

metaphorically *legal* solutions. Even the language they use is highly legalistic.

Perhaps the most widely known and utilized model code(s) comes from Attorney Edward Stoner. Stoner has created model disciplinary codes, which have been widely used in higher education as templates for discipline systems.³³ Stoner was not the only writer to allude to, or create in some form or another, model systems of discipline for colleges.³⁴ Yet by far, his vision of model student discipline has come to be dominant.

Stoner connected the central themes of the Civil Rights era—notice, specificity, uniformity, non-arbitrariness, rules, written as opposed to secret processes, etc.—and made the classic, post-Civil Rights era, argument that wide disciplinary codes—and model codes—are good and needed:

Although twenty-first century courts no longer merely rubber-stamp college or university decisions, as they once may have done under the doctrine of in loco parentis, courts continue to afford institutions of higher education a great deal of discretion. Nevertheless, when colleges and universities do specify the process they will follow for student discipline, courts expect them to follow the process they select. Because institutions will be held by judicial reviewers to comply with their own choices about process, language must be selected carefully. There must not be a commitment—even a vague one—to observe murky general “legal sounding” ideals like “due process” or “fundamental fairness.” A better practice is to state exactly what process is provided without using such platitudes.

³³ See Gary M. Pavela, *Applying the Power of Association on Campus: A Model Code of Academic Integrity*, 24 J.C. & U.L. 97 (1997); Edward Stoner & Cathy L. Cerminara, *Harnessing the Spirit of Insubordination: A Model Code of Student Conduct*, 17 J.C. & U.L. 89 (1990); Edward Stoner & John Wesley Lowery, *Navigating Past Spirit of Insubordination: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004).

³⁴ See Pavela, *supra* note 33, at 102–118 (discussing the revival of honor codes and providing an example of a model code of academic integrity); Stoner & Lowery, *supra* note 33, at 11–77 (providing an example of a model student code).

In this environment, it is now normal practice for colleges and universities to have written student disciplinary codes. Such a written code is one step toward educating students about how to behave appropriately as members of an academic community. The process of drafting or re-drafting a student conduct code allows members of the academic community to evaluate what choices they believe are educationally appropriate—away from the heat of a specific incident. It may also provide a bulwark against charges of arbitrary action; for example, allegations that the school singled out one student for particularly unfair treatment or applied processes or sanctions that were inconsistent from case to case. This consideration applies to private institutions, as well as public ones even though the constitutional concepts of minimal procedural due process apply only to public institutions. Thus, a written student code can benefit both public and private institutions, as well as students.³⁵

The Stoner code(s) attempts to address the major concerns of fairness raised in the Civil Rights era.³⁶ The Stoner code(s) were designed to create systems that would prevent wrongs and promote legal compliance.

Gary Pavela, who also has proffered a significant model code, is more *nostalgic* than Stoner. Pavela's model code is explicitly aimed at resurrecting or reemphasizing "an old idea."³⁷ Pavela has been more interested in honor codes and seeking empowerment of students in quasi-democratic systems. Pavela has seen a values-challenged post-modern world colliding with the modern campus:

³⁵ Stoner & Lowery, *supra* note 33, at 10–12 (footnotes omitted).

³⁶ However, by referencing Thomas Jefferson's famous quote regarding insubordination in both articles, Stoner did miss one key feature of the Civil Rights era. Students are no longer *subordinate*, but are considered legal adults capable of bargaining on mature footing with their institutions. Misbehaviors in higher education can no longer be considered "insubordinate" because this paradigm suggests that there is an ordination such that students are subject to superior power of an institution. Instead, when students transgress rules or violate policies, they are not *insubordinate* but instead fail to meet expectations, etc.

³⁷ Pavela, *supra* note 33, at 102.

post modernism as we used to know it is dead. And with its demise will come renewed attention to the values that support academic communities (both secondary schools and colleges)—especially the value of academic integrity.³⁸

Pavela decries the decline of character in the post Civil Rights era college and has advocated for reintroduction of value and character into college life:

Character education programs evolving in elementary and secondary schools need support and reinforcement on campus. The direction colleges and universities will take was summarized by Dartmouth President James O. Freedman, who predicted that, by the next century “[m]oral development will once again become an emphasis point of liberal education.”³⁹

Pavela has advocated the resurrection of honor codes as a means to improve moral development.

Stoner’s and Pavela’s work illustrate the twin themes of the era of legalisms—progressivism and neo-classicisms. On the one hand, colleges have sought to *modernize*—to reject the old systems and reform them in light of the specific problems raised in the Civil Rights era. On the other hand, colleges have sensed that something has been lost, and should be reclaimed.

Intriguingly, Stoner decries the very legalisms that he embraces. He has fashioned his model code(s) in highly legalistic ways, but also criticized overly legal approaches to student discipline.⁴⁰ For example, Stoner has recently stated that “a college or university should avoid criminal law language.”⁴¹ Stoner has also stated that,

The cardinal error of this type is the practice of calling student discipline proceedings “judicial.” The misnomer is unfortunate because rulings from

³⁸ *Id.*

³⁹ *Id.* at 101 (quoting James O. Freedman, *Five Areas of Concern*, WASH. POST, Aug. 6, 1989, at 18).

⁴⁰ Stoner & Lowery, *supra* note 33, at 10–11.

⁴¹ *Id.* at 14–15 (footnote omitted).

members of the *real* judiciary have consistently held, when so urged by college or university officials, the campus proceedings are *not* “judicial” proceedings. Much confusion has been caused by calling the campus process a “judicial” one when it is not. Frequently a college or university attorney’s explanation that judicial structures and technical judicial roles are not applicable on campuses has been derailed by a judge’s observation that, “The College itself calls it a mini “judicial process.” Luckily, most such derailments have only been temporary. The use of the term “judicial” may also contribute to similar confusion of elected officials and to the development of confusing legislation based upon a misunderstanding of the purpose and role of campus conduct codes. For these reasons, a sound twenty-first century student conduct code should eschew the word “judicial.”⁴²

This is not the only place that Stoner advocates loosening the grip of legalisms on student discipline.⁴³

Nonetheless the Stoner code, even in its second iteration, is highly legalistic.

Stoner’s code features all of the classically legalistic building blocks. For example the code begins with a preamble: preambles are common in large legislation or constitutions.⁴⁴ The model code then offers “definitions” in a section denominated “Article I.”⁴⁵ The idea of setting forth a specific definition section—similar to an insurance policy for comparison—is highly legalistic as is the use of terms such as

⁴² *Id.* at 15 (emphasis in original). The founder of the leading professional organization for student disciplinary personnel, the Association for Student Judicial Affairs, ASJA, now ASCA, Donald Gehring, advocated that that organization drop the term judicial and that campuses likewise do the same in their disciplinary codes. Association of Student Judicial Affairs, <http://www.theasca.org> (last visited June 19, 2009).

⁴³ See, e.g., *id.* at 10–11 (“[b]ecause institutions will be held by judicial reviewers to comply with their own choices about process, language must be selected carefully. There must not be a commitment—even a vague one—to observe murky general “legal sounding” ideals like “due process” and “fundamental fairness.” A better practice is to state exactly what the process is provided without using such platitudes. (footnote omitted)).

⁴⁴ *Id.* at 18.

⁴⁵ *Id.* at 18–23.

⁴⁶ KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* 175–77 (2005)

“Article” that have a highly legalistic overtone.⁴⁷ Many of the definitions themselves are highly legalistic. Consider, for example, the use of the term “appellate board”⁴⁸ or the definitions of “shall” and “may.”⁴⁹ The model code goes on to articulate “authority”⁵⁰—a term and concept used in administrative law, the law of agency and elsewhere.

Perhaps the most legalistic feature of the Stoner model code exists within the “Article” relating to prohibited conduct. It is here that Stoner succinctly restates a common misperception of the era of legalisms relating to how the Supreme Court views academic/conduct violations:

Commentary. Colleges and universities are, of course, free to include in their lists of misconduct as many types of acts as they choose. The list of acts of misconduct that constitute violations of the Student Code should give students notice of the types of conduct that may result in sanctions but not every specific type of misconduct is listed because it would not be possible to do so.

Courts give college and university officials much greater freedom concerning purely academic decisions than they do concerning purely disciplinary decisions. Academic misconduct cases involving cheating or plagiarism, for example, present a unique hybrid of academic and disciplinary decisions. Because courts have a real challenge in deciding whether misconduct is academic or disciplinary, the authors suggest that public institutions review with campus counsel each case of “academic misconduct” which might result in a suspension or expulsion to assure that minimal

⁴⁷ Stoner and Lowery, *supra* note 33, at 18, 24, 38, 63. Even many of the definitions have highly legalistic overtones.

⁴⁸ *Id.* at 22.

⁴⁹ *See id.* (specifically Article II). “The term ‘shall’ is used in the imperative sense; the term ‘may’ is used in the permissive sense.” *Id.* Most college students would struggle to understand why such a distinction is made, even though such a distinction is second nature to a lawyer.

⁵⁰ *Id.* at 24.

procedural due process required in the particular circumstance is provided. No such dilemma is presented at private institutions. Academic misconduct may also be grounds for academic sanctions, such as the imposition of a lower grade. This system must be dovetailed with the institutional process for disciplinary review of misconduct in the academic setting if additional sanctions are possible.⁵¹

In commentary on the model code, Stoner reproduces both the conduct/academic distinction *and* the public/private distinction. Stoner again bases this upon citation to authority from the federal courts and legal commentators.⁵² This is as precise a moment of insight into the consciousness of the era of legalisms as perhaps we might ever have. Stoner, a major champion of the era of legalisms, seems unconscious of the fact that he has projected into Supreme Court jurisprudence the very distinction that he believes is necessary. The maneuver works only because Supreme Court jurisprudence is so deferential to higher education. By interpreting Supreme Court jurisprudence in a certain way, and then adopting that interpretation, higher education then, in exercise of its academic freedom, is able to turn a *perception* of Supreme Court jurisprudence into academic *and* legal reality.

In making the distinction between academic and conduct violations, Stoner cites to *Ewing* and *Horowitz*.⁵³ Crucially, he also draws heavily from Ronald M. Levin, *Constitutional Law—Due Process of Law*,⁵⁴ to support the dichotomy. According to Levin, “disciplinary determinations are based on objective findings of fact so that hearings are useful and appropriate in this context. However, academic determinations are quite different because they are more subjective and evaluative.”⁵⁵ This line of reasoning creates sorting problems. Many “academic” decisions are based upon questions of fact and even upon hard objective determinants. For example, if one is teaching a competency-based course, and sets forth information that must be mastered by student, a student’s failure to acquire the information is

⁵¹ *Id.* at 32–33 (footnotes omitted).

⁵² *See, e.g., id.* at nn.97–100.

⁵³ *Id.* at 32 n.97.

⁵⁴ Ronald M. Levin, *Constitutional Law—Due Process of Law*, 47 U. CIN. L. REV. 514, 517 (1978).

⁵⁵ *See Stoner & Lowery, supra* note 33, at 32 n.97 (quoting Levin, *supra* note 54, at 517).

often a simple question of fact. Grading often features activities that are neither “subjective” nor “evaluative”: the student gets it, or not.

Conversely, many “disciplinary” decisions or conduct violations are highly evaluative and subjective. For instance, one of the most common issues modern discipline officers face is the situation involving alleged sexual misconduct by students who have “hooked-up” while highly intoxicated. The students were often severely intoxicated—often to the point that they are now incapable of recollecting facts. These matters often lack “facts” in any ordinary sense. Indeed, the resolution of many of these matters turns upon *evaluative* and subjective criteria. This is not unique to sexual misconduct cases; even in the most run-of-the-mill educational situation, we will see questions of fact and evaluation present. There is a crucial misstep in Stoner’s model. Stoner elevates an *ontological* distinction over an *epistemological* one.

Stoner follows the legalists in delineating a public/private distinction as well. True, Supreme Court jurisprudence regarding civil rights turns on “state action”⁵⁶ and thus there is and always will be some form of public/private distinction in higher education law. Nonetheless, when reviewing higher education law in the context of student discipline it appears that courts seek a kind of parallelism in many ways between public and private institutions. Courts do use different doctrinal categories to describe responsibilities of private and public institutions. Doctrinal analysis clearly breaks along public and private lines, but there are distinct patterns of parallelism in the way cases resolve (almost always in favor of the institution, sometimes with guidance on how to alter a system to make it fairer). Stoner does not emphasize the very parallelism his code is destined to create.

Stoner’s model code creates a cultural of legalisms. The infatuation with legalisms continues in the model code in terms of both disciplinary procedure⁵⁷ and in sanctions.⁵⁸ Procedurally, the model code is remarkably legalistic, mimicking procedures that might be available in administrative hearings under administrative law principles. The code talks in terms of “charges” and “witnesses”: matters are considered in “hearings” before “boards” with “appellate review.”⁵⁹ To any lawyer with administrative law training, the code is obviously a softened

⁵⁶ See *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (indicating that state action must be something more than receiving the benefits of the government).

⁵⁷ Stoner & Lowery, *supra* note 33, at 38 (specifically, Article IV).

⁵⁸ See *id.* at 54–55.

⁵⁹ *Id.* at 38–45, 60–63.

version of administrative adjudication procedure. In other words, Stoner has taken adjudicative administrative proceedings and adapted and used an administrative adjudicatory model to fashion his code.

Certainly, no United States Supreme Court precedent has ever even required that academic colleges do this. To the contrary, both *Horowitz* and *Ewing* begged higher education to avoid legalistic, adjudicatory models of all types. The Supreme Court invited higher education to find and follow its own path. One reason for this is obvious: administrative law systems are difficult to operate, require expertise, are slow moving, are designed for purposes other than education, are expensive, and can be subject to extensive appellate review. Indeed, even if one were to adopt legalistic models for dispute resolution in higher education there may be legalistic models that are better suited to the higher education environment than the administrative law concept. Stoner, however, has chosen to advocate very law-like legalistic models.

Stoner, a highly accomplished higher education attorney, became the perfect prophet for an industry infatuated with law. The success of the Stoner code is due primarily to the fact that it offers what most colleges thought they wanted. Ironically, what we promise is what we must provide, and to the extent that institutions embrace systems that are legalistic, courts will begin to analyze our responsibilities in the context of such a paradigm—because we chose and promised them. There is a grave danger for higher education in this approach. When systems resemble actual legal systems, judges and lawyers have a better understanding of them and can easily appreciate the strengths and weaknesses of such systems. Undoubtedly, this was the case in the *Than* litigation, discussed *infra*. Moreover, judges and lawyers are more likely to be critical of systems that they are familiar with but do not operate in proper or familiar ways. Systems that are law-metaphoric are targets for increased litigation, even if that litigation is not ultimately successful.

The Stoner code is a centerpiece of the era of legalisms. Even for those institutions of higher education who do not use the Stoner code, its influence is clear almost everywhere. It has established itself as a baseline for comparison. From Stoner, we get the ideas that model codes should begin with preambles; have a lengthy list of definitions;⁶⁰ feature lists of proscribed conduct in law-like language; use legalist

⁶⁰ See *id.* at 18 n.61 (“The authors recommend that, as in every good legal document, a student code should contain a section that the code’s drafters define all the terms of art that will appear through the code.”).

procedures that include, at a minimum, evidence, hearings, and appeals; and there must be a list of sanctions that are punitive and law-like. It is difficult to find a student code in America that does not feature all or most of these components. Whether taken from Stoner's code or not, these form the nucleus of the way in which the era of legalisms imagines a methodology to manage an educational environment via code. Stoner should be given credit for the masterful way in which his model code captures the imagination of the era of legalisms. His work is not simply good higher education scholarship and lawyering. Stoner's model code represents a significant moment in American higher education, actualizing the core beliefs of the era of legalisms into code form.

Stoner's code is *progressive*. His system for managing disputes in the modern college environment is dissimilar to systems that existed prior to the Civil Rights era. It is not that higher education did not have its codes and procedures before the Civil Rights era: what makes Stoner's code progressive is the fact that they are so inherently law-like and unlike anything that existed before in its legalistic focus and detail.

The era of legalisms has also featured, at times, a form of neo-classicism—a different path from that followed by Stoner. The Civil Rights era bred its own form of nostalgia, something like the modern fascination with the 1950s. The prime example of disciplinary nostalgia is the honor code. A number of commentators have advocated the use of honor-based systems, indeed an entire organization developed with devotion to that concept.⁶¹

Perhaps the best known proponent of honor systems has been Gary Pavela. Honor codes and academic integrity initiatives tend to focus on *academic* as opposed to *conduct* matters. Pavela correctly points out “[t]he honor code concept does not have to be limited to promoting academic integrity.”⁶² However, honor codes and models of academic integrity tend to weigh heavily in favor of addressing issues such as “cheating,” “fabrication,” “academic dishonesty,” “plagiarism,” “honor statements,” etc.

Honor codes usually have several key features.

First, honor codes are often organized towards creating process that is didactic and participatory—preparation for citizenry in a democracy. When reading honor codes, it is hard not to imagine an Athenian council; or if a defendant, the council of Sparta. “Honor” does

⁶¹ See, e.g., Donald McCabe & Linda Klebe Trevino, *Honesty and Honor Codes*, 88 *Academe* 37 (Jan./Feb. 2002), available at <http://www.aaup.org/AAUP/pubsres/academe/2002/JF/Feat/mcca.htm>.

⁶² See Pavela, *supra* note 33, at 103 n.26.

evoke images of marble columns, pressed uniforms atop trusted steeds, and founding fathers.

Second, honor codes prize pure procedural process. Process is primary in honor systems: results are deemed fair *because* they result from fair process.

Third, honor codes tend to place heavy reliance on students to manage them.

Fourth, honor code systems tend to have a strong preference for *gradualism*. Honor code systems incline towards incremental change because of the desire for consistency and predictability—something like *stare decisis* in courts of law. Colleges implicitly accept something like Ronald Dworkin's concept of a principle of fairness: all things equal, students are entitled to be treated similarly in similar circumstances.⁶³ Honor code systems therefore prefer slow systemic change with plenty of notice to students so that they may fairly re-order their affairs. Honor systems therefore rely heavily on principles of fairness. It is not essential that an honor system *prove* it reduces cheating.

Fifth, evaluation of secondary consequences, such as whether systems actually reduce levels of cheating or alcohol or drug usage, are of secondary, although not insubstantial, concern. Honor code systems tend to become ends in themselves, and are not primarily motivated by larger systemic goals, unless greater systemic goals are goals of fairness.

Historically, honor systems were not designed primarily for student empowerment. Instead, institutions of higher education in olden times were expected to prepare students for citizenship in society. Honor systems served the goal of matriculating individuals into social systems that were governed by rules that were not *strict sense* rules of the legal system. Students were not asked to enforce *their* own systems of honor as such. Instead, students were inculcated into hierarchically pre-ordained systems of honor that they were required to accept and internalize.

Modern honor systems suffer today from the conflict of attempting to be both classical and modern. On the one hand, honor systems were once designed to inculcate and teach ordination. However, Millennial students do not have a convergence of "honor" values like those that modern codes of honor attempt to state. For example, Millennials often have very different information sharing and usage values than those espoused by the academy: what we see as plagiarism, students often see as good practice. Moreover, many things are honorable to Millennials that are not recognized in any code. For

⁶³ See RONALD DWORIN, TAKING RIGHTS SERIOUSLY 184–205 (1978).

example, Millennials place heavy emphasis on helping friends and family. Many Millennials find the idea of a “code of honor” itself somewhat inapposite or cynical, partly because the values of honor stated and enforced are not ones that they espouse, or had a hand in creating. Honor systems that preexisted the Civil Rights era were hardly pluralistic or inclusionary nor were they always *written*. Traditional codes of honor thrived in unwritten form, and codification to the extent it existed, was designed to simply reflect unwritten but widely accepted social practice. One can redact practices of honor to rules, perhaps; but one cannot legislate honor. For example, the Southern code of dueling was part of a very extensive system for resolving disputes through stylized violence. However, much of code duello existed in unwritten form, known well to those who accepted it. When Alexander Hamilton and Aaron Burr faced off, no one needed to follow written procedures or made reference to italicized or Roman numeral code sections. Sanctions were obvious to all.

Student centrism in honor systems is therefore a *neo*-classical feature of modern systems of academic integrity and honor, and not something typically featured in pre-existing honor systems the way it is today. Student centrism in modern honor systems constantly walks a line between ordination and hierarchy, and a modern preference for student centered decision making. Codes of honor often best reflect another generation’s values, not the values of the one “self” regulating. This dissonance reveals itself persistently in the form of elongated honor council proceedings with respect to matters that seem relatively simple to administrators, staff, faculty, and trustees.

Pavala’s model honor code and modern initiatives on academic integrity incline towards student empowerment with an eye towards training students for self-governance in a democratic society. Students are placed closer to the center of the academic mission and are given great powers over that environment.

The notion of placing students in such a position of power is a direct result of the Civil Rights era. As Pavela states,

a new cohort of students appears to be even more assertive about the rights and responsibilities associated with adulthood, and the freedoms traditionally protected in American society. This is so, in part, because many colleges are rapidly becoming multi-generational learning centers, attracting and educating a broad range of students

with new technology, including communications technology including communications technology allowing instruction at a distance.

A single-minded reliance on punishment and censorship “from the top down” won’t work in dealing with most Americans—especially young people, and those attending colleges and universities now, or in the future. Candor, suasion, and the influence of peers might work, especially if colleges define their relationship with students as an *association*, grounded in shared rights and responsibilities. That’s why it’s a new day for honor codes on college campuses, or at least for “modified” honor codes that give students a significant voice in defining and enforcing academic integrity policies.”⁶⁴

Connecting these themes with “individualism,”⁶⁵ Pavela provides a perfect example of the neo-classical fascination with honor systems as systems creating student empowerment.

Pavela explicitly attempts to cast this type of autonomy and empowerment as the revitalization of something old.⁶⁶ This belief is deeply rooted in modern honor systems, even though it is entirely false. Prior to the 1960s, when doctrines such as *in loco parentis* prevailed, students were hardly empowered. Power and prerogative were for institutions, not students. Honor systems that predated the Civil Rights era were themselves tools of ordination and hierarchy: these systems were not designed to empower students against underlying institutions, but were designed to provide another tool by which institutions could inculcate and reinforce preexisting values and ideas. If an honor system did something considered dishonorable by faculty or administrators, presidents or trustees, the decision would and could be countermanded by superiors.

Thus, the most distinguishing feature of modern honor codes is the fact that they reflect a shift in power from institutions to students.⁶⁷

⁶⁴ See Pavela, *supra* note 33, at 102–03.

⁶⁵ *Id.* at 103.

⁶⁶ *Id.*

⁶⁷ *Id.*

Pavela believes that students are “adults,”⁶⁸ and adulthood and empowerment go hand in hand for these systems.

The empowerment motif is particularly ironic because honor systems are virtually powerless, on their own, to manage the environment in which the “empowered” live and learn. While there is some evidence that well run honor systems improve academic integrity, there is no strong evidence that these systems address the myriad of other challenges a college faces at all.⁶⁹ In many systems, all that students really have power to do is to decide a handful of “cases” presented to them each year.

The focus on student empowerment can also serve another function—deflect the responsibility of an institution. Systems that rely heavily upon student empowerment allow institutions to delegate decisions (or non-decisions) regarding the management of the educational environment to students. Thus, if a non-functional event occurs in the educational environment, administrators can point to the responsibility of students to report and act upon improprieties in the environment. A bad decision from an honor council can be justified by arguing that “at least the procedures were followed.” Inefficiencies in honor systems can be justified by referencing the importance of deliberative behavior—and the educational value of such. Issues of inexperience—honor systems typically turn over personnel rapidly—can be remedied by extensive training protocols: thus even if a bad decision is in direct result of lack of training or expertise, this dysfunctionality can be masked by pointing to extensive training protocols that are evidence of more than reasonable care in training. Honor systems therefore can provide highly functional ways for administrators to deflect criticism regarding the management of the educational environment. Dysfunctionalities in an educational environment can be rationalized as necessary costs of empowering students and training them for participatory democracy.

Pavela also associates honor systems with protecting traditional American freedoms. Freedoms expressed in disciplinary honor systems are the expression of free *adulthood*: students are now free from the constraints of parental discipline. Yet, the era of legalisms can hardly be described as era free from restriction and repression. Large numbers in a student population receive some form of disciplinary action during their tenure in college. Moreover, an even greater number of students violate

⁶⁸ See *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979).

⁶⁹ See *McCabe & Trevino*, *supra* note 61.

college rules and are not caught. These artful dodgers do not show up as disciplinary statistics, but their experience in college is highly tempered by rules and rule avoidance. It is difficult to make the argument that college life today is more “free” for students in another era. Instead, systems of honor and discipline that focus so heavily on negative events, are more restrictive than empowering in many ways.

It may seem that there are great difference between model codes such as Stoner’s that are progressive, and honor systems such as Pavela’s that are neoclassical. However, both are highly legalistic, even if in slightly different ways.

Pavela’s model code for example features procedural “protections” that are like the legalistic procedures of Stoner’s code.⁷⁰ Pavela proposes that students be judged under a “clear and convincing” evidence standard as opposed to a “preponderance of the evidence” standard.⁷¹ “Preponderance of the evidence” standards are used in civil trials frequently and are considered to be a lower burden of proof than the “clear and convincing” standard.⁷² Pavela’s model code is filled elsewhere with legal and legalistic terms such as “aggravated violation,”⁷³ “appeals,”⁷⁴ “probative,”⁷⁵ etc., even as Pavela states,

An honor review is not a trial. Formal rules of evidence commonly associated with civil or criminal trial may be counter-productive in an academic investigatory proceeding, and shall not be applied. The presiding officer will accept for consideration all matters that reasonable persons with except as having probative value in the context of their affairs. Unduly repetitious, relevant, or personally abusive material should be excluded.⁷⁶

Pavela speaks in terms that suggest that his code is not a trial, and indeed technically it is not. Instead, it bears a striking resemblance to certain

⁷⁰ See Gary Pavela, *Applying the Power of Association on Campus: Model Code of Student Conduct*, 11 SYNTHESIS: LAW & POLICY IN HIGHER EDUC. 817, 817–23, 829 (Spring 2000).

⁷¹ *Id.* at 823.

⁷² See generally Robert C. Power, *Reasonable and Other Doubts: The Problem with Jury Instructions*, 67 TENN. L. REV. 45 (1999) (describing the various levels of burdens of proof).

⁷³ Pavela, *supra* note 70, at 818.

⁷⁴ *Id.* at 829.

⁷⁵ Pavela, *supra* note 33, at 116.

⁷⁶ *Id.*

forms of formal arbitration.⁷⁷ Lawyers will immediately recognize arbitration-like features in Pavela's model code. (Pavela himself talks also of mediation-type model.⁷⁸)

Honor systems have mutated into *codified* systems that are quasi-judicial. The imprint of law and legalisms is unmistakable at almost every point in modern honor systems. Modern honor systems are not entirely distinct from other types of codes such as Stoner's.

The era of legalisms focuses on *codes* as central tools of managing an educational environment. Codes, legalisms and objectivity run hand and hand. Everywhere we look in higher education today we see rules procedures, sanctions, and metaphorical attempts to recreate judicial, administrative, arbitral, or otherwise juridical systems. Codes would seem to be a necessary feature of modern American higher education. The Supreme Court, however, has never even insinuated that codes are necessary, or even a good idea. *Ewing* and *Horowitz* actually suggest otherwise, which is why higher education's code-bringers tend to de-emphasize these cases. The success of codes is not due to legal mandate. The legitimacy of codes—honor or otherwise—lies not in legal requirements or proven effectiveness, but a *choice* made by modern higher education—or maybe even a non-choice hiding behind the pretense of mandate.

C. The Rise of Professionalism in Discipline

I. A New Caste of Administrators Emerges

The desire for legal compliance spurred on a movement towards the adoption of legalistic codes for student behavior. Legalistic codes require competent administration, without which a form of compliance error can occur—the failure to follow one's own code. Colleges began to make more complex contractual promises to students. Even at public institutions compliance error litigation was shifting from constitution to contract. The solution—creates a cadre of student discipline professionals who have significant training and whose mission is to administer complex codes faithfully. The Civil Rights era spawned a code driven response, which in turn, facilitated the rise of a class of distinct student discipline professionals. Codes mean code professionals.

⁷⁷ See generally *id.* at 109–16.

⁷⁸ Pavela, *supra* note 70, at 823.

Today, the association named the Association of Student Conduct Administrators (ASCA), formerly the Association of Student Judicial Affairs (ASJA), has become the primary and leading association for individuals charged with administering discipline in higher education. According to legend, the idea for the association began in conversations between Donald Gehring and Robert Bickel in the hallway of the annual Stetson Law Higher Education Conference in Florida sometime before the association formed. The rapid evolution and success of ASCA followed. No such organization existed in any similar form prior to the Civil Rights era. Individuals charged with student discipline responsibilities were not administering the same, or even similar codes, and the law did not interact with student discipline in any significant way. There were no driving compliance problems for disciplinary administrators. Indeed, much discipline was done directly by deans in informal ways. Professionalism in student discipline is a modern phenomenon, and entirely a creature of the era legalisms. Legalisms birthed codes; codes begat code professionals.

Codes and code professionals are naturally imperialistic, yet are never given the tools needed to build an empire. Fairness demands that like cases are treated alike, and that all students operate under the same rules. However, codes and code professionals constantly compete with other forms of “jurisdiction” and other administrators.

Modern institutions of higher education have typically developed systems of discipline for college students operated by residential life and intercollegiate athletics, for example. Another common classic example: the professor who determines on his or her own to assess penalties without referring students to the code; or coaches who attempt to handle matters on their own, and independently of the code; or students who chose vigilantism over the code.

Student discipline professionals must endure the reality that fully “consistent” adjudication can never be more than an aspiration. There are features of American higher education that make it impossible for the code-administrators to rule the campus completely. Professional higher education disciplinarians are rarely, if ever, the most senior administrators at an institutions of higher education. Professional disciplinarians must answer to superior administrative officers—including presidents, ombudsmen, and boards of trustees—and must also contend with the fact that may not out rank others when they disagree. Codes are written to be supreme statements of disciplinary authority but are administered primarily by individuals who do not have the highest rank of responsibility. (This, by the way, was not as true in the era of power and prerogative.)

Hierarchy and bureaucracy tend to go together; disciplinarians also face the problem of voluntarism.⁷⁹ After the Civil Rights revolution and the adoption of legalist codes, student discipline professionals began to run the risk of becoming *bureaucrats*. Higher education had never before had disciplinary apparatchiks. To correct the problem and promote voluntarism, codes and honor systems empowered *students* in key leadership roles. Thus, it has become fashionable to have panels, which decide cases logged against students that consist not only of faculty and administrators but also students. Students may also have other important roles as well, including in the investigative process. Hybrid systems of bureaucrats and volunteers, often create issues relating to the apportionment of responsibilities and rights.

II. Survival the Fittest—The Evolutionary Advantage of Bureaucrats over Students

One interesting feature in higher American education did play through from the era of power and prerogative into the Civil Rights era and into the era of legalisms. Student run discipline systems have never dominated American higher education widely.

Some, like Pavela, believe correctly that the Civil Rights era facilitated a much higher degree of student empowerment in discipline systems. Indeed, honor systems have made something of a comeback, but student-dominated systems have not captured the field. Instead, to the extent that professionals and students have competed for dominant roles in American higher education discipline, the professional caste has been the clear winner. When students are heavily involved, American higher education has shown a strong preference for hybrid systems run by students *and* administrators jointly over systems entirely run by students. An overlooked fact in Supreme Court jurisprudence regarding due process of the Civil Rights era is that the Supreme Court may well have been concerned that student-run discipline systems would come to dominate American higher education discipline and create new problems.

⁷⁹ Voluntarism is a major theme of the 1960s. During the 1960s, a volunteer with someone who willingly took up a cause for social justice as a self-determining individual. When Jefferson Airplane released its now classic album *Volunteers* it attempted to capture exactly this point. Individuals drafted to fight in the Vietnam War were hardly volunteered: masses of individuals protesting against the war were volunteering in a greater cause of social justice. For 1960s civil rights activists, *volunteers* were essentially polar opposites from *bureaucrats*.

Still, it is not entirely clear why—precisely—student-dominated systems did not win out over administrator dominated or hybrid systems. There may be several reasons for the evolutionary victory of professional disciplinarians.

First, a dominating concern for legal compliance pushed American higher education hard towards professionals and professional training. American higher education would have a strong preference for highly trained administrators who could be held accountable for year-to-year consistency in performance. Students were an ever changing body of difficult to train individuals, who might be susceptible to bias and inconsistency.

Second, modern students rarely come to campus to create participatory democracy or to engage in specific community building of a college community. Instead, students come to learn, grow and achieve, and to move on. Any interest in the college community is either incidental, or means to others ends. Baby Boomers tend to project *their* desire for participatory communities on campus on modern students. Ironically, modern students often have little interest in such goals. As a result, even after the immediate fall of the Civil Rights era, finding a sufficient number of highly motivated and self-actualized students to run systems was often difficult. Some campuses have had better luck with this than others, but participation in the participatory model often leaves something to be desired. Those who run systems or train students in them recognize this. As a result, a preference for professional administrators emerges.

Third, the advocates for legalistic, professionally-based systems were more persuasive. The Stoner code(s) succeeded in large measure because of the effectiveness in bringing that code and its philosophy—and workability—to the marketplace of ideas. Lawyers and legalists marketing and advocating for systems featuring legalisms have a natural advantage over proponents of volunteerism and participatory student democracy. Ultimately, senior principals of institutions of higher education, such as the president and/or board of trustees, must be convinced of the value of a disciplinary system. Stoner became president of the National Association of College and University Attorneys—the advisors to presidents and boards of trustees throughout the country. In addition, Stoner has been a long time consultant and presenter for ASJA (now ASCA), receiving the Distinguished Service

Award in 1995, and made an honorary lifetime member in 2005.⁸⁰ Moreover Stoner also succeeded in projecting his message in collaboration with United Educators, a major insurer of higher education institutions: "Reviewing Your Student Discipline Policy: A Project Worth the Investment."⁸¹ Codes with significant administrative empowerment will typically be preferred by administrative personnel, and/or principals. Thus, Stoner and others advocating legalistic codes with high levels of administrative involvement have natural allies.

The victor in the race for legal compliance has been professionalized, institutionalized, rule-based code systems. Such systems have now cornered the inside position, have achieved a sense of efficacy from their marketing success, and eliminated most serious competition. Such systems are not a complete monopoly in higher education today, but dominate the landscape.

The rise of professionalism in student discipline has had many, many powerful and positive effects. Crucially, professional student discipline has all but eliminated the major evils of the *Dixon* era in student discipline. Covert racism and overt retaliation for the exercise of legitimate civil rights have been *driven* like snakes from Ireland. Higher education suffered from diseases of exclusion, racism, homophobia, sexism, etc., but professional administrators have been so successful in eliminating these diseases that many have forgotten how very deep the scourges once ran. Moreover, a great deal of secrecy has been eliminated from higher education discipline, despite the fact that some commentators like Harvey L. Silverglate and Alan Charles Kors continue to argue that high levels of secrecy still remain.⁸² Even if Silverglate were correct, systems of discipline today are still far more visible than any systems that existed prior to *Dixon*. Our waters may not be as clear as the Caribbean, but there has been major change in openness on a national scale. Moreover, modern professionally administered discipline rarely creates concerns over *primary* legal compliance. In other words, students typically receive notice and some opportunity to be heard and we rarely see successful lawsuits these days

⁸⁰ Ed Stoner Student Affairs Best Practices Confidential Investigations, Ed Stoner's Campus Consulting Reflects Many Years of Nationwide Work in Higher Education, www.edstoner.com/consultant.html (last accessed June 3, 2009).

⁸¹ Edward Stoner, *Reviewing Your Student Discipline Policy: A Project Worth the Investment* (United Educators 2000), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/60/ab.pdf.

⁸² See ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* (1988).

over primary compliance with minimum due process requirements.⁸³ Litigation largely today occurs over contractually created promises or contractual breaches, or in secondary dimensions such as student safety.

These are just a few of the benefits higher education has seen from professionalism in student discipline. Perhaps most crucially, professionalism in student discipline has created a self-conscious caste of individuals with a stake in the direction and management of higher education.

The Civil Rights era created a brief window of opportunity into which any number of potential systems of educational environmental management could have existed. However, today proponents of alternative systems of educational environmental management must recognize that codes and the professionals that administer them occupy the high ground. Student discipline professionals have come to internalize the systems they operate and believe in them so thoroughly that they are often deeply committed advocates for these systems. As a direct result of professionalism, higher education now has a self-replicating cadre of individuals who are true code believers. At the root, their faith is the same: legalistic systems can manage an educational environment.

D. Litigation Avoidance

Modern college student discipline was born in a cauldron of some very bitter litigation. The first successful litigation by students against colleges occurred in the Civil Rights era with respect to basic civil, not safety, rights. The Civil Rights cases came first in the 1960s and 1970s—quite some time before colleges faced any serious litigation risk from students alleging safety rights. This meant that the search for legal compliance in creating and administering discipline systems was, in most regards, a litigation avoidance strategy aimed at avoiding a particular kind of litigation—civil rights litigation. Modern student discipline process owes much of its current form to the fact that it was born in an unusual way: colleges were facing litigation against them regarding deprivation of civil rights, but not facing litigation over the core mission, e.g., educational malpractice, or the safety and wellness of the college environment.

Litigation avoidance has two aspects. Primary litigation avoidance relates to avoiding successful litigation from students alleging

⁸³ Cases like *Than, infra*, are still anomalous. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926 (Tex. 1995).

improper discipline, failure of process, breach of promise to provide process, etc. For example, the college did not win in the *Dixon* case—the institution did not successfully avoid a primary litigation loss. Secondary litigation avoidance relates to successfully avoiding legal cases brought regarding the *secondary* effects of process failures. An example would be this: an accused student x allegedly harmed student y; student x is not held responsible in a discipline hearing and later attacks student z—student z now sues the university for negligence for failing to manage student x. Secondary litigation avoidance involves reducing the risk of non-process claims such as negligence claims: some non-process claims have roots in failures of process even though the lawsuits do not directly address process fairness.

There is a third concept that comes into play as well: litigation *management*. Litigation management stresses minimizing the cost of litigation that is otherwise unavoidable. Thus, even in a winning case there is a real cost to an institution and/or its insurers. Managing the process of litigation can often be very significant in reducing the cost—economic and otherwise—of litigation.

As a result of this Civil Rights era, primary litigation avoidance became a first priority for colleges. The goal was to design hermetically sealed disciplinary systems that would be primary litigation proof. In this dimension, more process can be better in the sense that it tends to deflect due process claims, but can be worse if compliance rates are low (complex systems may generate more error). The ideal system then is complex enough to be more than constitutionally adequate but not so complex as to be difficult to administer. The balancing of these two opposite concerns has driven the structure of student process in the era of legalisms, and is directly reflected in the Stoner code. This balance has not been easy to maintain. As colleges provide more *court-like* process, courts recognize that process and ask colleges to do more; *or* compliance error increases causing more primary process litigation.

Secondary litigation avoidance and litigation management were not significant in the immediate post Civil Rights era. Legal rules insulating colleges from safety and educational malpractice claims still held fast. Colleges had minimal fear of secondary litigation, as the possibility of lawsuit (and the need for legal counsel) was *de minimis* in secondary contexts. There was little to no chance that a case involving

failure of process would create the context for a successful secondary legal action regarding student injury.⁸⁴

Student discipline process as a primary litigation avoidance tool was thus derivative of the Civil Rights era and a byproduct of college liability law (as it moved from one era of protectivism to another—the era of insularity to the bystander era). It is crucial to realize that all modern process systems have this feature. These systems were born, and matured, in periods when concern for secondary litigation was minimal. The genetic code of modern student discipline systems bears the imprint of the Civil Rights era and the bystander era. From an outside perspective, it seems odd that higher education would chose to pursue discipline systems with little overt regard for secondary effects: but when viewed within the context of the evolution of American higher education law, this odd evolutionary development makes a great deal of sense.

As primary litigation avoidance became a major goal of legal compliance, the push for legally defensible but administrable codes increased. Primary litigation avoidance became a high priority: systems of college discipline were often drafted by lawyers or the legally trained so as to avoid legal pitfalls. Model code drafters like Pavela and Stoner are both lawyers, for example. Moreover, campuses typically looked to their legal counsel for assistance in drafting and implementing the new legal compliance systems. Legal compliance turned into litigation avoidance, and higher education turned to lawyers.⁸⁵ To reduce compliance error and achieve efficiency, the field of student discipline could not, and did not use fulltime lawyers (typically) to actually administer systems of discipline. Instead higher education turned to professionalized non-lawyers, who became *legalists*. Higher education would have populated many discipline systems almost exclusively with the legally trained, had using lawyers been cost effective. Many of the

⁸⁴ Perhaps the notable exception was the *Tarasoff* case. *Tarasoff v. Regents of Cal.*, 551 P.2d 334 (Cal. 1976). In *Tarasoff*, a physiotherapist was held to have a duty to protect third parties from a patient's dangerous intentions. *Id.* at 347–48. Thus in a sense, a therapist's failure to properly process a dangerous person could result in liability. However, it is notable that the *Tarasoff* case did not impose similar liabilities on administrators. As a result, the psychotherapeutic community began to bear heavier responsibility for protecting the academic environment from dangerous persons; similar responsibility upon administrators did not evolve quickly.

⁸⁵ As Kaplin and Lee state, “[r]egulations need not be drafted by a lawyer . . . but it would be usually wise to have a lawyer play a general advisory role in the process.” See KAPLIN & LEE, *supra* note 23, at 923. When legal compliance and litigation avoidance in a primary sense are dominant motivations of a discipline system, lawyers need more hands-on operational control.

job constraints, *inter alia*, however, have made this career path attractive to only some lawyers. As a result, some systems of modern student discipline use legally trained individuals to administer them, but most systems depend heavily on the non-legally trained.

To the extent that we measure the success of modern discipline systems in terms of primary litigation avoidance these systems were, and are, for the most part a tremendous success. Colleges continue to win the vast majority of reported decisions relating to student discipline process. Kaplin and Lee make the following observation:

Overall, two trends are emerging from the reported decisions in the wake of *Horowitz*. First, litigation challenging academic dismissals has usually been decided in favor of the institutions. Second, courts have read *Horowitz* as a case whose message has meaning well beyond the context of constitutional due process and academic dismissal. Thus, *Horowitz* also supports the broader concept of “academic deference,” or judicial deference to the full range of an academic institution’s academic decisions. Both trends help insulate postsecondary institutions from judicial intrusion into their academic evaluations of students by members of the academic community. But just as surely, these trends emphasize the institution’s own responsibilities to deal fairly with students and others and to provide appropriate internal means of accountability regarding institutional academic decision making.⁸⁶

There are, however, examples in recent reported cases in which colleges have lost, or nearly lost, procedural claims—and failed to achieve primary litigation avoidance and litigation nonagreement.⁸⁷

For example, in *Schaer v. Brandeis University*,⁸⁸ the Massachusetts Supreme Judicial Court handed out a four-three decision in favor of a private university in a matter raising questions of procedural fairness and contract. Even the majority questioned the

⁸⁶ *Id.* at 987–88.

⁸⁷ See, e.g., *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926 (Tex. 1996).

⁸⁸ 735 N.E.2d 373 (Mass. 2000).

wisdom of some of the institutional practices.⁸⁹ Such cases have seemed, until very recently, the exception not the rule and may signal developing counter-trends favoring students in process litigation. Courts traditionally held universities *accountable*, but offered a range of compliance solutions that would give colleges legal protection.

In a new era of protection, colleges could now substitute defensibility for insularity. Many of the revolutionary cases of the Civil Rights era did not create substantial litigation risk for colleges. The first major wave of litigation that was difficult or expensive to *defend* would be the *safety* cases that started in the 1980s. From our current perspective, it seems as though colleges have always been sued. To the contrary: the college litigation “explosion” has roots in the Civil Rights era, but a rise in litigation did not hit hard until the 1990s, and *successful* litigation has trailed behind, largely in the late 1990s and early 2000s.

To understand how insularity mutated into defensibility, it helps to digress a bit. Legal insularity, and power and prerogative, were deeply connected to the law of immunities. *Rights and Responsibilities* spoke extensively of legal immunities.⁹⁰ The fall of several classic legal immunities coincided with the fall of legal insularity for colleges.⁹¹ The law of immunities has been undergoing radical reformation since its appearance in early English law and then, later, in American common law. Traditional immunities that protected colleges, including familial, governmental, and charitable immunities have deep roots.⁹²

These historical immunities can be thought of as *complete* and *perfect*—complete, perfect insularity. Immunities such as familial, governmental, and charitable were *perfect* in the sense that *status*—e.g., a father, a king, a church, or a charity—settled the issue: if a father beat a child the *father* had family *status* and was immune. These immunities were also *complete*⁹³ in the sense that they immediately ended litigation once status was conclusively established.

The fall of traditional immunities in modern tort law can be best described as a revolution against perfect and complete immunities, not the concept of immunity itself. In the twentieth century most

⁸⁹ *Id.* at 480–81.

⁹⁰ ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* 17–33 (1999).

⁹¹ *Id.*

⁹² *Id.*

⁹³ There are immunities today that are incomplete in the sense that the assertion of an immunity does not end a matter, but merely changes a burden of proof, etc. See, e.g., *Monell v. Dep’t of Social Servs.*, No. 71 Civ. 3324, 1980 WL 321 (S.D.N.Y. Oct. 27, 1980).

governmental entities waived their sovereign immunity, making many governmental immunities no longer perfect. Governments often retained immunity for such things as discretionary functions including policy-making,⁹⁴ but waived immunity with respect to other actions. Status alone no longer settled the issue. Today it is hard to find any status-based immunity that creates complete protection from law—although several modern immunity doctrines create significant partial immunity. Sir Henry Maine's prediction of the fall of status as determinative of legal rights is entirely true when viewed through the lens of the law of immunities.⁹⁵ Status-based immunity has given way to other ways to determine if an entity should achieve some form of legal protection. Today most actors are far more likely to achieve immunity-based legal protection under the law by keeping their promises and acting with respect to certain pre-ordained guidelines.

The fall of status as a primary determinate of legal responsibility meant that *perfect* immunities would be disfavored. Indeed, by the late twentieth century, there were only minor pockets of perfect immunity in a place where perfect immunities once were widely granted. Governments, for example, have *perfect* immunities in certain spheres of activity, such as a judge acting in a judicial capacity. Today, such pockets of perfect immunity are typically more activity than status-based and have thus begun to lose the feel of traditional perfect immunities. In place of *perfect* immunity, the law has begun to develop a preference for two new types of immunity—*perfectible* and *imperfect* immunities. Bear with the jargon for a minute; it is important here.

A perfectible immunity—common in statutes waiving sovereign immunity such as the Federal Tort Claims Act (FTCA)⁹⁶—is one that *can be made perfect* by asserting a defense, usually involving some status-based criteria *and* by taking certain compliance steps. Governments, for example, typically retain a wide mount of perfectible immunity for decisions made with discretion regarding competing policy choices – in the FTCA, this is known as the discretionary function immunity.⁹⁷ If a government entity goes through certain deliberate policy-making steps, it *perfects* its immunity, and wins cases challenging the exercise of such discretion. Think status *plus* activity. The government wins not just because it is the government, but because it is the government doing a certain activity. For ministerial functions—the

⁹⁴ See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1291 (1982).

⁹⁵ See HENRY SUMNER MAINE, ANCIENT LAW (1986).

⁹⁶ 28 U.S.C. § 1291.

⁹⁷ *Id.*

administering of policy already adopted—a government entity may perfect immunity by following its own rules, for instance.

Now, higher education once had perfect, complete immunity. Recognize that the discretionary function/ministerial function distinction is mirrored in higher education law today almost exactly even if the doctrinal language differs. *Horowitz*, for instance, describes academic decisions in a way that courts would characterize as a discretionary act if performed by a governmental entity. Creating academic policy—the exercise of academic discretion—is a perfectible event in higher education law. On the other hand, when an issue involves applying fact to rule (mechanically, shall we say, ministerially) or involves a college following its own rules, a university can perfect its immunity if the college can place some procedural device to correct for error or follows its own rules substantially. There is little mystery in the fact that *Horowitz* and *Ewing* were applying modern concepts of immunity to what was once an independent and sovereign domain. The only difference—the educational context. Just like a government an educational entity can perfect an immunity and make it complete with certain forms of activity. Status plus activity.

The case law of the Civil Rights era arose as immunity law was changing. Changes in higher educational law in the 1960s and 1970s reflect the fall of traditional immunities and the transition to new paradigms in higher education law. As these immunities fell, for colleges and other entities, the law sought to achieve a kind of parity or similarity in the transition of immunities in a higher education context. Much of the misreading and misunderstanding of key United States Supreme Court decisions of this period result from the failure to appreciate this. The landscape of legal immunities was changing. What happened in higher education was, and is, similar to what has happened to other, previously perfectly and completely immune entities. Governments retained the largest share of immunities following a fall of traditional immunities in the late twentieth century: the parallel in higher education law is unmistakable when laid out side by side. The United States Supreme Court told higher education to employ academic judgment—not a pretense of it—and use some system to correct for obvious factual error. The message to government was almost precisely the same: engage in discretionary policy making—not the pretense of it—and governmental entity will be immune. However in deploying policy, governmental entities must be careful to follow the rules they have laid down, such actions are not “discretionary.” Higher education could perfect immunity, and make it complete—just like a government.

Since we are on this topic it helps to consider the following. This level of perfectible immunity contrasts with imperfect immunity—what we might call the immunities of the masses, or non-statused, not the elite. Imperfect immunities are based entirely on non-status based considerations. Such a concept—imperfect immunity—would have been unintelligible to lawyers and judges of the nineteenth century and before. The law of that era understood only perfect and complete immunities—and made exceptions with great and limited care (for example, the power of a parent to discipline was complete and perfect but if delegated could be subject to the outer limits of state regulation). The notion of a *perfectible* immunity—a modern legal concept—would have been viewed by lawyers of another era as no immunity at all, as well.

A modern lawyer would be tempted to view what I refer to as imperfect immunity in the pre-modern period as “no duty” rather than immunity. The law prior to the twentieth century focused on sets of legal obligations created in special and limited circumstances, and/or obligations created by promises. The term “duty” itself would have been foreign to many lawyers prior to the twentieth century, although the concept of legal obligation arising from special circumstances or promises would not have been. “Duty” is a twentieth century concept used to organize a system of laws that imposed obligations only under special circumstances. But insofar as the pre-twentieth century legal system knew of “duty,” it did comprehend that individuals would have to conform their behavior to certain standards.

Duty always brings with it a standard of care. (Some courts and communicators use the term duty to refer to standard of care, and it is easy to see why.) For reasons almost entirely historical, American legal theory evolved field theories of such special obligations very slowly. Overtime, one field theory came to be known as the law of “duty.” With duty came standards to conform to that duty. A standard can set a legal compliance expectation. Standards—like the now common “reasonable person” standard—can have a level of generality that does not specify or anticipate an exact or particular compliance step or steps. In other words, one can attempt to comply with some standards in good faith, and yet fail to do so. This is what makes an imperfect immunity—*imperfect*. An imperfect immunity provides a level of protection for actions pursuant to the immunity (or under an obligation, or standard, or *duty*). But there is no way to know if one is in compliance (or immune) until all is said and done. A legal system determining the existence of legal obligation (or imperfect immunity) reserves the right to second-

guess compliance steps taken and impose responsibility. At best, compliance steps create a form of presumption of compliance with a standard, which a party must suffer to prove. For example, in tort litigation a plaintiff or injured party must typically prove—with a certain burden of proof—that an actor, the defendant, did not, execute a proper compliance maneuver, e.g., to behave reasonably. From an institution of higher education's point of view, there are no *a priori* compliance steps that can protect an institution of higher education from litigation and give certain assurance of ultimate victory in litigation. Institutions of higher education are immune in a sense if, after litigation, their conduct is determined to be reasonable. Notice that this type of immunity has nothing to do with status—it is based on conduct.

So far I have used the terms no-duty, standard of care, and immunity in somewhat interchangeable ways. In the twentieth century jurors like Judge Benjamin Cardozo recognized the power of duty (a term created to give general concept for diverse legal obligations otherwise not grouped under a general heading) lay in its negative effects—meaning no-duty rules. In a famous case against a railroad sounding in negligence—Judge Cardozo ruled that the railroad owed no duty to an injured person—with the effect that litigation of many types against the railroad would stop or be seriously curtailed.⁹⁸ Duty was born to be a partner to the law of immunities, and to be another way of speaking about immunity.

The existence of duty has always been based on a balance of a complex variety of factors and determinations of policy or principle.⁹⁹ There are typically no simple compliance steps or status-based assertions, which guarantee there will be a no-duty ruling in favor of a defendant. There are steps, however, which tip the possibility of duty *vel non* one way or the other. No-duty rulings function like imperfect immunities, and the modern law or tort has created a similarity between no duty rulings and immunities.¹⁰⁰

⁹⁸ *Palsgraf v. Long Island R.R., Co.*, 162 N.E.2d 99 (N.Y. 1928).

⁹⁹ Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503 (1997).

¹⁰⁰ One example of imperfect immunity meeting duty and be seen by comparing the microscopically distinguishable cases of *Booker v. Leigh University*, 800 F. Supp. 234 (E.D. Pa. 1992), and *Knoll v. University of Nebraska*, 601 N.W.2d 757 (Neb. 1999). In *Booker*, a student became intoxicated and fell; in *Knoll*, likewise, a student became intoxicated and fell. Nonetheless, the Eastern District of Pennsylvania reached a contrary conclusion to the conclusion reached in the *Knoll* case. *Booker* determined that no duty was owed to prevent the students fall, but the *Knoll* case said such a duty was owed. Tort theorists can engage in doctrinal microscopy to understand why subtle

What is particularly striking about the evolution of higher education process law in the Civil Rights era and beyond has been the *perfectible*—not imperfect—character of student discipline legal requirements. This contrasts with safety law—in which higher education increasingly faces imperfect immunity protection.¹⁰¹

In the era of power and prerogative, no court recognized a specific higher education immunity as such, that comprehensively protected higher education from litigation of many types. Following the Civil Rights era—an era in which the concept of immunity itself has eroded and become less favored – courts similarly have not created overt and comprehensive immunities based on the status of higher education as such. Higher education’s invulnerability in the period prior to the Civil Rights era gave way to new forms of potential legal vulnerability after the Civil Rights era. The law recreated legal protectivism for higher education process, in a new form of perfectible immunities. This is most apparent in student process cases. Higher education was given compliance strategies in student discipline matters that would enable them to achieve perfectible immunity. However, in safety cases, courts now provide higher education much less protection in the form of imperfect immunities. Institutions of higher education must act reasonably and sometimes await a costly litigation process for confirmation that what they did was legally reasonable.

Several forces have contributed to undermine the perfectibility under law of the process universities can offer. As higher education has overly identified with legalisms and adopted court-like process, perfecting immunities is harder. There is more room for error and oversight; all of which is easily detected by courts of law. Moreover, higher education has drifted from its *unique* mission and becomes more like a business (and/or a court system). The very *uniqueness* that underlay the grant of perfectible immunities for higher education *institutions* and its process is dissolving.

The law of the Civil Rights era completely recast the uniqueness of higher education in modern terms and concepts. Higher education

differences in the facts of the cases might lead to vastly different results and conclusions. But two things are prominent in imperfect immunity and no duty rulings frequently: even the best trained lawyers and theorists might not be able to predict with certainty or even a high level of accuracy outcomes in particular cases even knowing all the rules, *and* variations and facts out of the control of institutions often tip the balance of cases in one direction or another.

¹⁰¹ This also explains the otherwise weird way some courts in the bystander era torqued tort law.

came through the Civil Rights process relatively empowered, if in new ways. At root, the law required legal compliance to assure that higher education lived up to its own ideals. This was to protect higher education, not interfere with it. The ghost of the visitor resides here, not in meaningless vestigial uses of the term. Visitorial power, it seems is an indispensable feature of American higher education. Although the visitor may have fallen into desuetude, the visitorial power reforms itself in new ways.

E. Limits of Legalistic Process

Higher education's decision to embrace legalisms is a *choice*. When viewed from the lens of primary litigation avoidance, the turn to legalisms was a powerful and largely successful choice, at least in the first two decades or so following the inception of the Civil Rights era. Legalistic approaches also appear good at secondary litigation avoidance. The latter however is a false positive. The lack of secondary litigation following the Civil Rights era is attributable to the slow evolution of legal rules of college safety. Process systems are not responsible for blocking safety lawsuits.

In the immediate aftermath of the Civil Rights era, higher education entered a second, and last, golden age of protection from large-scale intrusion of law into its affairs. Discipline systems could be easily designed to avoid primary litigation; college safety law had not matured. Times were different to be sure; higher education lost categorical protection based on status, and now had to *do* something to gain legal protection—create process systems policing core activities and otherwise actively disengage from much of student life (at least in the bystander era). Legalisms have often been viewed as a source and cause of a college renaissance. Legalistic approaches to student discipline appeared to be good choices for higher education.

The choice of legalisms and legalistic systems, however is not manifest destiny. There are other alternatives to manage higher educational environments. In recent times, it has become clearer that the choice of legalisms has inherent, and perhaps even unsalvageable, flaws. Higher education has been plagued with following persistent problems:

- Primary litigation avoidance is weakening. Primary litigation against process systems has increased, both in nature and intensity. Institutions in higher education are losing or nearly losing more cases; there is an organized and

vehement counter-cultural movement opposed to modern systems of legalistic discipline.¹⁰²

- Secondary litigation is increasing. Suits involving student safety litigation have increased, and the institutions of higher education are losing cases that never formed a basis for college liability at any time in the past. Some of these cases are the result of failure of process systems directly—for example in the *Tarasoff*¹⁰³ case, an inadequately “processed” individual caused harm to another and in turn created liability risks for the institution; or in *Nero v. Kansas State University*,¹⁰⁴ the failure to properly process an alleged offender resulted in a secondary lawsuit after that offender attacked again.¹⁰⁵ Appellate case law, however, rarely addresses connections between process opportunities lost and tort duty or liability. It is usually up to lawyers reading such cases to make these connections and realize that systemic failures can lead to tort lawsuits. In the bystander period, no one would have made such connections: a potential for tort liability would have motivated a campus to reduce systemic interventions that might trigger “assumed duties” (that otherwise did not

¹⁰² In *The Shadow University*, Kors and Silverglate offer definite arguments against the culture of modern discipline and higher education. A major theme of the book is that colleges engage in secret or non-obvious process against students—much like Dean Wormer—with more-legal finesse. The book vastly overstates malfeasance in higher education but underscores the ways in which the legalistic systems can create oppositional cultures among students and others. The authors typically figure significantly in litigation against college. The themes of their books were likely far more true in the era of power and prerogative. Nonetheless the book underscores several key points. First adversarial systems create adversaries, both individual and organized. Second legalistic systems used today connect with consumer attitudes. The main theme of *The Shadow University* is just that—there rights of a consumer student. Third there is some things subjective even unspoken in our process systems that persist. Video did not kill the radio star: the best designed legalistic systems never fully erased educational instincts of many process system administrators. Those in the field of education discipline often talk of educational or teachable moments. Interestingly, this experience is not reflected (or even guided by often) in the actual codes or handbooks that such administrators use. There is something ineffable in legalistic systems of student discipline and in this sense Kors and Silverglate are right in calling attention to this phenomenon, even if they assume wrongly, that it is always evil and the fairest.

¹⁰³ 551 P.2d 334 (Cal. 1976). For a discussion of the *Tarasoff* case, see *supra*.

¹⁰⁴ 861 P.2d 768 (Kan. 1993).

¹⁰⁵ *Id.* at 771.

exist). *Autonomous* process systems work best in a bystander mode, but as the bystander era has ended, the flaws in these systems are more evident.

- Student avoidance behavior is common. Modern students, particularly Millennials, have become adroit at maneuvering around rules and finding ways of coming into technical compliance with rules without regard to the spirit in which those rules were created.¹⁰⁶ Students have become better at not getting caught. Strangely as legalistic discipline systems have perfected themselves, the respect for rules has reached what might be an all time low.
- Legalistic discipline systems do provide adequate interventions for the current student wellness crisis. Self-harming, or endangering behavior challenges paradigms of student misconduct management under rules. Discipline codes are directed primarily at students who act—as opposed to neglect—and to students who cause wrongs to others or their community. Rule systems can seem inept at combating new problems of self harming, lack of engagement, and lack of self-care and respect. Today we realize that rule systems may be inappropriate to manage a culture of students who are inactive, disengaged, unwell, depressed, suicidal, etc. For example, a rule against suicide will not likely—in itself—impact whether a suicide occurs.¹⁰⁷
- The Ghost in the Machine: Despite a plentitude of published rules, highly legalistic systems in higher education must confront the fact that they have a certain lack of transparency. Greater *rule* transparency has been a hallmark of the age of legalisms. But, the *way* a system is administered, and the *philosophy* of its administration, are as critical as the rules themselves to students. The solution most colleges use to address transparency problems has

¹⁰⁶ For example, students will often squirm around the issue of how many individuals are present at the “party” in a party management plan at a college, with little regard to the reason why particular numbers of students were identified in the place as a point of concern.

¹⁰⁷ See STUDENT MENTAL HEALTH AND THE LAW: A RESOURCE FOR INSTITUTIONS OF HIGHER EDUCATION (Jed Foundation Dec. 2008).

been to generate more rules, more procedures, and so on. But, the practice of student discipline is not, and never could be, fully articulated by stated rules, policies, procedures, organizational statements or training and instructional materials. We must see *how* a system actually operates to understand it, and identify non-objective criteria that animate the system—judgment, mercy, etc. Legalists have trouble explaining the ghost in the machine.

- Legalist discipline systems are over- and under-inclusive. There is the good student who is caught up in a college discipline system and expelled or seriously disciplined—for example, under mechanistic three strike policies. The system judges that student “bad,” yet a truly dangerous student goes unpunished. Students simultaneously tell us that they want stricter enforcement but also complain about punishments being too harsh. This apparent inconsistency is merely a reflection of the fact that discipline systems routinely punish some students for doing common things, and allow dangerous artful dodgers to go unpunished.

As the millennium incepts, we can see more clearly that education and legalist discipline are not well matched in higher *learning*. College students are often least available for an educational opportunity when they are punished. Some students may learn best in oppositional situations; many others will not be able to learn in such moments. Legalistic systems take on the role of impersonal adversaries and students perceive that the appropriate response is avoidance or oppositionalism.

The failure of legalistic discipline systems as educational tools is particularly noticeable for Millennial students. Millennials were not raised and educated primarily in “rule” environments but in mentoring/self-esteem building environments. Millennials typically were not punished first, but bribed to do good things; trophies, not sanctions, were common. Indeed, Millennials even seem to struggle with the concept of rules as such. Millennial development stressed individual achievement and support—not confirming one’s behavior to objective external standards. Millennial students search for mentoring, guidance and facilitation. When Millennials interact with

systems that work primarily through rules, legalisms, oppositionalism, and procedure, these systems are very foreign to them. Baby Boomers, when they were college students, would of have thrived in such systems (or at least they believe so). But modern college students can experience systems based on “fairness” and legalisms as impersonal, judging and ineffective. For many students, the shock of environmental transition from K-12 into higher education is too great.

Sensing these issues, courts are currently torn between two completely different approaches to the intersection of process law and higher education.

On one hand, some courts seem to believe that since higher education has embraced legalisms, it must therefore see this endeavor through. These courts seem to toss direct guidance from *Horowitz* and *Ewing* aside. But on deeper examination they may actually be following a key message from *Horowitz* and *Ewing*—respect the instincts of academics. In this vein, some courts have had no qualms telling higher education that if higher education is to adopt legalistic systems of discipline then such systems should be better approximations of the systems that they mimic.

On the other hand, some courts, like *Schaer*, have seen that something important is lost in the quest for legalisms. *Schaer* is reminiscent of both *Horowitz* and *Ewing* in the sense that it recognizes that legalisms may not be consistent with the core academic mission. Higher education institutions likely can expect to continue to receive some level of protection from the courts. However, courts invariably will continue to recognize the tension in a quest for legalisms. As such, higher education institutions can expect vastly inconsistent judicial rulings in which some courts criticize higher education for not providing *enough* legalistic process, and others criticize higher education for adopting too much legalistic process. The law is confused by the choice (or non-choice) to adopt legalistic systems of discipline.

As higher education spirals down the path of legalisms, it faces the prospect of managing expensive, cumbersome, and ever more litigated systems of discipline—systems that have not proven themselves effective in the quest to create well-ordered higher education environments. Even to the extent that modern discipline systems maintain an ability to deflect successful primary litigation regarding student discipline process itself, institutions of higher education will face the prospect of growing litigation regarding secondary harms. On the

horizon are ever more complex litigations involving educational malpractice, and negligence in a variety of forms including lawsuits regarding prevention of violence and sexual assault, *inter alia*. There is another challenge as well.

The failures of a discipline system to adequately manage an educational environment ultimately puts pressure on others in the higher education community to do what they can and what is reasonable—even if they are not well situated to do so. A prime example came in *Garafalo v. Lambda Chi Alpha Fraternity*¹⁰⁸ in Iowa. In *Garafalo*, a student died from self-inflicted alcohol poisoning.¹⁰⁹ The student was a heavy drinker, and yet neither the university nor his Greek organization had intervened in any way to either eliminate the student from the community, or to provide adequate protection from self-harm. When the student became severely intoxicated one night, fellow fraternity members attempted to do what they undoubtedly thought was reasonable to protect the individual from harm. The failure of a system became a burden on individuals. Ultimately, some of the students who tried to help were told they could be potentially responsible in negligence law for their failure to use reasonable care to protect a fellow student who had died.¹¹⁰ (Intervention of this sort in residence facilities regarding students who are severely intoxicated is a weekly, even daily, occurrence on virtually every campus in America; failure to deal with these issues adequately leaves the burden upon fellow students and resident staff and others to take reasonable steps.) When deciding negligence cases courts do not typically make the link between the failure of systemic intervention and individual decisions made at the point of injury. In other words, tort litigation is somewhat myopic and points the finger at the person holding the hot potato, not the person who baked the potato or installed the oven. Failures of a discipline system are hard to link with particular injury in tort litigation because of the way that lawyers conceive of “causation” in tort law. From a public health and wellness perspective failures of a discipline system—or a system that relies too heavily on discipline—can clearly cause injuries that lead to tort suits. It is a fatal non-sequitor to draw the inference that lack of tort causation means there is no causal relationship between a systemic failure and an injury that leads to tort duty or liability. The failure to adequately manage an educational environment leads, in due course, to

¹⁰⁸ 616 N.W.2d 647 (Iowa 2000).

¹⁰⁹ *Id.* at 650–51.

¹¹⁰ *Id.* at 656.

negligence claims. When a system is failing, the responsibility to make reasonable decisions often falls upon the least trained and able, under most extreme circumstances. Ultimately, institutions of higher education pay a heavy price in litigation and otherwise, for the failure to provide the type of process that can realistically and reasonably manage the educational environment.

Higher education is only able to unlink discipline process from secondary harm by relying on legal doctrinal arguments that are dissociative. In a systemic sense—and from an *environmental perspective*—it is clear that systems of educational environmental management can and do impact ultimate outcomes, even if causal connections to specific incidents are difficult to draw. There is no way to say that better systems would have saved the life in *Garafalo*. However, at some point *Garafalo*-like situations some students will be saved. It is possible to design systems of education environmental management that, to a very large measure, create situations where such difficult decision-making by the least well-situated decision-makers never even needs to occur in the first place.

A *litigation management* strategy relying on the dissociative nature of process and negligence litigation gives higher education lawyers ample ways to defend legal cases by pointing the finger at individual students, Greek organizations, athletic groups, community businesses, etc. Since the Civil Rights era, higher education has routinely relied on such arguments to deflect secondary litigation. We blame the fraternity brothers in *Garafalo*; the student who became voluntarily intoxicated in *Booker v Lehigh University*,¹¹¹ the attacker (not successfully) in *Stanton*.¹¹² The quest to embrace legalisms, in systems of *discipline* has led higher education down a path to attempt to deflect responsibility for secondary harms. From a distance, one can marvel at the fact that higher education has so elegantly protected the procedural rights of students and at the same time consciously and deliberately attempted to defer responsibility for the very secondary harms that such systems cause and engender.

Such an approach, on a systemic level, is inconsistent with the facilitator university. A facilitator university seeks to create conditions under which students can make responsible choices for themselves and under which responsible choices and safe choices are likely to occur. The first goal of any system of discipline or system of educational environmental management should be to promote a university-student

¹¹¹ 800 F. Supp. 234 (E.D. Pa. 1992).

¹¹² *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045 (Me. 2001).

relationship based upon principles of mutual responsibility and respect. Modern systems elevate discipline over education, safety, and facilitation. A facilitator university resists deploying a concept such as *discipline* at all. To the extent that discipline should exist, its only purpose would be to support the goals of the facilitator institution, not as an end in itself. “Discipline” is an anachronism—a vestigial concept imbedded with hierarchical connotations. Discipline itself is not a facilitative system, or an educational environmental management approach.

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5

Beyond Discipline

An era of legalisms has reached its limits. The law has helped to create higher levels of fairness, visibility, and accuracy in student affairs. Many forms of bias and prejudice have been beaten back substantially. At no point in American higher education history has a student been more likely to be able to correct manifest errors that cause that student harm. However, the weaknesses of overly legalistic student process—and the over emphasis on objectivity, rules, procedures, and sanctions to manage a student’s experience—are increasingly manifest. The era of legalisms has often focused more on fairness and litigation avoidance than creating an educationally sound and safe environment that is student-centered. It is time to consider new forms of managing the higher educational environment. Chapter 5 sketches such a new vision for managing students and our higher educational environments.

New ways to manage the academic environment should not be a veiled return to a bygone era of bureaucratic power and prerogative. This is not *in loco parentis* in any way, shape, or form. Moreover, moving beyond discipline should not be anti-law. The law has many valuable tools for use in higher education. Some legalisms are necessary, good, and helpful especially when deployed in the proper ways. Modern universities, however, must recognize that solutions to educational environmental issues are not always generated first, completely, or best, by law or legalistic approaches. At times, the best approach to a situation of conflict (or opportunity) involving a student is not rule-based; but sometimes it is. And sometimes a combination of both rule-based and non rule-based approaches works best.

Managing an educational environment according to precepts of a facilitator university involves an attempt to transcend systems based solely on power and prerogative and ones based heavily on rules, procedures, and sanctions—e.g., legalisms. A facilitator university seeks a collaborative, student-centered, student-empowered approach. To effectively manage the environment in which our students live and learn, we need rules and legalisms, but we need other tools and

approaches too. The key for the modern university is to strike the right balance in approaches to managing an educational environment.

Overemphasis on legalisms has produced discipline systems that are highly autonomous and disconnected from the prime goals of students and higher education. Legalistic discipline systems operate with a high degree of independence from many other college operations and tend to have operational goals (such as the number of cases adjudicated) that are independent of major goals that an institution has set forth in its strategic plan, etc. Conversely, strategic planning and the like rarely set specific operational goals for student discipline systems. The era of legalisms developed a preference for a high degree of autonomy for discipline systems, and a preference for *discipline* systems as opposed to other systems of educational environmental management. As a result, student discipline systems are not usually, if ever, asked to identify and achieve significant heteronomous goals—namely, goals relating to other major and minor goals of an institution of higher education.

The true value of any student process is to help to create a reasonably safe and academically sound learning environment. This is a first precept of any system designed to manage an educational environment whether this system is disciplinary, or not. Processes deployed should aim to facilitate wiser and safer choices by students and/or choices that support learning and academic development. In short, good educational processes are *environmental* in focus.¹ Student process is justified not as an end in itself; fairness in process is a goal *if*, and only if, it supports a safe and sound academic learning environment. Danger and learning, for instance, are not fair at all. Future victims are not selected by rules or tribunals. Learning often happens at its own pace, only when a student is available to learn. Learning does not occur at an equal pace for all at all times. Indeed, in most instances in higher education, a learner is the one most in control of the pace of learning outcomes. Learning is often anything but fair. Higher education certainly requires fairness for *certain* goals—but higher learning is not likely to succeed in an environment that over emphasizes fairness in process at the expense of other super-ordinant goals. Higher learning cannot occur in environments that are indifferent to differences in learners and their learning curves, and to safety and wellness issues,

¹ WILLIAM DEJONG ET AL., ENVIRONMENTAL MANAGEMENT: A COMPREHENSIVE STRATEGY FOR REDUCING ALCOHOL AND OTHER DRUG USE ON COLLEGE CAMPUSES 6 (1998).

inter alia. We certainly need fairness in process. But an obsession with legalistic fairness can conflict with major educational and safety goals. When we achieve background levels of fairness, *more* fairness often comes at the expense of other important goals. Moreover, a *legalistic* vision of fairness, in particular, misses the mark for modern students, Millennials in particular.

The notion of environmentally and educationally sound process is still abstract at this point. In Section A of this Chapter, I develop some key conceptual features of this new vision to manage the educational environment in which students live and learn. Next I consider ways in which a new vision of process affects specific areas of concern for modern institutions of higher education such as alcohol and drug policies, residence life, Greek affairs, off-campus regulation, sexual misconduct, academic dishonesty, cheating and plagiarism, classroom misbehavior, misuse of technology, self-regarding harmful behavior, such as suicide, *inter alia*. New forms of process to manage the educational environment are highly contextual. In Section B of this Chapter, I explain how new forms of managing an educational environment function in the context of such specific topical areas. Section A deals with the more abstract and conceptual features of an educational environmental process, and Section B makes these concepts more concrete so to show ways in which educational environmental management might be operationalized.

Sections A and B of this Chapter contemplate what institutions may wish to operationalize features of this new vision for process by adopting specific policies and procedures. The Book is compatible with this, and envisions such changes should occur. However, this Book deliberately offers no model code. The Book offers a heuristic template, not a model. Model codes have been fashionable in the era of legalisms but there are several reasons that institutions of higher education should reject the use of model codes. Institutions of higher education will do better, in most cases, by doing the work of creating systems themselves while working within a broader educational environmental management conceptual framework. Institutions will have codes—although they will look very differently from today's codes. There is no one specific blueprint for operationalizing a post-legalistic educational community. That is the essence of academic freedom.

Managing an educational environment is *itself* a process that cannot be captured by adopting legalistic code—especially a *model* code or by copying others. The modern educational environment is fluid and dynamic, and the process to manage that environment must be subject to

constant and continuous, intentional development. Codes can never be stronger than the process used to develop them.

In the concluding section of this Chapter, Section C, the Book explores the ways reconceptualizing student process will lead to better strategies for primary and secondary litigation avoidance. The best approach to legal compliance lies in moving away from, not towards, greater legalisms. The most legally sound way to approach student discipline is to design a system that is educationally and environmentally sound, first. Section C also considers way in which moving to a system of educational environmental management will achieve efficiencies and better litigation avoidance for higher education. Higher education is facing tough financial and resource challenges. The Book proposes process that will save time and resources in the future.

A. A Vision for Transforming the Process of Managing the Modern Higher Education Environment

I. The Need for Vision and Visioning—Towards an Educational Mission Through Process

Modern discipline codes are long on rules, procedures, and sanctions, but short on articulated and actualized vision. Most modern student codes usually feature some form of a preamble, which often sets out succinctly, yet in high abstraction, the purposes of a code. Consider for example, Stoner and Lowry's suggestion for a preamble to a model code:

Commentary. A preamble could precede Article I reflecting the institution's mission, the principles that its faculty, students, and administrators value, and the community's commitment to establishing a special living/learning environment—all of which are intended to be reflected in the Student Conduct Code. These statements may, and do, take many forms and are worth the effort required to create one that reflects the culture of the institution.²

² Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 18 (2004).

Such a preamble is not designed to be specifically and necessarily connected to a particular code section, rule, procedure, or sanction. Instead, we are to understand that the preamble's vision permeates the code; it is to be like an Agent in the movie, *The Matrix*—everywhere and nowhere at the same time.³

Stoner and Lowery also draw attention to an example of what a preamble might look like, and does look like at one school.⁴ They draw attention to the “Carolina Creed” as expressed at the University of South Carolina.⁵ The Creed they acknowledged reads as follows:

The community of scholars at the University of South Carolina is dedicated to personal and academic excellence. Choosing to join the community obligates each member to a code of civilized behavior. As a Carolinian . . . I will practice personal and academic integrity; I will respect the dignity of all persons; I will respect the rights and property of others; I will discourage bigotry, while striving to learn from differences in people, ideas, and opinions; I will demonstrate concern for others, their feelings, and their need for conditions which support their work and development. Allegiance to these ideals requires each Carolinian to refrain from and discourage behaviors which threaten the freedom and respect every individual deserves.⁶

Importantly, Stoner and Lowery recognize that the Creed is a general statement of values and is not a part of the student code, per se.⁷ This is a very common feature of most codes—whether general student discipline codes or residence life policies, for example. A general preamble, usually short by comparison to both statements of rules and

³ “The Matrix is everywhere. It is all around us. Even now in this very room. You can see it when you look out your window. Or when you turn on your television. You can feel it when you go to work. When you go to church. When you pay your taxes. It is the world that has been pulled over your eyes to blind you from the truth.” Morpheus, *THE MATRIX* (Groucho II Film Partnership/Warner Bros. Pictures 1999).

⁴ Stoner & Lowery, *supra* note 2, at 18 n.60.

⁵ See the University of South Carolina website, at www.sa.sc.edu/creed/, for the most recent creed statement.

⁶ Stoner & Lowery, *supra* note 2, at 18 n.60.

⁷ *Id.*

procedures in the body of codes, stands apart from the more specific rules and procedures to be followed. It is not common to find significant integration of statements of value, principle, and standard with statements of rule, policy, procedure or sanction. The preamble usually is not cross-referenced in any rule section.

Moreover, typical codes are often extremely limited in their development of vision of student development and fairness. Preambles are often just a paragraph or several in length and read as though they were written by the long dead in a time when people actually used words like “whomsoever.” Preambles implicitly assume that the code and its rules speak for themselves in manifesting fairness. Preambles, and the codes they dwell in, also suggest that little to no prefatory visioning process is needed. Modern codes imply that it is far more important to reach collaborate consensus on the rules and procedures of the code than to work towards an elaborated vision upon which the code is based.

One of the greatest risks model codes face is that they can tempt an institution of higher education into bypassing a crucial step—namely the continuing *process* of developing a system of educational environmental management. Indeed, the history of many codes shows that many came into existence quickly decades ago, and have had little truly significant re-visioning process since. Often, to revise a code takes trustee or administrative approval (yikes!), which means that there are statues on campus that move more quickly. When I have visited campuses, students, and administration often cannot specifically recall how and when codes came to be. One of my research assistants, Jason Fletcher, called around to try to discover when many codes had been adopted. He reported back to me that many administrators have no idea when their codes were first adopted, or why, or when, or even by whom. That is consistent with my experience as well. Codes are photographs by unknown photographers, not photography.

II. Beyond Dualism and Autonomy

Modern discipline codes—model and real—are also typically *dualist*. Codes are often built upon the belief that objective and subjective determinants of student behavior are fundamentally different in kind—subjective determinants being less preferable. Codes themselves are typically dualist in this way, and do not attempt to integrate objective and subjective criteria to manage an educational environment. Modern codes typically seal out subjective determinants, like value and principle, by creating rule, process, and sanction systems that can, and do, run without any explicit reference to such subjective determinants.

Higher education students experience this routinely. Rules can, and often are, applied with little to no reference to the specific goals, objectives, values, and principles that such rules presumably were intended to vindicate. Modern codes, then, express objective proceduralism. Students are taught that if a fair process determines that an objective rule violation has occurred, and a fair sanction is imposed, the sanction becomes fair, reasonable, obligatory, etc., *because* objective rules were applied in a fair process.⁸ This is how modern codes become highly *positivistic*.

Critically, important questions such as “why is my case significant to the goals and values of the institution?” or “why are disciplinary resources devoted here, rather than there?” are not primary in such a system when a particular student faces disciplinary charges. Students “charged” with an offense instead immediately begin to posture and engage in sanction-avoidance behavior. Many codes value “remorse” in determining the level of punishment a student deserves, and students will seek to be perceived as demonstrating remorse or to take responsibility for their actions. Modern codes tend to reinforce the very dualism that they promote. Dualist application of rules and rule avoidance take on dominant roles.

Disciplinary systems actually even tend to promote greater systemic dualism. It is no wonder why so few students have read and absorbed preamble language in disciplinary codes. Pragmatically speaking, the language is virtually meaningless to them in most circumstances. What students find valuable is knowledge about how to avoid getting caught and punished. These lessons generalize to classroom and even interpersonal behavior.

The great legal philosopher John Austin believed that all meaningful legal rules are a species of commands.⁹ A command is, essentially, an order to do, or not do, something backed by the threat of some sanction or evil.¹⁰ For Austin, therefore, a rule without a sanction is no rule at all. If one commanded is under no form of penalty, or has no idea of how to turn the command to a specific action or non-action, then for Austin there is no rule and crucially no law at all, except metaphorically.¹¹ Moreover, the concept of a value or principle not

⁸ Student discipline sets an explicit goal of pure procedural justice. See JOHN RAWLS, *A THEORY OF JUSTICE* 75 (2d ed. 1999).

⁹ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 10 (Wilfrid E. Rumble ed., 1995). Although Austin acknowledged that not all commands are rules.

¹⁰ *Id.* at 21.

¹¹ *Id.* at 23–24.

mediated by a rule backed by a sanction was incoherent to Austin, if one were speaking about “rules” or “law.” Modern college discipline codes are classically Austinian. Abstract or controversial determinants of student behavior such as values, standards, and principles, do not readily translate into “do this” or “do not do that” statements on their own; they need rules and/or application of judgment to provide more specific direction. Therefore, for a legalist, values, principles, and standards *need* rules to make a code, a code at all.

The modern student discipline code follows Austin, and places faith in sanctions to make rules, rules. A great deal of unmanageable behavior goes unchecked in the student population because of the inability to formulate a rule to govern that behavior, or the inability to find or enforce a sanction that could impact that behavior. Austinians accept this as a cost of doing “law” business. Higher education students, however, learn that every value we *really* have is one that translates into a *rule* that can be *enforced*. Dualistic and autonomous codes teach this lesson, one case at a time, even if other actions in the institution of higher education community attempt to send contrary messages.

A prime example, to which we will return, is the high-risk alcohol and drug problem on many modern college campuses. Colleges have promulgated elaborate policies and rules to address high-risk alcohol use among college populations. Many alcohol rules, however, have no known measured effect. Rules aim to create wellness and a safer community; but rules translate for students into avoidance behaviors and often the dangerous, unhealthy perception that compliance with rules is an end in itself. Consider the common reality that students hosting a party will sometimes believe that if they comply with the rules of party management, their party will be safer simply for that reason.

No one is measurably safe when everyone believes that rule-based systems themselves will create reasonably safe and well-ordered educational environments. While rule systems are an essential component of a well-ordered educational environment, a campus could be full of rules applied fairly and overrun with malaise. Millennial students, for example, often cannot see the values and objectives that campus rules were designed for and thus take ever more dangerous steps to avoid getting caught. There is great danger in highly autonomous legalistic systems of discipline when members of the educational community labor under the illusion that rule compliance is an end in itself, and that obedience to a rule should be weighed against the

probability of a sanction being applied.¹² Instead, rule systems in educational environmental management systems must be measured in light of their ultimate effect on the educational mission of an institution of higher education.

An institution of higher education's quest for autonomous legalistic student process is rooted in a deep faith in proceduralism and apparent connections that proceduralism has to liberal arts education. Dualism has been a direct product of this quest. The search for autonomy of process has led institutions of higher education to seek to disconnect student disciplinary process from other operations, and even, from major functions of the academic mission itself. Surprisingly, many institutions of higher education run complex discipline systems but have little idea whether these systems improve non-disciplinary outcomes, or make them worse. Discipline systems often validate themselves based

¹²Student discipline systems are best suited to aspire to being instances of perfect, not pure procedural justice. See RAWLS, *supra* note 8, at 74. There is no point in running a macro-educational exercise in fairness if no one learns anything else and/or is unsafe. Pure procedural justice is a lofty and admiral goal, perhaps for constitutions. See *id.* at 75. But not for institutions of higher education, in general. This is not to say that instances of pure procedural justice may arise in an educational environment; for educational purposes, we may wish to postulate forms of pure procedural self governance to facilitate educational goals.

The value of many student organizations may be just that. Greek letter organizations may be suited for broad powers of self-governance—or not—so as to allow students to experience governance as the product of fair process. But even in instances such as these where the educational experience goes awry, an institution of higher education can, and should, intervene. See, e.g., *Pi Lambda Phi Fraternity Inc. v. Univ. of Pittsburgh*, 229 F.3d 435 (3d Cir. 2000).

The same holds true for students in student run honor systems. In all but the rarest circumstances, such systems will, sooner or later, require institution of higher education intervention to keep them working properly and to avoid manifest contradiction to the academic mission and the safety of the institution of higher education environment. Thus, even when aspiring to pure procedural justice as an educationally sound goal, systems of process must answer, ultimately, to the greater good of the academic community.

Moreover, instances of pure procedural justice within the greater academic community can, at best, be only approximations of pure procedural justice. It is natural for Baby Boomers to revere pure procedural justice and pure proceduralism in liberal arts education, particularly in an age of legalisms. Pure procedural justice, however, is not the prime goal of an institution of higher education—although using pure proceduralisms may assist an institution of higher education in some of its goals. Justice, if there is such a thing in higher education, is best served by providing students reasonably safe and reliable conditions under which they may choose to maximize their own individual educational potential. Pure proceduralism sometimes serves this master, but other times it does not.

on the number of matters handled and resolved. Autonomous systems self validate in this way, but then encounter a paradox. If a discipline officer becomes incrementally more aggressive, the number of cases will likely go up, giving the illusion of “a problem.” Conversely, if a discipline officer manages caseloads routinely, there will be a presumption that, things are about the same, even if they are not. Modern discipline systems sometimes *seem* less valid when used and more valid when not used aggressively.

Excessive emphasis on procedural autonomy has bred dualism in several particular pernicious forms:

1. There is a strong division between objective and subjective criteria in student evaluation.
2. Academic/conduct distinctions drive educational and disciplinary policy.
3. Institutions of higher education tend to divide the academic and student life affairs functions.
4. Educationally motivated discipline (if such a thing truly exists) typically occurs in non-formal, non-pellucid ways.
5. The formal system of rules, sometimes bears no relationship to the reality of campus culture. For instance, campuses prohibit alcohol use by underage students but high-risk alcohol use is rampant in these institutions and remains intransigent.¹³
6. Students run underground vigilante systems of justice, parallel to formal codes of conduct. (For instance, a student rape is not always reported at all; later the perpetrator is beaten by other students in retribution for the offense. The matter shows up in the discipline system, if at all, as an altercation among a group.)
7. The exercise of discretion is fundamentally different from adjudication.

Any new form of process to manage the modern educational environment must seek to reduce, or eliminate, dualistic culture. Dualism is a direct result of conceiving of, and implementing student discipline systems based too heavily upon objectivity, autonomy, and legalistic proceduralism. There is no necessary reason that a discipline

¹³ See, e.g., NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. UNIV. (CASA), *WASTING THE BEST AND THE BRIGHTEST: SUBSTANCE ABUSE AT AMERICA'S COLLEGES AND UNIVERSITIES* (Mar. 2007), available at <http://www.casacolumbia.org/absolutenm/articlefiles/380-WastingtheBestandtheBrightest.pdf> (last visited Oct. 1, 2008).

system, or any system for managing an educational environment for that matter, should be wholly objective, autonomous, or highly legalistic. Managing the modern student educational environment should involve the use of some forms of visible, articulated subjectivity. Student discipline systems should serve the educational mission of an institution.

III. The End of Academic/Conduct Divisions

The modern university has come to recognize that the division between academic affairs and student affairs is artificial, unsafe, and unsound. The only true value to an institution of higher education to get involved in “conduct” matters is to promote the educational mission of that institution: and, it is impossible to conceive of a purely “academic” moment, since behavior, a learner’s life context and circumstances, and learning are inextricably intertwined. Any discipline officer who has captured cheaters can attest to this—most cheaters have many other serious issues. Often, cheating is the least of their problems.

There is no pure “conduct” or any pure “academic” matters, such as legalists have postulated. Legalists have missed the point of the core cases they rely upon—*Dixon*, *Horowitz*, and *Ewing*—in creating a false pantheism.

Institutions of higher education were too quick to accept interpretations of case law that suggest that there is a purely academic mission for an institution separate and above that of a student affairs mission. As we have seen, *Horowitz*¹⁴ and *Ewing*¹⁵ never intended to reify a distinction between academic and conduct concerns in an academic environment. *Dixon* did so for very specific reasons, not to rewrite higher education policy and to redesign college organizational charts. *Horowitz*, *Ewing*, and *Goss* made a basic *epistemological* distinction for the academic environment—and did not attempt to divide higher education ontologically in the way that has since occurred.¹⁶ The academic/conduct divide has been a *choice* of legalists, not a mandate.

¹⁴ Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978)

¹⁵ Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)

¹⁶ Moreover, bystander era tort case law—apparently reinforcing the message of *Horowitz* and *Ewing* to deemphasize student affairs over academic affairs—was actually never meant to define the relationships between students and institutions in the long run. Bystander era case law—and the assumptions upon which it was based—have not proven to be viable. ROBERT D. BICKEL & PETER F. LAKE, RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 104 (1999); WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 197 (4th ed. 2006); Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.U. & C.L. 621, 627 (2005).

IV. Reintroduction of Values, Standards, and Principles

A new vision of student process seeks to make that process reflect its actual operation—not simply its aspirations—and the real values and standards of an institution of higher education. This is no small task. Lack of candor in managing the educational environment has been a long-standing feature of American higher education since the time of the era of power and prerogative (see e.g., Dean Wormer and double secret probation¹⁷ and *Anthony v. Syracuse*¹⁸). The fear of being candid about how we manage our educational environments persists even in the modern era. There is the concern that candor in operations will lead to increased scrutiny, and even litigation risk. Ironically, institutions of higher education face more accountability than less because of lack of candor.

An institution of higher education should strive to articulate and communicate *actual* operating features of its systems for managing its educational environment, not just its formal functioning parts or an ideal

The modern institution of higher education can no longer continue in a business model which is indifferent to student behavior on and off campus, or outside the class room. As events at Virginia Tech in April 2007 illustrate, continuing college operation requires active intervention in student life, even if the law does not specifically require institutions to make change. For example, despite the fact that the university prevailed in the litigation resulting from the 1999 Texas A&M bonfire tragedy, see KAPLIN & LEE, *supra* note 16, at 354–56, Texas A&M suspended the annual bonfire. The University's proactive steps, including creating a commission to study the incident, were praised by the Department of Homeland Security's report on the bonfire. BONFIRE COLLAPSE TEXAS A&M UNIVERSITY 19 (U.S. Fire Admin./Technical Report Series, USFA-TR-133, Nov. 1999), available at <http://www.usfa.dhs.gov/downloads/pdf/publications/tr-133.pdf>.

The report to the President on Virginia Tech, for example, demonstrated that classroom activities can shed light on physical risk to students and others. The President's report stated,

[Participants interviewed for the Report] highlighted the importance of ensuring that parents, teachers and students understand and are sensitive to warning signs and know what to do if they encounter someone exhibiting these signs. Effective practices shared during our meetings included identifying responsible and appropriate individuals with whom to share concerns, and creating interdisciplinary teams to evaluate the information, assess the degree of threat, and intervene to preempt the threat. State practices vary from using toll-free call centers to "risk assessment" teams in schools to receive, evaluate, and act on threat information.

DEPT. OF JUSTICE ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY: JUNE 13, 2007, AT 12, available at <http://www.hhs.gov/vtreport.pdf>.

¹⁷ NATIONAL LAMPOON'S ANIMAL HOUSE (Universal Pictures 1978).

¹⁸ 224 A.D. 487 (N.Y. 1928).

vision of operations. Today, most institutions offer their rules and procedures candidly—like the rules of monopoly on the inside cover of the game box—but this does not give students, or others, a clear picture as to how the game is actually played. Any system of managing an educational environment must use more than just rules, processes, policies and procedures. There are determinants essential to the operation of any system used to manage an educational environment, such as discretion, balancing of competing objectives and values, forbearance, etc., that play a large role in the outcomes in an academic environment. Most, if not all, of these types of determinants are not openly expressed. In other words, one might read every rule, policy, procedure, and sanction in a student handbook and still have no real notion of how a college system works in actual operation.

Autonomy and legalistic proceduralism have created systems that are somewhat invisible. Legalistic proceduralism has driven us to be less visible in important academic questions particularly with respect to non-objective criteria. American higher education today offers heavy legalistic procedural protections, yet we still come under severe attack for secretive process in much the way that Dean Wormer did.¹⁹ Charges of secretiveness leveled against us are deeply unfair in many ways, but arise from the fact that colleges *could* be more candorous regarding their use of subjective criteria. In attempting to defeat arguments about being secretive in student process, American higher education often thinks the solution is to continue to offer more and more rules and procedural protections. But this misses the mark. We dive ever deeper into a world of objectivism, when the solution to problems of candor lies elsewhere.

Any articulated college discipline system always will be somewhat aspirational in operation, but colleges should always strive to close the gap, and be willing to accept when they have not met their goals. Model discipline codes aspire to be more like Star Trek²⁰ than Star Wars.²¹ In Star Trek, everyone wears a squeaky clean, just-pressed futuristic uniform, but in Star Wars there is plenty of rust, mud, and matted fur. There is an *authenticity* to Star Wars that is lacking in Star Trek. The actual operation of our codes differs from their stated aspirational operations, often significantly. There are inherent limits to

¹⁹ ALAN C. KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* (1998).

²⁰ See *Star Trek: The Original Series* (Desilu Productions 1966–1969). I stake no position on the subsequent Star Trek inspired movies and series.

²¹ See, e.g., *STAR WARS: A NEW HOPE* (LucasFilm Productions 1977).

rules and procedures: they cannot fairly describe what they govern, any more than the American Constitution defines what it means to be an American. We have to live our Constitution to give it life. Rules and procedures frame a picture but do not paint it. In modern higher education, considering the enormous potential safety and academic risks, it is too much to ask students to “game” the educational system and attempt to understand, without assistance, how their experiences will unfold. Most Millennials and their families do not properly imagine the play of the “game” of higher education in advance.

We should seek to integrate determinants of human conduct other than rules, procedures, and sanctions into our systems. Our systems must overtly incorporate values, principles, standards, policies, and actual contexts in a seamless and integrated way along with rules, procedures and sanctions. We have asked too much of our rule-based systems, which can only operate efficiently and effectively when combined with other complementary tools. Even small steps in this direction can help, as long as statements of value, principles, etc., mirror actual principles and values of the institution of higher education’s environment, and are not purely aspirational.

The search for a unitary system of managing an educational environment leads to the quest to reclaim a place for subjectivity, and reaffirm the role of values and principles in higher education. Excessive rule-based management of higher education is a five-decade-old phenomenon: prior to the 1960s, other normative tools functioned to manage the educational environment. Emphasis on rules helped to cure problems of the Civil Rights era, but has created new problems for new populations of learners.

V. Values, Standards, and Principles—Intuition and Instinct

The modern legalistic student discipline code relegates values, principles, and standards to marginal roles, often in disconnected preambles to those codes. Even systems built upon “honor” have transmuted analysis of honor into statements of *rules* of honor.²² As one student told me about the honor code I helped to administer, “Honor cannot be codified.” To the extent that means that honor cannot be captured solely by rules, the student was correct. The Civil Rights era brought higher education to the recognition that a system based on

²² See, e.g., Wash. & Lee Univ., The Honor System, <http://www.wlu.edu/x34.xml> (last visited Oct. 1, 2008).

power and prerogative, featuring unrestrained discretion to govern student populations, could easily mask racist, sexist, and other improper motivations, and could also create a system in which professional educational shortcomings of many varieties could hide (including pretending to exercise judgment or discretion but not actually doing so). The modern institution of higher education replaced power and prerogative with rules, procedures, and sanctions. Values, principles, and other subjective standards were replaced with *objective* determinants of human behavior, primarily rules.

It is interesting that, the law itself has undergone a significant conceptual revolution since the Civil Rights era when higher education embraced legalisms. Higher education today emulates a juridical world of the brief past, and has carried a vision of legalisms into the present despite significant changes in the very system it emulates. The story of the modern institution of higher education has comparisons with a tragic Gatsby-like fascination for that which serves us poorly but animates us mercilessly. Our view of law and legalisms is our very own Daisy Buchanan.²³ This is hardly the place to address all of the sweeping jurisprudential changes of the late twentieth century.²⁴ Suffice it to say that the changes in the law and legal system occurred both at high levels of abstraction, and in intensely practical day-to-day ways.

One way to illustrate this is to draw a thread between *Rights and Responsibilities* and this Book. *Rights and Responsibilities* drew attention to key changes in American tort law, particularly changes in the conceptualization of legal tort duty.²⁵ Changes in tort law after World War II were led by pioneering decisions of the California Supreme Court including the famous *Tarasoff* decision (recognizing the danger in a modern world is information related),²⁶ *Rowland v. Christian* (recognizing that strict classification of responsibilities to those who

²³ F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925).

²⁴ These changes are addressed well by others, see, e.g., Mark Tushnet, *The Rights Revolution in the Twentieth Century*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, VOL. III: THE TWENTIETH CENTURY AND AFTER (1920–), at 377–402 (Michael Grossberg & Christopher Tomlins eds., 2008).

²⁵ BICKEL & LAKE, *supra* note 16, at 105–57.

²⁶ *Tarasoff v. Bd. of Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). In 1969, Prosenjit Poddar killed Tatiana Tarasoff. Both were students at the University of California at Berkeley. Two months prior to Tarasoff's murder, Poddar discussed his intentions to kill Tarasoff with a psychologist employed at the college's mental health facility. After a brief detention by campus police, Poddar was released with orders from the campus' chief psychologist not to detain him further. Tarasoff was not warned of the threat. *Id.* at 339–40.

come to your premises does not meet the needs of a fluid society with many different roles and activities),²⁷ and *Dillon v. Legg* (recognizing emotional harm can be as damaging as direct physical injury).²⁸ In reimagining legal duty in tort, the Supreme Court of California acknowledged that a determination of whether one owes another a legal duty—if not already well established—turns on weighing a variety of principle/policy factors.²⁹ Or, to connect this more clearly, the existence of certain legal rules is dependent upon non-rule like determinants of human conduct that are not rules themselves. There are very important principle/policy functions to be weighed and balanced—their identification is a strength, not a weakness in legal analysis.³⁰

This functioning of the law is exemplified everywhere today. Principle/policy factor-balancing is common in United States Supreme Court opinions.³¹ It is even featured in much legislation itself.³² The law has recognized that bright line rules sometimes deserve the cause of law, and the law is often better served in some instances with flexibility, fluidity, open-endedness, and yes, even the right degree of subjectivity and ambiguity on occasion. For philosopher John Austin, these types of things were deficits in law; modern law sees it differently.

An example of a far less abstract development—but the same idea—can be seen in the evolution of modern commercial law. Here we see the rapid development of forms of regulation of commerce that are

²⁷ 69 Cal. 2d 108 (Cal. 1968). James Rowland was a guest in Nancy Christian's apartment when he was injured while using the bathroom fixtures. Christian had reported the need to replace the faucet knob to her landlords approximately one month before Rowland was injured. Christian did not warn Rowland of the cracked knob when he went to the restroom, despite this knowledge. *Id.* at 110–111. She may have assumed, to her peril, that men do not always wash their hands!

²⁸ 68 Cal. 2d 728 (Cal. 1968). Marjory Dillon witnessed the death of her daughter, who was lawfully crossing the road when David Legg's car collided with her causing fatal injuries. As a result of watching this collision, Dillon sustained severe emotional trauma. *Id.* at 731. Perversely, some American courts still question whether a mother should be a legitimate plaintiff in these circumstances. Law can be cold in ways that education cannot afford to be.

²⁹ “But it should be recognized that ‘duty’ is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” *Dillon*, 68 Cal. 2d at 734, (citing PROSSER, *LAW OF TORTS* (3d ed. 1964) at 332–333). See also *Tarasoff*, 17 Cal. 3d at 434; *Rowland*, 69 Cal. 2d at 112–13.

³⁰ See, e.g., *Eisel v. Md. Bd. of Educ.*, 597 A.2d 447 (Md. Ct. App. 1991).

³¹ Wilson Huhn, *The Stages of Legal Reasoning: Forumulism, Analogy, and Realism*, 48 *VILL. L. REV.* 305, 316 (2003); see also Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 *HASTINGS L.J.* 825 (1994).

³² See KEITH KREHBIEL, *PIVOTAL POLITICS* 28–34 (1998) (discussing the balance of power and competing policies in three recent lawmaking scenarios).

as much facilitative of commerce as regulatory. In the twentieth century, the law began to recognize that it had power not just to say “no,” but also to foster “yes” among willing commercial entities. With this came the recognition that the law should reflect commercial reality as much as possible, and that it should offer options to those who wish to engage in trade or serious commerce. The law began to see itself as a referee creating better, safer and more efficient commercial activity.

Yet another concrete example has been the evolution of police high-speed chase policies. Oversimplifying the story greatly, it goes something like this. Police are the government, and the government once had complete immunity from lawsuits under the doctrine of sovereign immunity.³³ Hence, if Car 54³⁴ ran over you, an innocent bystander, while chasing a bad guy, your recovery for your injuries would be limited to whatever the political process might deign to give you. That might be nothing. The court system would not hear your complaint because of sovereign immunity. As modern American populations have grown and cars and police have become more numerous, there have been more crashes as police attempt to intercept bad people but accidentally hurt good ones. At first there were no lawsuits, but over time there was a public outcry against high-speed police chases causing injury to innocent bystanders. As a result of political pressure, some jurisdictions felt the need to create police high-speed chase policies. These policies connected to a waiver of sovereign immunity—mandated circumstances under which police could, and could not, pursue bad guys. Some were quite specific and long, and all were full of rules for officers to follow.

The rule intensive policies failed. Police officers did not always have the time to consider and consult complex policies in hot pursuit, and the policies became the platform for lawsuits by citizens against the police.³⁵ Lawsuits successfully alleged that sovereign immunity had been waived, and now the police had to execute their policies faithfully. In response, jurisdictions like Tampa, Florida, passed new policies that have some rules, but also allow for *discretion* by officers who must go through a simple balancing process to make life or death decisions.³⁶ The core idea—managed or guided discretion.

³³ DAN B. DOBBS, *THE LAW OF TORTS* 693 (2000).

³⁴ *Car 54, Where Are You?* (NBC television broadcast 1961–1963).

³⁵ See *Pinellas Park v. Brown*, 604 So. 2d 1222 (Fla. 1992); *Wells v. City of St. Petersburg*, 958 So. 2d 1076, 1079 (Fla. Dist. Ct. App. 2007); *Creamer v. Sampson*, 700 So. 2d 711 (Fla. Dist. Ct. App. 1997).

³⁶ Consider the current Tampa police chase policy states,

The evolution of police chase policies shows that a crucial feature of operational policies/codes that deal with multi-faceted problems is *discretion*. It is similarly possible to map out a sense of discretion for higher education administrators that are not the equivalent to the unfettered power and prerogative of Dean Wormer. In a crucial sense, Dean Wormer did not exercise discretion, but operated with *license*, the toxic mimic of discretion. The difference is evident in the Tampa police chase policy. There are *some* bright line rules but there is also *trust* in the discretion of an officer.³⁷ For colleges today this would mean that certain types of things are obviously not permitted, for example using discipline to punish students based on race, gender,

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1. Pursuits may be initiated only when the officer reasonably believes that someone in the pursued vehicle has committed or attempted to commit:
 - a. Any forcible felony as defined in Florida Statutes § 776.08 to include any felony which involves the use or threat of physical force or violence against any individual.
 - b. Any burglary of a structure or conveyance whether or not the structure or conveyance is occupied at the time of the crime.
 3. The nature of the specific crime, which justifies the pursuit, must be considered when weighing the need to immediately apprehend the suspect. For example, a more rigorous pursuit would be justified when attempting to arrest a homicide suspect than when attempting to capture a burglary suspect.
 4. In any event, pursuits shall not continue past the point in time when the danger to the public or law enforcement personnel outweighs the need to immediately apprehend the suspect.
 5. All communications related to pursuits will be via voice, not MCT.
 6. All units involved in the pursuit will advise status (i.e. primary, secondary, parallel, etc. . . .).
 7. Any unit involved that is equipped with on-board video equipment will have the audio and video components activated for the entire incident and document same in the pursuit form (TPD 996).

Tampa Police Dep't, Standard Operating Procedures, 386.1(VI)(A)(1), (3)–(7) (Dec. 31, 2008), http://www.tampagov.net/dept_police/Files/Documents/SOP_2008_12_31_Update.pdf (last visited June 18, 2009); see also Amber Mobley, *Police Chase Ends in a Pileup*, ST. PETERSBURG TIMES, Jan. 1, 2008, at 1B.

³⁷ Such as the conditions outlined in the current pursuit policy, *supra* notes 36 and 38.

sexual orientation, etc. There is no pretense to make a rule in advance for all situations, however. Instead, in more complex situations, colleges must balance, weigh, and consider options and various concerns.³⁸ This does *not* mean that a police officer in Tampa can do as Dean Wormer did. Although a range of options is open—and thus more than one decision by an officer may be appropriate or valid—there are some

³⁸ For example, the introductory discussion to the Tampa pursuit policy states,

Personal and public safety are prime responsibilities of the Tampa Police Department. The department recognizes its responsibilities in apprehending offenders but is also aware that accidents are more likely to occur during police pursuits or other emergency vehicle operation. Therefore, it is of paramount importance that the need to immediately apprehend a fleeing suspect be weighed against the danger to the community and officer before commencing or continuing any pursuit.

Emergency operation of a police vehicle for purposes including driving in response to an emergency call for police service, police pursuits and implementation of police intervention techniques, places enhanced demands upon the decision making process of the officer. Factors such as mechanical skills, knowledge of laws governing the operation of motor vehicles, normal eyesight and good reaction and physical reflexes, knowledge of the streets where emergency driving situations might be required, mature judgment, and an attitude which complies with department policies must be taken into account.

Although the police vehicle is an effective tool for law enforcement purposes, officers must understand that it is their duty to operate the car safely at all times. The mere fact that an officer engages in an operational emergency response such as a response to an emergency call for service, police pursuit, or police intervention technique does not relieve or protect the officer from the consequences of a reckless disregard for the safety of others.

NOTE: Pursuing law enforcement personnel shall retain the duty to drive with due regard for the safety of all persons and shall be responsible for the consequences of any reckless disregard for the safety of others. A determination to continue or terminate a pursuit should be based on the totality of the circumstances as they occur and, if appropriate, as the pursuit continues.

Tampa Police Dep't., *supra* note 36, at 386(I), 386.1(VI)(B)(5)Note.

options that are not reasonable at all, and many are less reasonable than others. Administrative discretion is essential to professionalism in higher education administration and police work. The failure of the era of power and prerogative was that “discretion” was unfettered, often secretive, and not articulated, or required to be articulated. Discretion however, does not have to be unlimited, unfettered, or without appropriate limits.

The role of discretion has become especially critical in modern higher education. There are several reasons for this, although most boil down to the fact that modern college life is so intensely fast and complex that only forms of reasoning that are as rapid have a real chance to work.

First, an individual disciplinary matter is not usually isolated, or isolatable, in the overall institution of higher education environment. Just one open container violation can impact the environment, even if not very much (although it could). Virtually every discipline matter, from minor to major, impacts the environment of an institution of higher education—usually in complex causal ways. There are many implications even for seemingly isolated decisions by administrators.

Second, there are often critical collateral issues raised in a student matter that are not specifically related to a rule violation per se. For example, a student with an open container violation may be in academic difficulty brought on by alcohol abuse. Rule systems tend to over emphasize situations involving students in terms of rules—and miss environmental opportunities in an encounter with a student. Sometimes an open container violation is a signal that a student is in crisis. Moreover, even a cursory exposure to academic misconduct cases shows that cheaters are often heavy drinkers, or victims of abuse, or gamblers, or have family issues, or something else. There are few “simple” academic misconduct cases. “Academic” misconduct is environmental in nature.

Third, the modern higher education environment is so complex, digitalized, and fast paced that rule-based governance or management alone will not be adequate. Discretion, judgment, and intuition increasingly are indispensable to the management of a higher education environment.

The inherent interconnectedness of the institution of higher education environment demands a new vision of process to manage students in an educational environment. Successfully managing a complex institution of higher education environment primarily with rules, procedures, and sanctions is not likely to succeed. Modern discipline systems are exuberantly fair in a strict procedural sense, yet

may be environmentally ineffective (or at least have not demonstrated their environmental effectiveness).

The modern discipline officer needs, and uses, different tools to help manage the modern college environment. There are simply too many variables and values at stake to ever successfully formulate a rule that accurately and appropriately addresses every situation. Disciplinarians on a modern campus face calculus-like interdependent variable problems. The quest for objectivity leads us to rules that focus on only the most commonly occurring problems. Codes certainly pick out the worst permutations of student behavior, but do not address many environmental issues. Moreover, because rules find their validity in the application of sanctions after fair process, we tend to seek rules and procedural systems that are proven to be effective in meting out sanctions. To the extent that behavior is difficult to sanction (or hard to codify in terms of rules), colleges tend to marginalize problems related to such behavior even if those problems are large issues in the campus environment generally. At times, colleges have been forced to move into areas of concern that rule-based codes struggle with—such as combating high-risk alcohol use, poor decision-making in a sexual culture, and mental health issues.

The business of higher education today is heavily left-brain in orientation. Administrators typically have high levels of skill in hard cognitive approaches to problem solving—research, writing, constructive discourse, etc. As such, as a profession, we tend to assign a high ordination to process systems that are more like what we do for a living. Rule and fact application, investigation, proof, etc., all appeal to the scientists, the political theorists, the jurists, and others in our community. Legalisms (not necessarily law)—naturally more left-brain than right—appeal to many of *our* academic disciplines.

However, the task of managing an academic environment requires the use of *intuition, instinct, and professionalism*—right-brain stuff.

A system of managing an educational environment based entirely on intuition, etc. would be extremely unworkable. Perhaps the Jedi Council might succeed at this, but not modern higher education. Yet, any system of educational environmental management that does not make significant room for intuition and instinct is likewise unworkable and inconsistent with the goals and values of modern education. The key is to strike a balance. The very nature of who we are as a profession tends to throw us out of balance in the task of managing an educational environment.

Today, modern student codes make little to no obvious, articulated, or intentional space for intuition and instinct as such in the process of managing the educational environment. These tools are not acknowledged openly, and are made subordinate—at best—to more hard cognitive processing approaches. The use of intuition and instinct is given low, often invisible, status in student discipline. Strangely, though, when one observes the actual operation of a student discipline system, there are actions everywhere in that system that are the result of discretion and the use of judgment and intuition (for example, the decision *not* to prosecute a wrong). The use of intuition and instinct is present in discipline systems even though it is not openly acknowledged or validated. No complex system of discipline can operate mechanically or without intuition, instinct and the exercise of professional judgment. Every system of human behavior management that uses rules, procedures and sanctions must have a caste of professionals who mediate that system – judges, arbitrators, referees, Solomon. In law, we speak of how judges use judgment as “jurisprudence.” Higher education needs “eduprudence,” a philosophy of—and an approach to—academic decision-making relating to students in a higher education learning environment.

We can foster greater authenticity and bring the actual practice of student discipline into line with experiences of students and others by an “eduprudence” based on the union of objective and subjective criteria in an articulated system of educational environmental management. We have not been *deliberately* inauthentic as Kors and Silverglate allege.³⁹ Higher education is simply inauthentic, if at all, in a way *not* captured by rules. In fairness to colleges, the conceptualization of the student-higher education institution relationship and the concept of student “discipline” itself have been evolving rapidly. We are only barely into an era where articulation has been a desirable and necessary goal in student affairs. Kors and Silverglate are much too hard on higher education, and their solution—sue schools—is usually the wrong approach to making higher education better.

The pressure to reach and maintain the equilibrium between objective and subjective criteria will continue. The complexity of college culture continues to increase; students bring new and ever more challenging issues to the higher education environment. Responding to the increasingly complex and changing higher education environment in its entirety will demand strong skills for administrators in rule/fact

³⁹ KORS & SILVERGLATE, *supra* note 19, at 356.

management *and* in intuition, instinct, and judgment. This will mean new forms of professional training, and competency.

VI. Reclaiming Subjectivity

Legalists assume, implicitly, that subjectivity in student discipline is inherently less desirable than objectivity. This would be true if all forms of subjectivity were bad and all forms of objectivity were good. Experience in higher education teaches otherwise.

Subjectivity certainly had its dark side in the era of power and prerogative—especially when institutions of higher education attempted to resist massive social change and the quest for equality. Subjectivity has been connected to a host of education evils, including bias, prejudice, secrecy, retaliation, partiality, etc. But objectivity has its dark side too. Objectivity, as we have come to realize, can be sterile, mechanistic, opaque, cruel, inefficient, clueless, non-environmental, and incongruent. These evils have the power to appear to have no clear victims: “offenders” have violated a rule and there is no obvious tyrannical figure like Dean Wormer to point to as an environmental culprit. Objectivity does not play out its dark side the way the evil subjectivity of Dean Wormer did. The real victim of extreme reliance on objectivity is often the institution of higher education environment itself, which suffers when actions are taken that have no clear environmental justification, or when a myriad of actions are *not* taken that could have made important positive impacts on the educational environment. In a sense, overly objective legalistic systems play the role of disciplinary bystander to ongoing environmental issues, mirroring the tort bystander era that prevailed in the era following the Civil Rights era. Objective rules and legalistic and autonomous discipline systems sometimes can be perfect forms of active disengagement. Our discipline systems today are precisely those that *Rabel*,⁴⁰ *Beach*,⁴¹ and *Bradshaw*⁴² might have envisioned for the modern institution of higher education. In the modern era, over-emphasis on objectivity and legalistic rule based systems has fostered the kind of distancing from managing the educational environment *environmentally* that *Beach*, *Bradshaw*, and *Rabel* preached through a tort lens.

⁴⁰ *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987).

⁴¹ *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986).

⁴² *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

The great evils of subjectivity centered on wrongdoing. The great evils of objectivity center on wrongful non-doing, and lost opportunities. Bad subjectivity creates villains; bad objectivity ennui.

Again, this does not mean that all forms of subjectivity are good or that all forms of objectivity are bad. Simply put, overemphasis on one or the other approach in managing an educational environment comes with a price. Indeed, only through the lens of the experience of the last few decades can we clearly see that there is something essentially objective *and* subjective in the management of a higher education environment, and that it is important to honor and preserve both objective and subjective approaches to managing that educational environment. The mistake of the eras of power and prerogative and the era of legalisms has been similar in one way: both overemphasized one technique to manage the educational environment.

The best decision-making will occur when an institution of higher education recognizes where, on a continuum, opportunities for resolution of issues lie. Ultimately, deciding which techniques to use to manage issues in an educational environment involves judgment. In other words, institutions of higher education must make meta-intervention decisions and use *judgment*—professionalism in higher education administration—to determine whether to exercise judgment and discretion or to apply rules and objective criteria. There is no escaping this choice, although it is tempting to pretend that it is not a choice. Exercising, or forfeiting, academic freedom.

There will be situations (for example, simple regulatory policy violations) that lie clearly on a continuum towards objectivity and rules. This sort of issue is best handled with rules and procedures, and approaches that are highly objective. Simple rules, with simple fact application approaches, best suit institutions in these situations. Think parking violations.⁴³ (Institutions of higher education sometimes overly process situations such as these and find themselves caught up in endless appeals and other utterly needless inefficiencies.)

⁴³ I even tend to think this is what went wrong in *Than*. Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926 (Tex. 1995). The university deployed an unbelievably complex and legalistic discipline system in a situation of “did he or didn’t he.” Or, perhaps *Than* is a situation of poor environmental management techniques creating hard “fact” questions. Was the proctor in the test room to deter cheating or to catch cheaters? If the latter, the proctor was in a tough position to know with the kind of confidence level we might want to know whether what he saw was cheating or not. If we want test rooms that catch cheaters a simple passive video system will work better. *Than* may simply mean we are not very good at police work, which may be a good thing.

There are other circumstances that are very value and principle laden where adjudicatory models are less inappropriate. For instance, decisions regarding admissions should be made in a deliberative and individuated way. This is the message from the United States Supreme Court in *Gratz and Grutter*,⁴⁴ for example. Our admissions processes usually work best (and comply with the law) when individual applicants are judged upon individual merit and their potential in an academic environment. In *Gratz and Grutter*, the Supreme Court rejected racial or other quotas in admissions—a type of objective criteria for admitting or not admitting a student—in favor of a subjective, individualized, merit-based approach. It is telling that the Supreme Court authorizes subjective approaches to admissions as the legal solution to issues of race conscience admissions. In this sense, *Grutter* and *Gratz* echo *Horowitz* and *Ewing*—institutions of higher education are not just permitted to use subjective approaches to evaluate students, they are *encouraged* and in some instances even *mandated* to do so at times. The Supreme Court has pointed to the other end of the continuum to impose some form of process to avoid manifest objective wrong—as say in a disciplinary system that runs the risk of punishing the wrong students for a transgression.⁴⁵

Thus, the task for an institution of higher education remains to determine what types of processes fit best given the position of certain types of issues on a continuum from objective to subjective. Because of the range of issues an institution of higher education may face, institutions of higher education will find themselves constantly considering whether to have one unified process for all environmental issues that arise in an academic environment, or to have several interdependent systems, such as separate processes for admissions, retention, housing, cheating, etc. (Colleges may wish to consider process czars who help to determine what process best suits an issue.) Universities face the meta-choice of whether to be mono-theistic or pantheistic in process. Modern universities typically choose both in their environment without doing so in a highly intentional way: institutions will often have a code that purports to be *the* discipline code, but then several independently functioning systems existing alongside the “singular” code system. Thus a campus may use an honor code, but have a separate, or separately operating, system for housing regulations.

⁴⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁴⁵ See *Goss v. Lopez*, 419 U.S. 565 (1975).

To date, no *model discipline or honor code* offers a model system of comprehensive educational environmental management for institutions of higher education to manage academic environments in their entirety. To put this in other terms, modern administrators are offered model tires but are not offered model cars. Institutions of higher education often recognize that a code is not enough and that they require other systems to support a code and manage an academic environment. Model codes attempt to stake a central role in managing the academic environment, but modern institutions of higher education operate other systems alongside their codes. For heuristic purposes, try to map out the ways in which all the functioning discipline systems on your campus interrelate: you will find the task quite complex.

B. Evaluation and Evaluative Process—The Role of Judgment in Education and Student Development

Systems of discipline based primarily on rules, procedures, and sanctions tend to reduce the exercise of judgment to the application of rules to manifested behaviors, and then application of sanctions. There is *some* room in such systems for the use of educational judgment. For example, a system can choose not to proceed at any time—systems are not usually mandatory in the sense that all violations must be fully prosecuted. Most systems permit administrators to choose whether to proceed to formal charges, or not. Institutions of higher education also commonly reach negotiated agreements with students (in a sense, a sort of reverse and partial master academic plan—described *infra*—but not usually as desirable), which involves a good deal of time and effort by administrators to craft and enforce. It is increasingly rare today, for matters that could have serious significance for a student's future, to go undisputed by that student, or their family or friends.⁴⁶ Often, individuals with no official role in the formal system (such as trustees, or friends and relatives) are brought into the fold to attempt to negotiate a resolution. Educational judgment also comes into play when administrators choose to characterize facts in certain ways or acknowledge ambiguities in facts so as to allow maneuvering room in the application of a rule to a certain behavior. Or, administrators can identify ambiguities in the rules themselves, or gaps in rules, and work within those gaps to create creative solutions. Sometimes administrators even use failures in process systems to make systems work better, especially when the punishment does not fit the crime. This is the

⁴⁶ Alicia Shepard, *A's For Everyone!*, WASH. POST, June 5, 2005, at W19.

equivalent of a defense lawyer who sets up an ineffective assistance of counsel argument to give his “guilty” client a viable defense. It is best—on rare occasions—that a “council” or honor court renders the “wrong” decision under the rules and facts and exonerates a student. Other times administrators engineer results that are designed to create an equitable result. For example, many deans reserve and exercise “inherent authority” to alter decisions made in formal proceedings.

These are some of the more common ways we see academic judgment exercised today.

However, the exercise judgment in modern higher education systems of discipline is often like the efforts of the Little Dutch Boy: plugging as many leaks as possible.⁴⁷ Rules, after all, lead our systems and educational judgment follows in its trail. Indeed, the exercise of judgment is often driven directly by problems rules create in the first place.

New forms of process for the use of educational judgment are needed.

First, a very large number of concerns or issues about students could be handled through educational conferences or sessions focused upon a student’s individual master academic plan, and ongoing, mutually agreed upon, alterations to that plan. As an operational document, a master academic plan—described *infra*—is also a living document—it evolves *and* entails consequences. One might say a master academic plan is educational dharma and karma: it is a plan with structure and flexibility, but there are consequences. The master academic planning process will require administrators to have skills and training in the use of educational judgment; administrators must also have abilities to work with rules and policies, goals, values, standards, etc. In a subsequent Section, I describe some of the training and skills needed for professionals to manage such a new process for the educational environment.

The second process will relate to the evaluation of the environmental system as a whole. Administrators must assess environmental goals as well and not just meet the needs of individual students. Although it may sometimes seem that college today runs to give students whatever they want, a college is an organic entity itself with its own goals and needs. Students should be taught that they must act for the best interest of their institutions too. We are all just visitors

⁴⁷ Peter Miller, *The Little Dutch Boy*, ENCYCLOPEDIA MYTHICA, Mar. 3, 1997, http://www.pantheon.org/articles/l/little_dutch_boy.html.

in college. College is now one of the great gifts of free, democratic society; there is no occasion for ingratitude. Colleges exist for many generations. If we drink and prosecute our college days away, future generations may pay. This, and future, generations share in the responsibility to an academic entity. We should facilitate students, but facilitation is not a one-way street. Facilitation and responsibility are twins. Students must be taught that their individual education process exists only because of appropriate background conditions and an institution's legitimate long-term goals, etc. In other words, we can, and should be able to, articulate a shared vision for individual students *and* an institution. For instance, an institution may determine that it wishes to reduce rates of alcohol and drug usage substantially on campus: students whose master academic planning processes indicate that their use of alcohol could be high-risk may find themselves subject to stern consequences in the implementation of their master academic plans, or may face new requirements in their plans; on the other hand, abstainers might be free from such restraints.⁴⁸

I. Evaluation of Students

Far too many college students are evaluated in key dimensions by institutions of higher education *only* after they engage in negative behavior. Outward behavior offers only an incomplete picture of a student as an individual higher learner, however. Students with poor objective behaviors may have more promise in the learning environment

⁴⁸ Under normal circumstances, students are entitled to know their institution of higher education's articulated goals for its environment, which should only be changed vis-a-vis a particular student as a result of mutual agreement, or in light of new circumstances provided for in a master academic plan. Students often gripe that their institutions are not fair. This arises from the fact that a good deal of applied institutional policy provides little to no explanation as to how institutional goals relate to an individual student. Moreover, students are typically aware of institutional norms from other generations. They have heard stories from family, friends and others. Unless institutions proactively educate current populations with respect to new policy initiatives, dissonance in expectations will continue. This is true for parents and friends as well. The master academic planning (MAP) process addresses this by individuating process, creating systems of accountability for every student (not just those apprehended as violators), forcing an institution to articulate specific environmental goals on a timeline and giving students a more detailed vision of what to expect in their time on campus.

Also, by individuating, educators can help students understand that the mere fact that they are not apprehended for a rule violation does not mean that prohibited behavior is positive or tolerated. Ongoing interactive educational management based on a master academic plan makes avoidance behavior easier to detect. In the long run, students' negative behavior will tend to catch up with them. A master academic planning process accelerates cause and consequence.

than objective indicia would suggest; conversely, many students with good grades and no behavioral issues have significant underlying problems. There are several ways to address the over- and under-inclusiveness of objectivity in evaluation. The cornerstones of evaluation are (1) *decentralization/individuation*, (2) *a focus on education*, (3) *longitudinal and latitudinal*, (4) *use of multiple criteria for evaluation*, (5) *a student-development focus*, and (6) *educational covenants*.

a. Decentralization/Individuation

There is decentralization in virtually all modern college systems, yet modern institutions of higher education exhibit strong preferences for *centralization*, primarily through model codes and centralized academic standards and advising processes. Hierarchy and centralization win out over decentralized and non-hierarchical models of evaluation. Hierarchy and centralization are hallmarks of the era of legalisms: by achieving the hierarchical coordination of review of student behavior, centralized systems in an institution of higher education can better achieve *fairness*. We must decentralize our educational management systems in some, but not all, ways.

From the point of matriculation forward, each student should remain in contact with a lead mentor and team of educational mentors for development of a master academic plan. Students should have periodic and/or “as needed” educational conferences. Educational mentors would be the normal, primary point of contact for *all* issues relating to a given student. When entering the Matrix, Neo needs Morpheus to guide him through safely:⁴⁹ this does not mean, however, that along the way Neo will not consult the Oracle, or other guides. Nonetheless, *everything* comes back to Neo’s lead mentor, Morpheus. To give a student a sense of coherent purpose and direction, each student should have some continuity in a lead educational mentor.

In today’s modern higher education environment, there are usually no comprehensive, proactive planning mechanisms that provide individual students an ongoing process to develop and interact with a master academic plan. One common method of decentralization and individuation today is probation. Students find themselves on probation through lack of academic achievement when measured against objective criteria, or by some form of misconduct specified by rule or policy. On

⁴⁹ THE MATRIX, *supra* note 3.

probation, a student receives both an individualized, and decentralized response. A student on probation often will go before some committee, or other group, to review his or her status and revisit the probation. In some instances, probation lapses if the student passes a period of time without incident or complies with certain criteria. Or, another way a student may receive an individualized, decentralized response from an institution of higher education is through academic advising and counseling. If the student participates in intercollegiate athletics or has a recognized disability that affects academic achievement that student may receive the most individual attention. Such individualized, decentralized interaction with students, however, typically lacks a *comprehensive* focus. Few academic advisors view admissions files, or have a wider view of a student's living/housing issues, conduct/compliance issues and/or wellness issues, *inter alia*: they may, but usually do not. Advisors typically receive fragments of a student's profile for a fragment of that student's academic tenure. Moreover, advisors usually lack an ongoing focus. Students can move from one set of academic advisors to the next with gaps in between, with little chance that a student's journey will be made coherent to any, or set of, advisors.

Thus, there is a tendency for institutions of higher education to individualize and decentralize in incomplete ways. Institutions of higher education count on the fact that comprehensive rule systems give coherence and cohesiveness to the whole environment and to individual students. A truly individualized system, on the other hand, gives a student a more comprehensive, coherent experience.

To effectuate greater individuation and decentralization, an institution should consider a variety of options for student evaluation, including the assignment of a self-perpetuating mentor teams and long-term lead mentors. These teams and/or lead mentors would participate in the development of student's master academic plan at the outset of a student's career in higher education, and guide a student throughout her career in the assessment, re-evaluation, and the implementation of that master academic plan as the student progresses through that institution of higher education.

Consider, for example, the way that Jedi in Star Wars are trained. For each Padawan—a pre-Jedi—one Jedi master is assigned as a principal mentor, although the entire Jedi Council provides a mentoring function and interacts with the primary mentor in terms of teaching methodologies and progress of the pupil.⁵⁰ This model may be a version of individuation that modern higher education will embrace.

⁵⁰ See, e.g., STAR WARS: A NEW HOPE, *supra* note 21.

Ultimately, however, there is no single form mentoring systems must take and institutions of higher education with different student populations, resources, challenges, etc., will inevitably develop their own approaches to mentoring and guidance. Indeed, quite a bit could be done using modern technology and self-assessment.⁵¹ Institutions must remember that the process of developing a process is itself a critical function in developing a coherent system of educational environmental management. While it is important to consider what other institutions do, and perhaps have an “ideal” vision, reality dictates that institutions will vary a great deal in the way that they deliver mentoring services to students in the future.

Millennials, and their family/parents will likely embrace the concept of a student/mentor team. This is not entirely dissimilar to what many students and their parents experience in K-12 education.⁵² Research shows that students desire to have mentors as part of their higher education experience.⁵³

The tasks of the student/mentor teams are, at one level, simple. The student/mentor team has the task of: (1) helping the student develop a master academic plan, (2) evaluate that plan periodically, (3) ensure that students are in compliance with the master academic plan, (4) liaison with other administrators at the institution of higher education and act as the central source for the collection and analysis of

⁵¹ Students themselves often create forms of virtual “guidance,” for example, in the online gaming community.

Gaming remains an entertainment good, but it immerses the player so thoroughly in the virtual society and economy that events in the virtual world have an emotional impact on people no different from the impact of Earth events. Events in the virtual world can have an influence that extends well beyond the borders of the virtual world; relationships, incomes, and even lives on earth may be affected.

Edward Castronova, *On Virtual Economies* 15 (CESifo Working Paper No. 752, July 2002), available at http://ssrn.com/abstract_id=338500. Avatars are extremely popular, as are sites like World of Warcraft, www.worldofwarcraft.com/index.xml; EverQuest, <http://everquest.station.sony.com/>; and Second Life, <http://secondlife.com/>.

⁵² NEIL HOWE & WILLIAM STRAUSS, *MILLENNIALS GO TO COLLEGE* 82, 109 (2003) [hereinafter HOWE & STRAUSS, *MILLENNIALS GO TO COLLEGE*]; Jean E Rhodes, et al., *Youth Mentoring in Perspective: Introduction to the Special Issue*, 30 AM. J. CMTY. PSYCH. 149 (Apr. 2002); Cynthia Sipe, *Mentoring Programs for Adolescents: A Research Summary*, 31 J. ADOLESCENT HEALTH 251 (2002).

⁵³ JAMES E. COTE & ANTON ALLAHAR, *IVORY TOWER BLUES: A UNIVERSITY SYSTEM IN CRISIS* 17 (2007); Annie Bernier et al., *Academic Mentoring in College: The Interactive Role of Student’s and Mentor’s Interpersonal Dispositions*, 46 RES. IN HIGHER EDUC. 29 (Feb. 2005).

information related to a single student, and (5) interface with the student in the role(s) of mentor(s) periodically and as needed.

Obviously master academic planning represents a major shift in approach for American higher education. This will place a new burden on administration/educational staff. New forms of personnel training and hiring will need to occur. Finding ways to achieve efficiency and cost savings will be essential: I discuss these points later. One thing to keep in mind is that many mentor functions can be routinized or even self-directed. For instance, it seems entirely likely that institutions of higher education will not elect to have students/mentors draft master academic plans entirely or wholly out of new cloth. Students tend to track in similar ways with individuation occurring in the unique combinations of interests pursued. Think Mr. Potato Head—a handful of pieces, many combinations, one small inexpensive toy. The key is to identify the range of common permutations and combinations, and to create relatively comprehensive lists of options, goals, challenges and the like.

There are also potential lessons from Howard Gardner's concept of multiple intelligences, for instance. Gardner is famous for identifying learning archetypes.⁵⁴ One approach for higher education may be to schematize learners on dimensions related to their learning aptitudes and profiles. There may be still other ways to assess a student's potential in higher education. We might find that there are similar recurring paths that students take in American higher education. Most students may track substantially into one or the other of these paths. (It would be a major advance for higher education students to use personality profiles and learning types more aggressively—archetypes not of learning so much as higher learning paths. If so, much of the work of mentors and mentor committees will be done before they even meet students for the first time.) Mentors/mentoring committees might spend time tailoring core archetypal permutations to individual students as individual learners in much the way that insurance underwriters use combinations of standardized forms to tailor an insurance policy to a client.⁵⁵ "Manuscripting," that is drafting entirely unique language for a student's master academic plan, could be used as an expression of a given student's unique master academic plan, or it could represent the fact that the institution of higher education has failed to identify recurring archetypal permutations that remain to be discovered or described.

⁵⁴ HOWARD GARDNER, *FIVE MINDS FOR THE FUTURE 4* (2007) [hereinafter GARDNER, *FIVE MINDS*].

⁵⁵ KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 149–50 (1986).

Institutions of higher education will likely need to have meta-mentoring processes that review the adoption of unique master academic planning language in an individual student's master education plan. Such a review process would determine if "manuscript" language is needed for a student's special needs, goals, etc.; and/or it may determine that new learning archetypes are forming or being recognized.

The MAP—Master Academic Plan—process ensures that the planning process itself is organic and constantly evolving with student populations. American higher education should seek to adapt to generational needs and trends quickly. One common issue in higher education since the 1950s is that administrators have been at least one generation behind in approaches to managing their current student populations. Modern higher education—e.g., the 1950s forward—has been beset at each generational interval with mismatches in approaches and expectations. Higher education, as a service industry, still primarily *reacts* to generational shifts. As an industry, our reaction time is better, but higher education is still not entirely generationally proactive.

Centralizing the process of master academic planning is preferable to centralized administration of student discipline. Over time, institutions of higher education may begin to identify student archetypes and use positive archetypes to counteract negative archetypes, like Bluto Blatarskis,⁵⁶ etc. As it is, students have a tendency to select college student archetypal patterns for themselves, usually those that accord with media/marketing conventions or other social trends, etc., not ones deliberately created or managed by institution of higher education. To see this, enter any student union on any American college and you will observe the ways in which students have often self-selected themselves into archetypal groups: jocks, Goths, emos, preps, etc. A paradoxical feature of Millennial student behavior is that "Generation Me" attitudes exist alongside strongly structured group behavior patterns. It is unlikely that such self-directed archetypal association is only a function of "Generation Me" Millennials. Indeed, students in the movie *Animal House* followed archetypal patterns, albeit those of *their* era.⁵⁷ Perhaps all that is different today from the *Animal House* era—apart from the difference in archetypal patterns—is that students today flow more freely from archetypal group to the next and that they have more archetypal patterns to choose from. Nonetheless, we should not be too celebratory: many students today find themselves essentially tracked

⁵⁶ NATIONAL LAMPOON'S ANIMAL HOUSE, *supra* note 17.

⁵⁷ *Id.*

into and trapped by their archetypal groups—without any carefully thought out exercise in intentionality.

Modern institutions of higher education do not always embrace the opportunity to work with archetypal behaviors and patterns in student populations. Higher education is more likely to revise archetypes for curricular or discipline systems. Perhaps this resistance is normative. Since the 1960s, American higher education has placed heavy emphasis on individual self-determination as a goal of liberal arts education. This tends to conflict with recognizing and acknowledging broad-based archetypal student behaviors. This also conflicts—rightly—with the fact that archetypes of another era were often imbued with racist, sexist, homophobic, etc., attitudes and patterns. Anti-archetypalism is a by-product of the Civil Rights era. However, as Howard Gardner’s seminal work shows, not all archetypal strategies are wicked.

Students in the Millennial generation clearly recognize a very wide variety of archetypal patterns for themselves. Moreover, archetypal student profiles permeate modern culture, particularly the media.⁵⁸ Movies such as *Ferris Bueller’s Day Off*,⁵⁹ *The Breakfast*

⁵⁸ Modern higher education’s resistance to archetypal identification is remarkable. The February 2008 Law and Higher Education Conference in Clearwater offered a session on emo culture. Peter F. Lake, Trevor Kelley & Leslie Simon, *Understanding Our Students by Understanding Emo Culture*, at 29th Annual Law and Higher Education Conference (Feb. 19, 2008). Although emo culture is a widely recognized archetype among modern college students, see Trevor Kelly & Leslie Simon, *Everybody Hurts: An Essential Guide to Emo Culture* (2007), most administrators had either no understanding of the archetype or a very dim understanding of it. Questions addressed to presenters often displayed primitive *stereotyping* that showed a lack of *archetypal* understanding. How could it be that an entire generation of students could go through college and be so misunderstood? Some of this traces back to American higher education’s strong preference for objectivity and law-like systems following the Civil Rights era. Archetypal identification and understanding is more of a right-brain function. Archetyping requires the skills of a painter or poet—consider James Joyce’s *Dubliners* and the characters therein who do not lend themselves well to rule, policy and objective criteria. Indeed, the very consciousness of objectivity in modern higher education that has so dominated since the 1960s has disabled us from working effectively with archetypes easily. We have been comfortable *generalizing* students with respect to objective criteria; however, our ability to generalize students on a level of *subjective* criteria is impoverished. Students fill the gap that we have created by seeking archetypal understanding in other venues. The success of Van Wilder (in the movie *Van Wilder*, *infra* note 82) is testament to this. Van Wilder moves among the tribes, and understands and supports them. Consider his relationship with the high academically achieving fraternity. He helps them. The message is clear: what American higher education fails to do others will provide. An incomplete educational process is an invitation for others to engage the process to their own ends. Someone will be trans-archetypal.

⁵⁹ FERRIS BUELLER’S DAY OFF (Paramount Pictures 1986).

Club,⁶⁰ and *Charlie Bartlett*,⁶¹ all clearly illustrate divisions in student bodies along a variety of lines including class, socio-economic status, recreational preference, etc. Popular culture often canonizes the freewheeling individual like Bueller or Bartlett who can move among the archetypes with relative ease, or can mediate disputes among archetypal patterns. Ferris Bueller releases Cameron, his best friend, from a rigid pattern dominated by class, status, and economic achievement. Charlie Bartlett becomes the *de facto* school psychiatrist and speaks to every type of student: watch the scenes where Charlie Bartlett dispenses advice in the bathroom and notice the wide variety of archetypes who come to seek advice from Charlie. *The Breakfast Club*, one of John Hughes' finest works, was a dramatic success because all the characters achieve a certain level of transcendent understanding of other archetypes. Even the title song by Simple Minds, "Don't You (Forget About Me)," reminds us at the end of *The Breakfast Club* to remember that we are individuals who have an archetype, but we are not the archetype itself and thus capable of transcending our archetypal pattern.⁶² Archetypes, unlike stereotypes, are not traps but reflect complex choices of how an individual chooses to represent interact, and behave. Archetypal understanding can be liberating.

b. Educational Focus

There is a common belief that modern discipline systems are, or should be, educational. Rules, procedures, and sanctions *can*, indeed have a didactic effect. However, there are many students who learn nothing from the process of discipline, many who only partially absorb a lesson, and others who learn the wrong, unintended, lessons. The latter point is often overlooked. If students engage in negative behavior and are put to the test in a process that ultimately wrongly vindicates them, they learn superior avoidance skills and become more effective at doing negative things. We rarely attend to the fact that our discipline systems can and do, albeit unintentionally, teach exactly the wrong lessons to students at times—particularly those who “win” hearings who should not have. In general, rule, procedure, and sanction-based systems tend to favor mechanistic treat-all-as-one philosophies towards student development. Trained administrators can give these systems an educational feel, either within the process itself or informally, but

⁶⁰ THE BREAKFAST CLUB (A&M Films 1985).

⁶¹ CHARLIE BARTLETT (Sidney Kimmel Entm't 2007).

⁶² SIMPLE MINDS, *Don't You (Forget About Me)*, on THE BREAKFAST CLUB SOUNDTRACK (A&M Records 1985).

veteran administrators often feel torn between upholding a discipline according to its own rules and virtues and doing what is educationally sound. The tension is inherent in any system that so radically favors one form of approach to managing an educational environment over another. It is difficult, to say the least, to play the role of adversary and educator at the same time.⁶³

Students (and their parents) experience the non-educational nature of legalistic student discipline processes as a *game*. The rules and procedures mirror the rules and procedures of *games*. Students soon learn that one way to approach a legalistic discipline system is to *posture*, as opposed to pursue the truth, to become *positional* in

⁶³ Modern discipline systems also tend to be biased towards Anglo-American ideas of the value of an adversarial system as a method to illuminate the truth. The choice of adversarial legalistic systems is a strange choice for higher education, particularly in light of *Horowitz* and *Ewing*. Higher education does not routinely cast itself in the role of adversary in the quest for truth in other circumstances (perhaps the thesis defense is the one example to the contrary). Even where adversarial process is used, for instance in the defense of a thesis, the long preparation process to approach the defense is nothing like a criminal trial, even if it is trying at times. Law schools once used a very tough adversarial system of Socratic teaching as a primary method to instruct law students. However law schools today advocate different methods and legal educators now recognize that a variety of methods as more effective in teaching law students. Benjamin V. Madison III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293 (2008); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996).

Sadly, when American higher education attempts to adopt the adversarial system as a method of ferreting out the truth we often experience the phenomenon that people tell carefully crafted lies to attempt to avoid prosecution. Adversarial systems often push people to positions as opposed to the truth. Higher education discipline administrators experience this reality of modern rule-based discipline: the search for the truth is sublimated to the process itself, and the truth is at best a byproduct of a system that operates towards its own goals. This is tragically evident in situations where rule-based systems attempt to turn disputes of a subjective nature into objective battles for the truth. Consider for example, the all too typical situation where two students, both severely intoxicated, “hook up” and then have conflict later regarding their sexual encounter. Such situations are often managed as sexual assaults in modern systems, and discipline systems spend an enormous amount of time attempting to prove facts that can be applied to rules. Sadly, the facts disappeared in the haze of alcohol that permeated the encounter. But more importantly, the misbehavior is more in the nature of an error in judgment than it is violation of a rule. Students make bad choices in bad situations, but rule-based systems channel decision-making regarding their poor choices into prosecution around rules and facts. The adversarial system, with its heavy emphasis on the search for truth, functions like the wrong tool in the garage. Indeed, all too often once a sexual assault matter has been handled under rules, the victimized student ultimately leaves the higher education institution. No one wins: in systems designed to pick winners when winning is not the real issue.

discourse, as opposed to discuss interests, needs, goals, etc., and to *game* the system to gain advantage the way one might play Monopoly. Immense amounts of time *and* energy⁶⁴ go into dealing with students who obfuscate, prevaricate, and threaten lawsuits or the like. And there are the parents. Not only does such a system teach the wrong lessons to students entering a democratic society, but it is intensely inefficient in terms of wasting student and administrative time and energy. Students rarely adopt an educational focus first when they encounter discipline systems. A few are contrite or submissive to the system, many students and their families and friends are not.

Remarkably, I found that about half of the students I handled in the discipline system I administered became better students or professionals because of their encounter with the system. 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. We have also seen surprising success with adapted drug court diversion programs, which typically report a small fraction of the recidivism rates associated with students not in college.⁶⁵ Perhaps college students can learn and grow because of discipline at times. Yet we have done very little to study how legalistic discipline systems impact learners in the aggregate in a learning environment in the short and long term. We have little sense of what and how we are teaching students by deploying legalistic discipline systems.

The first precept of any discipline or environmental educational management system in higher education is that the systems should be *primarily educational*. Discipline systems, systems of process, or what have you, must be grounded in their educational value. Legalistic systems generally have no interest in education as such—law is not

⁶⁴ When considering the real costs of modern discipline systems consider the *time* spent in discipline systems as a cost, and the lost *energy* that translates into lower productivity and burnout down the road. Negative, oppositional experiences do not foster positive educational energy—our true currency—but drain it.

⁶⁵ Randy Monchick & Don Gehring, Back on TRAC: Treatment, Responsibility, & Accountability on Campus, at 27th Annual National Conference on Law and Higher Education, Stetson University (Feb. 2006) (available at <http://justice.law.stetson.edu/excellence/HigherEd/archives/2006/BackonTRAC2.pdf>); Randy Monchick et al., *Drug Court Case Management: Role, Function, and Utility* (Nat'l Drug Ct. Inst. Monograph Series 5, June 2006), available at http://www.ndci.org/publications/Drug_Court_Case_Management.web.pdf.

education, per se.⁶⁶ The civil justice system is heavily focused on conflicts between large economic interests, and situations involving very serious physical injuries to persons. The criminal justice system has increasingly come to focus more and more upon how to process the guilty as opposed to determining guilt or innocence. In the criminal justice system for example, most defendants have long criminal records and have had serious involvements with the law in the past—most will plea out now, or later for some other crime. The criminal justice system is largely there for the processing of a class of repeat offenders, with the occasional individual who is a first-time serious offender thrown in the mix. Higher education bears little resemblance to the real legal system. We are neither processing a cadre of miscreants, nor are we re-ordering large economic interests, nor even rectifying wrongs.⁶⁷

Moreover, the legal system itself is increasingly less legalistic. Corporate entities today typically seek to go to non-judicial processes such as mediation and arbitration to solve their disputes.⁶⁸ Virtually all personal injury cases settle before trial or verdict in a fairly routine way.⁶⁹ Higher education is one of the last remaining businesses that elevate legalisms to such a high position in the management of its conflicts. The fact that American higher education adopted legalisms at exactly a transition point in American law has left it with the imprint of law of that time.⁷⁰ Overemphasis on law and legalisms in discipline processes violates the first precept of any educational system—process *should* be primarily educational. Higher education must recognize that legalistic systems of discipline are not ends in themselves.

A modern institution of higher education following a new approach to process will not abandon all rule systems: institutions of higher education will simply place rule systems in context.⁷¹ Rule systems have value in an educational environment, even if they are not always, at all times, and considered the primary tools or the only tools to manage that environment. Indeed, institutions of higher education will need some background rule systems to manage students who fail to meet standards in their master academic plans and have exhausted mentor-

⁶⁶ GENNARO VITO ET AL, *CRIMINOLOGY: THEORY, RESEARCH, AND POLICY* 23 (2006); Seymour Halleck & Ann D. Witte, *Is Rehabilitation Dead?* 23 *CRIME & DELINQ.* 372 (1977).

⁶⁷ The new trend in discipline is “restorative justice.” See Sara Lipka, *With ‘Restorative Justice,’ Colleges Strive to Educate Student Offenders*, *CHRON. HIGHER EDUC.*, Apr. 17, 2009, at A26.

⁶⁸ LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 230 (4th ed. 1998).

⁶⁹ *Id.* at 228.

⁷⁰ BICKEL & LAKE, *supra* note 16, at 35.

⁷¹ *Id.* at 199–200.

based educational solutions. Moreover, we can presume that a few students will *pretend* to come to an institution of higher education to learn, and have evil or nefarious primary purposes for their presence on campus. But this is not a large percentage of our population; rules work well for the wicked—there will be the drug dealers in any college population who need to go.⁷² We can presume however, that most students will come to higher education with largely laudable purposes, and transgressions, should we think of them that way, will occur in the context of a student's attempt to achieve larger, more admirable goals. It is unwise to build an entire system of managing an educational environment around a few very serious miscreants. Most students are completely unlike those for whom the criminal justice system was developed; very few of our students have a long history of criminal behavior.

Legalistic and/or rule-based systems—if appropriately streamlined for educational purposes—will work well for certain populations, but do not work as well for others. Moreover, rules can, and should, exist in our college environments to provide guidance and structure for behavior, even if they do not result in sanctions for an individual student. Rules *can* be great signifiers of widely held values, in some instances. Rules will also be needed for those students who have no respect for our environments at all, and come only with improper collateral objectives. Complex degree requirements, for example, may also function well in rule form. Sometimes rules even simply operate to remind individuals of appropriate aggregate behavior. Roman law knew such rules as “imperfect” obligations: such obligations come without significant threat of sanction but nonetheless are obligatory.⁷³ For example, signs in elevators typically say “No Smoking,” but there are no elevator police and I am unaware of anyone ever prosecuted for smoking in an elevator. Nonetheless, should someone ignite a cigarette in an elevator others in the elevator will use the rule as a way to attempt to modify the offending behavior: “Put that out!”

Rules have an important place in higher education even if they are not always the most appropriate or foremost tool to manage

⁷² Sadly, we are far too solicitous of these students procedurally. Many need to go, very quickly—some never to return. Endless appeals, elongated “hearings,” and ponderous legalistic “protections” often disable us from meeting the greater needs of our educational communities.

⁷³ JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 214 (Robert Campbell ed., 5th ed. 1885).

behavior. Institutions should not seek to reject rules as governing norms, but to put them in their proper place. Institutions may even discover that rules have heretofore unexplored power when they are disassociated from the classic legalistic notion that rules must be connected to sanctions and legalistic process to be efficacious.

Rules will also play a crucial role in the master academic plan. As part of the process of developing a master academic plan, students and institutions of higher education will integrate general *and* individual specific rules into a student's master academic plans. Some rules will be common for all; other rules will be specifically tailored to an individual student. Tailoring rules to an individual student is not pervasive today, but makes perfect sense in light of Millennial student populations. Millennials are used to being treated as individuals with unique needs.⁷⁴

When higher education uses rules in a process for management of the educational environment, and when students use rules in their master academic plans, it is crucial to communicate rules in appropriate *educational* discourse. The language of education is different from the language of law. Rules do not always have to be *legal* or *legalistic* rules. Educational discourse, as the United States Supreme Court itself has acknowledged, is rich with concepts like weighing, balancing, measuring, standards, principles, values, goals, and the like.⁷⁵ Educational discourse is the language of a facilitator university in its principal dealings with students. Although it is natural in modern society to correlate rules with legal standards, rules often exist independent of legal systems and can be formulated for other purposes in other ways. House rules, rules of etiquette, etc., do not read like court cases.

A prime example is higher education's four-letter word, "plagiarism." Colleges typically state their concepts of plagiarism by way of rules in codes. Plagiarism is considered a great academic evil. It is the sort of thing that will get a student expelled or expunged.⁷⁶ Plagiarism is so heinous that even using the term to describe someone's work is like invoking the name of Lord Voldemort: we dare not speak its

⁷⁴ NEIL HOWE & WILLIAM STRAUSS, *MILLENNIALS RISING: THE NEXT GREAT GENERATION* 32–33 (2000) [hereinafter HOWE & STRAUSS, *MILLENNIALS RISING*].

⁷⁵ See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁷⁶ Terri LeClercq, *Confusion and Conflict about Plagiarism in Law Schools and Law Practice*, in *PERSPECTIVES ABOUT PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 199 (Lise Buranen & Alice Myers Roy eds., 1999); Julie J.C.H. Ryan, *Student Plagiarism in an Online World*, in *STUDENT CHEATING AND PLAGIARISM IN THE INTERNET ERA* 56 (Ann Lathrop & Kathleen Foss eds., 2000).

name. The academic world is replete with discussions of what plagiarism is, and is not.⁷⁷

However, plagiarism is a *concept* and can never fully be expressed by prohibitive rules alone. Plagiarism is obvious in its most egregious examples, but sometimes difficult to see in more complex circumstances. In order to comply with *rules* of plagiarism, one must conceptualize the purposes of rules of plagiarism first. Rules do not explain concepts manifestly. (Asking students to conceptualize plagiarism from a complex set of rules is misguided, especially with Millennials who have trouble with rules in the first place.) Imagine trying to describe complex concepts such as “love” primarily with the use of rules. The era of legalisms leads higher education to believe the reduction of concepts to rules is desirable.

Rules can be used to foster a culture of academic integrity, but a vision of the appropriate use of academic material should precede rules of plagiarism. This is particularly necessary with Millennial students. Millennials value the use and possession of information differently.⁷⁸ They often have trouble understanding Baby Boomer views of the use of academic material, and sometimes believe that previous generations’ concepts of academic integrity are quaint and outdated. Many of the difficult issues that we face today regarding “plagiarism” are generational disputes over a vision of the use of material. There are deeply significant disagreements between Millennial students and their institutions with respect to the use of academic information. Using rules to mediate such a conflict is a poor choice: rules tend to enhance oppositionalism not resolve it. Those of us who have dealt with serious academic dishonesty matters sometimes see students who are indeed confused about what to use and how to use it, and we easily observe conflicts of values regarding information between their world and ours. There are of course, the bad students who do monstrous, willful

⁷⁷ E.g., MARILYN RANDELL, *PRAGMATIC PLAGIARISM* vii (2001); WENDY SUTHERLAND-SMITH, *PLAGIARISM, THE INTERNET AND STUDENT LEARNING* 69–70 (2008); Carol Bast & Linda Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U.L. REV. 777, 780–82 (2008); Laurie Stearns, *Copy Wrong: Plagiarism, Process, and the Law*, 80 CAL. L. REV. 513, 516–17 (1992).

⁷⁸ HOWE & STRAUSS, *MILLENNIALS GO TO COLLEGE*, *supra* note 52, at 120; HOWE & STRAUSS, *MILLENNIALS RISING*, *supra* note 74, at 9, 312; BARRETT SEAMAN, *BINGE: WHAT YOUR COLLEGE STUDENT WON’T TELL YOU* 67–68 (2005); JEAN M. TWENGE, *GENERATION ME: WHY TODAY’S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE TODAY THAN EVER BEFORE* 78–79 (2006).

academic misdeeds. These students have no place claiming that our rules and concepts of plagiarism are ambiguous. But there are a large number of teachable students who get caught in “plagiarism” tuna nets. Many students are simply misguided, confused, sloppy, have taken bad advice from others, or operate within their own frame of references on the appropriate boundaries for the use of information. Sending such people to plagiarism gallows is a poor choice as a first response in many cases.

In order to learn about values regarding academic information, students need to be taught these values and be offered a reasonable chance to internalize them. We may have to face the uncomfortable reality that many students have no desire to learn and follow our rules of information control. Those students should realize, from the outset, that their values and ours clash. Students must be taught *why* we are willing to crucify members of our community for transgressing our values. As an example, issues of misuse of legal academic materials have become so rampant in law school legal writing and methods programs that these programs now routinely run teaching modules just on the issue of the appropriate use of academic materials.⁷⁹

Many instances of the misuse of academic materials could be avoided entirely with the right amount of training and education. The master academic planning process should include discussions about critical values and standards regarding the use of academic information. Even students who do not violate rules will benefit from such a process. Colleges only capture a small fraction of the cheating and misuse of information that occurs in our academic environments, and it seems that the spirit of rules regarding the use of academic information is lost on many students. Cheating and the misuse of academic information remain extremely high in American higher education, despite our rule systems.⁸⁰ We ask too much of our rule systems when we ask them to foster a sound academic environment. A conflict in values cannot be solved with rules alone. For example, students today often avoid plagiarism issues by taking a source and rewriting it to the point that it

⁷⁹ ROBERT H. MILLER, LAW SCHOOL CONFIDENTIAL 130 (2000); Kristin Gerdy, *Law Student Plagiarism: Why It Happens, Where It's Found, and How to Find It*, 2004 BYU Educ. & L.J. 431, 432–34.

⁸⁰ Donald McCabe et al., *Cheating in Academic Institutions: A Decade of Research*, ETHICS & BEHAV. 219, 220–22 (2001); SEAMAN, *supra* note 78, at 67–69. *But see* Donald McCabe et al., *Academic Integrity in Honor Code and Non-Honor Code Environments: A Qualitative Investigation*, 70 J. HIGHER EDUC. 211 (1999) (finding that students at institutions with an honor code in place reported less cheating than students at institutions without an honor system).

does not technically violate rules against plagiarism. Students learn avoidance behaviors, as opposed to internalizing concepts of academic integrity.

Moreover, institutions of higher education should recognize that closely related to the concept of misuse of academic information and academic integrity is the reality of academic under-performance. Students unfortunately learn that they can sometimes do very little to avoid minimal academic probation standards. Students learn to skate, as opposed to being thorough, prepared, and committed to the academic enterprise. The phenomenon of academic under-performance and academic misconduct are deeply interrelated. Students who are called upon to do rigorous work are often unfamiliar with it and fall into predictable academic integrity traps.

A master academic plan process can address these issues directly. When a student's motivation changes from rule compliance to whether that student has endeavored in good faith academically and in the spirit of his master academic plan, colleges are more likely to have a greater impact on the level of academic integrity in educational environments.

The master academic plan also can help to identify and deal with issues that lead students down the path of academic misconduct in the first place. Even *some* dialogue regarding a student's overall well-being might reveal that a student has health, family, or relational issues, which might contribute to a motive to cheat or to cut corners. Experienced discipline administrators have all encountered tragic situations when students have had serious health, financial, familial, etc. issues that lead them to do things that they would not have done in other circumstances. But then it is too late—once a rule is violated such conditions cannot form an excuse for a rule violation even though an excuse might mitigate the punishment that is handed out. Discipline officers deal with lost educational opportunities of this type routinely. Students should be given a chance to recognize the dangerous path they are on *before* they take and make predictable mistakes.

Rules of plagiarism and academic integrity have not had the desired effect on the academic culture of modern American campuses. Even more disturbing, there are students who are learning dangerous academic lessons—such as how to avoid rules—because they are not receiving proper mentoring or intervention. Rules do not teach academic honesty on their own, and over-emphasis on rules and rule enforcement may actually make problems of academic dishonesty worse in some way.

c. *Longitudny/Latitudny*

Master academic planning aims to evaluate undergraduate students over an entire academic career using multiple criteria. Institutions of higher education today engage in only partial longitudinal/latitudinal evaluation of students. It is remarkable how little we know about many of our students when they graduate: the depth and width of their experience is sometimes known to us only through a transcript or personal encounter or two. Students can easily drift through our environments: we have built systems that give students the power to be invisible.

Students should receive mentoring with some level of continuity over their time in college. Consider Harry Potter, who received mentoring from Albus Dumbledore (and others), for many years in a consistent and comprehensive way. Of course, it may be difficult for most colleges to ensure that students have the same individual mentor for a given period of years, but it is not difficult to conceive of students receiving continuity in some form in comprehensive mentoring. Continuity could be generated via self-perpetuating mentoring teams, but there are other models that are possible. Mentors would likely serve more than one student, and might rotate from one mentoring team to other mentoring teams over time. At any one time, a student should be asked to identify a lead mentor as a principal and immediate contact, even if much of the work of a mentor team would be done collaboratively with more than one mentor. There should also be some process by which mentors may leave a team. A student may request a change in mentor, or an assigned mentor may not wish to work with a student at some point. Mentoring is, after all, a *relationship*, and like all relationships, there is always the possibility that either party can exhaust the potential of the relationship. There is little that is less facilitative than a dead or negative mentoring relationship. Evaluation of mentor relationships is essential to any good mentoring system.

Mentor *teams* ensure a certain degree of *longitudny*, which is essential for significant evaluation of a student to occur. This is also true with respect to *latitudny*—the depth and width of evaluation of a student. For most students in higher education today, evaluation is short and shallow. Institutions of higher education should seek to make evaluation longer *and* wider.

There is a tendency for institutions of higher education to only consider students on one evaluation dimension at a time. Thus a student is a champion, or a 3.25 GPA, or history major, or cellist. Students are often categorized in narrow categories, in a higher learning field that is

not very Aristotelian. But students are not one dimensional, or simply the sum of dimensions. The tendency to push students into their dominant dimension or the sum of their dimensions tends to sublimate important issues of a student's balance, focus, individuality, potential, etc. Institutions of higher education can too easily emphasize one feature of the student as a learner to the derogation of other aspects of that learner's personality and profile. Most dangerously, a student may learn to construct a vision of herself as the sum of parts, not a *person*. We leave little space for inherent aspects of a higher learner's experience—such as the basic human need for quantity (not just quality) time, the imperative for periods of cognitive dissonance, the drive for meaning in experiences, etc. “A cellist with a 4.00 on her way to medical school with a penchant for French food” does not describe a learner, but is merely a statement *about* that learner. Such statements leave out the not-so-tidy but crucial features of such a learner, such as “she cannot function well after dinner,” or even “plays the cello because her parents wanted her to.” Sadly, we often discern the realities about most of our students only when they are in trouble academically or otherwise. When a learner is no more than a construct of objective measures, the person inside strikes out, or self-medicates, or worse.

We often miss enormous opportunities with students. During the sanctioning process of a proceeding against a student, colleges typically consider “mitigating” factors, which essentially give a wider picture of why and how a student came to be in trouble in the first place. We discover that a serious cheater, for example, has a learning disability or other challenges. Had we discovered the challenges and advised accordingly the student might have avoided rule violations in the first place. There are opportunities beyond sparing a student from the rod.⁸¹

Latitude plays a role in preventative interventions—educational efforts directed to avoid conflict, failure and transgression in the first place. But the role of latitude is not limited to mitigating the negative. A wider long-term perspective on a student can help to identify opportunities as well. Van Wilder for instance, trolled through

⁸¹ Consider Han Solo. Solo has many dark characteristics—at times he is brash, reckless, slow to be inspired, selfish even. When the rebel alliance is about to attack the first Death Star, he “bails”—and Luke Skywalker scolds him. Luke is the good student of the force; Solo, the bad. Yet, when Luke is in peril in his attack on the Death Star, Solo sweeps in to attack Darth Vader and clear the way. It is Solo's dark side, his “I will do it my way” attitude that saves the day in the end. His recklessness is a strength and a weakness, which Luke later learns. When facilitated properly, every student's dark side has Solo's light side potential. STAR WARS: A NEW HOPE, *supra* note 21.

college for nearly a decade until he discovered that he had a deliberate reluctance to graduate, which was based on his fear of becoming like his father who was a workaholic.⁸² It took a fellow student to see this; to help Van Wilder to see it.

Van Wilder suffered from a poverty of post-graduation imagination—ironically, as a college student he was highly imaginative. There are many post-graduate futures that could appeal to a Van Wilder. However, none of them manifested for him, because he had no mentor to offer him visions of his future life to consider. For the most part, he drifted between (usually) pejorative encounters with administrators who could only interact with him one dimensionally. No one took a long and wide view of Van Wilder, save for that fellow student who was charged with writing a story in the college newspaper about him and his time in college. That student's biographical sketches of Van Wilder as a *person* helped Van Wilder to mature and to graduate. In essence, the newspaper story *was* his master academic plan in reverse. Van Wilder became his own mentor, with the facilitation of a fellow student. Van Wilder is a powerful archetypal figure for modern students; in his world, adults are clueless and/or oppositional, and students must figure life out on their own and with the help of their friends.

There are countless college students who *technically* succeed, but have non-optimal experiences in their time in college. We take credit for success with successful students but overlook that there was the possibility of a more optimal experience for many students. It will not be possible to create educational nirvana for every student, and to cut every potential transgression off at the pass. But a mentor team has a better chance to improve conditions for all students, even great ones.

d. *Judgment and the Use of Multiple Evaluation Modalities—The Master Academic Plan and Four Quadrant Analysis*

A mentor team will need many tools to evaluate a student and to help a student at self-evaluation. As part of the master academic planning process, a mentoring team will collaborate with a student to set expectations, standards and goals in both objective and non-objective ways.

These will fall into four quadrants. The four quadrants are:

⁸² NATIONAL LAMPOON'S VAN WILDER (In Motion-AG Movie & TV Productions/Artisan Entertainment 2002).

1. The Domain of Community Rules; Objective/General; the Rights and Responsibilities Quadrant;
2. The Domain of Rules for Self; Objective/Individual; the Individual Achievement Quadrant;
3. The Domain of Civic Engagement; Subjective/General; the Community Values Quadrant; and
4. The Domain of Inspiration; Subjective/Individual; the Engagement Quadrant.

	General	Individual
Objective	Quadrant 1— <i>The Rights and Responsibilities Quadrant</i>	Quadrant 2— <i>The Individual Achievement Quadrant</i>
Subjective	Quadrant 3— <i>The Community Values Quadrant</i>	Quadrant 4— <i>The Engagement Quadrant</i>

Each student will plan, and be evaluated, in all four quadrants.

In Quadrant 1, a student will focus upon objective, campus-wide, or generally applicable standards. Thus for example, an institution of higher education might establish minimum GPA standards for academic retention, which apply to all. These objective evaluative criteria will be featured in a master academic plan and a student will have to meet these objective general expectations. Objective general standards will form a core of minimum requirements for a student. One would assume that the core requirements would be waived or altered only under extremely unusual circumstances, if at all. Ordinarily students who do not want to accept these evaluative criteria should be mentored in the consequences of not working with general academic community-wide restraints: or, these students may be candidates for transition or delayed matriculation.

We have general expectations of our students (as they do of themselves) that are more than minimums: these expectations are difficult or impossible to express adequately in objective or rule form. Thus, in the third quadrant, an institution of higher education will set forth evaluative standards that are non-objective, or subjective such as values, principles, and standards criteria, *inter alia*. Quadrant 3 expresses community values and standards and recognizes that the modern college has the right and responsibility to rely upon, and protect,

its values even if those values are not easily expressed in objective ways, such as rules.

It is important to link the two quadrants—1 and 3—by drawing connections with certain rules and objective criteria and values, goals, principles, etc. expressed in Quadrant 3. In many ways, Quadrants 1 and 3 are like yin and yang. These quadrants function well *only* when paired with each other.⁸³ Quadrant 3 has its own vitality on equal terms with Quadrant 1. Values, principles, and standards, etc., do not exist in higher education simply to support sanctions, explain rules, and castigate miscreants. Values and principles, etc. in are also suited for inspiration, aspiration, and the like and thus often connect naturally to awards, praise, approval, etc. (Legalisms primarily use “evils,” as philosopher John Austin put it, to address noncompliance.⁸⁴) But modern higher education needs a system of inspiration/reward as well. A student who has shown good citizenship or leadership should expect acknowledgement and opportunities for being a good citizen.⁸⁵

⁸³ Quadrant 1 is the Rights and Responsibilities Quadrant; Quadrant 3 is the Community Values Quadrant.

⁸⁴ AUSTIN, *supra* note 9, at 22.

⁸⁵ Traditional Greek letter organizations often feel the pinch of legalisms. Greek groups actually add a great deal to the campus environment but receive little relatively speaking by way of rewards or praise. For example, Greeks often disproportionately create social opportunities for other students. However, in creating benefits for campuses, Greek groups often fail to receive necessary resources. Instead, misdeeds are punished. Administrators have told me “why should we reward people for doing the right thing?” Administrators, even college presidents, sometimes feel that students should do good for its own sake. It is as if higher education has become dominated by good Kantians and Clint Eastwood characters. Philosopher Immanuel Kant believed that much of what is right, good and law arises from free beings willingly and intelligently living in accord with rules they make for themselves. Doing right is an end in itself. See Immanuel Kant, *Universal Principles of Law and Morality: The Theory of Right*, in *LAW & PHILOSOPHY* 43–44 (Thomas W. Simon ed., 2001); RAWLS, *supra* note 8. Millennial students however are hardly Kantians. Instead, they have been treated to a heaping helping of rewards to motivate their behavior; and punishments were few and far between. Intrinsic motivation is not primary.

Millennials have developed in a culture of motivation by reward and are often startled to encounter higher education’s fascination with punishment doing good for its own sake. Psychologically, we know that carrots are powerful motivating tools. This is why in the past, colleges used rewards to motivate students. However, reward systems died in the Civil Rights era. There is a strong connection between adopting an overly objective legalistic approach to managing an educational environment and losing a culture of reward to motivate students. For legalists, rewards seem superfluous because individuals should be motivated to do the right thing for fear of a sanction. Or, doing the right thing should be motivating for its own sake. In jettisoning a culture of rewards in favor of a culture of punishments, American higher education has essentially given up the opportunity to make values, principles, standards and the like real in the community.

By focusing so heavily upon rules and sanctions, we risk turning out a generation of learned individuals who have acquired mostly negative skills of rule avoidance. We need higher education learners who seek challenges and reward as opposed to those who simply avoid sanctions and failure. Often, the best reward is acknowledging students: there is power in praise, the least utilized power tool in the higher education shed. It is especially important that higher education embrace this approach with Millennials. Millennial students have often been praised for doing relatively small things. Sadly, many students report that they seek money, family, and a successful career after college—or other mostly objective criteria. Unfortunately, overreliance on objective criteria of success also tends to promote attitudes of commodification. Basing our systems of higher education so heavily upon objective criteria inculcates the meta-value that objective criteria have inherent priority in life planning. We play into the very thing we lament. Students focus heavily on grades and high paying jobs (as do their parents). Modern higher education actually tends to promote these views by the ways in which we manage our environments. What we model, they learn. Many modern college students would view James Joyce as a drunk, F. Scott Fitzgerald a hopeless romantic, and Hemingway a self-destructive suicidal individual, but believe that Jay-Z or an American Idol epitomize human achievement because they make money, are highly self-actualized, and are on television.

Quadrants 2 and 4 reflect individually focused evaluative structures for students.

Quadrant 2 features objective individualized evaluative criteria. Some students will need, and want, rules or other objective evaluative criteria—just for themselves—in their master academic plans. These objective criteria may differ significantly from those offered to and used by other students. For example, a student with a history of substance abuse coming to college might need, and want, accelerated rules related to alcohol use. Or, an academically at-risk student might select learning criteria that are objective—say, meeting some test score minimums or

In much the way that rules gain meaning through sanctions, subjective criteria such as values, principles and standards gain their meaning through positive reinforcement, affirmation, reward, comradery, etc. When a student told me honor cannot be codified, that student was in part expressing to me the fact that societies based on honor reward honorable behavior and as much as they punish dishonorable behavior. It is unlikely that modern American higher education can continue into the millennium without reconsidering its position on using merits and rewards as tools for managing the educational environment.

seeking out tutors. Some students might have study rules, or even rules for the types of friends they associate with. Athletes may want to make rules regarding athletic performance. This is their personal *achievement* quadrant.

Students and mentors may believe that the preferred approach may be to address these concerns in Quadrant 4, first. But for others concerns may be significant enough to favor approaches in Quadrant 2 on an objective basis. Some people simply need to make rules for themselves to achieve certain goals; others need or want what Quadrant 4 offers first.

Quadrant 4 is the *Engagement* Quadrant, and represents and relates to a student's non-objective, self-oriented evaluative criteria. We speak of engagement as a goal in student development, but administrators from a Baby Boom era dominated population have a preference for *civic* engagement—group and outer-world directed engagement over inner-world directed engagement. Millennials are often disengaged at a personal level. Indeed college students often disengage the higher education experience from many things, except very concrete ends such as getting a job, making more money, etc. Apathy towards learning for its own sake seems to run high in this generation: college students all too often view learning as a necessary evil to gaining successful access to the “real world.” Students report they drink to become drunk: they literally disengage from themselves via alcohol and/or drugs. Students hook up frequently with compatriots—often doing so while highly intoxicated—and have little-to-no recollection of what occurred. Intimate relations among modern college students reflect a self-distancing, and a level of “intimate” emotional disengagement. It is hard to imagine a time in human history when intimate physical relations have occurred with such frequency and such dispassion.

Administrators who place emphasis on engagement as a *civic* virtue must confront the reality that students must be engaged at an individual level *first* before they have any real chance to engage in civic discourse. Modern higher education does little for students in the large to ensure that such engagement occurs and is genuine. Even our finest students—those who have achieved demonstrable success on objective measures—are at risk of disengagement. In a crucial sense, *all* modern college students are at risk, not just those at the fringe or in some sub-populations. Alcohol and drug abuse, sexual misconduct, cheating, and many other ills are common for the Millennial generation. Millennials need some form of mentoring for individualized engagement in higher education. Millennials are highly self-*actualized*, but paradoxically not

particularly self-directed, or self-engaged, at least in higher learning environments.

In many ways, then, Quadrant 4 is the most important quadrant in a student's master academic plan. The Four Quadrants together express the connections a student has with a learning environment and that student's goals and needs, etc. Through master academic plans, institutions of higher education and a student have a better chance to co-create a reasonable learning environment and a reasonably safe and directed learner.

Quadrant 4 represents the hopes and dreams of the learner. Consider the college movie *Accepted*.⁸⁶ The movie's premise is that students who do not get accepted at any colleges can start their own. Students at the movie's fictional college—South Harmon Institute of Technology—are given a choice to design their own majors. When asked at one point in the movie, “What do you want to study?” one student comments that no one has ever asked him that before: one student presciently says “Aren't you supposed to tell me?”⁸⁷ South Harmon students go on to have a level of involvement and engagement that any college could envy, even if the curriculum is, well, ridiculous.

Accepted represents a reality—modern college students often do not feel engaged at institutions that offer cookie-cutter, highly non-individuated paths to graduate. The protagonist of the movie—the college's founder and a student—makes a quintessential Millennial generation argument. While on “trial” (poetically pitting himself against personified objectivism) trying to gain accreditation for the “college,” he argues to the accreditation body,

You know what? You're a criminal. “Cause you rob these kids of their creativity and their passion. That's the real crime! Well, what about you parents? Did - did the system really work out for you? Did it teach you to follow your heart, or to just play it safe, roll over? What about you guys? Did you always want to be school administrators? Dr. Alexander, was that your dream? Or maybe no, maybe you wanted to be a poet. Maybe you wanted to be a magician or an artist. Maybe you just wanted to travel the world. Look, I - I - I - I lied to

⁸⁶ ACCEPTED (Universal Pictures 2006).

⁸⁷ *Id.*

you. I lied to all of you, and I'm sorry. Dad, especially to you. But out of that desperation, something happened that was so amazing. Life was full of possibilities. A—and isn't that what you ultimately want for us? As parents, I mean, is—is that, is possibilities. Well, we came here today to ask for your approval, and something just occurred to me. I don't give a [poop]. Who cares about your approval? We don't need your approval to tell us that what we did was real. “Cause there are so few truths in this world, that when you see one, you just know it. And I know that it is a truth that real learning took place at South Harmon. Whether you like it or not, it did. “Cause you don't need teachers or classrooms or —or fancy highbrow traditions or money to really learn. You just need people with a desire to better themselves, and we got that by the [poop] at South Harmon. So you can go ahead, sign your forms, reject us and shoot us down, and do whatever you gotta do. It doesn't really matter at this point. Because we'll never stop learning, and we'll never stop growing, and we'll never forget the ideals what were instilled in us at our place. “Cause we are [poop] heads now, and we'll be [poop] heads forever and nothing you say can do or stamp can take that away from us! So go!”⁸⁸

In a sense, many modern college students are waiting to be “accepted.” Many students have limited skills to answer basic life-planning questions such as “What do you want to do with your life?” All too often, college students pass through their college experience uninspired, unempowered, and disengaged.

Colleges should offer opportunities to experience engaged and facilitated self-direction. Some students, like Luke Skywalker or Harry Potter, can lean on fate to find their purposes and mission in life.⁸⁹ Perhaps the social context for Millennials will call them to some grand plan of action—as was the case with students in college in the 1960s. What seems most likely is that this generation's great challenge is itself

⁸⁸ *Id.* (Bartleby Gaines; expletives replaced with synonyms).

⁸⁹ Consider, however, what happened to Luke's dad in Jedi college: when Anakin Skywalker lacked an inspiring path he turned to the dark side, which turned on him. STAR WARS EPISODE III: REVENGE OF THE SITH (LucasFilm/20th Century Fox 2005).

and the crisis of false expectations that they will experience. Millennials must confront and overcome being over-protected and over-programmed in the value of self-esteem—they must learn failure and limits. This is a generation that must find a way to die and be reborn. College today provides the unique opportunity to tackle this generational challenge and provide the necessary context for success in the face of these obstacles.

Therefore there are two key points for a facilitator university.

First, modern higher education tends to place emphasis on the types of civic engagement that have been emblematic of the Civil Rights era and the era of legalisms. It is not that we should value one type of engagement category over another. Instead, we should realize that the engagement that attended the Civil Rights era does not have exactly the same significance or relevance to this generation. We need to recognize that the modern generation of college students needs a form of individualized engagement—plan, vision, aspiration, challenge, etc. By comparison to previous generations, Millennials are relatively lacking in that type of individualized engagement.

Second, the patronizing concept of “discipline” is misplaced in higher education. We have allowed the age of legalisms to lull us into believing that there is a need for *discipline*. Discipline problems are symptomatic of malfunctions in a higher educational environment; the need for discipline signals a failure of some form or another, by a student or an educational environment, or both. Many, many instances of “discipline” are the direct result of failures in planning and intentionality, and dissonance in expectation. Discipline is higher educational failure objectified, and represents lost opportunities.

The master academic planning process is, in essence, a higher education assessment tool for institutions *and* students. In other words, success or failure in the master academic planning process will identify strengths and weaknesses in higher education itself—it is truly a self-study process for students and institutions. Anakin Skywalker repeatedly carped about the mentoring he was not receiving (and it was painfully obvious that the Jedi were failing him) but no one, save an evil emperor, listened carefully. The Jedi Council, like many modern higher education institutions, did not have a lens through which to process certain types of evaluative criteria of the job it was doing. The Jedi failed Anakin as teachers: they gave him powerful skills and no sense of his place or purpose in the force in any positive way he could hear. Obi Wan ultimately realized this, and sacrificed himself to Darth Vader—an atonement for educational sin by the Jedi. Master academic planning can open up windows to new ways of managing our educational

environment and recreating it. A master academic plan is a two way street.

The master planning in Quadrant 4 is what makes education so vastly different from any other kind of business. There are many aspects of modern education that admit of commodification concepts. However, Quadrant 4 defies commodification (unless of course a student seeks that and an institution agrees). Connecting with a student on specific individual goals, aspirations, and challenges is a hallmark feature of a facilitative relationship—it is too much to even refer to a facilitative educational relationship as a “service industry” activity. Few industries seek to have consumers serve themselves. We “serve” our students in Quadrant 4 only in the most extreme sense of the word as used in a commercial context. We do not offer educational cheeseburgers with fries, but assist and guide individual students in developing life planning and assessment skills for themselves. When educators do this kind of planning, evaluation, and implementation with students they will experience a sense of honor and opportunity. Service to those who seek facilitation to grow is a great privilege; it is imbued with a level of trust that no legal term—even fiduciary—can describe and no law could ever adequately protect. Quadrant 4 is the Domain of Inspiration.

The Four Quadrants then help to explain several conundrums in the modern higher education environment. Modern higher education is a quantum experience: students have simultaneous, overlapping experiences from different points of view. The Four Quadrants describe signature interrelated features of the college experience. Each quadrant has a domain. Quadrant 1 is the domain of *rules*. These rules are for the community at large. Rules are good when their proper place and purpose is recognized. Quadrant 1 expresses responsibilities and opportunities with respect to an individual in an educated community. Quadrant 2—a cousin to Quadrant 1—is individual in focus. Some rules are not necessary for a community. For example, an individual attempting to lose weight may seek rules to guide their behavior, but these rules are not essential, necessary or even appropriate to a general community. Quadrant 2 is perhaps the most Kantian quadrant in the sense that here a student may find freedom, opportunity and responsibility through expressing objective criteria as guideposts for their own development. We might short-hand this quadrant as “*rules for self*.”

Quadrant 3 is the land of community standards and values and *civic engagement*. Campuses really do have a unique culture and value system, but often the expression of a unique culture and values runs headlong into a problem that values, principles, and standards *also* have

a personal dimension. Quadrant 4 placed in juxtaposition with Quadrant 3 illustrates this point. Higher education must realize that some values may be shared in a community but gaining consensus on all, or perhaps even many, values, standards, and principles may be impossible, unnecessary and even deleterious to a student's growth. Consider the endless battles over the use of student funds for purposes that some students object to.⁹⁰ Students are constantly forcing institutions to cross the boundaries of Quadrants 3 and 4 asserting *their* values as general ones: in response institutions may try to argue that general values *should* be incorporated in all students' master academic plans. Recognizing the distinction between Quadrants 3 and 4 helps to mediate such a conflict. An institution might say, for instance, that it seeks to create an environment receptive to all points of view, and could assert this as a Quadrant 3 value. Students who do not wish to engage such an environment will know this from the beginning—at matriculation when such standards are clearly articulated as the pluralistic values of the community. Students who seek a different campus value will know from the outset that their values conflict with the institution's values. Should students choose in their master academic plans to attend a school that they seek to reform or challenge, the master academic planning process can help such students identify reasonable, fair, realistically achievable horizons of reordering the pluralistic values of a larger community. Some students transfer from schools after long and protracted battles over core values. We should admire our Ghandis, Dixons, and our Martin Luther King Jr.'s, but such students must realize that changing a normative culture on a systemic level requires a great deal of personal sacrifice. If students are willing to shoulder this burden and have the resources, allies, etc., to do so, then we can applaud and even facilitate their efforts. But at the very least, we owe students the opportunity to understand what they face before they embark upon such a dramatic course of action. Major challenges lie ahead for martyrs.

The master academic plan is an organic, fluid document. The era of legalisms would tend to view master academic planning through the lens of contract law. Contract law focuses upon legal obligations arising out of certain kinds of promises, which are made with the understanding of the legal consequences of such promises.⁹¹ Contract law tends to divide promises without legal consequence from those with

⁹⁰ See, e.g., Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

⁹¹ E. ALLAN FARNSWORTH, CONTRACTS 3 (4th ed. 2004).

legal consequence.⁹² However, students at educational institutions should approach master academic planning not as a contract, but as a type of promising or undertaking or endeavor for which there are consequences, even if there are not *legal* consequences. Again, legalists such as John Austin found such concepts to be nonsensical: legalists understand obligation created by promise only through rule and sanction for failure to comply with rule. But human behavior is far more complicated than law devised by humans can ever capture; and promises are of many types when human beings undertake long-term plans and endeavors. Promises can be meaningful even if they entail consequences that are not legally binding consequences, perhaps more so. Not every promise or undertaking should be, or is intended to be, legally binding.

An overly legalistic system of managing an educational environment tends to teach the message that all promises are contracts and binding in law if there are real promises at all. Students in a legalistic world will usually avoid making such promises, just as institutions will. The college “contract” then becomes sterile and cold, and formed only out of that which parties are very certain they can provide—and overly objectified. Legalisms breed exactly what we see today—an unclear sense of what exactly is promised by colleges and students with malformed visions of why they are in college. Legalisms create issues of intentionality and mutual expectation—individuals are resistant to express intentions for fear of consequences.

Educators cannot afford to be so promise or aspiration risk-averse. Over-emphasis on legalisms also explains the unusual way that courts approach college contract cases. Intuitively, courts recognize that the very nature of education is promising and endeavoring, but that contract law can never capture, and could kill, the very thing it might attempt to define—academic freedom in action. Courts—correctly—stay their hand in contract cases against universities, except insofar as to protect students against fraud and to insure that they are treated in a substantially fair way. We should encourage students to take chances with meaningful consequences; we should also encourage institutions to share and endeavor in the kinds of bold intentionality that may well be revised in light of new circumstances. Promises and other statements of aspiration can, and should, be made without binding the institution of higher education in legal contract law. United States Supreme Court cases like *Horowitz* and *Ewing* fully understood that such promissory activity can exist in education without peril of litigation.

⁹² *Id.* at 47–48, 53–54.

Higher education must be vigilant to ensure that legalists do not pervert the master academic process into some kind of complex commercial contract. Courts often recognize that there are aspects of the educational relationship that are contractual—certainly it is in some ways. For example, one should be able to get one's money back from a higher education institution under some circumstances.⁹³ But the master academic planning process involves far more than the *legal* contractual relationships that define the outer boundaries of the learning process in its transactional dimension. Thus, the master academic plan should not be the place for contract language nor should it be conceived of as a legal contract. The master academic plan is an endeavoring or covenant—a statement of aspirations that have consequences in dimensions other than legal. A legalist would make no such space, but education requires it.⁹⁴ The master academic plan is a living, organic covenant, and we should have faith that those who do not faithfully abide by their educational covenants will receive a powerful consequence—the loss of opportunity of higher learning.⁹⁵

⁹³ Connecticut Attorney General's Office Press Release, State of Connecticut News Release by Attorney General Richard Blumenthal, Department of Higher Education Commissioner Valerie F. Lewis, and Department of Consumer Protection Commissioner Edwin R. Rodriguez, <http://www.ct.gov/ag/cwp/view.asp?A=1949&Q=307750> (Dec. 15, 2005) (announcing intent to file lawsuit and seek refunds for students from fraudulently accredited massage school); see also J. Douglas Drushal, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L.J. 608 (1976).

⁹⁴ This feature of higher education master academic planning may make it significantly distinct from many features of K-12 education planning. In K-12, education planning is often legally required and has significant ramifications in law. Perhaps this is due to the fact that students have legal rights to K-12 education that they do not have in higher education. But more likely it is due to the fact that the measurable outcomes of higher education usually differ substantially from many of those in primary school. As we move up the scale of learning to more esoteric forms of human comprehension, legal contracts relating to learning are less appropriate. The law essentially reflects this in higher education by refusing to recognize broad based rights of educational malpractice. See *Ross v. Creighton Univ.*, 740 F. Supp. 1319 (N.D. Ill. 1990); *Moore v. Vanderloo*, 386 N.W. 2d 108 (Iowa 1986). The law of educational malpractice is consistent with *Horowitz's* and *Ewing's* protection for academic freedom.

⁹⁵ There is always the concern that a court would interpret a master academic plan as a contract, and make it legally binding. Perhaps we are too deep into an era of legalisms to back out. However, the key is to write and develop master academic plans using educational discourse and in a way that clearly shows that students and institution do not seek adjudication of their differences relating to master academic plans. A mutual agreement on non-justiciability might help and a master academic plan might include a dispute resolution process.

e. *Individuation*

Objective, autonomous, legalistic rule-based systems of educational management favor identical rules for all. Individuation occurs when a student transgresses a rule or policy; now the rule is *applied* to that student. Many students engage in negative behaviors but never individuate in that way at all by being caught for a rule violation. Individuation with respect to academic difficulty occurs in grading or other assessment often only after a student has serious academic trouble. Given the costs and stakes of American higher education it is remarkable how little individuation occurs. Dean Wormer believed in individuation, but in a mean-spirited way. He advocated to a disciplined member of Delta house, “Fat, drunk and stupid is no way to go through life, son.”⁹⁶ Sadly it is possible today to go through higher education developing poor and unhealthy lifestyles, substance abuse problems, patterns of cheating, and not learning much of anything that is demonstrable. The student Dean Wormer admonished was aptly nicknamed “Flounder” by his fraternity, which is exactly what many college students do without individual focus and attention.

Objectifying students in terms of their behavioral manifestations—and mostly for *negative* manifestations—has been a hallmark feature of the era of legalisms. Bad character equals rule offenses. This vision of students as behavioral units would have been somewhat foreign to higher education merely two generations ago. Who you were as a person mattered greatly. Family connections counted, and students in higher education were weighed and measured by criteria other than just rules.⁹⁷

Higher education has individuated in other circumstances—especially when it has had to, or it is financially beneficial to do so. Perhaps the biggest shift to individuation in American higher education

⁹⁶ NATIONAL LAMPOON’S ANIMAL HOUSE, *supra* note 17.

⁹⁷ The obsession with measuring outward behaviors – and not attempting to individuate students in other ways—arises in part from the fear of lawsuits. The age of legalisms has been marked by a desire to reduce or eliminate error in student discipline process, so as to avoid litigation. There is a very high price to pay for being so risk averse. Institutions of higher education often ignore the fact that they make wrong non-decisions because non-decisions may escape accountability. Objective rule-based systems are prone to make error in decisions *not* made and conduct *not* regulated. We attempt to reduce our compliance error by hermetically sealing out error: it may appear that non-decisions leading to harm cannot be identified as process error, since no process occurred. This type of thinking is so deeply engrained in the consciousness of higher education that most modern administrators have trouble understanding causation arising from inaction, non-action, or indifference. This by the way reflects the *legal* definition of causation of harm, which is skewed towards actions, not inactions.

arrived with the need to meet Americans with Disabilities Act requirements (and the requirements of other disability laws.)⁹⁸ Disability law focuses a great deal upon reasonable accommodations for students with recognized disabilities.⁹⁹ There has been tremendous litigation over disability accommodation.¹⁰⁰ Administrators seeking to comply with disability law must deal with that student's special needs, disabilities and abilities—the law discourages one-size-fits-all solutions.¹⁰¹ The law's requirements related to accommodation are very specific to an individual student; although administrators can develop solutions for different types of disability, accommodation decisions still must be made on a case-by-case and individual basis.¹⁰² The best plans for accommodation focus upon not just meeting the challenges of a disability but upon developing a plan for success for that student overall.¹⁰³ Achieving success requires that an institution of higher education focus upon a student's special talents, abilities and opportunities as well.

Students may receive a similar type of individuation on athletic competition teams, and in other discrete areas in higher education, as well. For example, students who compete in intercollegiate athletics

⁹⁸ See generally, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2006); KAPLIN & LEE, *supra* note 16, at 391–99.

⁹⁹ 42 U.S.C. §§ 12181–12189; KAPLIN & LEE, *supra* note 16, at 391–99.

¹⁰⁰ See, e.g., *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1991). See also *Application of Federal Disabilities Law to Incidents of Threatened or Attempted Suicide on Campus*, 18 SYNTHESIS: LAW & POL'Y IN HIGHER EDUC. 1250 (2006) (summarizing OCR letter rulings at two Universities with regard to due process rights and students' mental health conditions).

¹⁰¹ For example, The George Washington University dismissed student Jordan Nott after Nott sought help from the GWU counseling center for his depression. Nott filed suit against GWU, see First Amended Complaint, *Nott v. The George Washington University*, Civil Case No. 05-8503, Superior Court of the District of Columbia (available at <http://www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf>), prompting discussion among higher education professional about what procedures could and should be in place to address student psychological needs. Rob Capriccioso, *Counseling Crisis*, CHRON. HIGHER EDUC., Mar. 13, 2006, available at <http://www.insidehighered.com/news/2006/03/13/counseling>. Nott settled with GWU in 2006. Eric Hoover, *George Washington U. Settles Lawsuit With Ex-Student It Suspended After He Sought Help for Depression*, 53 CHRON. HIGHER EDUC., Nov. 10, 2006, at A39.

¹⁰² Paul S. Appelbaum, "Depressed? Get Out!": *Dealing with Suicidal Students on College Campuses*, 57 PSYCHIATRIC SERVS. 914 (2006), available at <http://psychservices.psychiatryonline.org/cgi/reprint/57/7/914.pdf>; Capriccioso, *supra* note 101.

¹⁰³ KAPLIN & LEE, *supra* note 16, at 968–70.

often receive a great deal of individual attention from a coach or team of coaches. The coaches are, and must be, interested in more than the student's ability to shoot three-point shots, block or score field goals. Moreover, certain academic programs, such as aviation programs, are so competency focused that students will receive a great deal of individual mentoring, or students might achieve individuation by becoming sick, having roommate issues, etc. However, a consistent theme is that individuation often occurs most often when there is a *problem*. Higher education back-loads most student individuation as problem solving after a negative event or behavior.

Individuation is also essential because higher education learners are not of one type nor are they at the same place at the same time. Students have an array of intelligences and a variety of unique personal abilities and disabilities.¹⁰⁴ For a given learner, opportunities for further academic and personal growth depend upon that learner's "zone of proximal development"¹⁰⁵ and when applicable, other specific factors.¹⁰⁶ Higher learning does not happen on a strict schedule or in neat patterns at all times. The pace of learning is individual.

The implications for managing an educational environment are revolutionary. We must move from contract to covenant, from reacting to planning; and from objectifying students to realizing individual potential. Students do not typically receive individuated contracts as such. Instead, students X, Y, and Z all have essentially the same contract with their institution of higher education.¹⁰⁷

Yet learners are not essentially homogenous. Students have special needs and aptitudes that require individuation. The one size fits all "contract" model does not work well to meet student opportunities and needs. Many college students show no drive or enthusiasm for learning. Teachers are often left to cajole interest in class. Teachers must try to "sell" the educational "product" on a class-by-class basis to

¹⁰⁴ See GARDNER, FIVE MINDS, *supra* note 54; HOWARD GARDNER, MULTIPLE INTELLIGENCES: NEW HORIZONS (2006) [hereinafter GARDNER, MULTIPLE INTELLIGENCES]. Gardner summarizes his theory of multiple intelligences by stating "[m]ost people think there is but a single intelligence; [Multiple Intelligence] theory holds that we each have eight or more intelligences, and we use them to carry out all kinds of tasks." GARDNER, MULTIPLE INTELLIGENCE, *supra* note 104, at 26.

¹⁰⁵ See L.S. VYGOTSKY, MIND IN SOCIETY: DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES (1978).

¹⁰⁶ GARDNER, FIVE MINDS *supra* note 54, at 161–63; GARDNER, MULTIPLE INTELLIGENCES, *supra* note 104, at 56–60.

¹⁰⁷ A major exception, noted above, is when a student is subject to disability law. Under these circumstances a student is likely to get a far more tailored "deal" than other students.

“consumers” who sometimes seek to be cheated out of the very product they are “buying.”¹⁰⁸ Viewing higher education “transactionally” reveals a core problem. “Buyers” (parents and students) primarily wish to “buy” a credential and future opportunities; “sellers” (institutions of higher education and teachers) want to sell the process of education. Sometimes, neither “party” truly accepts the other’s terms squarely. Institutions of higher education do not seek simply to give credentials, and typically make no future promises relating to success in life after college; college students often view the education process itself as a necessary evil to obtain a credential to gain entry into the “real” world. Individuation can help to reduce commodification of higher education by treating learners as individuals, and engaging them comprehensively in their own learning process. Higher education can reduce the view that education is a transaction via individuation.

Individuation will also make rules more efficacious as well. Attempting consistently to apply a large number of general, objective rules to a sizeable student population is an almost hopeless endeavor – and misses the mark. A small sub-set of students engage in the most risky forms of behaviors; this population needs tough rules the most.¹⁰⁹ The goal of “fairness” in enforcement is misdirected. Institutions of higher education lack the resources to gather up all rule offenders. Indeed, if we were to enforce our rules against cheating and alcohol use

¹⁰⁸ My colleague Bradford Stone, who is a leading scholar on commercial contract law, made this point to me several times.

¹⁰⁹ A note on targeted enforcement: I have encouraged institutions in higher education for over a decade to target and focus rule enforcement efforts on highest risk populations. Many colleges and universities resist this concept. The law does not prohibit targeted enforcement, unless we target with improper or unlawful purposes or goals. Resistance to targeted enforcement is grounded in the legalist’s fascination with fairness, objectivity, uniform codes, and standardized student contracts. We approach discipline the way parents of many Millennials approach Christmas. Everybody had better get the same amount of “presents” more or less, or there will be trouble. We respond to students’ complaints that they are treated differently or unfairly with a great degree of solicitousness. At some level, philosophically, we sometimes agree with their unstated premise—that no discipline should be meted out to any student unless the same punishment is handed out to all students who engage in the same behavior.

There are the select few students who generate far more than their share of problems. Consider for instance, the problem of high-risk drinking. A small percentage of students consume the largest amount of alcohol, and account disproportionately for risks in the academic environment. Targeting these students can have an important effect on the overall safety of the campus. The assumption that frequent offenders will be caught more frequently is false. Many heavy drinkers have developed excellent avoidance skills (there are also many good students who will be caught up in enforcement nets disproportionately).

on every offender, most of our students would be in serious rule trouble, often. Selective enforcement is all we can realistically achieve; indeed our rule systems sometimes work *only* because they cannot be enforced consistently. Would our campuses have less cheating and less alcohol use tomorrow if everyone were sanctioned simultaneously today and every day? More enforcement would also likely cause widespread student avoidance behaviors. Indeed, when we have seen sudden “strict” enforcement of rules, student populations have rioted¹¹⁰ or left the higher education environment and moved to spaces with less enforcement.¹¹¹

Uniform enforcement of large rule systems is not the best way to secure the environmental needs of a higher learning community. Ironically, our current systems only survive because they fail on their own terms. It is the very hopelessness of applying a vast array of general rules to an entire student population that successfully masks the reality that many of our general rules, as promulgated, have little to no grounding in student reality. Consider “dry campus” rules, a sub-species of foolish zero tolerance policies.¹¹² (Legalists fall for zero tolerance policies because they believe that stricter sanctions make a rule more real.) When campuses suddenly become “dry,” students typically retreat off campus to engage in highly unsafe behaviors such as driving long

¹¹⁰ ROGER L. GEIGER, *THE AMERICAN COLLEGE IN THE NINETEENTH CENTURY* 12 (2000); *Student Rioters Demand the Right to Party*, CHRON. HIGHER EDUC., May 15, 1998, at A46; Leo Reisberg, *Some Experts Say Colleges Share the Responsibility for the Recent Riots*, CHRON. HIGHER EDUC., May 15, 1998, at A48.

¹¹¹ “Off-campus parties and off-campus bars were the locations where students were most likely to report drinking and heavy drinking.” Henry Weschler et al., *Underage College Students’ Drinking Behavior, Access to Alcohol, and the Influence of Deterrence Policies*, 50 J. AM. COLL. HEALTH 227 (2002), available at <http://www.hsph.harvard.edu/cas/Documents/underminimum/DrinkingBehavior.pdf>.

¹¹² A “dry campus” is one which does not permit any alcohol on campus. Approximately one in three universities prohibit alcohol. Yvonne Murray & Meade Harris, *US Universities Try Going Dry*, BBCNEWS (Mar. 31, 2005), available at <http://news.bbc.co.uk/2/hi/americas/4395857.stm>. For example, at the University of Oklahoma, possession of alcohol in the dorms results in a citation against not only the student in possession, but also every student on that hall. University of Oklahoma: College Experience Guide, <http://students.ou.edu/W/Daniel.T.Wolter-1/english/freetime.html> (last visited Nov. 1, 2008); see also Univ. of Okla., Alcohol and Drugs, <http://students.ou.edu/D/Andrew.N.Dobry-1/AlcoholDrug.html> (last visited Nov. 1, 2008). At Pepperdine University, it is a violation to be in the presence of alcohol or alcohol containers on campus. Pepperdine Univ., Alcohol and Other Drugs Policy, <http://seaver.pepperdine.edu/studentaffairs/content/handbook/2008/policy/1-alcohol.pdf> (last visited Nov. 1, 2008).

distances to go to parties, front-loading,¹¹³ or moving off campus to unregulated spaces. The paradox of enforcement then manifests: we have extremely high levels of fairness and also have drinking rates that rise dramatically or remain persistently high.

Higher education today needs to have fewer rules for the general student population and more rules for individuals. An intransigent few may need rules to successfully reduce high risk behaviors; there is no need to apply “strict” rules to everyone. A popular modern emo band, Relient K, says it best; “the beauty of grace is that it makes life not fair.”¹¹⁴ Many students have earned the right to be free from rules that they do not need to learn and grow. The cry for more enforcement arises from the fact that attitudes from the era of power and prerogative have still not completely died in American higher education. We still conceive of *discipline* as a primary tool to manage the educational environment.

Higher education remains ensconced with the application of general rules to individual students as a primary tool of managing a learning environment. By moving to a system featuring educational environmental management with more individuation and directed planning, however, we can make greater use of specific determinants for human behavior on an individual basis.

Some individuation via targeted enforcement is already occurring in higher education. An example is the University of Illinois suicide prevention model designed by Paul Joffe.¹¹⁵ The program has garnered a great deal of national attention¹¹⁶ and deservedly so; the

¹¹³ “Front loading” or “pre-partying” involves college students drinking before arriving at a party or bar. Jason Kilmer & Mary Larimer, *Case Study: Drinking Among Sorority and Fraternity Students in the United States*, in SWIMMING WITH CROCODILES: THE CULTURE OF EXTREME DRINKING 230 (Marjana Martinic & Fiona Measham eds., 2008); see also Eric R. Pederson & Joseph LaBrie, *Partying Before the Party: Examining Prepartying Behavior Among College Students* 56 J. AM. COLL. HEALTH 237 (2007).

¹¹⁴ RELIENT K, *Be My Escape*, on MMHMM (Gotee/Capitol Records 2005).

¹¹⁵ Univ. of Ill., Counseling Center—Suicide Prevention, http://www.counselingcenter.uiuc.edu/?page_id=53 (last visited Oct. 30, 2008).

¹¹⁶ Karen Arenson, *Worried Colleges Step Up Efforts Over Suicide*, N.Y. TIMES, Dec. 3, 2004, at A20, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0DE6DD1631F930A35751C1A9629C8B63&sec=&spon=&pagewanted=1>; Rob Capriccioso, *Suicide on the Mind*, INSIDE HIGHER ED, June 5, 2006, available at <http://www.insidehighered.com/news/2006/06/05/acha>; Jason Feirman, *The New College Dropout*, PSYCH. TODAY, May/June 2005, available at <http://www.psychologytoday.com/articles/200505/the-new-college-dropout>; Stevenson Swanson, *Student Suicides Spur Action on Campuses*, CHI. TRIB., Oct. 12, 2004, at 8..

program has impacted naturally occurring rates of suicide.¹¹⁷ Essentially, under Joffe's Illinois model, if a student manifests a risk of suicide, that student is individually managed with a combination of counseling and potential sanctioning for failure to adhere to a counseling plan. The Illinois plan is highly individuated and targeted. The same services—and consequences—are not the same for all students at all times. Instead, the Illinois plan operates to identify individuals who are at risk. The program sets a primary goal of reducing suicide rates, not fairness.

Systems of educational environmental management that put too much emphasis on generalized discipline are guaranteed to fail. Retention rates at many great colleges and even flagship institutions are unnervingly poor.¹¹⁸ Retention is affected by high-risk alcohol use, violence, mental health issues and the panoply of challenges in the modern college environment. Colleges compensate for educational environmental management failures with admissions processes that must admit large numbers of students (many of whom are destined not to succeed) to cover anticipated attrition. Many students graduate only after a long period of matriculation, others never succeed at all. Of the population that graduates, significant numbers are judged or "adjudicated" in some way. It is a myth to assume that systemic issues affect only the lazy, incontinent, and incompetent: higher education puts its best *and* worst students at risk with non-modern systems of educational environmental management. The academic reaper draws from across the education continuum and shows no mercy to race, gender, sexual orientation, creed, color, socio-economic status, educational success or failure, family backgrounds, and the like. We cover environmental failures with a philosophy of retention by admissions, which only masks management issues in our environments.

Even so, few institutions of higher education perceive that admissions processes play significant parts in managing an educational environment. Many campuses make little to no use of admissions

¹¹⁷ Chris Chamberlain, *Mandatory Counseling Appears to Reduce Suicide Rate by Half*, INSIDE ILLINOIS, Aug. 7, 2003, available at http://news.illinois.edu/ii/03/0807/08suicide_P.html.

¹¹⁸ One author asserted that on average, colleges and universities lose around 20% of their first-year class. See John Merrow, *The Undergraduate Experience: Survival of the Fittest*, N.Y. TIMES, Apr. 21, 2005. The attrition rate for certain subsets of the population can be much worse. For example, "[n]ationally, only 23 percent of Hispanics who start college finish with a bachelor's degree." *Id.* Attrition rates are much higher at some schools. These are casualty rates that would mortify even a World War I trench warfare commander.

information, even in their discipline processes. True, after the incident at Virginia Tech, American colleges have become more interested in admissions information, but the systemic use of admissions material (and the admissions process itself) is still far from complete. The admissions process today remains largely a sorting and marketing exercise, designed to draw an adequate pool of quality students. Admissions activities still remain highly secretive and separate, even to most members of the academic community. Admissions is sacrosanct because it supplies vital fluids to the academic environment.

In part, the disconnect with admissions is driven by legal rules. Admissions has little to no legal responsibility to generate a safe environment, or to insure that an applicant has a reasonable chance of success in a higher education environment. The law provides significant protection from accountability for admissions decisions, and for the admissions process itself. There are several legal doctrines that lawyers often think of as distinct, that actually work in tandem to insulate admissions decisions and the admissions process from legal scrutiny.

First, the law has been reluctant to impose a legal duty upon institutions of higher education with respect to negligent admissions. Today, other American businesses face responsibility for who they hire into the workplace.¹¹⁹ In tort law, a failure to use reasonable care in bringing someone into the workplace is known as negligent hiring.¹²⁰ Institutions of higher education have no similar responsibility with respect to students who are admitted.

This may seem strange, but the roots of this anomaly lie in the era of power and prerogative, academic freedom and even the Civil Rights era itself. In the era of power and prerogative, the right to admit whom you desired was a sovereign prerogative of an institution of higher education. *Sweezy*, decided in 1957 as the Civil Rights era dawned (and just prior to *Dixon*) determined that the United States Constitution protects institutions of higher education with respect to whom they admit.¹²¹ A hallowed academic freedom is according to *Sweezy*: “who to teach.”¹²² Interestingly, the university’s academic freedom with respect to whom to admit preceded Constitutional student rights. Academic freedom of who to teach and who to admit, who to

¹¹⁹ See, e.g., *Tallahassee Furniture Co., Inc. v. Harrison*, 583 So. 2d 744 (Fla. Dist. Ct. App. 1991).

¹²⁰ ALFRED G. FELIU & WEYMAN T. JOHNSON, *NEGLIGENCE IN EMPLOYMENT LAW* 25 (2002).

¹²¹ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

¹²² *Id.* at 263 (Frankfurter, J., concurring).

retain, who to graduate—was firmly in place at the beginning of the Civil Rights era. The law transposed the right to admit students from a *power* into Constitutional academic *freedom*. The timing of *Sweezy* was crucial. *Sweezy* predated *Dixon*, *Horowitz*, *Ewing* and other legal developments in the Civil Rights era; this meant that the academic freedom to determine who to admit would largely be immune from scrutiny in the Civil Rights era.¹²³ Hence, when race conscious admissions were initially challenged, the United States Supreme Court gave higher education unusual powers to create a diverse environment.¹²⁴

Constitutional freedoms, however, are typically subject to some kind of balancing process. Thus, recently in *Grutter* and *Gratz*, the Supreme Court has made it clear that race conscious admissions must answer more strictly to the Constitution and federal law.¹²⁵ Although the Supreme Court has been willing to challenge and limit the use of race conscious admissions, what has survived almost intact from the era of power and prerogative is the notion that institutions of higher education can admit students with little to no risk of negligent admissions lawsuits.¹²⁶

As Kaplin and Lee have stated “post-secondary institutions have traditionally been accorded wide discretion in formulating admissions standards. The law’s deference to administrator’s autonomy stems from the notion that tampering with admissions criteria is tampering with the expertise of educators.”¹²⁷ It is ironic that some admissions processes are operated without dominant input from individuals who teach on a full-time basis.¹²⁸ Academic freedom regarding who to teach and admit

¹²³ *Sweezy* was decided in 1957; *Dixon* was decided in 1961, *Horowitz* in 1978, and *Ewing* in 1985.

¹²⁴ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 256 (1978).

¹²⁵ *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹²⁶ KAPLIN & LEE, *supra* note 16, at 795–803 (providing seventeen guidelines on race conscious admissions considering *Bakke*, *Grutter*, and *Gratz*).

¹²⁷ *Id.* at 752–53.

¹²⁸ See JACQUES STEINBERG, *THE GATEKEEPERS* (2003). The author followed the admissions process at one college:

Ralph had worked as an admissions officer at Wesleyan for five years, and at Occidental College in Los Angeles for the previous three years. Prior to that, Ralph was a lawyer. As it turned out, his résumé was as representative as anyone else’s of the typical admissions officer. There is no prototype or formal training for such a unique line of work. Wesleyan, like most colleges, considered the perspective of its faculty to be too narrow to entrust them with exclusive authority to select a class, though professors were regularly consulted during the process.

has evolved to be a right exercised by administrators who may, or may not, be full-time teachers. This is not to say that classroom academics are no longer involved with admissions; however, there has been a demonstrable shift to using professional admissions staff more heavily to shoulder the business of admissions.

Deference to the academy in admissions decisions was apparent in the famous and scary 1980s case of negligent admission, *Eiseman v. State*.¹²⁹ In *Eiseman*, the New York Court of Appeals held that a university could admit a student with a violent criminal past history into a special program, and not suffer legal responsibility if the dangerous student injured another.¹³⁰ Essentially, the court held that even though a student had known dangerous propensities, there would be no negligent admissions claim sounding in tort against the university.¹³¹ The primary rationale of *Eiseman* was that at the time of admissions the potential for attack was not sufficiently foreseeable because the victim was not sufficiently foreseeable.¹³² In one sense, such a ruling is consistent even with the *Tarasoff* standard such that the potential victim must be usually at least “readily identifiable” for there to be sufficient foreseeability in a legal sense to require a psychologist to warn others.¹³³ Dangerous criminal records rarely give any evidence of a potential student’s intent to harm an identifiable person during the admissions process. However, *Eiseman* is not consistent with modern employment or business law. Employers typically now have the duty to use reasonable care in hiring dangerous persons who may be brought in contact with the public in their course of employment.¹³⁴ Business proprietors even have a duty to use reasonable care to protect patrons from attack by foreseeably dangerous persons who are not employed on their premises.¹³⁵ This has led employers to do criminal background checks on employees prior to hiring, for example. Higher education has not always been quick to

To Wesleyan, it was an admissions officer’s life experiences—the broader and further afield the better—that gave him or her the essential tools to assemble a class.

Id. at xix–xx.

¹²⁹ 518 N.Y.S. 2d 608 (Ct. App. 1987).

¹³⁰ *Id.* at 615.

¹³¹ See Dena M. Kobasic et al., *Eiseman v. State of New York: The Duty of a College to Protect Its Students from Harm by Other Students Admitted under Special Programs*, 14 J.C. & U.L. 591 (1988).

¹³² See *Eiseman*, 518 N.Y.S. 2d at 616.

¹³³ *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980).

¹³⁴ See, e.g., *Tallahassee Furniture Co.*, 583 So. 2d at 753.

¹³⁵ See, e.g., *Thompson v. Skate Am., Inc.*, 940 S.E.2d 123 (Va. 2001)

follow these trends. Courts have deferred to academics. There is some evidence that this may be changing, but even so, the law of higher education is years behind business law.¹³⁶

The second legal doctrine that protects the admissions process—and helps to insulate institutions of higher education from a general responsibility for creating an overall sound and safe learning environment via admissions decisions—is that higher education institutions face little to no threat of educational malpractice lawsuits.¹³⁷ Institutions of higher education increasingly face responsibility for legally foreseeable *physical* risks to persons in the institution of higher education environment.¹³⁸ However, when a learner looks to education law to provide a remedy for academic failure, poor teaching, etc., higher education law provides no remedy in most cases. Students have the right to expect a reasonably safe learning environment, but have few legal rights, if any, to expect a reasonable learning experience in the classroom. There is no legal accountability for core mission delivery. This is also a direct result of *Sweezy*—what we teach, and how we teach, are considered to be central academic freedoms.¹³⁹ Courts have devised numerous rationales for rejecting claims of educational malpractice (and related claims), but there has been strong consistency in rejection of educational malpractice claims since the era of power and prerogative.¹⁴⁰ *Sweezy* transmuted the *power* to teach into a Constitutional *right* of academic freedom. The Supreme Court chose to constitutionalize many powers and prerogatives of a prior era by turning them into academic *freedoms*.

The legal doctrines that insulate institutions of higher education from negligent admissions and that protect institutions of higher education from claims of educational malpractice have served to form a shield for admissions in higher education. Institutions of higher education have the sense that they are immune from legal accountability so long as they practice safe legalisms. This in turn, has staved off any push for greater individuation in higher education. An entire generation of legalists has believed that the Civil Rights era channeled institutions of higher education's accountability into narrow rivulets such as

¹³⁶ See Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J.U. & C.L. 419 (2008).

¹³⁷ KAPLIN & LEE, *supra* note 16, at 213–17.

¹³⁸ BICKEL & LAKE, *supra* note 16, at 111.

¹³⁹ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

¹⁴⁰ See, e.g., *Ross v. Creighton Univ.*, 740 F. Supp. 1319 (N.D. Ill. 1990); *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986); *Andre v. Pace Univ.*, 655 N.Y.S.2d 777 (Sup. Ct. App. Div. 1996).

accountability for due process, First Amendment, etc. Legalists believe that the core mission of higher education is, and should be, safe from legal scrutiny—right from the start in admissions. But the legalists have missed important clues from the United States Supreme Court—primarily, that freedom must be used and exercised to be preserved.¹⁴¹ Constitutional protection does not arise from legalistic systems. We must *engage* our academic freedom.

If we abdicate responsibility to manage our educational environments as *environments* and students as *individuals*, and do not provide academically sound and safe learning environments, then we should not assume that academic freedom will continue to protect us so broadly. The road to greater external accountability is paved with legalisms.

We can already see seismic fault lines.

Cracks in the legal protection for current admissions and discipline systems have begun to appear in at least four ways, legally:

1. Institutions of higher education are beginning to lose, or at least have been close to losing, process lawsuits.¹⁴² An organized attack on discipline systems is clearly underway by a well-organized opposition bar.¹⁴³
2. Institutions of higher education are losing more secondary (tort) litigation than ever. Or, at least, more is coming and courts are imposing legal requirements for safety more frequently.¹⁴⁴
3. There are new cases that suggest negligent admissions lawsuits may begin to be more successful.¹⁴⁵

¹⁴¹ See, e.g., *Lynch v. Ind. State Bd. of Trs.*, 378 N.E. 2d 900 (1978) (affirming a faculty member's dismissal after that faculty member had refused follow department policy to refrain from reading Bible verses during math class).

¹⁴² See, e.g., *Univ. of Tex. Med. Sch. at Houston*, 901 S.W.2d 926 (Tex. 1995).

¹⁴³ See KORS & SILVERGLATE, *supra* note 19; Foundation for Individual Rights in Education (FIRE)—Legal Network, <http://www.thefire.org/index.php/article/4891.html> (last visited Nov. 1, 2008); Foundation for Individual Rights in Education, FIRE's Individual Rights Defense Program, <http://www.thefire.org/index.php/article/4984.html> (last visited Nov. 1, 2008).

¹⁴⁴ Lake, *supra* note 16, at 621–663.

¹⁴⁵ *Ross v. Creighton Univ.*, 740 F. Supp. 1319 (N.D. Ill. 1990); THE SEC'Y OF EDUC.'S COMM'N ON THE FUTURE OF HIGHER EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION (2006), available at <http://www.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf>.

4. There have been a series of recent cases that have cracked the door open to some protozoan claims of education malpractice.¹⁴⁶

As these four trends evolve over the course of the next decades, the autonomy of discipline and admissions systems will come under attack. The pressure to create more individuation will increase.

Ultimately, the admissions process must connect more completely with the academic mission and living/learning environment that a student will eventually participate in. A more meaningful admissions process would *begin* the process of setting individual expectations, mutual rights and responsibilities, goals, opportunities, challenges and the like. While the admissions process will and should remain competitive in part, the purpose of competition is lost if lessons learned in the process are not carried forward.

The admissions process, as it is currently devised, is not a significant tool for management of a higher education learning environment. Most admissions application forms do not collect all of the critical information that will be needed for post-matriculation purposes. Interviews are limited; and admissions are mostly a lobbying-then-sorting effort. Our admissions processes breed posturing and puffing, and bait students to show only strengths and aptitudes as opposed to real weaknesses and challenges. Many college applicants are coached heavily on how to apply effectively; essays are often written by parents, friends, or others (even lawyers!) and often do not reflect the individual work of applicants. There is a strong drive for admissions offices to achieve “yields,” and there is little ultimate accountability for the way the college experience is marketed. An opportunity for education environmental management beginning at the moment of admissions is all too often lost.

f. *Educational Covenants*

It is important to distinguish *contract* from *covenant*. Covenant has a legal connotation but here the term “covenant” describes the sorts of agreements and processes that are not intended to be enforced in a court of law or in lawsuits. A master academic plan process should produce a living/learning *covenant*. We must create meaningful, individuated, mutual understandings among students and institutions of higher education. Master academic planning with each student allows

¹⁴⁶ See, e.g., *Troknya v. Cleveland Chiropractic Clinic*, 280 F.3d 1200 (8th Cir. 2002); *Byrd v. Lamar*, 846 So. 2d 334 (Ala. 2003).

each student to become, in essence, his or her own visitor, if in a newly conceived way. Originally, visitorial power was conveyed through planning and intentionality—but for the donor’s benefit. The shift to a focus on student empowerment naturally leads visitorial power to reconceptualization. In the modern university, student and institution essentially share the responsibility as visitor and facilitator respectively, and come together to see that vision for higher education is carried forward and modified, as appropriate, in mutually understood and accepted ways.

To actualize and operationalize this, an institution of higher education must engage in core features of a master academic planning process with each student. A master academic planning process will look differently from institution to institution, but there are core features of the master academic planning process all schools should consider when adopting an approach to managing an academic environment that is truly student-centered.

The core process of a master academic planning process consists of at least the following, not necessarily in this order:

1. Identification and Elaboration of Goals

Current admissions processes set aspirational goals for students, but beyond that, admissions processes do little—except when a student is in a special program—to set expectations for students after matriculation. A student might write an essay about majoring in English literature but that student might later enroll in science classes with no consequence or concern whatsoever. It is not that students should be prohibited from exploring new majors; but a shift of intention from one major to another signals that some significant change has taken place in the student’s learning approach that might warrant further mentoring, intentionality, or elaboration.

Many future discipline process issues originate in, or even before the admissions process. Three things are particularly noticeable.

First, students often have unrealistically high expectations on many dimensions of success and achievement.¹⁴⁷ This is undoubtedly, in part, a generational feature. As Jean M. Twenge writes in *Generation Me*:

¹⁴⁷ TWENGE, *supra* note 78, at 78–79.

These messages begin early. When the boy band 'N Sync appeared on the kids' show *Sesame Street*, they sang a song called "Believe in Yourself." Some people might tell you there are things you can't do, the song says. But you can be whatever you want to be, as long as you "believe in yourself." (What if they want to be brats?) One of the most popular Barney (the annoying purple dinosaur) videotapes for toddlers promotes a similar message: it's called *You Can Be Anything!*

And so it goes, into high school as well. Joey, a character in the teen soap *Dawson's Creek*, was usually portrayed as realistic and disillusioned; after all, her mother died a few years ago and her father is in prison. But after she paints a mural for the high school hallway in a 1998 episode, she says, "We could all use a daily reminder that, if you believe in yourself, even when the odds seem stacked against you, anything's possible." So much for realism. (Notice, too, the automatic connection between "anything's possible" and "believe in yourself.") It's not surprising, though, because the logical outcome of every kid having high self-esteem is every kid thinking that he can achieve anything. In a recent survey, a stunning 98% of college freshmen agreed with the statement, "I am sure that one day I will get to where I want to be in life."

One professor encountered this GenMe attitude quite spectacularly in an undergraduate class at the University of Kansas. As she was introducing the idea that jobs and social class were based partially on background and unchangeable characteristics, her students became skeptical. That can't be right, they said: you can be anything you want to be. The professor, a larger woman with no illusions about her size, said, "So you're saying that I could be a ballerina?" "Sure, if you really wanted to," said one of the students.

The ethos is reflected in the lofty ambitions of modern adolescents. In 2002, 80% of high school sophomores said they expected to graduate from a four-year college, compared to 59% just twelve

years before in 1990. In the late 1960s, by comparison, only 55% of high school seniors thought they would attend college at all, much less graduate. High schoolers also predict they will have prestigious careers. Seventy percent of late-1990s high school students expected to work in professional jobs, compared to 42% in the 1960s. Unfortunately, these aspirations far outstrip the need for professionals in the future. In *The Ambitious Generation*, sociologists Barbara Schneider and David Stevenson label these “mis-aligned ambitions.” In other words, the kids have learned the lesson “you can be whatever you want to be” a little too well, as there probably won’t be enough desirable jobs for everyone to be whatever he wants to be.

Ambitions *grow stronger* once young people enter college. In 2003, an incredible 3 out of 4 American college freshmen said that they wanted to earn an advanced degree (such as a master’s, Ph.D., M.D., or law degree). For example, 39% say they will earn a master’s degree, 19% a Ph.D., and 12% an M.D. Grand ambitions indeed, since the number of Ph.D.’s granted each year is only 4% of the bachelor’s degrees given, and M.D.’s only 1%. Thus about 4 in 5 aspiring Ph.D.’s will be disappointed, and a whopping 11 in 12 would-be doctors will not reach their goals. and that’s if you finish your bachelor’s degree at all; figures are hard to nail down, but the discrepancy between college enrollment and bachelor’s degrees suggests that less than 50% of entering college students finish their degrees within 5 years. During the next decade, we are going to see a lot of young people who will be disappointed that they cannot reach their career goals.

Young people also expected to make a lot of money. In 1999, teens predicted that they would be earning, on average, \$75,000 a year by the time they were 30. The average income of a 30-year-old that year?—\$27,000, or around a third of the teen’s

aspirations. Ray, 24, recently got his masters' degree and expects to land a high-paying job right away. "I don't want to have all those years of education and make only \$60,000 a year," he scoffs. Of course, most starting salaries are much lower than that, even with a master's. Overall, young people predict a bright future for themselves. Sixty-five percent of high school seniors in 2000 predicted that their lives would be better than their parents'; only 4% thought their lives would be worse. Adults surveyed at the same time were much less optimistic, with only 29% saying that high school seniors would have better lives, and 32% predicting a worse outcome. One young employee told a startled manager that he expected to be a vice president at the company within three years. When the manager told him this was not realistic (most vice presidents were in their sixties), the young man got angry with him and said, "You should encourage me and help me fulfill my expectations."¹⁴⁸

Without some tempering of unrealistically high expectations, students will face future disappointments and problems associated with failed expectations. Colleges will also see retention, alcohol and other drug, and wellness problems if students fail to cope with the realities of college life and the hard work (and failure) it entails. The price of expectations unmet is high. Institutions of higher education pay the price indirectly—the costs are buried in the cost of running extensive discipline systems, compensating for retention issues, engaging in extensive living arrangement management, etc.

Second, some students come with low, or no, expectations at all in certain dimensions. It is stunning to discover how many students arrive with no particular goals for themselves. Many report that they just want to have fun or be successful.¹⁴⁹ There is no plan of educational action; there are no set concrete objectives to achieve. Students often let themselves become educational flotsam and jetsam, even in graduate schools.

¹⁴⁸ *Id.* at 78–79, 87 (emphasis added).

¹⁴⁹ *Id.* at 51, 77.

Sadly, this is not entirely a surprise. Twenge also points out that Millennials have achieved success in the past, irrespective of actual measured achievement.

There has also been a movement against “criticizing” children too much. Some schools and teachers don’t correct children’s mistakes, afraid that this will damage children’s self esteem. One popular method tells teachers not to correct students’ spelling or grammar, arguing that kids should be “independent spellers” so they can be treated as “individuals.” (Imagine reading a newspaper wyten using *that* filosofy.) Teacher education courses emphasize that creating a positive atmosphere is more important than correcting mistakes. In 2005, a British teacher proposed eliminating the word “fail” from education; instead of hearing that they have failed, students should hear that they have “deferred success.” In the United States, office stores have started carrying large stocks of purple pens, as some teachers say that red ink is too “scary” for children’s papers. Florida elementary schoolteacher Robin Slipakoff said, “Red has a negative connotation, and we want to promote self-confidence.”

Grade inflation has also reached record highs. In 2004, 48% of American college freshmen—almost half—reported earning an A average in high school, compared to only 18% in 1968, even though SAT scores decreased over this time period. “Each year we think [the number with an A average] can’t inflate anymore. And then it does again. The ‘C’ grade is almost a thing of the past,” noted Andrew Astin, the lead researcher for the study. These higher grades were given out even though students were doing less work. Only 33% of American college freshmen in 2003 reported studying six or more hours a week during their last year of high school, compared to 47% in 1987. So why are they still getting better grades? “Teachers want to raise

the self-esteem and feel-good attitudes of students,” explains Howard Everson of the College Board. We have become a lake Wobegon nation: all of our children are above average. The results of these policies have played out in schools around the country. Emily, 8, came home from school one day proud that she got half of the words right on her spelling test (in other words, a grade of 50). When her mother pointed out that this wasn’t very good, Emily replied that her teacher had said it was just fine. At her school near Dallas, Texas, 11-year-old Kayla was invited to the math class pizza party as a reward for making a good grade, even though she had managed only a barely passing 71. The pizza parties used to be only for children who made A’s, but in recent years the school has invited every child who simply passed.¹⁵⁰

Students have not been forced to form coherent academic plans; academic success has never required that students learn to plan for themselves. Millennials have been rewarded for even their modest achievements, and sometimes are even given awards for poor performance.¹⁵¹

Crucially, students may lack, to some degree, the crucial skills of self-examination and self-assessment that would make planning more likely to occur and succeed. As Twenge also points out,

Perhaps as a result of all of this self-esteem building, educational psychologist Harold Stevenson found that American children ranked very highly when asked how good they were at math. Of course, their *actual* math performance is merely mediocre, with other countries’ youth routinely outranking American children. . . . In 2004, 70% of American college freshmen reported that their “academic ability” was “above average” or “highest 10%,” an amusing demonstration of

¹⁵⁰ *Id.* at 61–63.

¹⁵¹ *Id.* at 57.

American youths' self-confidence outpacing their ability at math.¹⁵²

College teachers, administrators, and disciplinarians constantly see the inability to self-assess accurately. Failure to formulate good academic goals and plans, and assess those goals and plans, is rampant.

Third, many students come with false and/or unrealistic expectations and goals regarding certain features of the way in which higher education will be delivered.

A prime example is the persistent problem of the proper use and citation of academic information. Most modern college students have never been far from electronic teaching. Most have grown up with computers: the internet has been ubiquitous for Millennial students who have very different expectations about who "owns" information and who may "use" information, *inter alia*. These expectations clash with traditional values from the pen and paper era. The ownership, control, and hierarchy of information were key features of the educational milieu in which the era of power of prerogative flourished. Ownership, control, and hierarchy of information was once paramount. As *Generation Me* suggests, students are less likely to value these features of education. For older generations, much of what modern students do is cheating. For Millennials, each video game, each song, and each movie is based on ones that have come before with perhaps a new twist or a new way of assembling the information. Modern students have seen what we would call "cheating" so frequently that it has lost much, if not all, impact on them. Students have become hardened to the idea of academic dishonesty because they have seen so much of it, and also because they do not share the same values as the generations in control of higher education administration. Information use and control is democratizing whether we like it or not.

Another example of false expectations is visible with alcohol and drug prevention efforts. Newly arriving college students perceive that alcohol and drug usage is much higher (and more functional) than it actually is. No surprise here: college students have been bombarded with images of college alcohol use prior to matriculation. The culture, media, and advertisers have created false perceptions and expectations regarding alcohol and drug culture. Moreover, some of the misperceptions are reinforced in campus sleepover visits. Worse yet, false

¹⁵² *Id.* at 64.

perceptions drive students' goals. Many students report that they have chosen colleges *because of* their perceptions of alcohol culture.

Modern universities rely heavily on articulated written statements of policy and rule to set proper expectations. This does not always work. Students faced with discipline often say, "I never read the code" as if it were some form of defense to an incident. Even though students are asked to sign an acknowledgement at orientation that they have read and understood the code, students later say, "I just signed that."

There is no particular reason to believe that large numbers of students will read and internalize our written rule materials. For one thing, our model codes are highly legalistic, unreadable, and unengaging. Highly objective reading materials can be excruciatingly dull. This is particularly true for a generation that has been bombarded with media emphasis on subjectivity (just watch any episode of any season of *The Real World*¹⁵³ on MTV). Millennials naturally relate to individualized, "me"-oriented readings and experiences. There often is not sufficient individual interaction with students with respect to objective materials, and usually no longitudinal assessment process to determine whether anything has actually been internalized by a student. Students primarily understand discipline materials through disciplinary outcomes, and rarely base their understandings on actual language of materials promulgated until after an incident. Most students, most of the time, get by just fine without any working knowledge of codes, which gives an illusion of efficaciousness. However, clearly written expectations for students set out in legalistic codes do not generate clear expectations among students, even if colleges provide some form of "training" to students. This is not a generation that reads complex documents full of objective directions and conforms behavior accordingly. That was *us*.

The idea of self-governing educational societies based upon clearly expressed rules, codes and procedures is a Baby Boom obsession. We have elevated Constitutionalism, the founding fathers, and social contract theorists like Locke, Rousseau, Kant, and John Rawls, to the highest standing in higher education's political consciousness. Baby Boomers were raised by depression era parents—for the most part—who gave their children rules and expectations (sometimes even in writing). Conforming behavior to rules, and challenging rules with social disobedience, have been signature features

¹⁵³ *The Real World* (MTV Bunim/Murray Productions 1992–2008).

of *Baby-Boom* culture. Millennials on the other hand, have no such culture. Millennials were not raised primarily according to rules or sanctions. Millennials were given rewards in a structured environment and were offered self-esteem training. Structure and rules were primarily for *supervisors*, not for students (and thus it is no surprise that when colleges press rules on students, they push right back with arguments about rules the administrators should follow). We should not confuse the fact that Millennials have lived a structured life with the fact that they have lived a rule-based life. My experience with Millennials, including law school classroom teaching, is that they lack what we might think of as basic skills in rule cognition. They had little experience with being “sanctioned” under rules in their formative period: their ability to read a rule, internalize it, and conform behavior accordingly on their own is vastly different from students in the Baby Boom generation.

Millennials have developed in a world where rules *underlie* their experience, and they can safely assume “experts” have done the rule “thing” for them. Millennials use a computer operating system like Windows but do not know the rules that make it work. Video games and fast food work the same way. There is no reason to learn a rule or to fish for food, just play a game, or eat a Filet-O-Fish.

Even to the extent that we may be able to train Millennials to more effectively manage their behavior according rules, we will fight against another generational trend. Millennials simply do not *value* rules the way we do as governing principles for a well ordered life. It is not that Millennials are a lawless generation, or even that they have contempt for authority. Quite to the contrary, Millennials often display strong deference to authority figures, and affinity for mentors. But, the way they imagine governing their own behavior is different from the way Baby Boomers typically imagine doing it themselves. Baby Boomers like *rules*; Millennials prefer *relationships*. One might be tempted to project onto Millennials communitarian notions of political justice such as those professed by philosopher Michael Sandel.¹⁵⁴ There is no communitarianism a la Sandel. Sandel’s vision is essentially a variation on Baby Boom ideals of participatory democracy. What communitarian theorists often miss is that to the extent that Millennials are motivated by relationships, their “community” of relationships is

¹⁵⁴ See MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1998); Michael Sandel, *Democracy’s Discontent*, in *JUSTICE* 328 (Michael Sandel ed., 2007).

defined primarily by family and friends, not by political associations. To Millennials, Sandel is passé.

The way we confront college students with expectations is not effective. We suffer from generational myopia—a persistent issue if higher education is delivered in a power paradigm. In some instances, our rule-based approaches backfire in just the way that marching troops into Kent State backfired as a riot control technique for protesting *Baby Boom* students. We impose a vision of managing an educational environment upon students that does not meet their needs, expectations or wishes. We talk the language of “adult” and “contract,” and then we tell students what to do in a form that is least receptive to them and punish them when they do not figure us out in time or blame them for making bad choices that our environments invite.

Ultimately, the only solution to the dissonance of expectations is to engage in master academic planning with each student, and start the process at the time of admission and matriculation. Master academic planning is the obverse of discipline. The core idea is that greater efforts directed at planning and intentionality on an *individual* level will make “discipline,” in a traditional sense, obsolete and virtually unnecessary.

A master academic plan, as described below, will help in at least three ways. First, the master academic plan will be a process to set realistic, achievable expectations. A crucial part of any master academic plan involves identification of opportunities and challenges. Second, the master academic plan aims to begin the process of identifying realistic assumptions and expectations (for example, letting William Hung¹⁵⁵ think that he is able to sing or dance is a tragic mistake). Third, and perhaps most importantly, a master academic plan will help students to develop engagement and, dare I say it, enthusiasm. The tragedy of modern higher education is how passionless and disengaged the students are about higher learning. The movie *Accepted* attempted to portray this and imagined an institution of higher education that would actually engage students in higher education. The movie was silly but the core idea is not. To foster engagement, we must help students generate realistic, measureable, and accurate expectations and goals, *inter alia*.

¹⁵⁵ *American Idol*, Season 3 (FOX television broadcast 2004).

2. The Master Academic Plan— A Proposed Heuristic

A master academic plan consists of at least the following key elements:

i) Aspirations and Goals

1.1 Concrete/Abstract

Students who engage in collaborative planning to achieve realistic goals and to state achievable aspirations will be less likely to transgress general norms of an educational community (and more likely to achieve on their own terms). Students should be encouraged to create aspirations and goals with specificity *and* abstraction. Generating a specific vision of one's future (academic) self gives a student a better chance to reach realistically achievable goals.

It is important to recognize the need for, and value of, abstraction in vision and aspirations. For instance, a student may wish to compete in varsity sports as a starter, a concrete goal. The goal could be frustrated by injury, or other more successful players. However, an aspiration could be stated more abstractly. For example, a student might aspire to become a successful competitor or to learn about the benefits of being on a team. The student could make progress towards such expectations even if more specific aspirations are not met. The benefit of specific goals is *measurability* and the benefit of abstract goals is *flexibility*. Assessment varies with the type of goal that a student seeks to achieve.

1.2 Learning Profile

Higher education learning theory is still evolving: volumes of learning theory and research have been directed at the pre-K and K-12 learner.¹⁵⁶ Nonetheless, pioneering work in higher education theory has made learning theory more directly applicable to the process of higher education.¹⁵⁷ Most teachers and administrators were educated almost entirely in an undergraduate and graduate world with no formal learning theory and no particularly science-based teaching strategies. Most professionals were taught *intuitive* approaches to higher education teaching and learning. A pre-scientific learning theory period in higher

¹⁵⁶ See, e.g., VYGOTSKY, *supra* note 105 (Vygotsky is the originator of the notion of zones of proximal development: the idea that learners have a range of opportunity for further learning.).

¹⁵⁷ See PAUL RAMSDEN, *Theories of Teaching in Higher Education*, in LEARNING TO TEACH IN HIGHER EDUCATION 109 (1992); Keith Trigwell & Michael Prosser, *Changing Approaches to Teaching: A Relational Perspective*, 21 STUD. IN HIGHER EDUC. 275 (Oct. 1996).

education is rapidly ending. It is highly unlikely that subsequent generations of college and graduate students will encounter such highly non-science-based learning environments. This is not to say that science is a panacea for higher learners—but it does have a role. Balance is key; higher education is, and is not, a science.

There are already tools that can assist students to understand their particular strengths and weaknesses as learners, and to devise preferable strategies for study, learning, etc.¹⁵⁸ For instance, we have widely used personality profiling tools such as the Myers-Briggs approach,¹⁵⁹ and multiple intelligence theory as propounded by Professor Howard Gardner.¹⁶⁰ Some campuses already have widely accessed learning centers, such as the pioneering center developed at Lynn University under the leadership of higher education learning path breaker, Marsha Glines.¹⁶¹ Armed with various tools to measure aptitudes, preferences, strengths, and weaknesses, a student can be in a better position to understand and act upon his or her learning profile. Many students with disabilities have such services and information; however, students without demonstrated disabilities typically know very little about their higher learning profiles. It is no wonder that many students struggle and discover their learning aptitudes and challenges only after failure, if even then. Many more students are discouraged or do not reach anything near their full potential. Academic dissonance

¹⁵⁸ Lynn University Institute for Achievement and Learning, Services for Students, <http://www.lynn.edu/academics/other-academic-programs/institute-for-achievement-and-learning/services-for-students-with-learning-differences> (last visited Oct. 30, 2008); Marsha Glines, *Thoughts on Curriculum Development—A Personalized Holistic Approach for College Learning Disabled Students*, at 17th Annual Law and Higher Education Conference, Post-Conference Workshop (Feb. 14, 1996) (available at <http://justice.law.stetson.edu/excellence/Highered/archives/1996/Thoughts%20on%20Curriculum%20Development.pdf>).

¹⁵⁹ The Myers & Briggs Foundation, <http://www.myersbriggs.org/> (last visited Oct. 9, 2008); see also ISABEL BRIGGS MYERS, *MBTI MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR* (1998). Myers-Briggs has challengers. Although, I must say, I am all “INFP.” Many scientists prefer the revised NEO Personality Inventory, sometimes referred to as Neo PI-R. See Robert M. McCrae & Oliver P. John, *An Introduction to the Five Factor Model and Its Applications*, 60 *J. OF PERSONALITY* 175 (1992), available at <http://www.bsu.edu/web/00t0holtgrav/623/ffmarticle.pdf>; Lewis R. Goldberg, *The Development of Markers for the Big-Five Factor Structure*, 4 *PSYCHOLOGICAL ASSESSMENT* 26 (1992). Thanks to Jean Twenge for leading me to this.

¹⁶⁰ GARDNER, *FIVE MINDS* *supra* note 54; GARDNER, *MULTIPLE INTELLIGENCES*, *supra* note 74.

¹⁶¹ Lynn University Institute for Achievement and Learning, <http://www.lynn.edu/academics/other-academic-programs/institute-for-achievement-and-learning> (last visited Oct. 30, 2008).

causes transfers, delayed graduation, retention issues and likely even substance abuse.

A critical feature of a master academic plan includes a reasonable effort at mapping a learner's learning profile and offering students specific guidance on likely successful, promising, study/learning strategies (possibly even courses of study that complement that student's learning profile). This is not to say that a learner's future will be mapped out completely and permanently, *ab initio*. (European education sometimes "tracks" students early, which in America is less attractive.) A master academic plan is not a track, or a trap, or an attempt to limit self-direction and self-renovation. A master academic planning process aims to empower, not limit, even if students must, at times face their own limitations constructively. An important feature of American higher education is that our higher education institutions permit students to choose, and revise, their own paths. Ideally, this feature of a master academic plan should be revisited periodically with students to ensure that the master academic plan remains accurate and up to date.

1.3 Physical Person/Wellness/Athletics

A solidly constructed master academic plan must also typically include opportunities/goals regarding overall wellness—mental, physical, spiritual—and athletic/competition goals.

Wellness and academic performance are highly interconnected. Many students have high academic aptitude but struggle in college because of wellness issues. Even students with no particular wellness challenges at the time of entering college will benefit from the master academic planning process though the process of setting wellness goals. We should not focus wellness efforts solely on the unwell. There will be many challenges and opportunities regarding wellness for *all* students that can be addressed through effective planning and intentionality. Most students, and their institutions, do not individuate comprehensive planning with respect to wellness. Prior to college, students' wellness needs may well have been addressed by various actors including parents, teachers, doctors, coaches, etc. There is a sudden dip in proactive coordinated wellness intervention when a student goes to college. Although a K-12 level of interaction is not typically appropriate or

advisable for a student in higher education, some continuity between the K-12 and college experience is advisable, perhaps essential.¹⁶²

In addition to general wellness goals, students typically have athletic/competition goals as well. Not all students will play intercollegiate sports, but many students come with various goals in the dimension of competition/athleticism. Unfortunately, some students come with no such goals, but probably should. College is an opportunity for students to develop lifestyle patterns that will result in long and short term wellness gains. Formulating athletic/competition goals with students will help institutions of higher education help their students, and vice versa.

An example: students routinely complain that athletic facilities are not open late enough. Students show us one of their goals—to work out or engage in specific activities late at night—is not sufficiently supported by the college or university. Knowing this kind of information prior to, or at, matriculation will help an institution of higher education develop better programs for students. Or, if it is not realistic for an institution of higher education to meet the goals of students, students will understand this and institution and students can work together to create other goals. Nonetheless, unmet, unaddressed goals can mutate into less functional goals: students who are not working out late at night might be tempted to spend more time in high-risk alcohol culture or some other less than positive activity.

1.4 Interpersonal Goals

Colleges and universities do little to set expectations for interpersonal skills, save perhaps for prohibiting certain kinds of conduct or behavior. Baby Boomers demonstrated very high levels of socialization. Indeed in the 1960s, Baby Boomers may have been sometimes too socially actualized (or at least that institutions of that era saw this as a problem). Baby Boomers were often quick to join a social movement or a group as well. For Millennials, development of personal and social skills has taken a different path. Administrators often see

¹⁶² A good example involves students with learning disabilities. Some students may arrive on campus with a prescribed 100 count prescription of Adderall (or Ritalin) with the label on the bottle reading “use as needed.” The medicine has been proscribed by a psychiatrist who may live many, many miles away. Students use these drugs, but that usage is not monitored. Students may abuse the drug or use it for non-proscribed purposes (such as using the drugs in place of Red Bull to extend a drinking experience), handing them over to their friends, or selling them.

that many students lack basic interpersonal skills and/or life skills.¹⁶³ Students have asked me—their law professor—to co-sign federal loans and to balance their checkbooks; others have seriously asked me why their whites have turned pink. Some students seem to lack even the most basic interpersonal classroom skills as well. Internet and digital communication is usually from a distance. Students often struggle with context issues in communication—often dimly aware that what one says to friends is not what one says to an administrator.

The interpersonal dimension of a master academic plan is not just about meeting the needs of those lacking interpersonal skills. Students should set off for college with positive goals that relate to how they wish to develop on an interpersonal level. Does the student seek to be outgoing? More focused on self over group dynamics? A better group learner? More polite? A leader? A better follower? Lack of focus upon such goals leaves students to slide along aimlessly, or to move from one interpersonal trauma to the next, repeating the same mistakes.

Lack of planning and intentionality here tends to produce lowest common denominator behaviors as well. We see this on modern campuses in the preference for alcohol and alcohol-related socializing, very late night activities and the hook-up culture. College students do not usually claim to want to be living a life of “pimps and ho’s.” Yet, lowest common denominator behavior dominates. Students engage in negative interpersonal behaviors largely as a result of the fact that many students do not have coherent long-term, well-considered, interpersonal goals. No one has ever successfully explained to them that “lothario” is not a good thing.

In contrast, educators in other eras seemed far more interested in interpersonal behaviors and choices. James Joyce portrays this feature of education in *The Dubliners*.¹⁶⁴ In one story, “An Encounter,” Joyce writes about young men playing hookie from school.¹⁶⁵ The teacher, a Catholic priest named Father Butler, discovers them reading escapist comic book-type literature, and confronts them:

“What is this rubbish?” he said. “*The Apache Chief!* Is this what you read instead of studying

¹⁶³ See WIM VEEN & BEN VRAKING, *HOMO ZAPPIENS: GROWING UP IN A DIGITAL AGE* 42 (2006); Aimee Heckel, *Generation Me*, *BOULDER DAILY CAMERA*, Nov. 5, 2006, available at <http://www.dailycamera.com/news/2006/nov/05/no-headline-05pwir/>.

¹⁶⁴ JAMES JOYCE, *DUBLINERS* (2001).

¹⁶⁵ *Id.* at 13–24.

your Roman History? Let me not find any more of this wretched stuff in this college. The man who wrote it, I suppose, was some wretched fellow who writes these things for a drink. I'm surprised at boys like you, educated, reading such stuff”¹⁶⁶

A theme in *The Dubliners* is escapism—just like in college today. Teachers were not always so indifferent to the risks of false-dreaming. Modern higher education is often beset by a large degree of indifference to the extracurricular activities and popular images that truly motivate students. We would love it today if our students read *The Apache Chief*—we could be so lucky! Goth, hip-hop, and emo culture are dominant, but many administrators are not tuned in to vampire-freaks.com or know who Trent Reznor is.¹⁶⁷ It may well be that in eras past, education was not so disconnected from engaging the whole life experiences of students.

Residence life staff see issues of interpersonal development and wellness most dramatically and consistently. Roommate issues for instance, suck up a great deal of the time of residence life staff. Residence life attempts to cope with the roommate disputes with tools such as dorm rules, roommate selection, removal criteria, dispute mediation, etc. Yet, many conflicts that students experience on an interpersonal level in residence life are set in motion long before students arrive on campus. Roommates often have vastly different interpersonal goals and expectations, *especially* when it comes to living arrangements. Many students have never even shared a room before college. Or, students may have no expectations at all, and form expectations only in conflict. Many college students have never lived communally or co-educationally, let alone in a double or triple room with common baths down the hall. Students often have no realistic expectations or goals regarding college living arrangements, are unrealistic about what lies ahead in their living situations. They may also lack key skills in preventing conflict and managing it. While no system will ever eliminate roommate conflicts, better designed systems for setting expectations, goals and aspirations can have a powerful effect on the management of living/learning conflicts.

¹⁶⁶ *Id.* at 14.

¹⁶⁷ Trent Reznor is the lead singer, songwriter and producer of Nine Inch Nails, see www.nin.com.

ii) Diversity and Inclusion

A major goal of a modern university is to achieve and sustain diversity and inclusion. Admissions committees, working under the framework of *Bakke*,¹⁶⁸ *Grutter*,¹⁶⁹ and *Gratz*,¹⁷⁰ populate student bodies diversely. Students may, or may not, see their role on campus as one of partnership with the admissions process. An effective master academic plan should provide every student the opportunity to express his or her own vision of their role on campus with respect to diversity, tolerance, and inclusion. Post-matriculation diversity and sensitivity training are important, but an institution of higher education will benefit immensely from individuating diversity/inclusion goals early on, and in an educational setting. Diversity and inclusion are often best taught and learned in peaceful situations and not in conflict.

One problem that vexes colleges and universities, especially public universities, is hate speech/expressive conduct. For a public institution, punishing hate speech typically violates the First Amendment, which protects good and bad speech alike—so the usual tool for managing the environment, a rule and sanction, does not work.¹⁷¹ Colleges sometimes seek to avoid First Amendment issues by attempting to punish, instead, the *conduct* associated with hate speech, as a way to address diversity and inclusion issues.¹⁷² Even that can be legally problematic, *inter alia*, because expressive conduct is protected by the First Amendment as well.

Often, future problems of intolerance, etc., can be spotted as early as the admissions/matriculation point. If students are asked to express their diversity and inclusion goals and expectations, we will be able to work with more diversity/inclusion issues earlier and in less confrontational and oppositional settings. An institution of higher education would thus be in a better position to address diversity/inclusion issues prior to the inception of negative or hateful behaviors or statements. Undoubtedly, some behaviors will not be checked or ameliorated by such a process. At least, however, both student and institution would know what is in store for the future.

¹⁶⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 256 (1978).

¹⁶⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁷⁰ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁷¹ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *UWM Post v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

¹⁷² *See, e.g., Iota Xi*, 993 F.2d at 393.

A public institution of higher education will have to be sensitive in handling students who express challenging opinions regarding tolerance or diversity in a master academic process. The First Amendment protects against prior restraint, and even chilling effects on speech.¹⁷³ Government action that attacks speech for content is also prohibited.¹⁷⁴ However, three things are important to recognize. First, students *can* be instructed that they may not form certain improper goals and aspirations regarding diversity/tolerance; for instance students, may express their views but may *not* turn their views into hostile and lawless action. Second, an institution of higher education can ask a student to execute a *Healy v. James*¹⁷⁵ affirmation that that student will strive to abide by all legitimate and lawful college regulations and rules.¹⁷⁶ Third, there is nothing unconstitutional about an institution expressing its views—and is entitled to have views under the First Amendment—to student *individually*. We have a bad habit of expressing our deepest convictions primarily collectively.

There is also another related matter to consider. Undoubtedly many prospective students are eliminated in admissions applicant pools because of racist, homophobic, or other hateful statements they make during the admissions process or on applications. It is unlawful, in some instances, for institutions to screen applicants this way. However, given the judicial emphasis on the academic freedom of “who to teach” and the fact that admissions decisions are made in relative secrecy and aggregately (and are the result of the review of many factors in an

¹⁷³ See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931); *United States v. Progressive*, 467 F. Supp. 990 (W.D. Wis. 1979)

¹⁷⁴ See *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972).

¹⁷⁵ *Healy v. James*, 408 U.S. 169 (1972).

¹⁷⁶ Just as in the community at large, reasonable regulations with respect to the time, the

place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students’ associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Healy, 408 U.S. at 192–93.

individual file), an applicant-litigant claiming prior restraint would have significant, often almost insurmountable, challenges to prove a First Amendment violation. Because of this, we have not seen significant litigation as such regarding First Amendment rights of students in admissions applications. The admission process can lawfully operate in a way that makes potential claims of prior restraint less likely to detect.

Problems of diversity, inclusion, tolerance, etc. are not limited to admissions decisions. Students will benefit from engaging in conscious and deliberate consideration of their roles in a diverse and inclusive academic community, and the future (American) society that they will live in, as they proceed through their academic career. Institutions of higher education will be better positioned to address issues that could mature into conflicts and/or rule violations through the master academic planning process. One might suppose initially that such an approach is only possible for selective admissions schools. However, even open admissions schools could benefit from more up front diversity/inclusion training and expectation setting.

It is unrealistic to believe that racist and intolerant attitudes will magically be transformed simply by a master academic planning process. However, the goal is to take reasonable steps to *reduce*, if not eliminate, instances of hate, intolerance, etc. and to enlighten students to the consequences of their beliefs and attitudes. Tolerance and open-mindedness do not go on with light switches, but arise from careful craftsmanship with painstaking emphasis on detail and individual context, like sculpture.

iii) Place in History/Future Self

Many students imagine themselves to be Aztec Gods: a shining four to seven years of college followed by functional death by drudgery. Van Wilder was afraid to graduate from college, and, like many modern students, deliberately, and furtively delayed his graduation until the end of his seventh year. Van Wilder feared the “real world” and did not want to be like his father who only worked.¹⁷⁷ When students are asked what life looks like after graduation they speak about career, family, marriage, settling down, responsibility. The lives they assume they will have are often two dimensional—plastic, boring, and stultifying. When I have asked students informally to imagine life without alcohol while they are in college, they at first resist the question and then voice their

¹⁷⁷ NATIONAL LAMPOON’S VAN WILDER, *supra* note 82.

concern that alcohol is *essential* to having fun. Their views are clear. Life after college is dry on many levels.

In *Quarterlife Crisis*,¹⁷⁸ Robbins and Wilner brought the *post* college crisis to national attention. As they stated,

The whirlwind of new responsibilities, new liberties, and new choices can be entirely overwhelming for someone who has just emerged from the shelter of twenty years of schooling. We don't mean to make graduates sound as if they have been hibernating since they emerged from the womb; certainly it is not as if they have been slumbering throughout adolescence (though some probably tried). They have in a sense, however, been encased in a bit of a cocoon, where someone or something—parents or school, for example—has protected them from a lot of the scariness of their surroundings. As a result, when graduates are let loose into the world, their dreams and desires can be tinged with trepidation. They are hopeful, but at the same time they are also, to put it simply, scared silly.

Some might say that because people have had to deal with the rite of passage from youth to adulthood since the beginning of time, this crisis is not really a “crisis” at all, given that historically this transitional period has, at various times, been marked with ceremonial rituals involving things like spears and buffalo dung. Indeed, it may not always have been a crisis.

But it has become one.¹⁷⁹

College students are correct to assume that the immediate period following graduation will be a challenge. As *Generation Me* suggests, some students are also not realistic about what the challenges will be.¹⁸⁰

¹⁷⁸ ALEXANDRA ROBBINS & ABBY WILNER, *QUARTERLIFE CRISIS: THE UNIQUE CHALLENGES OF LIFE IN YOUR TWENTIES* 4–5 (2001).

¹⁷⁹ *Id.* at 4–5.

¹⁸⁰ Young people who have high self-esteem built on shaky foundations might run into

Levine and Cureton captured much of the current generation in the title of their widely read book, *When Hope and Fear Collide*.¹⁸¹ As they wrote,

No generation has wanted to believe in the American dream more than current undergraduates.

They want good jobs. . . . 58 percent are aiming for careers in the platinum professions of business, law, medicine, and technology, an 8-percentage-point increase since the 1970s.

They want successful relationships; 92 percent say it is important for them to have a good relationship or marriage.

They want children; 78 percent want to have a family, which is a 4-percentage-point increase since 1976.

They want money and material goods; 75 percent of undergraduates say it is essential or very important for them to be very well off financially, a gain of more than 12 percentage points since 1979.

The only real subject of debate for undergraduates was what personal success meant. They were torn between doing well and doing good, that is, between having material resources and helping others. As noted, students overwhelmingly wanted to be very well off financially, but simultaneously a whopping 95 percent of undergraduates also said it was important to them to do good and help others. Five out of eight students

trouble when they encounter the harsh realities of the real world. . . . [K]ids who are given meaningless A's and promoted when they haven't learned the material will later find out in college or the working world that they don't know much at all. And what will *that* do to their self-esteem, or, more important, their careers? Unlike your teacher, your boss isn't going to care much about preserving your high self-esteem. The self-esteem emphasis leaves kids ill prepared for the inevitable criticism and occasional failure that is real life.

TWENGE, *supra* note 78, at 68.

¹⁸¹ ARTHUR LEVINE & JEANETTE S. CURETON, *WHEN HOPE AND FEAR COLLIDE: A PORTRAIT OF TODAY'S COLLEGE STUDENT* (1998).

wanted a career that would make a meaningful social contribution.

A particularly poignant conversation on this subject occurred in a focus group at the University of the District of Columbia. There was general agreement among the fourteen participants that they wanted to be materially successful and give something back to the generally poor black communities from which they came. The majority of the group, like their peers at colleges across the country, were currently involved in community service projects.

The interviewer asked the group how they were going to accomplish both of their goals. One student said she was going to become a lawyer and work in a major law firm. Then she was going to help the community. She spoke of giving legal help, money, and time. The rest of the group jumped on her immediately, saying, “What are you going to do, drive up in your Beemer and say I’m here to help?” They went on to say that law firms would not like to have her spending so much time away from the office with poor people who could not pay their fees. They said she would be too bust at her job to find time for the community; they claimed she could no longer be a part of it. She would change personally and lose touch with the community; she would live elsewhere and would need all of her money to support “a rich suburban apartment, her wardrobe, Beemer, and family.”

The would-be lawyer began by rebutting each charge. First she laughed at them. Then she yelled at them. Finally, looking beaten, she threw up her hands and agreed with the group. She said she didn’t know what to do. But no one else did either. The idea of returning to the community after college and then attending professional school was dismissed as unlikely, as was the possibility of staying in the community and taking a professional job. Making room in a professional career for a few hours each week of community service—tutoring,

working in a clinic, helping out at a shelter—seemed trivial to the group.

Ultimately, the group could figure out no way to do both meaningfully. They did not want to give up on material success, nor did they want to surrender their social responsibilities. They rejected both extremes. They did not need to be one of the Fortune 500, and they did not want to become Mother Teresa. They wanted balance but had no idea how to achieve it. They did not want to choose one over the other—doing well or doing good— but ultimately they saw no other possibility, particularly since the more appealing choice was to do well. Above all, they feared they might get neither.¹⁸²

We see college students with false, frightened, unrealistic, and paradoxical expectations of their future.

What is most evident is that most students have simply not thought ahead realistically. Lack of a coherent life plan and blurred vision of a future self leads directly to negative outcomes on campuses, including cheating and high-risk alcohol use. With no plan, and no intentionality regarding the future, students are tempted to emphasize “now” and try to pack “fun” into the only time they will have left before grievous “adulthood” sets in. College life’s non-real “fun” existence is a construct for those who live non-constructivist lives. There is also the very real possibility that the construct of “college life” may be a marketing construct created by various economic interests who hope to capture the market potential of the college demographic.

Institutions of higher education have an opportunity (perhaps even a responsibility) to assist students in the process of imagining their future selves. It will come as quite a shock to many students that life can improve substantially after college, and that a life that peaks in its early twenties is rarely one to envy or emulate. Most patterns of behavior built on a live for now attitude cannot be sustained in a long, healthy productive and meaningful life.

Long-term life planning is certainly a difficult game. Life has its own plans too, so we do not want to foster another dangerous illusion that plans make people safe from the vagaries of life. The illusion of the

¹⁸² *Id.* at 135–36, 138–39, 140–41.

halcyon-ness of college—and illusion it is—is believable only because of the vast marketing success of the image, the recollections of others, and because many students have no real sense of alternative ways to live (save perhaps for the lucky individual who finds true joy in excessive pursuit of one skill, or path). How would we expect a generation to behave that has been so protected from the challenge of building a life? And one with a poverty of imagination to boot?

Even when our lives do not go as planned, the process of engaging our future selves and reconciling our past selves is an integral part of learning and growing as a person. A meaningful life is one that is revisited regularly, and the process of revisitation is the essence of higher learning. First we visit with those wise elders who came before—then later, ourselves. Life planning is not about “winning,” or who dies with the most toys, or awards. The *process* itself gives life meaning and depth, and can be immensely rewarding in ways that money, fame, and power can never be. Higher education conceived of as a perpetual process of visiting and revisiting is *an end* in itself in higher education. This process *is* discipline in its most modern, positive, and widest sense.

As facilitators we have good cause to be concerned about our students’ future selves. High-risk alcohol use, cheating, promiscuity, debt, etc. all give us cause for concern. Facilitators are especially concerned with *latitudny*. This is best captured by a Peanuts cartoon that Bickel and I use to say was our favorite. In one particular strip, Charlie Brown and Linus acknowledge that winter days are shorter but *wider*. *Latitudny* is a quality that makes lives meaningful. Anne Frank, Dr. King, Bobby Kennedy, and Christopher Reeve, for example, all led tragically truncated lives in terms of length but their lives were wide, deep, poetic, and lived with meaning.

This connects to another crucial, but often overlooked point. Facilitators seek to help students understand their place in history as members of a generation, and individually. Only a few students will be a Mitt Romney or Allen Ginsburg, but all will play a role in a generational future. Millennials, who revere celebrity culture, must come to realize that the best paths in life are rarely glamorous, self-indulgent and lived publicly. Modern students are often tragically blasé about their place in history. In our lifetimes, billions of people will subsist at or below abject poverty level with little or no education at all. When one widens the lens a bit, modern college students form a large share of the very small percentage of humans who have had higher education at all. Going to college in America is an extraordinary human (existential, not legal) privilege, in this or any generation. College

educated people have consistently played more prominent roles in human history than individuals who have no higher education. The ongoing challenges of our global community will be handed disproportionately by the college educated. Yet modern college students often lack a sense of this unique place in history, and the tremendous human responsibility it entails.

Previous generations of college students had open enemies to confront like the great depression, fascism, and racism, which forged a clearer historical identity for them. This generation's challenge is internal—overcoming false expectations, over-confidence, and being over protected, etc. This is no less noble a generational calling: an entire world economy awaits their torch. Their sacrifices and challenges will leave a legacy of global significance, yet they are dimly aware of this.

iv. Challenges

A good master academic plan does not focus exclusively on aspirations and goals. Students must identify, and be assisted in identifying, challenges that they will face in college.

Admissions/matriculation processes today place heavy emphasis on positives and opportunities. Retention remains a major issue for almost every institution, yet many institutions see some of their biggest attrition in the first year of college. Some major state colleges, for example, lose nearly a third of their students, sometimes even in the first year.¹⁸³ Clearly, large numbers of students face challenges that they did not assess, did not realistically assess, and/or did not have proper preparation for. Not all challenges can be met and planned for, and many higher learners will fumble despite reasonable efforts at facilitation. Many obstacles, however, can be overcome or avoided with proper recognition and appropriate attention and planning.

The challenges that college students face are often so uniquely individual that their challenges are as individual as they are. Nonetheless, there are many common themes. Students can face parental (family) pressure, lack of family support, financial challenges, alcohol and other drug and wellness issues, relationship issues, lack of

¹⁸³ J. PAUL GRAYSON WITH KYLE GRAYSON, CANADA MILLENIUM SCHOLARSHIP FOUNDATION, RESEARCH ON RETENTION AND ATTRITION 5 (2003), available at http://www.millenniumscholarships.ca/images/Publications/retention_final.pdf; Amaury Nora et al., *Student Persistence and Degree Attainment Beyond the First Year of College*, in COLLEGE STUDENT RETENTION: FORMULA FOR STUDENT SUCCESS 132 (Alan Seidman & Vincent Tinto eds., 2005).

interest or initiative or motivation, and unforeseen forces, such as illness or accident. College students do not typically come to college braced for problems and challenges systematically. From an actuarial standpoint we know that some students will face these challenges and many will fail in the face of them.

Again, some effort from the outset to illuminate challenges and to provide realistic strategies for meeting challenges will help. Planning and intentionality can overcome many challenges, or at least mitigate their negative effects.

We would hope that students and mentor teams would systematically consider the best alternatives and options in every significantly challenging situation. At any point, a student may face a challenge that will ultimately force them from college. However, many challenges will not rise to an immediate in-or-out level of concern. Nonetheless, it is helpful to consider in advance the challenges that could be both college and career threatening. From this perspective the student—with assistance—could consider features of their educational experience that need the most attention immediately.

According to *Quarterlife Crisis*, many post-college twentysomethings face a bewildering array of choices:

[A]fter graduation, the pathways blur. In that crazy, wild nexus that people like to call the “real world,” there is no definitive way to get from point A to point B, regardless of whether the points are related to a career, financial situation, home, or social life. . . . The extreme uncertainty that twentysomethings experience after graduation occurs because what was once a solid line that they could follow throughout their series of educational institutions has now disintegrated into millions of different opinions. The sheer number of possibilities can certainly inspire hope—that is why people say that twentysomethings have their whole lives ahead of them. But the endless array of decisions can also make a recent graduate feel utterly lost.

So while the midlife crisis revolves around a doomed sense of stagnancy, of a life set on pause while the rest of the world rattles on, the quarterlife crisis is a response to overwhelming instability,

constant change, too many choices, and a panicked sense of helplessness.¹⁸⁴

It is possible to make college life less bewildering? Currently, from the point of view of a recently former K-12 student, college presents a mini-crisis of sorts along the same lines as the *Quarterlife Crisis*. This will be the first time away from home for many students; friends and relationships will be physically, if not electronically left behind. Basic questions about what to wear and eat, when to awake, etc., will require choices that most college students have not had to make routinely on their own. Disabled students will receive a different form of accommodation for their disabilities than they received in K-12.¹⁸⁵ The list goes on. College students will benefit from a more systematic and intentional approach to their foreseeable future challenges.

v. *Helpers*

College students typically succeed, in part, due to the assistance of helpers. Consider the eponymous character in the famous college movie, *Rudy*.¹⁸⁶ Rudy wants to play football for Notre Dame, but is not as athletically gifted as his college football peers. Rudy receives incalculably valuable assistance and encouragement at first from an elder, and later, from an entire team. Rudy needs a great deal of help to succeed in his football career, and systematically receives successive layers of help that make it possible for him to play intercollegiate football. Without helpers, Rudy would have never played college football at all. Most students who are successful in college have strong support from parents, spouses, children, siblings, other family members, friends, or other special Mr. Miyagi-type¹⁸⁷ helpers—even animals.¹⁸⁸ An institution of higher education may not be an idealized Smurf-like village full of helpers, but it can provide structured mentoring assistance to help students to succeed along the way. Many college students have a sufficient support system in place to succeed without mentoring from an institution of higher education. Systems of mentoring should not be

¹⁸⁴ ROBBINS & WILNER, *supra* note 178, at 3.

¹⁸⁵ KAPLIN & LEE, *supra* note 16, at 959.

¹⁸⁶ RUDY (TriStar Pictures 1993).

¹⁸⁷ THE KARATE KID (Columbia Pictures 1994).

¹⁸⁸ College students often leave the family/childhood pet for the first time. One of nature's cruelest tricks is that the life span of most pets times out poorly with departure for college. If you have ever been away at college and lost a pet you understand.

implemented so as to replace parents and family connections, etc. but to augment those helpers.

There are defects in relying too heavily on *de facto* mentoring systems. Typical college helpers—parents, friends—do not always have all the skills and information to help students, even if their motivations to help are pure as snow. Students themselves do not routinely and systematically assess who their allies will or can be, nor do they typically anticipate all the types of helpers that they will need. Indeed, in virtually all of the modern movies that involve higher education, helpers usually find the student, not the other way around. Obi-Wan Kenobi finds Luke Skywalker; Mr. Miyagi finds the Karate Kid; Rudy is facilitated by the elderly janitor who picks him out. Some helpers will magically appear when needed; the longer one works in higher education the more believable the old adage is true. But not all college students can expect Obi-Wan to get them out of a tight spot when the Sand People attack.¹⁸⁹ These types of helpers make for great movies, but in the real world, planning and a reasonable amount of effort in advance are necessary.

There is something else to consider as well. Some helpers will appear and *seem* to assist a student in their development. But often “helpers” provide dysfunctional assistance and make things worse. Thus, it is wise to develop some systematic process to evaluate the helping/assisting process and helpers both formally and *de facto*. The *Harry Potter* series provides a glimpse into the need for assessment of helpers. Only in the end do we truly discover whether Snape, a teacher, is helping or hurting Harry Potter.¹⁹⁰ (I would have pulled my child out of Hogwarts at the end of Book 1, *The Sorcerer’s Stone*,¹⁹¹ but I am risk averse.) Anakin Skywalker should have asked for an outside consultant to review the Jedi Council; my mother would have been in Yoda’s and Mace Windu’s face for all the “Anakin is bad” talk. It does not take the Emperor to see that Anakin Skywalker was being treated poorly by the Jedi Council. Few real world helpers are complex to assess. Most often even a modicum of attention to a helper illuminates that helper’s positive and negative qualities.

Assistance can come in many forms. Sometimes helpers need to make a long-term commitment; sometimes just a small intervention will do. Moreover, students should not expect that helpers will help them with everything or that assistance will always be available. Helpers

¹⁸⁹ STAR WARS: A NEW HOPE, *supra* note 21.

¹⁹⁰ J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (2007).

¹⁹¹ J.K. ROWLING, HARRY POTTER AND THE SORCERER’S STONE (1998).

must realize that many students will ask for help *too* often. It would be sad to create a generation of educational co-dependants, or a cadre of enablers called helpers.

Moreover, it is crucial for Millennials in particular to understand that assistance does not mean displacement. Millennials may have a tendency to allow their helpers to assume too much responsibility for decision-making. This goes to the core of the concept facilitation. A facilitator does not attempt to make choices for students. A facilitator helps students make wise and responsible decisions for themselves. Facilitator/mentors will recognize that failure is part of the process of learning and learners must be willing to tolerate a certain degree of error, mistake and even danger for the sake of the greater good of that student.

Parents of Millennials may resist this concept, but they too must understand that they may have to change their interdiction philosophies with their children. One major problem occurs again and again in modern discipline. Parents attempt to blame the discipline system for a student's mistakes, or worse, parents actually *interfere* with the system. Helping and assistance in American higher education is a fine art, takes special skills, and involves managing parents and parental expectations and behaviors.¹⁹² Parents are often primary helpers, but may lack the skill and knowledge—and orientation—to always truly “help” their children in the higher education environment. Master academic planning processes must confront the fact that parents will often be deeply connected to the process of planning, and must themselves be educated in their helping roles. As we educate Millennials, we must also educate their families in appropriate levels of helping and engagement – *and* disengagement.

vi. Background Conditions

As part of the master academic planning process, students should receive, understand, and acknowledge the background conditions of the environment they are entering. For example, students should understand the general criminal risks in their environment and be aware of other non-criminal dangers such as weather, traffic, and pedestrian risk. For example, students rarely read Clery reports, or comprehend

¹⁹² Also, when students (and families) hire lawyers, the lawyers may not “help” their clients in an educational sense. Lawyers are charged with zealously representing the interests of their clients. However, zealousness often connotes extreme positioning or a win at all costs approach. Lawyers can easily lead their clients into pyrrhic victories where they “win” a matter vis-à-vis an institution, but lose out educationally.

them.¹⁹³ Clery reports do not provide a necessary step in individuating the assessment of danger. Baby Boomers might have read and digested Clery reports as students; Millennials need to have such information individuated to them. Students should also receive specific information regarding alcohol and drug issues in their learning environments. At a minimum, every student should know about central features of CORE survey data¹⁹⁴ (or a similar assessment instrument) and should receive some form of social norms marketing information.¹⁹⁵

Unfortunately, if such information is provided only during orientation, it may be too little too fast, or there may not be sufficient time for an individual student to understand how information presented interacts with their choices. Many students may have already received an informal “disorientation” as part of a sleepover visit in which high-risk alcohol usage has been observed and promoted. Even without a sleepover visit, many students quickly learn about where and how to get alcohol as an underage drinker, how students perceive that other students drink, and worse. Often the information conveyed by the other students is grossly exaggerated or false, but because it is so highly individuated and verified by a purported “mentor,” it likely seems highly believable. Colleges must recognize that training students in the reality of alcohol and drug use on their campus requires far more than orientations, social norms marketing campaigns and the like. The failure in some education programs related to health and wellness is that crucial information is not presented in a form that students will realistically digest and internalize.

Traditionally, alcohol and drug prevention efforts have been grossly underfunded and therefore have been unable to perform at levels that science suggests would be fully efficacious.¹⁹⁶ (Legalisms have led an entire generation to spend generously in rule creation and administration, but poorly in prevention: ironically, many rule violations can be traced directly to high-risk alcohol use. We have credible prevention science, yet we lack significant evidence of rule efficaciousness.) In other words, institutions of higher education have not sufficiently prioritized alcohol and drug prevention efforts and

¹⁹³ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f) (2006).

¹⁹⁴ EDUCAUSE—Core Data Survey, <http://net.educause.edu/apps/coredata/> (last visited Oct. 11, 2008).

¹⁹⁵ See Nat’l Inst. on Alcohol Abuse & Alcoholism (NIAAA), *A Call to Action: Changing the Culture of Drinking at U.S. Colleges* (NIH Pub. No. 02–5010, 2002), available at http://www.collegedrinkingprevention.gov/NIAAACollegeMaterials/TaskForce/TaskForce_TOC.aspx.

¹⁹⁶ NIAAA, *supra* note 195.

therefore lose a great opportunity to work with students with respect to prime sources of risk and danger on campus. Of course, alcohol and drug risk is not the only feature of background conditions for students. For example, students should also be trained in the realities of academic culture, particularly issues of academic integrity, as part of the background conditions training and planning process.

C. Litigation Avoidance and Efficiency

Adopting a new vision for the management of the educational environment has challenges as well as opportunities. There are new horizons of litigation avoidance and educational efficiency to achieve. Nonetheless, there are obviously two concerns that must be addressed. First, will new forms of process generate new and more expensive litigation? Can we take the risk that changing our approach is a good idea? Second, there are issues of resources and efficiency.

Retreating from a well established line of legal defense is never easy. Modern legalisms are functional enough to give the illusion of good litigation avoidance. Institutions of higher education still typically win cases—*primary* litigation directly challenging the application of legalistic process rules to students—although we have seen some changes in the wind. Primary litigation avoidance functionality gives legalistic approaches to manage educational environments a certain validity, in much the way that the Maginot line was “validated” as a formidable defense against German military aggression for many years prior to 1940.

Obviously moving to more individuated master academic planning based systems will require some new resources and training. Delivery of highly individuated education has costs. Institutions of higher education have tended, in the period since World War II, to grow student bodies as opposed to shrink them, making use of greater system-wide approaches to student management to manage large student populations. Student-professor ratios have changed as well. Institutions of higher education increasingly use teaching fellows and graduate assistants to meet student needs. In creating a super race of *research* faculty, we have also generated a greater distance between faculty and students. For students, this means contact with an array of professionals but less contact with academic professionals one on one in longitudinal ways. Many students will spend more time with a residence hall director than any single professor. The individual contacts students do have are

usually not highly coordinated. Students have too much and yet little contact on an individual basis.

I. Litigation Avoidance

Legalistic process systems provide an illusory sense of being litigation proof. We tend to win primary litigation, although this is primarily due to judicial deference to academic freedom, rather than some magic in the way we administer our systems or use legalisms. Legalistic systems tend to produce substantial operational compliance error—see e.g., the *Schaer*¹⁹⁷ case in Massachusetts or *Than*¹⁹⁸ in Texas—yet most courts have tended to forgive our process sins even when our systems have significant compliance error. Our fortune here will not hold forever: organized opposition to our systems has developed, and we have seen the first wave of cases that do not show as much judicial forbearance when we fail to deliver process promised. But even if we were to win every process case outright, we would still be losing in several important ways.

First, higher education is increasingly at risk in *secondary* litigation. Second, major ills such as high-risk alcohol use, cheating and poor retention rates plague us on a business level, and reduce the value of the core mission to students and society. Third, on the not-so-far horizon, institutions of higher education may begin to face new forms of lawsuits that test the delivery of our core mission itself. Fourth, managing our educational environment with legalistic tools such as codes and academic standards will be insufficient to meet the challenges that higher education will face. We will not be able to sanction people into wellness, for instance.

We cannot continue to expect to receive judicial and legislative deference with respect to our core mission indefinitely. If we do not demonstrate success in that mission, the lessons of the Civil Rights era are clear. When American higher education began to fail in its core mission, the law as visitor intervenes. American law rarely forgives a business for attempting to sell its customers a product with no assurance to consumers that the product works as intended or expected.¹⁹⁹ *Caveat emptor* has died in many fields such as consumer law and professional

¹⁹⁷ 735 N.E.2d 373 (Mass. 2000).

¹⁹⁸ Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926 (Tex. 1995).

¹⁹⁹ U.C.C. § 2-316 (2005); FARNSWORTH, *supra* note 91, at 308–10.

services law.²⁰⁰ We cannot *facilitate* our students *and* simultaneously walk away from responsibility with respect to core environmental challenges that make learning challenging (and even impossible) for a large number of students. It is unlikely that the laws will continue to give us high degrees of deference if we do not consider these issues and act upon them first. In *Sweezy*, the United States Supreme Court gave American higher education academic freedom to confront educational issues on its own; but should American law come to feel that higher education is substantially failing in its core mission, academic freedom will recede.

This is the negative side of the equation. There is a positive side to choosing to engaging new forms of process. A major advantage of an educational environmental management approach grounded in master academic planning for every student is that it accords with Supreme Court doctrine. It is notable that *both* cases the Supreme Court heard on university student due process featured situations in which students were subject to highly intensive individual evaluation. Both students participated in highly planned out educational experiences. If we still believed that an academic/conduct distinction has some vitality, then we might say that the new approach is more “academic” and therefore subject to fewer due process strictures (than a more “conduct” based system would be.) But more accurately, the key legally protective feature of a system of educational environmental management is that it takes advantage of and relies upon, more subjective and evaluative criteria in individual interactions with students, and the exercise of our academic freedom. Engaging in a process of subjective, evaluative, individualized education provides the highest form of legal protection—not because of a label such as “academic” but because this is the way in which academics proceed with the most legal protection. When such engagement occurs in good faith, in accordance with academic norms, and without improper or illegal intent, that *is* the discipline of higher education.

Educational environmental management is subjective and evaluative in two ways. First, virtually all general educational management systems—even those based on rules or policies—can be modified to express the purposes and policies underlying them, and then be administered in a way such that the exercise of judgment—balancing,

²⁰⁰ David Blower, *Colorado HB 1061 and Advocating for the End of Caveat Emptor in Residential Leases*, 78 U. COLO. L. REV. 957, 961 (2007); George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition From Caveat Emptor to “Seller Tell All,”* 39 REAL PROP. PROB. 193 (2004).

weighing, evaluating—and student development are foremost. In short, we will still have “codes.” However, they will have a different look and be administered differently. Legalistic systems tend to reduce complex issues of student development to objective rule/fact applications. Under *Horowitz et al.*, this tends to open institutions of higher education up to a much higher level of scrutiny when *verification*²⁰¹ becomes more important than overall *evaluation* of a student.²⁰² Judging our students is certainly one way to evaluate them. However, it is not the only way, and rarely the best. It is certainly less legally dependable.

Second, educational environmental management is individualized and decentralized. The image of an institution of higher education interacting with students in a master academic planning process is archetypically what we imagine academics do. Delivery of educational services ultimately must be individualized in an ideal higher educational environment.

A system of educational environmental management introduces a much larger, and more visible and prominent role for the use of subjective evaluative criteria. The master academic planning process challenges the core assumption that the best environmental management tools are rules, objective facts, procedures and sanctions. We should seek to evaluate students with tools that reflect the academic enterprise itself. Managing an academic environment requires the use of principles and standards, evaluation and assessment, and more emphasis on rewards and success orientation—not just rules and sanctions. When educational environmental management is deployed through the use of subjective and deliberative criteria we receive the highest level of protection in the legal system under *Horowitz* and *Ewing*, so long as we do so in a careful, articulated, intentional, reasoned way.

Third, educational environmental management is the only approach that has a reasonable chance to reduce secondary harm and litigation. Modern legalistic codes do not prevent second secondary harm and litigation demonstrably. Legalistic systems do not improve general educational environmental conditions in aggregate ways that we can discern. Secondary litigation is rising even as our codes get more complex and exert more control over the college environment. The way to respond to modern educational environmental challenges is to deploy

²⁰¹ To put this another way, higher education has cast much of its student individuation in a *Goss*-like way. We tend to turn questions that require evaluation, balancing and weighing into “yes” or “no” questions that imply verifiability.

²⁰² *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *see also* *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926 (Tex. 1995).

systems that feature individual evaluation, planning and intentionality. An institution of higher education can evaluate students as individuals and simultaneously assess and evaluate the academic environment as a distinct educational organism itself as well.

Higher education works best when an individual is regarded as a learning environment situated within a larger academic environment. Legalistic codes have inherent difficulties performing in environmentally sound ways on their own; “cases” pit students against their environment and institutions, and students must choose whether to support the macro-environment or the micro. Legalistic codes tend to see individuals through the lens of their objective behavior and tend to seek procedural compliance as a top priority for litigation avoidance.

Legalistic codes also tend to resist instrumentalism in discipline—being used to achieve goals—because of an underlying belief that instrumentalism clashes with fairness. Legalistic codes also tend to evolve very slowly in response to change, in part because there is an implied fairness assumption that like cases should be treated alike. Slow moving codes do not respond quickly to secondary risk, and litigation over secondary risk may ensue.

When rules, procedures and sanctions are foremost, students in the educational environment are not. When rules are tempered with the reasons why we have them in the first place—the *spirit* of the rules—and when students are treated individually, we have the best chance to make meaningful environmental change within *micro* and *macro* educational environments.

Effective education and effective educational environmental management are calculus-like. Many variables are so interdependent that effective action on one variable alone is meaningless. Perceived administrative powerlessness—shared too often by parents and students—reflects the fact that individual action is necessary, but not sufficient. Without coherent educational environmental management for a *micro* and *macro* environment, the master academic planning and larger educational environmental efforts may have little impact upon the educational equation.

Fourth, we must take the looming threat of more litigation regarding negligent admissions and retention, and educational malpractice seriously. The lesson of the case law since *Dixon* is instructive. If we fail in our core mission—say by disciplining students for exercising the very freedoms we ostensibly try to teach (*Dixon*²⁰³), or

²⁰³ *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

by disciplining a student for transgressions they may not have committed (*Goss*²⁰⁴), or by facing unarmed students who present no threat of deadly force with deadly force (Kent State²⁰⁵), or by denying students the right to associate because it might go wrong (*Healy*²⁰⁶)—we will face legal consequences. The law will hold us accountable for our stated mission, and will show less forbearance when we attempt missions that are not properly ours or not proper to our core mission. How long can higher education continue to avoid accountability if students live in unsound environments, even if we promise the best classroom experiences possible? If we stumble in our core mission, the law will likely do what it has done before and move to protect it. Law will visit if we tempt it to. Higher education is better off because of *Dixon*, *Goss*, The Scranton Commission Report,²⁰⁷ *Tarasoff*,²⁰⁸ for example, even though higher education fought each of these feverishly. These *protect* our core mission, and make our learning environments stronger.

Educational environmental management is a powerful way to re-imagine the core mission of higher education *and* to protect against core mission litigation. A master academic plan based higher education system can proactively identify and remedy situations that could evolve into negligent admissions and retention matters for example. The risk of educational malpractice lawsuits can be reduced. Clarifying expectations, challenges, opportunities and goals can serve to bring a healthy dose of realism to a college student's path. Disappointed expectations, the seed of most litigation, occur when a student's expectations (or their parent's) are unrealistic. In addition, we often see that litigation in higher education is driven (as it is in professional malpractice litigation) by poor bedside manner, lack of candor, permitting false expectations to continue without correcting them, and poor communication, especially when something significant has gone wrong. Students with academic difficulty can often legitimately complain about some or all of the above. The gruff or absent academic advisor, inconsistent messages from faculty and staff, lack of contact and mentoring, or lack of clear competencies to achieve. The master academic planning process is designed in part to be a facilitator university's answer to charges of educational malpractice.

²⁰⁴ *Goss v. Lopez*, 419 U.S. 565 (1975).

²⁰⁵ REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970).

²⁰⁶ *Healy v. James*, 408 U.S. 169 (1972).

²⁰⁷ REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, *supra* note 205.

²⁰⁸ *Tarasoff v. Bd. of Regents of Univ. of Cal.*, 278 Cal. Rptr. 918 (Ct. App. 1991).

We should not embrace master academic plans or educational environmental management as a litigation avoidance technique alone, or primarily, however. Instead we should recognize the intrinsic educational value of such an approach. Any process system with a primary goal of litigation avoidance shares the same flaw. The law is not reluctant to intervene in higher education if we deviate substantially from our core mission, even when we are seeking legal compliance as a goal in good faith. American higher education generally does best under the law when we follow our own mission faithfully as professional educators. Yet, higher education does not set its own standards of care in law as the learned professions such as doctors, lawyers and accountants do.²⁰⁹ Higher education nonetheless finds a *similar* type of legal protection by acting in a way that is consistent with legitimate higher education objectives and norms. We find academic freedom, and freedom from serious litigation risk, in process—*our* process. Academic freedom is higher education's equivalent to being allowed to set its own standards as a learned profession might under the law *if, and only if, the* core mission is substantially delivered.

This is a very subtle, but a crucial point. Higher education has not been permitted to devise standards of behavior that become rules of decision in court, *per se*. Higher education administrators, unlike doctors and lawyers, cannot assume that what is customary and good practice will be considered reasonable *per se* in court. A doctor can typically take comfort in good practice when facing the law. Higher education administrators can never take comfort that good practice alone is compliance with the law. Legal compliance for higher education is more complex, and customary practice is less certain to protect us in litigation. In this way, the law treats higher education administrators as less *professionalized* than certain other professions such as the learned

²⁰⁹ “[T]he law places upon [a physician] the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians . . . and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine.” *Pike v. Honsinger*, 155 N.Y. 201, 209 (N.Y. 1898). “In general, a lawyer is liable for malpractice when he or she fails to exercise that reasonable degree of care and skill as is required to handle a particular case.” SUSAN HERSKOWITZ, *ATTORNEY RESPONSIBILITIES & CLIENT RIGHTS* 6 (2003). “The accountant's duty to conform to a legal standard of conduct requires reasonableness and competence in performing professional services. . . . [Generally, accountants] owe their clients a duty to exercise the degree of care, skill and competence that reasonably competent members of their profession would exercise under similar circumstances.” Constance Frisby Fain, *Accountant Liability*, 21 OHIO N.U. L. REV. 355, 366–67 (1994) (citations omitted).

professions of law, medicine, and accountancy. However, higher education receives greater protection in its core mission than even lawyers, who have drafted some pretty “neat” levels of protection for themselves as you might expect. Indeed one might argue that higher education still receives the highest protection of any business under law. How? The answer lies in the fact that for higher education administrators there are not specific *standards* for professional behavior, but there is an *academic process*, or a way in which academics reach conclusions, decisions, etc., that is protected. It is our process that protects us, not rules, policies, or standards. In the eyes of the law *we have few customary standards*, but we have *a way of doing things that marks us out as unique and deserving of protection*. Our process is the process of reasoned and deliberative evaluation and elaboration.

In some cases, the process of reasoned and deliberative evaluation and elaboration is highly objective, in many academic enterprises it is highly subjective, or a mix of both. This ultimately matters little in the eyes of the law, except that the process we use should reflect the way in which academics approach the issue at hand. There are infinite manifestations of the ways in which academics proceed in their unique endeavors. Scientists, philosophers, and Vice Presidents for Student Affairs all engage in academic process a little differently at times, but ultimately we still all do something recognizably similar in the eyes of the law. Everything we do reflects our core mission, or it does not belong.²¹⁰ Educational environmental management attempts to unleash the inherent power of academic process educationally and legally.

II. Efficiency

Moving to a system of educational environmental management featuring a master academic planning process will involve costs, but there will also be opportunities to realize greater efficiency. Some refocusing and retraining of personnel will be necessary, but institutions could easily use existing personnel without adding staff. Consider the following.

First, there are hidden costs and externalities associated with current discipline systems. Admissions is a costly endeavor, especially when it must be hyperactive to cover for retention problems. Retention problems themselves involve large costs. Discipline systems are

²¹⁰ This is the root of concerns over the rise of college athletics systems that mimic the ends and purposes of professional athletics. The question these activities face is simple: do college athletics serve the core mission in an authentic way?

expensive to run. Litigation costs and risks are increasing. New jobs are already arising, such as parent liaison, to meet the needs of students and families. Accreditation standards have been shifting to address outcomes and assessment of outcomes. It is not as though current approaches are obvious efficient choices—we have most current systems as a result of evolution, even glaciation.

Second, a great deal of master academic planning could be performed in self-directed ways, perhaps even using technology and/or web-based interactive software. Parents, or others, might also be utilized in volunteer capacities.

Third, oppositional systems are intensely energy, not just time, draining. Creative, positive academic energy is lost even when administrators and students are devoting time to a contested student matter.

Fourth, colleges would be able to divert personnel and resources from assignments in judicial, housing, and admissions to master academic planning. Fewer resources will be needed in some traditional areas as caseloads diminish and retention improves. Massive admissions efforts can be trimmed, and orientation likely will shift in some ways to more decentralized delivery.

Fifth, a major inefficiency in higher education is what I refer to as “flittering.” Students and parents flitter from one point of contact to another attempting to determine who can best provide needed service, information, etc. Parents usually flitter to the top of organizational charts—even to trustees. I cannot always determine why students choose first points of contact; my sense is that they often make intuitive guesses as to which “edadministrator” seems most receptive to their inquiry. Flittering can be mitigated by a master academic planning process. Students will have a lead mentor, who would normally be a first point of contact for previously unforeseen issues or opportunities. (Flittering is also dangerous; students often do not pick the right points of contact soon enough—even flittering to peers when administrators should be involved.)

Sixth, colleges that embrace educational environmental management approaches will have a competitive advantages. Students and families will likely gravitate to colleges that utilize these approaches.

Seventh, some universities may find that mentor teams perform functions that proxy for “threat assessment” (or other teams) and therefore will be able to ease the burden of threat assessment teams somewhat. Master academic planning is neither intrinsically a profiling

or threat assessment tool, but system-wide individual interaction will undoubtedly provide new tools for wellness and safety.

Overall, educational environmental management using master academic planning diverts resources from traditional areas of activity to newer, more educationally sound uses. Most critically, colleges will transform energy drained in conflict and failure management to energy used to prevent conflict and failure. Proactivity is preferable to reactivity in higher education in most situations.

Finally, higher education only appears efficient because many enormous costs are either hidden, or externalized. Perhaps the greatest cost, however, is in poor and delayed graduation rates. Consider the ominous findings in a recent study commissioned by the American Enterprise Institute:

In the fall of 2001, nearly 1.2 million freshmen began college at a four-year institution of higher education somewhere in the United States. Nearly all of them expected to earn a bachelor's degree. As a rule, college students do not pack their belongings into the back of a minivan in early September wondering if they will get a diploma—only when.

For many students, however, that confidence was misplaced. At a time when college degrees are valuable—with employers paying a premium for college graduates—fewer than 60 percent of new students graduated from four-year colleges within six years. At many institutions, graduation rates are far worse. Graduation rates may be of limited import to students attending the couple hundred elite, specialized institutions that dominate the popular imagination, but there are vast disparities—even among schools educating similar students—at the less selective institutions that educate the bulk of America's college students. At a time when President Barack Obama is proposing vast new investments to promote college attendance and completion, and has announced an intention to see

the United States regain leadership in such tallies, these results take on heightened significance.²¹¹

Retention, dropout rates, delayed graduation, etc. are costs related to the process we use to manage our environments.

It may be that movement towards greater core mission efficiency will arise only as the product of some dialectic process *vis-a-vis* the government and purchasers (families and students) of higher education. It seems almost inevitable that either or both—who largely sat the sidelines through the era of legalisms and the Civil Rights era with respect to many core mission delivery responsibilities—will intervene more strongly. Higher education in the United States experienced an almost uninterrupted upward business spiral after World War II to the millennium. Much of that growth was demographically connected and economically fueled by the enormous wealth of the United States after World War II (particularly its depression era citizens, who saved and accumulated wealth that was transferred and then used to fund housing and education—two general goods Baby Boomers strongly prefer. Remember that until recently many costs of higher education were paid for with home equity lines of credit.) Core sources of wealth, upon which higher education has depended, are constrained; we should expect conditionality to follow. This could be the greatest challenge to academic freedom in a broad sense in the history of the Republic, and we would be wise to meet the challenge head on.

D. Conclusion

The Civil Rights era represented a fall from academic grace, the return of the visitor, and the process of gradual redemption. Reasoned and deliberative evaluation went awry and was polluted with prejudice when Dean Wormer exercised raw, unchecked power. There were many things at stake in the Civil Rights era, but one of the most important was the process of academics themselves. Our power, as we have learned, is unique and delicate and can evaporate with the firing of one bullet or the wrongful expulsion of a single student.

With a magnanimous hand, *Horowitz* and *Ewing* (and other cases) gave higher education tools to purify its own process and reclaim

²¹¹ FREDERICK M. HESS ET AL., DIPLOMAS AND DROPOUTS: WHICH COLLEGES ACTUALLY GRADUATE THEIR STUDENTS (June 2009), available at <http://www.aei.org/docLib/Diplomas%20and%20Dropouts%20final.pdf>.

higher education Countless higher education cases have attempted to advance higher education and urged higher education not to abandon its core mission. A move within higher education towards legalisms misses the central point of the Civil Rights era and the underlying rationale of the case law. Too many legalisms unravel the process of academics. In the end, we must realize that the only real protection under law, and the only true assertion of our “power,” is the power of the academic process itself. We have a power greater than atomic bombs—a process to inspire and transform with knowledge, and to pursue the ever elusive, yet golden ideal—truth.

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6

Conclusion: The Student as Visitor

The major challenges of the modern university are ones of intentionality, choice, articulation, and expectation. Why do we have student discipline systems? What do we hope to accomplish with them? In what ways are oppositional systems of student interaction supportive of our core mission? What do our students and their families hope to gain from higher education? Why have we chosen legalisms to manage our environments? Or better still, why do we *continue* to choose legalisms over other tools to manage our educational environments? The future of academic freedom rests upon the choices we make, or avoid, with respect to such questions. It is not too late to assert and revive our academic freedom, even though we are perilously close to forfeiting our power and protection by choosing or acquiescing in legalisms.

The modern university has sublimated power and prerogative into legalistic process. *In loco parentis*, and other emblematic features of the era of power and prerogative, have given way to legalisms. We have a love/hate relationship with law: we resist the intrusion of law into our affairs but embrace legalisms to manage our environments.

The choice of legalisms—made in another generation—was clearly intended to end autocratic, even evil, administrative power over students. With legalisms, power is *processed* and rendered balanced, fair, unbiased, and objective. But it is still power—the exertion of authority by some force outside a student over that student. Legalistic systems of discipline are transitive; power exercised through legalisms is more palatable. Power shifts from *persons* into *systems*—Dean Wormer morphs into a process. In systems, power is dispersed among the faculty, students, administrators, and others, to the point no one group or individual truly wields power in all ways at all times. Power now rests in *codes*. It is common today for students, faculty, and administrators to express concerns regarding *disempowerment*. Disempowerment is a symptom in a higher education environment of the overusing of legalisms.

The diffusion of power under legalisms has made the image of Dean Wormer¹ passé—a caricature. Legalisms successfully stamped out many evils in higher education. Yet, in fixing one set of problems, higher education created another. The Civil Rights era generated success in providing civil and political liberties to students, but safety and wellness issues, *inter alia*, have lagged behind. There is a tendency to focus upon symptoms that face higher education today such as high-risk alcohol use, high levels of sexual assault and abuse, hazing, cheating, etc. Yet these are only symptoms of a deeper flaw in the delivery of our core mission. The major obstacles we face in modern higher education arise at a conceptual level and relate to an incomplete vision of what it means to deliver a meaningful higher education experience to students of the millennium.

We should reconsider using discipline as a primary, or even significant, tool of educational environmental management. Discipline and education are opposites and are mismatched in any educational environment that does not feature (1) parent/child or military responsibilities and/or (2) indoctrination as its primary goal. We discipline individuals inferior in rank, children, or those who are being indoctrinated. However, adult and near-adult learners in a free society seeking to learn and grow cannot experience educational growth primarily through negative consequences via *discipline*. For them, negative consequences, if any, must arise ultimately from their consent and agreement, and no other power.

The focus on *discipline* as a primary tool for managing a higher educational environment is vestigial—a relic of the era of power and prerogative. “Discipline” suggests a hierarchy of power that neither does, nor should, exist in a facilitative environment. Relationships with students are rooted in agreements, expectations, hopes, wishes, intentionality, understandings, and the like. If we have to take negative or oppositional action regarding a student who does not follow mutual agreements, expectations and understandings, we are not “disciplining” that student in any sense except metaphoric (and in higher education, the metaphor is inapt). For example, we do not speak of aggrieved parties in commercial litigation seeking to “discipline” parties who breach a contract. We seek to fulfill expectations, or in dire circumstances to end a relationship previously formed. Vindicating expectations or terminating a relationship is not discipline *in any modern sense*. A moment of disagreement or dispute in a college’s relationship with a

¹ See Eric Hoover, ‘Animal House’ at 30: *O Bluto, Where Art Thou?*, 55 CHRON. HIGHER EDUC., Sept. 5, 2008, at A1.

student is not inherently a dispute over power, nor should it be needlessly turned into one. To conceive of such issues in terms of power is a throwback to an era when the only way to conceive of conflicts in relationships with students was as struggles of power and prerogative. Dean Wormer saw a “misbehaving” student as a challenge to his power and prerogative. So it was at Kent State and Alabama State College, *inter alia*. Education-as-power-struggle paradigms have no role in modern higher education whatsoever. In an important sense, power over students is only an *illusion*; we only have power that students, families, and society give to us. Our power does not lie in wielding power over students, but in the freedom to design and implement a process for higher education.

The paradigm of educational environmental management by way of discipline and legalisms has failed in higher education. The era of legalisms has failed in less obvious ways than the era of power and prerogative. It would almost appear that it is the students themselves who are failing—drinking too much, being too violent, diffident, etc. We might be tempted to believe that our systems are fine, but the students and their choices are the problem. We should be hyper-vigilant in avoiding student blaming: if we do blame students, we might look in the mirror and see Dean Wormer staring back.

When the era of power and prerogative was collapsing, American higher education dealt with riots, violence, shootings, arson, a national student strike, etc. There was educational civil war. Modern universities do not face similar upheavals. Legalisms and legalistic process have reduced mass violence—especially political insurrection. The era of legalisms undoubtedly has made future Kent-State-like events vastly less likely. Today, our worst moments are sporadic acts of madness and violence that are random and not political, such as occurred at Virginia Tech. Higher education remains dangerous, but largely peaceful from a political perspective. A politically peaceful educational environment is a sounder environment than a non-peaceful one for sure, but it does not follow that politically peaceful educational environments are therefore educationally sound or safe. The very features of legalisms that tend to generate peace contribute to many of the problems of modern higher education. Educational environmental management based principally on legalisms can become a slow game of forbearance and conflict avoidance in which important educational goals, and students, are sublimated to legalistic process dramas.

American higher education must eventually come to realize that the deeper meaning of power struggles of the Civil Rights era does not lie in a mere redistribution of power. Student martyrs have not sacrificed

so much simply to reorder power between administration and students. The tumultuous 1950s, 1960s, and early 1970s should teach us that modern higher education is not about the exercise of power, or a relationship based on contests of power at all. Our core mission is educational and collaborative; our relationship with students should be rooted in expectations, service, and facilitation.

The shift in educational consciousness that our martyrs—still, sadly, disproportionately students—initiated is still in its relative infancy. Institutions of higher education today have not fully grasped, or accepted, the nature and magnitude of the changes that started with *Dixon* and Kent State. Colleges and universities have remained content to stay committed to a re-ordering of power in the higher educational environment, and to offer the types of learning environments a previous generation of students—now administrators—would have thrived in. When viewed from a larger lens, the era of legalisms is, and must be, only a transitory moment. The era of legalisms retains vestiges of the long dominant era of power and prerogative. Higher education has achieved peace and justice with legalisms—landmark achievement in light of the violence of the 1950s, 1960s, and early 1970s. But, higher education has goals other than social justice and peace to achieve, and management of an educational environment through transformed allocations of power and prerogative has failed to meet the critical challenges of today's students in the modern higher education environment.

There is evolution in the air as higher education moves to re-imagine its relationships with students. Creating an environment based on principles of educational environmental management represents an emphasis on some educational management techniques that were common in the period before the 1960s, such as individuation, subjectivity, values, character, principles, and standards. The era of legalisms radically deemphasized some or all of these, though they were once prominent in ordering a safe and responsible education community.

There are two key lessons for a facilitator university.

First, the facilitator university, using principles of educational environmental management recognizes that paradigms based on power and prerogative have little to no value in managing an educational environment. While these may serve different functions at other levels of education, such as K-12, there is something fundamentally inconsistent with facilitation and higher education relationships based on power.

Second, the modern university seeks coherent, cohesive management of its organic and seamless educational environment.

Legalisms tend to fracture and compartmentalize what is whole and render it into several seemingly independent parts.² The various reports compiled after the Virginia Tech tragedy illustrate this clearly. However, the learning fields our learners encounter are inherently interrelated and unitary.

Discarding the concept of discipline in favor of a concept of educational environmental management is both traditional and evolutionary. The concept of educational environmental management is revolutionary primarily at a conceptual and motivational level only. Institutions will continue to have statements of general requirements—and even “codes.” These “codes” will be different in some ways, of course, and over time will likely become systems of last resort for the most egregious situations. Process systems that will thrive in the future will be more educationally focused and use determinants of human behavior such as principles and standards more heavily. Indeed, a great deal of educational environmental management already occurs on campuses even if in a sometimes fragmentary way. There are campus-wide violence prevention and substance abuse programs, for example. However, educational environmental management activities are usually issue specific, or highly objective (like codes), and/or directed at the educational *system* and not individual students. What is unique about the master academic planning process is that it focuses on the *student* as the primary unit of educational management, and then erects systems to support student-centered process.

Even small steps towards creating an educational environment focused first on students will be valuable.

An institution of higher education does not have to move instantly to a full-blown master academic planning process or a comprehensive system of educational environmental management to have benefits. Indeed, educational environmental management is inherently organic and evolutionary, just like higher learning. Institutions should recognize that any shift cannot, and should not, be sudden. Crucially, it is the *process* of attempting to achieve an environment based on core principles of educational environmental management that is itself the major goal. Educational environmental management is not an *outcome* but a *process*: the process is an end in

² At times it almost seems that we have created for students an educational environmental cross-breed consisting of one part Kafkaism and one part fractal anarchy in which students are overwhelmed by bewildering, dissociative chaos. The best visual presentation of this is in the movie “Accepted” when the protagonist, Bartleby Gaines visits his nemesis Harmon College. At one point, his whole experience field begins to spin as he observes the process of college.

itself. Campuses engaging in comprehensive environmental management will be sensitive to outcomes and outputs in their environment, but an ongoing and collaborative educational process is an educational end in itself.

Educational environmental management has roots in the tradition of visitation. Visitation was once integral to higher education, but became lost. The idea of a visitor was originally designed to protect the power of donors and donative intent. Traditional donative views of visitation are archaic today in a society that no longer categorically values strict adherence to specific intent of ancient elders as a primary motivation in education. Moreover, as education has moved from being a gift to a transaction, the role of families and students has been steadily, if slowly, on the rise. A modernized version of visitation is captured by imagining that each student—in ongoing collaboration with an institution of higher education—becomes his or her own visitor by setting intentions and attempting to fulfill them. Historically, visitation was connected with intention, vision, purpose, challenges, conflict management, rectification, and the like. In a world where students and families bear so much of the cost, risk, and economic burden of higher education, it is no stretch to recast students in roles as visitors for themselves, who set goals and intentions, map out challenges, and periodically evaluate themselves and their performance, etc. The master academic planning process is the practical application of an idealized vision of the modern learner in a facilitative environment.

The process of visitation reappears in this new form and reflects the long journey of higher education from focusing upon preserving the power of donors, to protecting the power of administrators and governing boards, to the modern idea of empowering students. The path of higher education has been from donor, to institution, to student. Students have had to pay a heavy price to shift focus from status to student. A cycle of student martyrdom began in the 1950s that avoidably continues to this day. When we conceive of higher education as a process balancing power among students, institutions, and others, students must sacrifice to “gain” strategically in their learning environments.

Law and legalisms arrived on campus to replace the loss of visitorial oversight. Law, however, can never truly do justice to the spirit of education. Law and legalisms were essential to the reformation of higher education, yet legalisms now inhibit the very processes for which they were catalysts of change. Law is not the proper permanent visitor for American higher education. The rise of juridical culture in higher education served the ultimate goal of creating a space in which

educational process and students could flourish. But having done their job, legalisms must now retreat to make space for education. Principles of educational environmental management recognize that law and legalisms still serve a facilitative role in developing a safe and responsible campus, but cannot do so on their own. Moving beyond discipline does not mean doing away with law. Law will still serve an important role. The law is here to stay—it will and should remain a significant part of American higher education moving forward. But law is not our visitor of right.

Visitation is a core concept for higher education, even academic freedom itself. When Dean Wormer became out of touch with society and higher education, and abused the prerogative that he inherited from the visitor, the law visited to rectify and reform higher education. Looking back across the centuries, law has only flitted into higher education for short moments, usually to rectify an imbalance, just as Blackstone said almost 250 years ago. Even when law arrived in full battle dress, take *Horowitz* and *Ewing* for example, the law did not seek to be a permanent peacekeeping force in the core mission of higher education. Law is only ever a temporary visitor in higher education, and will remain until higher education completes the necessary steps in the recovery and reimagining of visitorial power and academic freedom. Master academic planning is one way that we might imagine such a transition to visitorial roles for students themselves within institutions of higher education. Even if higher education does not follow a path towards master academic planning, sooner or later it will follow *something* as higher education moves to consolidate around a vision of student-centered higher education.

A focus upon visitation also offers a vision of managing the academic environment that can reenergize the academic process itself. As a result of the Civil Rights era and the bystander era, the core mission of higher education became unduly narrowly drawn. Several things happened simultaneously to narrow the focus of higher education: (1) In safety cases, courts stated that higher education should view its role as primarily “educational”—in other words, the quintessential activity of higher education is to teach in classrooms and therefore other aspects of a student’s experience are not *primarily* educational. (2) It was perceived that courts gave higher education the greatest deference in “academic matters,” such as grading and ranking academic performance. American higher education bifurcated and focused upon “academic” and “educational” processes and then conceived of that which is “academic” narrowly as classroom-type student experiences and the like. (3) Higher education lagged in developing meaningful standards to ensure at

least some measurable learning outcomes and competencies: the lack of educational malpractice torts and other such remedies facilitated the further bifurcation of the academy into classroom and research functions.

What has suffered is the academic process itself. Narrowed, bifurcated, and disconnected from whole life learning, the vision of higher educational process that the era of legalisms has spawned is perhaps the narrowest vision of academic process in the history of higher education in America. The rise of consumeristic opposition in higher education has followed predictably to challenge the recession of the mission of the academy.

An educational environmental management process seeks to reverse core academic mission atrophy and reclaim academic power. Higher learning occurs in a seamless web, not through bifurcation and division. An angry student cannot learn well and is prone to discipline. A great teacher can reach a student but a bad roommate can block that student's progress. And so it is in higher learning, where the learner's experience field is one, coherent, integrated whole. Extremely fair, reasoned decision-making with respect to students only works when we have succeeded in contextualizing our decisions holistically for that student.

Educational environmental management and academic process thrive when students are engaged completely on an educational level. Again, Star Wars provides a perfect example. Yoda gives Luke a complete experience in the swamp planet Dagobah. Luke receives physical training and even an experiential learning component (the cave). Yoda gives intellectual and moral instruction—Luke has one teacher in a unified field of experience. If Luke Skywalker had been at a modern college campus, he would have had an athletic coach, a teacher, and someone else to take him on field trips. We have many Luke Skywalkers today who end up being disciplined, who are never given a realistic chance to achieve their potential fully and to meet and confront their personal Darth Vaders on fair terms. Discipline systems put students at risk of the same fate as Anakin Skywalker. Recall that Anakin Skywalker was constantly disciplined and told that he was bad and dangerous by the Jedi. The Jedi Council and Obi Wan Kenobi facilitated the birth of a Darth Vader through emphasis on an oppositional, judging, approach to training. Discipline can empower the dark side in near-adult and adult learners. Look how the evil emperor sought out Anakin and steadily turned him to bad deeds. Always remember, *someone* will provide a whole life experience to our students, if colleges do not do it.

Today the toxic-mimics of whole life education thrive on our campus. Students will create a culture full of meaning—positive or negative—whether we provide it or not. Sadly, many students live in a world where hookups replace intimacy, hazing replaces proper group dynamics, cheating replaces a search for excellence, drugs and alcohol provide dark peak experiences such as drug induced alternate consciousness, and so on. Are we teaching students the way Yoda taught Luke Skywalker or are we training Darth Vaders like Obi Wan Kenobi and the Jedi Council? Does an incomplete vision of process to manage an educational environment cheat a generation of students? Are we being supremely fair in one way, yet not in another?

Moving towards a student-centered environmental/holistic approach to process entails the resurrection of the process of academics themselves. There is no one process that is uniquely higher educational, even if there are key features of higher educational process. Perhaps the most important features of the process of educators—relegated to second class citizenship at best after the Civil Rights era—are the use of intuition, patience, intentionality, instinct, forbearance and judgment. These traits do not lend themselves to rules or even rule-like behavior easily. Yet teaching and learning cannot occur without these. Balancing, weighing, following hunches, *inter alia*, are crucial aspects of higher educational process. While rules and objective criteria are important to education, so is generating options, setting goals and aspirations, recognizing challenges and casting a vision of the future of a student.

Empowering instinct, intuition, and judgment—and values, goals and principles—is a major feature of educational environmental management and the master academic planning process. The goal of educational environmental management is not just to create more flexible codes or to supplant rule systems. Ultimately, the goal is to gain balance in how we approach managing students and our environments. If there is such a thing, this is due process in education.

The great hope for the college of the future is to manage its environment with tools that make the need for “discipline” obsolete and unnecessary. For a modern institution, instances of discipline are almost always instances of failure and lost opportunity. A few students need to leave—some rather quickly³—but most have found their way to discipline through some failure in planning, intentionality or explicating

³ One of the weird features of rule-based relationships is that it takes too long to tell a student to leave who needs to go. We sometimes feel as if we need a student to break a rule to ask them to leave.

mutual expectations. Rules, procedures and sanctions distract us from the real task at hand—giving every student a reasonable opportunity to manage his or her higher educational opportunity. *This* is fairness in higher education. The United States Supreme Court could not have been clearer in *Goss*, *Horowitz*, and *Ewing*—correct manifest errors to give students a reasonable chance to succeed, and otherwise *do what academics do best*.

The higher education environment of today is more complex than ever before and changes more rapidly than ever in the past. Institutions fought hard against the fall of power and prerogative. It was in their nature to do so. The era of power and prerogative mirrored the core mission of higher education in its first mission—replicating social hierarchy and the insulation of the truth from degrading influences.

The law, as *de facto* visitor, helped higher education reclaim itself in the era of legalisms. *Horowitz* and *Ewing* led higher education to recognize that the true power of a college or university does not lie in the exercise of power and prerogative over students, but in the reasoned elaboration and the deliberative processes of academics. Dean Wormer did not exercise the power of an academic; he was a dictator at a college. But the reformation of higher education did not come just in courts. A generation of college students, faculty, and administrators gave their careers, well-being, and even lives to protect the integrity of the core mission of higher education in the United States. It is no stretch to claim that higher education is hallowed space. Each student is a visitor in this place, in every sense of the word. It remains our solemn responsibility as educators to find and retain meaning in the events of the past and remember those who were martyred. Fairness in higher education lies in claiming our true power in educational process and developing systems that empower students now, and for a lifetime.

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