

STUDENT MISCONDUCT AT PRIVATE COLLEGES AND UNIVERSITIES: A ROADMAP FOR "FUNDAMENTAL FAIRNESS" IN DISCIPLINARY PROCEEDINGS

Abstract: When called upon to review the disciplinary procedures of private colleges and universities, courts have struggled to find a legal theory upon which to base their reviews. Much of this struggle can be attributed to the fact that, because the relationship between a student and a university is unique, it is difficult to find an appropriate doctrinal category. This Note analyzes the methods by which courts have reviewed challenges to disciplinary proceedings in private colleges and universities. Specifically, it examines the approaches taken by courts that have reviewed private school disciplinary procedures, paying particular attention to what these courts have recommended to avoid arbitrary decisionmaking and to achieve "basic" or "fundamental" fairness.

INTRODUCTION

On February 25, 2000, the Columbia University Senate, a legislative body comprised of faculty, students and administrators, voted unanimously to enact a new Sexual Misconduct Policy and Disciplinary Procedure and to create an "Office of Sexual Misconduct Prevention and Education."¹ The campaign for the new policy was spearheaded by Students Active for Ending Rape (SAFER), a campus group committed to "a non-adversarial approach" to student discipline and the eradication of "bureaucratic red tape" in the disciplinary process.²

¹ See *Resolutions of the Columbia University Senate*, February 25, 2000, available at <http://www.columbia.edu/cu/senate/resolutions/99-00/TF022500.html> [hereinafter *Resolutions*]. The entire text of the Policy is available on the web page of the Office of Sexual Misconduct Prevention and Education at <http://www.columbia.edu/cu/sexualmisconduct/policy.html>. Interestingly, the resolution permitted each of Columbia's undergraduate and graduate schools to elect to participate in this new Discipline Procedure—only the Law School elected not to participate and continues to govern student conduct in accordance with a resolution adopted by the Faculty of Law on December 8, 1989, as amended in June 1993 and on November 17, 1995. See *University and Law School Regulations*, available at http://www.law.columbia.edu/academics/rules/University_Regulations.html.

² See Jaime Sneider, *It's A Brave New World at Columbia U.*, N.Y. POST, Oct. 6, 2000. The campaign was also a response to federal and New York state law requirements that colleges

The implementation of this new policy during the fall semester of the 2000–01 academic year touched off a firestorm of debate and renewed scrutiny of disciplinary systems in private colleges and universities across the nation.³

Critics of this policy argue that it suffers from a number of shortcomings.⁴ They maintain, for example, that the policy fails to afford a student accused of sexual misconduct such fundamental tenets of due process as the right to be present during testimony, to cross-examine witnesses, to receive advance notice of evidence, to have an attorney present during hearings, or to have a tape recording or a transcript of the proceedings.⁵ Moreover, this failure to provide for a tape recording or a transcript of the proceeding, critics argue, is likely to render any appeal illusory.⁶ They further contend that the policy improperly omits the assignment of a burden and fails to create any standard of proof.⁷ Critics also argue that the policy's skeletal framework of due process is especially inadequate in situations in which the conduct in question could subject the accused student to criminal prosecution outside the university and where "conviction" within the university may result in substantial social stigma as well as serious punishment such as dismissal.⁸ Additionally, the policy specifies that "breaches of

and universities promulgate policies and disciplinary procedures aimed at the prevention of sex offenses. See generally Alan Stone, Vice President for Public Affairs, Columbia University, Letter to the Editor, *Sexual Assault Policy Still Has Safeguards*, WALL ST. J., Oct. 11, 2000.

³ See Karen W. Arenson, *New Procedure for Handling Sexual Misconduct Charges at Columbia University is Challenged*, N.Y. TIMES, Oct. 5, 2000.

⁴ See Vivian Berger, *Sexual Misconduct Policy: No Due Process at CU*, COLUMBIA SPECTATOR (N.Y.), Nov. 21, 2000; Nat Hentoff, *Columbia University's Star Chamber*, VILLAGE VOICE (N.Y.), Nov. 8, 2000; Dawn Santoli *NYU Rejects Columbia-like Sexual Misconduct Policy*, WASH. SQUARE NEWS (N.Y.), Oct. 12, 2000; Sneider, *supra* note 2; Norah Vincent, *The Accused*, VILLAGE VOICE (N.Y.), Oct. 25, 2000.

⁵ See Berger, *supra* note 4; Hentoff, *supra* note 4; Sneider, *supra* note 2; Santoli, *supra* note 4; Vincent, *supra* note 4. One critic has also charged that the policy has substantive shortcomings as well. See Berger, *supra* note 4. In particular, the policy defines sexual misconduct as "non-consensual, intentional physical contact with a person's genitals, buttocks or breasts" and goes on to state that "lack of consent may be inferred from . . . the victim's mental or physical incapacity or impairment of which the perpetrator was aware or should have been aware." See *Resolutions*, *supra* note 1. These definitions, according to opponents, are over-broad, lack clarity, and therefore do not adequately put students on notice as to what conduct will be violative of the policy. See Berger, *supra* note 4. As a result, the policy may in fact become a trap for the unwary innocent. See KORS ALAN CHARLES & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY* 268 (1998). A thorough discussion of the criticisms of the substantive shortcomings of Columbia's policy is beyond the scope of this Note.

⁶ See Berger, *supra* note 4; Hentoff, *supra* note 4; Vincent, *supra* note 4.

⁷ See Berger, *supra* note 4; Hentoff, *supra* note 4; Vincent, *supra* note 4.

⁸ See Berger, *supra* note 4.

the confidentiality of the proceedings, or retaliation against any person bringing a complaint, will constitute separate violations of the Sexual Misconduct Policy.⁹ The problem, opponents argue, is that this strict confidentiality provision may deter the accused student from approaching potential witnesses.¹⁰ As a result, the accused student, who is not entitled to receive advance notice of the evidence, but who has a strong interest in conducting his or her own investigation, is not afforded the opportunity to mount a successful defense.¹¹

On the other hand, supporters of the policy argue that it furthers two important interests—namely, encouraging the reporting of sexual misconduct and preventing potential witness intimidation.¹² Indeed, several of the policy's provisions appear to protect victims of rape and other serious sexual offenses from the additional trauma of being forced to confront their attackers face-to-face or of being subjected to cross-examination in a disciplinary hearing.¹³ Proponents of the policy maintain that empirical evidence indicates that to avoid this trauma, victims often elect not to report attacks.¹⁴ In fact, the policy incorporates these concerns, recognizing that the reported incidents of campus sexual assaults likely under-represent the number of actual incidents and eliminating the former procedural requirement that both parties be present at the hearing at all times.¹⁵

In the face of ongoing public criticism over its policy, the Columbia administration has staunchly defended the policy's provisions insisting that the imposition of every criminal law due process requirement is "not necessary to ensure a fair and effective [disciplinary] process."¹⁶ In addition, the administration maintains that the policy

⁹ *Sexual Misconduct Policy and Disciplinary Procedure*, available at <http://www.columbia.edu/cu/sexualmisconduct/policy.html>.

¹⁰ See Berger, *supra* note 4.

¹¹ See *id.*

¹² See Arenson, *supra* note 3.

¹³ See Vincent, *supra* note 4; Ben Wheeler, Letter to the Editor, *Due Protection*, VILLAGE VOICE (N.Y.), Nov. 8, 2000; *Due Process at Columbia*, WALL ST. J., Oct. 30, 2000. For further insight into the motivation behind the new policy see the *Revised Report of the University Senate Task Force to Review The Sexual Misconduct Policy and Procedure*, Dec. 9, 1999, available at http://www.columbia.edu/cu/senate/annual_reports/00-00/TF1299.html [hereinafter *Revised Report*].

¹⁴ See *Revised Report*, *supra* note 13.

¹⁵ See *Revised Report*, *supra* note 13.

¹⁶ See Arenson, *supra* note 3; Vincent, *supra* note 4. According to the Due Process Clause of the Fourteenth Amendment, "No State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 2. The United States Supreme Court has defined Fourteenth Amendment Due Process to incorporate the rights guaranteed by the Bill of Rights, including those guaranteed by the Fifth Amend-

affords accused students the basic due process standards *required by the University*.¹⁷ Columbia is correct—unlike public schools, private colleges and universities are not bound by the due process provisions of the Constitution; thus, they are permitted to establish and implement their own disciplinary procedures.¹⁸ Historically, courts have been reluctant to interfere in the discipline decisions of private colleges and universities and generally have required only that private schools substantially observe the rules or guidelines they have adopted.¹⁹

When called upon to review the disciplinary procedures of private colleges and universities, courts have struggled to find a legal

ment ("No person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V). In general, procedural due process requires that as the penalty becomes more serious, the formality of the procedures must increase. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁷ See Arenson, *supra* note 3; Vincent, *supra* note 4. Because public colleges and universities are created by state constitutions or statutes and are funded by state taxes, they are creatures of the states and their decisions, therefore, qualify as "state action" for Due Process purposes. See *Osteen v. Henley*, 13 F.3d 221, 223 (7th Cir. 1993) (indicating that three Illinois state universities are governed by separate state statutes); *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal. Rptr. 463, 468 (Cal. Ct. App. 1967) (holding that the University of California, Berkeley, is a department or function of the state government pursuant to Article IX, section 9, of state constitution). Public colleges and universities are bound by the Fourteenth Amendment's Due Process Clause and may not deprive a student of his education without affording him procedural due process. See generally Robert B. Groholski, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process*, 19 N. ILL. U. L. REV. 739, 739 (1999) (arguing that students in public colleges and universities have both a liberty interest and a property interest in their education that require protection by the Fourteenth Amendment and detailing federal and state court cases that have addressed this issue). Groholski's article provides a good overview of judicial treatment of a student's protected liberty and property interest in his or her education. See Groholski, *supra*, at 750-67.

¹⁸ See *Coveney v. Pres. of Coll. of the Holy Cross*, 445 N.E.2d 136, 139 (Mass. 1983) ("A college must have broad discretion in determining appropriate sanctions for violations of its policies."); *Anderson v. Mass. Inst. of Tech.*, 1995 WL 813188, *1, *4 (Mass. Super. 1995) ("[A] private university has a right to manage its own affairs and to establish its own rules and regulations in the conduct of the university's business and goals—including student discipline."); *Schulman v. Franklin & Marshall Coll.*, 538 A.2d 49, 52 (Pa. Super. Ct. 1988) ("A college . . . must be self-governing and the courts should not become involved in that process.").

¹⁹ See *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994); *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000); *Anderson*, 1995 WL 813188, at *4; *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1306 (N.Y. 1980) ("[W]hen a university has adopted a rule or guideline establishing the procedure to be followed . . . that procedure must be substantially observed.").

theory upon which to base their reviews.²⁰ Much of this struggle can be attributed to the fact that, because the relationship between a student and a university is unique, it is difficult to find an appropriate doctrinal category.²¹ Like courts, commentators also continue to search for a doctrine that will provide an appropriate standard to guide the judicial review of disciplinary procedures in private colleges and universities.²²

Although several different theories have been suggested, including tort law, association law, and *in loco parentis*, courts most often have employed contract law principles when reviewing university disciplinary procedures.²³ Some courts have applied contract law rather rigidly, whereas others, recognizing the inherent difficulties created by treating the student-university relationship as a strictly commercial arrangement, have adopted a "relaxed" contract approach.²⁴ Courts

²⁰ See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975); *Anderson*, 1995 WL 813188, at *4; *Tedeschi*, 404 N.E.2d at 1304-05; *Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991).

²¹ See *Slaughter*, 514 F.2d at 626; *Anderson*, 1995 WL 813188, at *4; *Tedeschi*, 404 N.E.2d at 1304-05; *Psi Upsilon of Phila.*, 591 A.2d at 758.

²² See Hazel Glenn Beh, *Student Versus University: The University's Implied Obligation of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 215-18 (2000) ("Good faith and fair dealing can provide a framework to adjudicate student claims that is not unduly intrusive."); Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 289 (1999); Note, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795, 803-06 (1970) ("[T]he student-private university relationship has been examined under several theories unrelated to constitutional law."); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 137 (1974) ("[I]t is not surprising to find the cases floundering in a sea of doctrinal doubt."); Scott R. Sinson, Note, *Judicial Intervention of Private University Expulsions: Traditional Remedies and A Solution Sounding in Tort*, 46 DRAKE L. REV. 195, 223-30 (1997) ("The unjust expulsion of a student from a university should lie in tort, and not contracts.");

²³ See *Slaughter*, 514 F.2d at 626 (noting that although some elements of the law of contracts should be used in the analysis of the relationship between the student and the University, contract law need not be rigidly applied); *Tedeschi*, 404 N.E.2d at 1304-06 (concluding that neither contract law nor association law are wholly satisfactory legal theories upon which to predicate judicial review of university expulsions, but not finding it necessary to resolve the issue in order to conduct a review). But see *Anderson*, 1995 WL 813188, at *3 (commenting that American courts have generally adopted the idea, although denounced by commentators, that the student's relationship to the private university is contractually governed by the documents he accepts at matriculation); *Psi Upsilon of Phila.*, 591 A.2d at 758 (noting that a majority of courts have characterized the relationship between a private college and its students as contractual in nature).

²⁴ See *Holert*, 751 F. Supp. at 1300 (concluding that under Illinois law, a university and its students have a contractual relationship, the terms of which are set forth in the university's catalogs and manuals); *Schaer*, 735 N.E.2d at 378 (assuming the existence of a contract between the student and the University and reviewing the student's allegations of a breach

applying a relaxed or quasi-contract approach have articulated that private schools should incorporate a requirement of "fundamental" or "basic" fairness in disciplinary proceedings.²⁵ The particular parameters of "fundamental" or "basic" fairness are difficult to discern, but a careful analysis of the decisions points to several vital elements, including a general requirement that the disciplinary procedures be free from bias and prejudice.²⁶

This Note analyzes the methods by which courts have reviewed challenges to disciplinary proceedings in private colleges and universities. Part I.A outlines the challenges presented by cases involving student-on-student sexual misconduct—arguably the most difficult cases a school faces.²⁷ Part I.B examines the approaches taken by courts that have reviewed private school disciplinary procedures, paying particular attention to what these courts have recommended to avoid arbitrary decisionmaking and to achieve "basic" or "fundamental" fairness.²⁸ Part I.C discusses the approaches of two commentators.²⁹ Finally, Part II recommends that private colleges and universities write a disciplinary policy that enables them to balance the interests of both the students and the school and further proposes that courts hold private schools to a more rigorous standard of procedural due process in their disciplinary proceedings.³⁰

I. BACKGROUND

A. *Student-on-Student Sexual Misconduct: Balancing Competing Interests in The "Toughest Cases"*

In the 1990s, student-on-student sexual misconduct and the disciplinary responses to this behavior by colleges and universities emerged as a topic of great interest in the popular press.³¹ In re-

by the school); *Coveney*, 445 N.E.2d at 138 (disposing of the case on the ground that the college did not violate any contractual right of the student).

²⁵ See *Anderson*, 1995 WL 813188, at *4; *Tedeschi*, 404 N.E.2d at 1306; *Psi Upsilon of Phila.*, 591 A.2d at 758.

²⁶ See *Anderson*, 1995 WL 813188, at *4; *Tedeschi*, 404 N.E.2d at 1306; *Psi Upsilon of Phila.*, 591 A.2d at 758.

²⁷ See *infra* notes 31–46 and accompanying text.

²⁸ See *infra* notes 47–153 and accompanying text.

²⁹ See *infra* notes 154–201 and accompanying text.

³⁰ See *infra* notes 202–278 and accompanying text.

³¹ See Nina Bernstein, *Behind Some Fraternity Walls, Brothers in Crime*, N.Y. TIMES, May 6, 1996, at 1 (describing roll of fraternities in campus sexual misconduct cases); Nina Bernstein, *College Campuses Hold Court In Shadows of Mixed Loyalties*, N.Y. TIMES, May 5, 1996, at 1

sponse to this heightened awareness regarding campus sexual misconduct, college and university administrators were under increased pressure from student groups to structure disciplinary procedures that were "victim-friendly."³² As schools responded to these demands and attempted to alleviate the stress inflicted on testifying rape and sexual assault victims, a growing counter-movement alleged that campus disciplinary systems had become strongholds of political correctness.³³ This group further charged that the rights of students accused

(discussing universities' internal procedures for investigating and adjudicating student-on-student rape charges); Nina Bernstein, *Years Later, Fordham Case Still Haunts Woman*, N.Y. TIMES, May 5, 1996, at 1 (describing Fordham's procedure in a campus rape case and detailing harassment of victim by friends of the accused); Kathryn Kranhold & Katherine Farrish, *Anxiety About Sex, Dating, Rape Transforms College Life*, HARTFORD COURANT, Oct. 10, 1993, at A1 (noting increased awareness of student-on-student rape and discussing efforts by colleges to use student conduct codes to prosecute allegations); John Silber, *Students Should Not Be Above the Law*, N.Y. TIMES, May 9, 1996, at 27 (noting that administration of college judicial codes should not result in sanctuary from the law); Wes Smith, *Trial and Error? Did A University Go Too Far in Getting Tough on Date Rape?*, CHI. TRIB., May 1, 1994 (Magazine), at 14 (discussing Valparaiso University's handling of a student-on-student rape case). The increased attention given to student-on-student sexual assault on campus also may be traceable to an oft-quoted October 1985 *Ms. Magazine* survey, titled *Date Rape: The Story of an Epidemic and Those Who Deny It*, that found that one in four college women is the victim of rape or attempted rape. See KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM* 6, 51 (1993).

³² See Smith, *supra* note 31, at 22. See also MICHAEL CLAY SMITH & RICHARD FOSSEY, *CRIME ON CAMPUS: LEGAL ISSUES AND CAMPUS ADMINISTRATION* 95-96 (1995). In addition, Congress, recognizing the value of rape awareness programs and special services for sexual assault victims, passed the Ramstad Amendment in 1992, requiring colleges and universities to develop campus sexual assault policies. See SMITH & FOSSEY, *supra*, at 79. The law, codified at 20 U.S.C. §1092(f) (7) (1994), requires higher education institutions to adopt policies to prevent sex offenses and procedures and to deal with sex offenses once they have occurred. 20 U.S.C. §1092(f) (7). It also requires several procedural safeguards including the right of both parties to have others present at the hearing and to be informed of the outcome of any disciplinary hearing. See SMITH & FOSSEY, *supra*, at 79. Smith and Fossey provide a comprehensive list of the Ramstad Amendment's other requirements. See *id.*

³³ See Smith, *supra* note 31, at 22 (citing a 1993 study on campus acquaintance rape by the National Association of College and University Attorneys noting that student-on-student sexual assault is "hands down the most difficult issue that comes up" for college administrators). See generally KORS & SILVERGLATE, *supra* note 5. Kors and Silverglate argue that the ultimate force of the "Shadow University" is its ability to punish students behind closed doors, far from public and campus scrutiny, and to engage in a systematic assault on due process. See *id.* at 4-5. See generally ROIPHE, *supra* note 31, at 6 (1993). Roiphe argues that a "new bedroom politics" has entered universities and that there is disagreement over how to define "rape." See *id.* at 6, 80-81. Recent definitions, according to Roiphe, stretch beyond acts of violence or physical force to include even verbal coercion or manipulation. See *id.* at 67. Roiphe suggests that "there is a gray area in which someone's rape maybe another person's bad night" and that the broad sweep of this definition has threatened to unfairly minimize the experiences of victims of violent sexual assaults. See *id.* at 54, 81-82.

of sexual misconduct are routinely trampled in campus Star Chambers.³⁴ Finally, schools have a legitimate and compelling interest in protecting their public image, guarding against negative publicity, preserving order on campus, and promoting the school's institutional values.³⁵

The highly politicized tension between these competing movements offers some insight into the difficulty schools face in investigating and adjudicating student-on-student sexual misconduct cases.³⁶ College administrators are faced with mounting pressure from both sides.³⁷ Victims demand swift action and private hearings in which they do not have to confront or face the accused.³⁸ From the other side, colleges face demands for procedures best designed to protect the rights of accused students and ascertain the truth, including the right to confront and cross-examine the accuser and other witnesses.³⁹ Because these interests directly conflict with one another, schools are forced to assume the neutral role of referee and design a disciplinary

³⁴ See Smith, *supra* note 31, at 22; KORS & SILVERGLATE, *supra* note 5, at 289–311. Kors and Silverglate are among the most outspoken critics of campus judicial procedures. See KORS & SILVERGLATE, *supra* note 5, at 289–311. In *The Shadow University*, they charge that “there is virtually no place left in the United States where kangaroo courts and Star Chambers are the rule rather than the exception—except on college and university campuses . . . where not only is arbitrariness widespread, but where fair procedures and rational fact-finding mechanisms, with disturbing and surprising frequency, are actually precluded by regulations.” *Id.* at 276. See also DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS* 206–08 (1999) (defining the Court of Star Chamber and noting that it has been portrayed as a bastion of tyranny based on its use of torture and mutilation and the lack of jury trials).

³⁵ See Thomas R. Baker, *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy*, 142 *EDUC. L. REPTR.* 11, 22–23; Paul E. Rosenthal, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 *COLUM. L. REV.* 1241, 1247 (1997); Sinson, *supra* note 22, at 196–98; Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 *YALE L.J.* 1362, 1392 (1963); Lisa Sweni, Note, *Due Process in Student Disciplinary Matters*, 14 *J.C. & U.L.* 359, 364 (1987).

³⁶ See Baker, *supra* note 35, at 22–23; Rosenthal, *supra* note 35, at 1247; Sinson, *supra* note 22, at 196–98. See also Mark S. Blaskey, *University Students' Right to Retain Counsel for Disciplinary Proceedings*, 24 *CAL. W. L. REV.* 65, 69 (1988) (maintaining that disciplinary proceedings are by their very nature more complex because they involve adjudicating offenses which might be deemed criminal).

³⁷ See Columbia University's *Sexual Misconduct Policy: Further Comments From a Former Student Panelist*, available at <http://www.columbia.edu/cu/safer/backlash/formerpanelist.html> [hereinafter *Further Comments*].

³⁸ See *Further Comments*, *supra* note 37; Amy M. Holmes, *Men, Women: We're Not that Different*, available at <http://www.odyssey.on.ca/~balancebeam/courts/columbia.htm>.

³⁹ See Blaskey, *supra* note 36, at 65; Sweni, *supra* note 35, at 382; Holmes, *supra* note 38.

system that enables them to investigate and adjudicate these complaints fairly and efficiently.⁴⁰

In addition to the campus political pressure that can influence the contours of a school's disciplinary system, student-on-student sexual misconduct cases are difficult from an evidentiary perspective.⁴¹ In cases of student-on-student sexual misconduct, the fact of sexual contact is often not in dispute and consent is the principal—and perhaps only—issue.⁴² Moreover, these incidents typically occur in dormitory rooms, and third-party eyewitnesses are rare.⁴³ Because alcohol is often involved and consensual foreplay typically precedes an acquaintance rape, physical evidence of an assault is often unavailable.⁴⁴ Even the presence of physical evidence of intercourse may not be dispositive of misconduct if consent is at issue.⁴⁵ Thus, such disciplinary hearings are susceptible to being reduced to a “he said/she said” credibility contest.⁴⁶

B. *Judicial Review of Private School Disciplinary Proceedings*

A public school student's right to procedural due process in disciplinary matters was first affirmed by the United States Court of Ap-

⁴⁰ See Baker, *supra* note 35, at 22–23; John Friedl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701, 713 (2000); Rosenthal, *supra* note 35, at 1247–48. See generally KORS & SILVERGLATE, *supra* note 5 (arguing that campus discipline systems administer justice in a biased fashion and without due process). Critics have called into question the ability of universities to prosecute and adjudicate allegations of offenses as serious as rape, and some have suggested that schools coddle criminals whereas others have charged that they run roughshod over the rights of the falsely accused. See Rosenthal, *supra* note 35, at 1248. This concern has led former Boston University President John Silber to conclude that colleges should avoid disciplining these crimes and instead report them to the police. See *id.* at 1249. The weakness of this argument is, as Rosenthal points out, that internal adjudication may provide victims of sexual assault a friendlier atmosphere than the criminal courts. See *id.* at 1247–48.

⁴¹ See Crime Awareness and Campus Security Act of 1990 § 204(a), 20 U.S.C. § 1092(f) (1)–(6) (1994) (requiring universities to develop policies to encourage prompt reporting of crimes to police and university officials); Higher Education Amendments of 1992 § 486, 20 U.S.C. § 1092(f) (1) (F), (f) (7) (1994) (requiring universities to develop and implement policies against sexual assault and compile and report statistics on sexual assault); Baker, *supra* note 35, at 23; Rosenthal, *supra* note 35, at 1247.

⁴² See Rosenthal, *supra* note 35, at 1247.

⁴³ See Baker, *supra* note 35, at 22–23; Rosenthal, *supra* note 35, at 1247.

⁴⁴ See Baker, *supra* note 35, at 22–23; Rosenthal, *supra* note 35, at 1247.

⁴⁵ See Baker, *supra* note 35, at 22–23; Rosenthal, *supra* note 35, at 1247.

⁴⁶ See Baker, *supra* note 35, at 22–23; Rosenthal, *supra* note 35, at 1247. See also Richard C. Cahn, *Sexual Harassment on Campus: Does the Accused Have Any Rights?*, 11 *TOURO L. REV.* 579, 580 (1995) (noting that even groundless allegations of sexual misconduct, like those of rape, can irreversibly damage reputations and ruin careers).

peals for the Fifth Circuit in 1961 in *Dixon v. Alabama State Board of Education*.⁴⁷ In *Dixon*, Alabama State College attempted to expel six students on grounds of misconduct, without showing the students detailed charges or any of the evidence against them.⁴⁸ The Fifth Circuit held that the Due Process Clause of the Fourteenth Amendment requires notice and some opportunity for hearing before a student at a public university is expelled for misconduct.⁴⁹

Fourteen years later, the United States Supreme Court provided more precise contours of *Dixon*.⁵⁰ In 1975, in *Goss v. Lopez*, the Supreme Court held that even students facing a temporary suspension must be afforded notice of the charges against them and an opportunity to be heard.⁵¹ In *Goss*, nine Columbus, Ohio high schools students alleged that they had been suspended for up to ten days without a hearing, in violation of the procedural due process component of the Fourteenth Amendment.⁵² Noting that the Due Process Clause forbids arbitrary deprivations of liberty, the Supreme Court held that a student facing suspension of ten days or less must be given oral or written notice of the charges against him, an explanation of the evidence against him and an opportunity to present his side of the

⁴⁷ 294 F.2d 150, 158 (5th Cir. 1961).

⁴⁸ See *id.* at 154-55. The students were not granted a hearing prior to their expulsion and the notice of expulsion mailed to them assigned no specific ground for expulsion. See *id.* at 151-52, 154. Moreover, the members of the State Board of Education who voted to expel the students assigned "somewhat varying and differing grounds for their decision." See *id.* at 159. This "outrageous action" of the Alabama officials prompted the Fifth Circuit to cite what it termed the "eloquent comment" by Professor Warren A. Seavey in his article *Dismissal of Students: Due Process*, 70 HARV. L. REV. 1406, 1407 (1957): "It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket." See *id.* at 158.

⁴⁹ See *Dixon*, 294 F.2d. at 158. In dictum, the court went on to state its views on the nature of the notice and hearing required prior to expulsion: the notice should contain a statement of the specific charges and the grounds which, if proven, would justify expulsion. See *id.* The nature of the hearing, the court stated, should vary depending upon the circumstances of the particular case. See *id.* Because charges of misconduct depend upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses, hearings in these cases at best protect the rights of all involved if the administrative authorities are given an opportunity to hear both sides in considerable detail. See *id.* at 158-59. The Fifth Circuit was not suggesting that a full-dress judicial hearing was required, but noted that the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. See *id.* at 159.

⁵⁰ See *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975).

⁵¹ See *id.* at 581. In a footnote, the Court indicated its approval of *Dixon*, explicitly referring to it as a "landmark decision." See *id.* at 576 n.8.

⁵² See *id.* at 568.

story.⁵³ Expressly confining its holding to short suspensions (those not exceeding ten days) the Court, in dictum, noted that longer suspensions or expulsions might require more formal procedures.⁵⁴

The Supreme Court further refined its academic due process jurisprudence in subsequent cases by recognizing two important distinctions—that between academic and disciplinary matters and that between public and private universities.⁵⁵ In 1978, in *Board of Curators of the University of Missouri v. Horowitz*, the Court made it clear that it would grant greater deference to public schools in decisionmaking in academic, as opposed to disciplinary, dismissals and, indeed, would require more stringent procedural requirements in dismissals based upon purely disciplinary matters.⁵⁶ Furthermore, in 1982, in *Rendell-Baker v. Kohn*, the Court held that, as a general matter, students attending private universities do not possess the same due process rights constitutionally guaranteed to students attending public schools.⁵⁷ Accordingly, courts have been more reluctant to review the disciplinary decisions of private schools and have maintained a deferential posture toward private school decisionmaking, particularly in internal disciplinary affairs.⁵⁸ In the absence of constitutional protections,

⁵³ See *id.* at 581. Explaining its holding in more detail, the Court commented that requiring effective notice and an informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. See *id.* at 583. The disciplinary administrator may then summon the accuser; permit cross-examination and allow the accused student to present his own witnesses, resulting in discretion that is more informed and a risk of error that is substantially reduced. See *id.*

⁵⁴ See *id.* at 584.

⁵⁵ See *Rendell-Baker v. Kohn*, 457 U.S. 830, 846 (1982); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978).

⁵⁶ See *Horowitz*, 435 U.S. at 86.

⁵⁷ See *Rendell-Baker*, 457 U.S. at 846. In an explanation of why private entities are not subject to a state action claim, the Court stated, "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

⁵⁸ See *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (commenting that courts adopt a deferential standard regarding university discipline decisions because of a reluctance to interfere with the regulation of student conduct in a private university); *Anderson v. Mass. Inst. of Tech.*, 1995 WL 813188, *1, *4 (Mass. Super. 1995) (noting that a court may only intervene in the student-university relationship when the student demonstrates that the university action was arbitrary and capricious); *Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991) (noting that courts are generally more reluctant to interfere in the disciplinary proceedings of a private college than those of a public college); *Schulman v. Franklin & Marshall Coll.*, 538 A.2d 49, 52 (Pa. Super. Ct. 1988) (indicating that because a college is a unique institution which, to the degree possible, must be self-governing, courts should not become involved in internal disciplinary

courts generally have required that private school disciplinary procedures adhere to a "fundamental" or "basic" fairness standard and not be arbitrary or capricious.⁵⁹ More precisely, state and federal courts have often held that a private school's disciplinary decisions are fundamentally fair if they comport with the rules and procedures that the school itself has promulgated.⁶⁰

1. State Court Decisions

In 2000, in *Schaer v. Brandeis University*, the Supreme Judicial Court of Massachusetts ("SJC") held that in disciplining students, a university should follow its own rules and that a failure to do so may

procedures unless the process has been found to be biased, prejudicial or lacking in due process).

⁵⁹ See *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983) ("We also examine the hearing to ensure that it was conducted with basic fairness."); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994) ("The College has agreed to provide students with proceedings that conform to a standard of 'fundamental fairness' and to protect students from arbitrary and capricious disciplinary action to the extent possible within the system it has chosen to use."); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 380 (Mass. 2000) ("In addition to reviewing the allegations of breach of contract, [w]e . . . examine the hearing to ensure that it was conducted with basic fairness."); *Coveney v. Pres. of Coll. of the Holy Cross*, 445 N.E.2d 136, 138 (Mass. 1983) ("[A] private university, college, or school may not arbitrarily or capriciously dismiss a student."); *Ahlum v. Adm'rs of the Tulane Educ. Fund*, 617 So. 2d 96, 98-99 (La. Ct. App. 1993) ("The disciplinary decisions of a private school may be reviewed for arbitrary and capricious action."); *Psi Upsilon of Phila.*, 591 A.2d at 760 ("[C]ourts should not interfere with internal procedure and discipline unless real prejudice, bias or denial of due process is present."). See also *Anderson*, 1995 WL 813188, at *4-*5 ("A court may only intervene in the student-university relationship when the student demonstrates that the university's action was arbitrary and capricious."). The *Anderson* court provided a comprehensive list of circumstances that would render a school's action arbitrary and capricious, including a failure to follow its own disciplinary rules and a failure to afford the student a hearing that was fundamentally fair. See *id.* at *4. Further, the court suggested that "at the very least" the student should be provided written notice of the charges against him; a written description of the evidence upon which the charges are based; the names of the witnesses the school intends to call at the hearing; an unbiased disciplinary committee or tribunal; an opportunity to be heard and present witnesses in his behalf; and the right to confront and controvert the evidence presented by the university. See *id.*

⁶⁰ See *Fellheimer*, 869 F. Supp. at 244 (concluding that the College can breach its obligation to students only by deviating from its own procedures in such a way that the disciplinary action at issue is fundamentally unfair, arbitrary or capricious); *Holert*, 751 F. Supp. at 1301 (holding that the student was entitled only to those procedural safeguards the University agreed to provide); *Tedeschi*, 404 N.E.2d at 1306 (holding that when a university adopted a rule or guideline establishing the procedure to be followed in relation to a suspension or expulsion that procedure must be substantially observed).

constitute a breach of contract.⁶¹ In this case, David Arlen Schaer, a student at Brandeis University, filed a complaint against the school seeking injunctive relief and compensatory damages after the Board on Student Conduct suspended him for four months for engaging in "unwanted sexual activity" and creating a "hostile environment."⁶² After the suspension, the University Appeals Board on Student Conduct denied Schaer's request for a new hearing.⁶³ Three weeks later, Schaer filed a complaint in the Massachusetts Superior Court, alleging that in unfairly disciplining him, Brandeis had not substantially conformed to its disciplinary process and, therefore, was in breach of contract.⁶⁴ The Superior Court denied Schaer's request for an injunction and granted Brandeis' motion to dismiss the complaint for failure to state a claim upon which relief could be granted.⁶⁵ On appeal, the Massachusetts Appeals Court reversed the Superior Court in part, concluding that Brandeis "did not substantially conform its disciplinary process" to its own procedures as outlined in the "Rights and Responsibilities" section of its student handbook, which serves as a contract between the student and the school.⁶⁶

Reviewing the case, the SJC considered Schaer's allegations and determined that he had not, in fact, stated a claim upon which relief could be granted.⁶⁷ The court did not, however, end its analysis there; it went on to examine the hearing to ensure that it had been conducted with "basic fairness."⁶⁸ Schaer argued that the proceeding was

⁶¹ See *Schaer*, 735 N.E.2d at 378, 381. The parties had stipulated to the existence of a contractual relationship. See *id.* at 378.

⁶² See *id.* at 376. The facts surrounding the *Brandeis* case are similar to those played out on college campuses nationwide. See Bernstein, *supra* note 31, at 1; Kranhold & Farrish, *supra* note 31, at A1. On March 26, 1996, a female student filed a report with the Brandeis student judicial system. See *Schaer*, 735 N.E.2d at 376. In the report, she stated that in the early hours of February 14, she spoke with Schaer on the telephone and that he then came to her dormitory room where they began kissing. See *id.* She alleged that she told Schaer that she "did not want to have sex," but that when she later awoke from sleep she found Schaer having intercourse with her. See *id.*

⁶³ See *Schaer*, 735 N.E.2d at 376.

⁶⁴ See *id.*

⁶⁵ See *id.* at 377.

⁶⁶ See *Schaer*, 735 N.E.2d at 378-79. The Appeals Court characterized the violations as: (1) failure to make careful evaluation of the facts and of the credibility of persons reporting them as required by section 17 of the [contract]; (2) failure to make a record of the proceedings of the board, as required by section 19.4; (3) receipt of irrelevant and inflammatory evidence, in violation of section 19.13; (4) failure to apply 'clear and convincing evidence standard prescribed by section 19.13 of the [contract]; and (5) failure to accord Schaer the process due under section 18.11 of the [contract]. See *id.* at 378-79.

⁶⁷ See *id.* at 378-80.

⁶⁸ See *id.* at 380.

unfair because the testimony of four witnesses was improperly admitted at the hearing.⁶⁹ The majority expressly rejected this argument, noting that a university discipline board is not required to follow the same rules of evidence employed in a court proceeding.⁷⁰ Further distinguishing a university disciplinary proceeding from a court of law, the court explained that a university "may choose to admit all statements by every witness or it may choose to exclude some evidence."⁷¹ Adhering to the well-established principle that courts are "chary about interfering" with the disciplinary decisions made by private colleges and universities, the court continued that "it is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject."⁷² Further, the court noted that a university must have broad discretion in determining appropriate sanctions for violations of its policies.⁷³ Finally, the court stated that a university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by the rules of evidence adopted by courts.⁷⁴

Although it rejected Schaer's breach of contract claim and found that Schaer was not denied "basic fairness," the majority, in dictum, suggested several procedural safeguards that schools might adopt to ensure that disciplinary proceedings are conducted with basic fairness.⁷⁵ For example, in addressing Schaer's complaint that the record of the hearing was "insufficient," the court indicated that because the applicable provision in the "Rights and Responsibilities" section of the student handbook did not require that the testimony of each individual witness be summarized, or that the record be any minimum length, Brandeis was in compliance with this provision.⁷⁶ The court commented, however, that the report was extremely brief and suggested that the better practice would have been to produce a more complete report.⁷⁷

⁶⁹ See *id.*

⁷⁰ See *id.*; see also *Psi Upsilon of Phila.*, 591 A.2d at 760 ("[A Discipline] Board is not subject to strict rules of judicial procedure.").

⁷¹ See *Schaer*, 735 N.E.2d at 380.

⁷² *Id.*

⁷³ See *id.* at 381.

⁷⁴ See *id.*

⁷⁵ See *id.* at 379-80.

⁷⁶ See *Schaer*, 735 N.E.2d at 379-80. Over the course of the five hour hearing, thirteen witnesses testified and the summary of their testimony consisted of only twelve lines! See *id.* at 384 (Ireland, J., dissenting).

⁷⁷ See *id.* at 380.

In a well-reasoned and powerful dissent, Justice Roderick L. Ireland faulted the majority for its failure to analyze the provisions in the "Rights and Responsibilities" section of the student handbook in a manner consistent with the standard principles of contract interpretation.⁷⁸ More specifically, because Brandeis issued the handbook unilaterally and students had no meaningful opportunity to negotiate the terms therein, the ambiguities should be construed against the school.⁷⁹ Justice Ireland next recognized the unique problem faced by private colleges and universities in balancing the interests of student victims of sexual assault and students accused of sexual assault.⁸⁰ Nonetheless, Justice Ireland concluded that in a hearing on a serious disciplinary matter there is too much at stake for a university to fail to follow the rules it has itself articulated.⁸¹

Other state courts have adopted a substantially similar approach.⁸² In 1993, in *Ahlum v. Administrators of Tulane Educational Fund*, the Court of Appeals of Louisiana held that the disciplinary decision of a private university could be reviewed only for arbitrary and capricious action, and that neither the university's disciplinary procedures nor the evidence it relied on in this case were sufficiently deficient to render the university's decision arbitrary and capricious.⁸³ In *Ahlum*, Tulane University's Joint Hearing Board and Appellate Committee found that a student, Sean Ahlum, violated Tulane's Student Conduct Rule III(A) (1), which prohibits a student from "[c]ausing harm or reasonable apprehension of physical harm including sexual assault."⁸⁴ Ahlum filed for relief in Civil District Court, seeking to enjoin the University from imposing a suspension on the grounds that the proceedings were unfairly conducted.⁸⁵ In particular, Ahlum argued that he was denied legal counsel and forced to cross-examine witnesses on his own during the hearing; that the University employed an experienced prosecutor to present its case and cross-examine witnesses; and that his right to an appeal was effectively eliminated.⁸⁶ The trial court granted a preliminary injunction and

⁷⁸ See *id.* at 382 (Ireland, J., dissenting).

⁷⁹ See *id.* at 382 (Ireland, J., dissenting).

⁸⁰ See *id.* at 382-83 (Ireland, J., dissenting).

⁸¹ See *Schaer*, 735 N.E.2d at 383 (Ireland, J., dissenting).

⁸² See *Anderson*, 1995 WL 813188, at *4-*5; *Coveney*, 445 N.E.2d at 138.

⁸³ See *Ahlum*, 617 So. 2d at 98-99, 101.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *id.* at 99-100, 101.

ordered a new hearing to reconsider the charges.⁸⁷ The court further ordered that a written record of the proceedings be made.⁸⁸ Tulane appealed the judgment and asserted, inter alia, that the trial court was without the power to enjoin a private school from implementing an internal disciplinary decision.⁸⁹

In reaching its decision, the Court of Appeals for Louisiana first noted that a private institution is "entitled to a very strong but rebuttable presumption that its internal administrative actions are taken in good faith" and has the power to "create, administer and implement its own rules and procedures concerning . . . the conduct of its students."⁹⁰ Although the court acknowledged that the role of the judiciary is not to substitute its own judgment for that of a private school on the appropriate standards of student conduct or the appropriate penalty for a breach of those standards, it nevertheless conceded that under some circumstances a court may review a private school's disciplinary decisions.⁹¹ Like the court in *Fellheimer v. Middlebury College* (discussed below), the *Ahlum* court specifically commented that its adherence to a policy of judicial restraint in this arena does not suggest that a private institution can maintain egregious policies or that a school's power is otherwise absolute.⁹² In a clear articulation of this position, the court announced that "due process safeguards in private schools cannot be cavalierly ignored or disregarded."⁹³ The court concluded, moreover, that a private school's disciplinary decisions could be reviewed for arbitrary and capricious action.⁹⁴

⁸⁷ See *id.* at 98.

⁸⁸ See *Ahlum*, 617 So. 2d at 98. This hearing would have been Sean Ahlum's third hearing before the Joint Hearing Board. See *id.* at 97. At the first hearing the board unanimously found him in violation of rule III(A) (1). See *id.* Ahlum appealed this finding to the Appellate Committee who overturned the Joint Hearing Board's decision and remanded it to the Hearing board because copies of the Louisiana criminal statute on "simple rape" had been placed in the record, prior to the hearing, without Ahlum's knowledge. See *id.* The second hearing again resulted in a unanimous finding that Ahlum violated rule III(A) (1). See *id.* At the second hearing, the tape recorder malfunctioned and no recording of the hearing was made and no transcript of the proceeding was available for appellate review. See *id.*

⁸⁹ See *id.* at 98.

⁹⁰ See *id.*

⁹¹ See *id.* at 98-99.

⁹² See *id.* at 99.

⁹³ See *Ahlum*, 617 So. 2d at 99.

⁹⁴ See *id.*

After providing definitions of "arbitrary" and "capricious," the court turned to the facts of the case.⁹⁵ The court found that Tulane had an "intricate system of hearings" at which Ahlum had an opportunity to present his version of the facts and to confront the witnesses against him.⁹⁶ Further, Tulane took great pains to inform Ahlum of the charges against him and allowed him an opportunity to present his case in what the court termed a "non-adversarial" forum.⁹⁷ The court thus held that after two separate hearings and two appeals it could not reasonably conclude that Tulane reached an unreasoned or thoughtless decision.⁹⁸ In fact, the court was impressed by Tulane's procedural safeguards and commented that the process afforded to Ahlum may have exceeded the due process required in public schools as envisioned by the United States Supreme Court.⁹⁹

2. Federal Court Decisions

Like the state courts, federal courts have similarly held private schools to a "basic" or "fundamental" fairness standard.¹⁰⁰ In 1994, in *Fellheimer v. Middlebury College*, for example, the United States District Court for the District of Vermont held that Middlebury College was contractually bound to provide students with the procedural safeguards it promised in its publications.¹⁰¹ Ethan Fellheimer, a student who had been suspended for one year after the College found him "not guilty of rape," but guilty of "disrespect for persons, specifically for engaging in inappropriate sexual activity" with a female student, brought a breach of contract claim against the College.¹⁰² In particular, Fellheimer alleged that his relationship with the College was a contractual one, the terms of which were enumerated in the Middlebury College Handbook.¹⁰³ According to Fellheimer, these terms included the College's promise to provide students accused of disciplinary violations procedural protections equivalent to those that are

⁹⁵ See *id.* The court defined arbitrary as a "disregard of evidence or of the proper weight thereof" and capricious as a "conclusion made without substantial evidence or a conclusion contrary to substantial evidence." See *id.*

⁹⁶ See *id.* at 99.

⁹⁷ See *id.* at 99, 100.

⁹⁸ See Ahlum, 617 So. 2d at 99.

⁹⁹ See *id.*

¹⁰⁰ See A & B v. C. Coll. & D., 863 F. Supp. 156, 158 (S.D.N.Y. 1994); Holert, 751 F. Supp. at 1300-01.

¹⁰¹ See *Fellheimer*, 869 F. Supp. at 241.

¹⁰² *Id.*

¹⁰³ See *id.* at 242.

required under the United States Constitution.¹⁰⁴ Conversely, the College argued that the unique relationship between a college and a student, especially with respect to disciplinary proceedings, precludes the rigid application of contract law.¹⁰⁵ In support of its argument, the College relied on *Slaughter v. Brigham Young University*—a Tenth Circuit case, holding that although some elements of the law of contracts should be used in the analysis of the relationship between a student and a university, this requirement does not mean that contract law must be rigidly applied in all its aspects.¹⁰⁶

The *Fellheimer* court concluded that there was no legal bar to the plaintiff's breach of contract claim and that the College was contractually bound to provide students with the procedural safeguards that it promised.¹⁰⁷ In making its determination, the court looked to an earlier Vermont case, *Merrow v. Goldberg*,¹⁰⁸ which found that the relationship between a student and a college is contractual in nature and thus a college has an obligation to conduct its hearings in a manner consistent with the terms of its handbook.¹⁰⁹

The *Fellheimer* court then examined exactly what was promised in the handbook to determine whether the College breached its obligations to the plaintiff.¹¹⁰ As a threshold matter, the court referenced the language of the handbook and rejected *Fellheimer's* contention that the College promised to provide procedural protections equivalent to those required under the Constitution.¹¹¹ On the contrary, as the court noted, the handbook explicitly states that a student's due process rights "cannot be coextensive with or identical to the rights afforded in a civil or criminal legal proceeding."¹¹² The handbook does, however, provide that the procedures are designed to "assure fundamental fairness, and to protect students from arbitrary or capri-

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 243. In a bizarre argument, Middlebury also urged the court to rule that the handbook does not create enforceable contractual obligations because: it was unilaterally developed by the College; its provisions were not bargained for by the plaintiff; and its broad informational nature is such that no rational trier of fact could conclude that the parties intended to enter into a contract on the terms contained in the handbook. See *id.* at 242-43.

¹⁰⁶ See *Fellheimer*, 869 F. Supp. at 243 (citing *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975)).

¹⁰⁷ See *Fellheimer*, 869 F. Supp. at 243.

¹⁰⁸ See *Merrow v. Goldberg*, 672 F. Supp. 766, 774 (D. Vt. 1987).

¹⁰⁹ See *Fellheimer*, 869 F. Supp. at 243 (citing *Merrow*, 672 F. Supp. at 774).

¹¹⁰ See *Fellheimer*, 869 F. Supp. at 242-44.

¹¹¹ See *id.*

¹¹² *Id.*

cious disciplinary actions."¹¹³ Additionally, as the court pointed out, the provisions of the handbook left the College considerable flexibility with respect to the specific procedures it could use in a particular hearing, effectively creating an "escape route" to prevent the requirement of scrupulous adherence to stated procedures.¹¹⁴ The existence of this escape provision did not, however, lead the court to the conclusion that the College would be free to administer disciplinary proceedings in any manner it desired.¹¹⁵ Instead, the court pointed out that because the College had agreed to provide students with proceedings that conform to a standard of "fundamental fairness" and to protect them from arbitrary and capricious disciplinary action, a deviation from its own procedures could result in a breach of this obligation.¹¹⁶

Finally, the court in *Fellheimer* examined whether the College actually breached its obligation to Fellheimer.¹¹⁷ The plaintiff alleged three claims: (1) that the Dean's participation in the case as both "prosecutor" and "judge" made the proceeding fundamentally unfair; (2) that the charge of "disrespect of persons" is impermissibly vague; and (3) that the notice Fellheimer received was insufficient because he was not informed that "disrespect of persons" was a separate and distinct charge from "rape" or "sexual assault."¹¹⁸ Of these three claims, the court summarily dismissed the first two based upon a plain language reading of the handbook's provisions.¹¹⁹ The court found the third claim more troubling.¹²⁰ The language of the handbook provided that when charges are brought against a student, the Col-

¹¹³ *Id.* at 243-44.

¹¹⁴ See *Fellheimer*, 869 F. Supp. at 244. The handbook states in part: "The following procedures are designed to promote fairness, and will be adhered to as faithfully as possible. If exceptional circumstances dictate variation from these procedures, the variation will not invalidate a decision unless it prevented a fair hearing or abrogated the rights of a student." *Id.*

¹¹⁵ See *Fellheimer*, 869 F. Supp. at 244.

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 244-46.

¹¹⁸ See *id.* at 244-45.

¹¹⁹ See *id.* at 244-45. As to the first claim, the court found that the handbook itself provides that the Dean of Students may serve in both roles and indeed may alone decide a case in which she has transmitted the charges. See *id.* at 244 n.1. As to the second claim, here again the handbook clearly indicates that "respect for persons and property" is expected and that violation of that provision may result in dismissal. See *id.* at 244. Although admitting that this broad language could encompass a wide variety of conduct, the court determined that it would be "very impractical for a college to spell out every specific offense which could lead to disciplinary action." See *id.* at 245 n.2.

¹²⁰ See *Fellheimer*, 869 F. Supp. at 244.

lege shall "state the nature of the charges with sufficient particularity to permit the accused party to meet the charges."¹²¹ Based upon undisputed facts, Fellheimer received a letter from the Dean's office informing him that he was being charged with rape—none of the subsequent correspondence provided any notice that there were two charges pending rather than just one.¹²² As a result, Fellheimer was prepared to defend himself only against the rape charge, which he did successfully.¹²³ He was not told that he was being charged with a second offense, and thus, was unable to defend against that charge.¹²⁴ Such a deviation from the procedures established by the College, according to the court, made the hearing fundamentally unfair.¹²⁵

Similarly, in 1983, in *Cloud v. Trustees of Boston University*, the United States Court of Appeals for the First Circuit held that Boston University's disciplinary hearing in the case of a student charged with misconduct was conducted with basic fairness and did not violate the student's contractual rights.¹²⁶ In this case, Leevonn Cloud, a third-year law student, was charged with four separate incidents of serious misconduct for peeping under women's skirts in the university library.¹²⁷ The University conducted a disciplinary hearing in accordance with the Provisional Student Code ("PSC"), a copy of which was sent to Cloud along with a statement of the charges.¹²⁸ The PSC, a comprehensive set of guidelines and regulations, affords students a number of procedural rights and "protections of due process."¹²⁹ The PSC also outlines the procedures governing the actual disciplinary hearing.¹³⁰ Notably, these governing procedures provide that confor-

¹²¹ *Id.* at 245.

¹²² *See id.* at 245.

¹²³ *See id.*

¹²⁴ *See id.* at 246.

¹²⁵ *See Fellheimer*, 869 F. Supp. at 246.

¹²⁶ *See* 720 F.2d 721, 724-25 (1st Cir. 1983).

¹²⁷ *Id.* at 723. Cloud allegedly engaged in the conduct while crawling on all fours under tables where the women were seated. *Id.*

¹²⁸ *Id.* Cloud argued that his hearing should have been governed by the Law School Disciplinary Rules (LSDR) rather than the PSC because he was a member of the law school community. *See id.* at 724. The court expressly rejected this argument, noting that students are subjected both to the rules of Boston University and the regulations of the School of Law. *See id.*

¹²⁹ *Id.* at 723. Among these protections, a student accused of misconduct is entitled to: (1) notice in writing of the alleged violation and the time and place of the hearing; (2) the right to be represented at the hearing by counsel; (3) the right to have the case decided by an impartial judicial body; (4) the right to confront and cross-examine any witness; and (5) the right to call witnesses and introduce evidence. *See id.*

¹³⁰ *Id.*

mity to the rules of procedure employed in a judicial proceeding is not required.¹³¹ Similarly, the procedures provide that the rules of evidence do not govern the hearing.¹³² Instead, the PSC allows the Hearing Examiner, a licensed attorney, the discretion to make protective rulings to exclude unreliable or prejudicial evidence.¹³³

After a twenty hour hearing in which Cloud, who was represented by counsel, testified on his own behalf and presented nine witnesses (the University presented six witnesses), the Judicial Committee found him guilty of all four charges and expelled him from the University.¹³⁴ Cloud unsuccessfully appealed the decision to the President of Boston University and subsequently brought a diversity action in United States District Court for the District of Massachusetts, in which he alleged violations of his contractual rights due to the improper conduct of the hearing.¹³⁵ The court granted Boston University's motion for summary judgment and Cloud filed an appeal.¹³⁶

On appeal, the First Circuit examined the disciplinary hearing and reviewed the procedures to ensure that the hearing was conducted with basic fairness.¹³⁷ In support of his claim, Cloud argued that the technical rules of procedure and evidence should have governed the proceeding and that the Hearing Examiner's selective utilization of the rules to resolve procedural questions during the hearing was fundamentally unfair.¹³⁸ Cloud also maintained that the hearing was unfair because the Hearing Examiner issued a limiting instruction that allowed the introduction of the transcript from Cloud's 1970 rape trial in a Maryland court. Furthermore, Cloud alleged that because one of the University's witnesses was allowed to testify without being confronted by Cloud, the hearing was in violation of the PSC's

¹³¹ See *Cloud*, 720 F.2d at 723.

¹³² *Id.*

¹³³ *Id.* The PSC governing procedures also establish that the Judicial Committee, a three-member panel selected from the faculty, student body and administration, is the sole arbiter of the weight of the evidence, demeanor and credibility of witnesses, guilt or innocence of the student and the appropriateness of any sanctions imposed. See *id.*

¹³⁴ *Id.* at 724.

¹³⁵ *Id.*

¹³⁶ *Cloud*, 720 F.2d at 724.

¹³⁷ See *id.* at 724-25. The court explained that in Massachusetts, the standard of basic fairness was expressed implicitly in *Coveney v. President & Trustees of the College of the Holy Cross*, where the Supreme Judicial Court held that "if school officials act in good faith and on reasonable grounds . . . their decision to suspend or expel a student will not be subject to successful challenge in the courts." See *Coveney*, 445 N.E.2d at 139.

¹³⁸ See *Cloud*, 720 F.2d at 725.

guarantee of the "right to confront and cross examine any witness."¹³⁹ Finally, Cloud argued that the transcript was unduly prejudicial and inflammatory¹⁴⁰ and that the anonymous testimony gave the Judicial Committee the wrong impression that Cloud was a threat to the witness.¹⁴¹

The court considered each of Cloud's objections individually and concluded that none of them rendered the hearing unfair.¹⁴² In rejecting Cloud's charge that the Hearing Examiner unfairly applied the rules of evidence and procedure, the court endorsed the Hearing Examiner's decision to refer to court-established evidentiary and procedural rules in making his own decisions.¹⁴³ The court concluded, however, that although reference to the court's technical rules is desirable, it need not trigger full application of those rules.¹⁴⁴ In the court's view, such a requirement would discourage references of this nature by making them a straitjacket for the university.¹⁴⁵ More specifically, the court found that any prejudice or stigma caused by the use of the transcript from Cloud's trial was outweighed by the probative value such evidence has on the issue of sanctions and in judging the credibility of witnesses.¹⁴⁶ In addition, the court reasoned that Cloud's right to confront witnesses was not abrogated by the Hearing Examiner's decision to shield one witness from his view.¹⁴⁷ According to the court, Cloud was given the opportunity to cross-examine and his attorney and the Judicial Committee were permitted to view the witness.¹⁴⁸ Moreover, the court found that the Hearing Examiner's decision to allow a nervous and frightened witness to testify out of Cloud's sight was a reasonable exercise of his discretion and did not render the hearing unfair or violate any of Cloud's rights.¹⁴⁹

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at 725.

¹⁴² *See id.*

¹⁴³ *See Cloud*, 720 F.2d at 725.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Cloud*, 720 F.2d at 725.

¹⁴⁹ *Id.* Cloud advanced several other arguments that the court definitively rejected. *See id.* at 725. First he argued that as the University's counsel, the Hearing Examiner was biased, thus violating the contractual right to an "impartial judicial body." *See id.* Here the court noted that the guarantee of impartiality pertained to the Judicial Committee, not the Hearing Examiner. *See id.* Second, Cloud objected to the University's failure to produce employees whose testimony Cloud requested. *See id.* at 726. The court noted that the PSC

Therefore, after considering and rejecting each of Cloud's challenges, the court held that the hearing was conducted with basic fairness.¹⁵⁰

In summary of the above, although courts have been reluctant to interfere in the disciplinary procedures of private colleges and universities and more reluctant to spell out the precise contours of a private school's obligation to its students, reviewing state and federal courts have nevertheless established a minimum standard with which private school disciplinary proceedings should comply.¹⁵¹ The language employed has varied, but most courts require that private schools comply with their own published procedures and regulations and act reasonably.¹⁵² Few courts have been willing to require that private schools afford students the panoply of procedural protections provided to criminal defendants or even public university students.¹⁵³

C. Commentators' Recommendations for "Fundamental Fairness"

Whereas courts have consistently argued that private colleges and universities should be afforded wide latitude to develop and implement their student disciplinary policies and procedures, commentators have long argued for increased procedural safeguards.¹⁵⁴ Most

does not guarantee subpoena powers and Cloud was provided the opportunity to present his own witnesses and cross-examine the University witnesses. See *id.*

¹⁵⁰ *Id.* at 726.

¹⁵¹ See *Ahlum*, 617 So. 2d at 98-99; *Schaer*, 735 N.E.2d at 381; *Anderson*, 1995 WL 813188, at *4; *Psi Upsilon of Phila.*, 591 A.2d at 760.

¹⁵² See *Fellheimer*, 869 F. Supp. at 246 (finding that the College's deviation from the procedures it established did render the hearing fundamentally unfair); *Coveney*, 445 N.E.2d at 138-39 (noting that although a private school may not arbitrarily or capriciously dismiss a student, if school officials act in good faith and on reasonable grounds, their decision to expel a student will not be subject to successful challenge in court); *Anderson*, 1995 WL 813188, at *4 (concluding that a court may only intervene in the student-university relationship when, inter alia, the university failed to follow its own rules and did not afford the student a hearing which was fundamentally fair); *Tedeschi*, 404 N.E.2d at 1303, 1306.

¹⁵³ See *Schaer*, 735 N.E.2d at 381 (commenting that a university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts); *Coveney*, 445 N.E.2d at 140 (noting that because the college is a private institution, plaintiff had no constitutional right to a hearing or to have an attorney present); *Psi Upsilon of Phila.*, 591 A.2d at 760 (pointing out that a private school is not subject to strict rules of judicial procedure).

¹⁵⁴ See *Baker*, *supra* note 35, at 11; *Beh*, *supra* note 22, at 183; *Berger & Berger*, *supra* note 22, at 289; *Blaskey*, *supra* note 36, at 65; *John Friedl*, *supra* note 40, at 701; *Edward J. Golden*, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.C. & U.L. 337, 337 (1982); *Groholski*, *supra* note 17, at 739; *Note*, *An Overview: The Private University and Due Process*, *supra* note 22, at 795; *Note*, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 120; *James M. Picozzi*, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2132

existing literature focuses on the procedural due process safeguards guaranteed by the Constitution for students in public colleges and universities,¹⁵⁵ while the few articles that have examined procedural due process in the private school context have focused exclusively on academic misconduct.¹⁵⁶ The arguments offered by these authors in the public school context, nevertheless, provide useful analogies to the difficult problems presented by private school disciplinary procedures for student-on-student sexual misconduct.¹⁵⁷ Although at first glance these approaches seem ill-fitting, they actually offer useful insights by analyzing two significant concepts: (1) the unique problems presented in a private school setting; and (2) the due process safeguards constitutionally required of public schools.

Commentators have discussed a number of specific procedural due process rights: several have argued that a student accused of misconduct should be provided a right to counsel.¹⁵⁸ Some have supported a right to cross-examine witnesses.¹⁵⁹ Others have urged that students should have a Fifth Amendment-styled right to remain silent during a hearing.¹⁶⁰

In their article *Academic Discipline: A Guide to Fair Process for the University Student*, Columbia University Law Professors Curtis and Vivian Berger argue that a registered student has a legally protected interest in his or her college education, and that the level of procedural protection should not decrease because the student attends a

(1987); Douglas R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289, 289 (1989); Rosenthal, *supra* note 35, at 1241; Marc H. Shook, Student Article, *The Time is Now: Arguments for the Expansion of Rights for Private University Students in Academic Disciplinary Hearings*, 24 LAW & PSYCHOL. REV. 77, 77 (2000); Sinson, *supra* note 22, at 195; Swem, *supra* note 35, at 359; Charles Alan Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1027 (1969).

¹⁵⁵ See Blaskey, *supra* note 36, at 65; Golden, *supra* note 154, at 337; Groholski, *supra* note 17, at 739; Picozzi, *supra* note 154, at 2132; Rosenthal, *supra* note 35, at 1241; Swem, *supra* note 35, at 359.

¹⁵⁶ See Berger & Berger, *supra* note 22, at 289; Shook, *supra* note 154, at 77.

¹⁵⁷ The commentators who focus on academic misconduct in private schools offer an analytic framework for examining the problems unique to private educational institutions. Those commentators focusing exclusively on misconduct in public schools provide a conceptual structure grounded in the Constitution's Due Process Clause that forms the guidelines for a "fundamental fairness" argument in the private school context.

¹⁵⁸ See Blaskey, *supra* note 36, at 82; Groholski, *supra* note 17, at 800; Richmond, *supra* note 154, at 289.

¹⁵⁹ See Baker, *supra* note 35, at 21; Swem, *supra* note 35, at 377.

¹⁶⁰ See Rosenthal, *supra* note 35, at 1276; Swem, *supra* note 35, at 377. The Fifth Amendment to the U.S. Constitution provides that "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

private rather than a public school.¹⁶¹ Although the Bergers focus their analysis on academic wrong doing—for example, plagiarism, cheating and the falsification of transcripts and resumes—much of their discussion can also be applied to an analysis of non-academic issues, such as those of student-on-student sexual misconduct.¹⁶² The Bergers argue that rather than attempting to ground a private school student's right to procedural protection in an expanded view of "state action," a more prudent method of analysis would be to employ contract law.¹⁶³ According to the Bergers, contract law can provide a student with as much due process as a public school student receives under the Constitution—and in some instances even more.¹⁶⁴ The Bergers offer a comprehensive examination of the manner in which a contractual relationship between a student and a private institution is formed and maintained.¹⁶⁵ They also discuss the role of an implied covenant of good faith and fair dealing in the contract-based analysis and the importance of the student's reasonable expectations.¹⁶⁶

According to the Bergers, the essence of the contractual relationship between the student and the school is in their mutual understandings and reasonable expectations—the student expects to be treated fairly and the school expects "good citizenship," including compliance with the prescribed set of rules.¹⁶⁷ This is consistent with the courts, which have imposed a "good faith" duty upon private schools, meaning that, at a minimum, the schools must follow the

¹⁶¹ See Berger & Berger, *supra* note 22, at 291.

¹⁶² See *id.*

¹⁶³ See *id.* The Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1. Because publicly funded colleges and universities have been determined to be agents of the state, their decisions qualify as "state action." See *Goss*, 419 U.S. at 737 n.8; *Dixon*, 294 F.2d at 158. Several commentators have attempted to show that the disciplinary proceedings of a private university involve a degree of state action sufficient to trigger the application of the Fourteenth Amendment's Due Process Clause, but the Supreme Court rejected the application of the "state action" principle to colleges and universities in *Rendell-Baker v. Kohn*, 457 U.S. 830, 846 (1982). See Note, *An Overview: The Private University and Due Process*, *supra* note 22, at 796–803; Note, *Private Government on the Campus—Judicial Review of University Expulsions*, *supra* note 35, at 1388–89; Sinson, *supra* note 22, at 215–17. For a thorough examination of the "state action" theory, as applied to private schools, see Note, *An Overview: The Private University and Due Process*, *supra* note 22, at 795–803.

¹⁶⁴ See Berger & Berger, *supra* note 22, at 291.

¹⁶⁵ See *id.* at 292–93.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at 318–319; cf. discussion *supra* Part I.A–B. The Bergers argue that the student's tuition payment supplies the consideration for his or her expectations. See Berger & Berger, *supra* note 22, at 319.

rules they have published.¹⁶⁸ The Bergers argue that the educational "contract" between the school and the student is essentially a contract of adhesion, a "take-it-or-leave-it proposition" under which the only alternative to complete adherence is outright rejection.¹⁶⁹ Consequently, because the student and the school do not have equal bargaining power, the Bergers argue that the school must treat the student fairly, and they urge courts to carefully scrutinize contracts when asked to review a discipline decision.¹⁷⁰

Using a number of cases from both the public and private school realms, the Bergers conclude that in order for a school's disciplinary procedure to be exercised "fairly" and in "good faith" it must satisfy two tests.¹⁷¹ First, they argue, a school must establish "just cause" by a preponderance of the evidence, which suggests that the school carries the burden of proving it is more likely than not that an offense has occurred.¹⁷² Second, a school must create a process that gives students accused of misconduct a fair opportunity to contest the charges, which includes, in serious cases, a hearing before an impartial panel.¹⁷³

Although the Bergers focus their analysis on the contractual nature of the relationship between a student and a private school, other commentators have examined the precise contours of due process required in public school settings.¹⁷⁴ In his article *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekin-*

¹⁶⁸ See Berger & Berger, *supra* note 22, at 331-32.

¹⁶⁹ See *id.* at 322-24. As the Bergers point out, the typical college applicant experiences neither bargain nor equality in the exchange with the school and few of the terms of the agreement ("contract") with the school are negotiable. See *id.* at 322. These factors, combined with the typical student's youth only heighten the bargaining inequality of the two parties. See *id.* at 323. Consequently, the resulting arrangement, or contract, arises between decidedly unequal parties, contains a set of written terms fashioned by the stronger party, is formed without discussion of or attention to the written content, and is generally not meant to be discussed. See *id.* at 324.

¹⁷⁰ See *id.* at 328. The Bergers note that courts, ultimately, must decide whether the terms or the contract are fair and reasonable in the circumstances. See *id.* Because the school has a duty of public service in educating its students, because the contract is adhesionary, and because the education which the contract promises is an important interest for the student, the court must insist that reasonable terms be adhered to, that unreasonable terms be stricken and that missing terms assuring a student's fair treatment be supplied. See *id.*

¹⁷¹ See *id.* at 335.

¹⁷² See Berger & Berger, *supra* note 22, at 335.

¹⁷³ See *id.*

¹⁷⁴ See Baker, *supra* note 35, at 11; Blaskey, *supra* note 36, at 65; Golden, *supra* note 154, at 337; Groholski, *supra* note 17, at 739; Picozzi, *supra* note 154, at 2132; Rosenthal, *supra* note 35, at 1241; Swem, *supra* note 35, at 359.

dles an Old Controversy, Thomas Baker compares and contrasts federal court decisions in the wake of disciplinary suspensions by public universities that were challenged on the grounds that the schools declined to afford the accused students an opportunity to cross-examine adverse witnesses.¹⁷⁵ Baker concentrates particularly on the importance of providing a student accused of misconduct the opportunity to cross-examine adverse witnesses.¹⁷⁶ He also advocates preserving a thorough and complete record of disciplinary hearings.¹⁷⁷ Although Baker focuses exclusively on disciplinary procedures in public schools, his argument is equally applicable to private schools, as the procedures he advocates would ensure "fundamental fairness" and would therefore be more likely to protect private schools from challenges to their disciplinary decisions.

In conducting his analysis, Baker focuses on *Donohue v. Baker*.¹⁷⁸ In 1997, in *Donohue*, the United States District Court for the Northern District of New York held that the United States Constitution entitled a student facing expulsion from a public school the right to cross-examine his accuser at the disciplinary hearing.¹⁷⁹ Donohue, a male student at State University of New York (SUNY)-Cobleskill, a public university, was accused of raping a female student on campus.¹⁸⁰ After the University conducted a hearing at which both the female student and Donohue testified, the hearing panel found him guilty of violating the student conduct code, and the university president suspended him for two years.¹⁸¹ Donohue filed suit in federal court alleging, inter alia, that the University violated his rights by not permitting him to cross-examine witnesses at the hearing.¹⁸² The court, through Judge Kahn, noted that the opportunity to cross-examine witnesses is not an essential requirement of due process.¹⁸³ Judge Kahn, however, also noted the dictum in a Second Circuit decision¹⁸⁴ that cross-examination might be necessary in contested expulsion hearings

¹⁷⁵ See Baker, *supra* note 35, at 21.

¹⁷⁶ See *id.* at 22-24.

¹⁷⁷ See *id.* at 25-28.

¹⁷⁸ 976 F. Supp. 136 (N.D.N.Y. 1997).

¹⁷⁹ See Baker, *supra* note 35, at 21.

¹⁸⁰ See *id.* at 18-19.

¹⁸¹ See *id.* at 19.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ *Blanton v. State Univ. of N.Y.*, 489 F.2d 377, 385 (2d Cir. 1972) (quoting Charles Alan Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1076 (1969)).

when the outcome of the hearing hinged upon witness credibility.¹⁸⁵ The court found that in this case, "the disciplinary hearing became a test of credibility of the [respondent's] testimony versus the testimony of [the complainant]" and that the Constitution obliged SUNY officials to afford Donohue some sort of opportunity to pose questions to his accuser before the University imposed a two-year suspension.¹⁸⁶

Baker uses this case as a springboard for his discussion of the administrative dilemma that university officials face in resolving charges based upon student-on-student sexual misconduct.¹⁸⁷ Baker argues that sexual misconduct cases, in particular, cause university administrators a number of problems.¹⁸⁸ First, these cases ordinarily involve disputed allegations and ultimately depend upon witness credibility.¹⁸⁹ This problem is magnified, Baker argues, by the fact that in many instances third-party eyewitnesses are rare, consensual foreplay typically precedes a date rape and, moreover, physical evidence of assault is often not available.¹⁹⁰ The second administrative problem presented in these cases, Baker contends, is that the school must assume the neutral role of referee because the interests of the student complainant and the student accused directly conflict with one another.¹⁹¹ This tension, Baker argues, presents colleges with no small challenge in designing an effective complaint resolution process.¹⁹² Finally, Baker argues that due to the highly personal nature of a rape charge and the emotional toll it exacts on the victim, the procedural safeguard that best protects the interests of the accused—namely, cross-examination—is most likely to maximize the victim's ordeal.¹⁹³ Baker concludes that because the federal circuits are split on the issue

¹⁸⁵ See Baker, *supra* note 35, at 21.

¹⁸⁶ See *id.* at 21. Judge Kahn clarified in a footnote that the Constitution did not entitle Donohue to cross-examine the complainant directly. See *id.* at 22. Baker points out the irony that the decision in *Donohue*, the first federal cross-examination ruling unfavorable to a public university, involved a charge of date rape during a time period remarkable for expansive developments in the rights of student victims in gender-based physical harassment. See *id.* at 22.

¹⁸⁷ See *id.* at 22-24.

¹⁸⁸ See *id.* at 21-22.

¹⁸⁹ See *id.*

¹⁹⁰ See Baker, *supra* note 35, at 23. As noted above, even when such evidence is available, physical evidence of intercourse may not be dispositive of guilt if consent is at issue. See *id.*

¹⁹¹ See *id.* at 22-23.

¹⁹² See *id.*

¹⁹³ See *id.* at 23.

of what, if any, cross-examination hearing rights are due a student facing expulsion from a public university, the precise contours of a student's procedural right to cross-examine his or her accuser have yet to be clarified.¹⁹⁴

Baker next maintains that judges and schools must consider the competing interests of the students involved in these cases and would be well-served to develop a complete hearing record to protect themselves in the event of post-hearing appeals or litigation.¹⁹⁵ He offers a number of suggestions for how such a record may be preserved and concludes that audio tape recordings are both cost-effective and high quality.¹⁹⁶ Finally, Baker argues that a college's administration must begin its fact-finding duties well before the date of a disciplinary hearing and should interview the parties, identify any third party witnesses and collect statements in anticipation of a contested proceeding.¹⁹⁷ Most importantly, Baker contends that hearing board members should strive to identify important factual disputes as the evidence is submitted, remain neutral as the evidence is presented and deliberate in good faith, resting their decisions solely on the evidence presented at the hearing.¹⁹⁸ In conclusion, Baker notes that if the right to due process means anything, it means that the outcome of the hearing should not be predetermined and that hearing board members should consider the possibility that an erroneous charge may have been brought against the accused student.¹⁹⁹ Ultimately, however, Baker does not suggest that colleges and universities adopt any or all of these procedures and, in fact, merely puts the cards out on the table for consideration. Like Curtis and Vivian Berger, Baker advocates that schools afford students accused of serious misconduct more procedural protection, thus better protecting themselves in the event of a lawsuit.²⁰⁰ On balance, commentators have been more willing to urge schools to adopt greater procedural protections and have encouraged

¹⁹⁴ See Baker, *supra* note 35, at 30-31. For example, in *Donohue*, the accused student was may have been permitted to cross-examine his accuser indirectly. See *id.* at 20. Baker suggests that future courts could choose to distinguish *Donohue* on its facts (the length of the suspension and lack of a hearing record) or take the decision one step further and mandate direct cross-examination as a minimum constitutional right. See *id.* at 30.

¹⁹⁵ See *id.* at 25-27.

¹⁹⁶ See *id.* at 25.

¹⁹⁷ See *id.* at 26.

¹⁹⁸ See *id.* at 27.

¹⁹⁹ See Baker, *supra* note 35, at 27.

²⁰⁰ See *id.* at 27-28.

reviewing courts to hold private schools to a higher standard of fundamental fairness.²⁰¹

II. ANALYSIS

"The history of liberty," Justice Frankfurter wrote, "has largely been the history of observance of procedural safeguards," for without procedural protection, substantive protections would be virtually useless.²⁰² Private schools have an obligation to guarantee their students charged with student-on-student sexual misconduct procedural safeguards that are most likely to ensure that disciplinary proceedings are fair and will lead to a reliable determination of the issues.²⁰³ Two central principles shape the relationship between a student accused of campus sexual misconduct and the private school that is charged with investigating the claim and administering discipline if a violation is found. First, as courts and commentators agree, a private school should have broad discretion to prescribe the moral, ethical and academic standards that its students must observe.²⁰⁴ Private schools should have the additional power to create, administer and implement their own rules and procedures governing disciplinary proceedings and determine appropriate penalties for rules violations.²⁰⁵ This broad authority certainly includes protecting other students from sexual misconduct and sanctioning this misconduct when it occurs.²⁰⁶ Sexual assault, if unchecked, severely undermines the institution's central mission to educate its students, creates a climate of hostility, and polarizes the campus community.²⁰⁷

²⁰¹ See Berger & Berger, *supra* note 22, at 328; Seavey, *supra* note 48, at 1407; Wright, *supra* note 154, at 1060.

²⁰² *McNabb v. United States*, 318 U.S. 332, 347 (1943).

²⁰³ See Wright, *supra* note 154, at 1060.

²⁰⁴ See *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994); *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990); *Ahlum v. Adm'rs of the Tulane Educ. Fund*, 617 So. 2d 96, 98 (La. Ct. App. 1993); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000); *Coveney v. Pres. of Coll. of the Holy Cross*, 445 N.E.2d 136, 139 (Mass. 1983); *Schulman v. Franklin & Marshall Coll.*, 538 A.2d 49, 52 (Pa. Super Ct. 1988); Rosenthal, *supra* note 35, at 1245; Sinson, *supra* note 22, at 196-97; Swem, *supra* note 35, at 364-65.

²⁰⁵ See *Fellheimer*, 869 F. Supp. at 244; *Holert*, 751 F. Supp. at 1301; *Ahlum*, 617 So. 2d at 98; *Schaer*, 735 N.E.2d at 381.

²⁰⁶ See Rosenthal, *supra* note 35, at 1247.

²⁰⁷ See *id.* at 1247. See also, *Schulman*, 538 A.2d at 52. Here, the court offered some insight into the importance of safeguarding a school's ability to ensure the safety of its student:

Second, a student accused of sexual assault has an important interest in his or her education that must be scrupulously protected by schools.²⁰⁸ A dismissal or expulsion from a college or university, the "capital punishment" of campus disciplinary systems, can alter a student's legal status and make admission to another school impossible.²⁰⁹ Specifically, when a student is expelled, he is often unable to enroll in a different university because in order to transfer, he must demonstrate to the new school that he left his former school in good standing.²¹⁰ Because a university degree is generally required for employment in technologically sophisticated fields and for admission to graduate and professional school, and because students with university degrees often earn higher salaries than students who are not university graduates, an erroneous expulsion may foreclose future economic opportunities for that student.²¹¹ Thus, the economic wound inflicted by an expulsion could remain with the student for the rest of life.²¹² In addition, in some instances the wound can run deeper and permanently damage the student's good name, reputation and integrity.²¹³ In highly politicized, notorious cases, universities have publi-

In this case, particularly with the necessary concern on college campuses as to student activities in the sexual area and with the widespread notoriety and publicity relating to date-rape and the opportunity for students to take advantage of one another; perhaps fostered by the proximity of students to each other in the mixed dorm communities . . . [i]t cannot be denied that college officials must protect the student body as well as assure that students charged with wrong-doing obtain fair treatment.

See id.

²⁰⁸ The complainant in a student-on-student sexual misconduct case undoubtedly has an interest that must be protected, but in these cases, school administrators are more likely to align the school's interest with the victim's interest. This was not always the case. *See* Bernstein, *Years Later, Fordham Case Still Haunts Woman*, *supra* note 31, at 1; Bernstein, *Behind Some Fraternity Walls, Brothers in Crime*, *supra* note 31, at 1.

²⁰⁹ *See* Groholski, *supra* note 17, at 753-55 (citing *Herman v. Univ. of S.C.*, 457 F.2d 902, 903 (4th Cir. 1972); Note, *Common Law Rights for Private University Students*, *supra* note 22, at 129; Picozzi, *supra* note 154, at 2138-39.

²¹⁰ *See* Groholski, *supra* note 17, at 742; Picozzi, *supra* note 154, at 2139.

²¹¹ *See* Groholski, *supra* note 17, at 742; Picozzi, *supra* note 154, at 2139.

²¹² *See* Groholski, *supra* note 17, at 742; Picozzi, *supra* note 154, at 2139.

²¹³ *See* Groholski, *supra* note 17, at 742; Picozzi, *supra* note 154, at 2139. *See also* ROIPHE, *supra* note 31, at 39-41. Roiphe details two instances in which a university student fabricated a date rape. *See id.* at 39. In one case, the female student reported that she had filed a complaint with the school administration (she had not), that a school official had told her to "let bygones be bygones" (he had not) and that the male student she accused of the rape complained to the administration. *See id.* at 39-40. As Roiphe correctly observes, the accusation of rape is a serious one and the male student accused in this case was in a terrible position in the community until the record was set straight. *See id.* at 41. "Accusations

cized the apprehension of the offending student to placate the university community, with little regard for the emotional distress to the student or the irreparable harm to the student's reputation.²¹⁴

These seemingly disparate interests can nevertheless be reconciled to protect both the school and the student accused of sexual misconduct. Although the Constitution's Due Process Clause affords no protection for a private university student challenging the school's disciplinary procedures or decisions,²¹⁵ a number of commentators have argued that the level of procedural protection in disciplinary proceedings should not fall because a student attends a private rather than a public school.²¹⁶ This argument is persuasive: procedural due process rights are consistent with the goals of collegiate life, at private as well as public universities.²¹⁷ Procedural safeguards benefit the entire school community by serving to legitimize the exercise of disciplinary authority, thereby fostering a sense of justice, fairness and community on campus.²¹⁸ These values, in turn, create an effective educational environment.²¹⁹ Perhaps more importantly, particularly in emotionally charged cases like those involving student-on-student sexual misconduct, the orderly procedures of requisite due process can mitigate the school's impulse to impose rash penalties and can provide the administrative body with a shield to fend off demands for hasty retaliation.²²⁰ It seems unthinkable that a private school would even consider guaranteeing fewer rights for their students than the

of rape stick, and in the twisted justice of the grapevine no one is considered innocent until proven guilty." *Id.* at 41.

²¹⁴ See ROIPHE, *supra* note 31, at 41.

²¹⁵ See *Ahlum*, 617 So. 2d at 98; *Coveney*, 445 N.E.2d at 140; *Anderson*, 1995 WL 813188, at *3; *Psi Upsilon of Phila.* 591 A.2d at 758.

²¹⁶ See Berger & Berger, *supra* note 22, at 291; Robert B. McKay, *The Student as Private Citizen*, 45 DENV. U. L. REV. 558, 560 (1968); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 123-24; Wright, *supra* note 154, at 1035-36.

²¹⁷ See Berger & Berger, *supra* note 22, at 291; Robert B. McKay, *The Student as Private Citizen*, 45 DENV. U. L. REV. 558, 560 (1968); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 123-24; Wright, *supra* note 154, at 1035-36.

²¹⁸ See Berger & Berger, *supra* note 22, at 291; McKay, *supra*, note 217, at 560; Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 123-24; Wright, *supra* note 154, at 1035-36.

²¹⁹ See Berger & Berger, *supra* note 22, at 291; McKay, *supra* note 217, at 560; Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 123-24; Wright, *supra* note 154, at 1035-36.

²²⁰ See Berger & Berger, *supra* note 22, at 291; McKay, *supra* note 217, at 560; Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 123-24; Wright, *supra* note 154, at 1035-36.

minimum rights the Constitution exacts from public schools.²²¹ Indeed, it would be a "cruel hoax on the integrity of the educational process" for any private school to take refuge in the existing public-private distinction to justify the promulgation of otherwise unsupported disciplinary procedures.²²² Because colleges and universities perform an essential function in a democratic society and because they have been given a position of esteem, trust and responsibility, they must, in return, treat students fairly, with equal dignity, care and concern.²²³

Changes in disciplinary procedures will come only when initiated by the schools themselves or compelled by the courts as legislative solutions are not to be expected.²²⁴ Consequently, both courts and schools play a vital role in protecting the interests of a student accused of sexual misconduct.

For their part, courts asked to review a private school's disciplinary decision should be more willing to do so.²²⁵ They should employ contract law principles as the doctrinal foundation of their review.²²⁶ The current deferential approach of the courts, finding that a school's disciplinary system is "fundamentally fair" if the school substantially complies with its own established procedures, is inadequate.²²⁷ In effect, it invites private schools to eliminate procedures to avoid violating them.²²⁸ Indeed, potential lawsuits have become a sufficiently potent threat so that counsel advising private schools have

²²¹ See Berger & Berger, *supra* note 22, at 291; McKay, *supra* note 217, at 560; Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 123-24; Wright, *supra* note 154, at 1035-36. As Curtis and Vivian Berger observe, "[i]f due process sets the minimum standard for public institutional fairness, the contractual (private) floor should sink no lower." Berger & Berger, *supra* note 22, at 337.

²²² See McKay, *supra* note 217, at 560.

²²³ See *id.*; Simson, *supra* note 22, at 196; see also EDWARD N. STONER, II, UNITED EDUCATORS INSURANCE RISK RETENTION GROUP, INC., REVIEWING YOUR DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT 1, 7 (2000).

²²⁴ See Berger & Berger, *supra* note 22, at 300; Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, *supra* note 22, at 1390.

²²⁵ See KORS & SILVERGLATE, *supra* note 5, at 278. In fact, courts appear to be more willing to conduct a review of a private school's expulsion of a student for misconduct. See *id.* As Kors and Silverglate observe, if colleges and universities remain stubbornly immune from notions of fairness that have long prevailed in other arenas, courts will be more likely to intervene in the affairs of the academy. See *id.*

²²⁶ See Berger & Berger, *supra* note 22, at 291.

²²⁷ See KORS & SILVERGLATE, *supra* note 5, at 350; Lana A. Shavartsmian, *Schaer v. Brandeis University: Justice and Fair Play in a Private University Disciplinary Proceeding*, 45 FEB B. B.J. 6, 7 (2001).

²²⁸ See KORS & SILVERGLATE, *supra* note 5, at 350; Shavartsmian, *supra* note 227, at 6, 7.

cautioned them to protect themselves by avoiding descriptions of highly specific procedural protections (that students might later claim constituted contractual obligations).²²⁹ By employing a heightened standard of scrutiny, however, and recognizing that the contract between the school and the student is essentially adhesiary, courts can better ensure that the administration of discipline in private schools is fundamentally fair.²³⁰ The importance of recognizing the adhesiary nature of the contract cannot be overstated: courts should acknowledge that these contracts are generally executed unilaterally, contain boilerplate language and do not provide opportunity for meaningful negotiation of any of the terms.²³¹ Moreover, courts should consider, when interpreting the terms of the contract, the extreme inequality in bargaining power and should construe ambiguities and unreasonable terms against the drafting party—the school.²³² Conducting a review of a school's disciplinary procedures would enable the courts to ensure that private schools are administering discipline in a fundamentally fair manner.²³³

Although the role played by the courts is essential to making certain that the discipline systems in private schools are "fundamentally fair," the schools themselves, of course, have the primary responsibility for enacting disciplinary procedures that comport with basic fairness.²³⁴ Student-on-student sexual misconduct cases are hard cases and the procedures a school adopts must consider the competing interests presented.²³⁵ As a result of the evidentiary problems posed by these cases, schools have a heightened duty to weigh the credibility of both parties.²³⁶ Disciplinary procedures designed to uncover the pertinent facts of a contested case will reduce the possibility of an erroneous finding and insulate the school against a potential lawsuit.²³⁷

²²⁹ See KORS & SILVERGLATE, *supra* note 5, at 350; Shavartsman, *supra* note 227, at 7. See also STONER, *supra* note 223, at 11 (counseling schools to provide the bare minimum of "process" to satisfy a judge in order to avoid long legal entanglements).

²³⁰ See Berger & Berger, *supra* note 22, at 322–25.

²³¹ See *id.*

²³² See *Schaer*, 735 N.E.2d at 382 (Ireland, J., dissenting); Berger & Berger, *supra* note 22, at 322–25.

²³³ See Berger & Berger, *supra* note 22, at 322–25.

²³⁴ See Baker, *supra* note 35, at 25–28; Berger & Berger, *supra* note 22, at 337–51; Swen, *supra* note 35, at 382; Wright, *supra* note 154, at 1060, 1064.

²³⁵ See Baker, *supra* note 35, at 22–24; Rosenthal, *supra* note 35, at 1246–48.

²³⁶ See Baker, *supra* note 35, at 26.

²³⁷ See *id.* See also KORS & SILVERGLATE, *supra* note 5, at 270–71 (observing that the jurisprudence of procedural due process is in large measure concerned with identifying those procedures effective in discovering the truth).

There are, however, a number of procedural protections a private school can provide to guarantee that the touchstones of fairness and reasonableness govern their disciplinary proceedings.²³⁸

A. Right to Written Notice of the Charges and Evidence

After a complaint of student-on-student sexual misconduct has been filed with school officials, and an initial investigation of the allegations has determined that a disciplinary proceeding is in order, the accused student must be given written notice of the charges.²³⁹ Among the most basic procedural protections, this notice should advise the student of the charges against him as well as the nature of the evidence.²⁴⁰ The written statement should further include the grounds which, if proven, would justify discipline, and the student should not be subjected to punishment on the basis of some ground other than that stated in the written charge.²⁴¹ The formal notice should inform the student of the date, time and place of the disciplinary hearing and afford him or her sufficient time to prepare a defense.²⁴² Finally, in the interest of fairness reliability, the school should have an ongoing duty to disclose to the student any exculpatory evidence.²⁴³

²³⁸ See *A & B v. C. Coll. & D.*, 863 F. Supp. 156, 158 (S.D.N.Y. 1994). In dictum, Judge Broderick recommended that in order to protect all of the interests at stake, and to minimize the risk of judicial involvement, schools should make the most effective possible efforts to implement procedures which will minimize the many risks inherent in sexual misconduct cases. See *id.* at 158. Among the risks he noted were failing to exercise discipline where harmful acts occur; encouraging or pursuing false or malicious charges, or permitting investigations or internal adjudications to turn into abusive events. See *id.* at 159. See generally *STONER*, *supra* note 223 (detailing a number of disciplinary procedures and policies to improve a school's discipline systems and drawing distinctions between criminal law and school discipline).

²³⁹ See *Berger & Berger*, *supra* note 22, at 351; *Picozzi*, *supra* note 154, at 2156-57; *Swem*, *supra* note 35, at 369-70; *Wright*, *supra* note 154, at 1071-72.

²⁴⁰ See *Berger & Berger*, *supra* note 22, at 346, 351; *Swem*, *supra* note 35, at 69-70; *Wright*, *supra* note 154, at 1071-72.

²⁴¹ See *Berger & Berger*, *supra* note 22, at 346, 351; *Swem*, *supra* note 35, at 69-70; *Wright*, *supra* note 154, at 1071-72; see also *Felheimer*, 869 F. Supp. at 246-47 (finding that the College's failure to "state the nature of the charges with sufficient particularity to permit the accused party to meet the charges" as it had promised to do constituted a deviation from procedure that was fundamentally unfair); *Ahlum*, 617 So. 2d at 99 (finding that Tulane "took great pains" to inform the student of the charges against him which did not result in an unreasoned or thoughtless disciplinary decision).

²⁴² See *Berger & Berger*, *supra* note 22, at 346, 351; *Swem*, *supra* note 35, at 69-70; *Wright*, *supra* note 154, at 1071-72.

²⁴³ See *Picozzi*, *supra* note 154, at 2157.

B. Presumption of Innocence and Standard of Proof

To ensure fundamental fairness in the disciplinary proceedings, the accused student should be entitled to a presumption of innocence.²⁴⁴ More precisely, the school should bear the burden of production of evidence to sustain the charges against the student.²⁴⁵ Beyond the burden of proof, the school should have an established standard of production and only discipline a student if there is, at a minimum, substantial evidence to support the charges.²⁴⁶ The difficulty in student-on-student sexual misconduct cases has caused some schools to go even farther and require that the charges be proved by clear and convincing evidence.²⁴⁷

C. Right to an Impartial Hearing

As one commentator accurately explained, "if the right to procedural due process means anything, it stands for the principle that the outcome of the hearing is not predetermined."²⁴⁸ There is little doubt that the disciplinary hearing itself should be conducted with basic fairness, but there is some doubt as to exactly what basic fairness means.²⁴⁹ First, it is wholly impractical in many schools to guarantee that no one who has had prior contact with the accused student may be involved in the adjudication of the case.²⁵⁰ It is not unreasonable, however, to require members of the disciplinary board to exercise independent judgment or to recuse themselves if impartiality is impossible.²⁵¹ Second, fundamental fairness in cases as sensitive and as emotionally charged as student-on-student sexual misconduct cases requires that the disciplinary decision be based only upon the evidence admitted at the hearing and the charges listed in the notice of

²⁴⁴ See Baker, *supra* note 35, at 27; Berger & Berger, *supra* note 22, at 362; Groholski, *supra* note 17, at 792; Picozzi, *supra* note 154, at 2151; Swem, *supra* note 35, at 379.

²⁴⁵ See Baker, *supra* note 35, at 27; Berger & Berger, *supra* note 22, at 362; Groholski, *supra* note 17, at 792; Picozzi, *supra* note 154, at 2151; Swem, *supra* note 35, at 379.

²⁴⁶ See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975); *Ahluwalia*, 617 So. 2d at 100-01; *Anderson*, 1995 WL 813188, at *4; Swem, *supra* note 35, at 379; Wright, *supra* note 154, at 1073.

²⁴⁷ See *Schaer*, 735 N.E.2d at 378; Berger & Berger, *supra* note 22, at 362; Groholski, *supra* note 17, at 792; Picozzi, *supra* note 154, at 2158; Swem, *supra* note 35, at 379-80.

²⁴⁸ Baker, *supra* note 35, at 27.

²⁴⁹ See Wright, *supra* note 154, at 1080.

²⁵⁰ See *A & B*, 863 F. Supp. at 159; *Holert*, 751 F. Supp. at 1301; *Anderson*, 1995 WL 813188, at *4; *Psi Upsilon of Phila.*, 591 A.2d at 760-61; Swem, *supra* note 35, at 371-72; Wright, *supra* note 154, at 1080-81.

²⁵¹ See Swem, *supra* note 35, at 371-72; Wright, *supra* note 154, at 1080-81.

hearing letter.²⁵² To ensure strict adherence to this requirement, training is essential: disciplinary board members should remain neutral and should attempt to identify important factual issues in dispute as evidence is presented.²⁵³ Deliberations should be in good faith and decisions should be based solely on the evidence presented at the hearing.²⁵⁴ Finally, in the event of an acquittal, the accused student's permanent record should be expunged of any reference to the matter.²⁵⁵

D. *Right to a Transcript or Recording of the Proceeding and to an Appeal*

Fundamental fairness in the disciplinary process requires a hearing record that can be used by hearing board members during their deliberations and in the event of an appeal.²⁵⁶ A verbatim record, either in the form of an audio tape or stenographic transcript enables hearing board members to recall key portions of the testimony without relying on frail human memory and, therefore, ensures that the ultimate decision will be grounded on the evidence presented.²⁵⁷ A complete record also protects the school on appeal: the accused student must be able to point to error or fundamental unfairness in the record in order to take meaningful advantage of the right to appeal.²⁵⁸ Finally, knowing that the proceedings are being recorded and may become "public record" if the student appeals the disciplinary decision, hearing board members may have a greater incentive to strictly conform their behavior to established procedures.²⁵⁹

²⁵² See Baker, *supra* note 35, at 27-28; Berger & Berger, *supra* note 22, at 363; Picozzi, *supra* note 154, at 2145, 2158.

²⁵³ See Baker, *supra* note 35, at 27.

²⁵⁴ See *id.*

²⁵⁵ Picozzi, *supra* note 154, at 2158.

²⁵⁶ See Schaer, 735 N.E.2d at 379-80; Ahlum, 617 So. 2d at 99; Baker, *supra* note 35, at 25-26; Berger & Berger, *supra* note 22, at 344-45; Picozzi, *supra* note 154, at 2158; Swem, *supra* note 35, at 380. See also STONER, *supra* note 223 (recommending that schools make a single verbatim audio tape recording of a disciplinary proceeding to aid hearing board members in their deliberations and to be used in the event of an appeal). Baker offers a number of excellent suggestions for the most effective use of audio tape including: (1) using reliable equipment; (2) following strict mechanical protocol at the hearing; (3) employing an appropriate number of microphones and a recording level gauge; and (4) having the hearing administrator interrupt the proceedings to identify each speaker. See Baker, *supra* note 35, at 25-26.

²⁵⁷ See Berger & Berger, *supra* note 22, at 344-45. A convincing argument can be made that an audiotape may produce a superior quality record because stenography cannot capture voice inflections, emphasis or tone quality. See Baker, *supra* note 35, at 25.

²⁵⁸ See *Berger v. Berger*, *supra* note 22, at 344-45.

²⁵⁹ See *id.*

E. Right to Confront, Cross-Examine and Present Witnesses

Cross-examination is an essential feature of the process by which truthful testimony is distinguished from falsehoods.²⁶⁰ Although cross-examination reduces the risk of an erroneous expulsion, face-to-face cross-examination of the victim by the accused also maximizes the victim's ordeal.²⁶¹ In situations in which the fact of intercourse is not in dispute and consent is the sole contested issue, the importance of cross-examination is magnified.²⁶² These cases resolve themselves into problems of credibility and the hearing board must choose to believe either the accused student or the alleged victim.²⁶³ A reliable determination of the issues is essential to a fundamentally fair process, but in these highly personal and emotionally grueling cases, a school must consider the toll that the proceeding exacts on the victim.²⁶⁴

What can a school do in these situations? One possible solution is to permit indirect cross-examination, in which the victim is shielded from the accused student's view.²⁶⁵ Another option is to allow the accused student to respond to the testimony of each witness after the witness has testified.²⁶⁶ Another option is to allow the accused student to offer evidence in defense, to suggest persons who might be interviewed by the hearing board and to suggest questions that might be put to these persons.²⁶⁷

²⁶⁰ See KORS & SILVERGLATE, *supra* note 5, at 272; Baker, *supra* note 35, at 23-24; Berger & Berger, *supra* note 22, at 363; Picozzi, *supra* note 154, at 2158; Swem, *supra* note 35, at 376-77; Wright, *supra* note 154, at 1076.

²⁶¹ See KORS & SILVERGLATE, *supra* note 5, at 272; Baker, *supra* note 35, at 23-24; Berger & Berger, *supra* note 22, at 363; Picozzi, *supra* note 154, at 2158; Swem, *supra* note 35, at 376-77; Wright, *supra* note 154, at 1076.

²⁶² See KORS & SILVERGLATE, *supra* note 5, at 272; Baker, *supra* note 35, at 23-24; Berger & Berger, *supra* note 22, at 363; Picozzi, *supra* note 154, at 2158; Swem, *supra* note 35, at 376-77; Wright, *supra* note 154, at 1076.

²⁶³ See Baker, *supra* note 35, at 24; Swem, *supra* note 35, at 376-77; Wright, *supra* note 154, at 1076.

²⁶⁴ See Baker, *supra* note 35, at 23; Swem, *supra* note 35, at 377.

²⁶⁵ See Cloud, 720 F.2d at 725.

²⁶⁶ See Baker, *supra* note 35, at 26.

²⁶⁷ See *A & B*, 863 F. Supp. at 159; Anderson, 1995 WL 813188, at *5; Berger & Berger, *supra* note 22, at 352. The Bergers urge that the student's right to be heard should comprehend more than the mere privilege of speaking to the hearing board himself or herself because witnesses with less obvious of a bias than that of the accused may be more persuasive. See *id.* at 352. They also may have relevant, even critical, knowledge not possessed by the parties. See *id.*

F. Right to Counsel

Colleges and universities fear that permitting an accused student to be represented by counsel in a school disciplinary hearing will result in an adversarial judicial proceeding.²⁶⁸ In reality, a case involving student-on-student sexual misconduct is per se adversarial, and there is simply too much at stake to deny an accused student the right to an attorney.²⁶⁹ Further, in all likelihood the school has sought the advice of counsel in preparation for the disciplinary hearing; thus, fairness dictates that the student should enjoy that same right.²⁷⁰ One competing consideration is that if lawyers enter the process, the system would advantage only those students able both to find and afford an attorney.²⁷¹

Even if the benefit cannot be shared equally, there are two other reasons that a student accused of sexual misconduct should be entitled to the assistance of counsel in a campus disciplinary hearing. First, because an accused student's statements in a hearing may be relevant to subsequent or concurrent criminal proceedings, accused students should be entitled to representation by an attorney when they face potential criminal charges arising out of the same set of facts that led to the school's disciplinary charges.²⁷² Otherwise, students in this position face the proverbial Hobson's choice: they can meaningfully defend themselves in the disciplinary hearings, potentially incriminating themselves and certainly exposing the strengths and weaknesses of the case to the criminal prosecutor, or—wanting most of all to avoid going to prison—they can protect their criminal defense by opting not to contest the school's charges, virtually ensuring expulsion.²⁷³ In the context of sexual misconduct cases, with consent often the key issue and alcohol frequently a factor, piecing together the pertinent details is imperative and the absence of any defense by the accused is likely to lead to sanctions at the school level.²⁷⁴ Here,

²⁶⁸ See Groholski, *supra* note 17, at 791; Richmond, *supra* note 154, at 290; Swem, *supra* note 35, at 373.

²⁶⁹ See Groholski, *supra* note 17, at 795–97; Picozzi, *supra* note 154, at 2150.

²⁷⁰ See Berger & Berger, *supra* note 22, at 343; Groholski, *supra* note 17, at 780; Richmond, *supra* note 154, at 298–300; Swem, *supra* note 35, at 373; Wright, *supra* note 154, at 1076.

²⁷¹ See Berger & Berger, *supra* note 22, at 340.

²⁷² See Richmond, *supra* note 154, at 298, 300; Swem, *supra* note 35, at 373.

²⁷³ Picozzi, *supra* note 154, at 2152–53; Richmond, *supra* note 154, at 300.

²⁷⁴ See Rosenthal, *supra* note 35, at 1276–77.

the stakes are enormous and basic fairness requires that the accused student be permitted representation by counsel.

Second, faced with serious disciplinary consequences, including expulsion, the accused student undoubtedly experiences an intense emotional response.²⁷⁵ School disciplinary hearings are intimidating; as a result, the student may not be able to effectively articulate his or her side of the story or version of the facts in a coherent and logical manner.²⁷⁶ With the potential of an erroneous expulsion, accused students should not be forced to "go at it alone"—an attorney can better articulate the student's position and protect his considerable interests.²⁷⁷

CONCLUSION

In his dissent in *Schaer v. Brandeis*, Justice Ireland cogently articulated the difficulty faced by private schools that are confronted with the competing interests inherent in student-on-student sexual misconduct cases:

While the university's obligation to keep members of its community safe from sexual assault and other crimes is of great importance, at the same time the university cannot tell its students that certain procedures will be followed and then fail to follow them. In a hearing on a serious disciplinary matter there is simply too much at stake for an individual student to countenance the university's failure to abide by the rules it has itself articulated.²⁷⁸

Without question it is imperative that private schools protect victims of sexual misconduct, but this protection must not come at the expense of procedural safeguards designed to resolve credibility questions and lead to a reliable determination of the factual issues. Although the Fourteenth Amendment's Due Process Clause is not availing to a private school student, concerns for fundamental fairness should not be sacrificed. Indeed, a good student disciplinary procedure should go beyond the constitutional minimum to avoid arbi-

²⁷⁵ See Berger & Berger, *supra* note 22, at 341; Groholski, *supra* note 17, at 789.

²⁷⁶ See Berger & Berger, *supra* note 22, at 341; Groholski, *supra* note 17, at 789; Rosenthal, *supra* note 35, at 1276-77.

²⁷⁷ See Berger & Berger, *supra* note 22, at 341; Groholski, *supra* note 17, at 789; Rosenthal, *supra* note 35, at 1276-77.

²⁷⁸ *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 383 (Mass. 2000) (Ireland, J., dissenting).

trariness and to promote reasonable decisionmaking and basic fairness.

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