Beyond Discipline

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Managing the Modern Higher Education Environment

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For Sandy, who was on her way to class;
For my friend Jerry, who of course still thinks he is not a hero;
For Bob—as a retirement present—who has given lifetime of service to his students at the University of Tampa;
For Mary Sylvia, Chester, and Julia who always stressed the value of education; and
Most of all, for Jennifer, now, and forever.

"[W]here the visitor is under a temporary disability, there the court . . . will interpose, to prevent a defect of justice."

I SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 484 (1765).

"Freedom of choice
Is what you got
Freedom of choice!

Then if you got it you don't want it
Seems to be the rule of thumb
Don't be tricked by what you see
You got two ways to go

I'll say it again in the land of the free
Use your freedom of choice. . . .

In ancient Rome
There was a poem
About a dog
Who found two bones
He picked at one
He licked the other
He went in circles
He dropped dead

Freedom of choice
Is what you got
Freedom from choice
Is what you want."

DEVO, *Freedom of Choice*, *on* FREEDOM OF CHOICE (Warner Bros. 1980).

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Preface

One of my all time favorite books in college was Colin Turnbull's *The Forest People*. The author, an English sociologist, heads into the rainforest to study a "primitive" tribe. He joyfully discovers a group of people living idyllically and realizes, to his surprise, that they know more about life and living than he ever could have imagined. After reading *The Forest People*—the perfect antidote to cynicism—I could not wait to read another Turnbull book, *The Mountain People*. I almost wish I hadn't. That book tells a tale of a different tribe, living in rough mountain terrain, a tribe who lives the opposite life of the people of the forest. Life on the mountain is harsh and mean. *The Mountain People* is a cautionary tale.

For me, writing my first book, *The Rights and Responsibilities of the Modern University* (1999), with Bob Bickel, was the forest, and this Book, the mountain. This Book, forged in challenge, will undoubtedly be the most personal of my career. Almost every obstacle conceivable came to block and slow progress on this Book.

I was so anxious to start a second book that I asked for, and received, an early sabbatical to start summer 2003. In May 2003, the month I started writing, my dean, Gary Vause, passed away. He was very sick with cancer, but bravely kept it to himself until nearly the very end. Gary was an intensely private man but we often shared stories of our love of Corvettes. Gary saved my career. I was assigned to honor court duty almost immediately upon entering Stetson in 1990. As luck would have it, I drew a politically sensitive matter—think "A Few Good Men"—and someone, as so often happens, threatened my job (and may have had the clout to make good on the threat). I had only met Gary in interviews, and hardly knew him at the time. He was a towering figure on our faculty—stately, fatherly, and stoic. He asked me to come to his office. When I arrived, he was a perfect gentleman and told me in a calm and reassuring tone, "Everything will be all right." And, after that it was. His death left a void, as if there were fewer adults in the world. I always associate Jimmy Buffett's song, "Incommunicado" with him, especially the lines about John Wayne.

After Gary's passing I tried to start writing again, and two weeks later, my best friend and refugee of World War II, Elsbeth Pogge, called me and said, "I can't read numbers anymore." It was a brain

tumor, and she died in August 2003. I was her health care surrogate, and together we let doctors talk her into foolish, barbaric treatments that only robbed her of time and quality of life. I was by her side the night she died. She just sort of ran out of gas and passed very peacefully. The room filled with unimaginable energy and then, just as quickly as it came, it moved on. I miss her all the time; she was one of just a handful of people who truly understood me.

I kept trying to work on this Book but kept spinning my wheels. I was also very busy servicing the first book—I did about 40 speaking engagements one year. My relationship at home was not going well, and it ended not long after. To make matters worse, my long-term association with Bob Bickel was deteriorating. I could write a book just on that. Guster's "So Long" sums it up fairly well. Bob and I were much more than colleagues and co-authors. We once talked frequently and shared everything. Soon we were not talking as much and then less. Bob eventually sent me a "Dear John" letter effectively ending our collaborative work. I remember that letter vividly, even though I tossed it from a car window on the way home that night. The letter came to me while I was on the road via FedEx package to my hotel room; I read it while trying to rush home to beat an incoming ice storm. I was exactly the last car out of North Carolina that night as the State Police closed the border to South Carolina because of the ice storm. Bob and I always called ourselves the Blues Brothers. Watch *Blues Brothers 2000* for the opening scene: I waited at Joliet for a long time, but the Warden finally came out and said it was time to go.

I had a hard time, for a long time, not feeling like I was being smited. No country song is complete without odd details, so I should add that in the time since, I was nearly killed on a plane, nearly killed twice in a car (once by tornado), had skin cancer, beat skin cancer, and lost a piece of my jaw and a few teeth over a Fourth of July. Coyote (my twelve-year-old cat) died and somehow revived (not kidding). There is more; but this is already the most pathetic preface ever.

I learned one lesson from all of this. You need good foundations and family to make it in this world. When you are surrounded by people who love and support you, good things follow.

Now that the Book is done I close a somewhat dark chapter in my life and begin a new, brighter one. My life is completely different now and things are finally looking up. I now share my life with my lovely and dedicated wife, Jennifer, and our two dogs, Lilo and Stitch. Coyote is old and not in great health now, but has refused to leave my side at least until this Book is done. He has used up six or seven lives depending on how you count, and as my dad always said, "It's tough to

kill a cat." Jennifer has been an utterly invaluable asset to this Book . . . and our other work. As we rushed to meet our printing deadline, she would carefully proofread from morning to the wee hours—once literally passing out from exhaustion around 2:30 a.m. after what must have been an 18 hour day. I am very, very lucky to have such a wife and partner. People say Jennifer saved my life—like anybody could even know that! I also thank her for introducing me to my brothers-in-law, Matt Buck who nearly tore my arm out of the socket with his tennis serve, and Chris Buck who shares my attitude towards wild pigs.

There are some others I would like to thank.

Stetson University College of Law and Dean Darby Dickerson especially, were very generous in giving me resources, time, and forbearance as my personal "Chinese Democracy" kept encountering delay after delay. Thanks Darby, and Stetson.

Angela Lauer-Chong provided tremendous assistance in the preparation of this Book. Patiently and diligently, Angela shepherded a team of research and other assistants through the valley of this Book's shadow—and me. I could never thank her enough for all of her help. I still feel guilty for stealing Angela away from Bob Ruday at the University of Tampa, who is the paradigm of a modern student affairs professional, and was gracious enough not to hate me for taking such a talented individual away from his organization. By the way, if you are ever considering hiring or promoting Angela, do it! You will not find a better combination of diligence, patience, honesty, and skill.

Special thanks to faculty support for all your help. Louise Petren, Janice Strawn, and Dianne Oeste . . . you should be granted PhDs in deciphering cuneiform or something for working with my "handwriting." Thank you.

Very special thanks to my long time pal and colleague Brooke Bowman, who proofread manuscripts of this Book. Brooke is fast, efficient, and accurate; any errata in this Book are completely my fault because I just could not stop myself from tinkering after she gave me a perfect draft. Brooke is the magical sort of person who is right there when you need her most.

I had a team of excellent research assistants who slaved over several versions of this Book. Stephanie Ciechanowski went above and beyond the call of duty, as she always does. Stephanie found sources I hadn't; she also helped compose some of the material in some of the footnotes. This is a far better Book because of her. I impressed Jesse Rose into service. He is one of the finest students Stetson has ever had—"Judge Rose" someday? What I asked him to do was a huge

inconvenience; but Jesse is a gamer, and produced A+ work, as is his tendency. (Jesse, thanks to your dad, Billy, too, who helped keep me sane and found my backhand.) Thank you Jason Fletcher, for looking hard for what no one knew existed. Jennifer Papillo put together volumes of helpful research, much of which is featured heavily in the Book. Kat Wachter, congratulations on your recent marriage, and thank you for all your extraordinary research efforts as well. Thanks also to Stacy Rowan, Jessica Hoch, William Hurter, and Theresa Payne for your efforts, especially in the wee hours before publication.

In my travels, especially through my beloved prevention field, I chanced upon Bill DeJong and his environmental management theory. Bill inspired me to think of an educational environment in a public health way. Your ideas have deeply influenced me, and this Book. Thanks Bill.

This Book is about building and sustaining a circle of support. Thanks to all of you, for being mine.

Peter Lake
Bradenton, Florida
June 2009

Beyond Discipline

1 Introduction—Rethinking the Purposes and Functions of Student Process in Higher Education

The modern university prizes fairness in its dealing with students as a foremost virtue. The rise of law, legalisms, and the virtue of fairness in academic and student affairs have been emblematic of the recent history of the modern university. Law, legalisms, and fairness, however, were not always prized so highly in American higher education. A transformation of American higher education came about in the Civil Rights Era,[1] and at a high cost. Many students and other martyrs paid in blood, lost opportunities, and/or contempt to bring a culture of lawfulness and fairness into the management of the academic environment.

It was just a generation or so ago that American universities managed their educational environments in very different ways, without lawyers and legalists. Much of what passed as higher education would be utterly unconscionable and blatantly illegal today. The modern university has rejected much of the culture of student affairs and academic management from the pre-1960s period—keeping only some vestiges of a bygone era here and there such as honor codes and concepts such as "plagiarism." It is a prime mistake to think that the modern university manages its educational environment in a form that *evolved* from the period before the 1960s. The story of the rise of the modern university is about a *revolution*, not evolution. This Book tells the story of rejecting so much, so quickly, so thoroughly that, within a generation few leaders in higher education, if any, remember what went *before* in American higher education. This is also the story of a

[1] The 1950s and 1960s marked the beginning of social change, where the American public challenged the government and sought civil rights. Students demanded due process, equal treatment, and protection from abuses of power. The intervention of courts into university life signaled an end to university immunity and a shift in higher education law. "The fall of *in loco parentis* in the 1960s correlated exactly with the rise of student economic power and the rise of student rights." ROBERT D. BICKEL & PETER F. LAKE, RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 35–36 (1999).

revolution in progress—one that did not end in the 1960s or 1970s, but continues today.

Incongruously, the strongest conceptual survival of the pre-1960s period is the concept of student *discipline* itself. *Discipline* was a concept known well to higher education prior to the 1960s.[2] Discipline is at home in any culture and education system that stresses power and prerogative, inculcation, and ordination. Perhaps this is why the modern university has been discovering, incrementally since the 1960s, that the concept of discipline itself does not fit well in modern higher education. If a modern university relies too heavily upon discipline systems to manage its living/learning environment, it will be hard-pressed to succeed on educational, philosophical, and pragmatic grounds. Discipline and higher learning are a modern mismatch.

So much was gained in the transformation of the American university in the Civil Rights era that it is tempting to ignore what was lost. There were many positive features of the way higher education was managed just two generations ago. To truly honor those who sacrificed so much to make American higher education better and fairer, we will need to reclaim that which was positive, but lost, from our past and clear away harmful vestigial concepts like "discipline." We must move *beyond* discipline. We have a sacred opportunity to seek and implement a vision for our higher educational environments that is worthy of those who, like Sandra Scheuer, laid so much at the altar of American higher education. The revolution is not over, just in the last and final phase.

It is common today to equate fairness on campus with clear disciplinary rules and fair process and procedural rights when a student has violated norms of academic integrity or campus standards regarding safety, order, living arrangements, inter-personal relations, etc. At the millennium, American higher education was and continues to be filled with rules, procedures, and sanctions. Student discipline procedures often take a recognizably similar law-like legalistic form: campuses have

[2] The ability to discipline students has some roots in the doctrine of *in loco parentis*. *Id.* at 19. In *Gott v. Berea College*, the court said, "College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose." 161 S.W. 204, 206 (Ky. 1913). *In loco parentis* gave the authority to direct the behavior of students and the authority to punish students. *See* DAVID HOEKEMA, CAMPUS RULES AND MORAL COMMUNITY: IN PLACE OF IN LOCO PARENTIS 27 (1994); *see also* Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 4–5 (1999). As we shall see, however, the concept of discipline predates even *in loco parentis.*

"codes" with "rules" that are "enforced" in a "judicial" "hearing" subject to "rules of evidence "in front of" an "officer" or "a court." If students violate "rules" they are "sanctioned." Some higher education institutions today essentially manage miniature court-like systems. The law—or more correctly legalisms—has (have) taken root in our discipline systems. Law, legalisms, and discipline are deeply connected in modern higher education.

Just 50 years ago, issues of student life and academic integrity in student life were handled in significantly different, and very non law-like, ways. How did American education come to see legalistic discipline process as the solution to issues of fairness? How, and why, did American higher education embark on a path towards legalistic discipline process? Modern higher education student discipline systems themselves are often like mute sentries and do not speak to these issues, except perhaps in faint or oblique ways. Modern student discipline codes often *evidence* that some great transformative event—in the order of a social contract[3]—occurred at some point in the past. However, there is little evidence in the codes themselves as to why, or how, or even when the great transformations took place. Modern discipline codes are Easter Island statues—many administrators have no idea exactly who put them in place or precisely why they came to exist at all.

American higher education institutions are undoubtedly the *fairest* of any such institutions in the history of human higher education. Fairness thrives in American higher education institutions, but our institutions of higher education are beset by high and often seemingly intractable issues of academic dishonesty,[4] hazing,[5] sexual assault and

[3] Social contract theorists believe that rules and governing bodies are only justifiable when they derive from the agreement of the individuals who will be governed. "[The social contract] comes down to this: 'Each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole.'" JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 61 (Maurice Cranston trans., Penguin Books 1968) (1762).

[4] According to Max Eckstein, 75 to 80% of college students admitted to cheating on exams or plagiarizing assignments. MAX A. ECKSTEIN, UNESCO INT'L INST. FOR ED. PLAN., COMBATING ACADEMIC FRAUD: TOWARDS A CULTURE OF INTEGRITY 26 (2003), *available at* http://unesdoc.unesco.org/images/0013/001330/133038e.pdf. Honor codes may influence students' behaviors toward cheating, and a significant number of students who attend schools with honor codes report that those codes are effective deterrents of academic misdeeds. Donald McCabe et al., *Academic Integrity in Honor Code and Non-Honor Code Environments: A Qualitative Investigation*, 70 J. HIGHER EDUC. 211, 216 (1999) At schools without honor codes, students were twice as likely to provide justifications for cheating, such as pressure to earn certain grades, get a good job, or earn

misconduct,[6] and high-risk alcohol and drug use,[7] *inter alia.* Students receive extremely high levels of procedural fairness in discipline

admission to graduate school. *Id*. at 224. *But see* Michael Vandehey et al., *College Cheating: A Twenty-Year Follow-Up and the Addition of an Honor Code*, 48 J. COLL. STUDENT DEV. 468 (2007) (finding awareness of an honor code has only *de minimus* effect on student cheating). Disturbingly, issues of academic dishonesty may not arise solely among students, as "students report that many faculty simply look the other way when they see cheating occur in their courses." Donald McCabe et al., *Cheating in Academic Institutions: A Decade of Research*, ETHICS & BEHAV. 219, 226 (2001) [hereinafter McCabe et al., *Cheating in Academic Institutions*]. The trends in academic dishonesty and the efforts to prevent cheating are routinely documented. *See, e.g.*, Donald McCabe & Gary Pavela, *Some Good News About Academic Integrity*, CHANGE, Sept./Oct. 2000, at 32–38 (discussing the positive effects of an honor code on curbing student cheating); Eric Hoover, *Honor for Honor's Sake?*, CHRON. HIGHER EDUC., May 3, 2002, at A39 (reviewing perceptions of the honor code-based justice systems at University of Virginia and Georgia Tech); Sara Rimer, *A Campus Fad That's Being Copied: Internet Plagiarism*, N.Y. TIMES, Sept. 3, 2003, at B7; Donald McCabe & Gary Pavela, *New Honor Codes for a New Generation*, INSIDE HIGHER ED, Mar. 11, 2005, *available at* http://www.insidehighered.com/views/2005/03/14/pavela1; Stephanie Etter et al., *Origins of Academic Dishonesty: Ethical Orientations and Personality Factors Associated with Attitudes About Cheating with Information Technology*, J. RES. TECH. EDUC., Winter 2006/2007, at 133 (comparing perceptions of cheating with perceptions of other dishonest or sensation-seeking behavior); ABC News, *A Cheating Crisis in America's Schools* (2008), http://abcnews.go.com/Primetime/ Story?id=132376&page=1 (last visited June 14, 2008).

[5] "Hazing involves a group's request (or the request of individuals within that group that the person in a subservient position perceives to be important) that a newcomer take some action in order to be held in esteem by the group and/or to gain entrance into an organization." HANK NUWER, WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING 37 (1999). More than half of students involved in campus organizations have experienced some form of hazing; however, of those students who experienced hazing behavior, nine out of ten students did not perceive the actions as hazing. ELIZABETH J. ALLAN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK—INITIAL FINDINGS FROM THE NATIONAL STUDY OF STUDENT HAZING 14, 33 (2008), *available at* http://www.hazingstudy.org/publications/hazing_in_view_web.pdf. Seventy percent of students involved in a social Greek-letter organization or varsity athletics experienced hazing behavior. *Id.* at 15. While student deaths due to hazing are underreported, in 2000, it is reported that 23 students died as a result of hazing behavior; by 2002, that number had doubled. Shelly Campo et al., *Prevalence and Profiling: Hazing Among College Students and Points of Intervention*, 29 AM. J. HEALTH BEHAV. 137 (2005); *see also* Lisa S. Foderaro, *5 Sentenced in Fatal Hazing at Plattsburgh*, N.Y. TIMES, Jan. 28, 2004, at B4. Hazing behaviors are becoming increasingly public, as in approximately half of hazing incidents, photographs of the hazing behavior are posted on the Internet by someone involved with the hazing acts. ALLAN & MADDEN, *supra* note 5, at 2; *see also* Brad Wolverton, *Hazing Photos Spur Debate on Complicity of Coaches*, 52 CHRON. HIGHER EDUC., June 2, 2006, at A1; Daniel de Vise, *Allegations of Hazing, Alcohol Abuse Lead to Shutdown of Fraternity Chapter*, WASH. POST, Mar. 15, 2008, at B06.

[6] Some researchers estimate that approximately 35 rape or attempted rape incidents occur per academic year among every group of 1,000 college women. BONNIE FISHER ET

systems; campuses, however, typically face issues of safety, integrity, and wellness that seem resistant to intentional intervention and management efforts.

True, highly legalistic student disciplinary process has vindicated itself *qua* process in the court system.[8] Yet, this vindication

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AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 11 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/182369.pdf. This percentage might be even higher at the nation's military academy campuses, where one out of every seven female students report being the victim of sexual misconduct. Daniel de Vise, *Defense Dept. Surveys Academy Sex Assaults*, WASH. POST, Mar. 19, 2005, at A01. Despite these significant percentiles, "less than 5 percent of attempted and completed rapes on campus actually are reported." CBS News, *Sexual Assault: Campus Problem*, Nov. 2, 2006, *available at* http://www.cbsnews.com/stories/2006/11/02/earlyshow/contributors/tracysmith/main2144397.shtml. "[S]tudents have a difficult time understanding, acknowledging, naming, and coming forward to report [sexual assault crimes] and access victim services." HEATHER KARJANE ET AL., CAMPUS SEXUAL ASSAULT: HOW AMERICA'S CAMPUSES RESPOND 126 (2002) *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf. Of course, issues of sexual assault and harassment on college campuses extend to male students as well. *See* BILLIE WRIGHT DZIECH & MICHAEL W. HAWKINS, SEXUAL HARASSMENT IN HIGHER EDUCATION 85–100 (1998).

[7] Approximately 50% of students are "high-risk" consumers of alcohol. Peter F. Lake & Darby Dickerson, *Alcohol and Campus Risk Management*, CAMPUS ACTIVITIES PROGRAMMING, Oct. 2006, at 18, 20 (citing the 2004 Core National Survey Results). The rate of consumption is higher among college students than their non-enrolled peers. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV. (CASA), WASTING THE BEST AND THE BRIGHTEST: SUBSTANCE ABUSE AT AMERICA'S COLLEGES AND UNIVERSITIES 19 (Mar. 2007), *available at* http://www.casacolumbia.org/absolutenm/articlefiles/380-WastingtheBestandtheBrightest.pdf. College administrators recognize the problem (over 60% of administrators perceive alcohol use as a problem on their campus). *Id.* at 20. "Just because a college had an alcohol policy does not mean the school has its high-risk drinking problem under control." JOEL EPSTEIN, A PARENT'S GUIDE TO SEX, DRUGS, AND FLUNKING OUT: ANSWERS TO QUESTIONS YOUR COLLEGE STUDENT DOESN'T WANT YOU TO ASK 88 (2001); *see also* BICKEL & LAKE, *supra* note 1 (suggesting the facilitator university as an effective risk-management model); Peter F. Lake & Joel C. Epstein, *Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L. REV. 611 (2000) (discussing the development of college liability for alcohol abuses and ways to prevent high-risk alcohol use). Additionally, prescription drug abuse among college students is on the rise. CASA, WASTING THE BEST AND THE BRIGHTEST, *supra* note 7, at 16; *see also* Andrew Jacobs, *The Adderall Advantage*, N.Y. TIMES, July 31, 2005, § 4A, at 16 (covering the popularity of college student stimulant use in attempts to increase academic success).

[8] Colleges win the vast majority of process cases brought to court. *See* Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 273 (N.J. Super. Ct. 1982) ("Courts have been virtually unanimous in rejecting students' claims for due process in the constitutional sense where academic suspensions or dismissal are involved." (citations omitted)); WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 975 (4th ed.

parallels the decline of academic integrity and the rise of wellness and safety issues.[9] Modern discipline systems are succeeding *and* failing simultaneously. Fairness and a sound, safe academic environment sometimes appear inversely related. Something is lacking in the fight to improve honesty, safety, and student wellness. Legions of "judicial affairs" personnel do their job well, professionally and conscientiously every day:[10] there has been no point in American higher education history where so many have been so well trained with a focus on providing fairness in a procedural and larger educational sense. (Having labored at the job of Honor Court Administrator for the better part of the decade, I can attest to the fact that this job is often thankless and filled with threats of retribution and lawsuits. It is a hard job and there are so many who do it well.) If there is a problem with American higher education discipline systems, it is not with the personnel who manage the modern systems. Nor, as Harvey Silverglate and Alan Kors have suggested, is there some nefarious agenda to persecute students.[11] The problems of the modern university are not personnel problems nor are they rooted in any evil purpose. The problems that plague modern higher education ultimately lie with the concept of *discipline* itself and the systems we deploy to manage our higher educational environments.

2006) ("[M]ost courts have applied these "minimal" procedural standards [from Goss v. Lopez, 419 U.S. 565 (1975)] and, for the most part, have ruled in favor of the college."). Courts sometimes praise colleges for going beyond legal process minimums. *See* KAPLIN & LEE, *supra* note 8, at § 9.4.3.

[9] *See* BICKEL & LAKE, *supra* note 1, at 42–43 ("Constitutional rights now won would beget a period in which universities could, like governments and businesses, stand by and not prevent grave danger.").

[10] The Association for Student Conduct Affairs (ASCA) formed in 1988 as a professional organization for campus judicial officers. ASCA, History of ASCA, http://www.theasca.org/en/cms/index.asp?61%20 (last visited June 15, 2008). Currently, ASCA has 1,200 members from 750 institutions of higher education in both the United States and Canada. *Id*. The ASCA provides an annual training institute for campus officers to learn more about conflict resolution in higher education. *See* ASCA, Donald D. Gehring Academy for Student Conduct Administration, http://www.theasca.org/en/cms/index.asp?48 (last visited June 15, 2008). Further information on the ASCA and its activities is available at the ASCA website at www.theasca.org.

[11] Consider this tragically comical indictment of American higher education. "The shadow university . . . hands students a moral agenda upon arrival, subjects them to mandatory political reeducation, sends them to sensitivity training, submerges their individuality in official group identity, intrudes upon private conscience, treats them with scandalous inequality, and, when it chooses, suspends or expels them." ALAN C. KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 4 (1998).

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

To move forward, we must re-imagine the delivery of higher education—the process of managing an academic environment—in ways that can serve the goals of fairness *and also* better serve the goals of academic integrity, wellness, and safety. We need to move beyond legalistic discipline, transform the process of higher education itself, and claim the final victory in a long and painful student rights revolution.

To find the way to a process that can manage the modern higher educational environment, we must look to the past for clues. In our past, colleges were not operating miniature court systems. Indeed, key United States Supreme Court decisions themselves have cautioned against the use of overly legalistic process in higher education, even when discussing constitutional parameters on discipline for the first time with respect to American higher education.[12] We must recognize an *appropriate* role for law and legalisms in higher education. Higher education should only be as law-like as it needs to be (which is often far less than we assume). Higher education in the past understood this implicitly—law and education do not mix well.

Without law inconceivable injustices—many such injustices discussed *infra*—would have marred and retarded higher education in America irreparably. Yet, the greatest gift the law—and lawyers—can give is to know when using law is appropriate, and when it is *not*. The law works best in American higher education when it facilitates the best practices and instincts of well intentioned "eduministrators" (educators/administrators), and promotes the development of students who ultimately can become *self*-facilitating in the future by constantly revisiting and evaluating their life and educational plans and goals. We

[12] Two cases that discussed the of due process rights students, were *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), and *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). The Court in *Ewing* expressed "a reluctance to trench on the prerogatives of state and local educational institutions" and expressed a special concern for the "responsibility to safeguard [the education institutions' a quotation is missing] academic freedom." 474 U.S. at 226. The academic freedom of particular concern to the *Ewing* Court was that which allows "[d]iscretion to determine, on academic grounds, who may be admitted to study." *Id*. at 226 n.12.

should strive to create students who become empowered, are capable of using constructive criticism, can know themselves better, and can perpetually revisit the path of their own development. In this sense, each student is a *visitor*—one who sojourns in our facilitative educational environment and (hopefully) leaves empowered to perpetually *re*visit higher learning, and proceed down an illuminated path of life-long, intentional, learning, and growth. The journey of the visitor to our colleges never ends, even if college days must.

To fully appreciate the path beyond discipline to a new form of process, it is critical to go even further back—beyond the Civil Rights movement and the rise of law and legalisms in higher education—to the earliest moments of American higher education. When we look back, to times before the 1960s, we find systems of higher educational governance and management based on norms of *power* and *prerogative,* and the evaluation of *character*—not elaborate legalistic process systems, rules, or legalisms. Chapter 2 describes the ways in which fairness and law were not central—or even dominant—norms of the pre-1960s American college. This is not to say that there were no processes and procedures in the era before the 1960s (although these procedures and processes were primitive by modern legalistic procedural standards). Issues of academic integrity and student life were addressed through the *prerogative* of administrators who exercised *judgment* and assessed the character of individual students.

Before the 1960s the focus of law was on *power* and *prerogative*, not procedural or legalistic fairness.

There is, and was, an obvious downside to the exercise of power and prerogative in assessment of character. Administrators with unfettered discretion can, and did, abuse that discretion. Issues of abuse of power and prerogative came to the forefront in the 1960s when the *exercise* of power and prerogative often became *abuse* of prerogative. Punitive "assessments" of "character" were used to attempt to crush the legitimate exercise of constitutional rights, such as First Amendment rights of speech and association, or to mask racism and other improper motives.[13] Abuse of power and prerogative led directly to the rise of constitutional and contractual fairness—legal fairness described in Chapter 3.

An era of power and prerogative in higher education came to an end when the law chastised higher education for inexcusable abuses of discretion and attempts to undermine legitimate civil rights. Power and

[13] *See* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (discussed in greater detail in Chapter 2).

prerogative were sometimes used in dark ways to promote illegal, unfair and racist policies, *inter alia*. As Chapter 4 describes, American courts of the 1960s and 1970s intervened and set boundaries for American higher education. The law sent very clear messages about what would trigger legal scrutiny when administrators abused their power over students.

The case law of the formative period of the Civil Rights era was some of the most profound in all of higher education law. There were two overarching messages from courts regarding power and prerogative and academic freedom. First, institutions built on tenets of academic freedom cannot retaliate against students for the exercise of freedoms in the marketplace of ideas. Second, higher education cannot pursue policies antithetical to the Constitution under the cover of the exercise of "academic freedom."[14]

Imbedded within the shift from power and prerogative to legalistic process was faith in law and legalisms to solve major social ills. The Civil Rights era in higher education started in the 1960s and 1970s—a time when American citizens and policy-makers believed in the power of law to rewrite social ills.[15] Timing was everything. The criminal justice system was undergoing the Warren Court's renovation of criminal procedure;[16] Constitutional legal process was extended to

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[14] The four academic freedoms were outlined in *Sweezy v. New Hampshire*:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[15] BICKEL & LAKE, *supra* note 1, at 216.

[16] "The Warren Court made the vigorous and aggressive defense of civil rights and liberties a principal judicial virtue; it was the only Court ever to seem heroic." David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 8 (1999). The Warren Court defended and elaborated key Constitutional Amendments, including procedure under the Fourth Amendment:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Terry v. Ohio, 392 U.S. 1, 21 (1968) (applying the Fourth Amendment to police conduct and balancing the reasonable necessity of a stop and frisk search against invasion of individual privacy rights); *see also* Katz v. United States, 389 U.S. 347 (1967)

consumer rights[17] and citizens gained more rights in civil cases overall.[18] It was the era of Ghandhi, Dr. Martin Luther King, Jr., and Bobby Kennedy, *inter alia*, all of whom appealed to our highest instincts by reference to legal ideals. Society was undergoing a period of legal infatuation: courts themselves were aware of the limits of their own power and often attempted to remind Americans that the law is an imperfect tool in social management, but the law-struck were not listening. Cases in higher education law, in particular, contained admonitions to not fall too deeply in love with legalisms and legal process. But higher education was infatuated and ignored these admonitions in the pursuit of not just process as fairness, but *legalistic* process as fairness.

Chapter 4 chronicles the rise of modern college disciplinary process systems in the moments following the initial flurry of legal cases imposing new legal responsibilities upon institutions. The rise of law and legalisms in higher education will forever be carbon dated to the period from the late 1960s to the 1990s[19]—especially the late 1960s and 1970s. During this period, American higher education moved to create legalistic systems of discipline rapidly. By the end of this period virtually every American higher education institution had completed the process of transformation from systems managing educational environments based on power of prerogative and the evaluation of

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(extending Fourth Amendment protection to wiretapped telephone booths); Mapp v. Ohio, 367 U.S. 643 (1961) (excluding from trial evidence obtained during search and seizure in violation of the Fourth Amendment).

The Warren Court's revolution of criminal procedure was not limited to the Fourth Amendment. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding statements acquired by police without warning of constitutional rights violate Fifth Amendment protections).

[17] Fuentes v. Shevin, 407 U.S. 67 (1972) (finding invalid replevin statutes that allow for seizure of property without first providing the consumer with notice and an opportunity to challenge the action in accordance with the Due Process Clause under the Fourteenth Amendment).

[18] Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972). Decided together, *Perry* and *Roth* defined property rights under the Due Process Clause as including expected property, such as tenure, when such expectation is reasonable under the circumstances. *Perry*, 408 U.S. at 601 ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that may invoke a hearing."); *Roth*, 408 U.S. at 578 ("[T]he terms of the respondent's appointment secured absolutely no interest in reemployment for the next year. They supported no possible claim of entitlement to reemployment. . . . . In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest").

[19] *See* BICKEL & LAKE, *supra* note 1, at 217.

character, to ones based upon law and legalisms. Power and prerogative were replaced by *rules*, *procedures*, and *sanctions*.

Several developments in higher education in this era of legalisms are salient. First, and foremost, courts sent the message that the function of higher education was primarily *educational*.[20] Matters of academic inquiry, for example, were more central to the college mission than, say, athletics or residence life. With the rise of law and legalisms a major first process axiom of higher education law formed: the lowest legal process requirements apply in matters that are purely "academic."[21] The corollary to this axiom was the second axiom of process: matters non-academic or mixed academic/non-academic were to be subject to higher legal process requirements.[22] Outside the classroom, higher education looked a bit like the rest of society. In the classroom, courts appeared especially reticent to interfere with professional academic judgment.[23] Universities heard what was perceived to be a strong judicial message favoring codes of behavior management that were written foremost around academic offenses. Universities also came to believe that the law protects academic process, and to the extent that a college disengages from student life, the law protects colleges as well. American higher education consolidated around its strongest remaining base of power—the world of "pure" academics, whatever that might be. Higher education bifurcated: Students would now experience college life in two distinct spheres, academic and non-academic.

Even today, many college discipline codes are more detailed in their treatment of academic matters than non-academic matters—student conduct or wellness, for example. Often, conduct and wellness rules have entered codes very recently. One need only look to vestigial

[20] *See, e.g.,* Bradshaw v. Rawlings, 162 F.2d 135 (3d Cir. 1979).
[21] *See* BICKEL & LAKE *supra* note 1.
[22] *See id.*
[23] "In their review of sanctions for academic misconduct, and of the degree of procedural protection required for students accused of such misconduct, courts have been relatively deferential." KAPLIN & LEE, *supra* note 8. This deference to academic mission was mirrored in the law of student safety as well: courts were sending strong "bystander" messages to American colleges in the regulation of student life, essentially encouraging colleges to disengage from many interactions student life related. *See* BICKEL & LAKE, *supra* note 1, at ch. 4. "In the role of bystanders, colleges had no legal duties to students and hence were not legally responsible for harm. Universities typically saw certain key cases in this period as providing (appropriate) protection from students' lawsuits in light of the reshuffling of student rights and university responsibilities." *Id*. at 49.

concepts such as "plagiarism" to realize that academic codes came first, and continue to retain many anachronistic concepts of another era.[24]

This period also saw the gradual rise of hyper-technical process issues such as rights to counsel in discipline process, and appeals. Higher education developed a codependency with law and began thinking legalistically in detail. Courts have consistently refrained that colleges do not have to create mini-court systems, or replicate the formalities of the criminal justice system, but colleges have chosen not to listen. Higher education has continued to develop systems that are increasingly legalistic.[25] Rules beget rules, process more process.

Moreover, in this era of legalisms a subspecies of student affairs personnel has self-identified. The Association of Student Judicial Affairs administrators, ASJA (now The Association for Student Conduct Administration or ASCA) formed.[26] Fairness as legalistic process became *institutionalized*, with an associated *professional* group. Today, every campus has someone whose job it is to be a conduct or hearing officer, or investigator, or the like. The function once performed by deans in informal processes without legalistic rules, is now commonly performed by administrators in routine and trained ways, under codes and rules.

An initial flurry of case law in the Civil Rights era was Constitutional in its basis, and thus inapplicable directly to private institutions. Constitutionalisms came to campus, as Professor Charles Allen Wright presciently observed,[27] but the question remained as to whether, and to what extent, any particular legal protections were available to private college students. As it turns out, it is a mistake in higher education law to over-emphasize public/private distinctions. With obvious parallelism, courts decided, usually under state contract law that students had "contracted" with colleges and thus gained rights of basic or substantial contractual fairness.[28] While the technical, doctrinal bases for private college student process rights differ from public college student rights, the contours of these rights are strikingly similar. Process rights in private colleges are the fraternal twins of

[24] Matters relating to plagiarism will be discussed *infra*.

[25] Peter F. Lake, *Private Law Comes to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 658 (2005).

[26] Recently renamed for the better, but not best, the ASCA was first organized as ASJA in 1988 at the Stetson University Law and Higher Education Conference in Clearwater Beach, Florida. ASCA, *supra* note 10. A focus on "conduct" management skews the organization's focus to legalisms.

[27] Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

[28] *See infra* Ch. 3.

process rights at public colleges. There appears to be a strong and consistent judicial sentiment that students at public universities should receive about the same process rights as those at private universities.[29]

By the 1990s, American colleges had begun to perfect complex, often highly legalistic, process systems. To their surprise, however, colleges began to be rebuked by the law using the very systems they perceived that courts had required them to adopt.[30] The legal system began to openly question the path American higher education had taken in student discipline process. Legalistic student process has begun to run into significant problems at its limits. A new, confusing type of meta-litigation over process is growing.[31] At least ten things have changed since the first, formative moments of the Civil Rights era.

First, by the 1990s, American society had taken a new view of lawyers and legalistic process. A love affair with law that started in the 1960s turned sour by the 1980s and 1990s. By the millennium, Americans came to question whether law in itself would solve major social issues, and whether more law and lawyers are a good thing.[32]

Second, lawyers themselves are in full swing advocating softer and less costly forms of law—mediation, arbitration, and all forms of alternative dispute resolution.[33] The legal system had begun to overwhelm itself, and courts faced challenges meeting basic promises of

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[29] Perhaps the greatest deviation occurs when a state asserts that state public institutions are subject to the State Administrative Procedure Act. *See* Bd. of Trustees of Ohio State Univ. v. Dep't of Admin. Servs., 429 N.E.2d 428 (Ohio 1981). In these situations, the law essentially imposes very strict procedural requirements on public institutions, which will differ greatly from those required at private institutions. The application of administrative law requirements to higher education should be considered unconstitutional; academic institutions are unlike other state agencies in that they have constitutionally recognized academic freedom. The United States Supreme Court has yet to reach this issue and, should it decide to take such a case, it is unlikely that the Supreme Court would permit such broad governmental interference into all of the operations of an academic institution generally. Sadly, many institutions have simply acquiesced in being so governed and walked away from their academic freedom.

[30] *See, e.g.,* the litigation culminating in the United States Supreme Court, *Than v. Univ. of Tex. Med. Sch.*, 528 U.S. 1160 (2000).

[31] *See, e.g.*, Gomes v. Univ. of Me., 365 F. Supp. 2d 6 (D. Me. 2005).

[32] *See, e.g.,* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994).

[33] The American Bar Association has formed a subsection devoted entirely to the promotion of alternative forms of dispute resolution. Am. Bar Ass'n, *Section of Dispute Resolution*, http://www.abanet.org/dispute/ (last visited June 15, 2008); *see also* AM. BAR ASS'N, WHAT YOU NEED TO KNOW ABOUT DISPUTE RESOLUTION: THE GUIDE TO DISPUTE RESOLUTION PROCESSES (2006), *available at* http://www.abanet.org/dispute/draftbrochure.pdf.

speedy trials and due process the law had set for itself. The 1980s and 1990s saw the rapid rise of alternative systems of dispute resolution and conflict mediation: law itself was evolving, even imploding.

Third, colleges were finding that discipline process compliance errors were a more significant problem than ever: complex procedures invite more potential for failure and mistake. By the 1980s and 1990s, colleges faced a new form of litigation. Litigation now took the form of arguments based on alleged failure of institutions to comply with their own process systems, or with due process requirements.[34] Unlike the cases of the 1960s and early 1970s, which focused on providing basic rights, the new process litigation was process compliance-error oriented. As process compliance error became a major factor in all student discipline, colleges moved to attempt to manage compliance error issues, but sometimes in vain. Legalistic systems are hard to operate. And one solution to process compliance errors is more process, which can itself cause more error. It is difficult even for legally trained and experienced professionals to manage legalistic systems, and professional discipline officers are not usually lawyers or legally trained.

Fourth, legalistic adversarial systems of process are not always good at ferreting out the truth in an educational setting. Instead, such systems are oppositional and push students into posturing and positioning. Higher education not only adopted a *legalistic* process vision, it adopted a highly criminal/administrative justice system oriented perspective on how to deliver discipline process. It is sometimes painfully apparent that higher education systems based on oppositional criminal justice models all too often fail to achieve positive results and/or to root out the truth.[35]

Fifth, legalistic process is often very slow and/or inefficient. One of the major functions of legalistic process is to slow things down to force decision-makers to make decisions deliberately. Mimicking the criminal justice system, many higher education institutions have developed systems that can take months, even years, to process a student

[34] *See, e.g.*, Haberle v. Univ. of Ala. at Birmingham, 803 F.2d 1536 (11th Cir. 1986) (student's suit, in part, alleged university grievance procedures did not follow the procedures listed in the graduate school bulletin). These claims are not limited to the 1980s and 1990s. *See, e.g.,* Gomes v. Univ. of Me., 365 F. Supp. 2d 6 (D. Me. 2005) (two students sued for breach of contract and violation of due process rights after serious discipline for sexual assault); Schaer v. Brandeis Univ., 735 N.E.2d 373 (Mass. 2000) (student filed suit against his university for failure to comply with university disciplinary procedure).

[35] For example, the scandal involving the lacrosse team at Duke University. *See* STUART TAYLOR JR. & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007).

matter. Even open-and-shut disciplinary matters can take too much time to resolve.

Sixth, legalistic process has a tendency to create a culture of passive incident management. As caseloads mount it is often imperative to manage the intake of rule violators; administrators have less time to take proactive risk management steps to avoid rule violating behavior in the first place. Indeed, as events at Virginia Tech in April 2007 painfully demonstrated many dangerous and problematic individuals do not violate rules or policies in ways that get the attention of appropriate decision-makers before something very bad takes place.[36] Systems of legalistic process tend to trap the unwary or inartful who violate rules and policies, but often lack the proactivity to prevent potential danger or misconduct. Legalistic discipline systems are *reactive*, not *proactive*.

Seventh, legalistic process is hard to reconcile with the developmental goals of higher education. Modern criminal justice systems are not focused on rehabilitation in the way that they were in the 1960s,[37] the time when higher education began to model discipline systems after the criminal justice system. Discipline systems constantly struggle with the perception that they are not developmentally sound and exist essentially to punish, not teach. A simple but elusive question perplexes the modern university – what is the core mission of a discipline system and how does it serve/relate to the core mission of the university?

Eighth, legalistic process tends to develop its own form of "positivism."[38] Legalistic process tends to influence decision-makers to translate issues of managing an educational environment into the rule

[36] VA. TECH REV. PANEL, MASS SHOOTINGS AT VIRGINIA TECH, APRIL 16, 2007—REPORT OF THE REVIEW PANEL PRESENTED TO GOVERNOR KAINE, COMMONWEALTH OF VIRGINIA 40–53 (2007), *available at* http://www.vtreviewpanel.org/report/index.html (detailing the totality of Seung Hui Cho's behavior as a student at Virginia Tech and concluding that there was a failure to share the information that would have brought Cho's behavior to the administration's attention).

[37] During the 1960s, science-based rehabilitation became the primary focus of the criminal justice system. JOHN W. ROBERTS, REFORM AND RETRIBUTION: AN ILLUSTRATED HISTORY OF AMERICAN PRISONS 169 (1997). Starting around the 1970s, the United States embraced punishment rhetoric after the publication of studies showing rehabilitation did not improve recidivism rates. Francis Cullen, *It's Time to Reaffirm Rehabilitation*, 5 CRIMINOLOGY & PUB. POL'Y 665, 666 (2006); Francis Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 CRIM. JUST. 109 (2000), *available at* http://www.ncjrs.gov/criminal_justice2000/vol_3/03d.pdf.

[38] For a quintessential treatment of legal positivism, see H.L.A. HART, THE CONCEPT OF LAW 181 (1961).

application. For example, a roommate dispute transforms into a process about a rule violation. There is a natural tendency when captured by legalistic systems to see solutions in terms of more and better processes, more and better rules, and more and better policies. Law-mindedness supplants good student affairs practice. Rule compliance supplants the goal of creating a safe and responsible academic environment. Technical compliance is the hobgoblin of overly legalistic campuses: administrators and students may be complying with all legal rules, but nonetheless fail to create safe and responsible campuses. In a broader sense, overly legalistic systems also tend to become *autonomous*, in a sense I develop *infra.*

Ninth, legalistic systems squeeze out other important techniques for managing human behavior. Legalistic systems of discipline tend to marginalize the use of judgment and discretion: moreover, legalistic discipline systems make it difficult to treat students as individuals and allow for a tolerable range of human frailty, show compassion and mercy, and evaluate character over infraction. Disciplinarians commonly attempt to use judgment, mercy, and discretion around the edges of the system. But in actual operation, the role of cart and horse are clear—rules come first. Higher education sometimes elevates managing a student's conduct over educating the student himself or herself.

Tenth, and critically, legalistic process tends to breed *meta*-process issues. Legalistic process in higher education is recognizable to court systems: courts find it easier to fault colleges for failing to meet procedural requirements that look law-like.[39] Legalistic process tends to turn issues of integrity and safety into meta-issues of compliance with technical procedures and rules. Moreover, modern higher education discipline processes have thus attracted their own pilot fish. A plaintiff lawyer's bar has self-identified and emerged to "defend" students against institutions in discipline process.[40] It is now common for students aggrieved with institutions to raise legal claims of breach of contract and or failure to provide constitutional rights. Paradoxically, higher education has created systems that invite new, expensive, and ferocious kinds of process compliance litigation.

The answers to the process issues raised in modern higher education do not lie in more rules and procedures, or more training and

[39] *See, e.g.*, Gomes v. Univ. of Me., 365 F. Supp. 2d 6 (D. Me. 2005). Consider also the *Than* and *Flaim* cases, discussed *infra*.

[40] The Foundation for Individual Rights in Education (The FIRE) has a mission to defend individual rights, including freedom of speech, due process, and religious liberty, in higher education. More information on The FIRE is available at www.thefire.org.

oversight of discipline systems. Nor do answers lie simply in following legal trends towards alternative dispute resolution, restorative justice, and diversion programs. Process problems will not be fixed by mimicking the legal system. There is important *educational* work to be done to complete what was started in the formative period in the Civil Rights era. The leading higher education cases on constitutional due process continue to call-out for higher education to claim and develop its *own* process. The Civil Rights era remains unfinished and incomplete until this work is done.

The first step towards finding process solutions for American higher education is to recognize how and why American higher education went down the path of legalisms in the first place. This is not a simple story. In a nanosecond—mostly the 1960s and very early 1970s—colleges and universities rapidly substituted legalistic process for systems based on power and prerogative. American higher education quickly dispensed with an entire student management epoch. Exploring this extraordinary movement in higher education is a major goal of this Book.

Chapter 5 describes a new way to imagine process for higher education environment. A facilitator university[41] prefers a model of managing an educational environment that is educational, student-centered, and not overly legalistic. *The Rights and Responsibilities of the Modern University*[42] considered the challenges and role of a facilitator university in providing a safe and responsible campus. A facilitator university seeks to create conditions under which a student can make wise and responsible choices, and not to be a babysitter or bystander. Two questions remain, "how does a facilitator university manage *all* aspects of its living/learning environments *and* what is the role of a student in a facilitator university?" *Rights and Responsibilities* hints at answers to these larger questions, but its focus was primarily on student safety and wellness. Chapter 5 therefore expands the vision of a facilitator university to answer these broader questions and supplies a vision for students as well as institutions.

Chapter 5 also describes the possibility of moving beyond discipline, in two senses, to develop a *visitorial process.* In one sense,

[41] "The facilitator university model is primarily designed to offer a *comprehensive, adaptable legal and practical model* for university/student safety affairs….It is principally aimed at establishing balance in college and university law and responsibilities." BICKEL & LAKE, *supra* note 1, at 163.

[42] ROBERT D. BICKEL & PETER F. LAKE, RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (1999).

the modern facilitator university seeks to move past paradigms of hierarchy and power to a collaborative educational paradigms focused on intentionality and assessment. In another, the search for the right process for a modern facilitator university leads inevitably to the search for the process of academics in their relations with students in the broadest sense. The facilitator university—inherently reflective and constantly revisiting its purposes and goals—seeks meaning and purpose in its own operation. This ongoing quest for the process of academics is its own discipline, beyond any specific discipline or area of learning activity. The facilitator university constantly seeks to transcend its varied disciplines to identify its unifying discipline.

There will always be a need for rules, processes, hearings (at least in a sense), and sanctions, but the paradigms of legalistic process should not drive an entire system of educational management. When legalisms serve to correct deep injustices in education, provide greater safety, or promote wellness, they are appropriate. There is nothing anti-law, or anti-legalist in moving beyond discipline. Law is just one tool among many to manage an educational environment. Law has no specific priority as an educational environmental a management tool.

The era of legalisms has favored uniformity. It has been common to believe that colleges will able to predict more accurately how courts will react to a discipline system if everyone uses more or less the same discipline system. Uniformity has been a legal compliance maneuver. The search for predictability in litigation regarding student discipline process has come at a high price, however. Students and campuses are too unique to ever create the kind of uniformity that litigation avoidance seems to demand. Notably, colleges are often *least* likely to be sued when using context driven decision-making. Higher education's true power lies in its ability to create environments that facilitate education, development, and personal growth in individual-specific and context-specific ways. There is no power in erecting forts out of model codes that someone else drafted.

Chapter 5 offers no model code, no cookie-cutter blueprint, and no hard and fast, or cut and paste process solutions. Instead, Chapter 5 explores the opportunities campuses have in reclaiming the management of educational environments. Chapter 5 offers the philosophical foundations for entirely new, visitorial process for higher education.

Chapter 5 owes a debt to the work of late great political philosopher John Rawls.[43] In his landmark work, *A Theory of Justice*,

[43] John Bordley Rawls (1921–2002) was one of the twentieth century's preeminent philosophers. A philosophy major at Princeton University, Rawls spent two years

Rawls offered a framework for a theory of political and social justice.[44] At the heart of Rawls's theory was a deeply American vision of process at its highest levels as the vehicle for the resolution of the hardest questions presented by pragmatic political philosophy. Inspired by Immanuel Kant and Willard Van Orman Quine, *inter alia*, Rawls imagined that moral consciousness itself was in its best moments a process—a process described as reflective equilibrium.[45]

Rawls also stated that process was divided into at least two major forms. *Perfect* procedural justice occurs when a process is designed to achieve an outcome.[46] The criminal justice system is an example of an attempt at perfect procedural justice that is in fact imperfect; [47] Rawls also pointed out that so is the process of cutting a

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following his graduation in the army. After his tour of duty in the Pacific, Rawls returned to Princeton for his graduate degree. While completing his dissertation, Rawls met and married Margaret Warfield Fox. The couple would later have four children. Rawls began teaching and earned a Fulbright to study at Oxford during the 1952–1953 year. At Oxford, Rawls was mentored by H.L.A. Hart, among others. Upon returning from Oxford, Rawls became an assistant professor with tenure at Cornell University, and taught there until 1959. Rawls was invited to a one-year visitorial professorship at Harvard during the 1959–1960 academic year; and, after spending an intermediary year teaching at MIT, Rawls accepted an offer to teach at Harvard permanently. Rawls taught at Harvard from 1962 until his retirement in 1991, and during that time published a number of writings, including his most famous, *A Theory of Justice*. THOMAS POGGE, JOHN RAWLS: HIS LIFE AND THEORY OF JUSTICE 9–18 (Michelle Kosch trans., 2007). John Rawls and Thomas Pogge advised my senior thesis in college.

[44] JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999).

[45] Rawls describes the state of reflective equilibrium: "It is an equilibrium because at law out principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation. At the moment everything is in order." *Id*. at 18.

[46] *Id*. at 74. There are two defining characteristics to perfect procedural justice: first, there must be "an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And second, it [must be] possible to devise a procedure that is sure to give the desired outcome." *Id*.

[47] Rawls categorizes a criminal trial as *imperfect* procedural justice:

> Imperfect procedural justice is exemplified by a criminal trial. The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard. But it seems impossible to design the legal rules so that they always lead to the correct result. The theory of trials examines which procedures and rules of evidence, and the life, are best calculated to advance this purpose consistent with the other ends of the law. Different arrangements for hearing cases may reasonably be expected in different circumstances to yield the right results, not always but

cake at a birthday party—if the cutter picks a piece last, the cake is most likely to be divided equally among all attendees at a birthday party.[48] *Pure* procedural justice on the other hand, differs in that the outcome is considered appropriate or just if the process is correctly and fairly created and followed.[49] For example, the just and legitimate winner of a baseball game is the team that plays well according to the rules and scores more than the other team.[50] No team has a preexisting right to win a baseball game, in contrast to the way an innocent person has the right not to be convicted in a criminal trial.[51]

Too often, systems of student discipline have viewed *themselves* as instances of pure procedural justice. In other words, it is easy to fall

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> at least most of the time. A trial, then, is an instance of imperfect procedural justice. Even though the law is carefully followed, and the proceedings fairly and properly conducted, it may reach the wrong outcome. An innocent man may be found guilty, a guilty man may be set free. In such cases we speak of a miscarriage of justice: the injustice springs from no human fault but from a fortuitous combination of circumstances which defeats the purpose of the legal rules. The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it.

Id. at 74–75.

[48] *Id*. at 74

[49] "[P]ure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct of fair, whatever it is, provided that the procedure has been properly followed." *Id*. at 75.

[50] As an alternative example, Rawls illustrates pure procedural justices with gambling.

> If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution is….The betting procedure is fair and freely entered into under conditions that are fair. Thus the background circumstances define a fair procedure. Now any distribution of case summing to the initial stock held by all individuals could result from a series of fair bets. In this sense all of these particular distributions are equally fair. A distinctive feature of pure procedural justice is that the procedure for determining the just result must actually by carried out; for in these cases there is no independent criterion by reference to which a definite outcome can be known to be just.

Id. at 75.

[51] The pure procedural justice of a baseball game, fair based on its procedure, thus differs from the preexisting right of an innocent man to be free of conviction because "[c]learly we cannot say that a particular state of affairs is just because it could have been reached by following a fair procedure." *Id*.

into the trap of believing that following all the rules in the student handbook creates just or fair outcomes by virtue of the fact that the process is followed. Sadly, however, discipline systems are often cruelly indifferent to the needs of an individual student; many bad apples escape the system entirely. Procedural tools such as a student discipline process can never be more than instances of imperfect procedural justice. Such systems must be tested in what outcomes they achieve in the educational environment. Disconnecting student discipline process from outcomes has been a foremost educational mistake. Miscasting discipline systems in pure procedural roles also distracts from the search for where pure proceduralisms lies in the academic world. Discipline systems are a poor proxy for pure academic process; just the way exams are poor proxies for learning. By one path or another, the search for the best process to manage an academic environment leads to the same place—the search for process of academics exercising their academic freedom in collaboration with higher learners in a facilitative environment.

The highest role of law and legalisms in higher education can only be in matters of perfect procedural justice. Law's efficacy wanes dramatically when considering the appropriate process for academics at the deepest level.

The concept of the facilitator university— first advanced in *The Rights and Responsibilities of the Modern University*[52]—has application well beyond the context of student safety. The facilitator university should adopt a process consistent with its relationship to the modern college student. Processes to manage the educational environment should operate, as much as possible, to create conditions under which students can make reasonable and responsible choices for themselves. Rules of responsibility and risk management should be coordinated with managing an educational environment in the larger sense. What good is it to have safe students who learn little? What good is it to have great classroom experiences if a student lives in fear? A facilitator university has difficulty imagining *discipline* as a tool for managing an educational environment. *Discipline* is an outmoded concept in higher education. Discipline connotes hierarchy, ordination, and punishment. *Discipline* is a misfit especially in higher education today, which services large populations of Millennial students.[53] Millennial students have been

[52] BICKEL & LAKE, *supra* note 1, at 159–213.

[53] The "Millennial Generation" roughly encompasses those students who were born between 1982 and the present. NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS GO TO COLLEGE 19 (2003).

educated in K-12 systems that use other tools to manage educational environments. *Discipline* is not consonant with the goals of a modern university, and especially out of place with today's dominant populations.

There is a generation gap. Baby Boomers[54]—and Generation X'ers[55]—must appreciate that the systems they created are not appropriate for students of all generations. Millennials show little interest in abstract systems of self-governance. Virtually every university requires students to read honor and disciple codes and then to sign documents acknowledging that students have read the codes. But students do not actually read the codes, they simply sign the forms.[56] Baby Boomers in particular find it hard to believe that systems of self-governance paid for with blood, protest, arrest, and the like, could be taken so lightly by modern college students. Yet, in many ways parents of modern college students themselves created this generation gap. Millennial students received very different forms of education and parenting than previous generations. For many college students, the experience of self-direction in an educational environment is difficult. Millennials are more accustomed to mentoring, self-esteem building, rewards, and awards, *inter alia*. Punishment, discipline, rules, etc. may not be foreign to Millennial students but systems of managing behavior based on punishment were not dominant for most of them. Coming to college is quite a shock to a typical Millennial: just like it was for Baby Boom college students. Millennials encounter generational shock. We still struggle with generationalism in higher education.

When viewed *systemically* and *environmentally*, modern university educational management systems are out of whack. College students demonstrate persistently high rates of substance abuse.[57] Modern students also report high levels of cheating, lying, and rule

[54] The term "Baby Boomers" consists of those who were born between 1943 and 1960. *Id.*

[55] The term "Generation X" consists of those who were born between 1961 and 1981. *Id.*

[56] For example, regarding the honor code at Duke University, one student commented in 2002: "You didn't have a choice to sign [the honor code], you just did it. . . . Who's going to say, 'I will not follow the honor code'?" Kate Zernike, *With Student Cheating on the Rise, More Colleges are Turning to Honor Codes,* N.Y. TIMES, Nov. 2, 2002, at A10.

[57] In 2004, College students consumed an average of six drinks per week; consumption at this rate results in nearly 50% of college students categorized as "high-risk" drinkers, and an additional 22% as "heavy and frequent" drinkers. Lake & Dickerson, *supra* note 7, at 20 (citing the 2004 Core National Survey Results). College students use illicit drugs, such as cocaine and heroin, at an increasing rate. CASA, *supra* note 7, at 22.

avoidance that may be unprecedented.[58] Female college students, and to a large extent their male counterparts, experience violence, harassment, and sexual misconduct directed at them.[59] Staggeringly, retention rates for major colleges are often abysmal: many colleges lose around one-fourth of their entering class just within the first year.[60] Many factors contribute to retention issues including the upswing in mental health issues reported by entering college students.[61] American colleges mask these systemic, environmental problems with hyper-active admissions processes that are designed to replace large numbers of students who do not succeed in the system. In a very real sense, American higher education has substituted effective management of its educational environment with a "retention by admissions" philosophy. Traditional pictures of college life from past era are inapposite: for example, the four-year college experience is all but a dinosaur. Most students take several more years to graduate.[62] Modern college students typically face

[58] Over three-fourths college students have admitted to some form of academic misconduct, including cheating on exams and plagiarizing assignments. ECKSTEIN, *supra* note 4. Since the mid-1960s, there has been a significant increase in cheating on exams and collaborative cheating on written assignments. McCabe et al., *Cheating in Academic Institutions*, *supra* note 4, at 221.

[59] Each year, approximately 1 in 36 college women are the victim of a rape or attempted rape. FISHER ET AL., *supra* note 6, at 10. Male students suffer sexual harassment as well, and are even less likely than their female counterparts to report harassment or other sexual violence to the appropriate authorities. DZIECH & HAWKINS, *supra* note 6, at 93–94. Further, sex in exchange for grades or other academic favors are still common in today's society. MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 145 (2000).

[60] Between 20 and 30% of college students leave the college in which they enrolled at the end of their first year. Amaury Nora et al., *Student Persistence and Degree Attainment Beyond the First Year in College, in* COLLEGE STUDENT RETENTION: FORMULA FOR STUDENT SUCCESS 129, 132 (Alan Seidman ed., 2005). Among students who graduated high school in 1992, over one-third completed their degree at an institution other than the one where they first enrolled. Serge Herzog, *Measuring Determinants of Student Return vs. Dropout/Stopout vs. Transfer: A First-to-Second Year Analysis of New Freshman*, 46 RES. HIGHER EDUC. 883, 885 (2005).

[61] In 2003, a survey of college counseling centers found that 81.4% of the centers were seeing more students than they had over the past 5 years. Jeremy Kisch et al., *Aspects of Suicidal Behavior, Depression, and Treatment in College Students: Results from the Spring 2000 National College Health Assessment Survey*, 35 SUICIDE & LIFE-THREATENING BEHAV. 3, 5 (2005). College students frequently experience some form of depression, with nearly 10% of students having seriously considered suicidal behavior. *Id.* at 7; *see also* Sarah Gollust et al., *Prevalence and Correlates of Self-Injury Among University Students*, 56 J. AM. COLL. HEALTH 491 (2008); Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis*, 34 J.C. & U.L. 253 (2008).

[62] Neil Swidey, *The Four Year College Myth*, BOSTON GLOBE, May 31, 2009.

college prospects that are often more grim than we would like to admit. Systems of managing educational environments—or the lack thereof—fail to meet the challenges our students face.

A great revolution in American higher education that started in the 1960s is still underway. In successive waves, students have asked modern higher education to meet new challenges. In what may be the last step in a long, painful, and often violent revolution, colleges and universities will have the opportunity to recognize that managing an educational environment is a complex *environmental* process, not merely the result of the application of objective systems of "justice" based on rules, processes, and sanctions. Law and legalisms certainly have their place; but we are institutions of *education,* not courts of law, and our virtues and goals are ones that even the law can never aspire to or achieve.

2 "Double Secret Probation"[1]— Power, Prerogative, and Privilege in the Era of *In Loco Parentis*

Prior to the 1960s, cases involving dismissal, suspension, or other sanction of a college student were rare. The few cases involving students that survive from the era of power and prerogative—the era before the 1960s—show that courts were not willing to create legal rules protecting students or provide process rights to students.[2] The degree of legal silence during the period prior to the 1960s is notable. *Rights and Responsibilities* called this an era of *insularity* from law[3]—conceiving of student discipline in terms of *law*, *legalisms*, or *legal compliance* was for later generations. The pre-modern college had prerogative and power, and the "rights" that were there, were left to private ordering through contract and to the law protecting donative intent. The law was more concerned with recognizing and protecting *power* than *rights*.

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[1] As Eric Hoover wrote in a recent article,

> For anyone who's been locked in the library since 1978, *Animal House*, directed by John Landis, depicts life at fictional Faber College in 1962. The protagonists are Bluto and his Delta brothers, all misfits with bad grades. They must contend with Dean Vernon Wormer, who yearns to kick them off the campus.
>
> Stern and scheming, Wormer (John Vernon) symbolizes the era of *in loco parentis*, when colleges and universities stood "in place of the parent," asserting control over students and their affairs. As legal scholars have noted, *in loco parentis* insulated colleges from litigation. Generally courts gave administrators, like parents, leeway to discipline their charges as they saw fit.
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> At Faber, Wormer is sheriff, judge, and jury. He boasts of putting the Delta House on "double-secret probation."He spouts off like a mad dictator. "The time has come for someone to put his foot down," he says, "and that foot is me."

Eric Hoover, *'Animal House' at 30: O Bluto, Where Art Thou?*, 55 CHRON. HIGHER EDUC., Sept. 5, 2008, at A1.

[2] *See* ROBERT D. BICKEL & PETER F. LAKE, RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 19 (1999).

[3] *Id*. at 29–31.

It is tempting to think that courts were dedicated to policies of protectionism for colleges regarding student discipline. The leading authority on higher education law, Kaplin and Lee's *The Law of Higher Education,*[4] takes the classic and widely accepted vision of the law's view of higher education in pre-modern periods:

> Higher education (particularly private education) was often viewed as a unique enterprise that could regulate itself through reliance on tradition and consensual agreement. It operated best by operating autonomously, and it thrived on the privacy afforded by autonomy. Academia, in short, was like a Victorian gentlemen's club whose sacred precincts were not to be profaned by the involvement of outside agents in its internal governance.[5]

The law was largely, though not entirely, *consistent* with this vision. However, the pre-modern law was far more dedicated to preserving power, prerogative, and privilege in general than the sanctity of college life itself. There was no strong sentiment to protect colleges *from* society or to acknowledge academic autonomy, per se. There was also no strong legal sentiment to protect college students, either.

True, there were noble statements of the role of colleges in society in some early legal documents. The Massachusetts Constitution, for instance, grandly stated,

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions,

[4] WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION (4th ed. 2006).
[5] *Id*. at 9.

> rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affection, and generous sentiments among the people.[6]

However, the predominate purpose of such language was to set up processes for state relationships to institutions of higher education, and in some instances, to place higher education under some process of governmental administrative review.[7] It is also well to remember that in colonial times, higher education was dominated by religious training, often for future church leadership in a commonwealth with a theocratic government.[8] Sectarian goals were not primary.[9]

The few cases acknowledging the prerogative of a college were not motivated in any significant way by any judicial policy of college protectionism and/or a roseate modern view of sectarian liberal arts higher education. College was typically for the few and the privileged—and the often religiously motivated—and mostly for white males either in positions of power and prerogative or wishing to assume such roles in society.[10] The direct remembrances upon which we base so much of our

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[6] MASS. CONST. ch. V, § II.

[7] In fact, the Massachusetts Constitution specifically states,

> [N]othing herein shall be construed to prevent the legislature of this commonwealth from making such alterations in the government of the said university, as shall be conducive to its advantage and the interest of the republic of letters, in as full a manner as might have been done by the legislature of the late Province of the Massachusetts Bay.

Id. at ch. V, § I, art. 3.

[8] As Rudolph stated, "The orientation of the colonial college was revision . . . ." FREDERICK RUDOLPH, THE AMERICAN COLLEGE UNIVERSITY 18 (1990).

[9] Massachusetts was also a legally theocratic state with no modern church/state separation: "[W]hereas the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America." MASS. CONST. ch. V, § I, art. 1. Frederick Rudolph provides an excellent discussion of the church/state relationship between colleges and colonies. *See* RUDOLPH, *supra* note 8, at 15–18, 36–37.

[10] Rudolph described this poetically when he wrote,

vision of college past are largely the recollections of those in privileged positions. When looking at this history through non-modern eyes, case

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> On the eve of the American Revolution, except in New England, there was no public provision for elementary education in the American colonies. Charity schools conducted by the denominations were the common institutions of elementary learning in New York, Philadelphia, and other eastern coastal towns. The responsibility for education rested largely with the parents who, if they could manage a little instruction in reading, writing, and arithmetic, felt they had done well by their children, as indeed they had. There were itinerant freelance teachers who accounted for some of the formal training of the period, and in the South planters sometimes hired northern college graduates or employed indentured servants to tutor their children and run plantation schools. But as far as most Americans were concerned, they were on their own when it came to education during the colonial period. Only a relatively few colonial Americans received any formal education beyond the elementary subjects. Secondary schools were rare. Private tutors and the local clergyman carried the main burden of college preparation. There were public secondary schools in New England, probably the best being the Boston Latin School, three graduates of which were to sign the Declaration of Independence. There were a few secondary schools in the middle colonies, and even fewer in the South.
>
> As for college, it has been estimated that as of 1775 "perhaps one out of every thousand colonists. . . . . had been to college at some time or other," and many of those who had gone to college had done so for less than a full course. The largest graduating class at Harvard before the American Revolution was the Class of 1771, with sixty-three graduates, a number that would not again be approached for forty years. In 1776 there were 3,000 living graduates of the American colleges. The college had long been a necessity for society, but it had not become a necessity for the people. The college was clearly a source of political leaders, but not everyone aspired to be a leader. The college sustained a literate, indeed a learned, ministry, but many Americans could get along without any ministry at all. For most colonial Americans, college was something that could wait.
>
> It is often pointed out that some middle- and lower-class families sent their sons to the colonial colleges, and unquestionably some of them did. But it should not be forgotten that the overwhelming majority of their sons stayed home, framed, went West, or became—without benefit of a college education–Benjamin Franklin or Patrick Henry.

Id. at 21–22.

law of the pre-modern period reflects classic views of the reach and limits of the law—not some special protectionism for colleges. Moreover, the idea that college is a consensual relationship was for later down the road.

The law of the era of power and prerogative did not imagine itself as providing the governing principles for all human conduct.[11] The law had a strong sense of its own limits. Prior to World War II, for example, it was rare for a court to become involved in disputes between a government and a citizen wronged by that government.[12] It was also unheard of for courts and the law to concern themselves too deeply with family affairs.[13] Prior to the 1960s, women and children had few legal rights arising out of wrongs committed within a family.[14] The law also knew many, many other limitations that it recognized for itself—too many to catalog here.[15]

In an era in which disabilities in the law were great in number, there was no particular need for the protection of *colleges* by virtue of *special*, *uniquely* college-driven legal protective doctrines. There was nothing much to be protected against—the law did not imagine any form of a modern role in college life in the first place. To the extent that the law had any peculiar concern for higher education, courts were dedicated, if anything, to protecting privilege, power, and prerogative. Most early American college law relates to the power and prerogative of

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[11] *See* BICKEL & LAKE, *supra* note 2, at 18. Even to the extent that state law set up procedures for chartering or licensing, it was not thought that the law should reach into the day-to-day operations of the college. Today, regulation of colleges still bears this imprint: it is rare for regulatory processes to invest much effort in how classes are taught, see *Statement on Government of Colleges and Universities*, *in* AAUP POLICY DOCUMENTS AND REPORTS 139 (10th ed. 2006), *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/governancestatement.htm, or to invest much effort in protecting student process rights as such. Pockets of academic freedom are vestiges of much older attitudes that the law should stay its hand in governing the internal affairs of college life. *1940 Statement of Principles on Academic Freedom and Tenure, in* AAUP POLICY DOCUMENTS AND REPORTS 3–7 (10th ed. 2006), *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm; *see also* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring).

[12] BICKEL & LAKE, *supra* note 2, at 25.

[13] *Id.* at 19.

[14] *See* DAN B. DOBBS, THE LAW OF TORTS 751–60 (2000).

[15] Including charitable immunity, JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS 465 (2d ed. 2008), and early Federal Congressional limitations under the commerce clause, Stephen L. Smith, *State Autonomy After* Garcia*: Will the Political Process Protect States' Interests?*, 71 IOWA L. REV. 1527, 1532–34 (1986), for example.

institutions: for example, in key cases, colleges were recognized to have rights to control board governance[16] and to police the morals and behaviors of students with almost unfettered discretion.[17]

Since law protected power, prerogative, and privilege, property and economic interests had more protection than student safety or rights of fairness. The law of reparation for wrongfully caused physical injury was written largely around concepts of ownership first: power and dominion preceded restorative justice. Rights to fairness, such as they were, were usually conditioned on property ownership first.[18] The law, however, was particularly highly developed with respect to the rules of the exercise of power, including rules for contract, and charitable and donative intent. When law recognized major disabilities in itself, these limitations served to enhance the powers and prerogative of individuals or institutions.

The pre-modern era was influenced by the doctrine of *in loco parentis*, but this was not the only doctrine, or even the most important doctrine, in the law relating to colleges.[19] Modern commentators make far too much out of *in loco parentis,* and the idea of a legal return to *in loco parentis* is illogical and fanciful, and demonstrates a lack of understanding of tort and higher education law.[20]

Rights and Responsibilities spoke of an era of insularity.[21] This insularity from law was a direct reflection of courts protecting power and prerogative of institutions of higher education. Insularity is simply the negative way of referring to the phenomenon that colleges, like many other entities, had significant powers and prerogatives recognized and protected by law. Insularity, and power and prerogative are two ways of describing the same phenomenon.

The doctrine that *most* influenced the course of American higher education in its earliest moments is one that is barely visible today. The doctrine of *visitation*—a legal doctrine protecting the rights of charitable donors—was singularly important in American higher education in its

[16] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).
[17] Gott v. Berea Coll., 161 S.W. 204 (Ky. 1913).
[18] Due process protection requires *inter alia*, "property interests," which until the Warren Court were typically strictly construed. *See infra* Ch. 3.
[19] Commentators have placed excessive emphasis on *in loco parentis* because it was a power and prerogative doctrine for *education*, including higher education. Myopic focus on education law misses the bigger legal picture. Colleges operated in a system that protected their power and prerogative, generally, which explains why some of the key decisions of the era in which *in loco parentis* flourished, make a reference at all to the doctrine. *See Trustees of Dartmouth Coll.*, 17 U.S. 518.
[20] BICKEL & LAKE, *supra* note 2, at ch. 2.
[21] *Id.* at 17–33.

formative period. The doctrine of visitation explains much of the early "student process" legal history in American higher education (or lack thereof, to be more accurate).

Today, the doctrine of visitation is all but lost, although the term "visitation," or its cognates, appears here and there in higher education without the content or significance it once had.[22] Like an ancient creature, such as the coelacanth (an ancient fish thought extinct), the doctrine of visitation once had power and dominion that dwarfed and preceded the significance of *in loco parentis*.

The doctrine of visitation is still significant in English higher education law.[23] Critically however, for America, the doctrine of visitation was extant in English law at the time of the adoption of the United States Constitution, and thus, was *received* into American law.[24] Yet, the doctrine of visitation was not to have the same path after 1787 in the United States that it did in England. Something uniquely American was under-way that would lead steadily over the course of nearly 200 years to a Civil Rights showdown in the 1960s.

Modern scholars believe that the doctrine of visitation derived from canonical law, which featured the concept of ecclesiastical visitation.[25] Canonical doctrine found its way into the law of charitable entities in England.[26] In ancient times, some charitable entities were

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[22] The term "visitation" (or any cognate) does not appear in the index of the two most recent editions of Kaplin & Lee's seminal higher education law treatise. *See* KAPLIN & LEE, *supra* note 4; WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION (3d ed. 1995). Even today some systems refer to their governing boards or bodies as "boards of visitors," or more commonly, "regents," which is a survival of a way of referring to the visitorial power of a sovereign. See for example, Virginia Tech and the University of Virginia, the University of North Carolina at Chapel Hill, the College of William and Mary, and Columbia Law School.

[23] *See* OLIVER HYAMS, LAW OF EDUCATION 537–44 (2d ed. 2004); J. RICHARD MCMANUS QC, EDUCATION AND THE COURTS 416–17 (2004); DAVID PALFREYMAN & DAVID WARNER, HIGHER EDUCATION LAW 583 (2002).

[24] "Reception" is defined as "[t]he adoption in whole or in part of the law of one jurisdiction by another jurisdiction." BLACK'S LAW DICTIONARY 1297 (8th ed. 2004). Upon settling America, the colonists brought with them the common law of England, which was adopted into American law so far as the laws were applicable. *See* United States. v. Reid, 53 U.S. 361, 363 (1851), *overruled in part on other grounds by* Rosen v. United States, 245 U.S. 467 (1918); *see also*, KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 5–6 (Paul Gewirtz ed., 1989).

[25] PALFREYMAN & WARNER, *supra* note 23, at 565 (citing a host of English authorities); *see* I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 480–84 (reprinted 1967) (1771).

[26] PALFREYMAN & WARNER, *supra* note 23, at 565.

often referred to as "eleemosynary" entities.[27] The term derives from a Latin word "eleemosynaria," which referred to the place in a church where alms for the poor were kept and distributed.[28] Charitable entities were thus conceived of in terms used in the ecclesiastical context of attending to the poor and the weak. Canonical principles were adapted to universities funded and founded by donors. Both the title "visitor" and the functions of visitation were similar at least at first, to those functions in church law.[29]

There is ongoing debate in England about the role and the function of the visitor into the modern period in England.[30] However, the role of visitor had some clear features in English law as it was picked up in America at the time of the reception.[31]

A leading text on the law of higher education in England relates,

> thus, the Visitor watches over the endowment, the foundation, on behalf of the Founder: ". . . for it is fit the members that are endowed, and that have the charity bestowed upon them, should not be left to themselves (for divisions and contests will arise amongst them about the dividend of the charity," but pursue the intent and design of him that bestowed it upon them—were they who are to enjoy the benefit of the charity are incorporated there, to prevent all perverting of the charity, or to compare

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[27] And still sometimes, if archaically, today. *See*, *e.g.,* Hernandez v. C.I.R., 490 U.S. 680, 689 (1989).

[28] *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 559.

[29] *See* PALFREYMAN & WARNER, *supra* note 23, at 565–74. There is ongoing debate in England about the role and function of the visitor in the modern period in England.

[30] *Id.* at 584.

[31] As Palfreyman and Warner state,

> The concept of the Visitor is an unusual one and has its origins in canon law. A Visitor is a person who has domestic judicial authority over "eleemosynary, lay, and ecclesiastical corporations for the correction of the life and conduct of the members and the adjudication of disputes between them." In practice, Visitors have a role principally in religious and educational contexts. The theoretical justification for the appointment of a Visitor has always been that the founder of an institution should have the authority to determine disputes arising within that institution.

Id. at 166 (citations omitted).

> differences that may happen among them, there is by law a visitational power.[32]

The visitor was the person who enforced the will of the original donor. The power and the privilege of the donor lived on in the role of the person who was invested with the power and duty to keep the original donation on track. Visitorial power was the power of donors to perpetuate their donative intention for generations. (Modern law students study at some length the infamous "Rule Against Perpetuities,"[33] sometimes known as the Rule in Shelley's Case,[34] which grappled with limits on a testator's power to lock up real property in perpetuity. In many areas of American law today, there are rules that limit the power of the dead to rule the living.) A donor's gift of charity to a college could live on—and on—as could donor control via visitation. Higher education was a gift and it mattered little if the gift was to children, adults or parents—a gift was a gift.

Importantly, the visitor played a crucial second role. The visitor was the arbiter of disputes within the university, and had the last, final, and exclusive authority over many internal disputes at a university.[35] There are some arguments about the extent of the "jurisdiction" of the visitor in English law; but it seems that when the disputes were among faculty, the university, and students, in any combination, the jurisdiction of the visitor was often final.[36] In reference to the plenary power of a visitor, the following is attributed to Sir John Holt, C.J., in *Philips v.*

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[32] PALFREYMAN & WARNER, *supra* note 23, at 566 (quoting LEONARD SHELFORD, A PRACTICAL TREATISE OF THE LAW OF MORTMAIN AND CHARITABLE USES AND TRUSTS 332 (1863)).

[33] "The common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created." BLACK'S LAW DICTIONARY, *supra* note 24, at 1357–58; *see also* McArthur v. Scott, 113 U.S. 340, 382–83 (1885).

[34] Wolfe v. Shelley, (1581) 76 Eng. Rep. 206 (K.B.). The Rule in Shelley's Case provides "that if—in a single grant—a freehold estate is given to a person and a remainder is given to the person's heirs, the remainder belongs to the named person and not the heirs, so that the person is held to have a fee simple absolute." BLACK'S LAW DICTIONARY, *supra* note 24, at 1358.

[35] PALFREYMAN & WARNER, *supra* note 23, at 570–71; *see* JAMES KENT, II COMMENTARIES ON AMERICAN LAW 300–304 (John M. Gould ed., 14th ed. 1901).

[36] PALFREYMAN & WARNER, *supra* note 23, at 70–71.

Bury, "[the visitors'] determinations are final and examinable in no other court whatsoever."[37]

English scholars have found evidence of the power and privilege of the visitor as far back as the 1600s, and there is reason to believe that visitorial power is much, much older.[38] Chief Justice Hail, for instance, in *Daniel Appleford's Case*, stated a court "ought not grant a mandamus where there is a visitor."[39] The matter involved an individual who sought to get his fellowship back at New College—today's closest American analogy is perhaps, a chaired professor seeking to reclaim his job. The court refused to interfere in the dispute and disturb the power of the visitor.[40] Lord Hardwick's statements of the power of the visitor are also well known:[41]

> [A visitor's] powers are absolute and final and cannot be taken away by the courts of law in this kingdom.[42]
>
> . . .
>
> [T]he general powers of a Visitor are well known; no court of law or equity can anticipate their judgment, or take away their jurisdiction, but their determinations are final and conclusive.[43]

English law conceived of the visitor and the visitorial power as something like a parallel court system. English case law and commentators have typically referred to the "jurisdiction" of the visitor and described visitorial proceedings in terms familiar to lawyers. The donor could thus manage an educational business and resolve disputes vicariously through a visitor.[44]

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[37] PALFREYMAN & WARNER, *supra* note 23, at 570 (quoting Phillips v. Bury, (1692) 87 Eng. Rep. 289 (K.B.)).
[38] *See* PALFREYMAN & WARNER, *supra* note 23, at 570–71.
[39] (1672) 86 Eng. Rep. 750, 751 (K.B.) (italics omitted).
[40] *Id*.
[41] Attorney General v. Talbot, (1747) 26 Eng. Rep. 1181 (Ch.)
[42] Attorney General v. Talbot, (1747-8) 27 Eng. Rep. 903, 903 (Ch.).
[43] *Talbot*, 26 Eng. Rep. at 1187, *quoted in* Palfreyman & Warner, *supra* note 23, at 570.
[44] See PALFREYMAN & WARNER, *supra* note 23, at 570–71 and authorities cited therein. Palfreyman and Warner quote from a modern synthesizer of English precedent: "Smith sums up the visitor as 'a private judge.'" *Id.* at 571. According to Peter Smith, "courts of law will not attempt to enter the jurisdiction of another which they recognize as possessing a competent authority over its own special laws and subject matter." Peter M. Smith, *Visitation of the Universities: A Ghost from the Past II*, 136 NEW LAW J. 519 (May 30, 1986), *quoted in* PALFREYMAN & WARNER, *supra* note 23, at 571. This may be

Modern English law has developed in such a way that principles of English constitutional natural justice (something like due process in America but not exactly)[45] apply to the proceedings of the visitor at least insofar as an institution's donor was the sovereign.[46] There was some authority from England during the Colonial period in America that sets forth very basic natural justice requirements for visitors—primarily that no person should hear his or her own dispute and that one should hear both sides of an argument before making a decision.[47] Principles of natural justice in England evolved to require only the barest procedural safeguards limiting visitorial power.[48]

Even though there has been some English authority to support the notion that English constitutional principles of natural justice should apply to the visitor, American case law never acknowledged anything similar for colleges. Perhaps the idea of federal Constitutional limits on a visitor was too controversial in America: the failure of American courts to "receive" this English constitutional concept may be due to the fact that our written Constitution does not recognize natural justice per se. It may also be due to the fact that Americans were highly suspicious of central federal government control of state-based religious education and training in the formative periods of our Constitution. The First Amendment to the United States Constitution prohibited both the establishment and interference with religion—but is clear that this was originally intended to stop the federal government from interfering with *state* theocratic governments and from establishing a central federal theocratic government competing with the states theocratic

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a modern overlay in the case law, but it is remarkably prescient when looking at how American courts have talked about student process issues in the modern era. The deep fascination with creating court-like systems to manage student behavior may have genetic roots that we have not previously imagined. In any event, the notion of letting special tribunals do what special tribunals do best may have been so strong that English courts were willing, at times, to defer enforcing certain background legal rights—like the usual right to have a valid contract enforced in the King's court—in favor of upholding the power of the visitor. This was precisely the issue raised in the famous (to English lawyers at least) *Daniel Appleford's Case* that upheld the power of the visitor in strong terms.

[45] Principles of natural justice in English law operate in part somewhat like our due process requirements. See PALFREYMAN & WARNER, *supra* note 23, at 148.

[46] *See id.* at 575.

[47] *See id.* at 87.

[48] *See id.* at 575.

governments.[49] Thus, the framers of the United States Constitution stymied any chance for a federal visitorial power, as an indirect result of seeking other goals.

The higher education system that America inherited through reception was a system based on historical visitorial privilege and power, with an American twist. The privilege and power of a visitor was *sacrosanct*. The roots of visitorial power lay in the church and the power of a donor of a private university. The uniquely American feature of the visitor was its disconnection from federal (or national) public law. Due process and the visitor would have to wait almost 200 years to reconnect.

A modern reader might be inclined to project visitorial power only on private institutions. In reality, in the formative period of American higher education, the public/private distinction matters little for our purposes here.

While early American colleges were often intertwined with the public domain through grants, chartering, tax breaks, and regulation, the public/private distinction America inherited from the English at the time of the reception was very different from the "state action" doctrine that separates public and private higher education today.[50] In early times, what made a college "private" (for visitorial purposes at least) was the nature of its creator, not its relationship with the state. The legal process of chartering was often critical in creating a visitorial role.[51] At the time the United States Constitution was adopted, American universities typically were subject to visitation in some form.[52] Early American colleges were religious in their orientation[53] and were chartered, in certain instances, under provisions of state constitutions (for instance in states like Massachusetts[54]).

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[49] *See* John H. Mansfield, *Church and State: The English Experience*, 10 J.L. & RELIGION 267 (1994); John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV. 1 (1986); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847 (1984).

[50] *See* KAPLIN & LEE, *supra* note 4, at 40–54.

[51] *See* PALFREYMAN & WARNER, *supra* note 23, at 563. There are some fine distinctions to be made in creation of a visitor in the English system as not all visitors found there power in charter. It appears that all English charities established in the era of our own Constitution and before had some form of visitor. *See id.*

[52] The visitorial system was a dominant norm in American college life in the year of reception.

[53] *See* KAPLIN & LEE, *supra* note 4 at 40.

[54] *See id.* at 30.

American colleges thus inherited a dispute resolution process for students and faculty that was built on legal norms of power, privilege and sanctity, and visitorial jurisdiction.[55]

There is plenty of evidence that doctrine of visitation made its way into American law, but later became lost like a Mayan city obscured by overgrowth. We see visitation clearly discussed in *Trustees of Dartmouth College v. Woodward* for example,[56] in which the United States Supreme Court grappled with the question of whether the State of New Hampshire could interfere with the charter of Dartmouth College that had been granted by the King in the pre-revolutionary war period.[57] The New Hampshire legislature had aimed to alter the governing and business structure of Dartmouth College in contravention of the donor's intent.[58] The technical United States Constitutional issue raised was

[55] It is important for the modern reader to recognize that the church/state separation we take for granted today was not a feature of early American federal Constitutional law. Massachusetts, for instance, and other states were specifically theocratic. States ratified the Bill of Rights to protect state rights to have theocratic governments and to stop the federal government from imposing federal religious requirements. *See infra* n.48. There were once legally sanctified entities other than flags, pledges and legislative prayers. American colleges retain the legacy of this in their process consciousness.

[56] 17 U.S. 518 (1819).

[57] *Id.* at 553–54.

[58] As Justice Marshall related,

> [Dartmouth College] claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "an act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter this act increases the number of trustees to twenty-one, and gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives, of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect. The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

whether the acts of New Hampshire constituted an impairment of contracts under Article I, section 10 of the United States Constitution.[59] Justice Marshall writing for a divided court, believed the Dartmouth College charter was indeed a contract and that the State of New Hampshire had impaired that contract.[60]

A major problem in the *Dartmouth* case was that all the original parties to the contract were dead. Recognizing the impact on not just colleges, but all charitable institutions,[61] Justice Marshall concluded that rights of contract passed to the successors of the donor. Thus, the successors to the donor could have their contracts impaired,[62] and the United States Constitution protected against such impairment. Justice Marshall imagined that formative documents for colleges—"contracts"—could be perpetual, and live on. In its day the *Dartmouth* decision was a clear victory for the concept of the visitor.

The *Dartmouth* decision relieved many private colleges of the fear of take-over by public regulation. The internal governance of many colleges would remain be a *private, visitorial* matter for some time to come. The course of early higher education in the United States was set, and private education received an opportunity to exist independently of sovereign control and take-over.

Concurring opinions by Justices Washington and Story made it clear that the nature and role of the visitor played heavily in the Supreme Court's protection of Dartmouth College from the New Hampshire legislature. Keep in mind that lawyers of this period would have been very familiar with doctrines of visitation. Justice Washington spoke repeatedly of the visitor and the right to visitation in his relatively short

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Id. at 626–27.

[59] *Id*. at 641–42.

[60] *Id*. at 628, 643–44. As Justice Marshall went on to state,

> This is plainly a contract to which the donors, the trustees and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

Id. at 643–44.

[61] *Id*. at 645.

[62] *Id*. at 650.

concurrence, and made direct reference to the seminal English decision of *Philips v. Bury* discussing visitorial power:

> We are informed, by the case of *Philips v. Bury*, which contains all the doctrine of corporations connected with this point, that there are two kinds of corporations aggregate, viz., such as are for public government, and such as are for private charity. The first are those for the government of a town, city or the like; and being for the public advantage, are to be governed according to the law of the land. The validity and justice of their private laws and constitutions are examinable in the king's courts. Of these, there are no particular founders, and consequently, no particular visitor; there are no patrons of these corporations. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and are to be visited by them or their heirs, or such other persons as they may appoint. The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full, to prove, that a college is a private charity, as well as an hospital, and that there is, in reality, no difference between them, except in degree; but they are within the same reason, and both eleemosynary.[63]

Moreover, Justice Washington stated what would have been axiomatic in the day: chartered private colleges are subject to their own law and the visitor was the governing authority in disputes.[64]

[63] *Id*. at 659–60 (Washington, J., concurring) (citations omitted).
[64] *Id*. at 661–62.

Justice Washington concluded,

> There is not a case to be found which contradicts the doctrine laid down in the case of *Philips v. Bury*, viz., that a college, founded by an individual, or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government.[65]

The doctrine of visitation was a central feature of early American law and survived the adoption of the United States Constitution. Justice Washington contemplated that the governance of a private college should be internal and managed at least in part by a visitor. Justice Washington restated principles of English law as they had been received through the Constitution of the United States, and gives us today a clear picture of a lost, but once dominant, governance structure of American higher education.

Justice Story's concurrence also demonstrates the pervasiveness of the visitor in early America. His concurrence features an excellent academic-style inquiry into the corporate nature of higher educational institutions circa the early 1800s:

> Some . . . corporations are . . . denominated spiritual, and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms and bounty of the founder, in such manner as he has directed; and in this class, are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits.[66]

Justice Story stated the common view that private colleges were lay, eleemosynary corporations. Colleges were, as the term "eleemosynary" implied, placed alongside corporate entities serving the poor and the weak.

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[65] *Id*. at 665.
[66] *Id*. at 668 (Story, J., concurring) (citations omitted).

Justice Story also provides the classic account of visitation as received into American law and culture:

> To all eleemosynary corporations, a visitatorial power attaches, as a necessary incident; for these corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of this charity to be faithfully fulfilled. The nature and extent of this visitatorial power has been expounded with admirable fulness and accuracy by Lord HOLT in one of his most celebrated judgments, *Philips v. Bury*. And of common right, by the dotation, the founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it in exclusion of the founder's heirs. This visitatorial power is, therefore, an hereditament founded in property, and valuable, in intendment of law; and stands upon the maxim, that he who gives his property, has a right to regulate it in the future. It includes also the legal right of patronage, for as Lord HOLT justly observes, 'patronage and visitation are necessary consequents one upon another.' No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons, under the charter, it can be inferred, that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modifications or control, by the fundamental statutes of the corporation. But where the appointment is given in general terms, the whole

> power vests in the appointee. In the construction of charters, too, it is a general rule, that if the objects of the charity are incorporated, as for instance, the master and fellows of a college, or the master and poor of a hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character.[67]

Justice Story pointed out, that at least in America, a private, chartered university with governors or trustees could vest the visitorial power with its governors/trustees, which many did. Justice Story gives us a glimpse into the merger of visitorial power with trustee power in America, something that would be ever more commonplace in another century.

Justice Story also expressed the classic power of visitation in terms of the power and prerogative of a college:

> When a private eleemosynary corporation is thus created, by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to, or diminish, the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn, and well settled doctrines of the common law.[68]

While the specific issue raised in the *Dartmouth* case was not student process rights per se, Justice Story's discussion shows that visitorial power in America was understood to trump the exercise of state administrative power over students. The private charitable college was

[67] *Id.* at 673–75 (citations omitted).
[68] *Id*. at 675 (footnote omitted).

thus protected from legal examinations with respect to how students were treated.[69] (Notice the absence of any discussion of *in loco parentis*. *In loco parentis* entered American higher education law later—and well after the reception—as courts began to re-conceive higher education from a gift to a transaction.)

Visitorial power created legal insularity.

Justice Story also presciently stated what he perceived to be the limits of the power of a private eleemosynary college. His views, however, were progressive, to say the least, for the time. As far as students' rights and process would go, nothing like the kind of supervision he described below would occur in the courts for nearly 150 years. Justice Story stated,

> [A]n eleemosynary, like every other corporation, is subject to the general law of the land. It may forfeit

[69] Justice Story's classic definition of the private college predates modern state action doctrine, which is the foundation for most modern public/private distinctions. *See infra* chs. 3–4. The way in which Justice Story defined private would encompass many, many institutions of higher learning:

> Another division of corporations is in the public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects, they are so, although they involve some private interests: but strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and the objects of the institution. For instance, a bank created by the government for its own uses, whose dock is exclusively owned by the government, is, in the strictest sense, public corporation. So, an hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.

Id. at 668–69.

> its corporate franchises, by *misuser* or *non-user* of them. It is subject to the controlling authority of its legal visitor, who, unless restrained by the terms of the charter, may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts. Where, indeed, the visitatorial power is vested in the trustees of the charity, in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the court of chancery, not as itself possessing a visitatorial power, or right to control a charity, but as possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds. And where a corporation is a mere trustee of a charity, a court of equity will go yet further; and though it cannot appoint or remove a corporator, it will, yet, in a case of gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other hands. [70]

Justice Story imagined a role for courts in supervising trusts, which was not inconsistent with English or early American law. However, such review of *visitors* was not common or widely accepted at the time. Undoubtedly, Justice Story picked up the idea of visitorial review in the courts from English case law, which did place supervision over *some* colleges in the hands of the courts. But this idea conflicted with the system of educational governance essentially ratified by the Constitution. The notion that a court would "redress grievances"[71] within a university was inconsistent with the dominant view in early American law to vest the visitor with plenary authority.[72] With respect to student discipline, Justice Story would have been out of step with his era.

The *Dartmouth* case was evidence of a shift in American law away from the English system. In America the power of the visitor would ultimately merge almost completely with the power of trustees or

[70] *Id*. at 675–77 (citations omitted).
[71] *Id*. at 676.
[72] *See* BLACKSTONE, *supra* note 25, at 480–84.

governing bodies. Over time the focus of inquiry regarding the power of an institution was to be with respect to the powers and privileges of the trustees or governors.[73] Moreover, over time higher education would shift from a gift to contractual bargain.

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[73] Some American institutions merged visitation early on with trustee power. Francis Wayland, prodigious scholar and President of Brown University for nearly thirty years in the ante-bellum period, gave his first-hand account of the state of the visitor mid-nineteenth century:

> In this country the visitorial power is almost universally vested in a corporation commonly denominated the Board of Trustees. Sometimes there are two or more boards and the visitorial power is divided between them. On this corporation, whether simple or complex, devolve the duties to which I have alluded in a preceding paragraph. They hold the property of the Institution, appoint and remove all officers of instruction and government, fix and alter their salaries, enact all laws, and see that these laws are carried into effect, or at least they assume the responsibility of performing all these duties. This corporation is created in the first instance by the Legislative act which grants the charter to the college, and they have the power, in most cases, of filling their own vacancies. The office is commonly for life. For the discharge of its duties these corporators are responsible to no one. If they do well they receive no praise, and if ill, no censure. They make no report of their proceedings, for there is no power to which they are amenable. They are wholly independent of all authority. They receive no payment for their services and are remunerated for their labors merely by the persona consideration which may be supposed to attach to their office.
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> . . .
>
> I have said that occasionally, their exist two boards instead of one. I may add that to one of these not unfrequently, a more direct influence over the course of instruction is confided. In such a case, it sometimes happens that this board meets oftener, and that to it are occasionally referred matters of serious discipline, or proposed regulations in the course of study. This is however a modification of the form rather than of the fact. The corporators do not consider it necessary in this case more than in the other, to make themselves familiarly acquainted with the subject of education. They are generally men of high professional standing, deeply immersed in business; and , relying, in the main, upon the superior practical knowledge of the senior officer of college, in general, yield an assent to his suggestions, and assist him more by dividing with him the responsibility than in any other manner.

FRANCIS WAYLAND, THOUGHTS ON THE PRESENT COLLEGIATE SYSTEM IN THE UNITED STATES 23–25 (1842). Wayland clearly describes the American preference to merge

In time, the separate doctrine of visitation became disfavored, and interest shifted to trustee power. In due course, *trustees* focused their efforts on asserting specific powers to regulate student life. There would have been no need for such articulations of power in the high era of visitation; indeed, there would have been concerns that language of this sort might *divest* visitors of inherent or implied powers. Articulation of power over students instead coincided with the evolution of contractual relationships with families with children in higher education.

Institutions continued to possess plenary power over students, even as separate visitorial power dissolved. The case of *Pratt v. Wheaton College* illustrates what happened when a student challenged an institution in the era of power and prerogative.[74] In *Pratt*, a student joined a secret society—against the rules of the college—and was suspended.[75] The Wheaton College charter "[gave] to the trustees and faculty the power 'to adopt and enforce such rules as may be deemed expedient for the government of the institution.'"[76] *Wheaton* made statements consistent with what in England would have been visitorial power over students. "[This is] a power which [the trustees and faculty of Wheaton College] would have possessed without such express grant, because [they are] incident to the very object of their incorporation, and indispensable to the successful management of the college."[77] The visitor once had similar implied powers as well.

Watch what the *Pratt* court said when it considered whether it had the judicial power to review a Wheaton College rule against students joining secret societies:

> But whether the rule be judicious or not, it violates neither good morals nor the law of the land, and is therefore clearly within the power of the college

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visitorial power into trustee power, and the autonomy of visitorial jurisdiction over college affairs from outside review. By the civil war, separate "visitors" were already in retreat in America.

Those that did not merge visitation early on with trustee power faced changes in American law that doomed separate visitorial/power control. American tax law disfavors donor control over trust in many instances. And, as the twentieth century emerged American law became very concerned with monopolies in the form of trusts. Donors' descendents or other visitors would be fearful of retaining too much control. Sherman Act, 15 U.S.C. §§ 1–7 (2006).

[74] 40 Ill. 186 (1866).

[75] *Id*.

[76] *Id*. at 187.

[77] *Id*

> authorities to make and enforce. A discretionary power has been given to them to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.[78]

The court spoke of disability in the law to overturn decisions made concerning students. Wheaton College was governed by self-perpetuating trustees. The link to a donor was no longer as direct, but the power over students was just as strong.

Pratt also analogized the discretion to run a campus and hand out sanctions to students with parental powers. The statement was just that—an analogy. *Pratt* did not specifically hold that trustees and faculty were *in loco parentis*: instead *Pratt* made an analogy to demonstrate that the same type of insularity from legal inquiry that existed with respect to family matters also existed with respect to the management of student affairs. *Pratt* is an excellent example of how modern rationalizations can overplay the role of *in loco parentis* in the formation of higher education law, and how judicial musings can later turn into legal doctrine. *Pratt* is evolutionary evidence of higher education law drifting from gift to transactional.

Modern obsessions with *in loco parentis* distract from the most significant transformations that were taking place in higher education law at the time of *Pratt*. The rise of *in loco parentis* judicial rationales pales in comparison to the shift towards consolidation of governing power in the hands of one, autonomous and self perpetuating, governing body; and the shift, to a lesser extent, from viewing college as a gift to a student to a transaction with a family. The first major change in the re-conceptualization of college power and prerogative was to shift from a focus on protecting a *donor's* power and intentions to protecting the powers and purposes of trustees. The shift was underway visibly in the nineteenth and twentieth century as American visitorial power morphed into powers of self-perpetuating trustees.[79]

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[78] *Id*.

[79] Or, state supervision. *See* Newton v. Lewis, 203 A.D. 395 (3d Dept. 1922) (visitorial power vested in a state board). Some boards had other names—governors, visitors, etc. But the name was not as crucial as the *function*—these boards were self-perpetuating and subject to no other board's control. *See* WAYLAND, *supra* note 73 at 22–23.

There are numerous reasons the visitor slowly dissolved in America. First, some higher education institutions had always had one governing body, with the power of the visitor imagined to reside in that body. Second, American law was less infatuated than English law with empowering dead donors; over time, the law relating to trusts in higher education would loosen the grip of the donor.[80] Third, donor control created tax issues for trusts, and by the late 1800s anti-trust law was evolving in ways that would have scared off separate visitors and encouraged them to merge their authority with trustees. Fourth, higher education became increasingly corporate and transactional and less "sacred" and gift oriented. Fifth, a plethora of subsequent donors made the notion that a founding donor should be the visitor less plausible. Sixth, newer higher education institutions were not constituted with a visitor at all. There was never a legal *requirement* that a college have a visitor designated by the donor, it was simply conventional to do so at one point—times changed.

By the early to mid-twentieth century the notion of separate visitorial power had all but dissolved into the concept of trustee or governing board power. At this time, American law reached its highest point of separation from English law with respect to the role of the visitor and the power of a donor. Nonetheless, English law of the twentieth century was still exploring the concept of the visitor in some depth and becoming less and less recognizable when compared to the law of higher education in the United States on this point.

As an example, consider also *Stetson University v. Hunt* from 1925.[81] In *Hunt*, the Supreme Court of Florida upheld the dismissal of a student for what today would likely amount to nothing more than mere hooliganism.[82] The student was summoned by an administrator and told to go home after a short period of questioning.[83] The power to dismiss the student derived from the incorporating documents of Stetson University. As the *Hunt* court stated,

> [Stetson University] is a private institution of learning, and the act of incorporation fully empowers the trustees "to make rules for the general management of the affairs of the institution and for

[80] *See, e.g.,* Coffee v. Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966).
[81] 102 So. 637 (Fla. 1925).
[82] *Id*. at 639. Despite the relatively minor nature of her misconduct by modern standards, Miss Hunt's behavior was "subversive" and "bordering on insurrection" to the Florida Supreme Court. *Id*.
[83] *Id*.

> the regulation of the conduct of the students." They are further empowered to "make, adopt and from time to time alter such constitution, rules, regulations, and by-laws as their convenience may require, and are not inconsistent with the constitution and laws of the United States or of this state." These powers within their scope give the trustees of John B. Stetson large discretion, though they are not unlike charter and corporate rights under which such institutions are generally conducted.[84]

The trustees of Stetson University made the following regulations:

> Offensive habits that interfere with the comforts of others, or that retard the pupil's work, etc., are prohibited. The government and discipline of the University are administered by the president. The University does not outline in detail either its requirements or its prohibitions. Students are met on a plane of mutual regard and helpfulness and honor. The ideals of the University are those of modern civilization in its best sense. The conventions and proprieties of refined society obtain here. A student may forfeit his connection with the University without any overt act if he is not in accord with its standards.[85]

The *Hunt* case arising from a university founded a century after the revolution and reception, was set up in the new, more recognizable form with pure trustee governance and no separate visitor.

By today's standards, the Stetson "regulation" in *Hunt* was hopelessly vague and ambiguous. It is more in the nature of aspiration, or assertion of power, than rule or standard. Yet, the Florida Supreme Court had no trouble upholding the "regulation" and its application to a student.[86] The regulation would have been well within the power of a

[84] *Id*. at 639–40.
[85] *Id*. at 640.
[86] *Id*.

visitor to promulgate—but the opinion makes no reference to visitorial power, nor would it have. Stetson never had a separate visitor. The modern period of higher education was under way. By the time of *Hunt*, visitation had dissipated or merged into the trustee power. Stetson's incorporating document spelled out powers *that would have been* visitorial in an earlier time—the plenary power to regulate student life.

Critically, another development was well underway: trustees themselves did not administer dispute resolution processes routinely as visitors might have. The power to discipline was *delegated* to the President (and administration) and/or faculty—usually not students. *Hunt* had no trouble upholding such a delegation of power.

By early twentieth century, key modern features of managing an educational environment had emerged. First, visitorial power had largely dissipated and merged into trustee power. Second, managing student behavior was delegated to Presidents, administrators, faculties, or others. Third, higher education was increasingly transactional, not donative, in nature. The soul of the visitor was all but unrecognizable in higher education, and a dangerous lack of accountability was building.

Hunt also shows the transition clearly. Under *Philips v. Bury*, the *Hunt* matter would have been legally simple. College is a gift—shut up and go home if you have a problem. However, the law was now conceding that the relationship among students and their universities was *contractual*.[87] In English law, the visitor had exclusive jurisdiction with respect to most disputes to determine the meaning and application of any contract at issue.[88] American courts were far less willing to give this power to trustees, presidents, administrators, or faculties without *some* judicial review. The *Hunt* case, for example, announced that the law of contracts applies to universities, and that contractual interpretation ultimately remains in the hands of the courts.[89] This was a significant conceptual departure from early American and English law, and paved the way for later judicial intervention in student discipline.[90]

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[87] *Hunt*, 102 So. at 640.

[88] *See* BLACKSTONE, *supra* note 25, at 480–84.

[89] At about the same time, American courts were in the process of unifying and reinventing commercial and contract law. *See generally* RESTATEMENT (SECOND) OF CONTRACTS (1973); Karl N. Llewellyn, *Why We Need a Uniform Commercial Code*, 4 U. FLA. L. REV. 367 (1957). American Courts of the early to mid-twentieth century began to reconceive the relationship between a student (or family) and university in terms of contract, consent, and choice as opposed to status, gift and property.

[90] And, student safety. It was the same Florida Supreme Court that would hold that higher education is fundamentally a "business" and owes its students the same level of care they would expect from other businesses. Nova Se. Univ. v. Gross, 758 So. 2d 86, 90 (Fla. 2000).

Courts of the era of power and prerogative, however, softened the blow of judicial "review." There was no *meaningful* contract law oversight by courts until the late twentieth century. Courts merely staked a future claim. In the period prior to World War II, assertion of judicial power over "contracts" in higher education was essentially theoretical—it was the assertion of power as opposed to the exercise of it. College students or their families in this period had no significant breach of contract claims, particularly in discipline cases.

Trustees—or by delegation to Presidents and faculties—had acquired the power to discipline students' subject to *de minimus* legal review. At the same time, courts began to see the relationships created at university in terms of choice and contract, and not *gift*. Courts, however, persisted in believing that the choosing and contracting party was the *parent not student*. The parent made a "contract" with the school, not the student. This "contract" was essentially one which included, and implied, the terms to delegate power of supervision—*in loco parentis*—to the school.[91] *In loco parentis* truly took off in higher education law when it was connected to a *delegation* of a power in a college contract and the relationship between families and colleges became primarily transactional, not donative.[92] *In loco parentis* entered higher education law essentially to fill in a theoretical gap created by the desuetude of the visitor.

An intriguing but entirely theoretical issue, "could a contracting *parent* alter the power of a college to stand *in loco parentis*?" Although no court seems to have ever addressed this issue directly in higher education law, the answer must have been no. The contract paradigm came forward essentially because an era of *visitorial* power had ended. In old visitorial systems of governance education was a gift, not a transaction, and student and parent interests were peripheral. This

[91] At mid-century, as courts were reconceiving the law of contracts and commercial law, the law of capacity—that is who may make a contract—had not evolved to where it is today to put students in the front seat of the college contract. This very unique feature of American law, and the timing of the transition in American law, has left a long legacy in American higher education law.

[92] Higher education would only become a, very, very costly transaction for most families (in terms of cost to wealth of family, as well as relative cost in many instances) in the last two decades of the twentieth century, especially the last. As such, the shift from *gift* to *transaction* was less pragmatically noticeable, and the rise of consumerism forestalled. Even today, higher education lacks one clear family-focused consumer advocacy group—in marked contrast to other major transaction complexes that have well defined advocacy groups. Consumers of higher education await their Cesar Chavez.

system of student/parent disempowerment carried over to some extent into the post-visitorial era. There is no evidence pre-World War II that courts sought to alter, in any meaningful way, the functional ordinations of power and prerogative that had existed for centuries among families and colleges. Doctrine, not reality, was changing. Although courts began to use the contract paradigm more dominantly to analyze higher education law vis-à-vis students, contract law of this period was hardly the law we would recognize today. The college/family relationship was "contractual," but was not contractual in any modern way. Indeed, the powers of "contract" that the universities possessed were very much like the visitorial powers of another era. This was no coincidence. American courts were dressing up donative visitorial power in new transactional garments while preserving much of the status quo. There was no groundswell to place more higher education power in the hands of students or families. The process of transactional reconceptualization was slow and would eventually eliminate the vestiges of visitorial power in the United States. Visitorial power was dying by transactional assimilation in much the way petrified wood forms.

Visitorial power was never "parental"—or based on *in loco parentis* in English or American law. There is no essential connection between visitors, visitorial power, and *in loco parentis*. *In loco parentis* is a minor theme in higher education law. In the high visitorial period, there would have been no need to justify or explain the exercise of power over students apart from pointing out that education was a gift. Indeed, contested decisions from the visitor were not subject to judicial review.[93] *In loco parentis* developed as a judicial tool in the period of legal insularity as a direct result of a shift to trustee governance and contract law rationales[94] so as to continue protect higher education from judicial review of internal decision-making. The visitor slowly faded but results were very much the same. Prior to World War II, American colleges rarely had to answer to the law with respect internal decisions-making regarding students.

Nonetheless, in the process reconceptualization of visitorial power courts ultimately did set the stage for *future* meaningful review of the internal decision-making in higher education.[95] As the visitor died,

[93] *See, e.g.,* Bracken v. William & Mary Coll., 7 Va. 573 (1790).

[94] BICKEL & LAKE, *supra* note 2, at 17.

[95] It is true that in English law, some universities had no donor visitor other than perhaps the King or Queen, and thus visitorial power was vested in the Courts. PALFREYMAN & WARNER, *supra* note 23, at 565–66. No doubt American law would have felt justified to follow this rule at the time of the reception if sovereign states set up colleges. Moreover, some English jurists have suggested that visitorial power in the *private* universities

its spectre continued to hover. The Florida Supreme Court chose to speak of the potential judicial power to review the exercise of disciplinary authority in *Hunt* as follows:

> We think the trustees were fully authorized to adopt these regulations, that they are reasonable, and that it is well settled that unless such regulations or rules are unauthorized, against common right or palpably unreasonable, the courts will not annul or revise them. Neither will courts afford relief in the case of the enforcement thereof, unless those who duty it is to enforce them act arbitrarily and for fraudulent purposes.[96]

Again, there is no evidence that courts actually acted upon these "boundaries" at that time. At the time of *Hunt*, a father was free to act arbitrarily with his children and sadly, many forms of evil perpetrated upon children by parents were perfectly acceptable under the law.[97] *Hunt*'s limitations on colleges were foreign to the application of the law of its day to parents. Yet, the dicta set the stage for change in later generations.

Hunt is evidence of a nascent moment in the law. It would be many, many years before the broad language of *Hunt* would manifest itself into significant student rights. At the time of *Hunt* the notion of what was arbitrary or fraudulent, etc., was not well developed in student discipline cases. The "regulation" used by Stetson in *Hunt* was profoundly vague by modern standards but not "arbitrary" according to that case. Stetson's regulation in *Hunt* was essentially legally incapable of being fraudulent because one cannot commit fraud by saying something vague. Thus, again, *as applied* the standard of review used in *Hunt* was toothless.

Hunt also reflected antipathy towards using legalistic process in student discipline. *Hunt* took the position that a student is not entitled to

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might be subject to principles of natural justice. Again, this idea never landed in the United States.

[96] 102 So. at 640. The court also spoke in terms of ensuring that the acts of administrators were not done "wantonly, willfully, or maliciously." *Id.* at 641.

[97] *See* DAN B. DOBBS, THE LAW OF TORTS 753 (2000). As Dobbs correctly states, the usual rule was that parents—and even those *in loco parentis*—were subject to immunity. *Id.* at 753–54.

have charges made and proven prior to dismissal.[98] Students have no rights to "trials" or "hearings" as such.[99] Moreover, if called to account, a student must testify against others.[100] Nothing like legal "due process" was present: there were no rights to process, just rights to have a result that was not arbitrary or fraudulent.[101] Thus *Hunt* invited universities to use broad and vague regulatory statements with little to no student process when managing their environments.

Universities, it seems, took *Hunt* up on its invitation.

Over time, *in loco parentis* evolved from analogy to *ratio decendi. In loco parentis,* received perhaps its highest expression in *Gott v. Berea Colleg*e.[102] *Gott* was a very unusual case. A private restaurant, frequented by students, claimed to have lost business when the college adopted a rule that forbade students from going to restaurants like the plaintiff's.[103] The central issue was whether the college owed the restaurant a legal duty to refrain from interfering with the restaurant's business.[104] The court reasoned that pursuant to powers *in loco parentis*, the college was acting lawfully and properly in prohibiting students from going to the restaurant.[105] The college charter gave the trustees wide power to make rules for the institution, which meant that no outside entity could challenge those rules.[106]

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[98] 102 So. at 641.
[99] *Id*.
[100] *Id*.
[101] *Id*. at 640. To seal the coffin, the *Hunt* court stated that mistakes of judgment as to legal duties or facts would not make a college liable under this standard! *Id*. at 641. This, for what it is worth, was essentially the same standard as *Phillips v. Bury*: a student had no practical right of review from an internally made decision at an institution.
[102] 161 S.W. 204 (Ky. 1913).
[103] *Id.* at 205.
[104] *Id.* at 206.
[105] *Id.*
[106] *Id*. The case is oft cited for the famous language describing the power *in loco parentis*:

> College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.

Id.

Gott raised an interesting issue—can entities outside a college challenge the power of a college to direct its students? The *Gott* case is a classic example of case law of the era of power and prerogative, which focused on battles over power. *Gott* first looked to the law of public officers, specifically the authority of school boards.[107] *Gott* directly analogized the powers to regulate and discipline college students to the authority vested in school boards over K-12 students.[108] Visitorial power over students in higher education—the root of all power and prerogative in higher education in America—was translated into the powers of school masters. Over time, as Kaplin and Lee have pointed out, *in loco parentis* became a more common way to dismiss suits against colleges arising out of discipline or lack thereof.[109] *Gott* was in part responsible for this.

Visitorial rules of power and prerogative certainly protected private chartered universities, but what of public? In England, visitorial power was vested in the sovereign for public universities.[110] English courts sometimes took the position that the sovereign could seek review in the courts as the visitor itself. In practice, the courts in England could act as visitor.[111] In America, this *might* have led to a juridical show-down in court over student discipline. That did not happen in America, however, for several reasons. First, the federal government did not charter any universities as sovereign founder. Moreover, federal constitutional procedural due process requirements were not applicable to the states until the mid-twentieth century.[112] There were no federal constitutional claims for denial of procedural due process available to state college students in the nineteenth century. For reasons very specific to American federalism, for many years no federal court would have been in a position to make assertions of "natural justice" or due process for all of America, as *Philips v. Bury* did for England. The *only*

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[107] *Id.*
[108] *Id.* at 206–07.
[109] KAPLIN & LEE, *supra* note 4, at 10.
[110] DENNIS J. FARRINGTON & DAVID PALFREYMAN, THE LAW OF HIGHER EDUCATION 322–27 (2006).
[111] *Id.*
[112] The Fourteenth Amendment to the United States Constitution, which was ratified in 1868, created due process, equal protection, and civil rights protections against the states. The purpose of the Fourteenth Amendment was to protect citizens, and particularly African-Americans, from a state's arbitrary or unfair legal process. RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 8–14 (2004).

visitor *could* potentially be a *state* sovereign. There are, and were, guarantees of "due process" in many state constitutions in some form or other.[113] States, however, retained sovereign immunity that kept most claims *against* the government out of court; the only viable visitorial lawsuit would be *by* a visitor against a private party, and such claims would never raise state constitutional due process issues.

Courts also devised another clever way to protect public colleges from lawsuits. Consider the famous *Hamilton* case.[114] In *Hamilton*, the United States Supreme Court considered issues of conscientious objection in a case that would foreshadow major college issues decades later.[115] In that case, the university ordered students to engage in military training.[116] Some students refused and were not allowed to attend school.[117] When the students sued, the United States Supreme Court held that students at public college were granted a "privilege" to attend.[118] Since attendance at public college was a privilege, there were no property rights or liberty interests at stake that could trigger Constitutional scrutiny. A university could tell conscientious objectors to train or leave.[119] The "privilege" doctrine was a public law parallelism to private law immunities and insularity. American courts were crafting functionally the same or very similar

[113] An express right protecting against deprivations of life, liberty, and property without due process of law can be found in forty-nine state constitutions: ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 7; ARIZ. CONST. art. II, § 4; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 7; COLO. CONST. art. II, § 25; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 2; IND. CONST. art. I, § 12; IOWA CONST. art. I, § 9; KAN. CONST. Bill of Rights § 18; KY. CONST. art. I, § 11; LA. CONST. art. I, § 2; ME. CONST. art. I, § 6; MD. CONST. art. I, § 23; MASS. CONST. pt. I, art. X; MICH. CONST. art. VI, § 32; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 14; MO. CONST. art. I, § 10; MONT. CONST. art. II, § 17; NEB. CONST. art. I, § 3; NEV. CONST. art. I, § 8; N.H. CONST. pt. I, art XII; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 10; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 7; OR. CONST. art. I, § 10; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § III; S.D. CONST. art. 6, § 2; TENN. CONST. art. 1, § 8; TEX. CONST. art. I, § 19; UTAH CONST. art. I, § 7; VT. CONST. ch. 1, art. IV; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 3; W.VA. CONST. art. III, § 10; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 6.

The only state that lacks an express due process clause is New Jersey. The text of the New Jersey Constitution can be found at www.njleg.state.nj.us/lawsconstitution/constitution.asp.

[114] Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

[115] *Id*.

[116] *Id*. at 253.

[117] *Id*. at 253–54.

[118] *Id*. at 261.

[119] *Id*. at 256.

standards for public and private higher education, simply using different doctrinal language.

American higher education law functioned in a very unitary way for both public and private institutions for a considerable period on process issues. This is hardly surprising; in American higher education law all colleges share a similar genetic heritage to ancestors for whom visitorial power mattered more than public/private. Public/private distinctions became only doctrinally significant, but have mattered little in practical outcomes in student discipline matters. Even today, much public and private higher education process law is functionally similar (despite the fact that sometimes public/private distinctions are a little unclear— consider the famous cases at Princeton and Alfred University[120]).

As the 1960s approached, American higher education—public *and* private—had all but unlimited power and prerogative usually

[120] In *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), the Second Circuit analyzed the relationship between the state and Alfred University. Seven students at Alfred University were suspended after protesting on the university's football field. *Id.* at 78–79. The due process protection that the students sought from the court required evidence of a state action. *Id.* at 79. In looking for the dominant characteristic of the college, the court acknowledged that Alfred University had a private board of trustees and that Alfred University received only a small amount of state financial aid. *Id.* at 81. However, the Ceramics College at Alfred University was deemed to have sufficient public connections so as to render regulation of its students "state action." *Id.* at 82. The three students who attended the Ceramics College were thus entitled to due process before suspension, while the four remaining students, not enrolled in the Ceramics College, were not. *Id.* at 83. The *Powe* court held, in effect, that it is constitutionally appropriate to look at the specific context of the situation to determine whether the student and student actions at issue are in the public or private sphere.

In *State v. Schmid*, 423 A.2d 615 (N.J. 1980), Schmid, a member of the United States Labor Party was charged with trespass upon private property after he distributed political literature on Princeton University's campus. *Id.* at 616–18. Schmid challenged his conviction on First Amendment grounds. *Id.* at 618. The central issue was whether Princeton University was a state actor, and thus bound by the First Amendment of the federal Constitution, or if the university was a private actor who could impair speech and assembly actions. *Id.* 618–22. The court conceded that Princeton University was privately owned and controlled and thus not a state actor. *Id.* at 619–21. However, the court also examined Princeton's position under the "public function doctrine." *Id.* at 622–24. Under the public function doctrine, a private entity not engaged in state action will still be required to protect federal rights, such as Fist Amendment protections, if the property in question is "sufficiently devoted to public uses." *Id.* at 622. The court was unable to reach a conclusion on Princeton's status under the public function doctrine, instead relying on state law grounds to find in favor of Schmid, requiring any regulation of speech to be reasonable and neutral in time, place, and manner. *Id.* at 624–630.

concentrated in the hands of a self-perpetuating board. The power and prerogative of a college of the past is often loosely spoken of in terms of *in loco parentis*. The real story is far richer, and more complex. The power and prerogative of American colleges over students drew all of its evolutionary history from the powers of a *visitor*. American colleges assimilated the English system, and then, for reasons unrelated to a desire to create Dean Wormer, magnified and concentrated the power and prerogative of colleges.

Yet, something dangerous happened in higher education that is as visible in *Animal House* as it must have been in 1950 and 1960. Self-perpetuating trustee boards did not answer commonly to visitors *or* courts— external or even internal—accountability was at an all time low. Historically, the visitor was at least accountable to a donor's original intention: trustees were too, theoretically at least. However, the evolution of the law of management of trusts had given trustees considerable power to re-conceive formative trust documents, loosening donor control considerably. Unintentionally, the law had charted a course towards a crisis of *accountability*, something unfamiliar in the high era of the visitor in which a system of checks and balances operated.

Prior to World War II, college populations were small and relatively homogenous; college was for the elite, mostly males, mostly *white* males, and the fortunate few. There was a much higher degree of consensus on values and principles, and strong ties between colleges and families ensured a more seamless transition from home life to college life. The visitor came to campus, armed with the intentions of the donor, to ensure that internal organizational behavior comported with external norms. In a sense, over a period of a century and a half, universities began to visit themselves. A dangerous and incestuous consolidation of power was underway that, when coupled with major changes in American society, made the revolutions to come in the 1960s all but inevitable.

The catalyst for the revolution would be the introduction of larger and more diverse student populations. The G.I. Bill, for instance, helped create these new student populations. Students would now be coming with new attitudes, and the diversity of the student body in terms of race, religion, gender, and ethnicity *inter alia*, would all quickly change. American higher education was in transition. College was also becoming the first major opportunity for people coming out of the K-12 system, replacing or displacing family, work, and military service for many. Depression era parents pushed education for their children, as no

generation before in America had. College was the new rite of passage for the young. College governance was never more autonomous.

The all but inevitable abuses of power and prerogative—racism, sexism, retaliation, etc.—fueled a student process revolution the likes of which neither England nor America had ever seen before. While the law of higher education in America had been gradually evolving over a period of many decades, accumulated changes would now cause a rupture of colossal proportions. After a long and painful struggle—the Civil Rights era in higher education—students would win a new ordination in higher education, and entirely new systems for reviewing administrative decisions and for management of the educational environment.

Perhaps the ghost of the visitor returned in the Civil Rights era the form of the courts. The law would significantly challenge the unbridled power and prerogative that higher education had accumulated and consolidated. This Civil Rights era would also essentially obliterate almost all recollection of historical visitorial power in higher education. By the end of the Civil Rights era, very few in American higher education would even recognize the significance of the term "visitor," or realize why there were even visitors in the first place. As the shift from donor power to administrative power perfected, there were hints in the law that the courts would assist *students* in claiming a visitorial role for themselves. Hints, as those in *Hunt*, which might only truly find form and substance in the more distant future.

3 Abuse of Prerogative and the Birth of Constitutional and Contractual Requirements for Process

There is a clear and defining moment in the law from *Dixon* to Kent State. This was the high Civil Rights era, which arose from abuses of power and prerogative. Legalists have created a dominant vision of how the law of this era intersects higher education. Legalists' vision is law-struck. This Chapter takes a fresh look at events of this formative period.

A. *Dixon*: The First Steps on the Path to Legalisms

Even before the great college revolution of the 1960s and 1970s, the law had hinted at changes to come. Private colleges, in particular, heard (although largely in dicta in a handful of cases) that there were some outer limits to the otherwise unlimited power and privilege these colleges had enjoyed. Public colleges were told—most notably through cases involving private colleges[1]—that their authority was *potentially* subject to more review in the court system.[2] However, there was otherwise little in the case law to suggest the dramatic and sudden shift in higher education from power and prerogative to accountability under legal rules and the rise of legalisms.

Social forces of great change were building beyond the courthouse doors; higher education had abused its prerogative and power badly. Some institutions of higher education systems actively pursued racist/segregationist policies; students were sometimes treated very

[1] Dehaan v. Brandeis Univ., 150 F. Supp. 626, 627 (D. Mass 1957) (allowing dismissal without hearing from private college while noting that precedent strictly limited hearing requirement to public schools); Barker v. Bryn Mawr Coll. Trs., 1 Pa. D. & C. 383, 396 (Pa. C.P. 1922), *aff'd*, 122 A. 220 (Pa. 1923) (stating in dicta that the general principle of requiring a hearing prior to dismissing a student related to a state university which implies duties towards citizens by way of state funding).

[2] *See* Commonwealth ex. rel. Hill v. McCauley, 3 Pa. C. 77 (1886) (stating that a student at a state-funded college was entitled to hearing before expulsion).

poorly. The magnitude of the abuses led directly to the creation of a culture of law and legalistic process.

Rules, process, and sanctions would quickly replace the exercise of power and prerogative—the transformation took less than two decades. The use of standards, principles, and values to evaluate students individually, so common in the era of power and prerogative, would also come to an end. *Rendering* a judgment based upon rules through a disciplinary process would replace the *exercise* of judgment. Abuses of power and prerogative led to a singular major change—higher education *legalized* its processes.

The story of the rise of legalistic process and the fall of power and prerogative begins for many with the landmark *Dixon v. Alabama State Board of Education* case.[3] *Dixon* serves to illustrate some of the great abuses of power in the end stages of the era of power and prerogative. Nonetheless, in and of itself, *Dixon* changed very little on a national level in terms of student process rights.[4] *Dixon* was not the first shot fired in the student process revolution, nor was it the final and decisive battle for the soul of higher education. *Dixon* did not cause a nationwide turn towards "due process" for students, although for some colleges it was a predicate for a choice of legalisms. The deeper significance of *Dixon* lies elsewhere, and in the fact that it became—and may still be—a harbinger of much broader change yet to come. The law

[3] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The facts of *Dixon* are discussed *infra*.

[4] It is easy to forget that *Dixon* was just a United States Court of Appeals in the Fifth Circuit opinion. *Dixon* only became the law of some, but not all, southern states at a federal level. Moreover, *Dixon*'s holding would not end debates about the process owed to students at public colleges in the United States. Students in 1961 were not protected by the Civil Rights Acts that were yet to come. *See, e.g.,* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (prohibiting discrimination on the basis of race and authorizing litigation to eliminate segregation in public schools). Students of public universities in the immediate aftermath of *Dixon* could still be dismissed in the Fifth Circuit but now only after certain minimal process steps were taken. In retrospect, the rise of civil rights in higher education seems inevitable but it is important to remember that *Dixon* still owes its long term significance to burgeoning (but as of that time, entirely inadequate) changes in American law.

While *Dixon* was revolutionary in the sense that it is the first case to impose federal due process requirements on a public college, due process rights in higher education would be meaningless in large measure without many other civil rights to support them. For example, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and 34 C.F.R. pt. 99, gave due process meaning in higher education. Without FERPA students would not have access to their educational records and higher education institutions could place damaging secret, uncorrectable statements in their records undermining both rights of process and other civil rights.

still has yet to catch up with *Dixon*, and there are some reasons to hope it never will.

Certainly, after *Dixon*, the relationship between students and their universities would never be quite the same. Courts had never before chosen to intervene in any meaningful way in student affairs; but suddenly they began to play a role akin to sovereign visitor (even if in a new way). *Dixon* heralded a new age of legal accountability.

Dixon also presaged the campus revolutions of the 1960s, which culminated at events at Kent State and other campuses in May of 1970. *Dixon* was Scene I in Act I, of a multi-act college student rights revolution play. Law, violence, oppositionalism, and protest would become more prominent in higher education after 1961. It is easy to overlook, however, that campus unrest of the precise *Dixon* period was noticeably distinct from the campus unrest of the late 1960s and especially 1970. *Dixon*'s students fought, peaceably, against Southern segregationist policies. Students of the late 1960s and 1970s were protesting the war in Vietnam and the draft, primarily, and were often more violent and forcibly confrontational than their early 1960s/late 1950s counterparts.

Dixon was a creature of *its* era. It is, and always will be, inextricably intertwined with brave efforts aimed at desegregation of the South. It was a landmark moment in desegregation, even if it was not as crucial in the national reformation of higher education law.

Consider the times. The United States in the immediate post World War II period had achieved a significant level of global hegemony. The United States claimed moral high ground after World War II as it had been the principal force that saved the world from fascism, gross humanitarian abuses, and communism. However, the United States was still a legally segregated country at the end of World War II.[5] True, most overt *de jure* segregation had ended or never taken root in some states fully, but the supreme law of the land still gave its imprimatur to "separate but equal" treatment of citizens if their state government so chose.[6] Many Southern states embraced the notion that

[5] *See generally* GAIL WILLIAMS O'BRIEN, THE COLOR OF THE LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH (1999) (chronicling attitudes through World War II and its conclusion in the 1940s, and the rise of the Civil Rights Era in the 1960s and beyond); SOUTHERN BUSINESSMEN AND DESEGREGATION (Elizabeth Jacoway & David R. Colburn eds., 1982) (including various accounts of desegregation during the 1950s and 1960s).

[6] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding "separate but equal" school systems violates Equal Protection); Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955) (urging lower courts to use equitable principles in desegregating under state law). It is tempting to believe that *Dixon* was a natural outflow of Warren Court values, such

separate could be equal and enforced segregation of public places, including education.[7] But racism was not simply a Southern issue. Most other states created *de facto* segregation: no single law made it specifically so, but in many American cities one could easily demarcate the boundaries of white and African American neighborhoods, and identify which schools belonged to which race. The United States was racially divided and legally racist in many ways. Greater access to higher education via the G.I. Bill and a surge of Baby Boomers meant that a perfect storm was brewing.

Dixon is a tragic and emblematic tale of the abuse of power and prerogative in higher education in this context.

In *Dixon*, several students were expelled and many other students were placed on probation for engaging in peaceful protest off campus.[8] The expelled students received a cursory and conclusory written notice of their expulsion: those on probation were warned not to participate in further demonstrations.[9] *Dixon* pointed out, "The misconduct for which the students were expelled was never definitely specified."[10] However, it was no mystery that the expulsions were in retaliation for legitimate, peaceful, student protest[11]—protest that would

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as those exemplified in *Brown v. Board of Education*. But the Warren Court did not target higher education primarily in its desegregation efforts, nor did it bring due process to college campuses (the Warren Court brought *some* Constitutional freedoms to college, but not all). In some ways, *Dixon* was on its own, and far ahead of its time. The Warren Court did not mastermind a specific plan of action for colleges to desegregate, although it believed that *Brown* was applicable to higher education. *See, e.g.*, Florida *ex rel* Hawkins v. Bd. of Control, 350 U.S. 483 (1954). Ultimately, the Supreme Court, well after the Warren Court period, gave *Brown* teeth in higher education in *United States v. Fordice*, 505 U.S. 717 (1992).

[7] For a first-hand account of attending segregated schools, see FRANKYE REGIS, A VOICE FROM THE CIVIL RIGHTS ERA 53–62 (Carol Schulz ed., 2004) ("Mississippi schools remained segregated well after the U.S. Supreme Court ruled segregation unconstitutional in is *Brown v. Board of Education* decision in 1954. . . . I didn't see a white face in my school until 1973, when I was in seventh grade." REGIS, *supra* note 7, at 56).

[8] Dixon v. Ala. State Bd. of Educ., 186 F. Supp. 945, 948 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[9] *Id.* at 949.

[10] *Dixon*, 294 F.2d at 151.

[11] As the Fifth Circuit in *Dixon* noted,

> The acts of the students considered by the State Board of Education before it ordered their expulsion are described in the opinion of the district court . . . :
>
> > On the 25th day of February, 1960, the six plaintiffs in this case were students in good standing at the Alabama State College for Negroes in Montgomery, Alabama. . . . On this

date, approximately twenty-nine Negro students, including these six plaintiffs, according to a prearranged plan, entered as a group a publicly owned lunch grill located in the basement of the county courthouse in Montgomery, Alabama, and asked to be served. Service was refused; the lunchroom was closed; the Negroes refused to leave; police authorities were summoned; and the Negroes were ordered outside where they remained in the corridor of the courthouse for approximately one hour. On the same date, John Patterson, as Governor of the State of Alabama and as chairman of the State Board of Education, conferred with Dr. Trenholm, a Negro educator and president of the Alabama State College, concerning this activity on the part of some of the students. Dr. Trenholm was advised by the Governor that the incident should be investigated, and that if he were in the president's position he would consider expulsion and/or other appropriate disciplinary action. On February 26, 1960, several hundred Negro students from the Alabama State College, including several if not all of these plaintiffs, staged a mass attendance at a trial being held in the Montgomery County Courthouse, involving the perjury prosecution of a fellow student. After the trial these students filed two by two from the courthouse and marched through the city approximately two miles back to the college. On February 27, 1960, several hundred Negro students from this school, including several if not all of the plaintiffs in this case, staged mass demonstrations in Montgomery and Tuskegee, Alabama. On this same date, Dr. Trenholm advised all of the student body that these demonstrations and meetings were disrupting the orderly conduct of the business at the college and were affecting the work of the other students, as well as the work of the participating students. Dr. Trenholm personally warned plaintiffs Bernard Lee, Joseph Peterson and Elroy Embry, to cease these disruptive [demonstrations] immediately, and advised the members of the student body at the Alabama State College to behave themselves and return to their classes. . . .

On or about March 1, 1960, approximately six hundred students of the Alabama State College engaged in hymn singing

eventually be protected by the United States Supreme Court under the First Amendment.[12]

The process of expulsion in *Dixon* was essentially unilateral and ex parte.[13] Students were given no chance to participate, or even observe, as their fates were decided. There was no chance to challenge assumptions made when decision-makers reached conclusions and no chance to challenge any finding, or characterization, of "facts."

Dixon and other expelled students, elected to take their concerns to federal court, which was all but unheard of in the decades prior to *Dixon*. State/federal courts—including the Fifth Circuit at one time—had shown an unwillingness to entertain a variety of civil rights cases by students.[14] Yet there was clearly an opportunity for a historic litigation over student civil rights in college when *Dixon* presented itself: the Fifth Circuit was now a champion of civil rights.

Dixon and the other expelled students alleged specific United States Constitutional civil rights violations, principally, that as a state actor the university had violated rights of due process and equal protection under the United States Constitution. (Bear in mind again that the *Dixon* case significantly pre-dated major federal statutory civil rights legislation and major cases from the United States Supreme Court

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> and speech making on the steps of the State Capitol. Plaintiff Bernard Lee addressed students at this demonstration, and the demonstration was attended by several if not all of the plaintiffs. Plaintiff Bernard Lee at this time called on the students to strike and boycott the college if any students were expelled because of these demonstrations.
>
> [T]he only demonstration which the evidence showed that all of the expelled students took part in was that in the lunch grill located in the basement of the Montgomery County Courthouse.

Id. at 152, 152 n.3.

[12] *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[13] "Ex parte" is a Latin term meaning "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." BLACK'S LAW DICTIONARY 616 (8th ed. 2004).

[14] Ultimately, however, the Fifth Circuit took an active role in both applying the Civil Rights Act, see e.g., *U.S. v. Wood*, 295 F.2d 772 (5th Cir. 1961) (finding denial of right to vote an actionable claim under the Civil Rights Act), and in desegregating the South, see JACK BASS, UNLIKELY HEROES (1990). Furthermore, certain civil rights cases were finally making their way to the United States Supreme Court, for example, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (protecting the right to counsel in felony cases), and *Shelley v. Kraemer*, 334 U.S. 1 (1948) (striking down racially based restrictive housing covenants).

giving college students constitutional rights.)[15] The expelled students argued that they were expelled under no valid rule or regulation, and that they were given no process whatsoever except for a perfunctory notice of dismissal.[16] The students also argued that their expulsions were in retaliation for the exercise of legitimate civil rights.[17] Sadly, it was still legal—or perhaps not clearly unlawful, yet—under federal law to retaliate against, and chill free speech of, college students. So the *Dixon* plaintiffs were forced to raise arguments like "due process" to find away into court.

The protests by Dixon and other students at Alabama State College[18] that led to expulsion were a direct assault on the power and prerogative of the Alabama State higher education system. Their actions drew an almost immediate power and prerogative based response. Dixon, and other students, received notices of expulsion that "assigned no specific ground from expulsion, but referred in general terms to "this problem of Alabama State College."[19] In keeping with the era of power and prerogative, this was merely a statement to students that they were insubordinate and that the power of a college had been exercised to correct the insubordination.

The college in *Dixon* asserted its plenary power in strong[20] language emblematic of the era of power and prerogative.[21] The college

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[15] *See, e.g.,* The Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 73–75 (Apr. 11, 1968).

[16] *Dixon*, 294 F.2d at 153.

[17] *Id.* at 156.

[18] Alabama State College was a part of the Alabama state university system, but a separate and putatively equal college for African American students. Its very existence as a "separate but equal" institution was unconstitutional under *Brown v. Board of Education*, but it would take years to correct this injustice. *See* United States v. Fordice, 505 U.S. 717 (1992); Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994). I have always taken the position that Alabama State College circa 1961 can and should be referred to as the University of Alabama.

[19] *Dixon*, 294 F.2d at 152.

[20] The University made the following assertions:

> Attendance at any college is on the basis of a mutual decision of the student's parents and of the college. Attendance at a particular college is *voluntary* and is different from attendance at a public school where the pupil may be required to attend a particular school which is located in the neighborhood or district in which the pupil's family may live. Just as a student may choose to withdraw from a particular college at any time for any personally-determined reason, the college may also at any time decline to continue to accept responsibility for the supervision and service to any student *with whom and* [sic] *relationship becomes unpleasant and difficult.* Alabama State

essentially argued that matriculation was a privilege, not a right—which also was in accordance with the way most courts conceived of power of the public colleges at that time.[22] The sovereign gave citizens a "privilege" to attend public colleges and retained a full right to control students and their learning environments. Alabama State College's assertion of authority in *Dixon* is a perfect specimen in higher education process history.

But, this time such an assertion of plenary power was doomed.

> College seeks to give maximum service to every student who evidences a sincere willingness to accept the leadership and supervision of the college. The college is given authority and is made responsible for the administration of the regulations as set up by the State Board of Alabama. Some exceptions from these official regulations are as follows:
>
> Every pupil, in addition to complying with the requirements fixed by this Board for entrance into said school, will be required to render strict obedience to all the rules and regulations, for the government of the school and for the conduct of the pupils thereof. The pupils shall conduct themselves in a manner becoming future teachers in the public schools of Alabama, and will be expected to show a spirit of loyalty to the institution they attend, and give willing and ready obedience to the President and faculty in charge of the school. Acts of insubordination, defiance of authority, and conduct prejudicial to discipline and the welfare of the school will constitute grounds for suspension or expulsion from schools.
>
> Pupils may be expelled from any of the Colleges:
> a. For willful disobedience to the rules and regulations established for the conduct of the schools.
> b. For willful and continued neglect of studies and continued failure to maintain the standards of efficiency required by the rules and regulations.
> c. For conduct prejudicial to the school and for conduct unbecoming a student or future teacher in the schools of Alabama, for insubordination and insurrection, or for inciting other pupils to like conduct.
> d. For any conduct involving moral turpitude.

Dixon, 186 F. Supp. at 951 (emphasis added).

[21] Note also that the university argued that the contract was with the school and *parents*, not the student. *Id.*

[22] "Being a 'privilege,' attendance could constitutionally be extended and was subject to termination on whatever conditions the institution determined were in its and the students' best interests." WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 10 (4th ed. 2006); *see, e.g.*, Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

In the lower federal court, the federal district court, Alabama State College fared well. Federal District Court Judge Johnson ruled—consistent with authority from the era soon to end—that any "right to attend and matriculate in a public college or university is conditioned upon an individual student's compliance with the rules and regulations of the institution."[23] Judge Johnson also held that the Alabama State Board of Education had authority to make rules regarding conduct, even ones that were broad and vague—a statement equally consistent with the law of the era or power and prerogative.[24] Judge Johnson also stated that a college has "the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution."[25] This is as clear a statement of the authority of a college to create "double secret probation" as *Anthony v. Syracuse University*, *supra,* asserted. The concept of the visitor had developed into *the* power to make *any* rule, at *any* time, in *any* place without *any* process, and in *secret*. That is not simply power—it is license.

Judge Johnson closed his opinion with historically significant *dicta apologia*. Sensing the reversal of the tide, Judge Johnson opined that the district court decision should not be read to condone race discrimination.[26] However, it would have been impossible for anyone to interpret the actions of the district court as anything other than acknowledging the power of a university to engage in racist policies under the protection of law. Racism could flourish in the dark just as it would have under *Anthony*. What First Amendment rights does a student have if that student can expect summary, unilateral dismissal for lawfully exercising such rights? Judge Johnson's opinion essentially ratified a form of *de facto* discrimination *and* the power of a university to squelch student free speech and assembly.

The expelled students appealed the decision of the district court. A three judge panel of the United States Court of Appeals for the Fifth Circuit voted two to one to reverse the decision of the district court.[27] The majority upheld the rights of the students. Due process entered college life for the first time, by one vote.

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[23] *Dixon*, 186 F. Supp. at 950.

[24] *Id.* (citing Waugh v. Bd. of Trs., 237 U.S. 589 (1915); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934)). The same ideas are expressed in *Anthony v. Syracuse University,* 231 N.Y.S. 435 (N.Y. App. Div. 1928).

[25] *Dixon*, 186 F. Supp. at 951.

[26] "Nor is anything stated or concluded herein to be construed as an approval or condonation of the operation of publicly owned and maintained lunchrooms where there is practiced discrimination solely on the basis of race in violation of the settled law." *Id.* at 953.

[27] *Dixon*, 294 F.2d 150.

The majority of the Court of Appeals phrased the question before the court in due process terms: "whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct."[28] In retrospect it is interesting that the central issue in the case was due process. The case *really* arose from infringements on First Amendment rights and deprivation of *other* civil rights. *Dixon* became a battle over due process only because of its timing: it preceded major decisions of the United States Supreme Court and major federal civil rights legislation.[29] The *Dixon* majority—and the lawyers for the aggrieved students—recognized that due process was the best avenue to assert nascent college student civil rights. One of the great college law ponderables is whether *Dixon* would have been a due process case at all if that case had arisen even just a few years later after the passage of the civil rights laws,[30] and/or the rise of Warren court protection for speech and expression, as in *Healy v. James* and *Tinker v. Des Moines*.[31]

Writing on college process law *tabula rasa*, the *Dixon* majority acknowledged that there were no statutes or regulations requiring the filing of "charges," or a "hearing," before the suspension or expulsion of a student. *Dixon* noted that the closest legal analogies to students' rights were distant at best. For example, *Dixon* cited to a case holding that an

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[28] *Id.* at 151.

[29] *Dixon* was a conflict, sublimated. Modern student process rights are—and have always have been—deeply and intimately connected with the fight for *other* civil rights, such as rights of free speech, non-discrimination and assembly, *inter alia*.. The development of student due process rights would likely have taken a very different path if the federal government had different laws and policies in place in 1960. More federal civil rights law was in the *not too* distant future, but was not yet the law of the land at the time of *Dixon*. The Supreme Court was also ending a period of deference to the states with respect to First Amendment matters, partly because of Cold War attitudes, but had not yet brought the First Amendment to campus for students. *See* Dennis v. United States, 341 U.S. 494, 541 (1951) (Frankfurter, J., concurring) ("[W]e have given clear indication that even when free speech is involved we attach great significance to the determination of the legislature"); *see also* Whitney v. California, 274 U.S. 357, 371 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

[30] *See, e.g.,* The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.

[31] Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (upholding freedom of symbolic speech in schools); see also New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defining freedom of the press); NAACP v. Button, 371 U.S. 415 (1963) (protecting NAACP's activities under the First Amendment); Engel v. Vitale, 370 U.S. 421 (1962) (mandatory school prayer violates the Establishment clause of the First Amendment). For a more comprehensive chronology of the Warren Court's First Amendment decisions, see MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 111–56 (Peter Renstrom ed., 2001).

alien with lawful residence and physical presence in the United States is entitled, constitutionally, to a fair opportunity to be heard prior to expulsion from the United States.[32] *Dixon* pointed out that, like college matriculation, naturalization was once considered entirely a privilege; however, once the process of naturalization *starts*, a person is entitled to some constitutional process. *Dixon* acknowledged that, as of the date of the decision, matriculation in college was *not* considered a constitutional right, but still merely a privilege.[33] *Dixon* was also forced to recognize that in prior cases students had no process rights whatsoever because of the privilege doctrine.[34]

Dixon correctly recognized that the states and the federal government had, or were, ceding sovereign authority and conceding arguments of privilege; and sovereign immunity was losing its power to block actions against governmental entities.[35] After *Dixon*, the argument that public *higher* education was a privilege without rights would be wounded, but not dead. In the high era of power and prerogative a college and the visitor were, as *Phillips v. Bury*[36] indicated, much like a government, and thus college and visitorial power operated much like sovereign immunity. *Dixon* challenged an era of visitorial prerogative as an exclusive, unchecked sovereign authority over education in which education was privilege without right. No court had truly ever done that before.

Dixon struck at the privilege doctrine and went on to hold that due process is not voidable or waivable. The *Dixon* majority made certain to clarify that the mere fact that a college promulgated rules did not mean that students entering the institution waived constitutional

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[32] Kwong Hai Chew v. Colding, 344 U.S. 590 (1953), *cited in Dixon*, 294 F.2d at 156.

[33] *Dixon*, 294 F.2d at 156.

[34] Cafeteria & Restaurant Workers Union v. McElroy, 81 S. Ct. 1743 (1961) (noting that because the claimant had no constitutional right to be present at the site of her employment in the first place, she was not deprived of constitutionally protected due process rights), *cited in Dixon*, 294 F.2d at 156.

[35] "Governmental immunity only gradually receded in the 1940s, 1950s and 1960s. . . . . [G]overnmental immunity was falling fast just around the time of the fall of *in loco parentis* in the 1960s." ROBERT D. BICKEL & PETER F. LAKE, RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 25 (1999)

[36] (1692) 87 Eng. Rep. 289 (K.B.). Relying on *Phillips v. Bury* as the authority on visitorial power, Justice Washington stated in an early United States Supreme Court case, "The only rules for the government of these private [colleges] are the laws and Constitutions assigned by the founder." Trs. of Dartmouth Coll. v. Woodward, 4 U.S. 518, 660 (1819) (Washington, J. concurring).

rights upon enrollment.[37] Heretofore, higher education had essentially been a take-it-or-leave-it transaction for a student, and contract rights were more theoretical than real. Although courts had begun to talk of higher education law in terms of "contract" law in mid-twentieth century, *Dixon* is essentially the first case that breathed any real life into contractual rights at a public college. Telling colleges that they cannot force students to contract away basic Constitutional rights gave students an important *contractual* power. (*Dixon* obviously realized that trying to force students to contract away basic rights would be the next obvious move for an institution that did not embrace student rights.)[38]

Oddly, *Dixon* is often best known for what may ultimately be its least significant contribution to higher education law on a national level—that students at public colleges have significant due process rights. Even today, *Dixon* goes beyond the pronouncements of the United States Supreme Court which, as we will see, has never squarely held that students have protected interests in higher education sufficient to create due process rights.[39] *Dixon* was a crucial civil rights case—and a necessary step on the road to desegregation of the South, as many proponents point out. However, later developments in civil rights law would relegate *Dixon*'s due process holding to lesser significance. *Dixon*'s greatest significance in higher education law and policy lies not in its due process holding, but in its bold and successful challenge to the era of power and prerogative. College students would not gain significant process rights nationally until much, much later and for reasons unrelated to desegregation. It would take violent, deadly confrontations over the war in Vietnam to get most of higher education to accept student process rights. *Dixon* foreshadowed Kent State in its

[37] *Dixon*, 294 F.2d at 156. The majority in *Dixon* also noted that things may be different in private college. *See id.* at 157. Nonetheless there was *some* law to suggest that even in private associations, the law provided for notice and some kind of hearing before expulsion from a group. *Id.* (citing Med. & Surgical Soc'y of Montgomery County v. Weatherly, 75 Ala. 248, 256–59 (1883)).

[38] *Dixon* anticipated a sad chapter in the Civil Rights movement—university efforts aimed at disenfranchising students by foisting contracts upon them that would force them to relinquish key civil rights.

[39] The Supreme Court did not review, nor has it overruled *Dixon*. It is likely that the Supreme Court would adopt something akin to *Dixon* if students were dismissed summarily for the exercise of legitimate First Amendment rights. Such rights would provide sufficient liberty interests to trigger due process. When asked to balance tricky questions of student First Amendment freedom, the Supreme Court has imposed process—like requirements on higher education even if they are not due process requirements in a strict doctrinal sense. *See, e.g.,* Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217 (2000).

challenge to college power and prerogative, but was not Kent State. As we shall see, Kent State provided the impetus for change in most of the country.

In asserting such absolute power and prerogative, American universities had completely lost touch with their legitimate visitorial heritage. The visitor was never conceived of as an *autocrat*. In fact, there is strong evidence that in England and early America that visitors thrived in *collaborative* systems for managing educational environments. The visitorial tradition was ultimately lost as visitorial power evolved into self-perpetuating *trustee* or governing board power, and then into an administrative disciplinary model for managing students in higher education. In many ways visitorial power was a perfect example of a check or balance on autocratic authority, not an example of it. However, over time, a dangerous strain of autocracy had replaced visitorial process by World War II. In about a century or so, American institutions evolved to the point that visitorial power was unrecognizable or simply gone. The focus shifted from managing a legacy to management by and for a bureaucracy—the notion of managing *students for the sake of students* in an educational environment as a primary goal was still in the future.

Dixon gave the ghost of the visitor a new voice. *Dixon* also gave due process a role the visitor *would have* found familiar had visitorial power still been functioning. In a very real sense, the visitor returned as law—student "due process" law at first. This feature of *Dixon* is the single most overlooked feature of the case, and helps to explain the near mythic power the case holds for higher education in America. *Dixon's* deepest significance lies in its resuscitation of visitorial power; and not in "due process" rules per se.

One might go as far as to say that *Dixon* recreated the visage of the visitor into the image of a *hearing.* Dixon stated "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."[40] In so stating, *Dixon* has become particularly famous for holding that "due process" requires some form of a "hearing." In retrospect, *Dixon* was far more ensconced with adversarial, *legalistic* hearings for higher education than the United States Supreme Court ever has been to date. Consider what *Dixon* said,

> By its nature, a charge of misconduct, as opposed to failure to meet the scholastic standards of the

[40] *Id*. at 158.

> college, depends upon a collection of the facts concerning the charge misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail as best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report of the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witness in his behalf. If the hearing is not before the Board directly, the results and findings of the hearings should be presented in a report open to the student's inspection.[41]

In fairness, *Dixon* was sketching the bounds of what it considered to be fair play—not establishing particular due process requirements for all matters. The purpose of *Dixon*'s "hearing" requirement was twofold: (1) to ensure fair play, and (2) to use the benefits of an adversarial system to ferret out the truth. For *Dixon* a hearing was not an end in itself, but a means to making more informed decisions.[42]

The United States Supreme Court however, has never shown such faith in adversarial process for education systems, particularly in higher education. *Dixon*'s due process holding has never been constitutionalized by the United States Supreme Court and its faith in legalistic, adversarial process for higher education has never been

[41] *Dixon*, 294 F.2d at 158–59
[42] *Id.*

validated by that Court. Yet, after *Dixon* the central focus of debate over student process rights would be upon the right to a hearing and all the accoutrements that go with that.

Dixon's legacy has raised two other key points for further consideration, both of which vex higher education over student process rights to this date. First, *Dixon* intimated, without holding, that process rights would different—and likely lesser—in private (non tax-supported) colleges.[43] Second, *Dixon* suggested (although the facts did not raise the issue squarely) that "a charge of misconduct" differs from "a failure to meet the scholastic standards of the college," with "conduct" violations presumably calling for *more* student process *rights* and "academic" violations *less*.[44] *Dixon* postulated two "modern" higher education law distinctions—public/private and academic/conduct. These postulated distinctions ultimately have become core governing principles in the modern law of higher education; although it is unlikely *Dixon* ever intended this to happen. Both distinctions, as we shall see, are deeply problematic for modern higher education. Doctrinally, *Dixon*'s dicta regarding the two distinctions has become even more powerful than its actual holding in some ways.

Dixon not only inserted "hearing" in to our educational lexicon, but "public/private" and "academic/conduct" distinctions as well.

It is essential to put *Dixon* in context first with respect to the public/private distinction. *Dixon* came to federal court raising the issue of whether a public entity had deprived individuals of certain basic civil rights: all statements in *Dixon* relating to private schools are dicta, and only dicta. *Dixon* correctly pointed out that key contrary private college cases—such as *Anthony v. Syracuse University*[45] and *Barker v. Bryn Mawr*[46] both of which provided no *Dixon*-like rights of process to students whatsoever—were cases in which rights of *contract*, not constitution, were asserted. To a very large extent, then the public/private distinction was born in *Dixon* because making that distinction helped to strengthen *Dixon's* position that the plaintiffs in *Dixon* were owed more process under the United States Constitution than under contract law. By contrasting the limited rights in the private sector under contract law, *Dixon* court hoped to emphasize that the public domain provided *more* rights.

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[43] *Id.* at 157–58.
[44] *Id*. at 158–59.
[45] 231 N.Y.S. 435 (N.Y. App. Div. 1928).
[46] 122 A. 220 (Pa. 1923).

Dixon birthed a public/private distinction to bolster its constitutional argument. This birth moment of a public/private distinction is interesting for two reasons. For one, there never was much need for a public/private distinction in the past because "public" and "private" both had equally powerful legal support for their power and prerogative over students. For another, *Dixon* was wrong about where contract law was heading. (As we shall see, contract law was also moving to be more student friendly.) Nonetheless, *Dixon* heralded in the belief that public law would lead the way in student rights revolution. This was true in many dimensions, but ironically not true at all in the student process arena. Indeed, and ironically, most college students today have extensive process rights only because their institutions contractually embrace legalisms as tools of governance.

At the same time *Dixon* was decided, American law was rapidly moving towards providing roughly parallel "discipline" rights for students into the private sphere—the *Syracuse* and *Bryn Mawr* cases were losing their power. The circumstances of the 1960s skewed emphasis on the fall of power and prerogative in higher education towards the *public*, as did *Dixon* itself. The 1960s saw great, overt and obvious challenges to public spheres of power and prerogative, which overshadowed parallel, but equally significant, if not more important, private law changes.

Dixon is also intriguing with respect to its second proffered dichotomy—academic/conduct. Remember: there was no academic/conduct distinction to speak of in pre-1960s American higher education. Colleges were in the business of teaching subordination as an *academic* virtue, which made an academic/conduct distinction, as we might think of it today, essentially irrelevant. Subordination was everywhere in the pre-1960s American college. Professors taught recognized doctrine—when they strayed they were sometimes persecuted and dismissed.[47] Research by junior professors often became the property of senior researchers. Gender and race segregation were common, reproducing the same divisions in society at that time.

[47] *See e.g.* Sweezy v. New Hampshire, 354 U.S. 234 (1957). In the era prior to the 1960s, it was not uncommon to attack teachers for their political views both within institutions and without. The *Sweezy* case, which is the fundamental root of academic freedom, points to a salient fact. The concept of academic freedom was born as a defensive doctrine in an era of power and prerogative. There is a parallel story about academic freedom to tell here, although it is beyond the scope of this Book. At the same time that students were winning freedom from an era of power and prerogative, professors were as well. See, e.g., Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205 Will County, 391 U.S. 563 (1968).

Students were considered subordinate to teachers—the concept of student as collaborative learner or social equal was far away in the future at most institutions. The era of prerogative and power emphasized subordination of students; students were forced to "respect" classroom teachers, administrators, etc. What makes Dean Wormer of *Animal House* so deliciously evil[48] is the way in which he gleefully wields power over others, and the way he deliberately (attempts) to impose the concept of subordination on others as an end in itself. The meta-lesson that hierarchy and subordination connect with higher education was omnipresent. Subordination and hierarchy—outflows of power and prerogative—were central to the academic mission in the pre-1960s university. Academic and conduct as we might think of it today, were one. In this environment "misconduct" was a core mission transgression.[49]

Many of the legal cases from the *in loco parentis* era evidence the emphasis on subordination as a central academic goal. In *Steier v. New York State Education Commissioner*,[50] for example, a student was suspended for failing to "conform to the requirements of good manners and good morals."[51] The "rule" was a typically open-ended "rule" of the day and really no rule at all. The "rule" in *Steier* was obviously designed to require student behavior to conform to the morals of the day as set forth by the administration. In a classic example of meta-insubordination, the student in *Steier* was dismissed under this "good morals standard" for challenging the administration. The student attacked a common practice of the day—subordination of student groups to university control. The student thus not only challenged a university rule, but also challenged the very *value* of subordination being taught by the administration. Predictably, he lost. The student was only allowed to return to school on a promise to follow college rules.[52] Later however, the student published a story about his ordeal and was expelled for that.[53] The Second Circuit Court of Appeals in *Steier* believed that attendance at college was a privilege, and upheld college's actions.[54]

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[48] NATIONAL LAMPOON'S ANIMAL HOUSE (Universal Pictures 1978).

[49] For example, the power of *in loco parentis* enjoyed by institutions of higher education prior to the 1960s included the right of teachers and administrators to enforce student subordination; indeed, it was understood that the very welfare of the school system required it. *See, e.g.,* Vermillion v. State, 110 N.W. 736, 738 (Neb. 1907).

[50] 271 F.2d 13 (2d Cir. 1959).

[51] *Id*. at 14.

[52] *Id.* at 15.

[53] Steier published a story regarding his probation in the September 20, 1956 issue of the Brooklyn College paper and was suspended for a second time in response to that

Steier is not an ancient case—it was decided in 1959, essentially two years prior to *Dixon*. *Steier* was the pronouncement of the United States Court of Appeals for the Second Circuit—a major higher education area of the United States, which includes all of the State of New York. *Steier* raised the same questions that *Dixon* raised: can a student at a public college be dismissed on "morality" grounds in retaliation for the exercise of free speech? *Steier* gave the traditional answer—yes. *Steier* also made no academic/conduct distinction. It is also significant that *Steier* was set in the North, and did not raise questions related to desegregation. *Steier* has never been formally overruled, and the Second Circuit has never officially followed *Dixon*. *Steier* demonstrates that for many, *Dixon* was more about desegregation and civil rights in the South than due process.

Similarly, consider the case of *People ex rel. Bluett v. Board of Trustees of University of Illinois*.[55] Again, just a few years before *Dixon*, a Northern court upheld the power and prerogative of an institution in a case with no desegregation overtones. The dispute in *Bluett* was "academic" in a modern sense, but the court made no distinction between academic and conduct violations. A student cheated

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publication. *Id.* Steier applied for reinstatement in December 1956, but after appearing before a Faculty Committee Steier was dismissed from Brooklyn College. *Id*. at 15–16.

[54] In rejecting Steier's claim, the Second Circuit stated,

> The protection to citizens of the United States by the "privileges and immunities" clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. The "privilege" of attending The College as a student comes not from federal sources by is given by the State.

Id. at 16 (citations omitted).

Judge Moore took an even more unambiguous view of higher education as a privilege in his concurring opinion:

> Despite the fact that [Steier] was receiving his education without cost at the hands of the tax-payers of his community and that he entered Brooklyn College *not as a matter of right but as a matter of grace* after having agreed to conform to its rules and regulations, he regards himself deprived of free speech, holding himself free to write or say what he chooses, subject only to the risk of civil or criminal libel and slander. Such redress, he says, must be by the individual recipient of his abuse, and cannot be considered as a breach of good morals or good manners by the College.

Id. at 20 (Moore, J., concurring) (emphasis added).

[55] 134 N.E.2d 635 (Ill. App. Ct. 1956).

and was dismissed.[56] She was not given access to the identity of her accusers, nor was she permitted access to anything more than summary information about the grounds for her dismissal.[57] The student suffered an all too typical "secret" dismissal—and the Illinois First District Appellate Court endorsed that procedure. The court carved the outer boundaries of college authority—"do not act wantonly or corruptly" (similar to the "arbitrary and capricious" standard).[58] But secret and summary university actions were fine.[59]

Bluett is all but a Catch-22 for a student. A student summarily suspended by a secret investigation would have no evidence of wanton or corrupt behavior, nor any notice that there is no evidence in support of charges filed against her. A student would likely only have a "real" case if administrators were openly and brazenly flaunting the fact that they had no evidence of a student's wrongdoing. One might presume that higher education administration after *Bluett* would not be that foolish. *Bluett* did not just condone secret and summary dismissal—it essentially encouraged it, and it did so without making any academic/conduct distinction.

Prior to *Dixon* courts made no meaningful distinction between academic and conduct violations in any modern sense because, again, such a distinction made no difference— the university retained plenary power and prerogative.[60] The mostly theoretical standards of review articulated by some courts, such as in *Bluett*, were the same for any kind

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[56] *Id.* at 636.

[57] *Id.*

[58] In fact, Bluett conceded that her college had a right to expel a student for cheating, subject to court control only when that power was "substantially abused." *Id*. at 637.

[59] "In order to carry out the powers and duties of school directors or Board of Education of high school districts, no form of trial or hearing is prescribed." *Id.* (quoting Smith v. Bd. of Educ., 182 Ill. App. 342 (1913)).

[60] *See* Dehaan v. Brandeis Univ., 150 F. Supp. 626, 627 (D. Mass. 1957); State *ex rel.* Ingersoll v. Clapp, 263 P. 433 (Mont. 1928); State *ex rel.* Sherman v. Hyman, 171 S.W.2d 822 (Tenn. 1942). Nonetheless, under the cover of broad language empowering colleges, courts of the *Dixon* era were beginning to *suggest* that there would eventually be limits to the power and prerogative of higher education. Courts began to state that the student would have legal redress if the college had acted with malice, fraudulently, or arbitrarily (or various statements meaning essentially the same thing). *See, e.g*., Ky. Military Inst. v. Bramblet, 164 S.W. 808, 809 (Ky. 1914) ("[C]ourts will not interfere or revise [college rules], nor will [courts] afford relief in case of their enforcement, unless those whose duty it is to enforce them act arbitrarily and for fraudulent purposes."); Booker v. Grand Rapids Med. Coll., 120 N.W. 589, 591 (Mich. 1909) ("[W]hen one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom."); Barker v. Trs. of Bryn Mawr Coll., 1 Pa. D. & C. 383, 394 (Pa. C.P. 1922), *aff'd,* 122 A. 220 (Pa. 1923) (noting the fairness and reasonableness of the procedures undertaken by the college before suspending the claimant).

of dispute whether we might categorize it today as "academic" or "conduct." This lack of discrimination between "types" of cases was clearly connected to the plenary authority of a college to manage an academic environment, and it was also connected to the fact that in the pre-*Dixon* period, *everything* was essentially academic. Colleges were teaching morals and a student's place in society along with Chaucer and Kant: ordination and subordination were key features of the learning objectives of the era. Students were being taught to follow the orders of superiors—implicitly and explicitly—and to show respect for the superordinant and for fellow subordinates who respect existing ordinations.

Perhaps no case has said this better than *Stetson University v. Hunt*.[61] Listen carefully to how *Hunt* framed the issue of managing an educational environment:

> The government and discipline of the University are administered by the president. The University does not outline in detail either its requirements or its prohibitions. Students are met on a plane of mutual regard and helpfulness and honor. The ideals of the University are those of modern civilization in its best sense. The conventions and proprieties of refined society obtain here. A student may forfeit his connection with the University without any overt act if he is not in accord with its standards.[62]

The *Hunt* court believed that college teaches the rules of civilized society. "Misconduct," as we might call it today, was a challenge not just to order and safety but to the core academic mission of a college. Today, it would be odd for schools to list openly "insubordination" as an academic violation or "subordination" as an academic value. Yet, as we explore the law of the pre-*Dixon* era we see very clearly that the very nature of the academic program was so deeply connected to preparation for social hierarchy that the two were virtually inseparable. The focus of higher education shifted from preparing individuals to play roles in hierarchical social structures to preparing individuals to be individuals only after the 1960s.

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[61] 102 So. 637 (Fla. 1925).

[62] *Id.* at 640 (quoting the language adopted by the trustees of Stetson University, and endorsing such language as reasonable and enforceable).

Another case illustrating subordination as academic value came from the Wisconsin Supreme Court in *State ex rel. Burpee v. Burton*,[63] which articulated the connections between subordination and learning in these terms:

> [T]here exist[s] on the part of the pupils the obligations of obedience to lawful commands, *subordination*, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been reenacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly.[64]

Being insubordinate is not simply wrong as "misconduct" – it violates the academic value of ordination. College life, and education in general, was largely training for an ordinal society.[65]

Dixon's academic/conduct distinction was out of step with the law of its day, and hardly a longstanding, well-accepted distinction. Why did *Dixon* essentially create such a distinction? The answer is fairly plain, when placed in context. By the time of *Dixon*, the United States Supreme Court had already decided *Sweezy*,[66] which strongly

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[63] 45 Wis. 150 (1878).

[64] *Id.* at 155 (emphasis added).

[65] Perhaps the most over-used quote in higher education comes from Thomas Jefferson, which clearly illustrates the heavy importance of teaching subordination and ordination to students of the period,

> The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the greatest obstacle to science with us, and a principal cause of its decay since the revolution. I look to it with dismay in our institution, as a breaker ahead, which I am far from being confident we shall be able to weather.

Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), in THOMAS JEFFERSON: WRITINGS 1463, 1465 (M. Patterson ed., 1984).

[66] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

protected academic freedom. *Dixon* must have been concerned that its due process holding would reach too far and conflict with the academic freedom of an institution. Due process requirements could mean less academic freedom. *Dixon*'s academic/conduct distinction was designed to *limit* the scope of *its* holding to make it more constitutionally defensible in light of *Sweezy*. *Dixon* was essentially correct in this speculation—when lower federal courts intruded too far into controlling the academic freedom of institutions via aggressive "due process" rulings, the United States Supreme Court moved to correct those courts in *Horowitz*,[67] and later, again in *Ewing*.[68] *Dixon* correctly guessed that the United States Supreme Court was not ready to constitutionalize the process of academics when exercising academic freedom, and was not ready to limit the freedom of academics to control the academic mission. Had *Dixon* not made an academic/conduct distinction, and thus limited its holding, it would likely have been overruled. *Dixon* correctly recognizes that there is, at best, a very weak claim of violation of academic freedom when a college tries to silence its students when exercising legitimate First Amendment Rights.

Dixon, however, did (apparently at least) strike a chord of some sort with the United States Supreme Court in *Horowitz.* In *Horowitz,* the Supreme Court discussed the difference between "academic" and "disciplinary" determinations,[69] *apparently* picking up on *Dixon*'s academic/conduct distinction. Most commentators seem to assume that *Dixon*'s distinction was the same as that adopted in *Horowitz.* That is a step too quick. *Horowitz*, as we shall see, had its own agenda with the distinction.[70]

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[67] 435 U.S. 78 (1978).
[68] 474 U.S. 214 (1985).
[69] *Horowitz*, 435 U.S. at 85–86.
[70] The *Horowitz* Court made an academic/conduct distinction to preserve academic freedom, and, critically, to make, a key epistemological distinction about *how* decisions are made, not how they are *labeled*. (Moreover, *Horowitz* may well have made an academic/conduct a distinction to *limit* due process rights in K-12 after *Goss v. Lopez,* 419 U.S. 565 (1975), and *not* to illustrate some major ontological differences in the core mission of academic institutions of higher learning. *Horowitz* seemed uncomfortable with the reach of *Goss* in K-12 and may have sought to limit its scope—not to bifurcate higher education.). *Horowitz* stretched, to say the least, its "historical" thesis. As *Horowitz* stated,

> Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences returned on decision to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter.

435 U.S. at 87. *Horowitz* proceeded to marshal support for this (for our purposes misleading) statement. *Id.* The lower federal cases cited by *Horowitz* were decided *after*

Dixon, then, has left a confusing, yet surprisingly unquestioned legacy, especially with its public/private and academic/conduct distinctions. In a sense, *both* distinctions were engineered in *Dixon* to be argumentative tools to ensure survivability in further appellate litigation. However, *Dixon* has left the imprints of these distinctions in the hearts and minds of a generation of higher education legalists. Even today, in the face of overwhelming legal indications to the contrary, many higher education administrators typically believe that there are significant pragmatic differences in legal rules for public and private institutions, and in academic and non-academic or conduct disputes. Misreadings of *Dixon* have misguided administrators for decades.

Do not get me wrong: *Dixon* was a significant moment in higher education process law. However, *Dixon* looks different in the rear view mirror.[71] *Dixon*'s due process holding has not received ratification from the United States Supreme Court (if it ever will.)[72] It is possible to pay *too* much homage to *Dixon*, or to what appears most important about *Dixon*. *Dixon* was primarily a civil rights battle over desegregation in the South, not a national plebiscite on due process for American higher education. Legalists have overplayed *Dixon* in some ways, and overlooked its core significance.

Indeed, much of the country after *Dixon* retained, for some time, vestiges of the era of power and prerogative. It is easy to forget, for example, that the Second Circuit—all of New York included—followed *Steier*, which contradicted *Dixon*, for years after *Dixon*. While *some*

Dixon, *see id*, including one from the Fifth Circuit, *Mahavongsanan v. Hall*, 529 F.2d 448 (1976). *Horowitz* also relied primarily upon *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095 (Mass. 1913), and *Mustell v. Rose*, 211 So. 2d 489 (Ala. 1968), *cert denied*, 393 U.S. 936 (1968), for support of its position on state courts. Neither case says so much. In *Barnard*, the State of Massachusetts provided a right to a hearing by statute in some but not all matters involving students: *Barnard* was not making an academic/conduct distinction but simply following statutory directives and reciting them. 102 N.E. at 1096–97. The *Horowitz* Court essentially read *Barnard* out of context, and it turns out that *Mustell* did as well. *See Mustell*, 211 So. 2d. at 498. *Mustell*, a 1968 decision of the Alabama Supreme Court actually took a polite but discernable swipe at *Dixon* and its academic/conduct distinction. *Id.* at 488–89.

[71] *See, e.g.,* KAPLIN & LEE, *supra* note 22, at 725 (referring to *Dixon* as the key case in evolving student status); Elizabeth Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decisionmaking in American Universities*, 23 J.C. & U.L. 829, 834 (1997) ("The landmark case of *Dixon v. Alabama State Board of Education* sounded the death knell for the doctrine of *in loco parentis*.").

[72] More than ten years after *Dixon*, the Supreme Court recognized students' due process rights for the first time in *Goss v. Lopez*, 419 U.S. 565 (1975), by requiring that high school students have notice and an appropriate hearing before suspension. There is reason to believe that the Supreme Court will ultimately and explicitly extend *Goss* in some form, to college students. To date, however, that has not happened.

courts were no doubt influenced by *Dixon* to impose due process requirements on public colleges[73] many other federal circuit courts were slow or resistant, to say the least, to follow *Dixon* without Supreme Court imprimatur.[74] For example, the Sixth Circuit (which includes Ohio) essentially followed *Dixon* first in 1986[75] (officially in *2005*)[76] and the First Circuit (much of New England) essentially joined ranks with *Dixon* only in 1988.[77] More recently, the Seventh Circuit, in a deliciously cautious opinion by the eminent scholar/jurist, Judge Posner, declined to impose due process requirements in a case involving students disciplined for hazing.[78] Indeed, it was only after Kent State that most colleges nationally altered their course towards legalisms. Had Kent State never happened it is unclear whether a student discipline revolution would have occurred at all, or if so, on what timetable. *Dixon* was important; Kent State was to be even *more* significant in moving higher education towards legalisms and "due process."

B. After *Dixon*—The Seven Axioms of Student Process

Case law before 1960 typically attempted to allocate power and prerogative. Consider, for instance, the *Dartmouth College* case, which determined that the trustees of Dartmouth College possessed the power to rule their institution, not the legislature of New Hampshire; or *Gott v. Berea College* which allocated plenary power to colleges to set standards of morality for students. After *Dixon*, colleges still fought to preserve power over students.

Colleges have thrown themselves headlong into fights over the allocation of power since the inception of the Civil Rights era, including arguing that they have the power to not act for the benefit of students' safety.[79] Starting in 1960s and 1970s courts began to respond to look at

[73] *See, e.g.,* Soglin v. Kaufman, 418 F.2d 163 (7th Cir. 1969); Esteban v. Central Mo. State Coll., 415 F.2d 1077 (8th Cir. 1969).

[74] And they still are. *See, e.g,.* Iota Xi Chapter of Sigma Chi Fraternity v. Patterson, No. 08-1417, 2009 WL 1314710 (4th Cir. May 13, 2009) (ducking issues of protected interests so as to avoid conflict with *Horowitz*.)

[75] *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 633. (6th Cir. 2005). Even so, Flaim upheld the college, not student.

[76] *Id.*

[77] Gorman v. Univ. of R.I., 837 F.2d 7 (1988).

[78] *See* Williams v. Wendler, 530 F.3d 584 (7th Cir. 2008).

[79] No duty arguments, discussed in *Rights and Responsibilities*, are vestigial arguments about power and prerogative—the power to do nothing if a college so chooses. BICKEL & LAKE, *supra* note 35, at 49. This is why no duty arguments in higher education feel like immunity arguments. An egregious example is the Texas case of *Delaney v.*

student issues presented to them as ones that require the *balancing* of rights and responsibilities and competing social policies, not as issues of power allocations. Particularly after the shooting of students at Kent State—a singularly defining moment in the Civil Rights era and the history of American higher education—assertions of power in higher education would be subject to evaluation according to competing assertions of rights and responsibilities, freedoms and duties, and social policy. Power would now imply correlative responsibility and accountability.

The law of the Civil Rights era would establish the following seven axioms, for better or worse, which are evident everywhere in higher education today.

First, academic freedom and due process (or substantial fairness) are deeply connected in higher education law. Like yin and yang, academic freedom and due process in some ways oppose, and in other ways complete each other. Due process requirements can limit academic freedom, and vice versa. Yet in another way academic freedom and due process illuminate and support each other: explaining the purposes and functions of due process, for example, informs the meaning and purposes of academic freedom.

Second, misbehavior by students falls into one of two categories—conduct (or disciplinary) or academic. The organizational charts of institutions of higher education show this clearly. The academic path is on one side of a student's experience—professors, tests, and academic evaluation. On the other side, students deals with hall directors, Greek or activity advisors, campus police, etc. Student discipline process reflects this mitosis of educational experience. This academic/conduct division is so powerfully entrenched that most individuals in higher education have lost the purposes for which some courts of the Civil Rights era postulated such divisions in the first place. The academic/conduct distinction has reified.

Third, law and legalisms are central to the delivery of higher education. The courts in the Civil Rights era were well aware of the important role that law could play in higher education, but also realized the limits of law and the dangerous effect law might have upon an academic environment. The Civil Rights era gave higher education a

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University of Houston, 835 S.W.2d 56, 57 (Tex. 1992). In that case, an institution of higher education argued that deciding not to fix locks in a residence facility was within its sovereign immunity. *Id*. at 57. The Texas court disagreed and chided the college and its attorneys for even making the argument. *Id*. at 61. The persistent effort to resurrect legal insularity and the push for do-duty rulings is little more than an attempt to reclaim lost power.

subtle mandate—come into legal compliance but do not to turn into overly juridical learning societies. As we shall see, colleges went well beyond legal mandate and *chose* legalisms even as courts *encouraged* them not to do so. But to many in higher education, this choice seems axiomatic.

Fourth, the deployment of violence or physical force is subject to strict rules of accountability. In the Civil Rights era some institutions asserted that power to threaten to use serious physical force on students. The law evolved quickly to require a proper use of decision-making when deploying violent force.[80] The law also strongly discouraged the use of serious, and indiscriminate or disproportionate force. Corporal discipline in any form—already well on the way out in K-12 education—was at an end in higher education. The Civil Rights era essentially ended the use of physical force as a tool to manage a higher education environment, except as a last resort and then only in controlled, rational ways.[81]

Fifth, college students are constitutional and/or contractual adults. Students do not leave constitutional rights at the campus gate, noted Professor Charles Alan Wright.[82] Several things occurred in the law simultaneously. First, earlier doctrines of visitorial power, trustee power, and delegated parental authority waned in favor of new legal rights and responsibilities arising from constitutional or mutually agreed upon texts. This in turn led to the second and, critical feature: as adults, students were now the unit of constitutional *and* contractual interest. As *adults*, students were now the ones who were in privity with their colleges, not their parents.[83] As such, students could now bring breach of contract claims if a college promised something and did not

[80] *See* Spacek v. Charles, 928 S.W.2d 88, 95 (Tex. App. 1996) (citing RESTATEMENT (SECOND) OF TORTS §§ 150–151 (1965)) (outlining numerous factors to help determine if the use of force is necessary and reasonable); s*ee also* Carr v. Wright, 423 S.W.2d 521, 522 (Ky. Ct. App. 1968) (quoting 47 AM. JUR. *Schools* § 175 (1960)) (explaining that teachers may use corporal punishment when it is necessary to maintain order, but the use of force must be reasonable).

[81] Recall that until *Regina v. Hopley*, (1860) 175 Eng. Rep. 1024, the issue of whether serious or deadly force was defensible in school discipline was not resolved fully. Even after that decision, moderate corporal punishment was distinguished from more serious uses of force. *Hopley* kept corporal discipline alive in American education for the better part of the century and reminded students in K-12 and higher education that force was the ultimate exercise of the power and prerogative of an institution of education.

[82] Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1032–33 (1969).

[83] E. ALLAN FARNSWORTH, CONTRACTS 652–54 (4th ed. 2004).

substantially deliver.[84] Students also could now bring an action against a public college if that college denied their constitutional rights.[85]

Sixth, overt retaliation for the exercise of legitimate civil rights would no longer be tolerated. Recall that in *Dixon* students were disciplined precisely because they engaged in the exercise of legitimate rights of speech, protest, and assembly. However, a college could still retreat from responsibility. The bystander era in tort law was born, in part, from a disdain for the new, irreverent, politically oppositional college student.[86] Colleges could not retaliate against students, but the price of freedom and self-determination was a judicially created doctrine that tolerated poor, even inexcusable, safety and wellness practices by institutions of higher education. The same courts that protected constitutional rights, also preserved the power and prerogative of institutions to manage, *or not*, the safety of their environments. The Civil Rights revolution in higher education contained a deep paradox—a broad grant of civil and political rights juxtaposed with a recreated doctrine from the era of power and prerogative relating to student safety and wellness.

Seventh, as a corollary to the sixth axiom, the Civil Rights era focused *first* on political and civil liberties, desegregation and equality, and diversity inclusion, and the like. Thus, the 1960s and 1970s resulted in an *incomplete* revolution, giving apparent priority to civil over safety and wellness rights. The first phase of the Civil Rights era all but ignored student safety and wellness issues and implied further revolutions to come.

C. The Supreme Court and Constitutional Process

It is very interesting that the United States Supreme Court—very active under Chief Justice Earl Warren—sat the sidelines on issues of college student due process. The Court was very active with respect to due process issues in other areas, but the Supreme Court did not directly address due process in higher education until the late 1970s—well after the heat of the 1960s and early 1970s had cooled and the court had

[84] For most purposes, the legal term "privity" means that a party has legal standing under a contract. For a more correct, precise, and legally definitive definition of "privity," if such a thing exists, see *Black's Law Dictionary*, *supra* note 13, at 1237 (defining "privity" as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property").

[85] 42 U.S.C. § 1983 (2006).

[86] BICKEL & LAKE, *supra* note 35, at ch. 4.

passed to another Chief Justice. The story of due process on campus is unusual. It is one area of due process law the Warren Court was not active in.

The United States Supreme Court issued the landmark decisions of the Civil Rights era (as they relate, or connect to student process and academic freedom).[87] The Supreme Court issued subtle directions to higher education. Consequently, some commentators have tried to elevate certain lower federal court opinions to near equal or even greater status.[88] Yet the Supreme Court remains the final authority on matters of United States Constitutional law, and "due process" discussions should begin with Supreme Court rulings. One strange feature of modern higher education law has been the tendency by legalists to sublimate Supreme Court rulings to *lower* federal court rulings. This is a telling inclination and, as we shall see, arises from a *preference* for legalisms by legalists, not from the law itself.

It is important to revisit the key precedents from the Supreme Court; and re-examine the case law to put the rush towards legalisms in perspective. The dominant legalist's view of key Supreme Court precedent essentially is that the Supreme Court moved in to protect academic-decision making many years ago but has otherwise acquiesced in, and approved of, the rise of due process law otherwise on campus. The legalists' vision of what the Supreme Court did, and did not do (and has not done) misses entirely what the Supreme Court was doing and has done. The United States Supreme Court, in fact, constructed a vision of American higher education that is much more than mere Constitutional doctrine. That vision has no appeal to legalists, who typically ignore it or reduce it.

I. The Roots of Due Process —Academic Freedom

There is one critical feature of due process in higher education that is often overlooked: professors won constitutional protection before college students did. The constitution came to campus *first* to protect academic freedom, primarily the freedom of academics, and then later to grant due process rights to many professors.[89]

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[87] There are hyper-technical legal ways to determine if a college action is subject to federal constitutional restraints. KAPLIN & LEE, *supra* note 22, at 90–92. Detailed development of these doctrines is not essential to the central themes of this Book. Private colleges usually are not bound by United States Supreme Court rulings.

[88] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975); Gilligan v. Morgan, 413 U.S. 1 (1973); Healy v. James, 408 U.S. 169 (1972); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[89] *Sweezy,* 354 U.S. 234.

The story of student constitutional student process rights begins with the rights of professors. Academic freedom for professors under law essentially originated in the middle of the twentieth century in the United States. The first truly clear pronouncement from the United States Supreme Court protecting academic freedom was in *Sweezy v. New Hampshire.*[90] It is not terribly surprising that academic freedom arrived late: in the era of power and prerogative faculty as such typically held no significant power and prerogative against institution or state.[91] Power and prerogative were *institutional* or *donative*; if college professors or administrators exercised authority, they did so either by *delegation* or *acquiescence*. If trustees disagreed with the decision by a professor or administrator that individual would often be dismissed.[92] Academic freedom was inconsistent with the power and prerogative of institutions, unless academic freedom were to lie with trustees or an institution itself.

Although there had been ruminations by the Supreme Court earlier regarding academic freedom, the concept found its first full expression in *Sweezy*.[93] The facts of the case seem far removed from issues of student due process today.

Sweezy arose during one of the most historically significant political assaults on American higher education. The cold war was in high gear, and there was enormous suspicion and fear of communism in American society. Loyalty oaths became a common tool to "weed out" "communists" in government and public employment.[94] Many Americans today are familiar with the infamous McCarthy hearings,[95] but state governments also took part in similar anti-communist activities.

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[90] *Id.*

[91] Contrast with some institutions in England where professors have had greater powers and prerogative for centuries. DAVID PALFREYMAN & DAVID WARNER, HIGHER EDUCATION LAW 209–10 (2d ed. 2002).

[92] In public education it really took until the United States. Supreme Court's decision in *Pickering v. Board of Education of Township High School District 205 Will County,* 391 U.S. 563 (1968), and *Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972), to protect free speech and other rights for teachers and faculty.

[93] *Sweezy*, 354 U.S. at 249–50.

[94] 17 ENCYCLOPEDIA AMERICANA 822–23 (Grolier Inc., Int'l ed. 2001). A loyalty oath is "a declaration of loyalty to a government or constitution." *Id*. at 822; *see* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

[95] *Executive Sessions of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations*, 83d Cong. (1954). For a copy of the McCarthy Hearings, see United States Senate, *Executive Sessions of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations*, http://www.senate.gov/ artandhistory/history/resources/pdf/Volume5.pdf.

In 1951, the State of New Hampshire passed its own Boris and Natasha[96] statute attempting to combat "subversive activity."[97] Under New Hampshire law, employers were required to seek sworn loyalty oaths from employees.[98] Requiring loyalty oaths was not enough, however, the state of New Hampshire also set up a "process" to root out communists. The Attorney General of the State of New Hampshire was authorized to be a one man "committee" by Resolution of the New Hampshire legislature.[99] The Attorney General's charge—find and root out communism and subversives. The "committee"—again the Attorney General—called and summoned witnesses to testify under penalty of contempt.[100]

Sweezy, a teacher at the University of New Hampshire, was summoned to testify before the Attorney General in New Hampshire. Sweezy was asked a typical McCarthy era question: had he ever been a member of the Communist party or ever been part of any program to overthrow the government by force or violence?[101] Sweezy denied this.[102] The Attorney General was also curious about the content of certain lectures Sweezy had given.[103] Sweezy declined to answer various questions pertaining to his work, and asserted that, "the questions were not pertinent to the matter under inquiry and that they infringed upon an area protected under the First Amendment."[104] For this, Sweezy was held in contempt.[105]

The United States Supreme Court reversed the decision of the New Hampshire Supreme Court, which had upheld the use of contempt power over Sweezy.[106] Writing for the plurality, Chief Justice Earl Warren concluded that the questions which Sweezy refused to answer

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[96] *See The Bullwinkle Show* (NBC 1961) (Boris was the communist spy out to get Rocky and Bullwinkle, and Natasha, also a communist, was Boris's partner).

[97] *Sweezy*, 354 U.S. at 236 (citing 1951 N.H. Laws ch. 3). Subversive activities were to be considered "seditious," and "subversive persons" and "organizations" were banned. *Id*.

[98] *Id*.

[99] *Id.* at 237.

[100] *Id*. at 238. Although the Attorney General did not have the power to hold witnesses in contempt, the Attorney General was able to use the State Superior Court in order to hold witnesses in contempt. *Id.*

[101] *Id.*

[102] *Id*.

[103] *Id*. at 243–44. Sweezy gave a lecture to the students of a humanities class at the University of New Hampshire. *Id*. This was the third consecutive year that the faculty that taught humanities invited Sweezy to address their class. *Id.*

[104] *Id*. at 244.

[105] *Id*. at 244–45.

[106] *Id*. at 255.

(and which formed the basis for his contempt) were beyond the authority granted in the charge from the legislature to the "committee" (e.g., the Attorney General): "the lack of any indication that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority."[107] This was the narrow, technical way to hold for Sweezy.

In the process of so ruling, Chief Justice Warren took the opportunity to discuss the merits of protecting academic freedom:

> The State Supreme Court thus conceded without extended discussion that petitioner's right to lecture and his right to associate with others was constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated. Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations in a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.
>
> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an

[107] *Id*. at 254. The Court specifically stated, "Our conclusion does rest upon a separation of the power of a state legislature to conduct investigations from the responsibility to direct the use of that power insofar as that separation causes a deprivation of the constitutional rights of individuals and a denial of due process law." *Id*. at 255.

> atmosphere of suspicion and distrust. Teachers and student must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.
>
> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.[108]

However, the plurality did not take the important step of knocking down the New Hampshire process specifically *because* it violated academic freedom. Chief Justice Warren's plurality opinion made academic freedom unessential to its holding.[109] The plurality rested on a narrower ground—that authority was not properly delegated to the attorney general (a committee) to seek the information that was the basis of the contempt order. The constitutional problem therefore was that the contempt order did not follow due process of law; the Attorney General asserted a power he did not have and used the New Hampshire court process to enforce a contempt order improperly. Had Chief Justice

[108] *Id*. at 249–51.
[109] *Id*. at 250.

Warren's opinion been the only opinion in *Sweezy*, academic freedom might have had to wait for a voice much later.

As it turns out, however, a concurring opinion in *Sweezy* has become the most important feature of that case for academic freedom.[110] In a sweeping concurring opinion, Justice Frankfurter, joined by Justice Harlan, conceived of the issue presented in *Sweezy* somewhat differently.

Frankfurter's concurrence agreed that the question presented related to due process but stated that the issue at hand created an "exceedingly difficult task of making judicial accommodation between the competing weighty claims that underlie all such questions of due process."[111] Frankfurter concluded: "when weighted against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate."[112]

In reaching this conclusion, Frankfurter set forth foundations for the protection of the academic community under the United States Constitution. Chief Justice Warren believed and rested his opinion on the fact that the Attorney General in *Sweezy* used process without sufficient authority. Justice Frankfurter instead viewed the matter as *primarily* raising a challenge to *academic freedom*, and forever linked the First Amendment and due process in higher education.

Frankfurter made three key observations in *Sweezy*. First, academic scholarly activity flourishes in a free environment, and that the needs of modern society depend upon the ingenuities of scholars.[113] Second, a free society depends on free universities: "these pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of the university."[114] Democracy needs scholars for a better society, a freer society. Third, direct legal regulation of academic life contaminates it. Government action can even *chill* the academic environment even if it does not directly and overtly intrude: "it matters little whether such intervention occurs avowedly or through action that

[110] *Id*. at 255–67; *see also* Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603–04 (1967) (explaining that academic freedom is a special concern upon which the Nation's future depends).
[111] *Sweezy*, 354 U.S. at 256.
[112] *Id*.
[113] *Id.* at 262.
[114] *Id*. Frankfurter noted, "Political power must abstain from intrusion into this activity of freedom." *Id*.

inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."[115] Government action—by its very nature—can disrupt the delicate ecosystem of the academy.

Since *Sweezy*, Justice Frankfurter's concurrence has become foundational to constitutional academic freedom. (*Sweezy* demonstrates that concurring opinions may ultimately become more important than majority opinions in the future.) In articulating the contours of academic freedom, Justice Frankfurter made an interesting and deliberate choice. As if to underscore the very (third) message of his opinion, Justice Frankfurter chose to let the words of an academic speak to the meaning of academic freedom. Quoting Harvard President A. Lawrence Lowell, Justice Frankfurter incorporated by reference a vision of academic freedom described by academics themselves:

> These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. One need only refer to the address of T.H. Huxley at the opening of Johns Hopkins University, the Annual Reports of President A. Lawrence Lowell of Harvard, the Reports of the University Grants Committee in Great Britain, as illustrative items in a vast body of literature. Suffice it to quote the latest expression on this subject. It is also perhaps the most poignant because its plea on behalf of continuing the free spirit of the open universities of South Africa has gone unheeded.
>
> In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A

[115] *Id.*

> university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates- "to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.
>
> Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.
>
> . . .
>
> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[116]

Frankfurter recognized that if a *court* were to define the contours of academic freedom that court would risk compromising academic freedom. If a court were to tell academics how they must proceed, there would be no real academic freedom at all. The very concept of academic freedom is, at some level, the *process of academics* and entrusted to academics to articulate. Academic freedom generally is subject to the same rules of free inquiry that apply to *specific* disciplines such as science, humanities, etc. Academic freedom is itself a *discipline*—a process beyond any specific academic process of inquiry or debate, a discipline beyond discipline.

[116] *Id*. at 262–63 (citations omitted).

Frankfurter's deference to academics is telling. Frankfurter believed that academic freedom consists of four core freedoms because *academics* themselves do: "who may teach, what may be taught, how it will be taught, and who the students will be."[117] These four academic freedoms have stood the test of time and remain the benchmark by which all academic freedom is measured in, and out, of court.

Frankfurter's four basic freedoms have become fundamental in later opinions of the United States Supreme Court.[118] Most importantly, academic freedom has become specifically associated with the First Amendment.[119] The First Amendment has a wide penumbra of protection for academic freedom, which includes prohibitions against state actions which may *chill* speech.[120] *Sweezy* marks a point of demarcation in the law. Academic freedom now began to walk down its own analytical and doctrinal path, different from issues of student discipline or, at least so it appeared.

Sweezy signaled that the era of power and prerogative was coming to a close. A reordination of many long standing relations was coming. *Sweezy* dealt specifically with issues relating to state control over faculty but its broad statements regarding academic freedom suggested that faculty would also win important rights vis-à-vis institutions.[121]

After *Sweezy*, the law would have a great deal of work to do in balancing the respective rights and responsibilities of the Five Estates of American higher education—students (family), state, institution (donors, visitors, trustees), faculty/staff, and third parties (such as neighbors, vendors, etc.). The era of power and prerogative (or *negatively*, the period of legal insularity) greatly simplified the role of the law in determining the Five Estates' respective roles. In large measure, superior power rested categorically in the hands of donors, visitors, trustees, and institutions themselves. *Sweezy* initiated a new era of *balancing* respective rights and of responsibilities among the Five Estates.

A diagram may help illustrate:

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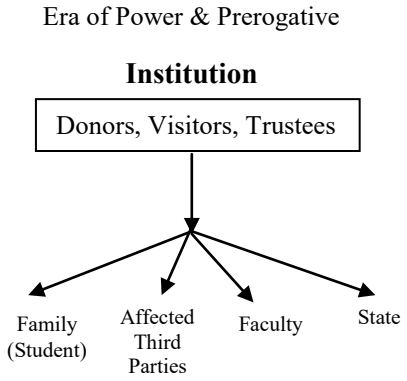
[117] *Id*. at 263.

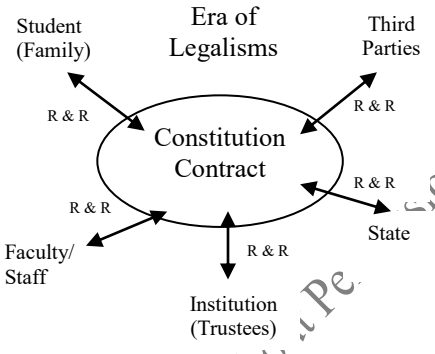
[118] *See, e.g., Pickering*, 391 U.S. at 568; *Keyishian*, 385 U.S. at 603–04; Shelton v. Tucker, 364 U.S. 479, 485–87 (1960).

[119] *Pickering*, 391 U.S. at 568; *Keyishian*, 385 U.S. at 603–04; *Shelton*, 364 U.S. at 485–87; *see Ewing*, 474 U.S. at 226 (discussing the constitutional implications at issue following the University's refusal to allow Ewing to retake an examination after failing it).

[120] *Sweezy*, 354 U.S. at 260–61.

[121] *See, e.g,. Pickering*, 391 U.S. 563.





The step from simple top/down ordination of power to complex multi-faceted balancing of (often competing) interests is a major and significant step in the shift away from the era of power and prerogative.

Now the central focus of this Book is on student process rights. *Sweezy* may *seem* tangential, but it is not. The United States Supreme Court began to articulate the connections between academic freedom and student rights in later cases and it is clear that the Court was well aware of the fact that student due process rights and academic freedom are deeply connected.

The first United States Supreme Court case (albeit in K-12) to clearly make a connection between academic freedom and discipline was *Goss v. Lopez*.[122] *Goss* was not a college case, but it has had important implications for higher education. In *Goss*, high school students were said to have engaged in conduct that their public high school prohibited.[123] These students were suspended without any hearing.[124] *Goss* held that constitutional due process requirements are triggered if a state actor adversely impacts a citizen's interest in life,

[122] 419 U.S. 565 (1975).

[123] *Id*. at 569–71. Nine high school students were suspended for various reasons. Six of the students were suspended for "disruptive or disobedient conduct." *Id*. at 569. Another student was suspended after he attacked a police officer on campus. *Id.* at 570. Dwight Lopez was suspended for physically damaging school property. *Id*. The last student was suspended for attending a demonstration at a different high school. *Id*. Following the demonstration, this student was arrested, but she was never formally charged. *Id*. The common denominator is that none of the students were afforded a hearing before their suspension. *Id*. at 569–71.

[124] *Id*. at 571.

liberty, or property.[125] *Goss* determined that, at least for public high school students, there is a sufficient property interest in education to trigger due process rights, and that this property interest was negatively impacted even when a student was suspended for ten days or less. [126] (Importantly, as discussed *infra*, the United States Supreme Court has never squarely decided whether college students have sufficient property or other protected interests in higher education to raise due process concerns. In key cases the Supreme Court has avoided deciding the issue by postulating such interests exist, an intriguing legal maneuver that legalists have struggled to understand.)

Goss did not specifically adopt *Dixon,* or rely on its holding. This was an easy sidestep: *Dixon* was readily distinguishable as a *college* case. But, like *Dixon*, *Goss* unmistakably killed the "education as privilege" doctrine of the era of power and prerogative at least insofar as it existed in K-12 education.[127]

Goss's biggest impact on education law came in response to the argument by the high school that there should be no hearing before short term suspension: . . . "It would be a strange disciplinary system in an educational institution, if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. . . . [These basic procedural requirements] . . . will provide a meaningful hedge against erroneous action."[128] Although *Goss* was a K-12 case, many college administrators came to think it must be applicable to higher education as well—a point the United States Supreme Court has never clarified.

Goss recognized that some questions in education turn on *fact* issues—such as whether a student was wearing gang colors to school or not. Other questions require the use of academic judgment—such as whether or not an exam paper is better than others. The former type of question—of *fact,* raised in *Goss*—benefits from *some* process to ensure that no *obvious* error has been made. After all, this is the sort of thing that academics do, or should do, all the time. Professors routinely double check their grades to make sure that they have not made obvious mistakes. Manuscripts receive meticulous proofreading; scientists constantly double check data. *Goss*, in a sense, is perfectly consistent with, and supportive of, academic freedom. Academics are not oblivious to correcting manifest error.

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[125] *Id*. at 579.
[126] *Id*. at 576.
[127] *Id.* at 574.
[128] *Id.* at 581, 583.

Goss is both compatible with and consistent with *Sweezy*. *Goss* does not interfere with academic freedom/judgment at all. All the *Goss* case asks is that administrators do *some* fact checking prior to meting out significant discipline. (As if to emphasize the limits of its holding, *Goss* made it perfectly clear that whatever "hearing" should take place should be consistent with the "teaching process."[129]) *Goss* does not insist that administrations seek or use process that reduces *all* error.

To the extent that *Goss* applies to higher education at all, we must assume that the pull of academic freedom would be even stronger. This may be why the Supreme Court ultimately took a K-12 case, not a college case. *Goss* left many open questions, especially for higher education. There is certainly nothing troubling in applying *Goss* to higher education unless it is *over*-applied.

Ultimately the United States Supreme Court filled the college law void (with grey space perhaps) and decided two cases involving higher education—*Horowitz*, and later, *Ewing*—to clarify the importance of academic freedom in "disciplinary" matters.[130] It is common for legalists to miss the point of these two cases. Neither was decided primarily to illustrate due process law. Both cases were decided to protect academic freedom. (*Horowitz* may have also been handed down to trim the sails of *Goss,* particularly in K-12 as discussed *infra*.)

In *Board of Curators of the University of Missouri v. Horowitz*, a medical student at a public university was dismissed for academic deficiency.[131] Her dismissal came in her final year of study.[132] Medical students in her program were put through an impressive course of study, including clinical rotations and various areas of study such as pediatrics, etc.[133] Students were subject to review by professors and practicing physicians.[134] A student's overall performance was reviewed by a body called the Council on Education, consisting of both students and professors, which could recommend academic sanctions such as probation and dismissal, subject to further review by a special committee of the faculty, itself subject in turn to ultimate review/approval by the Dean.[135]

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[129] *Goss,* 419 U.S. 565.
[130] *Ewing*, 474 U.S. at 226; *Horowitz*, 435 U.S. at 105.
[131] 435 U.S. at 78–79. Horowitz was a student at the University of Missouri-Kansas City Medical School.
[132] *Id*.
[133] *Id*. at 80.
[134] *Id*. at 80–81.
[135] *Id*. at 80. The special committee that reviewed the recommendation of the Council on Evaluation was the Coordinating Committee. *Id*.

The aggrieved dismissed student had received low evaluations in some rotations, was tardy or absent at times, and did not meet standards for personal hygiene.[136] The Council met several times to consider the student's situation. Ultimately they recommended dismissal, which the special faculty committee, the Dean, and later the Provost all upheld.[137] The Council and the special faculty committee did not meet (as was typical) with the student pursuant to making their recommendations.[138] The student was concerned that she did not have a chance to confront the committees prior to making their recommendations.[139]

Horowitz pointed out that a claim of deprivation of due process requires that a valid life, liberty, or property interest, be deprived.[140] Critically however, *Horowitz* ducked the issue of whether university students *ever* have *any* protected interests in their education. *Horowitz* avoided the issue of whether the property or liberty interest had been deprived by *postulating* that such interests could exist without so deciding.[141] This maneuver would be replicated later in *Ewing*. After so postulating necessary interests the Supreme Court went on to state that the amount of process given was in excess of due process requirements.

To say the least, *Horowitz*'s approach to an obvious, major issue in higher education was, and remains, somewhat mysterious. The mystery might be solved in part by looking at *Horowitz* through a non-college lens. *Horowitz* may actually represent a retrenchment of *Goss*. Or, to put this somewhat differently, the Supreme Court, with a new Chief Justice, may have used a *college* case to make a major point about K-12 law.

Horowitz spent considerable time castigating the lower federal appellate courts for overreacting to *Goss* by attempting to (1) require formal hearings of some sort and doing so expressly in the context of (2) "academic" dismissals.[142]

Horowitz's discussion of "academic" decisions and due process is crucial. *Horowitz* made the following observations:

[136] *Id*. at 81. Although Horowitz was dismissed in her final year, the faculty began to express their dissatisfaction with her performance starting in her first year. *Id*. at 80–81.
[137] *Id*. at 81–82.
[138] *Id*. at 80. Students were not generally allowed to meet with the Council or the Coordinating Committee concerning their academic performance. *Id*.
[139] *Id.*
[140] *Id*. at 82.
[141] *Id*. at 82–83.
[142] *Id.* at 85.

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss*, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances "provide a meaningful hedge against erroneous action." *Id*. The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.
>
> Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, "one in which the teacher must occupy many roles—educator, adviser, friend, and, at time, parent-substitute." *Goss v. Lopez*, 419 U.S. at 594, 95 S. Ct. at 746 (Powell, J., dissenting). This is especially true as one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and

> more specialized. In *Goss*, this Court concluded that the value of some form of hearing in a disciplinary context outweighs any resulting harm to the academic environment. Influencing this conclusion was clearly the belief that disciplinary proceedings, in which the teacher must decide whether to punish a student for disruptive or insubordinate behavior, may automatically bring an adversary flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context. We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship. We recognize, as did the Massachusetts Supreme Judicial Court over 60 years ago, that a hearing may be "useless or harmful in finding out the truth as to scholarship." *Barnard v. Inhabitants of Shelburne*, 216 Mass. at 23, 102 N.E. at 1097.[143]

Where the goals of the educators are *educational*—and thus where academic freedom thrives—*Horowitz* refused to require a "hearing" precisely because of the risk of the deterioration of the faculty-student relationship and the impact such a legal requirement would have on academic freedom. *Horowitz* is *Sweezy*: due process and academic freedom interrelate.

Horowitz in the above language also appeared to give credence to the now axiomatic conduct/academic distinction. For *Horowitz*, however, this "distinction" was neither the same distinction made in *Dixon,* nor a statement of some ineluctable ontological higher education distinction. *Horowitz* was concerned with the *nature* and *process* of an inquiry into student performance, not whether the inquiry was ultimately *labeled* "academic" or "conduct." The student in *Horowitz* was dismissed in large measure for being absent or late, and dirty. These violations could easily be seen as "conduct" violations by legalists: *Horowitz* thought not. But if being clean and on time are legitimately related to an academic program then, *ipso facto* these standards would be *academic.* What makes something academic is that it arises from is the expression of academic freedom. What is academic will turn on

[143] *Id*. at 89–91.

what academics legitimately say is academic, and will vary from context to context, program to program, etc. There is no reason to assume under *Horowitz* that all expressions of academic freedom will be the same everywhere and at all times. Indeed, as *Horowitz* suggested in the above language, a college can even cede its academic freedom, if it chooses to, by being adversarial, legalistic, and oppositional with students. Moreover, *Horowitz*, unlike *Dixon*, was not creating an academic/conduct distinction to protect its holding on appeal.

Horowitz's central message is that due process impacts academic freedom and the exercise of careful and deliberate academic judgment *is* due process (and more) if there is such a thing in higher education. The Supreme Court reinforced the point in 1985 in *Regents of Michigan v. Ewing*.[144] *Ewing* was likely decided to settle the issue of the essential connection between academic freedom and due process for good. (Neither *Horowitz* nor *Ewing* realized, however, that a culture of legalists had formed who would resist direction from a court advocating non-legal solutions.) *Ewing* tried to reiterate the subtle, but important, point that the process due under law is not always *legalistic* process. The Supreme Court saw several lower federal courts stray from its messages in *Horowitz*.[145]

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A digression is necessary here.

The Supreme Court—for somewhat legally technical reasons—believes that due process has two dimensions—one *procedural* and the other *substantive*.[146] Most people associate denials of due process with procedural problems. This was exactly the issue in *Dixon* – the lack of a hearing meant defective procedure, meant due process violation.

There can also be another due process issue—*substantive* due process. For a non-lawyer, ignore the specific language of the distinction and instead focus on what the procedural/substantive distinction is intended to convey. On the one hand, a college can fail to deliver promised process. On the other hand though, a college could

[144] 474 U.S. at 214.

[145] *See generally* Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L.J. 243 (2001) (explaining the due process implications when colleges impose academic and disciplinary standards on their students).

[146] U.S. Const. amends. X, XIV; *see* 16B AM. JUR. 2D *Constitutional Law* § 901 (2008) (noting the dual protections provided by the Due Process Clause, which include substantive and procedural safeguards); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 521 (2d ed. 2005) (discussing the two types of protections afforded by the Due Process Clause, substantive and procedural).

follow all its promised rules and procedures and still do something wrong. The Supreme Court has said that when reviewing under standards of *substantive* due process, a college's actions must not be arbitrary and capricious.[147] Consider the following illustrative situation, which isolates an issue of substantive due process.

Unbelievably, deserters from the German Army on the eastern front were later put to death by post-war German courts for desertion—even though the war was over and the war that soldiers deserted from was a violation of international law.[148] The post-war German courts followed their rules and procedures punctually, but something was very, very wrong in a substantive sense in what they were doing. Colleges might think of substantive due process as directing them to evaluate their processes beyond whether they are simply following all their rules and procedures.

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Although *Horowitz* likely should have made the subsequent decision in *Ewing* unnecessary—the Supreme Court took the occasion to address the doctrine of due process as applied to higher education in some detail again.

In *Ewing*, a student failed a crucial written examination that became the nail in his academic coffin.[149] The student had enrolled in a special six-year "interflex" program, which was a joint program with the college and the medical school.[150] As part of the program, the student was required to take medical boards and receive a certain minimum score.[151] The student failed several sections of the boards, and received a cumulative score that was very low, and insufficient for his program.[152] A review board looked at the student's individual file: after considering the student's file, the board "voted unanimously to drop him from registration in the program."[153] The student petitioned the board, in

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[147] *Ewing*, 474 U.S. at 217.
[148] H.L.A. HART, THE CONCEPT OF LAW 125 (10th ed. 1979).
[149] *Ewing*, 474 U.S. at 216. "Ewing failed five of the seven subjections on that examination, receiving a total score of 235 when the passing score was 345." *Id*.
[150] *Id*. at 215.
[151] *Id*. at 215–16. Not only was Ewing unable to attain a passing score, but he managed to record the lowest score in the history of the Interflex program. *Id*. at 216. Or, at least so the case reported. *See* JUDITH AREEN, HIGHER EDUCATION AND THE LAW CASES AND MATERIALS 341–42 (2009).
[152] *Ewing*, 474 U.S. at 216.
[153] *Id.*

writing, to reconsider.[154] The student was even given a chance to appear before the board on rehearing to present his side of the matter.[155] The board reaffirmed its earlier position, again unanimously.[156] Following the boards' decisions, the student took his position to an Executive Committee of the medical school, which denied his appeal and later twice rejected his application for readmission.[157] The student was given the opportunity to appear before this board as well.[158]

There were no procedural irregularities that caused any violation of procedural due process: "It is important to remember that this is not a case in which the procedures used by the university were unfair in any respect; quite the contrary is true."[159] Moreover there was no basis for a bad faith claim.[160] Instead the Supreme Court agreed to hear the case "to consider whether the Court of Appeals had misapplied the doctrine of 'substantive' due process."[161] The lower federal court in *Ewing* said it had read far too many "legalisms" into prior Supreme Court decisions.

According to *Ewing*, a decision is not "arbitrary or capricious" (the standard of review in substantive due process matters) if it is made "conscientiously and with careful deliberation."[162] A college should be able to show that its decision was made with professional judgment, and in accord with accepted norms of academics. If academics do as academics should, there are no violations of rules of substantive due process, if any apply in the first place.

The reason why—consistent with *Horowitz*—is that the exercise of academic judgment is central to academic freedom. As *Ewing* stated,

> Ewing's claim, therefore, must be that the University misjudged his fitness to remain a student in the Interflex program. The record unmistakably demonstrates, however, that the faculty's decision

[154] *Id*. Ewing blamed his poor test results on a series of events that precluded him from being able to adequately prepare for the examination. *Id*.
[155] *Id*. Ewing also tried to convince the Board that his poor test results did not reflect his ability or potential. *Id.*
[156] *Id*. The Executive Committee of the Medical School "unanimously approved a motion to deny his appeal for a leave of absence status that would enable him to retake Part I of the NBME examination." *Id.*
[157] *Id*. at 216–17.
[158] *Id*.
[159] *Id*. at 225.
[160] *Id*. at 220. The record from the trial court did not contain any indications that the University's decision was based on any impermissible motives. *Id.*
[161] *Id*. at 221.
[162] *Id*. The Court also respected the University's decision because it carefully based its decision "on an evaluation of the entirety of Ewing's academic career." *Id*.

> was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.
>
> Considerations of profound importance counsel restrained judicial review of the substance of academic decisions.
>
> . . .
>
> Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making."[163]

Ewing continued and made a definitive statement of the connection between process, academic freedom, and the academy:

> Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself. Discretion to

[163] *Id*. at 225–26 (citations omitted).

> determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university.[164]

A careful and deliberate academic judgment *is* due process, in a substantive due process sense, as it is in a procedural sense. (This is true even in situations—unlike *Ewing* and *Horowitz,* but like *Goss*—typically today described as "conduct violations." An academic would naturally check facts before asserting a matter of fact such as "you were tardy" or "you used an inappropriate source during an exam.") The process that is due in the academic environment is *not* legalistic process. The process of learning and teaching is not like the process of prosecuting a criminal or hearing a civil case regarding disputes over contracts between commercial entities. Teachers and academics should operate like teachers and academics, not judges. The Supreme Court sent this message loudly and subtly, *twice*.[165]

Ewing did *not* supply a specific account of precisely what academic process looks like. Following *Sweezy*, *Goss*, and *Horowitz*, *Ewing* believed that if a *court* were to supply a vision of such a process that court would be interfering with the very freedom it was trying to protect. A generation of legalists would later project ambiguity and open-endedness onto this deliberate act of judicial restraint. But there is nothing open-ended or ambiguous at all in *Horowitz* or *Ewing*. The clear message: go forth and express your academic freedom genuinely and *that* will satisfy due process requirements, if any. Power and prerogative of an earlier era was at an end. Real power now lay in the power of academic process—a process involving balancing, weighing and deliberating.

II. Academic/Conduct

The great hobgoblin of modern higher education process law is the "distinction" between decisions on matters "academic" and decisions on matters "non-academic" or "conduct." The Supreme Court in *Horowitz* and *Ewing* would be perplexed by the ways in which higher education has made academic/conduct distinctions operational in its process systems, and by the fact that higher education has all but abdicated core academic freedom.

The leading treatise in higher education law, Kaplin and Lee's *The Law of Higher Education*, states the modern legalist view of the

[164] *Id*. at 226 (citations omitted).
[165] *Id*. at 225.

academic/conduct "distinction." According to Kaplin and Lee, *Horowitz* and *Ewing* mean the following:

> *Horowitz* signals the court's lack of receptivity to procedural requirements for academic dismissals. Clearly an adversary [sic] hearing is not required. Nor are all of the procedures used by the University in *Horowitz* required, since the Court suggested that Horowitz received more due process than she was entitled to. But the Court's opinion does not say that no due process is required. Due process probably requires the institution to inform the student of the inadequacies in performance and their consequences on academic standing. Apparently due process also generally requires that the institution's decision making [sic] be "careful and deliberate." For the former requirements, courts are likely to be lenient on how much information or explanation the student must be given and also on how far in advance of formal dismissal the student must be notified. For the latter requirement, courts are likely to be very flexible, not demanding any particular procedure but rather accepting any decision-making process that, overall, supports reasoned judgments concerning academic quality. Even these minimal requirements would be imposed on institutions only when their academic judgments infringe on a student's "liberty" or "property" interest.
>
> Since courts attach markedly different due process requirements to academic sanctions than to disciplinary sanctions, it is crucial to be able to place particular cases in one category or the other. The characterization required is not always easy. The *Horowitz* case is a good example. The student's dismissal was not a typical case of inadequate scholarship, such as poor grades on written exams; rather, she was dismissed at least partly for inadequate peer and patient relations and personal hygiene. It is arguable that such a decision

> involves "fact-finding," as in a disciplinary case more than an "evaluative," "academic judgment."[166]

This synthesis of *Horowitz*, *Ewing*, and lower federal court cases accurately states the legalists' perception of the law of due process in higher education arising from the Supreme Court.

Kaplin and Lee's classically legalist view of *Horowitz* and *Ewing* is that constitutional procedural requirements are "unclear" in that case. However, the Supreme Court was neither "cautious," nor "unclear." *Horowitz* was clearly opposed to legalistic process requirements. *Horowitz*, and later *Ewing*, begged higher education to see that the type of process that is due in higher education is not the type of process lawyers use in a court of law. Process in higher education calls for judgment, balancing, weighing, evaluation, etc.—the very kinds of things legalists tend to label as vague or indefinite. *Horowitz* and *Ewing* are very clear about not requiring overly legalistic process. *Horowitz* and *Ewing* boldly constitutionalized the way academics express their academic freedom through academic process. Both cases acknowledge a vision of academic process that is as flexible as the operations of the academy itself—without ever actually imposing due process requirements on higher education.

To Kaplin and Lee, and others, what is "clear" about *Horowitz* is exactly what in fact is not. The Supreme Court deliberately chose *not* to make a clear distinction between academic and conduct matters because that "distinction," if there is one, is not what is important. Since *Horowitz* and *Ewing* many scholars and courts have dwelled upon the distinction between academic and conduct issues, believing as Kaplin and Lee do, that the Supreme Court somehow singled out "academic" matters for more protection from due process requirements than conduct matters.[167]

We should be very careful in reifying the academic/conduct distinction as legalists do. *Horowitz* did not seek to create some magic bright line between conduct and academic matters. Legalists put the cart

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[166] KAPLIN & LEE, *supra* note 22, at 985. The need to reduce *Horowitz* and *Ewing* to an academic/conduct distinction is itself a feature of the legalists' preference for objectivity. Legalists press *Horowitz* and *Ewing* into objective categories and are not comfortable with the level of subjectivity and deference those cases embrace. Legalists tend to be reductionist in this way, often attempting to reframe phenomenon in objective categories. This is where lawyers and legalists usually part ways. Lawyers (and jurists) must become comfortable with law's other side.

[167] *See, e.g,.* Than v. Univ. of Tex. Med. Sch., 528 U.S. 1160 (2000). *See generally* Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619 (2003); Dutile, *supra* note 145, at 244–52.

before the horse. If promptness and cleanliness are academic virtues what could *not* be academic? *Horowitz* made *another* distinction primary. It is crucial *first* to determine if the situation is one that requires judgment, balancing, weighing, etc. *or* if it is susceptible to straightforward factual verification. Then, *and only*, then does the academic/conduct distinction come into play as a *conclusion* about an analysis regarding the way in which the academics have proceeded. If academics ultimately assert that cleanliness and promptness are virtues of academic success, then decisions made about cleanliness and promptness, if made in good faith, are subject to the protections accorded academic judgment. The Supreme Court, in *Horowitz*, *Ewing*, and *Goss,* tried to get educators to understand that an *epistemological* distinction precedes and supports any *ontological* distinction made by way of conclusion. It is critical to first determine if the question before an academic is a simple question of fact verification *or* a question of judgment and evaluation—not whether the matter is "conduct" or "academic."

Several pre-*Horowitz* decisions in the lower federal courts missed the point completely. Consider the oft-referenced case of *Brookins v. Bonnell*.[168] A community college student in a nursing program was dismissed for several reasons—poor attendance, failure to disclose attendance at another similar program, and failure to meet certain state regulatory requirements.[169] The federal trial court ruled that the dismissal was a conduct matter—whether a student complied with school regulations. There were indeed "fact" questions imbedded in the case, but *Brookins* got the matter wrong by calling it one of "conduct." Many academic boards entertain issues of questions of fact—did "so and so" attend class, etc.—and they may also weigh many variables in making an individual academic determination, just as in *Horowitz*. The mere presence of fact questions does not transform a process into a process of simple fact verification like *Goss.*

Brookins is simply out of step with *Horowitz. Brookins* applied a conduct/academic distinction without giving proper weight to what academics do. In cases like *Brookins* the "facts" may or may not be significantly in dispute but *evaluation* of the facts *in context is*—as in *Horowitz* and *Ewing*. Often, how we *characterize* "facts" is what is crucial. This is, epistemologically speaking, *evaluation. Brookins* shows how a legalistic frame of reference can reverse the significance of

[168] 362 F. Supp. 379, 382–83 (E.D. Pa. 1973).
[169] *Id*. at 380.

epistemological and ontological distinctions and make the labeling of a matter improperly significant.

What makes the legalists position so difficult to sort out is that conduct/academic distinctions have a way of being self-fulfilling prophecies in higher education law. *If* an institution *believes* that a concern with a student is a conduct or academic issue - or that the labels have independent significance - then it is likely to be so in the eyes of a court. *Horowitz* and *Ewing* looked to higher education to identify its own values; thus if *we* believe in a distinction we can make it real in the eyes of the law. A college can forfeit much of its academic freedom simply by failing to assert it, recognize it, or assert it properly. (Of course, an institution cannot simply call something "academic" to gain *Horowitz*-like protection. That the assertion that something is "academic" must be made bona fide.) Academic freedom ultimately is deeply connected to the First Amendment and it is essential to express oneself to gain First Amendment freedoms.[170] A college can only gain the greatest due process protection by expressing academic freedom through a deliberative and careful academic process; or can lose it by imaging the process of academics in legalistic, overly objective and oppositional ways. Academic freedom is such that academics can choose to forfeit it. The choice of an academic/conduct distinction is just that. Not a mandate; mandated only by choice.

The United States Supreme Court certainly *permits* colleges to make academic/conduct distinctions in the way they handle student concerns. But the distinction that the Court drew for purposes of protecting academic freedom was fundamentally *epistemological*, not *ontological*. The distinction is rooted in *how* an academic community makes decisions. Ontologically, any conduct/academic distinction is derivative from epistemological distinction. Thus, under *Horowitz* there is no sense in the concept of a so called "mixed" conduct/academic decision.[171] A decision might require fact verification *and* evaluative deliberation, but there is nothing "mixed" about this—there are simply two separate decisions to make on the way to an ultimate decision. To the extent that due process requirements apply at all to public colleges, *Goss*, *Horowitz*, and *Ewing* send a straightforward epistemological

[170] *See generally* THE FEDERALIST NOS. 1–89 (Alexander Hamilton, James Madison, & John Jay) (interpreting and explaining the United States Constitution and the intention of its drafters).

[171] Kaplin and Lee assert that such a situation can exist. KAPLIN & LEE, *supra* note 22, at 984–88. However, because the distinction is essentially epistemological at its root, a single decision can only be reached in one of two ways. While ultimate decisions about students may involve both, no single decision is essentially mixed.

message. If a matter involving a student reduces to simple verifiable questions of fact, hedge against erroneous action by having some process to avoid manifest error. If the matter involves evaluation use deliberative and careful academic process to make decisions, and the best way to stay out of court is by not being overly legalistic.

III. Accountability Under Law, not Legalistic Process

When courts hand down decisions requiring "due process" using legalistic terms it is natural for higher education to equate legal process requirements with requirements for *legalistic* process.

Goss itself may be partly to blame for the overly legalistic higher education culture we inhabit. *Goss*—like *Dixon*—used terms with legally charged meaning like "notice" and "hearing." *Goss* also stated that more process might be needed in situations involving very serious sanctions such as long-term suspension from high school. This all suggests legalisms may be required. *Goss* may not have properly anticipated the possibility that there would be misunderstanding about the use of legally charged terms.

Nonetheless, three things make it clear that *Goss* never actually meant to send the message that *higher education* should use legalistic process.

First, *Goss* is a high school case—primary and secondary education—involving clear property interests (states typically mandate primary and secondary education and/or state specific legal rights to primary and secondary education). Also, students *must* go to school, unlike higher education.[172] Even if *Goss* did anticipate the use of legalisms for K-12 education, it did not seek to imply that legalistic process was appropriate for higher education.

Second, *Goss* did not mean for the legal terms it used to be interpreted so literally in legalistic ways. *Goss* explicitly said that a student is entitled to "some kind of notice and . . . some kind of hearing."[173] *Goss* went on to state very informal due process mandates,

> We do not believe that school authorities must be totally free from notice and hearing requirements… [Students must] be given oral or written notice of the charges . . . and [an explanation of the evidence authorities have and an opportunity to present [his or her] side of the story. [Schools are required to

[172] *Goss*, 419 U.S. at 565.
[173] *Id*. at 579.

> provide] at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.[174]

Goss warned K-12 *explicitly* about using administrative or criminal style proceedings: "[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."[175]

Goss made it clear that formal (meaning legalistic) requirements have two dangers: (1) excessive cost, and (2) interference with education goals. In this vein, *Goss* described a more informal hearing process: "[E]ffective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action."[176] *Goss* demands little more than a process that consists of "I asked you here today because I am worried about it," or "what do you have to say for yourself now, young man?" *Goss* sought to provide students sufficient "process" to create meaningful protection against error, and envisioned a "hearing" as no more than a chance to offer one's side of a story at some point, and in some form.

A crucial implication of *Goss* is often overlooked. If *any educational* process is so formalized and complex that the process itself makes many errors—if students easily navigate to avoid the system or that the system generates its own process errors because of its complexity—*that* process might violate *Goss*. Too much process can generate manifest error just as too little can. One particularly dangerous type of error legalistic systems tend to make is in *not* providing consequences to individuals who transgress community rules and standards.

Third, *Horowitz* and *Ewing* settle the meaning of *Goss*, at least for higher education. When *Horowitz* chastised lower courts for imposing too much legalistic process on higher education it reminded lawyers and colleges what *Goss* intended. Admittedly, the facts in *Horowitz* are different from those in *Goss*, but *Horowitz* made sure to clarify *Goss*:

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[174] *Id*. at 581.
[175] *Id*. at 583.
[176] *Id*. The Court stated, "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Id*.

> The Court of Appeals apparently read *Goss* as requiring some type of formal hearing at which respondent could defend her academic ability and performance. . . . But we have frequently emphasized that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.[177]

Horowitz emphasized that due process in an educational setting should be (1) informal, (2) flexible, and (3) respectful of the education process.[178] *Horowitz* used *Goss* to point out that if legalistic process is not suitable for resolution of "fact" issues then it is even more out of place in decisions with respect to evaluative issues of academic competence. *Horowitz* said it succinctly,

> [Academic judgment] is by its nature more subjective and evaluative than the typical factual situations presented in the average disciplinary decision [such as in *Goss*]. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.[179]

Legalistic process *especially* is out of place in the realm of educational evaluation.

From the Supreme Court: procedures that negatively impact an academic environment and case law that requires overly legalistic process is unconstitutional and dangerous. A classic example of a case that is indefensible (at least outside the context of First Amendment rights of students) in light of *Goss*, *Horowitz*, and *Ewing* is the well-known and oft-cited case of *Esteban v. Central Missouri State College*.[180] This case predates *Goss*, *Horowitz*, and *Ewing* and illustrates

[177] 435 U.S. at 85–86 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).
[178] *Id.*
[179] *Id*. at 89–90.
[180] 277 F. Supp. 649 (W.D. Mo. 1967)

the way some courts[181] after *Dixon* became infatuated with legalistic process for higher education.

In *Esteban*, student protestors who had been disciplined were later told by a federal district court that they were entitled to an extremely high level of legalistic process.[182] Without ever squarely addressing the fact that *Esteban is at least* highly *suspect* in light of *Goss*, *Horowitz*, and *Ewing.*[183] Kaplin and Lee summarize and rely upon

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[181] *See, e.g.,* Soglin v. Kauffman, 418 F. 2d 163, 167–68 (7th Cir. 1969) (foisting court-like process on higher education; and requiring "rules" to manage a university environment); Abbariao v. Hamline Univ. Sch. of Law, 258, N.W. 2d 108, 112 (Minn. 1977) ("Expulsion for misconduct triggers a panoply of safeguards designed to ensure the fairness of fact-finding by the university." (citation omitted)).

[182] Esteban v. Central Mo. State Coll., 277 F. Supp. 649, 651 (W.D. Mo. 1967)

[183] The 1967 decision in *Esteban* is also suspect in light of subsequent history. After the students were told that they had the above-referenced procedural rights, their institution was ordered to rehear their discipline matters subject to the strict legalistic requirements; the students lost, and went to court again. Esteban v. Cent. Mo. State Coll., 290 F. Supp. 622 (W.D. Mo. 1968). They lost, *id*., and appealed to the Eighth Circuit, where they lost again. Esteban v. Central Mo. State Coll., 425 F.2d 1077 (8th Cir. 1969) Then Judge Blackmun (later Justice Blackmun of the United States Supreme Court, 1970 to 1994) authored the Eighth Circuit opinion, and flatly contradicted the original district court ruling in 1967:

> We agree with those courts which have held that a school has inherent authority to maintain order and to discipline students. State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, 827 (1942), *cert. denied*, 319 U.S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703; Jones v. State Bd. of Educ., 279 F. Supp. 190, 202 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969); Buttny v. Smiley, 281 F. Supp. 280, 285, 286 (D. Colo. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 757 (W.D. La. 1968); Barker v. Hardway, 283 F. Supp. at 235. We further agree that a school has latitude and discretion in its formulation of rules and regulations and of general standards of conduct. Goldberg v. Regents of University of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 472 (Ct. App. 1967); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 618 (M.D. Ala. 1967); Jones v. State Bd. of Educ., *supra*; Buttny v. Smiley, *supra*; Cornette v. Aldridge, 408 S.W.2d 935, 941 (Tex. Civ. App.1966).
>
> We regard as quite distinguishable cases such as *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967), and Dickey v. Alabama State Bd. of Educ., supra, where the focus was on an attempted restraint of peaceful assembly or speech. Our attention has been called to the fact that Judge Doyle, in his recent opinion in *Soglin v. Kauffman*, 295 F. Supp. 978, 990-991 (W.D. Wis. 1968), expresses disagreement with the observations of Judge Hunter on this aspect of the case. To

the extent that, in this area, Judge Doyle is in disagreement with Judge Hunter, we must respectfully disagree with Judge Doyle.

The appellants argue, to what exact purpose we are not sure, that attendance by a Missouri resident at a publicly supported educational institution of his state is an important right. We are not certain that it is significant whether attendance at such a college, or staying there once one has matriculated, is a right rather than a privilege. Education, of course, is vital and valuable, *Brown v. Board of Educ.*, 347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and remaining in college in good standing, much like reputation, is also something of value. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193. So, too, is one's personal freedom. But one may act so as constitutionally to lose that freedom. And one may act so as constitutionally to lose his right or privilege to attend a college.

College attendance, whether it be a right or a privilege, very definitely entails responsibility. This is fundamental. It rests upon the fact that the student is approaching maturity. His elementary and secondary education is behind him. He already knows, or should know, the basics of decent conduct, of nonviolence, and of respect for the rights of others. He already knows, or should know, that destruction of property, threats to others, frightening passersby, and intrusions upon their rights of travel are unacceptable, if not illegal, and are not worthy of one who would pursue knowledge at the college level.

These plaintiffs are no longer children. While they may have been minors, they were beyond the age of 18. Their days of accomplishing ends and status by force are at an end. It was time they assumed at least the outward appearance of adulthood and of manhood. The mass denial of rights of others is irresponsible and childish. So is the defiance of proper college administrative authority ("I have the right to be here"; "I refuse to identify myself"; gutter abuse of an official; the dumping of a trash can at a resident's feet; "I plan on turning this school into a Berkeley if * * *"; and being a part of the proscribed college peace-disturbing and property-destroying demonstration). One might expect this from the spoiled child of tender years. One rightly does not expect it from the college student who has had two decades of life and who, in theory, is close to being 'grown up.'

Let there be no misunderstanding as to our precise holding. We do not hold that any college regulation, however loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the

Esteban significantly. Their interpretation and elevation of *Esteban* has influenced a generation of legalists to make a subtle, but critical mistake:

> Probably the case that has set forth due process requirements in greatest detail and, consequently, at the highest level of protection, is *Esteban v. Central Missouri State College*, 277 F. Supp 649 (W. D. Mo. 1967). . . . The plaintiffs had been suspended for two semesters for engaging in protest demonstrations. The lower court held that the students had not been accorded procedural due process and ordered the school to provide the following protections for them: (1) a written statement of the charges, for each student, made available at least ten days before the hearing; (2) a hearing before the person(s) having power to expel or suspend; (3) the opportunity for advance inspection of any affidavits or exhibits the college intends to submit at the hearing; (4) the right to

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> inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded (as Judge Hunter by his first opinion here specifically required) by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement.
>
> After all, the test, we feel, is that of reasonableness. *Dickey v. Alabama State Bd. of Educ.*, 73 F. Supp. at 618. On that standard we perceive here no denial of constitutional rights of Esteban or of Roberds. If these two plaintiffs are really serious in what is said to be their protestations of desire to complete their college education, we naturally assume that they will apply for readmission. We are mildly surprised that they have not done this as yet. We also assume, of course, that the College will view their applications, if and when they are ever submitted, with the respect and deferences to which they are entitled.

415 F. 2d at 1089–90.

> bring counsel to the hearing to advise them (but not to question witnesses); (5) the opportunity to present their own version of the facts, by personal statements as well as affidavits and witnesses; (6) to right to hear evidence against them and question (personally, not through counsel) adverse witnesses; (7) a determination of the facts of each case by the hearing officer, solely on the basis of the evidence presented at the hearing; (8) a written statement of the hearing officer's findings of fact; and (9) the right, at their own expense, to make a record of the hearing.[184]

Kaplin and Lee later refer to these requirements as "the outer limits of what a court might require" and state that *Esteban* identifies "those procedures most often considered valuable for ascertaining facts where they are in dispute."[185]

Kaplin and Lee, however, are wrong if they suggest that courts after *Goss*, *Horowitz*, and *Ewing* should require process like *Esteban*. This is legalist credo, not law. *Esteban* does not represent the outer limits of constitutional requirements, it is, and must be, unconstitutional in light of subsequent history in its circuit and *Goss*, *Horowitz*, and *Ewing unless* it is to be distinguished somehow on the grounds that student First Amendment rights were implicated. The procedures that *Esteban* outlines are precisely the type of overly legalistic criminal/administrative procedures that both *Horowitz* and *Ewing* have criticized for higher education. *Esteban* is *not* a foundational case. Kaplin and Lee choose to emphasize *Esteban* because it fits legalist mythology better than *Horowitz* and *Ewing.*

In light of *Goss*, *Horowitz*, and *Ewing*, *Esteban's* highly legalistic and formalized process is neither legally required, nor to be encouraged. It might not be unconstitutional for a college to offer such procedures, but it would be unconstitutional for a court to *require* such procedures for a college that chose not to do so. *Esteban* is extremely dangerous because such highly legalistic procedures are costly and detrimental to the educational process, and can create the type of error *Goss* sought to combat. *Esteban* failed to consider that such highly formalized processes themselves tend to generate error when deployed in educational contexts. *Esteban* also did not consider that the process it

[184] KAPLIN & LEE, *supra* note 22, at 975–76.
[185] *Id.* at 976

described could be so slow and cumbersome that it would be highly ineffective in managing a college environment. *Esteban* is *Dixon* on energy drinks and not constitutionally sound.

Nonetheless, many colleges and universities today have *Esteban*-like procedures. These procedures are in the handbooks, policy manuals, etc.; colleges may now be obligated to provide the process promised. Misguidedly, Kaplin and Lee bait colleges into adopting *Esteban*-like procedures, which in turn (and only in turn) makes those procedures more likely to be constitutionally required.

Choosing *Esteban* as a governing principle is a choice—a choice by legalists displaying a preference for law-like procedures in college. This is a dangerous choice, made even more dangerous if administrators believe it to be a mandate.

Why did *Goss*, *Horowitz*, *and Ewing* create accountability under law but not insist on legalistic process in higher education? The Supreme Court did not seek to turn higher education into a litigation culture, but sought instead to increase the level of transparency and accountability in how students were managed. The Supreme Court also wished to send strong messages regarding academic freedom. Prior to *Dixon*, *Goss*, *Horowitz* and *Ewing* double secret probation was the order of the day. The Court changed the course of the law of higher education to ensure that students would not be victimized by palpable error, and would have a chance to see, in more transparent ways, why they were being managed certain ways. *Horowitz* and *Ewing* send an implicit threat to Dean Wormer: if you attempt to dress up double secret probation in the garments of academic evaluation, courts just might impose due process requirements on higher education, and in earnest. *Horowitz* and *Ewing* deliberately and measurably brandished due process at higher education.

It is important to put *Dixon*, *Goss*, *Horowitz*, and *Ewing* into context. The Supreme Court, under the tutelage of Chief Justice Earl Warren, had embarked in the 1950s and 1960s upon a path of remaking due process rights in America[186] Today we take many of these new rights for granted, as if they have always existed. Yet, during a period of about twenty years, the Warren court rewrote the law of due process. One of the major goals of the Warren Court was to create a new level of transparency and fairness in governmental action in general. By the time *Horowitz* and *Ewing* were decided, the Warren Court era was over, and the Warren Court never made due process in higher education a top

[186] *E.g.* Fuentes v. Shevin, 407 U.S. 67 (1972); *Pickering*, 391 U.S. 563; Miranda v. Arizona, 384 U.S. 436 (1966).

priority. Even the liberal Warren Court was loathed to bring legalisms in to higher education.

D. Force and Process

The era of power and prerogative did not end for most American college students as a result of the grand design of the Warren Court. Contrary to popular higher education wisdom, the United States Supreme Court did not embrace, or even ratify, strong college due process cases like *Dixon* or *Esteban*. Congressional legislation played a much larger role in ending the era of power and prerogative than due process. The era of power and prerogative in higher education was ultimately brought to its knees by campus unrest in the late 1960s and events at Kent State in May 1970. The rise of the era of legalisms in higher education is directly linked to Kent State.

Campus unrest increased in the late 1960s. Much of the energy behind campus activism was directed at the war in Vietnam, although there certainly were many other forces at work as well. Forceful confrontations with police and administrators became increasingly common. However, when President Nixon announced the expansion of the Vietnam War in the spring of 1970, campus unrest came to a crescendo. In many ways, events at Kent State have become emblematic of this moment in American higher education history.

On May 4, 1970, four students were shot and killed by National Guardsmen on the campus of Kent State University, in suburban, mostly white, middle class location near Akron, Ohio. These shootings were not isolated—roughly contemporaneously students were shot, and some killed, at other institutions of higher education[187]—although for various reasons, Kent State is far better known. Undoubtedly, events at Kent State gained notoriety because the other major violent incidents occurred in the South, and could more easily have been viewed as violence in the struggle to end segregationist policies in the South. But the confrontation at Kent State was between a largely white student population and the National Guard in Ohio, and for many Americans such violence, in such a place, was unthinkable.

Kent State is one of American higher education's most sacred spaces. A place, and point in time, that marked an end of an era.

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[187] *See* THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 411 (1970) (discussing the events at Jackson State College in May of 1970); *see generally* JACK BASS & JACK NELSON, THE ORANGEBURG MASSACRE (2d ed. 2002) (discussing the tragic events that transpired at South Carolina State University in 1968).

The era of legalisms has developed its own process creation mythology, which often relegates the legal significance of Kent State to a tragic and avoidable, violent confrontation. (Consider that the most recent edition of Kaplin and Lee makes no specific reference to Kent State *at all* in its subject index, and the *only* discussion of Kent State[188] is in relation to technical legal issues surrounding the event including a brief discussion of the United States Supreme Court decision in *Scheuer v. Rhodes* (and that discussion is limited to the issue of governmental immunity).[189] Legalists often focus upon *Dixon* and other cases (such as *Esteban*) as formative moments in the development of legalistic process in higher education.

However, events at Kent State in May 1970 marked the high water mark of the era of power and prerogative, and the point from which the era of legalisms emerged conclusively as the new, and dominant norm for institutions of higher education nationally. After Kent State campuses that had not already done so sought to reorder their relationships with students *under law and legalisms.* While some Southern institutions of higher education had already been forced to constitutionalize student process—notably in the Eighth and Fifth Circuit Courts—many other institutions of higher education began to shift to legalisms in the aftermath of Kent State irrespective of judicial mandates. Events of Kent State clearly motivated many campuses to use "due process" model codes, or the like, to manage student populations.

The circumstances surrounding events at Kent State were complex, and generated numerous legal battles, both criminal and civil. Litigation—both criminal and civil—provided little to no closure to the shooting of May 4, 1970. Most of the legal issues decided focused upon rules of evidence and sovereign immunity and did not provide any obvious answers to the pressing questions, such as who was at fault. The fact that the legal system did not offer resolution to the broader issues raised by the incidents of May 4, 1970 thrust the investigative reports—quasi-executive and legislative—into the lime-light. This feature of the legal aftermath of Kent State has diminished its significance to legalists somewhat, because legalists have been particularly focused on judicial and legislative mandates for reform. In the world of objective legal commands, statements from courts and Congress are more significant than statements in investigative reports.

As it would turn out, the clearest directives to campuses for managing their environments would come from the investigative reports

[188] KAPLIN & LEE, *supra* note 22, at 347, 347 n.29.
[189] 416 U.S. 232 (1974).

not legal cases—and the greatest push to action from the violence itself and its aftermath. Shortly after Kent State, President Nixon announced the creation of the President's Commission on Campus Unrest on May 24, 1970.[190] Former Governor of Pennsylvania William Scranton took the chair of the commission, and the report that the commission generated is known as the "Scranton Commission Report."[191] Although the commission was charged to consider the general state of campus unrest throughout the country, the commission was told to give special attention to the shootings of May 4, 1970, at Kent State and the subsequent killings at Jackson State University on May 15, 1970.[192] The Scranton Commission went straight to work. In September 1970, the Scranton Commission Report became public.[193]

The Scranton Report did not exculpate student protesters at Kent State. On the contrary, the Commission stated that "the conduct of many students and non-student protesters at Kent State on the first four days of May 1970 was plainly intolerable."[194] Some students, as the commission stated, bore responsibility for the deaths on May 4, 1970: "those that burned the ROTC building, those who attacked and stoned National Guardsmen, and those that urged them on and applauded their deeds share the responsibility for the deaths and injuries of May 4."[195]

Although some students, and others, were assessed some blame, some of those shot, and shot at, were *entirely* blameless. The United States Justice Department Report summarized the findings of an enormous FBI report on the incident. Here were some of the key findings:

> 20. [Fatally shot students] Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandra Scheuer, as best we can determine, was on her way to a speech therapy class. We do not know whether Schroeder

[190] *See* Thomas R. Hensley, *The Kent State Trials*, in THOMAS R. HENSLEY & JERRY M. LEWIS, KENT STATE AND MAY 4TH: A SOCIAL SCIENCE PERSPECTIVE 41, 43 (1978).
[191] *See* Jerry M. Lewis, *Review Essay: The Telling of Kent State*, in HENSLEY & LEWIS, *supra* note 190, at 31.
[192] *Id.* at 37.
[193] Hensley, s*upra* note 190, at 42–43.
[194] THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, *supra* note 187, at 287.
[195] *Id*.

> participated in any way in the confrontation that day.
>
> 21. No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away; another, 75 yards, another 95 or 100 yards; another, 110 yards; another, 125 or 130 yards; another, 160 yards; and the other 245 or 250 yards.
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> 22. Seven students were shot from the side and four were shot from the rear.
>
> 23. Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC building on Saturday, May 2, 1970.
>
> 24. As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and Wrentmore were merely spectators to the confrontation."[196]

Many students were entirely innocent. Crucially, there was no evidence whatsoever with respect to the four students who were killed that those students presented an immediate physical risk to the guardsmen or, used, or presented, any deadly or serious force.[197]

To put in perspective what happened on May 4, 1970, consider the fact that Jeffrey Miller and Allison Krause, although they may have been part of the demonstrations at one point, were both shot at approximately a distance of a modern football field. A typical NFL football player today would take well over 10 seconds to run from one end of the field to the other at top speed. Sandra Scheuer was a shot at even longer distance; and she was on her way to class. The fact that some students were shot in the back is particularly strong evidence that use of force was unjustified. Arguments that the guardsmen acted in self defense against the specific students shot are utterly unsupportable.[198] Guardsmen later claimed that they faced a serious threat from the

[196] David E. Engdahl, *The Legal Background and Aftermath of the Kent State Tragedy*, 22 CLEV. ST. L. REV. 3, 21 (1973).
[197] *Id*. at 19–21.
[198] THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, s*upra* note 187, at 288–90.

students; the FBI noted that there was some reason to believe that this excuse was fabricated after the event.[199]

The Scranton Commission blasted the Guard. As to the use of deadly force: "even if the Guardsmen faced danger, it was not a danger which called for deadly force. The 61 shots by the 28 Guardsmen cannot be justified."[200] As to the firing at the crowd, "the indiscriminate firing of rifles into a crowd of students and the deaths that followed were unnecessary, unwarranted, and unexcusable."[201] The Scranton Commission suggested that the guard itself "engendered in part" the very violence that became the pretext for the use of force in self defense.[202] Moreover, the Commission observed that the riot response was inappropriate, and a cause for the injuries: the guard did not follow explicit guidelines regarding M1 Rifles with live ammunition.[203]

Other reports were not charitable to the administration of Kent State University either. The *Report of the Special State Grand Jury* faulted the administration for several things including the lack of clear executive leadership during the weekend prior to May 4.[204]

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[199] Engdahl, *supra* note 196, at 19–20.

[200] THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, s*upra* note 187, at 91.

[201] *Id*. at 90.

[202] *Id*. at 91.

[203] *Id.*

[204] THE KENT AFFAIR: DOCUMENTS AND INTERPRETATIONS 192–93 (Ottavio M. Casale & Louis Paskoff eds., 1971).

> We find that the major responsibility for the incidents occurring on the Kent State University campus on May 2nd, 3rd, and 4th rests clearly with those persons who are charged with the administration of the University. To attempt to fix the sole blame for what happened during this period on the National Guard, the students or other participants would be inconceivable. The evidence presented to us has established that Kent State University was in such a state of disrepair, that it was totally incapable of reacting to the situation in any effective manner. We believe that it resulted from policies formulated and carried out by the University over a period of several years, the more obvious of which will be commented upon here.
>
> The administration at Kent State University has fostered an attitude of laxity, over-indulgence and permissiveness with its students and faculty to the extent that it can no longer regulate the activities of either and is particularly vulnerable to any pressure applied from radical elements within the student body or faculty.

Id.

Prior to Kent State the use of power—even serious physical force—in higher education had been largely beyond the scope of legal accountability. Prior to events at Kent State, a university would have been far less likely to consider the potential legal ramifications of their actions the way they would today. The legal issues that would have dominated discussions prior to Kent State would have been power/jurisdictional issues: Can a Mayor call a Guard to campus? Can the Guard or Governor declare a state of emergency on their own, etc.? Legal questions prior to Kent State revolved around who could deploy power or force, where, and when. This is not to say that universities (or states) were free to use deadly or serious force indiscriminately upon students. Certainly not. But Kent State pressed the following question: can an institution bring a military force to campus that is capable of using deadly force, especially when prior unrest on campus to indicate that violent confrontations are likely, even inevitable? The power and prerogative to put students in harm's way was a given prior to Kent State. To engender great risk. There were *no* legal restrictions on the ability to deploy a show of force that itself would ignite the kind of violence that would injure students. Colleges were free to escalate confrontations of power to the point of serious risk of violence.

It is perfectly legitimate to focus on the specific legal issues raised by the Kent State tragedy, including sovereign immunity etc. Moreover, Kent State will always legitimately be remembered as a situation where inappropriate force was brought to bear upon students. But Kent State raised a much larger set of issues. After Kent State, the use of force would be measured *prior* to the deployment of that force, and the use of *any* serious force would be subject to legal rules of *accountability*. Force could not be used deliberately or negligently so as to escalate violence, but only to disassemble violence. From the point of view of the era of power and prerogative, the response to a crisis of power was to deploy *more* power—escalation was considered a legitimate and valid solution to student issues.[205] After Kent State, emphasis shifted to find ways to *de-escalate* violence.

A new era was emerging—an era of *measured* university responses subject to rules of accountability under the law. Kent State taught that paradigms of power are not suitable to manage an educational environment. Kent State was the *reductio ad absurdum* of

[205] Even after the Kent State tragedy some members of the Ohio community and elsewhere openly voiced the opinion that more students should have been shot at the Kent State campus. *Kent State: The Day the War Came Home* (Single Spark Pictures 2000) (TV broad.). Clearly some of these voices reflected dominant attitudes of the era of power and prerogative.

the era of power and prerogative—a Runnymede to Magna Carta—and perpetually reminds us that we must be vigilant to watch for ancient higher education instincts to use force and power to overcome educational dilemmas. (For example, modern "zero tolerance" alcohol rules reflect the kind of over-active use of power of paradigms to solve campus environmental issues. Strict systems of discipline reflect such attitudes as well; as do mechanical policies such as mandatory parental reporting policies, and the like.) What perhaps contributed *most* to the tragedy at Kent State was the failure to use, and exercise, sound judgment. Excessive reliance on *power* tends to get in the way of the use of *judgment*. There is usually an inverse relationship between the use of power and use of judgment.

Kent State is often depicted as the opposition of students versus government and institution, and vice versa. From a distance, however, what is striking about events at Kent State is how *all* the actors—the students, the faculty, the administration, the National Guard, the State of Ohio, the Governor of Ohio, etc.—were united in a common fate. Each of the actors was playing out a tragic role in a "system" of educational management that doomed them from the start. Groups and individuals made choices and decisions for which they should be accountable; but all were caught up in brewing system that had been evolving for three centuries in American higher education. Few on the field in May 1970 could have imagined that the slow de-evolution of the visitor had methodically caused in the rise of unbridled, centralized power and prerogative in higher education. A Kent State, someplace, at some time, was inevitable. Kent State was not a battle over who would have power, but a battle over whether the exercise of power would be the dominant norm for managing higher educational environment at all.

Kent State signaled that campuses had to find completely new ways to manage their educational environments.

May 1970 was a decisive moment for the rise of legalisms. The Scranton Commission issued a call to action that campuses and the Supreme Court responded to. The call to action issued by the Scranton Commission pushed colleges that had not done so previously to consider implementing systems of student self-governance and legalistic codes to manage campus disruption.

There is also little doubt that events at Kent State motivated the United States Supreme Court to take and decide in *Healy v. James*[206] so as to address the rights of students to challenge their institutions politically.

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[206] 408 U.S. 169 (1972)

The facts of *Healy* arose in the same milieu of campus unrest that generated the shootings at Kent State, and Jackson State.[207] In

[207] Contemporaneous events at Jackson State and South Carolina State should not be forgotten. On May 14, 1970, law enforcement opened fire on a crowd of protestors at Jackson State College in Mississippi. In a hail of bullets Phillip Gibbs and James Earl Green were killed. One eye witness recounted what he saw that night. As Vernon Steve Weakley wrote,

> Jackson State College was a very large black college set in the capital city of Mississippi. For years it had been rumored that the powers that be and Mississippi desperately wanted to correct the mistake they had made by placing a black college in the capital rather than a prestigious white university. In 1970, the student body was not very involved in local or national politics. Although JSC had a few radical students, most students could only be considered moderately active at best. I do recall a few students trying to hold a rally in front of the cafeteria building to show support for the students who had been killed at Kent State on May 4, but the event went practically unnoticed. . . .
>
> It was not unusual for large numbers of students to congregate in front of either the women's or men's dormitories at JSC. . . . The night the murders occurred, I was in the company of a group of fraternity brothers and sorority sisters gathered in front of the women's dorm. . . . As the police and the highway patrolmen approached, most of the students did not move. I think we all felt that they would continue on past us and leave the campus. Instead they stopped in front of the west wing, turned, and faced us. One of the city policemen used his bullhorn to order us to get inside of the building. This demand was met with a lot of jeers and protest from the crowd. All the sudden the bottle was thrown from behind the police and arched in the direction of the cafeteria. . . . Something in my gut told me all Hell was about to break loose. . . . the moment the bottle hit the ground the police and the highway patrolmen appeared to go crazy. They began to fire their weapons as if they had been waiting for an excuse to fire.

Vernon Steve Weakley, *Mississippi Killing Zone: An Eyewitness Account of the Events Surrounding the Murders by the Mississippi Highway Patrol at Jackson State College*, *in* KENT AND JACKSON STATE 1970–1990, at 71–72 (Suzie Erenich ed., 1990).

Sadly, it is likely that the shootings at Jackson State College were de-emphasized vis-à-vis Kent State as another outflow of the era of power and prerogative's institutionalized racism. As one commentator pointed out,

> the murders of Phillip Gibbs and James Earl Green would have been just another page in the long history of racist violence affected upon Blacks in my native state of Mississippi. But coming on the heels of the murder of four white students. . . . at Kent State University ten days earlier, conscientious and compassionate individuals could not ignore the tragic events on an all black college campus is Jackson, Mississippi.

Healy, a state college attempted to stop the recognition of a student group—Students for Democratic Society (SDS) chapter[208]—before it formed, as the college feared that the group would foment campus unrest.[209] *Healy* ruled in favor of the students who sought to form a local chapter of the SDS and held that a campus cannot constitutionally restrain the formation of such a group.[210] *Healy* is touted as the mother of associational rights for students on campus, and it is.[211] As a result of *Healy*, students won the right to associate and to form recognized groups. Dean Wormer had once relished the power to control and inhibit groups with whom he disagreed. *Healy* changed that.

Healy, when placed alongside events at Kent State and the Scranton Commission Report, told colleges that (1) student speech and association must be permitted, and (2) undesirable speech and association cannot be met with a show of force certain to turn peaceful protest into violence and/or with any retaliation (or discipline) based on the content of speech, the exercise of speech rights qua speech, and/or the expression of legitimate associational rights. College power was now limited, and accountable, in ways that would have been utterly foreign to higher education in the prior centuries. *Healy* is clear evidence that the Supreme Court believed that empowering students through the First Amendment was preferable to the *Dixon*'s "due process" approach to student empowerment.

The facts of *Healy* were paradigmatic of the period leading up to events at Kent State. In *Healy*, a group of students seeking recognition for a local SDS chapter at Central Connecticut State College filed a request for official recognition with the appropriate committee empowered to review such recognition.[212] After requesting additional materials following the initial application, the majority of the committee voted to approve the application and sent their recommendation to the

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Jean Cornelius Young, *May 15, 1970: The Murder at Jackson State College*, *in* KENT AND JACKSON STATE 1970–1990, *supra* note 207, at 82.

[208] 408 U.S. at 170. The students at this university tried to start their own local chapter of Students for a Democratic Society (SDS). *Id*.

[209] *Id*. at 171. Several SDS chapters at other schools were cited as a catalyst for the looting, vandalism, arson, destruction of school property, and civil disobedience that took place. *Id*.

[210] *Id*. at 194.

[211] *See, e.g.,* Gregory F. Hauser, *Intimate Associations Under the Law: The Rights of Social Fraternities to Exist and Be Free from Undue Interference by Host Institutions*, 24 J.C. & U.L. 59 (1997).

[212] *Healy*, 408 U.S. at 172. As required, the students filed a request with the Student Affairs Committee to be formerly recognized as a campus organization. *Id*.

college president.[213] The president rejected the application and the recommendation.[214]

Formation of a local SDS chapter must be seen in context.[215] Recall that the SDS had been argued to be a central cause of the events at Kent State at one point.[216] As the *Healy* court stated,

> We mention briefly at the outset the setting in 1969–1970. A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period. Although the causes of campus disruption were many and complex, one of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few. Indeed, many of the most cherished characteristics long associated with institutions of higher learning appeared to be endangered. Fortunately, with the passage of time, a calmer atmosphere and greater maturity now pervade our campuses. Yet, it was in this climate of earlier unrest that this case arose.[217]

During the application process, concerns were raised about the local SDS chapter's connection with the national SDS organization and the intent of the local chapter to respect the rules, policies, and norms of the college community.[218] *Healy* was well aware that it raised central issues pertinent to events at Kent State.

Healy also was not unaware of its impact on academic freedom. If a college could not deny recognition of a student group, that college's

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[213] *Id*. at 173–74. The Student Affairs Committee approved the request by a vote of six to two. *Id*.
[214] *Id.* at 174.
[215] *Id.*
[216] *See* JAMES A. MICHENER, KENT STATE: WHAT HAPPENED AND WHY 154–55, 234–35 (1971) (discussing the controversial events surrounding the SDS prior to the Kent State shootings).
[217] *Healy*, 408 U.S. at 171–72.
[218] *Id*. at 172–73.

ability to exercise its academic freedom (who to teach) would be compromised. *Healy* recognized that academic freedom sometimes has to balance with the constitutional rights of students.[219] As the *Healy* Court stated, "[i]t is to remembered that the effect of the College's denial of recognition was a form of prior restraint . . . a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."[220] *Healy* correctly observed that this was not a situation in which protected speech or association had occurred and was now the subject of discipline (as was the case in *Dixon*); *this* was a case of stopping speech and association beforehand—prior restraint.

Healy rejected several arguments for allowing prior restraint in a college setting, and in doing so, limited the power and prerogative of institutions.

First, the Court rejected the idea of sanctions for mere "guilt by association":

> In these cases it has been established that "guilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.[221]

The college did not prove that students in the *Healy* posed such a threat.[222]

Second, philosophical disagreement in a college community alone does not justify prior restraint:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as those views may have been, especially to one with President James'

[219] *Id*. at 171. The Court addressed the competing interests of the students, faculty members, and administrators. *Id.* Justice Powell explained that while free expression should be given wide latitude, the educational process must be free from disruptive interference. *Id*.
[220] *Id*. at 184.
[221] *Id*. at 186 (quoting U.S. v. Robel, 389 U.S. 258, 265 (1967)).
[222] *Id*. at 189–90. In addition, the Court concluded that the petitioners were not affiliated with the National Chapter of the SDS. *Id*. at 187.

> responsibility, the mere expression of them would not justify the denial of First Amendment rights . . . The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.[223]

Healy repudiated Dean Wormer.

Third, the fact that *some* speech or association may turn into violent action does not mean that *all* speech or association will. The *Healy* Court noted that the president had a "general and undifferentiated"[224] fear of disruption from the putative local chapter. Following a line of cases arising after the famous *Chaplinski*[225] case, *Healy* reinforced that "the critical line hereto foredrawn for determining the permissibility of regulation is the line between mere advocacy and advocacy '"directed to inciting or producing imminent lawless action and . . . likely to insight and produce such action."'"[226] The mere fact that a group agrees with the general statements of a larger, more inclusive group is not sufficient to meet the grounds for prior restraint: a group must cross the line from *advocacy* to *action*, and from *ideas* to *words* that are likely to create *imminent* lawlessness.

Healy thus opened the door to positive *and* negative speech on campus. *Healy* has been a very important case in limiting the power of administrators to curb undesirable speech. Dean Wormer once had no responsibility to open his campus to wide ranging viewpoints. After *Healy*, the campus and college would become an important First Amendment expression zone—a marketplace of ideas. Power and prerogative gave way to tolerance and balancing.

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[223] *Id*. at 187–88.

[224] *Id*. at 180.

> At the outset we know that state colleges and universities are not enclaves immune from the sweep of the first amendment . . . the college classroom with its surrounding environs is particularly the "marketplace of ideas" and we break no new constitutional ground in reaffirming the nation's dedication to safeguarding academic freedom.

Id. at 191 (citing *Tinker*, 393 U.S. at 508).

[225] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). The Chaplinsky doctrine, also known as the "fighting words" doctrine, explains that prohibiting words that are likely to incite a "breach of the peace" or a fight does not contravene the right of free expression. *Id.*

[226] *Healy*, 408 U.S. at 188 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

But opening campuses to such wide ranging speech has also invited the dark side of free speech into campus. Perhaps the most absurd example of an attempted application of *Healy* is the *Pi Lambda Fraternity, Inc. v. University of Pittsburgh*.[227] In that case, a drug dealing fraternity attempted to argue that it had protection under the associational freedoms that *Healy* recognized. The Third Circuit in *Pi Lambda* essentially scoffed at this and rejected the argument that the First Amendment protects such criminal behavior.[228]

In the era of power and prerogative, colleges retained the right and power to make—*and not make*—decisions that could to escalate into campus violence. Colleges had the right to create conditions under which they, or others, might use serious or deadly force. Kent State, and *Healy*, changed that. Today, the application of very serious or deadly force to maintain general campus order is exceedingly rare. When such force is deployed, police and paramilitary forces show remarkable restraint and professionalism. A modern college is vastly more likely to call its lawyers than the National Guard.[229]

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Yet another digression is in order.

Something else emerged from Kent State. It is perhaps the most *heroic* and least well-known event in American higher education history. After the initial volley by the National Guard, a small group of brave faculty marshals intervened, at the risk of their own lives, and saved the day from further bloodshed. As James Best relates,

> [F]urther bloodshed was averted by the intervention of faculty marshals, who worked to cool down the emotions of the crowd and prevent hostile and provocative actions of the Guard. Major Jones and General Canterbury seemed intent on dispersing the crowd with the use of force, but they were convinced to give the marshal's a chance to plead with the crowd to disperse before further violence occurred. A tense twenty minutes ensued, all the marshals—visible in their white arm-bands—talked with the crowd and the National Guard Officers. By 1:30 p.m., the marshals were successful, leading the

[227] 229 F.3d 435 (3d Cir. 2000).
[228] *Id*. at 447.
[229] It is noticeable that there are no lawyers at all in the movie *Animal House*.

> Commons and Blanket Hill clear of demonstrators with the Guard standing at "parade rest" in a circle around the burned out ROTC building.[230]

This was the first and only time the faculty would have ever won a battle, literally. The brave faculty marshals acted at significant risk to their own safety, as they could have easily been caught in a melee between students and National Guard and slaughtered. This was a moment when true *facilitators* in higher education were born, employing tactics completely different from those used in the era of power and prerogative—judgment, reasoning, collaboration, mercy, and conciliatory dialogue. Faculty marshals were able to achieve something the government, the National Guard and Kent State University had failed at—a cessation of violent confrontation. Faculty marshals made the approach of Governor Rhodes, the president of Kent State, and the commander of the National Guard look utterly inapt, and out of place in modern higher education. This heroism is an enduring testament to the power of not resorting to force and power in higher education.

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Healy was very aware that the new freedoms of students would have to balance against the academic freedom of institutions. In often overlooked language, the Supreme Court in *Healy* gave colleges special First Amendment powers:

> 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 students' associational rights. . . [The college] may have, among its requirements recognition, rule of perspective groups

[230] *See* James J. Best, *Kent State: Answers and Questions*, *in* HENSLEY & LEWIS, *supra* note 190, at 23.

> affirm that they intend to comply with reasonable campus regulations.[231]

The Supreme Court reaffirmed that colleges, like other state actors, may exercise reasonable time, place, and manner regulatory power, but *also* gave colleges a new tool. In effect, colleges could ask for *loyalty* oaths to the effect that students and organizations intend to comply with reasonable campus rules.[232] Colleges now had the power to require that students with philosophical differences affirm that they would not violate valid campus rules. Or, in other words, a mild form of prior restraint *is* acceptable if a group fails to demonstrate allegiance to reasonable campus rules.[233] The Supreme Court took almost exactly the opposite view of loyalty oaths when applied to faculty by state.[234]

Healy is a signature case of the Civil Rights era, and evidences a significant shift away from the era of power and prerogative. *Healy* ushered in a new dynamic of the weighing and balancing of competing rights and responsibilities in higher education. Without so dictating per se*, Healy* essentially required colleges to develop some *process* to weigh and balance respective First Amendment rights. Not technically a procedural or substantive due process case, *Healy* nonetheless pushed colleges towards *procedural* compliance maneuvers to meet First Amendment requirements of balancing and weighing. When put in context with events at Kent State and the Scranton Commission Report, colleges now clearly had some responsibility to create a process to mange an education environment using norms other than power and prerogative.

Legalisms seemed a natural choice for higher education.

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[231] 408 U.S. at 192–93.

[232] *Id*. at 193–94. The college could have implemented "a rule that prospective groups affirm that they intend to comply with reasonable campus regulations." *Id*. at 193.

[233] Quoting from an earlier case, the *Healy* Court made reference to Justice Blackmun's statements while he was a judge on the Eighth Circuit: "They may not, however, undertake to flout these rules. Justice Blackmun capitalized, at the time he was a circuit judge on the eight circuit, stated: 'we . . . hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct.'" *Id*. at 192 (quoting *Esteban*, 415 F.2d at 1089).

[234] See Keyishian v. Bd. of Regents of Univ. of N.Y., 385 US. 589 (1967).

E. Constitutional and Contractual Adults and the Public/Private Distinction

In the several hundred years of Anglo-American higher education history preceding the 1960s, the public/private distinction was pragmatically unimportant in higher education law for purposes of managing an educational environment. It is remarkable how relatively pragmatically unimportant that distinction is today, despite the fact that the public/private distinction may be important to the technical doctrinal structure of legal reasoning in case law involving higher education. The evolution of public law has clearly influenced the evolution of private law in higher education, and vice versa. The Supreme Court has dictated very little that higher education must do procedurally to protect student rights; contract and promise are as likely to determine student rights as constitutional minimums. Traditional legalists often emphasize the role of the Constitution on campus: however, looking back from the twenty-first century, contract came to campus as well.

The classic legalist's view of the public/private distinction goes something like this. Private colleges are free to fashion their environments as they see fit in accordance with state private law—contract, tort law, and the like. Public colleges, however, are subject to the strictures of the Constitution, academic freedom and other public law doctrines. There is truth in this story, but in many ways it is intensely misleading.

"Public" and "private" were never so distinct in the first place in American higher education, at least where students were involved. The public/private distinction evolved in early American law to identify who had power and prerogative, and why—it did not evolve to define student rights. The distinction served no practical purpose for student rights at all as there were none.

In modern times a "contract" with a student at a public college can, and usually does, legally exceed constitutional requirements if there are any (or at least precede those requirements). "Due process" arguments at public colleges do not usually turn on what is minimally required by the Constitution, but upon what has been *promised*, and what has been *delivered*. Cases coming out of the public college system sometimes blur the line between "due process" (public law) and "contract" (private law)—making a sort of "due contract" law for public institutions.[235]

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

Meanwhile the law of private colleges has showed signs of taken on aspects of public law. The law of contracts, for example, has taken on pseudo-public law doctrines such as doctrines of adhesion designed to promote public policy.[236] Moreover, courts dealing with contractually promised process at private schools often infer that the private law provides minimal procedural requirements similar to "due process."[237]

The real story of the public and private in American higher education is not the story of two distinct evolutionary paths. Instead, public and private are twins and have evolved in close proximity, with the many of the same goals.

This is perhaps the only way to explain recklessly extra-constitutional cases like the recent *Flaim v. Medical College of Ohio* case from the United States Court of Appeals for the Sixth Circuit.[238]

In writing for the court in *Flaim*, Judge Royce Martin criticized a medical school's discipline process, despite holding for the school, even though the process it used was quite legalistic and complex. Ultimately, the Sixth Circuit determined that the process used coincided with minimal constitutional requirements, but barely.[239] In analyzing the process used, and legally required, *Flaim* set forth extremely legalistic constitutional due process guidelines not unlike those stated in *Dixon* and *Esteban.* As if to throw constitutional caution to the wind, the *Flaim* case *makes no direct reference whatsoever to the United States Supreme Court decisions of* Ewing *and* Horowitz. Instead *Flaim* boldly, and baldly, announces that in the Sixth Circuit, college students *do* have sufficient interests in higher education to trigger due process rights.[240] Taking liberties with Supreme Court acquiescence since *Ewing*, the *Flaim* court ignores the fact that the United States Supreme Court in *Ewing* and *Horowitz* did not invite the federal appellate courts to determine whether such interests exist. *Flaim* instead relies heavily upon *Dixon* and leans upon *Goss*'s description of *Dixon* as a "landmark" matter for support in essentially following *Dixon* over *Horowitz* or *Ewing*.[241]

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[236] A contract of adhesion is one offered on a take it or leave it basis and is often interpreted, according to public policy, favorably to the person forced to take the terms. *See* FARNSWORTH, *supra* note 83, at 286.

[237] *See, e.g.,* Abbariro v. Hamline Univ. Sch. of Law, 258 N.W.2d 103, 113 (Minn. 1977) ("The requirements imposed by the common law on private universities parallel those imposed by the due process clause on public universities.").

[238] 418 F.3d 629 (6th Cir. 2005)

[239] *Id*. at 643.

[240] *Id*. at 633–34.

[241] *Id.* at 636–37.

Of greater concern, however, *Flaim* ignores the very reason for *Horowitz* and *Ewing*. The Supreme Court was concerned that lower federal courts were reading other due process cases, like *Goss,* too broadly to require overly legalistic requirements for higher education. *Flaim* is exactly the type of case *Horowitz* and *Ewing* sought to correct, and can only be constitutional if the Supreme Court changes its course substantially. What makes *Flaim* especially nefarious is that its holding is correct, just not its rationales. There would be no reason for the Supreme Court to quibble with the result in *Flaim*; however, Judge Royce Martin's scolding—with all of its chill—will undoubtedly push some colleges in the Sixth Circuit further down the path of legalisms.

Flaim represents a form of due process judicial activism. The Court willfully ignored constitutional precedent on the gamble that the United States Supreme Court has changed and acquiesced and will not reverse it. There is, however, a reason for cases like *Flaim*, and higher education itself is the cause. *Flaim* lies in the gray space between constitution and contract, and public and private law. Where an institution, as in *Flaim,* postulates the existence of constitutional rights via systems of discipline that would protect such rights, *contractual* promises begin to look as if they are creating the very constitutional interests needed to sustain due process requirements. To put it another way, colleges appear to be creating the very rights students assert, by way of contract. The United States Supreme Court has never said that colleges *create* due process rights *because* they have some systems of discipline that assume constitutional rights exist, although it is easy to see why someone might incorrectly read this into *Horowitz* and *Ewing.* That it is a simple trap to fall into, and it seems *Flaim* did.

Flaim underscores a key point of this Book. The academic freedom needed to order a higher educational environment, which the Warren Court (and others) so dearly protected, can be lost in *one generation* by virtue of over-identification with legalisms. *Flaim* is a canary in a mine: academic freedom is at risk, and *we* are putting it at risk by using systems of discipline that are so legalistic. What makes *Flaim* so potentially academically toxic is its insistence on a *legalistic* model of student discipline.[242]

[242] Another case invoking a toxic level of legalisms is *University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926 (Tex. 1995). Than was accused of cheating. His medical school provided disciplinary process that was extremely law-like in many, many ways. The Texas Supreme Court acknowledged this and then essentially required something similar to due process in a criminal hearing in holding for Than (relying heavily upon the Texas Constitution's process guarantee):

> Mindful of these concerns, we note that UT, pursuant to its own

rules and regulations, afforded Than a high level of due process. Than was given oral and written notice of the charges against him; was given written notice of evidence to be used against him in the hearing, including a witness list and summaries of their testimony; was afforded the right to counsel or other representation; and was afforded a formal hearing with the opportunity to present evidence and cross-examine witnesses. Despite this level of process, we conclude that Than's due course of law rights were violated by his exclusion from a portion of the evidentiary proceedings. Although Than additionally alleges several deficiencies in the notice he received concerning the disciplinary action the university was commencing, our disposition in this matter cures those complaints. Thus, we express no opinion on whether any other aspect of the process afforded to Than is required by our due course guarantee in student disciplinary matters.

The undisputed evidence shows that at the conclusion of testimony and remarks in Than's hearing, the hearing officer personally examined the site where the test was conducted, accompanied only by Dr. McNeese. Than asked to accompany them to the testing room, but the hearing officer refused. No contemporaneous record exists of what transpired during the hearing officer's inspection of the exam room. However, the hearing officer testified by deposition that on her visit to the test site she sat in four different chairs, representing the place occupied by Than, Mr. Chiang, the student from whom Than allegedly cheated, and the two proctors. In her report concluding that Than should be expelled, she lists as one of her findings that "I sat in the chair occupied by Mr. Than during the examination and could clearly see the paper from the examination chair occupied by Mr. Chiang." In determining Than's guilt, the hearing officer relied, at least in part, on the evidence she obtained while sitting in those chairs.

We evaluate this ex parte contact in light of all of the surrounding circumstances. In other words, we decide whether the probable value of allowing Than to accompany the others to the examination room, together with his interest in attaining his medical degree and protecting his reputation, outweighed the burden that would be placed on UT by allowing him to attend. *See Mathews,* 424 U.S. at 335, 96 S. Ct. at 903; *Newsome v. Batavia Local Sch. Dist.,* 842 F.2d 920, 924 (6th Cir. 1988).

As previously discussed, Than's interest in continuing his medical education and preserving his good name was substantial. We further note that the evidence obtained during the visit was relevant and material, and that it was relied upon by the hearing officer in her decision. If Than had been allowed to accompany the others, he would have had the opportunity to

Legalists have created self-fulfilling prophecies.

Since *Horowitz* and *Ewing*, the central legal question has changed from whether a college has a minimum due process system in place, to whether any process system adopted and used is sufficient and is delivered as *promised*. Analysis of compliance with public law constitutional minimal requirements has merged into private law questions of whether student codes—usually part of the promise made to students in the contract with students—are properly delivered. A failure to follow a promise can be both a due process issue *and* breach of contract issue. Legalists would like to think of the issues presented in two separate steps—whether the system is minimally Constitutional, and then whether a contractual promise was breached. The reality after *Horowitz* and *Ewing* is that these issues are not so distinct. The modern public college is in no position to avoid contracting with its students. Students are now constitutional adults, and promises made to them with respect to process can be part of the "contract" with them. Due process rights, if any, are inherently intertwined with contract rights students may have. Doctrinally, the relationship between contracts and due process is technically correctly linked *if*, and only *if*, contact rights and promises create or interface with, sufficient liberty in property interests. Decisions like *Flaim,* however blur contract and due process law.

There is reason to suspect that the Supreme Court understood that a "two" step analysis—constitution first, then contract second—— is impossible or inappropriate for higher education. Both *Horowitz* and

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> respond to this evidence and to offer his own explanation about the seating arrangements. But, because the visit was conducted ex parte and at the end of the presentation of the evidence, Than was given neither a contemporaneous nor an after-the-fact opportunity to respond.
>
> We balance UT's failure to give Than an opportunity to rebut this evidence with the burden on UT of providing this procedural safeguard. In this case, we fail to see any burden that would have resulted from Than's presence during the visit to the examination room. We therefore conclude that Than was not accorded due course of law. *See Swank v. Smart,* 898 F.2d 1247, 1252–54 (7th Cir. 1990) (holding that ex parte presentation of evidence during an employee's discharge hearing denied the employee due process); *Newsome,* 842 F.2d at 927–28 (holding that ex parte presentation of evidence during a high school student's expulsion hearing denied the student due process).

Id. at 931–32. The case reads like a disposition of a criminal trial. All of this to determine the single question: "Did he cheat?" *Than* illustrates how easily the choice of legalisms can accelerate into the requirement of essentially a criminal justice system.

Ewing painstakingly walked through the actual, and promised, processes of the institutions in question. The fact that the colleges substantially followed their own procedures suggests that, in part, due process turns on following promises to a significant degree. Or, at least *substantially*. Crucially, the fact of contracting with students itself may be a key step for an institution in the search for constitutional compliance: *Horowitz* and *Ewing* both suggested that the respective institutions promised and delivered *more* than constitutional minimums, if there were any. The Supreme Court certainly did not encourage colleges to attempt to contract to the constitutional minimum—wherever that might be—and the cases they picked illustrate this. The message of *Horowitz* and *Ewing* was exactly the opposite: make a good and fair academic arrangement with your students, abide by it, and the Constitution will stay out of the business of legalizing college student process. Compliance with public law then turns heavily on making a good contract with students, and substantially following it—not providing a mini-court system.

Public and private law overlap in the constitutional cases, but does the same hold true in private college cases? In other words, do private colleges, held to private law standards, find themselves subject to quasi-public law doctrines?

The answer is a clearly, "yes." Private college cases have been heavily influenced by what has been occurring in the public law domain. How is it that public law lurks in private law doctrine?

Contract law is considered private law[243] but the law of contracts went through many major changes in the twentieth century. In some ways the civil rights movement came to the law of contracts long before it came to public (constitutional) law. Early contract law was heavily dependent upon bargains struck—fairly or not—between freely choosing citizens. Courts would sometimes uphold terribly one-sided bargains, and we see vestiges of this even today.[244] But during the twentieth century American courts adopted various doctrines—including the doctrine of adhesion—that created a more *public* law overtone in the law of contract. Some contracts would be struck down as violative of public

[243] Contract law is not the only source of private law impacting student rights, but it is the most significant. The law of private association may also impact court analysis. *See Abbariao*, 258 N.W.2d 103.

[244] FARNSWORTH, *supra* note 83, at 285–87; *see* Martindale v. Sandvik, Inc., 800 A.2d 872, 879–80 (N.J. 2002) (explaining that a contract for employment that included an arbitration clause was valid despite the imbalance of power between the parties and noting that even if a contract is found to be a contract of adhesion, that does not make it automatically void).

policy,[245] or as "unconscionable"[246]; some contracts would be read favorably to weaker parties simply because parties with a stronger bargaining position had misused their bargaining power.[247] Courts were no longer always willing to enforce private bargains as is, but recognized that some bargains implicated issues of *public* policy.

This process of development in the law of contracts in this way was well underway before *Dixon*, but it took two crucial legal steps to bring the new law of contracts to campus. First, students would have to gain contractual adulthood. And second, the law would have to recognize that the relationship between colleges and student-adults *is* contractual—a development that *roughly* coincided in time with the rise of constitutionalisms. The timing was significant. In theory contract law and constitutional law *could* have evolved at a very different time and pace.

As the private law of contract evolved in the twentieth century, the importance of contract law in higher education rose. The relationship between students and colleges was becoming a *contractual* relationship, not one based on status or power. (Likewise, recall that public law changed to grant students constitutional adulthood ending the public law privilege doctrine.) It is somewhat coincidental that the evolution of private contract law and public constitutional law for colleges occurred at the same time. The fact that *both* private and public law were changing at almost the same time, even if *for* different reasons, gave each the imprint of the other in college law, and encouraged subsequent public/private parallelisms to come.

Today the public/private distinction is doctrinally important for lawyers in the way they argue cases, but public and private are hardly as dissimilar as technical legal doctrine may make them seem. Public colleges win cases regularly, as do private colleges. (Recall that in formulating academic freedom, the United States Supreme Court tried to promote formulations of those freedoms as expressed by academic leaders. Justice Frankfurter quoted from a *private* university president in *Sweezy*.) Today, under the guise of private law, courts provide guidance to private colleges that is very familiar to public counterparts.

[245] Franklin v. Delta Air Lines, Inc., No. 90-16118, 1991 WL 270787, at *3 (9th Cir. Dec. 19, 1991); Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1056 (E.D. Pa. 1977); Valley Med. Specialists v. Farber, 982 P.2d 1277, 1282 (Ariz. 1999).

[246] Greene v. Gibraltar Mortgage Inv. Corp., 488 F. Supp 177, 180 (D.D.C. 1980); Sacred Heart S. Missions, Inc., v. Terminix Int'l, Inc., 479 F. Supp. 348, 351 (N.D. Miss. 1979); Fischer v. Gen. Elec. Hotpoint, 438 N.Y.S.2d 690, 690–91 (N.Y. Dist. Ct. 1981).

[247] FARNSWORTH, *supra* note 83, at 285–87.

Whether a college is public or private is not nearly as important as whether the actions a college takes with regard to a student are reasonable expressions of the relationship between students and their college. This may be why the courts often say that the relationship between students and college is largely contractual.[248] Thus it becomes important to understand what the nature of the "contract" and relationship between a student and a college is.

Classical private law contract theory was relatively simple. For the most part, a contract was a special type of situation in which very specific promises were exchanged between two parties in a somber and serious way. Historically, in England and America, the primary way to create a contract was to make mutual promises with many specific terms like price. These promises also had to be supported by legally significant acts that demonstrated the parties were serious. Courts have had a variety of ways of referring to the seriousness sufficient to create a contract, and one way among several for parties to a contract to indicate seriousness was to support the contract with "consideration."[249] "Consideration" is a legal doctrine that determines when otherwise non-legally binding promises turn into the types of promises that can be enforced.[250] Classical contract law, however, was constrained by the rules of the society in which it flourished.

The eminent contract scholar Alan Farnsworth summarized the law of contracts as it arrived in America:

> It was generally supposed during this period that, as Adam Smith had proclaimed, freedom of contract—freedom to make enforceable bargains—would encourage individual entrepreneurial activity. Lawmaking devoted much of its energy to creating the conditions for a market on which such bargains could be made. By the end of the century, the bargain theory of consideration had taken shape and the objective theory of contract was in its ascendancy. The market took on legal definition

[248] Mangla v. Brown Univ., 135 F.3d 80, 83 (1st Cir. 1998); Govan v. Tr. of Boston Univ., 66 F. Supp. 2d 74, 82 (D. Mass. 1999); Gagne v. Tr. of Ind. Univ., 692 N.E.2d 489, 495 (Ind. Ct. App. 1998); Gally v. Columbia Univ., 22 F. Supp. 2d 199, 208 (S.D.N.Y. 1998); 15A AM. JUR. 2D *Colleges and Universities* § 25 (2008).

FARNSWORTH, *supra* note 83, at 47–52. There is little need here to elaborate upon the legal meaning of consideration, which is often a bit oblique.

[250] *Id.*; Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 640 (1982); Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1112–13 (1984).

> mainly in the law of contract, and quite naturally in the temper of the time the law of contract dominated the nineteenth century legal order. From a utilitarian point of view, freedom to contract maximizes the welfare of the parties and therefore the good society as a whole. From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely.[251]

There is something distinctly American about this. In England relations among parties typically had been allocated by class, status, and power and prerogative. Property ownership and status preceded the right to bargain. The Sheriff of Nottingham did not need to bargain with Robin Hood: Robin Hood had to steal for his power. There was no system in place for many individuals to bargain their way to significantly better lives.

Sir Henry Maine said this famously in 1861 when he presciently anticipated twentieth century legal developments: "[T]he movement of progressive societies has historically been a movement from *status* to *contract*."[252] Maine recognized that law had been, as legal theorist John Austin put it, the commands of the uncommanded sovereign in society—law was about power, class and status.[253] Emerging contract law of the eighteenth and nineteenth centuries in America—a period of revolution and industrialization—turned the freedom of contract into freedom for autonomous and choosing individuals in an increasingly fluid society.

Nonetheless, this freedom of contract revolution of Maine's period did not quickly mature in college law. Status hung on. It took some time to move away from status and power images in college, in part because the law still focused on donors and donative intent, and saw college as a "gift" to students. Courts of the eighteenth and nineteenth century in America also did not see students as principals in any contract: relations between colleges and students at public colleges were governed by the privilege doctrine well into the twentieth century, as well. In theory, some private colleges had contracts with parents in the eighteenth and nineteenth century: but parents did not argue that their children's colleges breached contracts for failure to discipline (or in disciplining) their students. Higher education remained very status based despite the gradual evolution of private law in other areas.

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[251] FARNSWORTH, *supra* note 83, at 19–20.

[252] HENRY SUMNER MAINE, ANCIENT LAW 20–21, 170–71 (1986) (1861).

[253] *Id.*; JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 13–17 (1965).

There are likely several reasons that status persisted in higher education. For one thing, a dominant educational belief was that children required discipline and structure to have a chance to become fully functioning adults. This attitude is strikingly evident in the late nineteenth century development of the attractive nuisance doctrine otherwise known as the "turntable" doctrine.[254] Certain dangerous commercial premises were considered to be "a lure" such that children would be drawn hopelessly to their injury.[255] Second, the eighteenth and nineteenth centuries were not nearly as child-centric or as education-centric as society is today. Third, education was, for the most part, for the rich and the privileged. Higher education was for a small segment of society; that segment often had a preference for working things out in non-legal ways. Complaints about a college, if any, would be worked out informally. Fourth, private law contract cases could *only* arise in private education because the privilege doctrine in public law blocked lawsuits, unless a public college was to waive its sovereign immunity (which the states typically did much later). Fifth, college was often religious training, which deterred courts from entertaining lawsuits because of private law doctrines of charitable immunity and deference to religious entities. Sixth, although classical contract law was moving away from status in the nineteenth century, the practical reality of the time was that contract law still favored the wealthy and more powerful.

In the large, status began to evolve to contract, but not quickly for college students. College students would have to wait until the latter part of the twentieth century.

By the time of the middle of the twentieth century, there were no individuated contracts with students. Unlike other industries that had developed complex contractual commercial relationships with clients, higher education was, at best, primitive contractually. Today, with explicit knowledge that the student/college relationship is contractual, many colleges contract with their students in *aggregate* ways and with language that may never have been intended to be contractual or even promissory in the first place. Colleges rarely sign or offer specific

[254] State v. Juengel, 489 P.2d 869, 873–74 (Ariz. Ct. App. 1971); Novak v. C.M.S. Builders & Developers, 404 N.E.2d 918, 919–20 (Ill App. Ct. 1980); Kopczynski v. Barger, 887 N.E.2d 928, 932 (Ind. 2008); 62 AM. JUR. 2D *Premises Liability* § 299 (2008).

[255] *See* Hollyfield v. Texas, No. 09-93-243 CV, 1994 WL 660148, at *6 (Tex. App. Nov. 23, 1994) (noting that the attractive nuisance doctrine imposes a duty on a land owner toward children that are lured by the attractive nuisance); Bremerton v. Sesko, No. 30263-2-II, 2004 WL 665005, at *2 (Wash. Ct. App. July 27, 2004) (explaining that a junkyard is considered an attractive nuisance because children are lured to it because they want to play there).

contractual documents, as say in an automobile transaction. Higher education skipped a grade in the evolution of contract law, and it shows. Status has hung on, and the college "contract" remains weirdly devoid of form and forms. At root, many colleges approach students acknowledging that a bargain has been struck without ever clearly expressing the contractual relationship that is the heart of the agreement between colleges, students, and families. Like their students, many colleges have deficits in intentionality and setting expectations just like their students.

Nonetheless by the middle of the twentieth century, the law of contracts had changed markedly from its classical period, and now for the first time, contracts for college students began to evolve too. At about that time, American contract law generally had developed its own approach to issues of aggregate transactional bargains. Standardized transactions were increasing in many fields. As Alan Farnsworth stated,

> But, though contract provided opportunities for the realization of human wants, it did not shape those wants. "The cautious sense that contract alone was not a sufficient organizing principle for society never quite deserted us." With the advent of the twentieth century, the tide in favor of freedom of contract began to be reversed. A contracts scholar characterized the individualism of our rules of contract law, epitomized in the notion of freedom of contract, as "closely tied up with the ethics of free enterprise capitalism and the ideals of justice of a mobile society of small enterprisers, individual merchants and independent craftsmen." As competitive capitalism has drifted toward monopoly and the free enterprise system has declined, "the meaning of contract has changed radically." It was suggested that "the question is not so much one of status and contract as it is of a broader classification that embraces these concepts: standardized relations and individualized relations" and that in this sense there is now a "distinct veering back to status."[256]

While some bargains could be struck fairly with few problems—like a contract for the sale of grain—many contracts were not the result of

[256] FARNSWORTH, *supra* note 83, at 20 (citations omitted).

meaningful bargaining, and were thus on a take-it or leave-it basis, and also very, complex and offered on the same basis to all. Recognizing this, a path-breaking scholar of the twentieth century Frederick Kessler, denominated such take-it or leave-it standardized agreements as contracts of "adhesion."[257]

Farnsworth has described the process, and limits of, standardized transactions:

> Traditional contact law was designed for a paradigmatic agreement that had been reached by two parties of equal bargaining power by a process of free negotiation. Today, however, in routine transactions the typical agreement consists of a standard form containing terms prepared by one party and assented to by the other with little or no opportunity for negotiation. Commonplace examples range from automobile purchase orders and credit card agreements to confirmations for goods ordered over the telephone and license agreements for software acquired online. Sometimes basic terms relating to quality, quantity, and price are negotiable. But the standard terms—the *boilerplate*—are not subject to bargain. They must simply be adhered to if the transaction is to go forward.[258]

As Farnsworth points out standard form agreements are often contracts of adhesion: "under which the only alternative to complete adherence [and acceptance] is outright rejection."[259]

In the early part of the twentieth century, there were still concerns that contract law was "veering back to status" because of such lopsided transactions.[260] Just as students and families gained more

[257] *See* Friedrich Kessler, *Contracts of Adhesion–Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629. 632 (1943) (discussing how the stronger party utilizes standard form contracts and forces the weaker party, who cannot shop for better terms, to accept the contract); *see also* Edwin W. Patterson, *The Delivery of Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (noting that life insurance contracts are generally considered contracts of adhesion because the insured does not really have a choice).

[258] FARNSWORTH, *supra* note 83, at 285.

[259] *Id*. at 286.

[260] Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 40 (1917); *see* FARNSWORTH, *supra* note 83, at 286–87 (explaining that the dangers in these standardized contracts is that the stronger positioned party may impose its terms on a weaker party).

meaningful contract rights, the reality of the contacting world was tilting towards standardized take-it-or-leave-it agreements. College law picked this up. With little to no experience "contracting" with students, colleges became exceedingly inartful in creating clear, visible contracts with students and tended to offer essentially the same "deal" to all on a "come to our school or leave it" basis. Colleges even implicitly resisted the idea that college is a deal at all. Students offered admission could not haggle with schools over discipline processes, for example, or much of anything else. Most of the college "bargain" was not subject to negotiation, even though the "bargain" could change over time as a college unilaterally changed the rules, etc. Crucially, at least before World War II, prospective students typically had little to no written or negotiated information regarding the rules, standards, and procedures they would face. Many students must have learned about discipline systems only after they matriculated. College contracts were not "sold" or "negotiated" like other major standardized commercial deals.

College contracts thus have little resemblance to freely negotiated commercial contracts and bear much more resemblance to contracts of adhesion. But unlike most contracts of adhesion that signal that the devil has carefully printed a "you lose" form, colleges offer a deal with no clear shape or substance in many dimensions. Yet, despite this courts are chary to call the college contracts adhesory and to apply the rules that would follow favoring students. One court has accurately described this reticence: "the relationship between a university and its students is distinctive, however, and a strict doctrinal approach is inappropriate. . . . [t]hus, although the first step of analysis is to examine the language of the contract under the basic tenants of contract law, the parties' unique relationship must also be considered."[261] Courts have cautioned against the uniform application of classical contract principles across all areas of the academic relationship; however, some characterize the relationship between institutions and students as too complex for the application of classical contract law, suggesting the law of contracts lacks coherent and unified application in this sphere. Other courts adopt a position of deference to the expertise of the institution unless a student can show the actions of the college or university were arbitrary, capricious, motivated by ill-will, or wholly inconsistent with academic norms. Courts consistently say that the college/institution relationship is primarily contractual, but have acknowledged that this

[261] Gamble v. Univ. Sys. of N.H., 610 A.2d 357, 360 (N.H. 1992) (citations omitted).

"contract" is unusual and bears the marks of standardization and adhesion.[262]

The vision of college as a contractual relationship emerged at about the same time that college students become legal adults. The signature event for colleges in this regard was the ratification of the 26th Amendment—lowering the voting age to 18.[263] The 26th Amendment did not itself change the age of capacity for contracting, but that Amendment was part of a larger movement to lower ages of majority for various purposes. Most states eventually lowered the minimum ages of majority for alcohol purchase and usage, and for consensual and contractual relations of most sorts.[264] For most purposes, the age of majority dropped from 21 to 18 or 19. College students were now adults and the parties in interest, not their parent. For many students, the college "contract" was the first major contractual relationship of their lives. Colleges were offering take-it-or-leave-it "deals" to highly unsophisticated bargainers in a major transaction unlike any other.

Under the guise of applying private contract law courts were inclined to intertwine principles of public law with private contract law. There are several modern contract law doctrines that protect contracting parties from harsh effects of standardized forms. The law, for example, recognizes that if contractual language is ambiguous, it must be read against the drafter and in favor of the non-drafter (*contra proferentum*). Contract law also recognizes that contracts contain implicit covenants of good faith and fair dealing (an implied at law term in the contract).[265] Moreover, courts often adhere to an "objective" theory of contracts, which reads contract language as an average, reasonable, or objective, reader would read it when a contract is entered into between parties of the relatively equal bargaining power.[266] All of those who are similarly situated—without regard to their knowledge or understanding of the

[262] *Id.* at 360–61; Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992). In *Ross*, a former student brought a claim for breach of contract alleging that the institution failed to provide him with a meaningful education. 957 F.2d at 415–16.

[263] U.S. Const. amend. XXVI.

[264] *See* KAPLIN & LEE, *supra* note 22, at 372.

[265] *See, e.g,.* Communale v. Traders & Gen. Ins. Co., 328 P.2d 198 (Cal. 1958).

[266] *Id*. "[A]s a general rule, the proper interpretation of a contract is ultimately a question of law for this court, and we will determine the meaning of the contract based on the meaning that would be attached to it by reasonable persons." Goodwin R.R. Inc. v. State, 517 A.2d 823, 829 (N.H. 1986) (citing Baker v. McCarthy, 443 A.2d 138, 140 (N.H. 1982)).

standard terms of the writing—receive the same "deal" if the language of the contract is the same.[267]

Thus, the private law of college as is primarily the law of *contract,* which has evolved in light of modern standardized agreements. Contract law is uniquely adapted to the environment of higher education and relations formed in that environment.[268] The private law of contract, as applied to colleges, should express and enforce the nature of the college relationship.

Two things follow. First, the college relationship that forms at a public college is essentially the same that forms under the private law of contracts. Public *and* private law doctrines succeed if they express, and protect, the higher education environment and the unique promissory and aspirational relationship of students and colleges. Second, public law is influenced by the same types of promises and expectations that drive the private higher education context. Due process law is *contextual*; contract law is *relational*. Both are deeply rooted in expectations, academic freedom, and promises. Not only should due process and contract law doctrine sound and act alike, they in fact largely *do*.

For lawyers and judges, who think in legal doctrinal categories, a public/private distinction has meaning and importance for purposes of analysis and doctrinal categorization. From a larger social perspective, however, college law should not make significant distinctions between the public and private at least with respect to college discipline and disciplinary process issues. From a public policy perspective, the same considerations that drive decisions in public law tend to drive decisions in private law. Not surprisingly, judicial decisional outcomes tend to be very similar.

Consider the following.

First, courts often cast a wide net to determine what constitutes the contract with the student.[269] Many things in writing presented to students can become part of the contact with students, but not everything

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[267] RESTATEMENT (SECOND) OF CONTRACTS § 211(2) (1981). *See generally* FARNSWORTH, *supra* note 83, at 310–16.

[268] *See* Mathew Boyle, *The Relational Principle of Trust and Confidence*, 27 OXFORD J. LEGAL STUD. 633, 636–37 (2007) (describing Macneil's relational theory of contracting as one based on personal relationships involving trust and confidence that promote future harmonious cooperation); *see also* Luigi Russi, *Can Good Faith Performance be Unfair? An Economic Framework for Understanding the Problem*, 29 WHITTIER L. REV. 565, 590 (2008) (explaining that with the relational contract theory, the parties are bound by good faith and by the "internal norms generated by the relationship.").

[269] *See, e.g.,* Warren v. Drake Univ., 886 F.2d 200, 201–02 (8th Cir. 1989) (illustrating a breach of contract claim based on the university's student handbook).

does.[270] There is even case law that suggests that one way to avoid having too many writings used against a college is to have clear disclosures or reservations of rights in writings disseminated to students.[271] The "contract" with a student can include almost anything a court sees fit to include. It usually matters little if a student attends a public or private school.

Second, courts also have shown a great deal of *deference* to academic institutions in the construction of contracts. This runs counter to the fact that college contracts seem adhesory. However, an attitude of protection and deference that is constitution-*like* permeates court decisions relating to college contracts. A recent case from the Massachusetts Supreme Court illustrates this well: "[C]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities."[272] The deference to public colleges under *Horowitz* and *Ewing* is almost exactly mirrored in cases involving private colleges. There appears to be a "contract" law equivalent to academic freedom for private colleges—in part based upon the fact that many private colleges embrace statements of academic freedom at least broad as those mandated by the First Amendment.

The connection between public and private is visible. Key cases from the United States Supreme Court—starting with *Sweezy*—have overtly given protection to the expression of academic freedom by academics themselves.[273] Academics tend to make the same assertions of academic purpose and intent in private colleges, which then become part of the academic "contract" with students at private schools. The Constitution and private contract law essentially aim to enforce and protect the same norms. The major difference between public and private law is the legal doctrinal structures used to analyze issues—which matters little in outcomes.

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[270] *See, e.g.,* Doherty v. S. Coll. of Optometry, 862 F.2d 570, 577–78 (5th Cir. 1988) (explaining how statements preserving rights in a handbook helped to defeat a breach of contract claim when certain requirements for students changed).

[271] Beukas v. Bd. of Tr. of Farleigh Dickinson Univ., 602 A.2d 776, 782–83 (N.J. Super. Ct. Law Div. 1991).

[272] Schaer v. Brandeis Univ., 735 N.E 2d 373, 381 (Mass. 2000); see Harwood v. Johns Hopkins Univ., 747 A.2d 205, 209–10 (Md. Ct. Spec. App. 2000) (discussing the contractual implications for expelling and refusing to award a diploma to a student who was convicted of murdering another student); *see also* Davis v. Regis Coll., 830 P.2d 1098, 1099–00 (Colo. App. 1992) (upholding the university's decision to issue a failing grade to a nursing student).

[273] *See Sweezy*, 354 U.S. at 260–61 (Frankfurter, J., concurring) (discussing the protection afforded to a college professor to lecture).

Third, courts applying contract law often speak of the need for fluid and flexible interpretation of college contracts. What is most important to courts is not the rigid application of legal categories, but finding a way—using legal concepts and rules—to acknowledge and express the relationship of college student and institution.

The court in *Slaughter* v. *Brigham Young University*, 514 F.2d 622 (10th Cir. 1975), stated this relational nature of contractual analysis in higher education,

> [S]ome elements of the law of contracts are used and should be used in the analysis of the relationship between the plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects . . . the student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category.[274]

Since the formative cases of the United States Supreme Court announcing public law doctrine as it applies to public colleges, courts considering *private* law have applied contract law flexibly when the student-college relationship calls out for such flexible application. The flexibility and fluidity of private contract law mirrors the same flexibility and adaptability that is emblematic of due process analysis in the college context, and generally.

Fourth, one hallmark of modern private law as applied to colleges is the rule that colleges must substantially deliver that which they promise. One court summarized this as follows:

> A majority of the courts have characterized the relationship between a private college and its students as contractual in nature. Therefore, students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides. The general rule, therefore, has been that where a private university or college establishes procedures for the suspension or expulsion of its students, substantial compliance

[274] 514 F.2d 622, 626 (10th Cir. 1975).

> with those established procedures must be had before a student can be suspended or expelled.[275]

A primary question in a breach of contract lawsuit is whether the breach is (in legal terms) *material*.[276] Material breach of contract can be defined in terms of its opposite—substantial performance.[277] For some time now, the law of contracts has realized that in certain circumstances a party may have gone far enough in performance to have complied materially with the contract, or at least performed substantially so as to require the other party to do its part.[278] The doctrine of substantial performance implies that parties in some circumstances can omit details of performance and still be in material compliance with the contract. The great twentieth century contracts law theorist Professor Farnsworth pointed out that some breaches of contract are not significant enough to merit a court holding that a breach of contract has occurred, and some partial performances are so nearly complete as to be substantial compliance under contract law. "Although usage is not uniform, there is a commendable tendency among courts and scholars to use *substantial* in the sense of "almost complete" and *material* in the sense of "more than just a little."[279] Thus it is natural for courts to excuse some mistakes or failures in promised student discipline process, but not to excuse significant deviations from promised process that fail to meet the standard of substantial performance.

How much error in process is *too* much is dependent on the nature of the errors made in relation to the college/student relationship. The question ultimately is whether "the breach will deprive the injured party of the benefit that it justifiably expected."[280] When a majority of justices in *Schaer* upheld a private colleges' discipline process in the

[275] Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 579 (Pa. Super. Ct. 1990).

[276] *Schaer*, 735 N.E.2d at 381. For instance, in *Schaer*, the student alleged that the university failed to make a sufficient record of the proceedings, and the court noted that although the record was "extremely brief," there was no minimum requirement. *Id*. at 379–80. This meant that although the university could have done more, the minimal length of the record does not amount to a material breach because there was no minimum requirement. *Id*.

[277] FARNSWORTH, *supra* note 83, at 567 (stating that "[t]he doctrine of material breach is simply the converse of the doctrine of substantial performance").

[278] *See* Boone v. Eyre, (1777) 126 Eng. Rep. 160(a), 162 (K.B.) (noting that plaintiff's readiness and willingness to deliver payment as agreed by the parties was sufficient performance on his part to require the defendant to uphold his obligations).

[279] FARNSWORTH, *supra* note 83, at 567 n.3.

[280] *Id*. at 567–68.

face of several errors and mistakes, a vigorous dissent saw the matter very differently:

> [T]he university's obligation to keep the members of its community safe from sexual assault and other crimes is of great importance, at the same time the university cannot tell its students that certain procedures will be followed and then fail to follow them. In a hearing on serious disciplinary matter there is simply too much at stake for an individual student to countenance the university's failure to abide by the rules it has itself has articulated.[281]

The notion of following one's own rules and abiding by one's own provisions is central to contract law—*and* due process. In *Horowitz* and *Ewing*, for example, it was important that the universities followed their own rules substantially. Promised process raises both due process and contract issues. Moreover, reasonable expectations, and reliance, are key components to determining failure to provide due process *and* breach of contract. Substantial compliance is substantial fairness, which is, in a sense, due process as well.

Fifth, case law applying contract law to private colleges sometimes speaks in terms of prohibition against arbitrary and capricious action.[282] In this vein, some courts speak of a requirement dealing with students in a spirit of good faith and fair dealing, or not in bad faith.[283] One way courts have attempted to enforce fairness in the bargain between colleges and students is to imply, at law, a covenant of good faith and fair dealing, and/or to proscribe arbitrary and capricious action as a material breach of contract. Such doctrines of contractual fairness can play the same role for a private college that procedural and substantive due process plays in public college. It is no chance that the standard for review under substantive due process is virtually the same under private contract law. It does not take a microscope or a judgeship to see that contract law, as applied to college process, can have a procedural and substantive dimension just as due process does.

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[281] *Schaer*, 735 N.E.2d at 383 (Ireland, J., dissenting).

[282] *See, e.g., Harwood*, 747 A.2d at 209 (citations omitted) (noting that a university cannot act arbitrarily or capriciously in deciding to confer degrees).

[283] *Id.*; *Buekas*, 605 A.2d at 782; s*ee generally* Hazel G. Beh, *Student Versus University: The University's Implied Obligations of Good Faith in Fair Dealing,* 59 MD. L. REV. 183 (2000) (discussing the universities' obligations of good faith and fair dealing towards students because of their contractual relationship).

Sixth, to the extent that the United States Supreme Court ultimately were to hold that there *are* protected interests in college education sufficient to trigger due process rights, such rights will invariably be grounded in promises, reasonable expectations, academic freedom and contracts. The future post-*Ewing* and *Horowitz* cases from the United States Supreme Court will likely ultimately face the reality of the unity of public and private.

Seventh, public and private distinctions have arisen in the modern history of colleges, and were not significant in the early periods of power and prerogative, at least so far as relations with students were concerned. Public/private is a rending of a formerly whole cloth. *History* continues to drive us towards a unity of college law.

Public and private law express themselves in different legal doctrinal terms, but public and private colleges often find themselves—as a result of a greater Civil Rights era—governed by basically the same principles when managing an education environmental. Public and private colleges now must deliver substantially on promises made to students, deal with students without bias and in good faith, not act arbitrarily or capriciously, provide some rights to correct manifest error, and recognize that discipline will be subject to scrutiny in the legal system. In turn, colleges have come to realize that the legal system will grant a great deal of deference to the academy, and permit flexible and adaptable approaches to managing an educational environment.

Status, power, and privilege ruled education from its infancy in England and America for hundreds of years. The shift from status and power to contract and freedom that Sir Henry Maine described finally hit American college campuses after World War II. The evolution from status to contract has been followed by yet another revolutionary step—from contract and freedom to *education.* As major societies move from status and power, to contract and freedom, they tend to value higher education and knowledge more highly. If Sir Henry Maine were here today, he might say that the evolution of a civilized society is from status to contract, and then to knowledge and education. It follows that as more individuals go to college they will make the acquisition and pursuit of knowledge as important as the ability to contract had been in an earlier time and status in another. We live in an era where knowledge is more important than status and even contractual power.

In light of these changes, higher education has come to take on a new role in modern society. Higher education once operated to preserve status quo. What occurred in the 1960s and 1970s was more than merely a civil rights revolution—it was the first phase of a social and educational *reformation* on a fundamental level. This reformation

shifted the focus of higher education from society and institutions *to students.* After the initial phase of the Civil Rights era, relations among students and institutions would be built on the rule of law, freedom of contract, and mutual rights and responsibilities. Discipline systems would never be the same again in form, delivery, or content. Yet, always keep in mind that we live in the midst of an *ongoing* reformation, which is still in progress, at this time.

This reformation is in its relative infancy. Any number of approaches to student discipline could have emerged in the immediate wake of the first phase of the Civil Rights era. That which emerges from a revolution often has a stamp of manifest destiny. In higher education today, there is a sense that student freedom was inevitable and that the process systems that most institutions have today are manifestations of the inevitable rise of student rights. Modern discipline systems born in the 1960s and 1970s carry the imprint of the circumstances in which they were formed, but we should remember that from a larger perspective, we are just getting started. It has only been 50 years since the great higher education reformation began.

The Civil Rights era in the 1960s and 1970s was the first phase of the reformation of American higher education, not its end state. The first phase of the reformation of American higher education brought with it many new and important ideas: student as adult; student freedom; law, rules and legal process; judicial functions; academic and conduct distinctions; public and private distinctions. However, the reformation today remains visibly and tragically incomplete, and a bit misguided in minor ways.

Chapter 4 explores the élan for law and legalisms that has permeated higher education in the aftermath of the fall of the era of power and prerogative. There were many paths that higher education might have been embarked upon following the fall of the of the era of power and prerogative, but as it turns out higher education primarily took one path with respect to student discipline—law and legalisms. We can now see more clearly that the connection between law and legalisms and the fall of the era and power and prerogative was not an essential one, at least with respect to student discipline. The fact that the fall of power and prerogative in American higher education happened exactly at the point in time that it did, under the social circumstances that it did, has given legalisms apparent validation among the set of solutions to the challenges of managing a higher educational environment. Yet, embarking on a path toward systems of educational management heavily dominated by law and legalisms has exposed the weakness in such a singular choice; and stunted the growth of a great educational

reformation while creating a new case of student martyrs. The reformation of American higher education has been always much bigger than law and legalisms. To see that more clearly, the next Chapter explores the era of legalisms that emerged from the first phase of the Civil Rights era in depth.

4 The Age of Legalisms and Legalistic Process

Dramatic shifts in the law, which came to head in the Civil Rights era, ushered in an unprecedented need for legal compliance. Not surprisingly, colleges and universities looked to law, lawyers, and legalisms to help obtain legal compliance. Typically, colleges and universities turned to elaborate model codes of conduct and behavior.[1] It was the dawn of an entirely new era. Law had just recently arrived on campus, and a deep infatuation with legalisms had just begun. Colleges chose to achieve legal compliance with legalisms.

Within one generation, several major themes and axioms emerged in this new era of legal compliance and legalisms for higher education. The contours of the new era took shape incredibly quickly. The speed and timing of this change were driven by many events, including Kent State.

First, approaches to managing the educational environment would no longer be based on subjective or open-ended standards such as values, etc.—or upon the exercise of unstructured "judgment." The way to legal compliance seemed clear—rules and policies, process and sanctions. In 1950, a student in trouble was sent to the Dean's office and punished. By 1975, a student violated a *rule,* went to a *hearing*, and was *sanctioned*. The evils of the era of power and prerogative could be avoided by following objective rules, and by applying them neutrally in a fair process with uniform sanctions. Campuses around the country began to dream a noble dream of legalistic modernism in which colleges were governed by law-like process imitating constitutional democracy itself.

Second, the best approach to student discipline is objective uniformity. There would be *one* student code of conduct for *all* students so as to achieve internal uniformity. Moreover, student codes would also be similar to codes used at *other* institutions so as to achieve

[1] *See, e.g.,* Univ. of Ky., Code of Student Conduct, http://www.uky./StudentAffairs/Code/part1.html (last updated Sept. 1, 2006) (delineating students must follow a particular code of conduct, and within this code of conduct, students are entitled to certain rights).

external uniformity. All students in an institution were treated similarly under identical provisions, and no student would have grounds to complain of unfairness: if students were to be treated similarly across institutions, no institutions would be singled out from the herd for being unfair. Higher education rapidly moved to become like zebras: each individual highly similar so as to blend into a herd and not to stand out. Uniformity created a sense of protection from the lions of legal action, and also gave administrators a new and powerful tool to manage the first generations of college students who now complained regularly about concerns in their educational environment. Administrators could now argue "you are being treated just like everyone else." The quest for uniformity also birthed a new phenomenon in higher education—the proliferation of "model" disciplinary codes and "model" approaches to discipline, described *infra*.

Third and closely related, the field of student discipline became *professionalized.* Complex systems of rules, processes and procedures, need a caste of administrators who can implement such systems. Professionalism paralleled volunteerism. Self-empowered, self-governing students could now form their own societies or governments within institutions supplementing—even supplanting—the role of administrators. It is almost impossible to emphasize what a radical development this was. Prior to the 1960s, students had formed associations, but those associations had always been subject to the ultimate power and control of the institution. The Civil Rights era and the era of legalisms birthed a new vision of student autonomy and a new role for students—students as self-administrators. Thus, many spheres of activity would no longer be administered directly, or entirely, by professors or institutional administrators, but would be directed in large measure by highly motivated students. New codes and procedures were seen to facilitate this role for students. However, even the students would need training for "their" new systems. Discipline rapidly became the province of the trained, the motivated, and the specialist volunteer—whether professional or student.

Fourth, the administration of student discipline began to take on aspects of being an end in itself. Discipline quickly became more *autonomous*: as such, systems of discipline moved away from being *heteronomous.* I develop this in significant depth later in this Chapter. For now, try to think of this as the process of discipline becoming hermetically sealed off from *other* major campus objectives and taking on a life (perhaps a bit Kafka-esque) of its own.

Fifth, litigation avoidance became a major goal of legal compliance. The aim has been to deliver process that meets each and

every legal compliance requirement and so entered an era of litigation risk-averseness. New codes were designed to take few chances of increasing legal litigation risk. Thus, for example, it is only relatively recently that most colleges have considered using their codes to manage off-campus misconduct. The fear of exercising "jurisdiction" over off-campus behavior was that it could increase litigation risk by assuming new responsibilities.

Paradoxically, higher education's pursuit and development of these five themes has been coterminous with a litigation boom against universities and coeducational groups such as Greek and other student organizations. Litigation over *process* alone has been greater in this period then in the several centuries preceding combined. Litigation over *safety* has blossomed as well. Perhaps the litigation boom would have occurred with or without the pursuit of these themes.

There is reason to believe that the pursuit of these five themes—constituting an orientation towards legalisms—itself may have fueled further litigation. The pursuit of compliance has come at a cost to higher education. Even the very academic freedom upon which higher education process protection is predicated may be at risk.

The five themes—(1) rules, process and sanctions (with model code), (2) objectivism, (3) professionalization, (4) autonomy, and (5) litigation avoidance—help to provide a conceptual framework for the era of legalisms. This Chapter develops each of these five themes in more depth.

A. The Rise of Objectivism

From a legal perspective, discipline in the era of power and prerogative centered on recreating and enforcing hierarchy. The Civil Rights era exposed the inherent weaknesses of systems built *solely* on power and prerogative, and highly subjective and individual assessment. Such systems—as in *Dixon*—could be cloaked in secrecy (or cloak secret motives) and could facilitate those in power to impose evil or even illegal norms upon students with little to no accountability. The eventual decline of visitorial review slowly created a system that lacked overall accountability; bad deans could retaliate against students for the exercise of legitimate civil rights and blackball a student, for instance.

For many administrators, the major culprit was subjectivism in student discipline. The era of legalisms sought to create objective, non-relativistic measurements of student behavior, with the hope that there would be greater accountability and transparency in discipline systems.

A strong sentiment permeated higher education that evil deans and motives would be banished by transparent and objective systems of educational management.

Colleges set out to design new systems of discipline in the immediate aftermath of the Civil Rights era that were not subjective or secretive, or biased. Simultaneously, colleges created new discipline systems with entirely new moral ontologies and epistemologies. Formerly, discipline focused heavily on values, standards, principles and the like. Moral/disciplinary thinking was based on such things as balancing, weighing, the use of intuition, and other right brain functions including the exercise of judgment. In light of the Civil Rights era, these forms of reasoning were considered dangerous, inappropriate, and even unlawful. New discipline systems would be based primarily on an ontology of facts, rules, written procedures, and specific sanctions—the building blocks of every major modern student discipline code. The new systems would adopt an epistemology of fact finding and gathering, fact to rule application, and similar left brain functions such as hard cognitive reasoning and rationalizing, and the rendering of a rationalized judgment or an articulated decision.

At its most fundamental level, the Civil Rights era brought forth a *philosophical* revolution. Modern colleges engage students today with a world of facts and rules and procedures and do so with a correlative epistemology—fact-finding and fact determination, and applying facts to rules. The philosophical revolution was so thorough and fast that an entire way of thinking and governing educational institutions ended as if in a cataclysmic event. An entire mode of educational discourse and communication ended. This is most apparent today in the way that modern legalists project modern legalist ontology and epistemology into the past. Michael Dannells, for example, in his excellent book, *From Discipline to Development—Rethinking Student Conduct in Higher Education*[2] (one of the first major publications to beg for a more developmental approach to discipline), recounts a classic legalist vision of the past. As he writes,

> The earliest American colleges were established by the colonies to ensure that their future religious and civic leaders would be "piously educated in good letters and manners," according to the sectarian principles of their founders. While the purposes of

[2] MICHAEL DANNELLS, FROM DISCIPLINE TO DEVELOPMENT: RETHINKING STUDENT CONDUCT IN HIGHER EDUCATION (Jonathan D. Fife ed., 1997).

the original colonial colleges reflected denominational differences, they shared a set of nonsectarian educational and civic ends. To these ends, the students—almost all of whom were boys the age of today's high school students, some even younger—were subject to a curriculum and an authoritarian form of governance, that did not distinguish between mental and behavioral discipline, or between religious and intellectual training. While the academic, social, and moral aims of the college were virtually indistinguishable, and the context was clearly religious, dominated by Calvinist doctrine, it was the influence of the English residential college, more than Puritanism, which shaped the colleges and their approach to matters of student behavior. The "collegiate way," defined by its residential nature, away from the distractions of the town, and "permeated by paternalism," required rigorous and extensive regulation of conduct.

Fearing the unbridled expression of the natural depravity of their charges, the early colonial college trustees, presidents, and faculties set about shaping the moral character and social manners of their students with long and detailed codes of conduct and rigid scheduling. No portion of the day was unaccounted for, and no misbehavior was too small to go unrecognized and unpunished. In many ways, the view and treatment of the students and the atmosphere it produced "resembled a low-grade boys' boarding school straight out of the pages of Dickens." Students' lives were regulated in virtually every way—when they arose and retired, when and what they ate, what they wore, and how they behaved in and out of class, etc. Conduct was dictated by rule and was monitored by the close attention of the president, the teachers, and the tutors. In the more serious cases, the president would share decisions with the board, which would hear the matter and rule on the appropriate

punishment. Minor infractions were delegated to the faculty and later to the tutors. Punishments ranged from expulsion (which was communicated to the presidents of other colonial colleges to ensure the miscreant would not subsequently enroll at another school) to fatherly counseling. But flogging was the standard means of discipline, until 1718, when Harvard ceased its use. Flogging was followed by "boxing," "in which the bad boy was made to kneel at the foot of his tutor, who proceeded to smack him sharply on the ear." Public reprimands and confessions ("degradation"), fines, loss of privileges, and extra assignments were common.

The warrant for this extensive supervision, and the harsh sanctions, arose from the authority vested in the board, which in turn was derived from the power of the colony. The colonists made laws that circumscribed the conduct of their youth and, at least in New England, they "empowered their governments to act *in loco parentis*." In fact, some colonial laws extended past parental authority, allowing for the possible punishment by death of children who willfully disobeyed, cursed, or struck their parents. In this light, and given the then-great distances and difficulties of travel, it is perhaps less surprising that the colonial colleges acted in the place of the parents in all things pertaining to the proper education and guidance of the youth in their charge, in accordance with the community and religious standards of the times. Thus:

> *students were forbidden to lie, steal, curse, swear, use obscene language, play at cards or dice, get drunk, frequent inns, associate with any person of bad reputation, commit fornication, fight cocks, call each other nicknames, buy, sell, or exchange anything,*

> *or be disrespectful, or tardy, or disorderly at public worship*.[3]

The use of terms like "rule" and "code" to describe colonial discipline is instructive. For what Dannells, and others, overlook is that while students of this era were *commanded*, not all commands are "rules" or "codes." Later systems, such as the system at Harvard that Dannells describes,[4] were also not "rule" focused, but like those in the colonial period sought *character* development.

The legalist cannot help but to project rules and rule/fact application to the past. But being given a long list of commands/demands or "rules" is no more a "code" or set of "rules" than a shopping list, or the disapproving directions of a parent directed at a son or daughter returning from college with poor marks. Certainly we *could* talk that way—the "rules" of laundry and such—but what is truly crucial is that the colleges of the era of power and prerogative *did not*. That era focused on character development. Rules can *limit* a commander, or give the commanded paths to argue that the rule is not valid, etc.

The new ontology and epistemology of higher education, which aimed to rid higher education of *subjectivism* in disciplinary matters, led to a preference for *codes*—especially *model* codes. Codes represent the ontology and epistemology of the changes brought about in the Civil Rights era. Codes are vehicles or vessels for rules, procedures, and sanctions, and for objective reasoning processes.

B. Rules, Processes, and Sanctions—Model Codes

The sudden paradigm shift in higher education disciplinary process in the 1960s and 1970s was virtually coterminous in time with a rise in faith in law in American society generally as a principal tool for social justice and reform.[5] The Civil Rights era was the era of the Warren court, the Civil Rights Acts,[6] *Brown v. Board of Education*,[7] Robert Kennedy, Martin Luther King, Jr., The Great Society, etc. Law

[3] *Id.* at 3–4 (citations omitted).
[4] *Id.* at 7.
[5] *See* Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, in ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 362, 362–369 (4th ed. 1995).
[6] 42 U.S.C. § 1971 (Supp. 1957); 42 U.S.C. § 1971 (Supp. 1960); 42 U.S.C. § 2000(a) (1964).
[7] 347 U.S. 483 (1954).

and legalisms were taking on a new, much more important role in American society. Legalistic process consciousness in higher education came into higher education exactly at that time, and still bears the imprint of a post World War II to the 1960s idealized vision of law's role in society. Higher education anxiously embraced legalisms as the proper approach to legal compliance in student process matters.

The United States Supreme Court appears to have been keenly aware of this unique historical congruence of higher education reformation and the rise of law in society. There are many ways to effect legal compliance—the law rarely specifies just one specific course of action—and *one* way was for colleges to adopt highly legalistic processes. The Supreme Court, however, strongly urged that legalistic process was unnecessary and inappropriate: higher education was not listening and did not *want* to listen.

The Supreme Court essentially required just two things for due process compliance in higher education with respect to students, if even that. First, if a matter were one of *evaluation*—weighing and balancing—a college should engage in a deliberative academic process. Second, if a dispute with a student turns on a question of fact, a college should use some process that hedges against obvious factual error-verification. The Supreme Court urged higher education not to adopt mini-court systems; indeed the Court invited colleges to devise other systems. It may have been that these messages were too subtle for the times. Despite admonitions to the contrary, colleges turned to legalisms for compliance and reformulated these two basic "requirements" from the Supreme Court.

This turn to legalisms was due in some measure to the fact that there were no process professionals per se in American higher education at this time. Although administrators had often been cast in the role of disciplinarian, there was no professional student process group. The closest source for process expertise was *lawyers*. Lawyers had played only a minor role in student affairs prior to the 1960s. Most lawyers have no specific training in education theory, discipline, or the management of education systems. Lawyers are process experts in a sense but legal process training had to be adapted to the academy somehow. Lawyers tend to "litigate" against students or treat them like clients. Lawyers and the legally trained have a tendency to generate legalistic process solutions, not educationally based ones.

Add it up, and you see (1) a sudden perceived need for legal compliance; (2) a society turning to law; (3) a preference for objectivity and thus rules, processes and sanctions; (4) lawyers as the architects of

the new discipline systems; and (5) the voice of the Supreme Court muted by the context of the day.

Within a very short time several key features of modern student discipline emerged. Many of these features had existed in higher education in the period prior to the 1960s, but new and broader emphasis was placed on these features to the exclusion of other features of managing an education environment. It is critical to realize from the outset that most of what to come in the era of legalisms was not required by the law, and that the law itself preached against the very legalisms higher education came to embrace. American higher education *chose to become legalistic and wanted to do so*; higher education magnified, and even sometimes badly distorted, the law to justify an era of legalisms.

I. Rules

In the ontology of modern student discipline, rules are primary units of disciplinary reality. Since the Civil Rights era, American higher education has promulgated the greatest number of rules governing students in human educational history. We take it for granted today that student life must be governed by rules. Yet, a generation or so ago, such a vision of student life would have seemed unusual, even a bit Orwellian. Not because student life is managed in such detail, but because of the depersonalization of students in the system.

A rule-based culture is a natural response to problems of due process compliance. For legalists, it is axiomatic that due process needs rules. Due process, as the Supreme Court has told us, requires some kind of notice of what a problem is. A perfect way to provide notice to a student is to have a rule and then tell a student that they have violated that rule. This is basically the way it is done in judicial proceedings. Notice requirements, then, evolved rapidly into notices of *charges* or *rule* violations.

The next logical step is to consider the problem of *specificity* in rules. In the domain of rules, several issues appear. Rule systems—all things equal—have a natural tendency to expand because rules may not be specific enough, and thus demand more rules. A great legal philosopher, H.L.A. Hart, recognized every rule has "open texture."[8] Many rules, as H.L.A. Hart stated, are open-ended enough that they will require further elaboration as new circumstances and social needs arise.[9]

[8] H.L.A. HART, THE CONCEPT OF LAW 124–136 (1994).
[9] *Id.*

Thus, many rules will, sooner or later, require the creation of even more rules. Rules grow, sometimes exponentially.

Thus, a rule stated on general terms to cover multiple situations might, conceivably, not be specific enough to give notice of a problem to a student who is about to engage in improper behavior. More rules will therefore be needed to generate more specificity and so on, and so on. Specificity issues are creatures of rule systems. It is at least noteworthy to recognize that the United States Supreme Court has never specifically made a "specificity" requirement for due process in higher education, save perhaps for cases involving First Amendment rights.[10] There are ways to give fair notice in systems that are not rule-based or rule-dominated. Standards, values, and principles for example, can give sufficient guidance to individuals. In the period prior to the Civil Rights era, students were often managed by such determinants, but after the Civil Rights era, a student would be judged according to whether that students' behavior conformed to rules. Over time, notions such as values, principles, standards, and character became subsumed to rules.

Today a student who is considered to have bad character is typically one who has violated *rules*: a student with no rule violations is often considered of good character, or not of bad character. Modern students have come to believe that good character is determined by rule compliance—at least institutionally. The "rules" in systems that existed in the era of power and prerogative were typically used in the effort of evaluating a student based on standards, principles, values and character. Indeed, much of what we see through our legalistic lens today as rules, were actually simply commands to students. The Civil Rights era, however, led administrators to believe that non-objective, non rule-like ways of evaluating students would be too subjective and non-specific. The preference for rules implied a strong non-preference for forms of student evaluation that are not rule-based.

Today, deans across the country sign forms that go to professional schools, graduate schools, and to employers. When employers, schools, or the government ask if a student is "honest" or of "good character" the response given is typically based on, and only on, rule violations. Sadly, every college in America graduates students with significant honesty and character issues who have never been caught violating rules. In rule systems such students represent, falsely, as "honest." Moreover, many good students make predictable mistakes and

[10] *See, e.g.,* Morse v. Frederick, 551 U.S. 393 (2007); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

are branded as being dishonest or of bad character: those students may well have *learned* from their mistakes and have become better, and better educated, people. Rule systems have a tendency to be under- and over-inclusive to the detriment of the educational mission.

Rule systems operate as if rule compliance is a proxy for good character. Rule systems, however, are not evaluative or educational in themselves. Honor codes, for example, have become more rule and infraction oriented. Honor systems have become both quaint and faint: they have become the restaurant chain, and only dimly representative of systems that once bore similar names. Honor systems have become disconnected from the social values from the eras in which they were created, and have mutated into *rule* systems that attempt to assess honor and character by proxy via rules.

In a closely allied development, the Civil Rights era placed new emphasis on student-development and empowerment and upon student self-government and governance. Colleges placed new emphasis on creating systems of rules that would allow students to express their adulthood. Colleges now sought to provide a new level of "freedom" and autonomy to the modern student. Volunteerism was on the rise. There was a strong flavor of social contractarianism—the idea that free adults would create self-governing rule systems that would apply evenly to all at all times. Higher education came to be seen as a miniature training ground for citizens in a constitutional democracy. Colleges sought to create institutions that mimicked key features of a democratic society, such as student legislatures, courts, etc.

Over time weaknesses would emerge in heavily student-run governance systems. But for a magic moment, legalisms in education seemed to merge into a coherent vision of discipline, democracy, and education.

II. Process as Procedure; Procedure as Fairness; Fairness as Legalistic Process

The Civil Rights era elevated the virtue of fairness to new and previously unheard of levels in American higher education. The Civil Rights era made fairness foremost. Higher education accepted that fairness should be a prime virtue in major college operations, especially discipline processes. Higher education then chose to believe that due process must mean legalistic "fairness" in process.

As colleges pursued this vision of due process and legalistic fairness, it became common to equate fairness with fair *process* and fair process with a set of legalistic *procedures*. Systems based on rules

needed procedures that would complement the rule systems. Many colleges and universities never seem to have seriously considered that there are ways to achieve fairness without process, and not all process is legalistically procedural.

For higher education, fairness/process/procedure were intimately tied together from the Civil Rights era forward. This reflected profound philosophical currents of the day. The greatest political philosopher of the twentieth century and a prime philosophical voice of the Civil Rights era, John Rawls published his landmark work, *A Theory of Justice*, in 1971. As Rawls stated, "Justice is the first virtue of social institutions."[11] Rawls argued that the appropriate vision of social justice was a vision of "justice as fairness,"[12] Rawls was convinced that fairness and justice are interconnected. He also believed that both justice and fairness were inherently procedural and made arguments that suggested that moral reasoning itself may be inherently procedural.[13] Justice is primary; justice is fairness; fairness is process; process is procedural. Rawls' own view of procedure had some prominent legalistic features. Legalistic proceduralism had become essentially an American way of viewing justice and fairness.

Rawls's philosophical vision of proceduralism was in many ways, very similar to the actual process that birthed the United States Constitution.[14] Rawls's theory is sometimes quite legalistic, if not per se legal. Rawls was not a lawyer, although he did have some exposure to legal training. For the most part, until the end of his career, Rawls steered wide of directly tackling legal issues. Late in his career, when he did stretch to discuss legal specifics his lack of hard legal training became evident. In many ways, Rawls vision of justice was *metaphorically* legal, but not actually a legal system or description of an actual legal process. Rawls was the voice of *legalistic* fairness, if not actually a large voice in law itself.

Rawls was a Kantian.[15] Kant believed that justice was intimately tied to law.[16] Of all the contractarians—including Rawls—Kant was perhaps the most juridical in equating justice and morality

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[11] JOHN RAWLS, A THEORY OF JUSTICE 3 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE].

[12] *Id*. at 11; *see also* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001).

[13] RAWL, A THEORY OF JUSTICE, *supra* note 11, at 83–90.

[14] *Id*. at 221–28.

[15] *Id*. at 251.

[16] *Id*.; *see* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Harper & Row 1958) (1948).

with *rules*. When Rawls elected to follow Kant closely, he may have picked up some of Kant's affinity to connect law and justice. Although Rawls falls in to the general range of philosophical contractarians, his unique perspective, birthed exactly in the middle of the American Civil Rights revolution, gave his philosophical theory a distinct preference for legalisms.

Rawls was not a philosopher of higher education. Rawls, however, was fascinated with macro-level fairness and justice of the political system as a whole. Rawls's solution to questions of justice was to propose proceduralistic approaches to fairness—ones with a legalistic overtone. Rawls captured philosophically what was in the hearts and minds of civil rights reformers—build and sustain freely governed systems of procedural fairness. Rawls resonated widely with the Civil Rights era and helped to build the bridge to a future of process as fairness.

However, higher education had more than a philosophical task at hand. Higher education set out to create process systems, metaphorically legal, using actual legal processes and terminology as a baseline to model from.

As a field, higher education settled fairly quickly upon several discipline process axioms that even today define legalistic process in American higher education.

First, a college needs a code (or several codes). The term "code" is laced with legal meaning: technically, few colleges actually have *legal* codes. The use of the term code is thus metaphoric. "Code" is actually code for an expression (usually) of a (contractual) relationship with students. College codes usually have recognizable functioning parts that taken as a whole give codes, "codeness." A typical college code will have a compilation of generalized statements of educational purposes, rules, specific procedural requirements, and sanctions for violations of the code.

Second, a discipline system should have *rules* as the principal regulators of student behavior. No court of the Civil Rights era said it more clearly than *Soglin v. Kauffman.*[17] In a case raising issues related to Vietnam War protestors, the court reasoned as follows:

> No one disputes the power of the University to protect itself by means of disciplinary action against disruptive students. . . . [B]ut as [a p]rofessor . . .

[17] 418 F.2d 163 (7th Cir. 1969).

> has observed: "[t]he first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules." The proposition that government officials, including school administrators, must act in accord with the rules in meting out discipline is so fundamental that its validity tends to be assumed by courts. . . . These same considerations also dictate that the rules embodying standards of discipline be contained in properly promulgated regulations.[18]

Soglin went on to criticize the institution because the institution did not proceed against students under "university standards of conduct expressed in reasonably clear and narrow rules."[19]

Soglin is perhaps the case that best expresses the era of legalisms preference for rules as governing determinants for student behavior. While it is true that a number of courts have considered the doctrine of vagueness[20] in interpreting college regulatory standards, *Soglin* is unusual in the sense that it translates questions about vagueness into specific requirements that higher education institutions have *rules*.[21] There are ways to be clear without rules.

The era of legalisms has such a strong preference for rules that despite the fact that *Soglin* cannot be consistent with later United States Supreme Court decisions, including *Ewing* and *Horowitz*,[22] legalist commentators nonetheless have pressed the need for rules as a legal mandate. For instance, Kaplin and Lee state, "[a]lthough the judicial trend suggests that most rules and regulations will be upheld, administrators should not assume that they have a free hand in promulgating codes of conduct. *Soglin* signals the institution's vulnerability when it has no written rules at all or when the rule provides no standard to guide conduct. . . . Regulations need not be drafted by a lawyer—in fact, student involvement in drafting may be valuable to insure an expression of their "common understanding"—but it would

[18] *Id.* at 167 (citations omitted).
[19] *Id.*
[20] "Vagueness" issues usually only factor in when a First Amendment issue is in play.
[21] A closely contemporaneous case, *Sord v. Fox*, 446 F.2d 1099 (4th Cir. 1971), suggested something similar, but unlike *Soglin*, did not strike down the university regulation.
[22] Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Bd. of Curators v. Horowitz, 435 U.S. 78 (1978); *see also* State Bd. of Educ. of Rogers, Ark. v. McClusky, 458 U.S. 996 (1982). Further, "federal courts may not break down school regulations [unless they are] 'so extreme as to be a violation of due process.'" *McClusky*, 458 U.S. at 969–70.

usually be wise to have a lawyer play general advisory role in the process."[23] While Kaplin and Lee are careful to point out contrary precedent that contradicts *Soglin*, they nonetheless advocate systems of managing an educational environment that are based upon rules written by, or with, lawyers.[24]

Three sub-points are notable. First, colleges often successfully communicate their desires clearly to students, sans rules. Rules are not a *sine qua non* of clear human communication. Second, when tasked with creating systems of rules administrators will naturally defer to lawyers. Hence, the popularity of model *codes*, especially those that were written by lawyers. Third, legalists seem determined to give rules priority.

Modern Western legal systems have a preference for judging behaviors not internal states. The great jurisprudential writers from John Austin to Oliver Wendall Holmes believed that law should judge outward manifestations rather than internal states.[25] A shift to rules to manage students' educational environments in higher education marked a shift from evaluating character and internal states to judging outward manifestations or behavior as a proxy for making evaluations of character. Over time, the proxy for character evaluation would dissolve, and higher education institutions would put emphasis on simply attending to outward manifestations with less and less attention to inward states.

The third discipline process axiom is that a system of rules—as set out in a code—should be as clear, and not vague, as possible. Clarity is a prime virtue of rules, but not always the first virtue of other measures of human conduct. Principles and values often thrive in abstraction. Rules however, often *suffer* from being vague or "ambiguous." When higher education embraced rules as primary determinants of student behavior this brought forth the perceived need for clarity—or, its cousin, specificity. Not every determinant of human behavior is clear in the way that specific rules are. Sometimes clarity is the result of a process, not a rule, and rarely what results from process related to rules. Despite United States Supreme Court admonitions to

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[23] WILLIAM A. KAPLIN & BARBARA LEE, THE LAW OF HIGHER EDUCATION 923 (4th ed. 2006).

[24] *Id.* at 910–27.

[25] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457–64 (1897) (discussing the distinctions between morality and law). *See generally* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (Robert Campbell ed., 5th ed. 1885).

the contrary, higher education embraced a culture of rule clarity over a culture of academic process.

Kaplin and Lee have written about the need to address vagueness issues in rules in college codes. They have drawn attention to several higher education cases to make this point, including *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969); *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969); *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992 (5th Cir. 1975); and *Sword v. Fox*, 446 F.2d 1091 (4th Cir. 1971).[26] All of these cases raise issues of free speech or protest—First Amendment issues. These cases are all specific to the special concerns of state regulation of speech and assembly. In this area of the law, clarity is indeed a virtue, even though, as Kaplin and Lee correctly note, courts often side with the university even in the face of alleged vagueness.[27] It is not simply that these cases predate key Supreme Court decisions that contradict using them in other contexts. It would be a mistake to generalize the specific Constitutional requirements under the First Amendment relating to student protest and speech to *all* areas of discipline—especially in-class academic performance. Again, all of these four cases predate *Ewing* and *Horowitz*. In particular, *Soglin* has unwarranted exuberance for legalistic requirements for higher education: this is not speculation; it is Constitutional law. It is wise to remember that *Soglin* arose in the immediate aftermath of *Dixon v. Alabama*. There were palpable abuses of power and prerogative in higher education at this time.

Consider the way in which Kaplin and Lee have given some priority to the original Federal District Court opinion in the *Esteban* case. As they state in their fourth edition:

> Probably the case that has set forth due process requirements in greatest detail and, consequently, at the highest level of protection, is *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (Western District Missouri 1967) . . . . The plaintiffs had been suspended for two semesters for engaging in protest demonstrations. The lower court held that the students had not been accorded procedural due process and ordered the school to provide the following protections for them:

[26] *See* KAPLIN & LEE, *supra* note 23, at 921–24.
[27] *Id*. at 347–48, 910–27.

1. A written statement of the charges, for each student, made available at least ten days before the hearing;
2. A hearing before the person(s) having power to expel or suspend;
3. The opportunity for advance inspection of any affidavits or exhibits the college intends to submit at the hearing;
4. The right to bring counsel to the hearing to advise them (but not to question witnesses);
5. The opportunity to present their own version of the facts, by personal statements as well as affidavits and witnesses;
6. The right to hear evidence against them and question . . . adverse witnesses;
7. A determination of the facts of each case by the hearing officer, solely on the basis the evidence presented at the hearing;
8. A written statement of the hearing officer's findings of fact; and
9. The right, at their own expense, to make a record of the hearing.

. . .

[F]or the internal guidance of an administrator responsible for disciplining procedures, the Esteban requirements provide a useful checklist. The listed items not only suggest the outer limits of what a court might require but also identify those procedures most often considered valuable for ascertaining facts when they are in dispute. Within this framework of concerns, the constitutional focus

> remains on the notice-and-opportunity-for-hearing concept of *Dixon*.[28]

To the extent that the original Federal District Court opinion in *Esteban* holds that such procedures are *required* for *all* disciplinary cases, it is clearly inconsistent with *Horowitz* and *Ewing* (and even with the later Eighth Circuit opinion in *Esteban*). When Kaplin and Lee assert that *Esteban*-like procedures are considered valuable to ascertain facts when they are in dispute they clearly favor an overly legalistic model of dispute resolution. Indeed, disciplinary proceedings with this high level of formalism often tend to do exactly the opposite when ascertaining facts. Highly legalistic procedures promote posturing, obfuscation, and fabrication. Further, the rights of confrontation listed in number 6 might actually create further disciplinary problems. The accused often wishes to retaliate against a principal witness. Unlike a court of law, typical universities do not deploy forces, such as marshals, to protect judges, witnesses, etc. in court or thereafter.

The original federal district court opinion in *Esteban* is not the law of the land, and is bad policy. Nonetheless, this has not stopped a generation of legalists from promoting this type of model for universities throughout the country. Most modern universities have systems that feature many, if not all of the above listed procedures. Unfortunately, what may be a good model for court (and that is debatable) is not a good model for higher education.

While many courts have recognized the inherent power of colleges to regulate their environments, the preference for rules in higher education has brought with it a high level of emphasis on clarity and specificity, even when there are no legal requirements for such things. Higher education has internalized legalistic rule-thinking into its culture. Most higher education judicial administrators believe deeply in rules with clarity and specificity. The drive for clarity is dogma—dogma based on faith in rules, and law-like rules at that.

II. Judicial Systems

Higher education quickly adopted "judicial systems."[29] For example, Kaplin and Lee encourage colleges to adopt systems denominated "judicial systems" and use them to manage the academic environment. As Kaplin and Lee state:

[28] *See id.* at 975–76.
[29] *See id.* at 917–21.

> Judicial systems that adjudicate complaints of student misconduct must be very sensitive to procedural safeguards. The membership of judicial bodies, the procedures they use, the extent to which their proceedings are open to the academic community, the sanctions they may impose, the methods by which they may initiate proceedings against students, and provisions for appealing their decisions should be set out in writing and made generally available within the institution.[30]

It is interesting of course that the United States Supreme Court has never even intimated that higher education should form "judicial" systems, or that sensitivity to "procedural safeguards" be a first or even significant priority in all matters. Kaplin and Lee assume that there should be provisions for appealing decisions: yet the United States Supreme Court has never suggested that such mechanisms are essential, necessary, a good idea, or even proper.[31]

When adopting "judicial" systems colleges typically adopt "hearing" based models with rules of evidence and specific rules of procedure, appeals, prosecutors, etc. In the rush to embrace legalisms, higher education rapidly turned the requirement for procedural fairness into the creation of an emulative court system.

Consider the specific advice of Kaplin and Lee:

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[30] *Id.* at 917 (footnote omitted).

[31] Indeed, the very term "judicial" that appears both in Kaplin and Lee and in the former name of the leading organization—The Association for Student Judicial Affairs, now the Association for Student Conduct Administration (ASCA), see ASJA, www.theasca.org/ [hereinafter ASJA]—has come under attack. Except in states where public universities are forced to conform their judicial procedures to administrative procedure act requirements, discipline systems denominated judicial are metaphoric only, and even misleading. Students do not face process that is truly identical or even similar to that which actually occurs in the court system, and the metaphors to the legal system create false expectations and generate academic and environmental management problems. The fact that Kaplin and Lee ratified the use of the term "judicial" to refer to systems of environmental management shows how deeply engrained the era of legalisms is in the mindset of higher education academics and lawyers. It is as if higher education became so excited by legalisms that the field subsequently ignored direct statements by the United States Supreme Court in later cases.

Higher education is the perfect example of the fact that what people believe the law requires is often more important that what it actually requires.

> It is not enough, however, for an administrator to understand the extent and limits of institutional authority. The administrator must also skillfully implant this authority through various systems for the resolution of disputes concerning students. Such systems should include procedures for processing and resolving disputes, substantive standards or rules to guide the judgment of the persons responsible for dispute resolution, and mechanisms and penalties with which decisions are enforced. The procedures, standards, and enforcement provisions should be written and made available to all students. . . .
>
> The choice of structures for resolving disputes depends on policy decision made by administrators, preferably in consultation with representatives of various interests within the institution. . . .
>
> Devices for creating dispute-resolution systems may include honor codes or codes of academic ethics; codes of student conduct; bills of rights, or rights and responsibilities, for students or for the entire academic community; the use of various legislative bodies, such as a student or university senate; a formal judiciary system for resolving disputes concerning students; the establishment of grievance mechanisms for students, such as an ombudsman system or grievance committee; and mediation processes that provide an alternative or supplement to judiciary and grievance mechanisms. On most campuses, security guards or some other campus law enforcement system should also be involved in the resolution of disputes and regulation of student conduct.[32]

Their advice is essentially to create a parallel justice system similar to that used in society generally. Virtually all of their proposed solutions to the problems of dispute resolution— and due process—have centered on

[32] KAPLIN & LEE, *supra* note 23, at 911–12.