PART III:
PROCEDURAL FAIRNESS AT PRIVATE UNIVERSITIES

Public universities, as an arm of the government, have to follow certain constitutionally required standards in setting rules and disciplining students. Private colleges or universities are free, by contrast, within very wide guidelines and boundaries established by state laws, to set their own rules and to formulate their own disciplinary procedures. A student is free to take or not to take such procedures into account when deciding to attend such an institution. Once private institutions establish and publish disciplinary rules, however, they are then obliged, by principles of contract law, to follow them in good faith, even if not always to the strict letter.

Private Universities Generally Must Follow Their Established Procedures

Private universities are not required to promise fair procedures to their students. However, nearly all universities have student handbooks and judicial manuals that set out rules and standards for their student judicial systems. Courts in many states have held that these rules and standards form a contract of sorts, and that universities must live up to them in at least a general way.

The legal requirement that universities actually give students the rights they promise stems from a variety of doctrines, above all from the law of contracts. The basic principle of contract law is also one that lies at the heart of morality: people have to live up to their reciprocal promises. If one party agrees to a contract and doesn't honor it, the court can force that party to do so and can award monetary damages to the other party. If you agree to attend a university and pay tuition and fees, and you do so relying at least in part upon the rules and regulations that the university tells you it has established, then a deal of sorts has been struck, roughly like a legal contract.

Courts have often held that the representations universities make in their student handbooks about the disciplinary process are promises that they must keep. However, courts do not enforce these promises as strictly as other kinds of contracts, which would be meticu-

lously enforced. For example, the courts typically will not give students monetary damages when colleges simply fail to follow their disciplinary rules. In addition, they tend to give universities a certain leeway if they have followed their rules in a general way, even if not to the letter. The consensus of the courts is that the relationship between a student and a university has, as one judge put it, a "strong, albeit flexible, contractual flavor," and that the promises made in handbooks have to be "substantially observed."

Some states follow an ancient "common law" doctrine—not embodied in any statute but followed by courts on the basis of longstanding practice and precedent—that binds private organizations to treat their members with at least a minimal level of fairness and decency. This doctrine reinforces the contract law rules requiring universities to follow their own procedures.

While courts have not held that universities must adhere to their rules precisely, you can sometimes use the mere threat of a lawsuit to force your university to follow its own rules. Colleges and universities do indeed fear lawsuits when they are very likely in the wrong. If you make it clear that you know your rights, your university is less likely to stray too far from keeping its promises, thus placing itself in a gray area of possible breach of contract.

You also can use to your advantage the fact that your university itself set the terms of its student handbook.

When a contract, or a contract-like agreement, is formulated by what the law terms "the stronger party," and "the weaker party" does not have an opportunity to negotiate specific terms, courts will lean in favor of the weaker party in resolving any ambiguities in the contract. Under this standard—applied to higher education,

"Discovery" and Civil Suits: Universities and the Court of Public Opinion

Another reason why universities fear credible lawsuits involves what the law terms "discovery," which occurs before the start of a civil trial. During discovery, the university must produce for your lawyer and the court all of the information relevant to your case. This can include e-mail, administrative correspondence, internal documents, or other evidence. Once this evidence is submitted, it usually becomes a public record. This information is not only essential to your legal case, but is often very embarrassing to the university when it reveals unfairness or even malice. Universities sometimes treat their own students in ways that they would be ashamed to reveal to the general public, even if their behavior possibly broke no laws. Therefore, universities are sometimes frightened of defending claims they well might win, when doing so would reveal that they acted in an unfair or outrageous manner.

for example, in the U.S. District Court for the District of Columbia case of *Giles v. Howard University* (1977)—courts will interpret rules in a student handbook with whatever meaning the university should reasonably expect **students** to give them.

Breach of Contract Lawsuits

If you sue your university for breach of contract, the court—in a jurisdiction with precedents favorable to student rights—will review the student handbook and the record of your trial, to see if the university failed to meet your reasonable expectations and therefore violated its contract with you.

Because most courts view the student handbook as having to be only what the law terms "substantially" (rather than precisely) observed, it is difficult to win a suit if the university can argue plausibly that it fulfilled its promises in some general way. For example, in the Massachusetts Supreme Judicial Court case of *Schaer v. Brandeis* (2000), a student sued Brandeis University for, among other things, failing to produce a "summary report" of his disciplinary hearing, as promised by the student handbook. Brandeis had summarized the five-hour hearing in a mere twelve lines of text. The Massachusetts Supreme Judicial Court ruled that although it would be a better practice to issue a more complete summary, Brandeis's published procedures never had stated

precisely how detailed a summary it would produce. Therefore, the court held, the twelve-line summary did not break its promise to the student, although the better practice may have been to produce a more complete summary. Courts do not always reach decisions that most ordinary citizens would find fair.

However, when your university clearly has failed to live up to its obligations to you, then you have a genuine chance of obtaining judicial relief. For example, in the case of *Fellheimer v. Middlebury College* (1994), the U.S. District Court for the District of Vermont cleared the disciplinary record of a Middlebury College student who had been found innocent of rape by the campus court but who was instead convicted of "disrespect for persons." However, he had never even been notified that he was being prosecuted for **that** offense. Middlebury's handbook at the time promised that accused students would be told of the charges against them "with sufficient particularity to permit [them] to meet the charges." While Middlebury told Fellheimer that he was charged with rape, he was not told that he was also being charged with "disrespect for persons." He only learned about that second charge when he had been convicted of it. The court held that while Middlebury, a private college not bound by constitutional due process requirements, was under no general obligation to tell its students of the charges against them, it had nonetheless agreed to do so

and had failed to live up to that promise in Fellheimer's case.

"This Is Not a Contract": University Disclaimers Are Invalid

Sadly, as the law increasingly has called upon our institutions of higher education to live up to their promises, campuses have sought new ways to be free from having to follow the rules that they advertise. Many universities, acting on the advice of their lawyers, now add disclaimers to their student manuals, stating that they are not required to adhere to them completely. Others state specifically that the procedures set forth in student handbooks should not be viewed by students as contractual promises. Middlebury's handbook in the Fellheimer case, for example, said that the procedures were only to be adhered to "as faithfully as possible." Such language may give universities additional leeway, but, as seen in the Middlebury case, it does not allow universities to ignore their own rules. Universities are less likely to cross the line into the gray area of what might be impermissible misconduct if they know that you are aware of your right to judicial relief should they cross that line.

The preamble to your university's disciplinary code may help make the case that this or that unfair practice violates your university's disciplinary rules, even where your university promises merely to follow its procedures

"as faithfully as possible." Why? Many preambles assure "fundamental fairness" or "integrity and impartiality" in the administration of the campus court. Even if your university's handbook contains an escape clause ("as faithfully as possible"), you can make the strong case that the university was so deeply unfaithful to its own published rules that it broke its overarching promise to offer fair procedures.

Some colleges even state in their student handbooks that their own rules and even promises do not constitute a contract. Such claims are often not meaningful, and you should not let them fool you. Universities plainly intend their student handbooks to be read as a promise of fairness; such promises cannot reasonably be interpreted as meaningless glitter meant "merely" to convince students to attend the particular college. In addition, if the student is required to adhere to the rules of conduct as if the handbook were a contract, the university has some obligation to adhere to it in the same way. Many judges would not take kindly to a college's effort to escape its obligations by claiming that its apparent promise is not really binding.

At least one state legislature, New York's, has obliged both private and public colleges and universities to formulate specific disciplinary rules and procedures and to register these with state authorities. While courts have held that New York's registration requirement does not elevate the rules of private universities, for legal purpos-

es, to the level of the rules of governmental agents, the fact that the rules are registered with the authorities can aid your contract claim. With its rules filed with the state as a public document, your university cannot reasonably claim that these rules were not a factor in your decision to attend, not known to you when you matriculated, and, thus, not a binding contract.

Private Universities May Not Be "Arbitrary and Capricious"

Many courts agree with the general proposition that disciplinary procedures at private colleges and universities may not be "arbitrary and capricious." This protection flows from ancient common law ideas about how private associations must treat their members. Decent societies have learned to offer certain protections against individuals being subject to the pure whims and arbitrary acts of other individuals. Courts differ, however, on just how dreadful a university's disciplinary process must be before it is unlawful under this principle. Some courts prohibit convictions reached "without any discernable rational basis," and some bar those "made without substantial evidence" or "contrary to substantial evidence." Thus, even when a private college does not promise fairness in its student handbook, other legal doctrines beyond contract law are available to place some limit on just how badly a college may treat a student.

The doctrine prohibiting "arbitrary and capricious" discipline also prevents universities from disciplining students maliciously or dishonestly. A protection from arbitrary punishment is also a protection from discipline meted out with an utterly outrageous or improper purpose.

That's the good news. The sobering news is that no matter how courts in your jurisdiction define "arbitrary and capricious," winning a case based on such a claim turns out to be very difficult in practice. While the courts are very open to detailed reviews of a student's claim that his or her campus's disciplinary procedures are arbitrary and capricious, such claims, in fact, are at present rarely sustained. Courts tend to give very broad respect for the self-government of private associations, including private colleges and universities. Nevertheless, the arbitrary and capricious rule is an important safeguard, because it prevents administrators from establishing truly outrageous disciplinary rules. Without it, there would be nothing to prohibit a private institution from using a flip of a coin to determine a student's guilt or innocence. Besides, the mere presence of a legal doctrine placing some limit on an institution's power, where that limit is not clearly drawn, often has the effect of restraining the arrogance of power.

Courts indeed will intervene, however, on the very rare occasions when discipline at private universities is

without any basis in reason whatsoever. For example, in the case of *Babcock v. New Orleans Baptist Theological Seminary* (1989), the Court of Appeal of Louisiana determined that a religious seminary had decided, in a manner that was "grossly unfair and arbitrary," not to grant a degree to a student. The court ordered the university to award the student the degree. The student, who had encountered previous disciplinary problems at the seminary, had been allowed to complete his coursework, and had received notice of his impending graduation. Eleven days before graduation, however, the university decided not to graduate him under a rule allowing it to withhold degrees from those "unfit" to receive them. Further, the student already had secured a court order prohibiting the seminary from punishing him further for his earlier difficulties. The court held that because the university gave no explanation for the sudden unfitness of the student, the discipline was grossly arbitrary and therefore prohibited.

Definitions: Arbitrary and Capricious

Arbitrary: Determined by chance, whim, or impulse, and not by necessity, reason, or principle.

Capricious: Characterized by or subject to whim; impulsive and unpredictable.

—American Heritage Dictionary

Special State Protections for Speech

Increasingly, students and student groups face discipline not for conduct, but for offensive (and often not so offensive) speech. Private universities, which are not bound by the First Amendment, are generally not prohibited by law in most states from imposing discipline for mere speech, but there are important exceptions.

The United States Constitution does not prohibit private organizations, such as universities, from making rules limiting the speech of those who choose to join them. Some **state** constitutions, however, establish what is known to lawyers as an "affirmative right" to free speech that belongs to every citizen. In states with such provisions, courts have sometimes ruled that there are limits to the blanket rules that private colleges may make restricting speech.

In *State of New Jersey v. Schmid* (1980), for example, the New Jersey Supreme Court ruled that a guarantee in the state constitution—that "every person may freely speak … on all subjects"—barred Princeton University, a private campus, from enforcing too stringent a rule on speech. Princeton had required all persons unconnected with the university to obtain permission before distributing political literature on campus. This case was one of a series decided by various state supreme courts that interpreted the free speech provisions of their respective

state constitutions to give citizens more speech rights than are guaranteed by the First Amendment to the U. S. Constitution. Such decisions have obvious implications to free speech on the campuses of state universities. Some states, however, also have **statutes** that limit the right of private associations—in our case, private colleges and universities—to restrict the free speech of their members. Other states have **civil rights laws** that protect citizens' speech beyond the protection afforded by state or federal constitutional provisions.

If you face charges that relate in any way to speech, you should find out if your **state** constitution or **state** statutes establish such a right to free speech. If your state offers such protections, you may want to defend yourself by going on the offense about your protected speech rights.

You also should check if your state has any laws that insist on the same treatment of private and public campuses in terms of the censorship of speech. California, for example, has a law, the so-called Leonard Law (named after its sponsoring legislator), which gives students at private universities the same speech rights that the First and Fourteenth Amendments guarantee to students at public universities. This statute, passed in 1992, was the basis for a state court's declaration that a code prohibiting "offensive speech" at private Stanford University was illegal.

Sexual Harassment and Sexual Assault Cases

All educational institutions that participate in federal grant and federal aid programs—which includes virtually all private colleges and universities—have special obligations when dealing with complaints of sexual assault or sexual harassment.

Regulations stemming from Title IX of the Education Amendments of 1972—"titles" are sections of laws—mandate that educational institutions receiving federal funding establish "prompt and equitable" grievance procedures to hear and resolve complaints of sexual discrimination. "Discrimination" is now taken to include harassment and assault. This requirement, then, applies to both complaints about systematic discrimination at an institution and complaints against particular persons for sexual harassment and sexual assault. Regulations prohibit colleges and universities from permitting a pervasive atmosphere that creates a "hostile educational environment" on the basis of sex, an atmosphere that inhibits a student's ability to benefit from the educational opportunities and facilities afforded by the college.

Title IX gives victims of sexual discrimination an interest in due process. If a student makes an allegation of sexual assault or harassment, his or her university must pursue the alleged perpetrator in a manner that is "prompt and equitable." If the university does not do so, the student can file a complaint with the Office for Civil

Rights of the Department of Education, which will review the university's handling of the case, and, if it finds that there has been unfair treatment, take corrective action.

While Title IX's guarantee of fair grievance procedures was intended to create a sound system for **victims** of sexual discrimination, such procedures, of course, should also work to the benefit of **persons accused** of sexual harassment or assault, who are, of course, presumed to be innocent until proven otherwise. Indeed, one could argue that the requirement of fair procedures confers rights upon **both** parties in claims of sexual harassment or assault. Some private universities choose not to offer even the most rudimentary safeguards (or even a hearing) to those accused of crimes of violence. Although courts have not yet tested such an argument, it is possible that Title IX would prohibit the expulsion or suspension of individuals accused of sexual misconduct if they had been denied basic fair procedures. The law's mandate of a "prompt and equitable" hearing in order for the **victim** to seek vindication should ensure, in theory, fair treatment for the **accused** as well. An "equitable" procedure, after all, by definition must be a fair one. Students and their defenders would do well to point this out in cases where they are accused of sexual misconduct. How could a process not fair to **all** parties in a case actually be fair?

Some additional protections for students accused of

sexual assault derive from the Campus Security Act of 1990, which requires that educational institutions receiving federal funding create and publish formal rules for cases involving charges of sexual assault. Private universities have no obligation even to have any rules related to most crimes, but under this law they are obliged to codify procedures for dealing with sexual assault.

Due Process at Sectarian Institutions

Some sectarian institutions—seminaries, colleges, or universities that are associated with churches, synagogues, or mosques, for example—have strict rules governing student conduct. Private colleges are allowed to establish and advertise such rules, of course, as long as their regulations do not violate antidiscrimination laws or other statutes. Even then, some religiously required practices that may appear to be discriminatory—above all in areas of sexuality—may be constitutionally protected as "the free exercise of religion." For example, rules mandating the expulsion of homosexual or sexually active students by sectarian institutions are lawful, as are rules dismissing students for lacking "Christian character." In the 1962 case of *Carr v. St. John's University*, for example, the Court of Appeals of New York (the state's highest court) upheld the right of St. John's University, a Catholic university, to dismiss a student couple who married in a civil but not in a religious ceremony.

Although St. John's has since changed its rule that "in conformity with the ideals of Christian … conduct, the University reserves the right to dismiss a student at any time on whatever grounds," such a regulation would still be perfectly lawful. This is because the First Amendment's religious liberty clause, applied to the states by the Fourteenth Amendment, affords considerable autonomy to religious institutions. What may on the surface appear discriminatory might well be simple voluntary adherence to a religious commandment. While not every religious practice enjoys constitutional protection (human sacrifice and the use of sacramental illegal drugs do not, for example), many practices involving adherence to religious doctrine and to the freedom to associate with others of similar beliefs are protected.

If you are considering attendance at a religious institution, you should review its code carefully to see if it satisfies you and if you are willing to be bound by it while there. If you are a member of a religious student group at a secular university, you should be aware of the fact that you have great leeway to associate with those who believe as you do, without being accused of religious discrimination against those with different beliefs.