

# THE ETHICAL AND EDUCATIONAL IMPERATIVE OF DUE PROCESS

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*“For the legal order, after all, is an accommodation. It cannot sustain the continuous assault of moral imperatives, not even the moral imperative of ‘law and order’ . . . [The] highest morality almost always is the morality of process.”<sup>1</sup>*

## INTRODUCTION

In 2006, Wendy Murphy (Adjunct Professor of Law at the New England School of Law and a CBS News legal analyst) wrote a law review article titled *Using Title IX’s “Prompt and Equitable” Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to*

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1. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 120, 123 (1975).

*Redress Sexual Assault on Campus.*<sup>2</sup> Readers soon realized that Professor Murphy's reference to "fair proceedings" meant *fairness to the accuser*.<sup>3</sup> As far as the fairness to the accused was concerned, Professor Murphy had a simple legal prescription for private colleges and universities:

As the Supreme Judicial Court of Massachusetts held in *Schaer v. Brandeis University*,<sup>4</sup> accused students are not entitled to due process as a constitutional matter. Obviously, a [private] school is not the government and without state action, there can be no constitutional claim. Even if certain procedures are promised accused students as a matter of school policy of "contract," *there is no basis for a claim that such procedures must be followed* or the accused student may have the right of redress in civilian court. *The simple truth is, there is no right of redress for the accused student because schools are free to punish the student as they see fit without governmental regulations or interference.*<sup>5</sup>

Professor Murphy's due process observation (which we question below) was included in a critique of a 2002 Harvard University policy requiring "independent corroboration" as "a prerequisite to a full investigation and adjudication" of student sexual misconduct complaints.<sup>6</sup> Her views highlight one of the defining characteristics of the contemporary debates about the design of college and university sexual misconduct policies: procedural fairness—stripped of any ethical or educational purpose—is seen by "victim-centered" advocates as an impediment to providing a safe environment on college and university campuses.<sup>7</sup>

The thesis of this article is that due process—broadly defined as an inclusive mechanism for disciplined and impartial decision making—is essential to the educational aims of contemporary higher education and to fostering a sense of legitimacy in college and university policies. Even if due process were not required by law (as it typically is), colleges and universities would want to provide it as a matter of policy. An immediate risk is that persistent internal and external pressure on institutions to lower due process thresholds and to impose mandatory sanctions (initially in sexual violence cases, but possibly moving into other categories of student misconduct as well) will unnecessarily tip the balance of procedural due

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2. Wendy Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007 (2006).

3. *See generally id.*

4. 735 N.E.2d 373, 381 (Mass. 2000).

5. *Id.* at 1009–10 (emphasis added).

6. *Id.* at 1007.

7. *See, e.g., id.* at 1020 ("Simply put, any requirement of 'proof' beyond the word of the victim clearly will place women students at extra risk of sexual violence while potentially excluding from investigation and adjudicatory resolution the most serious of sexual assaults.").

process toward reassertion of greater paternalistic control by college and university administrators. Reassertion of such control—even when disguised by progressive-sounding euphemisms—is precisely the wrong direction for institutions to take as young adults seek to develop and demonstrate new leadership skills and as more older students (including returning veterans) arrive on campus expecting to be treated like adults. Furthermore, consistent with the aims of educational institutions to model ethical behavior expected of others, core due process procedures defined in campus publications should be honored in the same way other enterprises (commercial or otherwise) are expected to keep their stated commitments.

### I. STUDENT CONDUCT AND DUE PROCESS: A HISTORICAL PERSPECTIVE

Our views about the importance of defending core due process protections for students are influenced, in part, by historical accounts of efforts to regulate college and university student behavior going back as far as the middle ages. Those accounts do not reveal any “pre-due process” golden age of student rectitude. More evident is a pattern where rigid, “top-down” student conduct policies enforced with minimal due process created a poisonous “us versus them” (students versus faculty) atmosphere, usually corresponding with widespread incidents of student misconduct and violence. Ignorance of this pattern—and the value of engaging multiple internal constituencies in shaping college and university disciplinary procedures—can do incalculable harm to the future of American higher education.

#### A. Student Conduct and Due Process in European Institutions

One good starting point for a historical perspective on college and university student discipline is a 1495 code of conduct at the University of Paris<sup>8</sup> optimistically called “The Manual of the Perfect Student.” One scholar wrote that:

*The [M]anual of the [P]erfect [S]tudent* lists a great many things that students must *not* do. These include . . . swimming on Monday; . . . falling asleep during mass; . . . beating up children; . . . stirring up trouble; making stupid remarks; destroying trees;

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8. Students attending early European colleges and universities like Paris, Oxford, or Heidelberg were subject to greater regulation than southern institutions, like Bologna. *See generally* CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* 10 (1957) (observing that the great university at Bologna was “emphatically” a “student university, and Italian students are still quite apt to demand a voice in university affairs”). Haskins also wrote that the origins of colleges and universities in the north of Europe—Paris in particular—can be traced to “cathedral schools” run by the church and chartered by the crown. *Id.* at 14–15.

[and] pestering the hangman while he is trying to do his job . . .

Compilations of student conduct rules<sup>10</sup> were not accompanied by detailed due process guarantees<sup>11</sup> familiar to contemporary educators. Students typically lived in a less “legalistic” academic world where they were subject to close control by “masters” (lecturers) who “agreed to protect the student and to be responsible for his behavior.”<sup>12</sup> Evidence from a later era (eighteenth and nineteenth centuries) suggests that procedural informality existed even when students were subject to incarceration. Mark Twain provided an account of student life at the University of Heidelberg in his 1880 book *A Tramp Abroad*.<sup>13</sup> The “university prison” he described—also replicated at other German institutions<sup>14</sup>—had already been in existence for over 100 years:<sup>15</sup>

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9. HUNT JANIN, *THE UNIVERSITY IN MEDIEVAL LIFE: 1179–1499* 32 (2008).

10. The rules could be strict. “Undergraduates at the Sorbonne had to comply with strict regulations designed to preserve discipline and scholarly decorum.” *Id.* at 34. Student excursions off campus, however, seemed to provide greater freedom, since medieval students as “minor clerics” enjoyed certain exemptions from civil law. *See generally* Steven J. Overman, *Sporting and Recreational Activities of Students in Medieval Universities*, 1 *FACTA UNIVERSITATIS*, no. 6, 1999, at 25–33.

11. The absence of detailed “student rights” statements, of course, reflects levels of procedural due process in the surrounding society. *See generally* Kenneth Pennington, *Due Process, Community, and the Prince in the Evolution of the Ordo Iudiciarius*, 9 *REVISTA INTERNAZIONALE DI DIRITTO COMUNE* 9 (1998), available at [http://faculty.cua.edu/pennington/law58/procedure.htm#N\\_1\\_](http://faculty.cua.edu/pennington/law58/procedure.htm#N_1_). (observing “due process,” starting with a rudimentary right to be heard, was eventually grounded on the story of Adam and Eve: “[E]ven though God is omniscient, He too must summon defendants and hear their pleas.” This reasoning was not consistently applied, however. Pennington also observed that “Great Britain, a country that prides itself on its adherence to the principles of due process and in whose courts the community has never lost its place, did not establish the absolute right of defendants to defend themselves in court until the seventeenth and eighteenth centuries . . .” *Id.*

12. JANIN, *supra* note 9, at 35. *See also* LYNN THORNDIKE, *UNIVERSITY RECORDS AND LIFE IN THE MIDDLE AGES* (1975). “Due process” in this context depends upon the quality of relationships, not statements of student rights. There are appealing qualities to such arrangements, but the likely application to large numbers of students in contemporary higher education seems limited.

13. MARK TWAIN, *A TRAMP ABROAD VOL. I* (Samuel Clemens ed., Harper and Brothers 1921) (1880).

14. Carolyn J. Mooney, *How German Students Left Their Mark on a Campus Prison*, *CHRON. OF HIGHER EDUC.*, Mar. 1, 1996, at A55, available at <http://chronicle.com/article/How-German-Students-Left-Their/97185>.

15. Studentenkarzer (The Students’ Prison), HEIDELBERG MARKETING, [http://www.heidelberg-marketing.de/tourism/sights/historical\\_buildings/students\\_prison/index\\_eng.html](http://www.heidelberg-marketing.de/tourism/sights/historical_buildings/students_prison/index_eng.html) (last visited Apr. 28, 2012).

If the offense [by a student] is one over which the city has no jurisdiction, the authorities report the case officially to the University, and give themselves no further concern about it. The University court send[s] for the student, listen[s] to the evidence, and pronounce[s] judgment. The punishment usually inflicted is imprisonment in the University prison. *As I understand it, a student's case is often tried without his being present at all.* Then something like this happens: A constable in the service of the University visits the lodgings of the said student, knocks, is invited to come in, does so, and says politely—

“If you please, I am here to conduct you to prison” (emphasis added).<sup>16</sup>

The last student prison in Germany (at Gottingen) closed in 1933, “because the university had lost its authority to punish students for such offenses” and “*because students had come to view a stay in the campus slammer as a badge of honor*” (emphasis added).<sup>17</sup> The latter reason reflects an “us versus them” quality we will see again in American colleges and universities.

The widespread existence of student prisons at German institutions highlights the fact that significant portions of the student population there remained undeterred by strict rules and sanctions imposed with minimal due process.<sup>18</sup> This problem was not localized. Students at the University of Paris seemed as vexatious as their German counterparts<sup>19</sup> and “did not

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16. TWAIN, *supra* note 13, at 261.

17. Mooney, *supra* note 14.

18. Student misconduct even posed a threat to professors, as evidenced by “graded penalties” at Leipzig for any student “who picks up a missile to throw at a professor, him who throws and misses, and him who accomplishes his fell purpose to the master’s hurt.” HASKINS, *supra* note 8, at 61.

19. Consider this description by churchman Jacques de Vitry (d. 1240), who studied at the University of Paris:

Very few [University of Paris students] studied for their own edification, or that of others. They wrangled and disputed not merely about the various sects or about some discussions; but the differences between the countries also caused dissensions, hatreds and virulent animosities among them and they impudently uttered all kinds of affronts and insults against one another. They affirmed that the English were drunkards and had tails; the sons of France proud, effeminate and carefully adorned like women. They said that the Germans were furious and obscene at their feasts; the Normans, vain and boastful; the Poitevins, traitors and always adventurers. The Burgundians they considered vulgar and stupid. The Bretons were reputed to be fickle and changeable, and were often reproached for the death of Arthur. The Lombards were called avaricious, vicious and cowardly; the Romans, seditious, turbulent and slanderous; the Sicilians, tyrannical and cruel, the inhabitants of Brabant, men of blood, incendiaries, brigands and

have a good reputation with the townsfolk, who complained they were always brawling, whoring, dicing, swanking around in inappropriate clothing, singing and dancing, carrying weapons, and insulting not only respectable citizens but also the forces of law and order.”<sup>20</sup>

Likewise, in reference to students at Paris,<sup>21</sup> Homer Haskins wrote:

[I]f further evidence were needed to dispel the illusion that the medieval university was devoted to biblical study and religious nurture, the Paris preachers of the period would offer sufficient proof. Many [students] go about the streets armed, attacking the citizens, breaking into houses, and abusing women. They quarrel among themselves over dogs, women, or what-not, slashing off one another’s fingers with their swords, or, with only knives in their hands and nothing to protect their tonsured pates, rush into conflicts from which armed knights would hold back.<sup>22</sup>

Students in England appeared to be no better. Haskins wrote that “The coroners at Oxford recorded many a fateful issue of town and gown riots . . .”<sup>23</sup>

#### B. Student Conduct and Due Process in American Colleges and Universities

Higher education in the new world borrowed many attributes from the old, especially what historian Frederick Rudolph called “the collegiate way.”<sup>24</sup> This “collegiate way” paradigm was a residential institution model in an English tradition “permeated by paternalism.”<sup>25</sup>

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ravishers; the Flemish, fickle, prodigal, gluttonous, yielding as butter, and slothful. After such insults from words they often came to blows.

*Jacques de Vitry: Life of the Students at Paris*, MIDDLE AGES ONLINE READER, <http://jcsites.juniata.edu/faculty/tuten/vitry1.html> (last visited Apr. 28, 2012).

20. JANIN, *supra* note 9, at 32. See also THORNDIKE, *supra* note 12, at 78–79 (discussing a proclamation at Paris in 1269 against “some clerks and scholars” who “more and more often perpetuate unlawful and criminal acts . . . namely, that by day and night they atrociously wound or kill many persons, rape women, oppress virgins, break into inns, also repeatedly committing robberies and many other enormities hateful to God”).

21. Alcohol undoubtedly fueled much student misconduct at Paris. Hunt Janin reported that “[d]uring the Middle Ages there were about 4,000 taverns in Paris which sold some 700 barrels of wine every day. About sixty of those taverns were special favorites of the Paris students.” JANIN, *supra* note 9, at 37.

22. HASKINS, *supra* note 8, at 62.

23. HASKINS, *supra* note 8, at 61.

24. FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 86 (1962).

25. *Id.* at 87.

American students may have felt that Jeffersonian ideals clashed with paternalistic authoritarianism, but college and university officials held the view (expressed by one college president of the day) that “Republicanism is good: but the ‘rights of boys and girls’ are the offspring of Democracy gone mad.”<sup>26</sup>

Early American faculty members—like “masters” at many European institutions—typically assumed disciplinary control over students.<sup>27</sup> The extent of such control (or efforts at control) at the University of North Carolina in 1851 is reflected by the fact that “282 cases of delinquency came before the faculty from a student body of 230.”<sup>28</sup>

Harvard University in the 1840s seemed to enforce student disciplinary rules with almost as much zeal as North Carolina. Derek Bok (a former Harvard president) wrote about the history:

During chapel services, presidential addresses, and other ceremonial occasions, students were constantly urged to live god-fearing, upright lives. These exhortations were backed by detailed codes of conduct enforced by fines, demerits, and, if need be, expulsion. Not that the effort to mold conduct through discipline was notably successful. Annual reports of Harvard presidents in the 1840s are spiced with references to episodes such as a “college fence and a small building . . . were wantonly set on fire and the latter burnt down” or “a bomb-shell was placed, about midnight, in one of the rooms of University Hall, and exploded, doing great damage.” . . . To cope with these transgressions, the book of regulations at the end of the Civil War took a full forty pages of text.<sup>29</sup>

The violence Bok described (including arson and bombing) was not an isolated phenomenon. Incidents elsewhere included a “professor who was killed at the University of Virginia, the president of Oakland College in Mississippi who was stabbed to death by a student, [and] the president and

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26. *Id.* at 106 (citing remarks made on an unspecified date by President Thomas Cooper (d. 1839) at South Carolina College).

27. *Id.* at 106. Rudolf provides an amusing example of faculty perspectives on the responsibility to police students:

[T]he immigrant political economist Francis Lieber [teaching at South Carolina College] did not permit his distaste for [student] discipline to keep him from being conscientious; yet frustration was his lot. On one occasion, in pursuit of a student with a stolen turkey, he stumbled and fell on a pile of bricks, got up, rubbed his shins, and was heard to exclaim, “Mein Gott!! All dis for two thousand dollars.”

*Id.* at 106.

28. *Id.* at 106.

29. Derek Bok, *Ethics, the University, and Society*, HARVARD MAGAZINE, May–June 1988, at 39, 40.

professor who were stoned at the University of Georgia . . . .”<sup>30</sup> From a broader perspective, American colleges and universities in this era were encountering what historian Helen Lefkowitz Horowitz described as “a wave of violent collective uprisings in the late eighteenth and early nineteenth centuries against the combined authority of college professors and presidents.”<sup>31</sup> She wrote that:

Even we who lived through the 1960s find the violence directed against persons in the early 1800s hard to comprehend. At the University of North Carolina students horsewhipped the president, stoned two professors, and threatened the other members of the faculty with personal injury. Yale students in the 1820s bombed a residence hall. In a later Yale conflict, a student killed a tutor who tried to break up a melee.<sup>32</sup>

Princeton was a hotbed of insurrection at the time, producing six student rebellions between 1800 and 1830.<sup>33</sup> Lefkowitz Horowitz described two incidents—and the authoritarian college leadership that spawned them:

In 1800 students disturbed morning prayers by “scraping,” insulting the speaker by rubbing their boots against the rough floor. President Samuel Stanhope Smith called in three seniors and, when they admitted their wicked deed, dismissed them from the college. When their fellow students learned of this harsh penalty, they set off a riot. They shot pistols, crashed brickbats against walls and doors, and rolled barrels filled with stones along the hallways of Nassau Hall . . . . One of the expelled seniors did not leave the area and returned to the college two weeks later. He beat up the tutor whom he suspected of reporting on him. This set off a second riot that Smith quelled only by threatening to close the college.

Seven years later the suspension of three students again angered their classmates. This time undergraduate leaders acted responsibly and drew up a letter of remonstrance that questioned the justice of the dismissals . . . . President Smith found this conscious, collective act more threatening than spontaneous violence . . . . At evening prayers, he, his faculty, and a trustee

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30. RUDOLPH, *supra* note 24, at 97.

31. HELEN LEFKOWITZ HOROWITZ, *CAMPUS LIFE* 32 (1987).

32. *Id.* at 25.

33. *See* RUDOLPH, *supra* note 24. Rudolph wrote:

Ashbel Green [Princeton President from 1812–1822] remarked of one of Princeton's six [student] rebellions between 1800 and 1830 that “the true causes of all these enormities are to be found nowhere else but in the fixed, irreconcilable and deadly hostility . . . to the whole system established in this college . . . a system of diligent study, of guarded moral conduct and of reasonable attention to religious duty. . . .”

*Id.* at 98.



[demanded that the student signatories] disavow the letter . . . . Refusal meant suspension. A student leader led the way out of the room, followed by 125 Princetonians. Riot followed. Angry students seized Nassau Hall, smashed windows, and armed themselves with banisters against villagers who had assembled at the request of the president. The revolt ended when Smith closed the college for an early recess.<sup>34</sup>

Frederick Rudolph compiled a list of institutions with students “in rebellion” between 1800 and 1875: “Miami University, Amherst, Brown, University of South Carolina, Williams, Georgetown, University of North Carolina, Harvard, Yale, Dartmouth, Lafayette, Bowdoin, City College of New York, Dickinson, and DePauw.”<sup>35</sup> He concluded that the source of the rebellions was a clash of worldviews related to student discipline:

The system of discipline used in many colleges . . . thoroughly failed to achieve either its purpose or the larger purposes it intended to serve. For while discipline was an aspect of paternalism, the strict, authoritarian, patriarchal family was making no headway in American life, and for the colleges to insist upon it was for them to fight the course of history.<sup>36</sup>

### C. The UC-Berkeley Experience

Colleges and universities weathered the storms of student rebellion in the early nineteenth century and, for a time, adhered to the authoritarian model. Student resistance, however, resurfaced. The history of the University of California (hereinafter “Berkeley”) is instructive in this regard. Initial policies adopted by Berkeley (founded in 1869) provided for “the ready dismissal of any student who has not the habits or instincts of a gentleman or the tastes and ambition of a scholar.”<sup>37</sup> The rules allowed “prompt removal” of any student “who is known to be wasting his time . . . jeopardizing the good order of the University or the studious habits of his fellows, even though he has not been detected in and indeed may not have committed any single outrageous act.”<sup>38</sup> Sociologist C. Michael Otten, commenting on the Berkeley policies, wrote that:

The [accused] student need not be tried for a specific infraction of the rules; a bad reputation was ground enough for expulsion. . . [I]n a community where everyone knows everyone else, the most severe punishment need not be mitigated by formal procedures. Discipline could be and was meted out on the basis

34. LEFKOWITZ HOROWITZ, *supra* note 31, at 24–25.

35. RUDOLPH, *supra* note 24, at 98.

36. *Id.* at 104.

37. C. MICHAEL OTTEN, UNIVERSITY AUTHORITY AND THE STUDENT 29 (1970).

38. *Id.*

of personal reputation and not according to objective standards, established precedent, or formalized procedures.<sup>39</sup>

Students may not have challenged Berkeley disciplinary policies directly, but—as enrollment expanded—the faculty grew weary of tensions that ensued. Otten tells the story of a 1904 UC riot that indicated “time was ripe for a new system of control:”<sup>40</sup>

[In] 1904, local newspapers were carrying front page banners telling of “RIOT AT THE UNIVERSITY,” “TWELVE RUSHERS TAKEN IN HAND BY STATE UNIVERSITY AND BOOKED FOR EXPULSION,” followed by another story of how “Professor Cory and his armed forces put handcuffs on as many as they could capture and held them until they could get their names.” The faculty also resorted to guns and searchlights .

<sup>41</sup>  
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The story of student discipline at Berkeley followed its own path thereafter, but generally paralleled developments in the larger society. Student resistance and faculty exhaustion led to a new, less authoritarian model involving what Otten called “paternalistic self-government.”<sup>42</sup> The result was less manipulative than it sounds, since there appeared to be a time (1899-1919) when presidential leadership and student devotion to the quality and standing of the University created a climate of trust and cooperation. Students were given genuine disciplinary authority (a student judicial panel) and used it responsibly.<sup>43</sup> Their participation in “self-government,” Otten wrote, was “remarkably successful in quelling student ‘riots.’”<sup>44</sup>

Significantly, for our analysis, this era of trust and student self-governance at Berkeley did not last. Authoritarian control can reappear when students seem alienated or combative, aggressive media decry moral failings of the youth, and college and university administrators fear for the reputation of the institution. During the 1920s and beyond—at Berkeley

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39. *Id.* at 37.

40. *Id.* at 44.

41. *Id.* at 64.

42. *Id.* at 38.

43. Proceedings before this body were deliberately informal. It was described as a “household tribunal” rather than “judicial” board. OTTEN, *supra* note 37, at 65. While the procedures did not meet contemporary due process standards (e.g. no right of cross-examination) only one student in 15 years exercised a right of appeal to the Faculty and Academic Senate (where much more due process was provided). *Id.* at 66–70. In a time of shared values, strong community feeling, and significant student responsibility, trust in fellow students apparently trumped procedure. Whether this model could be re-created in a far larger and more diverse institution is questionable, especially during times of social and political polarization.

44. *Id.* at 38.

and elsewhere<sup>45</sup>—alienation after World War I, the social turmoil associated with Prohibition, political radicalization (and conservative reaction to it), and the growth of a bureaucratic management style all contributed to ideological conflict on campus. The result at Berkeley was a gradual return to authoritarianism, transformed into a new managerial style. Otten observed that “student government jurisdiction tended to contract as student [social and political] interests [off-campus] expanded.”<sup>46</sup> Disciplinary charges were managed and diverted by an “Office for the Dean of Students.”<sup>47</sup> Eventually, “all cases involving sentences of suspension or dismissal had to be referred to the chancellor, who also had the authority to establish procedures for the hearing.”<sup>48</sup> Administrators were reasserting control “with only the most cursory consultation with students.”<sup>49</sup>

The return of authoritarian control at Berkeley was incremental, but the end result became evident in the 1960s, when a new student culture of rebellion (with roots going back to the 1920s<sup>50</sup>) reasserted itself in Berkeley’s “Free Speech Movement” (FSM) in 1964. Serious disciplinary cases related to that movement resulted in appointment of a special judicial body: “The Ad Hoc Committee of the Academic Senate,” chaired by a prominent law professor. While holding student violators accountable, the Committee offered “serious criticism” of the disciplinary process:

On the other hand, the procedure by which the University acted to punish these wrongdoings is subject to serious criticism. The relevant factors are: first, the vagueness of many of the relevant regulations; second, the precipitate actions taken in suspending the students sometime between dinner time and the issuance of the press release at 11:45 PM; third, the disregard of the usual channel of hearings; fourth, the deliberate singling out of these students (almost as hostages) for punishment . . . ; and fifth, the

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45. RUDOLPH, *supra* note 24. Rudolph described student perspectives in the 1920 and 1930s:

Everywhere most students were in revolt over something or thought that they were: perhaps only compulsory chapel or compulsory military training. Disillusioned by the nature of the post-Versailles world, they registered their disgust in peace demonstrations and in solemn pledges never to go to war. They joined picket lines, they helped to organize labor unions. In the great urban centers a small number even signed up with the Communist party.

*Id.* at 467.

46. OTTEN, *supra* note 37, at 151.

47. *Id.* at 185.

48. *Id.* at 187.

49. *Id.* at 162.

50. *Id.* at 104.

choice of an extraordinary and novel penalty—"indefinite suspension" which is nowhere made explicit in the regulations.<sup>51</sup>

The Ad Hoc Committee criticism would resonate with most students. Over eighty percent of the student body at Berkeley "said they agreed with the goals of the FSM."<sup>52</sup> Those goals included "concerns about due process, as FSM leaders seemed to many students to have been unfairly singled out for punishment . . . ."<sup>53</sup>

"Core" FSM demands for due process were:

The rules . . . should be specific, clear, and well-publicized. Rule violators should be notified of the specific charges against them, and they should have a prompt hearing before an impartial body. At the hearing they should have the right to confront their accusers, and a written record should be kept of the proceedings. If the defendant wished, he could have professional counsel.<sup>54</sup>

FSM leaders at Berkeley understood that freedom of expression is meaningless without corresponding *procedural* protections. As Charles Alan Wright wrote in his classic law review article *The Constitution on Campus*,<sup>55</sup> freedom of expression can't be protected if "some administrator were permitted to make an *ex parte* and unreviewable determination that particular behavior was 'disruptive action' [not protected expression] and that a particular student had participated in it."<sup>56</sup>

The Free Speech Movement at Berkeley was one of the defining moments in the campus revolutions of the 1960s and 1970s. Following the pattern we previously described, it arose in a context of student rebellion against arbitrary authoritarian control by colleges and universities.<sup>57</sup> When

51. *Id.* at 187.

52. *Id.* at 179.

53. ROBERT COHEN & REGINALD E. ZELNIK, THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S 7 (2002). *See also* ROBERT COHEN, FREEDOM'S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960S 235 (2009).

54. OTTEN, *supra* note 37 at 185–86.

55. Charles Alan Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969).

56. *Id.* at 1059.

57. *See* ROBERT COHEN, FREEDOM'S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960S 1 (2009). A critical moment occurred on October 1, 1964:

[P]olice drove a squad car to UC Berkeley's central thoroughfare, Sproul Plaza, to arrest civil rights organizer Jack Greenberg because he, like so many other free speech activists, was defying the ban by staffing a political advocacy table on the plaza. Before the police could complete the arrest . . . a crowd of students surrounded the car in a non-violent blockade that would last thirty-two hours. Shortly after the blockade began, Mario Savio, a leader of the civil rights group University Friends of SNCC (Student Non-Violent Coordinating Committee), removing his shoes so as not to damage the police car,

the “Cox Commission on the Disturbances at Columbia University” examined comparable unrest there, it likewise concluded that one of the internal causes of unrest that “especially impressed” Commission members was “an attitude of authoritarianism” among university officials.<sup>58</sup>

Over thirty years ago, in *Bradshaw v. Rawlings*,<sup>59</sup> The U.S. Court of Appeals for the Third Circuit suggested that the campus revolutions of the 1960s and 1970s—exemplified by the Berkeley Free Speech Movement—had permanently altered the relationship between students and institutions:

Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students.<sup>60</sup>

There is no guarantee the change will last. Our historical overview of efforts to regulate college and university student behavior shows longstanding cyclical tensions between students and administrators. Substantive and procedural protections that students gain in one generation may be lost in the next. Student memories in this regard are often fleeting, but college and university administrators' inclination to paternalism endures.

## II. *DIXON* AND *GOSS*: DUE PROCESS AS A THINKING STRATEGY

As suggested above, the Free Speech Movement at Berkeley was also a *due process* movement. Demands for greater procedural fairness were an

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climbed on top of it and into national headlines, using its roof as a podium to explain the protest and demand freedom of speech. From those first moments atop that car Savio emerged as the Berkeley rebellion's key spokesman, symbolizing all that was daring, militant, and new about the Free Speech Movement.

*Id.* Later, according to Cohen and Zelnik, “Savio's daring attempt to speak at an administration-run meeting in Berkeley's Greek Theatre days after the sit-in electrified thousands of students, who were shocked to see campus police drag him from the podium.” COHEN & ZELNIK, *supra* note 53, at 1.

58. CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY 1968, at 193 (1968).

59. *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) (holding institution had no duty to prevent risk of harm to underage students consuming alcohol off-campus, even though the off-campus gathering was planned, in part, by a faculty member, flyers announcing the event were distributed on campus, and sophomore class funds were used to purchase beer).

60. *Id.* at 138–39.

indigenous response to local conditions, not a “legalistic” intrusion from without. Still, there’s no question formative case law was being decided around this time, most notably in *Dixon v. Alabama State Board of Education*,<sup>61</sup> and, somewhat later, in *Goss v. Lopez*.<sup>62</sup> Both *Dixon* and *Goss* set measured and moderate limits on unchecked disciplinary authority at public schools and colleges. By doing so, both decisions also made positive—perhaps not fully anticipated—contributions to student learning, individual and community decisionmaking, and the role of adult students as constituent participants in college governance.

*Dixon* and *Goss* have been discussed often and in detail elsewhere.<sup>63</sup> We previously wrote in *JCUL* that educators often failed to appreciate the “considerable leeway” those decisions gave them to fashion equitable and efficient disciplinary procedures.<sup>64</sup> In any event, the core due process standards in *Dixon* and *Goss* have become sufficiently settled to hold public college administrators personally liable for violating the due process rights of college students.<sup>65</sup>

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61. 294 F.2d 150 (5th Cir. 1961) (holding students are entitled to notice and some opportunity for a hearing prior to expulsion from a public college or university).

62. 419 U.S. 565 (1975) (finding public school students entitled to notice and an opportunity to be heard prior to suspension).

63. See, e.g., PETER LAKE, *BEYOND DISCIPLINE: MANAGING THE MODERN HIGHER EDUCATION ENVIRONMENT* 64 (2009); WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* 485 (3d. ed. 1995).

64. Gary Pavela, *Limiting the Pursuit of Perfect Justice on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137, 139 (1979–1980).

65. See *Barnes v. Zaccari*, 757 F. Supp. 2d 1313 (N.D. Ga. 2010) (holding, in part, that former Valdosta State University President Ronald M. Zaccari was personally responsible under 42 U.S.C. § 1983 for violating the procedural due process rights of Hayden Barnes—a VSU student who was “administratively withdrawn” by Zaccari because Barnes was a perceived “danger to [himself] or others.”). The court went on to write:

The court is unpersuaded by Zaccari’s argument that he is entitled to qualified immunity because he ‘sought out legal advice’ . . . The law is clearly established in the Eleventh Circuit that ‘due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.’ *Dixon v. Alabama State Board of Education*, 294 F.2d at 151. Moreover, the court finds Zaccari’s assertion that he relied upon the [legal] advice . . . disingenuous. The undisputed facts show that Zaccari ignored the lawyers’ warnings that withdrawing Barnes would require due process in executing his administrative withdrawal of Barnes . . . Accordingly, the court denies Zaccari’s motion for summary judgment . . .

*Id.* at 1333. College administrators should be wary of sometimes attenuated academic discussion and guesswork about whether the Supreme Court might (or might not) explicitly adopt or reject the reasoning in *Dixon*. Academic speculation

Essentially, *Dixon* (recognized by the Supreme Court as a “landmark” decision that quickly influenced courts across the country<sup>66</sup>) defined higher education as a “vital” private interest that cannot be denied by the government without due process.<sup>67</sup> The court wrote that:

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens . . .<sup>68</sup>

The court then provided the following due process guidance (in a context where plaintiffs had been expelled for participating in a civil rights lunch counter sit-in):

For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an

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can be engaging and occasionally instructive, but decision-makers have to be attentive to what the courts do in fact.

66. *Goss* 419 U.S. at 576 n. 8 (citing *Hagopian v. Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972)) (“Since the landmark decision of [*Dixon*]... the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion.” The Court’s reference to the Second Circuit in *Hagopian* is instructive. Six years after *Dixon*—in a setting where courts are especially cautious in setting any procedural due process requirements—the U.S. Court of Appeals for the Second Circuit held that “due process only requires for the dismissal of a Cadet from the Merchant Marine Academy that he be given a fair hearing at which he is apprised of the charges against him and permitted a defense” [emphasis added]. *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir 1967). The same requirement was then imposed by the Second Circuit on the United States Military Academy in *Hagopian*.)

67. The court in *Dixon* cited the 1961 Supreme Court decision in *Cafeteria and Restaurant Workers Union v. McElroy et al.*, 367 U.S. 886, 894 (“One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.”) (quoting *Homer v. Richmond* 292 F.2d 719, 722 (D.C. Cir. 1961)).

68. *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.<sup>69</sup>

The *Dixon* court elaborated upon the rationale for procedural fairness in student disciplinary cases:

The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well nigh inevitable when the Board hears only one side of the issue. In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the expelled students and

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69. *Id.* at 158–59.



of others familiar with the injustice, and do inestimable harm to their education.<sup>70</sup>

At heart, the court in *Dixon* is describing an *educational* as well as a legal process. A disciplinary allegation against a student must be tested by unbiased examination of relevant evidence, including testimony from the accused. The “example set by the Board” in failing to follow such a process is demoralizing to students and would “do inestimable harm to their education.”<sup>71</sup> Implicit in this language is the insight that educators reviewing disciplinary charges are also teaching students the essential components of disciplined, empirical thinking. In few other contexts will accused students be paying as much attention. And, if fellow students are sitting on a hearing panel helping decide the case, they too will be engaged learners intensely focused on the importance of examining the evidence before resolving the issue. This experience—the application of “rudimentary elements” of due process—is not an alien, “legalistic” intrusion into academic life. It constitutes part of the core mission of colleges and universities to develop ways of thinking and qualities of character essential to the academic enterprise itself.

The U.S. Supreme Court decision in *Goss v. Lopez* addressed a school (not college student) case. But the Court's analysis is fully applicable to public higher education in light of its internal logic;<sup>72</sup> the “liberty” interests shared by students at public schools and colleges;<sup>73</sup> subsequent references

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70. *Id.* at 157.

71. *Id.*

72. *Goss*, 419 U.S. at 580, stating:

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

*Id.* Public colleges, of course, impose discipline in precisely the same way, but the potential harm of an adverse disciplinary finding to the career prospects of an adult college student (whose misbehavior is less likely to be regarded as an adolescent indiscretion) is even greater.

73. The fact that public school students are *required* to attend school—while college students are not—does not render *Goss* inapplicable in the public college context. The Court in *Goss* also identified a “liberty” interest (and a resulting entitlement to due process) fully applicable to public college students as well. *Id.*

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. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students’ standing with their fellow pupils and

by lower federal courts;<sup>74</sup> subsequent references from the Supreme Court itself,<sup>75</sup> and *even greater* Constitutional protections the Supreme Court has to given to adult college students attending public institutions of higher education.<sup>76</sup> We are in accord in this regard with Professor Peter Lake, who

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their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

*Id.* (citing *Wisconsin v. Constantineau*, 400 U. S. 433, 437 (1971)).

74. *See Gorman v. University of Rhode Island et al.*, 837 F.2d 7, 12 (1st Cir. 1988):

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. There is no doubt that due process is required when a decision of the state implicates an interest protected by the fourteenth amendment. It is also not questioned that a student's interest in pursuing an education is included within the Fourteenth Amendment's protection of liberty and property. *See Goss v. Lopez*, 419 U.S. 565, 574–75 (1975). Hence, a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process. *See id.* 575–76 . . . ; *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (internal citations omitted).

75. *See Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88–89 (1978):

In *Goss*, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative fact-finding to call for a “hearing” before the relevant school authority. While recognizing that school authorities must be afforded the necessary tools to maintain discipline, the Court concluded: “. . . [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect.”

*Id.* Notwithstanding the opportunity provided in *Horowitz*, the Court declined to limit *Goss* to the school setting and cited language in the *Goss* decision (“Effective notice and informal hearing” can be “a meaningful hedge against erroneous action”) that applies with equal force in higher education. *Id.* at 89.

76. *Compare Bethel Sch. Dist. v. Fraser* 478 U.S. 675, 683 (1986) (“[A] highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse”) with *Papish*, 410 U.S. at 670 (“the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency’”).

has written that “[t]here is reason to believe that the Supreme Court will ultimately and explicitly extend *Goss*, in some form, to college students.”<sup>77</sup> The Supreme Court has, however, “carefully limited” *Goss* to student *disciplinary* decisions, not matters involving the “subjective and evaluative” assessment of academic performance.<sup>78</sup>

Like *Dixon*, the Supreme Court in *Goss* defined due process as a natural component of the educational process:

[I]t would be a strange disciplinary system in an educational

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The heightened constitutional protections the Court has given to college students was manifest in *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995):

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.

*Id.* It strains credulity to suggest the court would grant this stature to college students for First Amendment purposes, but give them less procedural due process than was accorded to school children in *Goss*.

77. LAKE, *supra* note 63, at 85. Professor Lake’s observation in this regard seems at odds with other portions of his text, but we think it is a concise and accurate statement of law.

78. *See Horowitz*, 435 U.S. at 89–90:

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss*, the school’s decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances “provide a meaningful hedge against erroneous action. . . . The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. 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.

institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. “[F]airness can rarely be obtained by secret, one-sided determination of facts . . .” “Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”<sup>79</sup>

The Court also identified due process as a *thinking* strategy:

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process . . .

[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced . . .

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the fact-finding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.<sup>80</sup>

The above cited language from *Dixon* and *Goss* reflect the spirit of the scientific method. Both the methodology of science and the core components of due process encompass 1) a truth-seeking orientation; 2) a reasoned hypothesis (e.g. in the student disciplinary context, sufficient evidence to initiate a charge); 3) empirical investigation (an unbiased fact-finding process); and 4) candid assessment/reassessment of the outcome (e.g., informal or structured administrative review). The starting point for this kind of thinking and decisionmaking is summarized by Learned Hand's

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79. *Goss*, 419 U.S. at 580.

80. *Id.* at 580, 583–84.

famous observation that “the spirit of liberty is the spirit which is not too sure it is right.”<sup>81</sup> In a less frequently cited speech (receiving an honorary degree from Columbia University in 1939), Judge Hand applied the core idea behind “the spirit of liberty” to scholarship and teaching:

And where shall we find a better exemplar of those qualities of heart and mind on which in the end a democratic state must rest than in the scholar? I am not thinking of the patience and penetration with which he must be endowed, or of the equipment he must have; but of the consecration of his spirit to the pursuit of truth. No one can keep a mind always open to new evidence, always eager to change its conclusions, who has other allegiance or commitments. Upon the failure of this necessary detachment right judgment is most often wrecked; its achievement most strains our animal nature; it is the last habit to be acquired and the first to be lost . . . .

You may take Martin Luther or Erasmus as your model, but you cannot play two roles at once; you may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that, when the final count is made, it will be found that the impairment of his powers far outweighs any possible contribution to the causes he has espoused. If he is fit to serve in his calling at all, it is only because he has learned not to serve in any other, for his singleness of mind quickly evaporates in the fires of passions, however holy.<sup>82</sup>

Learned Hand's “spirit of liberty” and “spirit to the pursuit of truth” are components of what Derek Bok has defined as the university's *ethical curriculum*: formal and informal instruction designed to help students acquire “a greater respect for facts and a greater ability to reason carefully about complicated problems.”<sup>83</sup> This is not to suggest reason can be divorced from empathy (empathy is essential to making good choices about the *aims* of reasoning), but ethical traditions worldwide stress the role of self-restraint and mental discipline in leading a worthy life.<sup>84</sup> College

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81. LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES* 190 (3d ed. 1960).

82. *Id.* at 136–38.

83. Bok, *supra* note 29, at 49.

84. For example, in the Buddhist tradition, mental discipline is viewed as a joyful experience: “The mind is fickle and flighty, it flies after fancies and whatever it likes; it is difficult indeed to restrain. But it is a great good to control

disciplinary systems are a resource for teaching precisely those qualities. Properly managed, an equitable disciplinary process models the thinking process itself—what John Dewey described as “a postponement of immediate action”, while the mind “affects internal control of impulse through a union of observation and memory.”<sup>85</sup> Most colleges' greatest educational deficiency in this regard may not be in providing an improper “amount” of due process, but in failing to be instructive about the *thinking enhancement* due process can provide.

The thinking enhancement associated with basic due process also needs to be understood as a form of “community cognition.” Separation of powers in governmental structures is designed, in part, to serve as a check on the self-righteous passions that can ignite any community (see our discussion of the Duke Lacrosse case, below). Due process serves a built-in repository of reasoned truth-seeking at precisely the time communities need it the most—when passions affirm truth is “obvious” and punishment needs to be “swift and severe.” At the social level this process is akin to cognitive therapy for individuals, described by psychologist Jonathan Haidt as “training clients to catch their thoughts, write them down, name the distortions, and find alternative and more accurate ways of thinking.”<sup>86</sup>

In the context of procedural fairness, the due process revolution of the 1960s and beyond reflected the natural evolution of a broader “thinking revolution”—evident in political theory (distrust of unchecked power), greater understanding of unconscious motivation, appreciation for the methodology of science, and—more recently—ongoing research into structural flaws of human cognition.<sup>87</sup> Finding the right procedural balance will always be a worthy endeavor, but rescinding the *idea* of due process (e.g. suggesting that due process at private colleges isn't necessary) requires rescinding one the most important self-corrective and truth-

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the mind; a mind self-controlled is a source of great joy.” BUDDHA’S TEACHINGS 8 (1973).

85. JOHN DEWEY, *EXPERIENCE AND EDUCATION* 64 (1938).

86. JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS* 38 (2006). Research on brain science and cognition is moving too quickly to be fully appreciated. An outline is emerging of multiple distortions in the human thinking process itself (recognizing the distortions is ground for modest optimism). This research validates the wisdom of Learned Hand’s observation that “the spirit of liberty is the spirit which is not too sure it is right.” HAND, *supra* note 81, at 190–9. See also Daniel Kahneman, *Don’t Blink! The Hazards of Confidence*, N.Y. TIMES MAG., Oct. 11, 2011, available at <http://www.nytimes.com/2011/10/23/magazine/dont-blink-the-hazards-of-confidence.html?pagewanted=all>.

It’s reasonable to suggest in this regard that the evolution of legal structures like “due process” mirrors the evolution of the brain itself (i.e. a more recently evolved “rational” component of the brain draws upon and mediates older limbic or “emotional” structures). *Id.*

87. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011). See also Kahneman, *supra* note 86.

seeking mechanisms created within the modern university—and society as a whole.

### III. DUE PROCESS AND STUDENT ENGAGEMENT

The due process revolution in higher education was not limited to demands for greater procedural fairness. It was also contemporaneous with demands for greater student engagement in campus governance.<sup>88</sup> Greater student engagement, of course, was not a “legalistic” intrusion from the courts; *Dixon* and *Goss* mandated basic procedural due process, not student participation in defining and enforcing campus rules. But the fit between “due process” and student empowerment was intuitive and seamless. In 1967, several major national higher education organizations<sup>89</sup> devised and

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88. The intensity of feeling is seen by this concluding observation in the STUDENTS FOR A DEMOCRATIC SOCIETY, *Port Huron Statement* (1962) <http://www.h-net.org/~hst306/documents/huron.html>:

To turn these [proposals] into realities will involve national efforts at university reform by an alliance of students and faculty. They must wrest control of the educational process from the administrative bureaucracy. They must make fraternal and functional contact with allies in labor, civil rights, and other liberal forces outside the campus. They must import major public issues into the curriculum—research and teaching on problems of war and peace is an outstanding example. They must make debate and controversy, not dull pedantic cant, the common style for educational life. They must consciously build a base for their assault upon the loci of power.

*Id.* Students on some campuses now serve on institutional governing bodies. For a partial list (and an example of ongoing controversy) see also: Andrew Ramonas, *Other Schools Have Students on Boards of Trustees*, GEORGE WASHINGTON UNIV. HATCHET (Nov. 7, 2005), <http://www.gwhatchet.com/2005/11/07/other-schools-have-students-on-boards-of-trustees/>.

89. AM. ASSOC. OF UNIV. PROFESSORS, AAUP POLICY 273, 278 (10TH ed. 2006), <http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm> (The AAUP website lists the following founding organizations “[T]he American Association of University Professors, the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors formulated the joint statement. The document was endorsed by each of its five national sponsors, as well as by a number of other professional bodies. The governing bodies of the Association of American Colleges and the American Association of University Professors acted respectively in January and April 1990 to remove gender-specific references from the original text. Organizations approving the 1990–1993 interpretative notes were: American Association of Community Colleges, American Association of University Administrators, American Association of University Professors, American College Personnel Association, Association for Student Judicial Affairs, National Association for Women in Education, National Association of Student

promulgated the “Joint Statement on Rights and Freedoms of Students.”<sup>90</sup> Those “rights and freedoms” blended procedural due process protections (without reference to controlling court opinions) with a call for student participation in campus decisionmaking. No distinction was made in this regard between public and private universities. What follows are the Joint Statement “Hearing Committee Procedures” and language on “Student Participation in Institutional Government.”<sup>91</sup>

#### A. Hearing Committee Procedures

- a. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.
- b. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to ensure opportunity to prepare for the hearing.
- c. The student appearing before the hearing committee should have the right to be assisted in his or her defense by an adviser of the student’s choice.
- d. The burden of proof should rest upon the officials bringing the charge.
- e. The student should be given an opportunity to testify, to present evidence and witnesses, and to hear and question adverse witnesses. In no case should the committee consider statements against the student unless he or she has been advised of their content and of the names of those who made them and has been given an opportunity to rebut unfavorable inferences that might otherwise be drawn.
- f. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.
- g. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.
- h. The decision of the hearing committee should be final, subject only to the student’s right of appeal to the president or ultimately to the governing board of the institution.

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Personnel Administrators, National Orientation Directors Association, Southern Association for College Student Affairs, and United States Student Association. *Id.*

90. *Id.* at 273.

91. *Id.* at 275, 277–78.



### B. Student Participation in Institutional Government

“As constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs. The role of student government and both its general and specific responsibilities should be made explicit, and the actions of student government within the areas of its jurisdiction should be reviewed only through orderly and prescribed procedures.”<sup>92</sup>

Ideas expressed in the *Joint Statement* have deep roots in American educational philosophy, especially the work of John Dewey and Horace Mann. Mann's memorable language about the aim of fostering student participation in school or college governance resonates with equal force today:

In order that men may be prepared for self-government, their apprenticeship must begin in childhood . . . He who has been a serf until the day before he is 21 years of age, cannot be an independent citizen the day after. . . As the fitting apprenticeship for despotism consists in being trained to despotism, so the fitting apprenticeship for self-government consists in being trained to self-government.<sup>93</sup>

Comparable views were expressed by former Harvard President Derek Bok in his 1988 essay “Ethics, the University, and Society.”<sup>94</sup> Bok wrote that “elements of a comprehensive program of moral education” in higher education should include “discussing codes of conduct with students and administering them fairly.”<sup>95</sup> He also observed that:

A final aim in maintaining discipline should be to involve students in the process of devising and administering rules. The more responsibility students can assume, the more likely they are to understand the reasons for regulations and to gain a stake in implementing them successfully . . . In addition to discussing rules, students can also assist in their administration. In fact, most institutions, including Harvard, involve students as members of judicial bodies in some types of offenses . . .<sup>96</sup>

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92. *Id.* at 275, 277.

93. Horace Mann, in PETER SMAGORINSKY & JOEL TAXEL, *THE DISCOURSE OF CHARACTER EDUCATION* 54 (2005).

94. Bok, *supra* note 29.

95. *Id.* at 49.

96. *Id.* at 49, 46. Bok expressed similar views in an interview with the *Christian Science Monitor*:

[Bok referred to] “qualities of character that go back to Puritan times . . .” Those qualities, he feels, are based on “some very basic principles

Nowhere in his analysis does Bok cite court cases as final authority. Procedural fairness and student engagement are independently derived from an *educational* perspective as core components of teaching and learning at public and private institutions of higher education. Similar analysis from other prominent educators has been applied to the school setting.<sup>97</sup>

The risks and benefits of involving students in “devising and administering rules” (and other forms of campus governance) are comparable to the risks and benefits of democracy itself. Some student proposals will seem trivial and unwise; others will inspire innovations that can revitalize the campus.<sup>98</sup> But the greatest benefit of student engagement

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that have been held to be important by almost every human society of which we have any knowledge. One [principle] obviously has to do with refraining from acts of unjustified violence or aggression toward others. Another has to do with keeping one’s word. Another has to do with telling the truth.” What can the university do to promulgate such principles? Among other things, it can encourage discussion of its own rules. On most campuses, Bok says, “There is an unwillingness to address squarely the central issue of why do we have this rule? What principle of ethical behavior is it built on? As a result the rule becomes an abstract, arbitrary, alien, thing,” he says. That’s better than having no rules at all. But it “falls very far short of how rules might be used as part of an educational process—so that students really learn something about the underlying principles of conduct.”

Rushworth M. Kidder, *Developing ‘Character’ Again at American Universities*, CHRISTIAN SCI. MONITOR, July 27, 1987, at 21.

97. See ERNEST L. BOYER, THE BASIC SCHOOL: A COMMUNITY FOR LEARNING 22, 25 (1995) (“A basic school is a just place . . . there is, in the school, a feeling of fair play . . . The Basic School, as a disciplined place, has a code of conduct which students themselves help define.”).

98. A relatively recent example is the movement to adopt “modified” honor codes nationwide. Student leadership has been essential to the effort. See Donald McCabe and Gary Pavela, *New Honor Codes for a New Generation*, INSIDE HIGHER EDUC., (Mar. 11, 2005), <http://www.insidehighered.com/views/2005/03/11/pavela1>:

An important element of Maryland’s success is the fact that faculty members and administrators were already accustomed to seeing students as participants in campus governance. A student sits on the statewide Board of Regents and students make up twenty percent of Maryland’s University Senate (a body that reviews and makes recommendations about core institutional policies). The impetus for this level of student participation was the campus revolutions of the sixties and seventies, which institutionalized student power and all but ended the concept of “in loco parentis” in American higher education. Ironically, those campus revolutions also laid the groundwork for the revitalization of an old academic tradition: student-administered honor codes.

is *the spirit* of engagement—protected and encouraged by the idea of student academic freedom.<sup>99</sup> The student rebellions at American colleges in the early nineteenth century seem as distant as the leadership style that inspired them. The (generally) less violent campus revolutions of the 1960s and 1970s fostered an era of student empowerment that may wax and wane in intensity, but has taken root at some of the nation's leading universities.<sup>100</sup> Contemporary college presidents—sometimes echoing language about student empowerment used by the Supreme Court in *Rosenberger v. Rectors of the University of Virginia*<sup>101</sup> can now be heard actively encouraging students to be partners in teaching, learning, and governing. At an April 20, 2005 Honors Convocation, University of Michigan President Mary Sue Coleman told the assembled students:

“I have a question I want our outstanding students to consider today—have we challenged you enough? More importantly, have you challenged this university enough? And are you ready to go out and challenge the world?”

This question is more important than ever before. Being able to challenge people, institutions, and policies in an informed manner is growing more complex every day.

What makes the environment of universities so intense is the unfettered intellectual exchange between faculty and students. Our students arrive here to learn from faculty—but quickly find out that we expect students to dispute existing theories and ideas. The unique nature of an academic community relies upon the expectation that everyone will be a contributor—that iconoclastic ideas are encouraged—that all knowledge is in a

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99. See Gary Pavela, *Academic Freedom for Students Has Ancient Roots*, CHRON. OF HIGHER ED., May 27, 2005, at B8.

100. This is not to say the authoritarian style has disappeared or isn't lying dormant. *Barnes v. Zaccari*, 757 F. Supp. 2d 1313 (N.D. Ga. 2010) (holding, in part, that former Valdosta State University president Ronald M. Zaccari was personally responsible under 42 U.S.C. § 1983 for violating the procedural due process rights of Hayden Barnes—a VSU student).

101. 515 U.S. 819, 836 (1995):

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

constant state of flux, contingent upon new data, new discoveries, new ideas.”<sup>102</sup>

A college campus where students are asked “*have you challenged this university enough?*” will not be grounded in authoritarian paternalism. Students will be engaged in campus governance, including decisionmaking roles in designing and administering disciplinary systems structured by basic due process. This overall approach—rooted in the campus revolutions of the 1960s and 1970s—is beneficial for students and colleges on many fronts. Colleges will avoid the student alienation associated with authoritarian management styles of the past; student voices will be heard on pressing local and national issues (including the need for stricter sexual assault policies on and off campus);<sup>103</sup> and the broad range of students will have better opportunities to develop the reasoning, thinking, creating, and leadership skills they need for the future.

#### IV. CHALLENGES TO THE DUE PROCESS REVOLUTION

Challenges to the due process revolution on college campuses have taken several prominent forms.<sup>104</sup> We address below what we think are the most important: 1) private colleges can and should dispense with due process standards applicable at public institutions; 2) college disciplinary codes should be reconfigured to provide only “minimal” due process; 3) violence, alcohol abuse, sexual harassment, and other forms of misconduct on campus have become so widespread that the due process “model” must be reexamined, both by colleges and universities and the courts.

##### A. Due process and the Public/Private Distinction

First, on the public/private college and university distinction (emphasized by professor Wendy Murphy, *supra*), there's no question federal courts refrain from requiring private institutions to adhere to standards for procedural due process mandated by the United States

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102. Mary Sue Coleman, Address at the University of Michigan Honors Convocation (Apr. 20, 2005), *available at* <http://www.umich.edu/pres/speech/archive/050420honors.php>.

103. DICKINSON COLLEGE, *Students Speak Out*, March 5, 2010, <http://www.dickinson.edu/news-and-events/features/2010-11/Students-Speak-Out/> (“A student protest at Dickinson, which began on Wednesday afternoon, focused on college policies related to sexual misconduct. While peaceful, the student sit-in [seeking stricter sexual assault policies and sanctions] blocked the halls of Old West, requiring administrative staff to move to other locations on campus.”).

104. Professor Murphy’s views seem supportive of all three positions identified in this paragraph; Peter Lake appears to endorse the latter two. Victims’ advocacy groups make a variety of analogous arguments, portraying colleges as dangerous places where crime is regularly and routinely hidden by college administrators.

Constitution.<sup>105</sup> Nonetheless, in spite of the latitude available to them, private colleges don't proudly proclaim the *absence* of due process, or adherence to a golden age when students could be summarily dismissed for offenses such as not being "a typical Syracuse girl."<sup>106</sup> Private colleges provide due process in student disciplinary cases because they have sound policy reasons for doing so, not because they mistakenly follow constitutional standards.

As evidenced by the 1967 "Joint Statement on Rights and Freedoms of Students" (*supra*), basic due process procedures typically followed at public institutions were also broadly endorsed by organizations representing both public and private colleges.<sup>107</sup> This pattern was also evident in a 1971 Carnegie Commission on Higher Education report titled "Dissent and Disruption."<sup>108</sup> Without distinguishing between public and private colleges, the report called for "more precise [disciplinary] rules than in the past, more formal procedures, and new mechanisms for clearly impartial judgments."<sup>109</sup> The Commission—which cautioned that "colleges cannot afford to get bogged down in frequent, complicated, and time-consuming judicial machinery"<sup>110</sup>—also stated:

The campus needs to provide evidence—to students, faculty members, administrators, and the general public—that justice will be done. This requires clear rules, expeditious and simple procedures that move quickly from informal to formal procedures, and the availability of independent and impartial tribunals.<sup>111</sup>

As an apparent model disciplinary procedure, the Commission report (in "Appendix N") cited a disciplinary code at the University of Oregon that included a specific list of prohibitions, a joint student-faculty student conduct committee, a student-faculty appeals board, provisions for written notice of charges and summoning of witnesses, representation by student defenders and a "clear and convincing" standard of proof.<sup>112</sup>

The Carnegie Commission listed many factors as grounds for heightened due process protection—including a recognition that colleges

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105. The public/private distinction is emphasized by professor and commentator Wendy J. Murphy. Wendy J. Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007 (2006).

106. *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 489 (N.Y. App. Div. 1928).

107. AM. ASSOC. OF UNIV. PROFESSORS, *supra* note 89, at 273.

108. CARNEGIE COMM'N ON HIGHER EDUC., *DISSENT AND DISRUPTION* (1971).

109. *Id.* at 95.

110. *Id.* at 96.

111. *Id.* at 101.

112. *Id.* at 247.

are “now much more central to the lives of many more citizens”<sup>113</sup> and a need to promote “acceptance of [disciplinary] decisions[s] by the members of the campus.”<sup>114</sup> None of the factors identified by the Commission members (including Presidents at Notre Dame and Harvard universities) included *constitutional* mandates or any identifiable judicial mandate at all. Similar reasoning was followed in a 1970 American Council on Education report authored by a distinguished committee of educators, included Presidents or Chancellors at Michigan, Vanderbilt, and UCLA.<sup>115</sup> We highlight this point—and supporting evidence in reports or studies arising out of student unrest at Columbia University and UC-Berkeley in the 1960s—to challenge narratives that portray the college due process and student empowerment revolution as the single-minded result of judicial “engineering.” If “engineering” was involved, it came largely from *within* both public and private institutions of higher education as a self-correcting mechanism to reduce arbitrary decisionmaking and enhance student learning.

A noteworthy example of “self-correction” in procedural due process at a private institution of higher education can be seen in the contrast between Syracuse University (SU) procedures described in the 1928 *Anthony* decision<sup>116</sup> (the court upheld summary dismissal of third year student for not being “a typical Syracuse girl”) and the SU disciplinary process in 2012. The 2011-2012 SU Student Handbook states:

Students have the right to fundamental fairness before formal disciplinary sanctions are imposed by the University for violations of the Code of Student Conduct, as provided in the published procedures of the University Judicial System or other official University publications. Students have the right to written notice and the opportunity for a hearing before any change in status is incurred for disciplinary reasons . . .”<sup>117</sup>

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113. *Id.* at 94.

114. *Id.* at 93.

115. AMERICAN COUNCIL ON EDUCATION, *CAMPUS TENSIONS: ANALYSIS AND RECOMMENDATIONS* 39 (1970). The Committee stated:

Since increased [student] participation will contribute to effective institutional decision making and is also of educational benefit, students should serve in a variety of roles on committees that make decisions or recommendations . . . Effective student representation will not only improve the quality of decisions; it will also help insure their acceptance to the student body.

*Id.*

116. *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 489 (N.Y. App. Div. 1928).

117. SYRACUSE UNIVERSITY, *2011–2012 Student Handbook* 3, 10 (2011), available at <http://www.syr.edu/currentstudents/studenthandbook/pdf/studenthandbook2011.pdf>. An interim suspension procedure is set forth on page ten and authorizes “a temporary suspension of certain rights or privileges while a judicial

The contemporary SU reference to “fundamental fairness” parallels language in the *Dixon* opinion requiring “at least the fundamental principles of fairness” prior to the imposition of serious disciplinary sanctions at public colleges.<sup>118</sup> SU policies do not identify any judicial compulsion to adopt such a standard. Instead, “fundamental fairness” is built into a disciplinary process designed to meet *SU's* objectives of better “educating and protecting members of the University community.”<sup>119</sup> Outside observers who would regard the SU disciplinary system as inappropriately mirroring more “legalistic” due process at public institutions<sup>120</sup> ignore the possibility that *the university itself* may find the system suitable and desirable. Private colleges and universities have significant intellectual resources and long traditions of self-governance. Facile presumptions that they have been led astray for over fifty years by misapplication of court decisions like *Dixon v. Alabama* need a stronger empirical foundation than critics have presented to date.

The adoption and preservation of “fundamental fairness” standards (or the equivalent) at public and private colleges and universities in the United States may be influenced, in part, by the significant voice students have gained in college governance. This phenomenon, largely an outgrowth of the campus revolutions of the 1960s and 1970s, is manifest at Syracuse University by the appointment of three students as non-voting “representatives” to the University Board of Trustees (the SU faculty is represented by one non-voting representative).<sup>121</sup> From a broader historical and geographical perspective, this kind of student participation in campus governance is not a radical innovation. It harkens back to the earliest European universities, as explained by the Supreme Court in *Rosenberger v. Rectors of the University of Virginia*:

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous

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case is pending. An interim suspension . . . is based on the determination that the safety and well-being of the University community or specific persons are at risk.”

118. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

119. SYRACUSE UNIVERSITY, *supra* note 117, at 7.

120. Syracuse University, *2011–2012 Judicial Handbook* (2011), [http://judicial.syr.edu/\\_documents/judicial-handbook.pdf](http://judicial.syr.edu/_documents/judicial-handbook.pdf). Provisions in the SU code provide a detailed statement of student rights and responsibilities; written notice of charges; an opportunity for a peer review hearing in most serious cases; a right “to face the opposing party and to ask questions indirectly through the hearing board;” a right to be assisted “by a procedural advisor who is a full-time member of the Syracuse University community;” a right to be advised by an attorney when criminal charges are pending; and a right to appeal to a University Appeals Board. *Id.*

121. Provisions for student and faculty trustees are set forth in Syracuse University Bylaws, *available at*: <http://supolicies.syr.edu/ethics/bylaws.htm>.

assemblages or concourses for students to speak and to write and to learn . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment.<sup>122</sup>

Both public and private colleges and universities were incubators of the due process and student empowerment revolution of the 1960s and 1970s. Procedural protections and governance structures developed in that era retain strong internal constituencies, independent of judicial mandates. So, as cited in the introductory paragraph to this article, when Professor Murphy says private colleges and universities “*are free to punish the student as they see fit . . .*,” she seems to be living in an earlier era when a college or university president could instantly recognize the wisdom of her insights and issue a *pronunciamiento* making them so. But that approach is no longer available—and any person conversant with the idea that absolute power corrupts institutions should be wary of encouraging it.

We also think Professor Murphy is wrong when she writes that “[e]ven if certain procedures are promised accused students [at private colleges and universities] as a matter of school policy of ‘contract,’ there is no basis for a claim that such procedures must be followed or the accused student may have the right of redress in civilian court.”<sup>123</sup> Her statement in this regard (as cited in our introduction) is based on her interpretation of the holding in *Schaer v. Brandeis University*.<sup>124</sup> In *Schaer*, a sharply divided (3-2) Supreme Judicial Court of Massachusetts held that Brandeis—when interpreting and applying its published disciplinary regulations in a sexual assault case—met the “reasonable [procedural] expectations” of David Schaer, a student suspended for sexual misconduct. The court “assumed” a contractual relationship between the parties, but applied the contractual terms broadly and loosely in Brandeis' favor:

We adhere to the principle that courts are weary about interfering with academic and disciplinary decisions made by private colleges and universities . . . A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts. A college must have broad discretion in determining appropriate sanctions for violations of its policies.<sup>125</sup>

The “broad discretion” referenced in *Schaer* (associated with an archaic 1924 Maryland decision few colleges and universities would be proud to

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122. *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

123. Murphy, *supra* note 2, at 1010.

124. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373 (Mass. 2000) (finding disciplinary proceedings at a private university did not violate “basic fairness” or otherwise constitute a breach of contract).

125. *Id.* at 482.



reference today)<sup>126</sup> was not absolute. The court held that “[t]he facts alleged do not show that Schaer was *denied basic fairness*”<sup>127</sup> and observed that “[w]hile *a university should follow its own rules*, Schaer’s allegations, even if true, *do not establish breaches of contract by Brandeis*.”<sup>128</sup> Recognizing a “basic fairness” standard in this context—and saying the Brandeis University met that standard—is not compatible with professor Murphy’s assertion that accused students at private colleges and universities have no “right of redress in civilian court.” Indeed, three years after *Schaer* was decided, a lower court in Massachusetts cited it as authority for issuing a preliminary injunction ordering the College of the Holy Cross to reinstate a suspended student pending trial on his breach of contract claim against the college.<sup>129</sup>

Clearly, the majority in *Schaer* was showing unusual deference to Brandeis. One dissenting justice (Justice Ireland)<sup>130</sup> wrote in this regard:

I write separately because I believe the court, while correctly assuming that a contract exists between Brandeis and its students regarding the university’s disciplinary procedures, fails to interpret the provisions of the disciplinary code in a commonsense way, or in a manner consistent with the standard rules of contract interpretation . . . .

In short, if the college or university puts forth rules of procedure to be followed in disciplinary hearings, it should be legally obligated to follow those rules. To do otherwise would allow Brandeis to make promises to its students that are nothing more

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126. *Woods v. Simpson*, 126 A. 882, 883 (Md. 1924) (upholding dismissal of public university student on grounds she was “apparently not in sympathy with the management of the institution”). The court wrote:

The maintenance of discipline, the upkeep of the necessary tone and standards of behavior in a body of students in a college, is, of course, a task committed to its faculty and officers, not to the courts. It is a task which demands special experience and is often one of much delicacy, especially in dealing with girl students[.]” *Id.*

127. *Schaer*, 735 N.E.2d at 380.

128. *Id.* at 381 (emphasis added).

129. *Ackermann v. President and Trs. of the Coll. of the Holy Cross*, 2003 WL 1962482 (Mass. Super. 2003). The court wrote:

Clearly, the College has countervailing risks of harm relating to its concerns for both the threat to its community that Ackermann’s presence on campus allegedly presents and the risk that the College’s independence in disciplinary matters will be undermined. But the College faces at least as great a risk of harm if it is perceived as ignoring the very rules of procedures it has established in disciplinary matters.

*Id.*

130. Justice Ireland was appointed Chief Justice in 2010.

than a “meaningless mouthing of words.” *Tedeschi v. Wagner College* . . . While the university's obligation to keep the members of its community safe from sexual assault and other crimes is of great importance, at the same time the university cannot tell its students that certain procedures will be followed and then fail to follow them. In a hearing on a serious disciplinary matter there is simply too much at stake for an individual student to countenance the university's failure to abide by the rules it has itself articulated.<sup>131</sup>

Justice Ireland was addressing Brandeis' legal obligations, but inherent in his criticism was the core, cross-cultural ethical principle of “promise keeping.” The importance of honoring this principle is also inchoate in other decisions involving colleges' and universities' obligation to follow their stated disciplinary procedures.<sup>132</sup> Philosopher Sissela Bok explored the origins of the “promise-keeping” imperative in her book *Common Values*:

From the Ten Commandments to Buddhist, Jain, Confucian, Hindu, and many other texts, violence and deceit are the most consistently rejected . . . To cement agreement about how and when these curbs apply, and to keep them from being ignored or violated at will, another negative injunction is needed—against breaches of valid promises [and] contracts . . . Together these injunctions, against violence, deceit, and betrayal, are familiar in every society and every legal system. They have been voiced in works as different as the Egyptian Book of the Dead, the Icelandic Edda, and the Bhagavad-Gita.<sup>133</sup>

Likewise, Derek Bok identified “promise keeping” as one of the core ethical teachings educators try to affirm:

[U]niversities should be among the first to reaffirm the importance of basic values, such as honesty, promise keeping, free expression, and non-violence, for these are not only

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131. *Schaer*, 735 N.E.2d at 381–82 (Ireland, J., dissenting) (citing *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302 (1980)).

132. The importance of honoring this principle is also inchoate in other decisions involving colleges' and universities' obligation to follow their stated disciplinary procedures. See *Ackermann*, 2003 WL 1962482, where the court stated:

Clearly, the College has countervailing risks of harm relating to its concerns for both the threat to its community that Ackermann's presence on campus allegedly presents and the risk that the College's independence in disciplinary matters will be undermined. But the College faces at least as great a risk of harm if it is perceived as ignoring the very rules of procedures it has established in disciplinary matters.

133. SISSELA BOK, *COMMON VALUES* 15 (1995).

principles of civilized society; they are values on which all learning and discovery ultimately depend.”<sup>134</sup>

It is untenable for colleges and universities to proclaim these ethical aims in theory while seeking “discretion” to wiggle out of them in practice. Significant procedural protections identified in college and university policies should be followed (unless waived by the parties) until properly changed in accordance with structures of the institution’s governance.

Not surprisingly, the outcome in *Schaer* does not reflect the law nationwide.<sup>135</sup> New York courts, for example, are also deferential to academic and disciplinary determinations at private institutions of higher education, but the tone of decisions there is reflected in a 1980 Court of Appeals decision (New York’s highest court) in *Tedeschi v. Wagner College*.<sup>136</sup>

Suspension or expulsion for causes unrelated to academic achievement . . . involve determinations quite closely akin to the day-to-day work of the judiciary. Recognizing the present day importance of higher education to many, if not most, employment opportunities, the courts have, therefore, looked more closely at the actions of educational institutions in such matters . . . .

Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline

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134. Bok, *supra* note 29, at 50.

135. *See* *Fellheimer v. Middlebury Coll.*, 869 F.Supp. 238, 246 (D. Vt. 1994) (rendering misconduct hearing “fundamentally unfair” when college did not honor its published commitment to “state the nature of [student disciplinary] charges with sufficient particularity to permit the accused party to meet the charges.”). *See also* *Marita Hyman v. Cornell Univ.*, 82 A.D.3d 1309, 1310 (N.Y. App. Div. 2011). The court sided with the university under the facts of the case, but observed that:

It is well settled that in reviewing a university’s disciplinary determinations, “court[s] must determine whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings.” When a university has not substantially complied with its own guidelines or its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious.

*Id.* (internal citations omitted). *See generally* Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements*, 9 U. N.H. L. REV. 443 (2011); Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653 (2001).

136. *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1304 (N.Y. 1980).

establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.<sup>137</sup>

The New York court in *Tedeschi* split 4-3 for the student plaintiff. The Massachusetts court in *Schaer* split 3-2 in favor of the university. Those contested outcomes highlight the tension between judicial deference to college and university decisionmaking and the “promise-keeping” imperative. The best legal advice we have seen comes from professors William Kaplin and Barbara Lee: “The sharp differences of opinion in *Schaer* suggest that some courts will more closely scrutinize colleges’ compliance with their own disciplinary rules and regulations.”<sup>138</sup> In short (for reasons of sound policy as well as applicable law) private colleges and universities are not free to punish students “as they see fit.”

### B. Looking Beyond Minimal Due Process

The second due process challenge identified at the outset of this section (i.e., that college and university disciplinary codes should be reconfigured to provide only “minimal” due process) is associated with the work of Robert Bickel and Peter Lake. We think they—like professor Murphy—overlook the depth and value of the college and university due process revolution, especially the sense of *legitimacy* in campus regulations due process helps provide.

Professors Bickel and Lake assert their recommended “facilitator university” (an institution that would provide students with enhanced guidance, protection, and structure without “legalistic” discipline) would “respect . . . the voluntary association that is the core of the college community.”<sup>139</sup> Nonetheless, they seem to postulate a general “command” style of management—capable of ordering campus judicial systems to stop “fiddl[ing] with due process that exceeds constitutional/contractual minimums . . .”<sup>140</sup>

In our view, “fiddling” (e.g., negotiating with campus constituencies, including students) in the design of disciplinary procedures is precisely what colleges and universities should do if they wish to have the greatest educational impact.<sup>141</sup> As Derek Bok has suggested, the involvement of

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137. *Id.* at 1306.

138. WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* 473 (2007).

139. ROBERT BICKEL & PETER LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 210 (1999). *See also* LAKE, *supra* note 63, at 10–25.

140. BICKEL & LAKE, *supra* note 139, at 143.

141. Peter Lake, in his book *Beyond Discipline*, refers approvingly to “educational discourse.” LAKE, *supra* note 63, at 256. This discourse, he says, “is rich with concepts like weighing, balancing, measuring, standards, values,

students in designing and participating in rule enforcement makes it “more likely they will understand the reasons for regulations and . . . gain a stake in implementing them successfully.”<sup>142</sup> If anything has been learned from the student rebellions of the 1800s and the campus unrest of the 1960s and 1970s, it is that the failure to involve students in campus governance promotes a climate in which violence, disruption, and general defiance of campus rules<sup>143</sup> is more likely to occur.

Both at public and private institutions, greater student participation in campus governance will likely result in implementation of due process procedures that go beyond minimal standards set by the courts.<sup>144</sup> No one

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principles, goals, and the like.” *Id.* We think debating and defining college and university disciplinary procedures entails the use and development of this kind of discourse.

142. Bok, *supra* note 27, at 46.

143. For example, the Princeton University Honor Code appears to have arisen out of student and faculty dissatisfaction with a climate of widespread cheating in the late 1800s. The Honor System website at Princeton contains this overview:

Examinations at the College of New Jersey (as Princeton University was then known) in the late 19th-century were rife with cheating; students saw cheating as a way to outwit the faculty, while professors went to great lengths to uncover undergraduate cheating. Booth Tarkington '1893, as quoted in W. Joseph Dehner, Jr.'s 1970 paper, described this rivalry as a “continuous sly warfare between the professor and the student.” Crib sheets were common, as was sharing answers during examinations. Students who refused to collaborate were ridiculed. Reporting fellow students to the faculty was seen as dishonorable and out of the question for most students. Professors, on the other hand, would spend exams stalking the recitation rooms watching for any inconsistencies, and sometimes hired extra sets of eyes for the purpose of catching cheaters.

PRINCETON UNIV., FREQUENTLY ASKED QUESTIONS: HONOR SYSTEM, [http://www.princeton.edu/mudd/news/faq/topics/honor\\_code.shtml](http://www.princeton.edu/mudd/news/faq/topics/honor_code.shtml) (last visited Jan. 15, 2012). It's reasonable to hypothesize that the “continuous sly warfare between the professor and the student” at Princeton during this period was a reflection of the earlier student rebellions against Princeton's authoritarian model (described earlier in this article). When overt challenges to faculty dominance failed, the students resorted to the academic equivalent of asymmetrical warfare.

144. I (Gary Pavela) know this likelihood due to personal experience implementing (and sometimes failing at implementing) revised due process procedures at the University of Maryland. Consider, for example, the following editorial published several years ago in the University of Maryland *Diamondback*:

As citizens of the United States we have certain rights. But how many students are aware that when they step onto campus, they lose some of those rights? . . . One major difference in rights is the conflict between the Fifth Amendment to the Constitution against self-incrimination, and the [University of Maryland] Declaration of Student Rights . . . which

should be surprised that students—like faculty members<sup>145</sup>—expect significant due process when serious penalties can be imposed. Alliances often form between students and teachers that make it harder to backtrack on due process protections, once given.<sup>146</sup> We do not regard this dynamic as undesirable. Substantial changes in student behavior must be internalized and habituated. As recognized decades ago by the Carnegie Commission on Higher Education,<sup>147</sup> students who are alienated from campus governance are likely to be a hostile and uncooperative audience. The “costs” of more-than-minimal due process may be repaid many times over by broad-based acceptance of the legitimacy of campus rules.

The perceived legitimacy of campus disciplinary policies will depend, in part, upon the proper “fit” of those rules with distinct campus cultures (e.g., behavioral standards and enforcement mechanisms at Liberty University will probably have variations not followed at UC-Berkeley). One lesson we draw from this truism is that college and university disciplinary rules and due process procedures should not be exclusively defined from without. Courts will set minimal constitutional and contractual standards, but the legitimacy of college and university policies must be determined, in large measure, by local constituencies identifying, discussing, and balancing competing perspectives. Some colleges and universities will favor less procedural due process, some more. The cultural “flavor” of each institution, however, should not be circumvented

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states: “In all disciplinary hearings . . . no student shall be compelled to testify against himself or herself, although a negative inference may be drawn from any person’s failure to respond to relevant questions in a judicial proceeding.” Though we are students, we are United States citizens first, and our rights should not be altered or reduced when we step onto campus. . . . The answer is not to hole up in some ranch in Montana, but rather work through the system to get it changed. Fight the power.

*NO RIGHTS*, UNIV. OF MD. DIAMONDBACK, Oct. 1, 1997, at 4. Campus newspapers often form a powerful alliance with elected student leaders on these topics.

145. See 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, American Ass’n of Univ. Professors (1958), available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementon+procedurals tandardsinfaculty+dismissal+proceedings.htm> (recommended standards call for notice and a hearing in contested cases, assistance by counsel, and the right to summon and question witnesses).

146. For example, the AAUP favors a high (“clear and convincing”) standard of proof—also favored by accused students in disciplinary cases—in order to preserve a comparable standard in the resolution of sexual harassment allegations against faculty members. Letter from Gregory F. Scholtz to Russlyn Ali, U.S. Dept. of Educ. (June 27, 2011), available at <http://www.nacua.org/documents/AAUPLetterToOCRReSexualViolenceEvidence.pdf>.

147. CARNEGIE COMM’N ON HIGHER EDUC., *supra* note 108, at 93.

by one-size-fits-all prescriptions of consultants, commentators, government regulators, or authors of law review articles.

Peter Lake offered a revealing insight on college and university student conduct systems in his book *Beyond Discipline*. He first observed that “[r]emarkably, I found that about half the students I handled in the discipline system I administered became better students or professionals because of their encounter with that system in some way.”<sup>148</sup> He then wrote:

Such things are hard to measure, but my sense is that most discipline officers concur that a substantial number of students who process through discipline systems actually are made better off by their encounter with that system in some way.<sup>149</sup>

Professor Lake’s word “remarkably” is apt, since most of his book is devoted to arguing that college and university disciplinary systems typically follow what he regards as a “legalistic process . . . hard to reconcile with the developmental goals of higher education.”<sup>150</sup>

The conceptual tension in Professor Lake’s analysis may be influenced, in part, by the fact that many college and university disciplinary systems are not so “legalistic” as he assumes. For nearly fifty years, courts and commentators have cautioned against turning student conduct proceedings into miniature criminal trials.<sup>151</sup> What many educators seek is the kind of balanced approach summarized in a 1970 American Association of State Colleges and Universities “White Paper” on “Due Process in the Student-Institutional Relationship”:

The lesson should be clear . . . that the institution’s disciplinary system must be simple enough to deal with small infractions and minor penalties without undue processes or delay, and, at the same time, complex enough to handle contested or serious cases with appropriate speed, detachment, objectivity, and regard for the rights of the accused.<sup>152</sup>

For example, from first publication in 1979–1980,<sup>153</sup> our *Model Code of Student Conduct*<sup>154</sup> has contained a “disciplinary conference” procedure for

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148. LAKE, *supra* note 63, at 253

149. *Id.*

150. LAKE, *supra* note 63, at 17.

151. *See supra* part II and accompanying text. *See also* CARNEGIE COMM’N ON HIGHER EDUC., *supra* note 108, at 96 (“[colleges and universities] cannot afford to get bogged down in frequent, complicated, and time-consuming judicial machinery”); Gary Pavela, *Limiting the Pursuit of Perfect Justice on Campus*, 6 J.C. & U.L. 137 (1980).

152. THOMAS C. FISCHER, DUE PROCESS IN THE STUDENT-INSTITUTIONAL RELATIONSHIP 2 (1970).

153. Pavela, *supra* note 64.

resolving cases in which accused students are subject to penalties less than suspension or expulsion—the large majority of cases on most campuses. Disciplinary conferences normally consist of a non-adversarial meeting between an accused student and a decision maker. The person filing a complaint is not required to participate, unless cross-examination is necessary to resolve a dispositive factual issue. Documentary evidence and written statements are relied upon, so long as the accused student is given access to them in advance, and allowed to respond to them at the conference. Accused students are allowed to call relevant witnesses, in the discretion of the decision maker. There is no right of appeal.

Disciplinary conference procedures are grounded in the 1975 U.S. Supreme Court decision in *Goss v. Lopez*. The Court held in that case that a student subject to a brief suspension—or other comparatively minor penalty—is entitled to “oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story” in a “discussion” with a “disciplinarian.”<sup>155</sup> Colleges and universities now using disciplinary conference procedures include the University of Maryland, American University, George Washington University, North Carolina State University, Pennsylvania State University, Illinois State University, Rutgers University, and Occidental College, among others.<sup>156</sup>

Our experience has been that students and their families readily accept fair-minded, informal disciplinary procedures grounded in “respectful two-way listening.”<sup>157</sup> Legitimacy is not lost when “conversational” due process is associated with less severe sanctions. However, when the stakes are high—i.e., suspension, expulsion, or permanent disciplinary records—greater procedural protection is usually expected.<sup>158</sup> In this context,

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154. An updated, online version of this Model Code is available at <https://docs.google.com/Doc?docid=0Aaj24xYwfevnZGZkcHZ6cDlfODk0Y2JtdHR0aHE>.

155. *Goss v. Lopez*, 419 U.S. 565, 581–82 (1975).

156. Gary Pavela, *The Value of Investigatory Procedures*, 365 ASCA LAW & POLICY REPORT (May 6, 2010), available at <https://docs.google.com/Doc?docid=0Aaj24xYwfevnZGZkcHZ6cDlfNjI0cWRtdjUyZjI>.

157. The term “respectful listening” is derived from research done by the United States Secret Service on preventing lethal school violence. U.S. SECRET SERV. & U.S. DEPT. OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 69 (2002), available at [http://www.secretservice.gov/ntac/ssi\\_guide.pdf](http://www.secretservice.gov/ntac/ssi_guide.pdf).

158. The importance of providing more substantial due process in serious or “difficult” cases was stated in *Goss v. Lopez*. The Court wrote:

[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit



colleges and universities that provide more due process than the law requires may be making rational judgments about what is needed to maintain confidence in their disciplinary procedures. Charles Alan Wright made the same point in 1969, at the start of the due process revolution: “[v]oluntary acceptance of wise rules,” he wrote, “going in many instances beyond the minimal requirements of the Constitution, is a constructive act, ‘calculated to ensure the confidence of all concerned with student discipline.’”<sup>159</sup>

#### i. Due Process and Social Science Research

A growing body of social science research supports Wright's view. This research usually focuses on people's *perceptions* of justice—what will lead them to describe their experiences as fair?<sup>160</sup> Intuitively, having an outcome in one's favor will make it more likely that someone will describe their experience as fair. Indeed, prior to 1975, most research focused on the relationship between perceptions of fairness and outcomes.<sup>161</sup> But later research, spurred by the work of psychologist John Thibaut and legal scholar Laurens Walker,<sup>162</sup> has repeatedly and robustly demonstrated that perceptions of procedural fairness contribute significantly to the overall perception of fairness, independent of the outcome.<sup>163</sup>

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cross-examination, and allow the student to present his own witnesses.

In more difficult cases, he may permit counsel.”

*Goss*, 419 U.S. at 581–82. We suggested above that differing cultural environments at different colleges and universities will be manifested in diverse disciplinary rules and procedures. In the realm of procedural fairness however, the differences seem less pronounced. *See, e.g.*, Liberty Univ. Office of Student Conduct, *Student Appeals Court Handbook* (2010), available at <http://www.liberty.edu/media/1216/SAC%20Handbook%202010-2011.pdf>.

159. Wright, *supra* note 55, at 1087 (citing Gen. Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax Supported Insts. of Higher Educ., 45 F.R.D. 133, 148 (W.D. Mo., 1968)).

160. Russell Cropanzano & Jerald Greenberg, *Progress in Organizational Justice: Tunneling Through the Maze*, in 12 INT'L REV. OF INDUST. AND ORG. PSYCHOL. 317–72 (Cary L. Cooper & Ivan T. Robertson eds., 1997).

161. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

162. JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

163. *See* Robert J. Maccoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. LAW SOC. SCI. 171 (2005). Indeed, the fair process effect has been so well documented that some scholars have expressed concerns about the possibility of manipulation; (i.e., a fair procedure will be used to mask unfair results), hence the “double-edged” sword. We are aware of this critique, and hope that others who value due process do so with the goal of improving both procedural and substantive outcomes.

In short, organizations and institutions believed to follow fair procedures enjoy greater levels of legitimacy.<sup>164</sup> Perceived institutional legitimacy is important because it is a key precondition for the effectiveness of governance.<sup>165</sup> It follows that colleges, universities, and other institutions not perceived as practicing fair procedures will have difficulty encouraging compliance with policies, thereby stymieing efforts to achieve organizational goals. Results from laboratory studies suggest a link between judgments of procedural justice and rule compliance. When individuals perceive procedural injustices they are less likely to comply and develop innovative methods of avoiding detection.<sup>166</sup> Strict enforcement accompanied by minimal due process may thus *encourage* student deviance rather than deter it.

Perception of procedural fairness is also associated with greater general satisfaction with the legal experience regardless of outcome, and may “cushion the dissatisfaction that might result from unfavorable outcomes . . . .”<sup>167</sup> Satisfaction with the overall process is an important consideration when making future decisions to report a crime, an especially important issue for sexual misconduct given that reporting the harassment is the least common response, while ignoring or avoiding the behavior the most common.<sup>168</sup>

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164. See Barry M. Goldman & Edward McCaffrey, *Why Fair Treatment Matters*, 10 SYNTHESIS: LAW & POL’Y IN HIGHER EDUC. 738, 739. The authors wrote:

Although the effects of organizational justice (and injustice) have been well-established, with over 200 studies to date documenting these effects, there is less agreement among scholars as to *why* it matters. The primary explanations are that justice matters for both *instrumental* and *non-instrumental* reasons. The instrumental reasons are, perhaps, easier for people to understand: fair procedures make it more likely that individuals will achieve desired results. For example, an individual is more likely to feel that she or he will be successful with the decision process if the decision makers are unbiased . . . . The non-instrumental reasons, while less tangible to many, are proving to be very powerful and may be traceable to the need for self-esteem . . . . For example, a recent study indicates that most (65%) of individuals filing discrimination claims with EEOC identified feeling disrespected as a catalyst for their claim.

*Id.*

165. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (explains study revealing that people follow the law if they believe it is legitimate, not out of fear of punishment).

166. See Nehemia Friedland et al., *Some Determinants of the Violation of Rules*, 3 J. OF APPLIED SOC. PSYCHOLOGY 103–18 (1973).

167. LIND & TYLER, *supra* note 161, at 72.

168. See Caroline C. Cochran et al., *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. OF WOMEN Q. 207–26 (1997).

Core definitions of procedural fairness seem to be broadly shared.<sup>169</sup> One of the earliest and most consistent findings is that perceptions of procedural fairness are influenced by the opportunity to tell one's story, known as process control.<sup>170</sup> But process control is just one dimension of procedural justice; later researchers explored other determinants. A 2002 meta-analytic review of 183 empirical studies found that even after controlling for the outcome (distributive justice), a set of fair-process criteria known as *Leventhal criteria* were significantly related with perceptions of fairness.<sup>171</sup> Although acknowledging that different rules will be given different emphasis depending on the situations, Leventhal (1980) identified the following rules to be met in order for a process to be perceived as fair: (1) rules should be consistently applied; (2) individuals involved in the decisionmaking process should be perceived as bias free; (3) information must be gathered and processed as accurately as possible; (4) there must be an opportunity to modify or reverse decisions made throughout the process; (5) the decisionmaking process must reflect the interests of all groups and subgroups affected by the decisionmaking process; and (6) the procedures must conform to an individual's basic moral and ethical values.<sup>172</sup>

## ii. Lessons from the Duke Lacrosse Case

Broadly-shared conceptions of procedural fairness do not insulate communities or societies from losses of collective or individual judgment when passions inflame the group or an influential subgroup. One noteworthy example in the recent history of American higher education is

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169. Philosopher Sissela Bok wrote in her book *Common Values*:

Whether in council scenes in Homer's Iliad, where leaders met to settle conflicts and to decide between war and peace, or in debates in contemporary parliamentary bodies and international organizations, certain rudiments of procedure are necessary for decision making: recognizing different points of view, hearing and weighing arguments, and striving for a modicum of impartiality. While these rudiments hardly guarantee the fairness or wisdom of the outcome, they provide "the core of a thin notion of minimum procedural justice."

Bok, *supra* note 133, at 53 (citing STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 90 (1989)).

170. See THIBAUT & WALKER, *supra* note 162; LIND & TYLER, *supra* note 161.

171. Jason Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. OF APPLIED PSYCHOL. 425, 438 (2001).

172. Gerald S. Leventhal, *What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27-55 (Gergen et al. eds., 1980).

the Duke University lacrosse case. The details of this story have been told and retold in multiple sources,<sup>173</sup> but a concise insight was offered by CBS news correspondent Ed Bradley: the “biggest surprise for us [in preparing a related 60 Minutes story] was the presumption of guilt.”<sup>174</sup> This presumption was openly expressed or implied by significant numbers of faculty members, including a published statement by what came to be known as “The group of 88.”<sup>175</sup> The statement was described by authors Stuart Taylor and KC Johnson:

The Group of 88 . . . committed themselves to 'turning up the volume . . .' [Their] statement concluded, 'To the students speaking individually and to the protestors making collective noise, *thank you for not waiting* and for making yourselves heard.' By this point, of course, the protesters had plastered the campus with wanted posters showing the lacrosse players' photos; chanted . . . 'Time to confess'; and waved a banner proclaiming, CASTRATE.<sup>176</sup> (emphasis added).

Given the context, the Group of 88 reference to “not waiting” was antithetical to basic conceptions of fundamental fairness. Duke University chemistry professor Steve Baldwin aptly summarized the climate in his subsequent observation: “I have never heard presumably intelligent, careful, balanced people being so completely over the top.”<sup>177</sup>

If, as we suggest above, fundamental standards of procedural fairness “seem to be broadly shared,” it could be expected during the lacrosse team crisis that some Duke constituencies would have emphasized a presumption of innocence and the need for unbiased assessment of facts. That is precisely what occurred, both in the context of courageous leadership by faculty members with legal training and experience (most notably, a former chair of the American Bar Association’s Section of Individual Rights and Responsibilities)<sup>178</sup> and a cross-section of student

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173. The most comprehensive compilation can be found in *Until Proven Innocent*, a book by Stuart Taylor (a former *New York Times* reporter and a senior fellow at the Brookings Institution) and K.C. Johnson (a professor of history at Brooklyn College and CUNY). STUART TAYLOR & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007).

174. *Id.* at 117.

175. *Id.* at 145.

176. *Id.*

177. *Id.* at 135.

178. Duke law professor James E. Coleman, Jr. chaired an investigating committee that challenged many “negative stereotypes” about the lacrosse team. See TAYLOR & JOHNSON, *supra* note 173, at, p. 207–11 (describing the Coleman Committee’s approach to the investigation).

constituencies, especially the student newspaper. Johnson and Taylor wrote:

One of the few oases of common sense in [a] wretched media landscape was Duke's own student newspaper, *The Chronicle*. Setting a tone for coverage that would consistently outclass almost all in the national media, *The Chronicle* published an April 3 editorial noting that student protesters and professors who demonized the lacrosse players were "guaranteed front page coverage in the nation's biggest newspapers [and their] fringe views are slated for prime time." But it stressed that far more students reserved judgment while awaiting the evidence. "You'd hardly believe that," the editorial said, "if you've read any major newspaper or turned on your television in the past few days."<sup>179</sup>

The Duke lacrosse story highlights the passions that can be aroused when allegations of wrongdoing involve issues of social class, race, athletics, or sex. These are not infrequent topics at American colleges and universities; they will inevitably arise again. Colleges and universities are free to follow a "minimal due process" model, but that model may not serve them well if they are thrust into the social and legal maelstrom of a polarized student conduct case. Furthermore, for purposes of our analysis, internal dynamics of the Duke lacrosse case suggest that important student voices will be attuned to the need for procedural fairness. If those voices are disregarded, the perceived legitimacy of college and university rules will be in jeopardy.

### C. Due Process and Campus Safety

The third due process challenge identified above (i.e., violence, alcohol abuse, sexual harassment, and other forms of misconduct on campus have become so widespread that the due process "model" must be reexamined, both by institutions of higher learning and the courts) takes varied forms. Some critics assert college and university student disciplinary proceedings constitute "a kind of parallel judicial universe"<sup>180</sup> where "offenses as serious as . . . rape" can be "disposed of discreetly" rather than referred to the criminal justice system.<sup>181</sup> Implicit in this critique—which is typically uninformed by any knowledge of federal laws *requiring* colleges and universities to resolve sexual misconduct charges independently of

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179. TAYLOR & JOHNSON, *supra* note 173, at 125.

180. Ironically, reporters writing these kinds of stories seem oblivious of the fact that the newspapers employing them also have "parallel judicial universes" resolving comparable claims of sexual harassment in the workplace.

181. Nina Bernstein, *College Campuses Hold Court in Shadows of Mixed Loyalties*, N. Y. TIMES, May 5, 1996, at 1.

criminal courts<sup>182</sup>—is an assumption colleges and universities cannot or should not resolve such cases at all.<sup>183</sup> Another perspective, better informed about the legal obligations colleges and universities have to enforce rules that may overlap with criminal laws, seems to suggest that crime and misconduct on campus are somehow associated with too much due process for the accused. Professor Lake makes this point in *Beyond Discipline*:

Fairness and a sound, safe, academic environment sometimes appear inversely related . . .

This Book addresses a paradox of modern higher education: extremely well-run and complex systems ensuring fairness coexist in higher education environments filled with persistent negative outcomes, like cheating, drinking, and violence. How is it possible that higher education has achieved such success in process and fairness dimensions and simultaneously failed to conquer the intransigent educational environmental problems of the day?<sup>184</sup>

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182. An April 4, 2011, United State Department of Education Office of Civil Rights “Dear Colleague” letter on sexual violence states:

[A] school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.

Letter from Russlyn Ali to Colleague, U.S. Dept. of Educ. (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

183. Nina Bernstein notes, for example, that college and university disciplinary proceedings may interfere with criminal prosecutions:

[P]rosecutors and police officers cite campus proceedings that have damaged or destroyed viable cases. At Salem State College, a recent student rape trial ran for 11 hours, until 1 A.M., with no rules of evidence, and produced a tape recording that the local prosecutor had to study word by word because the criminal case could be dismissed if she withheld anything exculpatory from the grand jury. It declined to indict.”

Bernstein, *supra* note 181, at 16. Ms. Bernstein, however, doesn’t inform her readers why the grand jury “declined to indict.”

184. LAKE, *supra* note 63, at 8–9.

Terms used by Professor Lake (“education environments *filled with* persistent negative outcomes”) echo language used by a variety of national advocacy groups portraying college and university campuses as dangerous places run by administrators trying to hide a rising tide of campus crime.<sup>185</sup> The website for the Network of Victim Assistance proclaims that “[i]ncidents of drug and alcohol abuse, sexual assault and hate crimes *are common* on today's college campuses.”<sup>186</sup> This is so, in part, because “*many* victims are discouraged by college authorities from reporting crimes to local law enforcement agencies and encouraged instead to file complaints only with the campus justice systems. This practice protects the reputation of the school, but may increase the impact and consequences of the crime on the victim . . . .”<sup>187</sup> (italics added).

Terms like “filled with,” “common,” and “many” are conveniently ambiguous. They set the stage for a range of earnest and urgent prescriptions, generally lacking historical insight or comparative analysis of behavior patterns in the larger society. When the suggestion is made in this context that “complex [college and university conduct] systems ensuring fairness” have “failed to conquer” student misconduct,<sup>188</sup> readers are not invited to consider whether:

- 1) the same argument should not be made about the criminal justice system in general (e.g., the Bill of Rights has likewise “failed to conquer” crime);
- 2) young adults attending institutions of higher learning are generally safer than young adults *not* attending institutions of higher learning;
- 3) certain kinds of college or university student misconduct (especially cheating and binge drinking) are associated with cross-generational behavioral problems not confined to college and university campuses;
- 4) some of the most serious forms of reported misconduct by college and university students occur off-campus, beyond the reach of college and university officials;
- 5) a majority of victims (especially in sexual misconduct cases) decline to report allegations for reasons unrelated to the design of campus disciplinary systems, and

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185. *Id.* (emphasis added).

186. *Campus Crime*, NETWORK OF VICTIM ASSISTANCE (NOVA), <http://www.novabucks.org/campuscrime.html> (last visited Apr. 26, 2012) (emphasis added).

187. *Id.*

188. See LAKE, *supra* note 63.

6) the frequency of college and university student misconduct *might be worse* without the levels of procedural fairness provided.<sup>189</sup>

First, from a broader perspective, there is ample evidence colleges and universities are comparatively safe places for young adults. In 2011, the American College Health Association (ACHA) conducted a large study involving 157 colleges and universities, enrolling 1.36 million students ages eighteen to twenty-four.<sup>190</sup> The researchers found that college and university campuses:

[P]rovide much safer and more protective environments than previously recognized. When compared to the mortality of eighteen- to twenty-four-year-olds in the general population, college student death rates are significantly lower for such causes as suicide, alcohol-related deaths and homicide.<sup>191</sup>

Specific findings included data showing that the suicide rate for traditionally-aged college and university students was forty-seven percent lower than “the same-aged general population”; alcohol related deaths sixty to seventy-six percent lower; and homicide ninety-seven percent lower.<sup>192</sup>

Although the ACHA researchers found that alcohol-related mortality among traditionally-aged college and university students “was substantially lower than predicted,”<sup>193</sup> student binge drinking remains one of the greatest challenges faced by college and university administrators. The 2010 National Survey on Drug Use and Health found that:

Young adults aged 18 to 22 enrolled full time in college were more likely than their peers not enrolled full time (i.e., part-time college students and persons not currently enrolled in college) to use alcohol in the past month, binge drink, and drink heavily. Among full-time college students in 2010, 63.3 percent were current drinkers, 42.2 percent were binge drinkers, and 15.6

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189. This possibility does not seem remote in light of the reported history of student violence in eras when due process was minimal, at best.

190. James C. Turner & Adrienne Keller, PRESENTATION AT AMERICAN PUBLIC HEALTH ASSOCIATION ANNUAL MEETING AND EXPOSITION: LEADING CAUSES OF MORTALITY AMONG AMERICAN COLLEGE STUDENTS AT FOUR-YEAR INSTITUTIONS 3, (Nov. 4, 2011), *available at* <http://apha.confex.com/apha/139am/webprogram/Paper241696.html>.

191. *More U.S. College Students Die from Suicide than Alcohol-Related Causes, U.Va. Researchers Find*, UVA TODAY, Nov. 4, 2011, <http://www.virginia.edu/uvatoday/newsRelease.php?id=16568>.

192. Turner & Keller, *supra* note 190, at 19.

193. PRESENTATION SUMMARY: LEADING CAUSES OF MORTALITY AMONG AMERICAN COLLEGE STUDENTS AT FOUR-YEAR INSTITUTIONS, Am. Pub. Health Ass’n (Nov. 2, 2011, 12:50 PM), <http://apha.confex.com/apha/139am/webprogram/Paper241696.html>.



percent were heavy drinkers. Among those not enrolled full time in college, these rates were 52.4, 35.6, and 11.9 percent, respectively.<sup>194</sup>

The high level of college and university student binge drinking has stabilized or slightly declined.<sup>195</sup> College and university campuses (especially those in the Northeast where “Greek systems dominate . . . [and] athletic teams are prominent”<sup>196</sup>) are hotspots for this behavior. At the same time, however, the larger society is recognizing that binge drinking is a national, cross-generational problem. A January 11, 2012, *New York Times* article reports that:

Excessive drinking isn’t just for college kids anymore. New research shows that four times a month, one in six Americans goes on a drinking binge, knocking back an average of eight alcoholic beverages within a few hours.

The findings, based on a survey of 457,677 Americans around the country, show that while binge drinking remains common among the young, it’s also an issue for people well past their 20s. Over all, about 36 percent of binge drinking occurs among people 35 and older, and older people tend to binge-drink more frequently than the young.<sup>197</sup>

No issue this complex and entrenched is going to be solved by the simplistic reduction of college and university due process procedures to “minimums” required by the courts. Other environmental and social-norming approaches are given much more attention by researchers who have studied the problem in depth.<sup>198</sup> Again, a particular danger in this

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194. SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 20 (2011), [www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.htm](http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.htm).

195. The 2010 National Survey on Drug Use and Health reports that:

Among young adults aged 18 to 22, the rate of binge drinking appears to be declining somewhat. In 2002, the binge drinking rate within this age group was 41.0 percent compared with the current 38.4 percent. Among full-time college students, the rate went from 44.4 to 42.2 percent, but the change was not significant. Among part-time college students and others not in college, the rate decreased from 38.9 to 35.6 percent during the same time period.

*Id.*

196. NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, WHAT PARENTS NEED TO KNOW ABOUT COLLEGE DRINKING 4 (2002). <http://www.collegedrinkingprevention.gov/NIAAACollegeMaterials/parentBrochure.aspx>

197. Tara Parker-Pope, *America's Drinking Binge*, N.Y. TIMES BLOG (Jan. 11, 2012, 3:40 PM), <http://well.blogs.nytimes.com/2012/01/11/americas-drinking-binge/>.

198. *See generally* NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, HOW TO REDUCE HIGH-RISK COLLEGE DRINKING: USE PROVEN STRATEGIES, FILL

context is generating campus-wide controversies about procedural fairness that detract from interventions requiring suasion, education, and peer engagement. The 2004 National Academy of Sciences report to Congress entitled “Reducing Underage Drinking: A College Responsibility” offered guidance in this regard:

Law is a blunt instrument. It is not self-executing, and it requires the affirmative support of a substantial proportion of the population and of those who are expected to enforce it. These characteristics of a law are particularly important for instrumental prohibitions, such as the ban against underage drinking, because the level of compliance will depend heavily on the willingness of a large number of individuals to adhere to the law simply because they accept its moral authority to command their obedience. That is, a legal norm of this kind, which affects so many people in so many everyday social and economic contexts, cannot be successfully implemented based on deterrence (the threat of punishment) alone. It must rely heavily on the “declarative” or “expressive” function of the law: by forbidding the conduct, it aims to shape people’s beliefs and attitudes about what is acceptable social behavior and thereby to draw on their disposition to obey.<sup>199</sup>

We believe the expressive function of the law encompasses *how the law is administered*. In the college and university context, if students do not respect the fairness of the process, they will not accept the legitimacy of the rule.

Academic dishonesty is another area of particular concern for college and university administrators. Don L. McCabe at Rutgers University, one of the leading researchers in the field, has documented “an ever-increasing rise in the incidence of academic dishonesty among students—cheating on tests and exams, on written assignments, and on class projects.”<sup>200</sup> McCabe attributes the increase, in part, to pervasive attitudes among many high school students who “view high school as simply an annoying obstacle on the way to college, a place where they learn little of value, where teachers are unreasonable or unfair, and where, since ‘everyone else’

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RESEARCH GAPS (2002) (discussing the importance of science-based research and effective strategies to control excessive drinking on college and university campuses), *available at* [http://www.collegedrinkingprevention.gov/media/FINAL\\_Pane12.pdf](http://www.collegedrinkingprevention.gov/media/FINAL_Pane12.pdf).

199. COMM. ON DEVELOPING A STRATEGY TO REDUCE & PREVENT UNDERAGE DRINKING, NAT’L ACAD. OF SCI., *REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY* 28 (Richard J. Bonnie & Mary Ellen O’Connell eds., 2004) *available at* [http://www.nap.edu/openbook.php?record\\_id=10729&=page=28](http://www.nap.edu/openbook.php?record_id=10729&=page=28).

200. Donald L. McCabe & Gary Pavela, *New Honor Codes for a New Generation*, *INSIDE HIGHER EDUC.* (Mar. 11, 2005, 4:00 AM), <http://www.insidehighered.com/views/2005/03/11/pavela1>.

is cheating, they have no choice but to do the same to remain competitive.”<sup>201</sup> Many high school students, McCabe believes, “take these habits with them to college.”<sup>202</sup>

Colleges and universities have responded to the increase in academic dishonesty with research-based programming showing positive results.<sup>203</sup> McCabe described that programming in 2006, saying:

[W]e propose that administrators work with faculty and students to develop broader programmatic efforts based upon notions of ethical community building . . .

Developing an ethical community happens outside the classroom as much as inside it, and thus involves creating a “hidden curriculum” in which students are actively engaged in developing moral reasoning skills through regular facilitated discussion of real-life ethical dilemmas that face them in the context of their educational program (e.g., Trevino & McCabe, 1994). In addition, students can be involved in the development and enforcement of a code of conduct. Unlike the deterrence approach that focuses exclusively on catching and punishing cheaters, the ethical community building approach emphasizes a more positive message about creating a culture in which all members benefit from living in a culture of integrity.

Student involvement is central to the ethical community-building approach (McCabe & Pavela, 2000): 'Such an approach not only communicates to students that [their] institution is committed to academic integrity, it also encourages students to take responsibility for their own behavior.' With proper guidance, students can play a vital role in designing and enforcing academic integrity standards in their program.<sup>204</sup>

As in the case of binge drinking, effective responses to academic dishonesty require a broad base of community support. The continued success of honor codes in influencing student behavior highlights again the

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201. *Id.*

202. *Id.*

203. See Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, *Honor Codes and Other Contextual Influences on Academic Integrity: A Replication and Extension to Modified Honor Code Settings*, 43 RES. IN HIGHER EDUC. 357, 357 (2002) (“[Study] [r]esults suggests that modified honor codes are associated with lower levels of student dishonesty and that the McCabe and Treviño model appears to be reasonably robust.”).

204. Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, *Academic Dishonesty in Graduate Business Programs: Prevalence, Causes, and Proposed Action*, 5 Academy of Management Learning & Educ. 294, 302 (2006) (citations omitted).

pivotal role of a sense of *legitimacy* (active student participation and engagement) in designing and enforcing college and university rules. That sense of legitimacy will be lost if students come to believe the rules are not fairly enforced.

Finally, the issue of sexual harassment on college and university campuses—including sexual violence—has subjected college and university due process procedures to heightened scrutiny, including direct federal intervention to mandate a “preponderance of the evidence” standard of proof (lower than the “clear and convincing standard” used at some colleges and universities).<sup>205</sup> This is an area fraught with controversy and competing statistics, but there is evidence at the national level that continued efforts to challenge sexual harassment are producing results. A 2011 *Washington Post/ABC* poll reported that:

Seventeen years ago, nearly four in 10 women ages 18 to 49 said they had been sexually harassed at some point. Now, one in four say so. Similarly, 25 percent of college-educated women in the new survey report experiencing harassment, compared with 42 percent in 1994.<sup>206</sup>

We have examined competing views about the extent of sexual violence on college and university campuses. National commentary was galvanized by the work of Professor Mary Koss at the University of Arizona, who found (over 25 years ago) that “one of four college women will be the victim of rape or attempted rape.”<sup>207</sup> Her data and interpretation have been vigorously challenged,<sup>208</sup> but are generally supported by recent (and we think carefully researched) data accompanying the April 4, 2011 Office of Civil Rights “Dear Colleague” Letter (OCR DCL) on sexual violence.<sup>209</sup> The authors of the 2007 Campus Sexual Assault (CSA) Study cited in the DCL<sup>210</sup> found that “about 1 in 5 women are victims of completed or attempted sexual assault while in college.”<sup>211</sup>

The CSA Study cited in the OCR DCL is worthy of careful study.<sup>212</sup> It was derived from a web-based survey administered in the winter of 2006 at

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205. Ali, *supra* note 182, at 11.

206. Scott Clement, *Workplace Harassment Drawing Wide Concern*, Wash. Post, Nov. 16, 2011, at A6.

207. Mary P. Koss, *Defending Date Rape*, 7 J. INTERPERS. VIOLENCE 122–26 (1992) (explaining and responding to criticism of her work).

208. See, e.g., Heather MacDonald, *The Campus Rape Myth*, 18 CITY J. 22 (2008) (discussing flaws in Koss’ study).

209. Ali, *supra* note 182, at 2 (citing CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT xiii (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>).

210. KREBS ET AL., *supra* note 209.

211. Ali, *supra* note 182, at 2 (citing KREBS ET AL., *supra* note 209, at xiii).

212. The data and commentary contain a wealth of insight and should be read in their entirety.

two large public universities; 5,446 undergraduate women and 1,375 undergraduate men participated.<sup>213</sup> The following findings are especially noteworthy for our topic:

- Data on female victims: “Data indicate that 13.7% of undergraduate women had been victims of at least one completed sexual assault since entering college: 4.7% were victims of physically forced sexual assault; 7.8% of women were sexually assaulted when they were incapacitated after voluntarily consuming drugs and/or alcohol (i.e., they were victims of alcohol and/or other drug- [AOD] enabled sexual assault); 0.6% were sexually assaulted when they were incapacitated after having been given a drug without their knowledge (i.e., they were certain they had been victims of drug-facilitated sexual assault [DFSA]).”<sup>214</sup>
- Data on male victims: “Although the prevalence of sexual assault is considerably lower among the male sample than the female sample, there are some estimates worth noting. Approximately 6.1% (n = 84) of males reported experiencing attempted or completed sexual assault since entering college. Half of them (n = 50, 3.7%) experienced a *completed* sexual assault. Among victims of completed sexual assault since entering college, incapacitated sexual assault was much more prevalent (n = 45, 3.4%) than physically forced sexual assault (n = 12, 0.7%). Only 0.7% of the male sample reported experiencing physically forced sexual assault (n = 12).<sup>215</sup>
- College and university women at greater risk [background/previous research]: “Although methodological variation renders comparisons difficult to make, some previous studies suggest that university women are at greater risk than women of a comparable age in the general population. This pattern is likely due to the close daily interaction between men and women in a range of social situations experienced in university settings, as well as frequent exposure to alcohol and other drugs.”<sup>216</sup>

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213. KREBS ET AL., *supra* note 209, at x.

214. *Id.* at vii.

215. *Id.* at 5-5 (emphasis in original) (citations omitted).

216. *Id.* at 1-1 (citations omitted).

- Data on sexual assault before and after entering college: “Nineteen percent of the women reported experiencing completed or attempted sexual assault since entering college, a slightly larger percentage than those experiencing such incidents before entering college.”<sup>217</sup>
- Greater risk for freshmen and sophomores: “Years in college was positively associated with experiencing physically forced sexual assault since entering college. This finding is not surprising given that the more years a woman has been in college, the more exposure she has had to potentially being assaulted since entering college. However, upon examining *when* sexual assault is most likely to occur (by restricting the analyses to sexual assaults occurring within the past 12 months, or since entering college for freshmen), the risk was greater for freshmen and sophomores than for juniors and seniors . . . .”<sup>218</sup>
- Fraternity membership and incapacitated sexual assault: “Over a quarter of incapacitated sexual assault victims reported that the assailant was a fraternity member at the time of the incident; this proportion is significantly higher than that reported by victims of physically forced sexual assault (28% vs. 14%, respectively). Not surprisingly, the vast majority of incapacitated sexual assault victims (89%) reported drinking alcohol, and being drunk (82%), prior to their victimization. This is much higher than the proportion of physically forced victims who reported drinking (33%) and being drunk (13%) prior to their assault.”<sup>219</sup>
- Sexual assault and parties: “A surprisingly large number of respondents reported that they were at a party when the incident happened, with a significantly larger proportion of incapacitated sexual assault victims reporting this setting (58% compared with 28%).”<sup>220</sup>
- Most incidents occur off-campus: “The majority of sexual assault victims of both types reported that the incident had happened off campus (61% of incapacitated sexual assault victims and 63% of physically forced sexual assault victims).”<sup>221</sup>

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217. *Id.* at xiii (citations omitted).

218. *Id.* at xiv (emphasis in original).

219. *Id.* at xvi.

220. *Id.*

221. *Id.* at xvi–xvii.

- Few victims seek assistance: “A very small percentage of victims reported that they contacted a victim’s, crisis, or health care center after the incident. This type of disclosure was more prevalent among physically forced sexual assault victims (16%) than incapacitated sexual assault victims (8%).”<sup>222</sup>
- Few victims report sexual assault: “A similarly small proportion of victims of both types of sexual assault stated that they reported the incident to a law enforcement agency, with incapacitated sexual assault victims once again being less likely to report the incident (2% vs. 13%).”<sup>223</sup>
- Reasons for not reporting: “Of the victims who did not report the incident to law enforcement, the most commonly reported reasons for non-reporting were that they did not think it was serious enough to report (endorsed by 56% of physically forced sexual assault victims and 67% of incapacitated sexual assault victims), that it was unclear that a crime was committed or that harm was intended (endorsed by just over 35% of both types of victims), and that they did not want anyone to know about the incident (endorsed by 42% of physically forced sexual assault victims and 29% of incapacitated sexual assault victims).”<sup>224</sup>
- Sorority membership as a risk factor [background/previous research]: “Sorority membership itself has been identified as a risk factor for sexual assault, including being a victim of alcohol or drug coercion.”<sup>225</sup>
- Greek organizations and alcohol consumption [background/previous research]: “Not surprisingly, previous research has documented that students who are members of Greek organizations drink more frequently and heavily than nonmembers, and it is questionable whether Greek affiliation is associated with sexual assault once alcohol consumption is controlled for analytically.”<sup>226</sup>
- Sexual assault and fraternity men [background/previous research]: “[F]raternity men have been identified as being more

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222. *Id.* at xvii.

223. *Id.*

224. *Id.*

225. *Id.* at 2–7 (citations omitted).

226. *Id.* at 2–8 (citations omitted).

likely to perpetrate sexual assault or sexual aggression than nonfraternity men.”<sup>227</sup>

- Sexual assault and aggressive sports [background/previous research]: “[A] recent study found that college men who had participated in aggressive sports (including football, basketball, wrestling, and soccer) in high school used more sexual coercion (along with physical and psychological aggression) in their college dating relationships than men who had not. This group also scored higher on attitudinal measures thought to be associated with sexual coercion, such as sexism, acceptance of violence, hostility toward women, and rape myth acceptance.”<sup>228</sup>

- Sexual victimization before college [background/previous research]: “[E]ven though some women experience their first sexual assault after entering college, many women who experience sexual assault during college had been sexually victimized before coming to college. Since women who have experienced sexual assault before entering college have a much greater chance of experiencing sexual assault during college, it is important that sexual assault programming reflects this reality.”<sup>229</sup>

- Few college and university programs address the relationship between substance use and sexual assault [background/previous research]: “[D]espite the link between substance use and sexual assault, it appears that few sexual assault prevention and/or risk reduction programs address the relationship between substance use and sexual assault. In a review of 15 university-based prevention interventions conducted between 1994 and 1999, only three included references to alcohol use.”<sup>230</sup>

The CSA study provides convincing support for calls to expand institutional efforts to reduce sexual violence on college and university campuses. As the authors state, colleges and universities are places where there is “close daily interaction between men and women in a range of social situations,” often accompanied by “frequent exposure to alcohol and other drugs.”<sup>231</sup> Stepping back from impassioned criticism or defense of college and university administrators trying to manage this exceptional

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227. *Id.* at 2–11 (citations omitted).

228. *Id.* (citations omitted).

229. *Id.* at 6–4.

230. *Id.* (citation omitted).

231. *Id.* at 1–1 (citation omitted).



environment, commentators might focus more attention on the fact that alcohol abuse and sexual violence are probably exacerbated on college and university campuses, but are also reflective of significant, cross-generational social problems in other settings. Single-minded focus on college and university student misconduct—a favorite topic in national media—can be a convenient distraction from important contributory shortcomings elsewhere, including disengaged parenting. Caricatures of college and university campuses as uniquely dangerous places also pose the risk of forcing institutions to adopt largely politicized solutions (e.g., a lower standard of proof in disciplinary cases) when far deeper issues are involved (e.g., the “most common reason” college and university students decline to report sexual violence is a belief the offense was not “serious enough” to report).<sup>232</sup> Politicized solutions, in turn, politicize college and university sexual assault policies, undermine their legitimacy, and discredit educational interventions.

The CSA data also highlight the difficult task colleges and universities have undertaken in resolving contested sexual violence cases. The close connection between substance abuse and sexual assault hinders communication when incidents occur; it also clouds memories when investigations are undertaken thereafter. The large number of cases occurring off-campus (sometimes in places where colleges and universities have no authority or control) may also inhibit access to evidence and witnesses. These and other obstacles—including reluctance on the part of young adults<sup>233</sup> to discuss sexual desires or limits openly and directly—help explain why unbiased disciplinary proceedings (while unquestionably necessary) will be a consistent source of disappointment to individuals who rely primarily on the threat of punishment to address student sexual misconduct.

Most educators understand that sexual misconduct must be challenged in multiple ways, including education, peer group suasion, and more candid communication among and between men and women. Peggy Reeves Sanday, professor of anthropology at the University of Pennsylvania and author of *Fraternity Gang Rape: Sex, Brotherhood and Privilege on Campus*<sup>234</sup> has recognized that colleges and universities “have to be prepared to expel perpetrators after due process.”<sup>235</sup> The core of her research-based message, however, is the need to challenge male bonding that “involves defining women as ‘the other’.”<sup>236</sup>

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232. *Id.* at xvii.

233. We hypothesize this reluctance is not limited to young adults.

234. PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD AND PRIVILEGE ON CAMPUS* (2d ed. 2007) [hereinafter Sanday I]. See also Peggy Reeves Sanday, *The Culture of Rape*, 4 *SYNTHESIS: LAW & POL’Y IN HIGHER EDUC.* 281, 281–83, 295–96 [hereinafter Sanday II].

235. *Id.* at 295–96.

236. *Id.* at 282.

[M]ale bonding depends on being loyal to the male group and separating from women. It involves defining woman as the “other.”

Guys need to talk with their female peers on campus, and not just talk to each other. If there were open discussion between males and females about these issues on campuses across the country, then we would have far fewer problems. . . . Men and women have to understand each other's points of view. There are women—and men—who enjoy sex every day or three or four times a week. There are men and women who don't enjoy that kind of sexuality. We have to understand that polarization forces men into a kind of “hypersexuality.” . . . It's shameful to force men into a kind of hypersexuality they may not feel. The same with women. . . . The sexual variation among males and females is great.<sup>237</sup>

Sanday's challenge to sexual stereotyping and her emphasis on candid communication require active student participation. Student participation, in turn, depends upon a sense of trust in the legitimacy of campus rules and rule enforcement. Accordingly, it is not surprising that Sanday's call for strict enforcement of sexual misconduct policies would be associated with a concurrent emphasis upon due process. Students accused of sexual misconduct, she stated, “must receive a proper hearing and due process. Justice means that both sides must be heard.”<sup>238</sup> This is not a conception of due process from a “legalistic” frame of reference; it derives instead from the social science perspective that due process—properly balanced and applied—is essential to fostering broad-based community support for other kinds of sustained social and educational interventions.

## V. CONCLUSION

Our title refers to the *ethical* and *educational* imperative of due process. Ethics (broadly conceptualized as examining, defining, and developing components of good character and behavior) encompasses an understanding that institutions, like individuals, benefit from the kind of self-insight and self-restraint expressed by Learned Hand: “*The spirit of liberty is the spirit which is not too sure that it is right.*”<sup>239</sup> This spirit, which is also a core component of the methodology of science, promotes both basic due process and participatory decisionmaking—especially student engagement in campus governance. Greater student engagement, in turn, is likely to foster more than “basic” due process, since students (generally) favor greater procedural protections when serious penalties may

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237. *Id.* at 282–83.

238. *Id.* at 283.

239. Learned Hand, *The Spirits of Liberty*, Address at New York City's Central Park (May 21, 1944), in *LIFE*, July 3, 1944, at 20 (emphasis added).

be imposed. This is how a democratic process works. It is not always an elegant mechanism, but it tends to foster a sense that the rules and policies being enforced are worthy of being obeyed. Our overview of the history of efforts to regulate college and university student behavior was designed to demonstrate this point; for all the turmoil involved, the campus revolutions of the 1960s and 1970s had the virtue of promoting a sense of moral legitimacy in rules adopted through a participatory, less authoritarian model. This history may reflect an aspect of what Alexander M. Bickel (cited in our preface) had in mind when he wrote: “For the legal order, after all, is an accommodation. It cannot sustain the continuous assault of moral imperatives, not even the moral imperative of ‘law and order’ . . . The highest morality almost always is the morality of process.”<sup>240</sup>

Furthermore, as our overview of several key due process holdings indicates, due process is a form of *institutional* self-restraint. Grounded in traits like humility and reciprocity, it also promotes the educational aim of disciplined thinking (“hear the case before you decide it”). Disciplined thinking for worthy ends—properly described as a “ladder of reason”<sup>241</sup>—is a magnificent human creation. Colleges and universities contributed to its birth and must be ever watchful for its future.

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240. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 120, 123 (1975).

241. GEORGE T. LEMMON, *THE ETERNAL BUILDING: OR, THE MAKING OF MANHOOD* 233 (1899) (“[W]ithout space or seeming necessity for argument. . . . we put foot on the ladder of reason and start in our climb for the realm of moral law.”)

