. REV. 1, 3, 80 (2016) (property rights as natural rights that are inseparable from liberty); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 19 (1980) (the Constitution’s life, liberty, and property reference as holistic and functionally oriented).

⁸² See BENJAMIN CONSTANT, *Principles of Politics Applicable to All Representative Governments*, in POLITICAL WRITINGS 175, 220 (Biancamaria Fontana trans., 1988).

⁸³ See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 73 (H.B. Nisbet trans., Alan W. Wood ed., Cambridge Univ. Press 1991) (1821); see also JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 351 (1988) (“Hegel’s claim is that property is something everyone needs in order to develop his freedom and individuality.”); Dudley Knowles, *Hegel on Property and Personality*, 33 PHIL. Q. 45, 49 (1983).

⁸⁴ See T.H. GREEN, *The Principles of Political Obligation*, in THE POLITICAL THEORY OF T.H. GREEN: SELECTED WRITINGS 157 (John R. Rodman ed., Appleton-Century-Crofts, Inc. 1964) (1881); see also Jeremy Waldron, *Property and Ownership*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/archives/sum2020/entries/property/> [perma.cc/ZN7S-NJVH].

⁸⁵ L.T. HOBHOUSE, *The Historical Evolution of Property, in Fact and in Idea*, in PROPERTY: ITS DUTIES AND RIGHTS 1, 27 (Charles Gore ed., 1913).

⁸⁶ *Id.* at 28.

⁸⁷ *Id.*

⁸⁸ Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1242 (2005).

⁸⁹ See *id.*

⁹⁰ See Allan Gibbard, *Natural Property Rights*, 10 NOÛS 77, 77 (1976) (“If a person owns a thing, his ownership enhances his liberty, but it does so at the expense of the liberty of others.”). And this is true in contexts where the property interest is in something other than a tangible physical object, as in our public campus discipline cases and related cases. Importantly, arbitrary or unjust allocations of various sorts of property rights in the first place pose central questions of political and legal theory. See, e.g., G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008); LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002); T.M. SCANLON, *WHY DOES INEQUALITY MATTER?* (2018); see also THOMAS PIKETTY, *THE ECONOMICS OF INEQUALITY* (Arthur Goldhammer trans., 2015).

despite the inevitable conflicts and tradeoffs, we might still quite reasonably think of one distribution of property rights as more conducive to freedom, overall, than another distribution of those rights.⁹¹

Relatedly, the idea that property rights can serve to promote autonomy⁹² has also been continuously developed.⁹³ The emphasis of late, however, has not been on autonomy in some sort of isolated, atomistic, non-relational sense. Instead, autonomy, self-realization, and flourishing as the primary purpose of property rights has increasingly been understood in an explicitly social, communal, and institutionally embodied sense.⁹⁴ Autonomy in this sense assumes a supportive group context, including that of a university.

Thus, for example, Professor Gregory Alexander's understanding of property rights as promotive of human flourishing emphasizes our chosen and unchosen dependencies "upon communities . . . for our ability to function as free and rational agents."⁹⁵ Autonomy in this sense recognizes that "the physical process of human development makes us dependent on others . . ."⁹⁶ Autonomy, self-realization, and flourishing do not require, and generally cannot be attained through, self-sufficiency without being situated in networks of supportive communities.⁹⁷

Unsurprisingly, the development and well-informed exercise of a capacity for practical reasoning and related skills has been recognized as a vital dimension of autonomy, self-realization, and flourishing.⁹⁸ Property rights should

⁹¹ For background on freedom measurement problems, see FREEDOM: A PHILOSOPHICAL ANTHOLOGY 441–81 (Ian Carter et al. eds., 2007).

⁹² This claim must, of course, recognize the problems of distribution and conflict addressed in the literature cited *supra* notes 90–91.

⁹³ See, e.g., GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 5–6 (2012); Stephen Kershner, *Private Property Rights and Autonomy*, 16 PUB. AFF. Q. 231, 231 (2002) (the institution of property as a potential contributor to "a self-shaped life").

⁹⁴ See, e.g., ALAN RYAN, PROPERTY (1987); Gregory S. Alexander, *The Human Flourishing Theory* (Cornell L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 20-02, 2020) [hereinafter Alexander, *Human Flourishing Theory*]; Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 818–19 (2009) [hereinafter Alexander, *Social-Obligation*]; Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 CORNELL L. REV. 991, 1001–02 (2019) [hereinafter Alexander, *Property*]; C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 745 (1986); Hanoeh Dagan, *Autonomy and Property*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY (Hanoeh Dagan & Benjamin C. Zipusky eds., 2020); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 141 (1990).

⁹⁵ Alexander, *Human Flourishing Theory*, *supra* note 94. See generally ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (2001).

⁹⁶ Alexander, *Property*, *supra* note 94, at 995.

⁹⁷ See Alexander, *Social-Obligation*, *supra* note 94, at 760–62.

⁹⁸ See MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 32–34 (2011).

thus protect, as crucial to human flourishing, “the ability to acquire knowledge.”⁹⁹

The basic property right functions of protecting freedom, autonomy, self-realization, and flourishing are clearly and strongly implicated in post-secondary public education cases. These basic functions of property rights presume that the acquisition of knowledge and the capacity to fully exercise practical reasoning¹⁰⁰ are normally developed in a social, indeed communitarian, context.¹⁰¹ And certainly, public university campuses have long¹⁰² been thought of as a sort of community, and as a community of communities.¹⁰³ The virtualization of public university education may, of course, over time affect the nature of this sense of community, as the technologies continue to evolve.

In a diverse society, a public university, with or without a virtual component, is often thought of as a community, or a community of communities, in which students can, or should, find necessary support for learning, development, and fulfillment.¹⁰⁴ Denying improperly any relevant property interest undermines the basic functions of the institution of property itself and plainly jeopardizes the availability of any constitutional-level process rights. Recognizing the potential of relevant property rights to promote the underlying basic values of freedom, autonomy in community,¹⁰⁵ social learning, and self-realization requires the availability in campus contexts of some sort of procedural due process in all otherwise appropriate cases.

Of course, in many student disciplines cases, the accusation itself implies a claim that the student seeking due process has himself already improperly undermined a sense of community or the freedom, autonomy, self-realization, or

⁹⁹ Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

¹⁰⁰ See NUSSBAUM, *supra* note 98, at 33–34; see also Alexander et al., *supra* note 99, at 743–44.

¹⁰¹ See *supra* notes 94–97 and accompanying text.

¹⁰² See CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* 24 (1st ed. 1923); ROBERT S. RAIT, *LIFE IN THE MEDIEVAL UNIVERSITY* 50 (1918) (“The earliest College founders did not necessarily erect any buildings for the scholars for whose welfare they provided; a College is essentially a society, and not a building.”).

¹⁰³ This is not to suggest that all public university students think of themselves primarily as members of one or more campus communities or as focused exclusively on knowledge acquisition, on reasoning well, or even on broad self-realization and fulfillment. There are many reasons to attend any university, and universities, whether public or private, exist for a range of contested and conflicting purposes. See R. George Wright, *Campus Speech and the Functions of the University*, 43 J. COLL. & U.L. 1, 1–12 (2017).

¹⁰⁴ JACQUES BARZUN, *THE AMERICAN UNIVERSITY: HOW IT RUNS, WHERE IT IS GOING* xxix, xxxii, 6 (2d ed. 1993); CLARK KERR, *THE USES OF THE UNIVERSITY* 1, 14 (5th ed. 2001); ROBERT PAUL WOLFF, *THE IDEAL OF THE UNIVERSITY* 127 (Transaction Publishers 1992) (1969) (“[A] university ought to be a *community of persons* united by collective understandings, by common and communal goals, by bonds of reciprocal obligation.”); Michael Oakshott, *The Idea of a University*, 17 ACAD. QUESTIONS 23, 24 (2004).

¹⁰⁵ For official recognition of the university campus as a community, see *Healy v. James*, 408 U.S. 169, 171 (1972) (referring to “the academic community”).

indeed the property rights of others, in one sense or another.¹⁰⁶ In some such cases, certainly, there will indeed be a substantive conflict between the freedom, autonomy, and self-realizational interests of the accused and of the accusing and other parties, as is typical in the law.¹⁰⁷ But our primary focus herein is, initially, on the accused party's liberty, autonomy, and self-realizational interests—or property interests, broadly construed—in being granted at least some sort of due process hearing. In cases where there is a specifiable victim, the victim's own freedom, autonomy, and self-realizational interests may well be further implicated, and further jeopardized, by ill-considered or inequitable procedural rules at the hearing.¹⁰⁸ And again, the freedom, autonomy, or self-realizational interests of some accusers may well have already been substantively violated by the accused party's underlying conduct, leading to the initial administrative accusation.¹⁰⁹ These considerations, however often conflicting, should shape the nature and timing of any hearing.

III. CAMPUS DUE PROCESS IN LIGHT OF THE BASIC FUNCTIONS OF PROPERTY

The importance of the basic reasons for recognizing fairly distributed property rights in general carries over into the context of property interests, and inseparable liberty interests, on the public university campus.¹¹⁰ Crucially, these basic reasons—again, something like well-being, liberty, autonomy, and self-development—cannot be confined within whatever state constitutional, statutory, regulatory, or contractual limits the states may happen to choose to set.¹¹¹ The very nature and functions of a typical public post-secondary school should ordinarily preclude states from denying the existence of a property interest that is sufficient to activate some sort of procedural due process for typical students,¹¹² even if a state makes its attempt to do so formally and explicitly.¹¹³

¹⁰⁶ Merely as an example, accusations of sexual misconduct often focus on violations of these basic values, which are also then relied upon by the accused party.

¹⁰⁷ See, e.g., R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 336, 338 (2001) (noting that the basic grounds and reasons for protecting freedom of speech appear on both sides of the typical free speech restriction case).

¹⁰⁸ As in the extreme case of a protracted, degrading, humiliating, and privacy-invading live and in person cross-examination of a victim of sexual misconduct by the alleged perpetrator.

¹⁰⁹ As in many sexual misconduct, battery, assault, trespassing, stalking, and other cases on campus.

¹¹⁰ In fact, the idea of autonomous self-determination, as an aim of property rights, may seem more at home at the university level than at less mature lower school levels, as in the student discipline case of *Goss v. Lopez*, 419 U.S. 565 (1975) (ruling ten-day suspensions of junior high school and high school students as unconstitutional without due process).

¹¹¹ More broadly put, "the Constitution does and must protect, as property, some claims that are not treated as entitlements by standing law." Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1103 (1981).

¹¹² See generally Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 440 (1977) (presenting a hypothetical involving a dramatic state limitation on motor vehicle ownership as a protected property interest).

¹¹³ See *id.*

Thus, where the underlying purposes of a property interest sufficient to justify at least a minimal hearing are denied or underrecognized by the public university, the university's denial of any such procedure should be judicially set aside. Any apparently contrary university interests are typically pertinent not to whether any constitutional process is due, but only to the further question of the nature and timing of the required hearing.¹¹⁴ Typical university interests, and the interests of any accuser, witness, or other members of the university community, can be accommodated by thoughtful reflection on the nature and practical weight of the various interests at stake.¹¹⁵

In this regard, the Court's classic administrative due process hearing decision in *Mathews v. Eldridge*¹¹⁶

[r]equires consideration of three distinct factors: First, the private interest¹¹⁷ that will be affected by the official action;¹¹⁸ second, the risk of an erroneous deprivation of such [property] interest through the procedures used, and the probable value, if any, of any additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved¹¹⁹ and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.¹²⁰

Of course, this three-part interest balancing test regarding the nature and timing of a hearing amounts only to an abstract general schema. The general *Eldridge* balancing test must be sensitively applied in light of the range of public university purposes and the number and weight of the interests at stake in a given case.

It is still possible to deny the existence of any relevant property interest, and thus any right to a hearing, on the theory that no student is legally required to attend a public post-secondary school.¹²¹ This need not be an attempt to re-

¹¹⁴ See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹¹⁵ See *id.* at 335.

¹¹⁶ See *id.* at 323, 335.

¹¹⁷ Or the interests, presumably, of other specific persons affected by the nature and timing of the hearing, including third parties, accusers, and witnesses.

¹¹⁸ Presumably including the hearing process itself, as it is subjectively experienced, as distinct from any adjudicative outcomes of the hearing on the merits.

¹¹⁹ Typically, the public university's functions will be multiple. See *supra* notes 102–105 and accompanying text. The university will ordinarily have responsibilities toward all students, past, present, and future, including persons only indirectly affected by any given hearing.

¹²⁰ *Eldridge*, 424 U.S. at 335. It is certainly possible that any broad, abstract, principled interest balancing that might justify generally recognizing a property interest might not also precisely mirror the interest balancing in applying the *Eldridge* balancing factors in any specific case. See generally John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3 & n.1 (1955) (noting “the distinction between justifying a practice [that is specified by rules] and justifying a particular action falling under it”).

¹²¹ See Timothy P. Terrell, “Property,” “Due Process,” and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861, 865, 940 (1982), for a distinction between free or voluntary relationships and compelled or monopolistic relationships between persons and government agencies.

vive a now partly defunct legal distinction between legally enforceable rights and mere “privileges.”¹²² The idea would be rather that while governments may hold monopolies on, for example, key systems of welfare payments¹²³ or disability payments,¹²⁴ prospective students have realistic alternatives to public post-secondary education systems.¹²⁵

Procedural due process rights, however, are properly made available, for example, to public employees who may have a wide range of attractive private sector employment alternatives.¹²⁶ Typical college students understandably do not attempt to compare, let alone bargain over, the vague and complex terms of any contractual relationship, express or implied, with any public university. This does not imply that most such contracts are procedurally or substantively unconscionable, and thus unenforceable.¹²⁷ But the harms typically visited upon post-secondary public-school students by the denial of any relevant property right, or by a grossly inadequate hearing, are often substantial. Such harms would typically be sufficiently direct, personal, and concrete to support constitutional standing to sue, all else equal, in other contexts.¹²⁸

So assuming, then, a hearing based ultimately on the crucial underlying functions of property,¹²⁹ what can be said about the required nature and timing of required hearings in the range of student discipline cases? In general, such hearings must be consistent with the abstract three-part balancing test presented in *Mathews v. Eldridge*,¹³⁰ as specified above.¹³¹ The lower courts, where they

¹²² As this right-privilege distinction is importantly limited in the right to a continuing stream of welfare benefit checks by the case of *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8, 263–64 (1970).

¹²³ See *id.* at 255–56, 256 n.1, 261–62, 264.

¹²⁴ See, e.g., the tax-funded federal disability benefit system described in *Eldridge*, 424 U.S. at 323.

¹²⁵ Note that the tuition cost and other costs associated with some forms of online private post-secondary education may be less than those of many residential state university campuses.

¹²⁶ Classically, see *Bd. of Regents v. Roth*, 408 U.S. 564, 571–72 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972), as developed in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 535, 542 (1985) (inadequate process was utilized in terminating a publicly employed security guard). More recently, see *Carlock v. Wayne State Univ.*, No. 19-11969, 2020 WL 3469159, at *3–4, *8 (E.D. Mich. June 25, 2020).

¹²⁷ For background in more overtly commercial contexts, see, for example, *Reimonenq v. Foti*, 72 F.3d 472, 477–78 (5th Cir. 1996); *Adams v. John Deere Co.*, 774 P.2d 355, 357 (Kan. App. 1989); *Rozeboom v. Nw. Bell Tel. Co.*, 358 N.W.2d 241, 244–45 (S.D. 1984); *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 459–60 n.1, 460–61 (Utah 1983). For a broader perspective, see Jacob Hale Russell, *Unconscionability’s Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 967 (2019).

¹²⁸ See, e.g., *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (indicating that standing requires, at a minimum, a cognizable injury in fact; causation of the injury by the defendant’s challenged conduct; and likely redress of the plaintiff’s injury if granted a favorable legal decision).

¹²⁹ As discussed in *supra* Part II.

¹³⁰ See *supra* notes 114–20 and accompanying text.

detect some sufficient property interest, acknowledge the applicability of the general *Eldridge* framework.¹³² But the *Eldridge* balancing factors, insofar as they are to apply to virtually any broadly administrative due process case, must necessarily be too abstract in themselves to guide their own application in public campus discipline cases.

The most defensible further response, then, is to apply the abstract *Eldridge* balancing test in light of the most relevant features of the public campus community itself, as a context in which the basic property right values must be recognized and respected. As we have seen, public universities typically present themselves as a community, if not also as a community of communities.¹³³ A community of this sort is, of necessity, not a space of boundless individual self-assertion at the obvious expense of one's colleagues.

Within that college community, the fundamental purposes of property rights should inform not only the availability of a hearing in significant disciplinary cases, but the nature, timing, and limits of any such hearing. The interests of all affected persons in sheer well-being or utility, in meaningful freedom, and in autonomy or self-realization within community may often conflict.¹³⁴ But inquiring, in general and in the specific case, into these basic values can genuinely help universities understand how to best apply the *Eldridge* balancing test.¹³⁵ The basic purposes of the institution of property in the first place can and should steer our understanding, in the campus context, of the appropriate conduct of campus disciplinary hearings.

In typical such cases, of course, no constitutional-level right to a hearing should attach unless some sufficient impact upon the disciplined student's life seems likely. And certainly, appropriate weight in designing the hearing process should be assigned to that possible impact.¹³⁶ But even the long-term impacts, of various sorts, on accused persons, along with considerations of the

¹³¹ See text at *supra* notes 116–20.

¹³² See, e.g., *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 65–66 (1st Cir. 2019); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12–16 (1st Cir. 1988).

¹³³ See *supra* notes 102–05 and accompanying text.

¹³⁴ For discussion, see *supra* Part II.

¹³⁵ See *supra* text accompanying notes 116–20.

¹³⁶ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In the public university disciplinary context, see, for example, *Plummer v. Univ. of Hous.*, 860 F.3d 767, 773 (5th Cir. 2017) (noting a “substantial lasting impact on appellants’ personal lives, educational and employment opportunities, and reputations in the community” (citation omitted)); *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (noting the likely consequences of an administrative determination of sex offender status); see also the logic of the constitutional standing cases cited *supra* note 128, as well as the discussion in Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities Are Adjudicating Sexual Assault*, 71 U. MIA. L. REV. 377, 425 (2017).

costs of the hearing process itself,¹³⁷ cannot be allowed to dominate the ultimate decision as to the nature and timing of the hearing process.

Crucially, the nature and timing of the hearing may significantly impact, as well, any accusing parties, any witnesses, and the campus community more broadly, including everyone's interest in freedom, autonomy, and self-realization in community. Whatever the presumably similar interests of private universities and their students,¹³⁸ public universities and their members have strong interests in the values that are promoted by a legitimate system of property rights.

The *Eldridge* balancing factors can be interpreted to take these campus community-based considerations into proper account. *Eldridge* balancing requires courts in particular to reflect upon "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹³⁹

For our purposes, the primary focus of this element of the analysis should not be on sheer direct financial cost differences among different university hearing formats. Rather, the primary focus should be on what *Eldridge* refers to, imperfectly, as the "Government's interest,"¹⁴⁰ and on the government "function"¹⁴¹ involved in the case.

It is certainly true that universities have basic functions and purposes, however multiple and contested those functions may be.¹⁴² But the interests of the university itself lie largely in recognizing and accommodating the rights and interests of all of the particular persons and groups significantly affected, presently and over time, by the nature and timing of the hearing in question. Certainly, the university has an interest in, say, optimally promoting the broad

¹³⁷ See *Eldridge*, 424 U.S. at 335. For reflection on the costs of conducting different forms of due process hearings, along with any increases or decreases in the likely accuracy of those alternative procedures, see, for example, *Haidak*, 933 F.3d at 68–69.

¹³⁸ With respect to private universities, the required standard of basic fairness of the hearing continues to be distinguished from the Fourteenth Amendment due process requirements that bind state institutions. See, e.g., *Doe v. Trs. of Bos. Coll.*, 942 F.3d 527, 533–34 (1st Cir. 2019) ("[A] private university need not comply with federal due process to meet the basic fairness requirement in disciplining students."); *Doe v. Case W. Rsrv. Univ.*, No. 19-3520, 2020 U.S. App. LEXIS 10963, at *10 (6th Cir. Apr. 6, 2020) (referring to "a private university, where constitutional due process principles lack the same force"). For further discussion of student disciplinary hearing procedures in the private university context, see *Rossley v. Drake Univ.*, 958 F.3d 679, 684–85 (8th Cir. 2020). Given, in particular, that constitutional due process requirements basically mandate fundamentally fair procedures, and a meaningful hearing at a meaningful time, it is unclear whether a responsible private college would want to set aside or fail to meet such a standard. See, e.g., *Leary v. Daeschner*, 228 F.3d 729, 744 (6th Cir. 2000) (referring to the meaningful hearing at a meaningful time standard); see also *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (on the "fundamental fairness" procedural due process standard in juvenile cases).

¹³⁹ *Eldridge*, 424 U.S. at 335.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *Wright*, *supra* note 103, at 4–11.

property value of self-realization in community.¹⁴³ This university interest, however, largely reflects the underlying, more concrete self-realizational interests of the individuals and groups that constitute the university as an institution, past, present, and future.

Thus, instead of focusing on the largely derivative and “abstractified” interests of the university, as *Eldridge* seems to recommend,¹⁴⁴ the courts and the universities should attend to all of the persons and groups whose basic interests are most clearly implicated in the particular hearing and in its specific procedures.

Consider, for example, the crucial, and often controversial, question of cross-examination in campus sexual misconduct hearings.¹⁴⁵ The state and federal courts are currently deeply and variously split over issues of any proper role for, and the proper forms of, cross-examination in these and other sorts of campus discipline cases.¹⁴⁶ There is, on the one hand, the traditional popular legal sentiment that cross-examination, at least in some general sense, is “the greatest legal engine ever invented” for arriving at a disputed truth.¹⁴⁷ But there is also, on the other hand, a justifiable sense that this belief in the distinctive, irreplaceable value of cross-examination in general may actually outrun the available empirical evidence.¹⁴⁸

More specifically, there may be broad and distinctive *Eldridge* balancing costs associated with some, if not all, forms of cross-examination in university-based sexual misconduct cases.¹⁴⁹ In particular, face-to-face cross-examination

¹⁴³ See *supra* note 94 and accompanying text.

¹⁴⁴ See *Eldridge*, 424 U.S. at 334–35.

¹⁴⁵ See, from among the remarkably large number of such cases, *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68 (1st Cir. 2019); *Doe v. Baum*, 903 F.3d 575, 581–83 (6th Cir. 2018); *Doe v. Mia. Univ.*, 882 F.3d 579, 599–601 (6th Cir. 2018); *Doe v. Cummins*, No. 16-3334, 2016 U.S. App. LEXIS 21790, at *26–27 (6th Cir. Dec. 6, 2016); *Doe v. Allee*, 30 Cal. App. 5th 1036, 1061–69 (2019).

¹⁴⁶ See William J. Migler, *An Accused Student’s Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 CHAP. L. REV. 357, 379–81 (2017) (usefully sorting the cases).

¹⁴⁷ *Baum*, 903 F.3d at 581 (quoting *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017)); see also, e.g., *White v. Illinois*, 502 U.S. 346, 356 (1992) (quoting *California v. Green*, 399 U.S. 149, 158 (1970) (citing the evidence law authority John Henry Wigmore)); see also *Haidak*, 933 F.3d at 68 (“Considerable anecdotal experience suggests that cross-examination in the hands of an experienced trial lawyer is an effective tool.”).

¹⁴⁸ See, e.g., Migler, *supra* note 146, at 368–69 (referring to social science evidence indicating some potential counterproductive effects of cross-examination techniques).

¹⁴⁹ See, e.g., *id.* at 370–72; Sara O’Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. PITT. L. REV. 511, 536 (2018); Hannah Walsh, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1788, 1795 (2020); see also Russlynn Ali, Assistant Sec’y for Civ. Rts., Office for Civ. Rts., U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 12 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [perma.cc/V6FB-JAGT] (discussing Title IX hearing policies and procedures).

of the complaining party by the accused person himself has distinctive risks and costs in terms of all of the fundamental reasons for recognizing and protecting property interests, broadly construed. In particular,

[w]hen survivors of sexual assault are personally cross-examined, it often adds to their trauma and may make it more difficult for them to share their stories. Survivors may appear less credible, distracted, angry, or reactive in ways that prevent their account from being understood and reviewed impartially. . . . There is reason to doubt the value of permitting personal cross-examination in this context and the likelihood that it would produce a more accurate outcome.¹⁵⁰

There may thus be, in particular, a link between the costs of unnecessary victim re-traumatization and an unnecessarily misleading or otherwise defective perception of the complaining witnesses' testimony on cross-examination.¹⁵¹

As well, an in-person cross-examination of an accuser by the accused party is, in practice, unlikely to amount to a distinctively valuable objective truth-evocation process. At least as likely, the typically emotionally fraught context may instead produce an intrusive, disorganized, emotionally driven back-and-forth, short on articulateness and long on argumentation, venting, defensiveness, accusatoriness, imprecision, and animosity.¹⁵²

On one ground or another, many courts are unwilling to require such direct, immediate, and personal cross-examination in public campus sexual misconduct cases.¹⁵³ Such courts do not interpret the *Eldridge* balancing test to require campus administrative procedures that mirror those of a criminal trial for a corresponding offense.¹⁵⁴

The best explanation for these latter differences between campus and criminal proceedings obviously incorporates, for example, the possibility of criminal sentencing and imprisonment. But the best, and deepest, such explanation must also account for the distinctive character of the public university community. In particular, account must be taken of the logic of protecting important broad property interests in that university setting—interests that are held in some form by every member of the university community.

¹⁵⁰ O'Toole, *supra* note 149, at 536 (footnotes omitted).

¹⁵¹ *See id.*; Migler, *supra* note 148, at 370; Walsh, *supra* note 149, at 1788.

¹⁵² *See Haidak*, 933 F.3d at 68–69 (distinguishing between classically adversarial and non-, or at least less, adversarial “inquisitorial” systems that are less centered on initiative taking and realistic control by the parties or by their attorneys).

¹⁵³ *See, e.g., id.*; *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (referring to the accused or “his agent”); *Doe v. Cummins*, No. 16-3334, 2016 U.S. App. LEXIS 21790, at *26–28 (6th Cir. Dec. 6, 2016) (only written questions permitted and only as tendered to and edited by hearing officials, with no opportunity for follow-up questions from the accused); *Doe v. Mia. Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (authorizing flexibility as to the testing of witness or accuser credibility and demeanor); *Doe v. Allee*, 30 Cal. App. 5th 1036, 1039, 1061 (2019) (direct or else indirect cross-examination, perhaps by means of video conferencing).

¹⁵⁴ *See cases cited supra* note 153.

Property interests, it will be recalled, are commonly thought to be essential in general to promoting something like sheer well-being; freedom itself; self-determination; the possibility of meaningful self-realization; and the exercise, in one sense or another, of autonomy.¹⁵⁵ These inseparable purposes and functions of any fair institution of property then take distinctive, and distinctively valuable, forms on the public university campus.¹⁵⁶

And certainly, one specific dimension in which respect for the basic property functions and interests must be manifested is the campus community interest in reducing any reasonably perceived or actual threat of sexual misconduct on campus. Any threat of such misconduct plainly tends to impinge upon individual well-being; upon genuine freedom of movement and choice on campus; upon one's control over one's own experiences and interactions on campus; upon the possibilities for self-realization and genuine flourishing on campus and in later life; and upon the exercise of autonomy within and supported by the campus community.¹⁵⁷

Thus, the broadly conceived basic purposes of property interests attach not merely to persons accused of their violation, but also to their accusers; to witnesses; and to past, present, and future members, in all roles and capacities, of the campus community. Concisely put, there simply are no mere bystanders, within the campus community, to threats to the basic property values as they manifest themselves in the life of the campus community. And any aggregation of interests must accommodate the basic interests of all campus community members. Any departure from this inclusive accounting of the relevant interests denies not only legitimate property interests, but the nature and the aspirations of the campus community itself.

CONCLUSION

It has been said that "due process is one of the conditions of the moral acceptability of those institutions that give some people power to control or intervene in the lives of others."¹⁵⁸ The first vital consideration is that of whether, and on what basis, a right to some sort of due process hearing may be invoked in the first place. The key to answering this question involves adopting a sensibly broad and well-informed understanding of the basic reasons for recognizing property interests in general in the first place. The second vital consideration is then that of the proper nature and timing of any required hearing. That question can be answered, in our contexts, by again focusing on the several basic purposes underlying the establishment of reasonably and fairly allocated property

¹⁵⁵ See *supra* Part II.

¹⁵⁶ See *supra* Part II.

¹⁵⁷ See *supra* Part II.

¹⁵⁸ T.M. Scanlon, *Due Process*, in *DUE PROCESS: NOMOS XVIII* 93, 94 (J. Roland Pennock & John W. Chapman eds., 1977).

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rights, in light, specifically, of the basic purposes and functions of the public university as a valued and diversely constituted community.

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