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President Richard H. Brodhead
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Sent via U.S. Mail and Facsimile (919-684-3050)

Dear President Brodhead:

As you can see from the list of our Directors and Board of Advisors, FIRE (thefire.org) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of freedom of speech, freedom of association, religious liberty, legal equality and, as in this case, due process and fair procedure on campus. FIRE has engaged these issues for more than a decade.

FIRE is gravely concerned about threats to due process and fair procedure presented by Duke University's new sexual misconduct policy. Because of its experience during the 2006–2007 lacrosse controversy, Duke is in a unique position among American universities to understand the risks of policies that jeopardize fairness and offer insufficient due process. Unfortunately, the new policy appears to reflect little or no such understanding. In fact, it risks creating more innocent victims of unsubstantiated and untrue sexual misconduct allegations, further tarnishing the university's name and possibly leading to additional lawsuits. As an alumnus of Duke University (2000) and of Duke University School of Law (2003), I write with the hope that you can redress the inconsistencies, ambiguities, and unjust procedures in the new policy.

According to Lindsey Rupp's August 28, 2009, story in *The Chronicle*, "Rape Policy Mandates Reporting," Duke's sexual misconduct policy was changed last summer so as to encourage more victims to come forward. This is a laudable goal. Yet, having examined that article and Duke's Undergraduate Conduct Board (UCB) and Sexual Misconduct policies, FIRE has determined that the Sexual Misconduct policy lacks the necessary safeguards to prevent unjust findings of student sexual misconduct, creating a secret, asymmetrical process that favors the accuser and appears to remove some of the protections afforded to students in

other kinds of disciplinary cases. The new policy also defines consent in a way that transforms a wide range of sexual activity that is traditionally (and by state law) considered to be consensual into sexual assault. Finally, the policy generally demands behavior of Duke students that is unrealistic and embarrassing.

Duke's Redefinition of Consent Contrasts with Common Sense, Common Practice, and State Law

Duke's new policy defines sexual misconduct as follows:

> Sexual misconduct is defined as any physical act of a sexual nature perpetrated against an individual without consent or when an individual is unable to freely give consent. Acts of a sexual nature include, but are not limited to, touching or attempted touching of an unwilling person's breasts, buttocks, inner thighs, groin, or genitalia, either directly or indirectly; and/or rape, forcible sodomy, or sexual penetration (however slight) of another person's oral, anal or genital opening with any object. Sexual misconduct also includes sexual exploitation, defined as taking nonconsensual, unjust sexual advantage of another for one's benefit or the benefit of another party. These acts may or may not be accompanied by the use of coercion, intimidation, or through advantage gained by the use of alcohol or other drugs.
>
> ("Sexual Misconduct," available at http://www.studentaffairs.duke.edu/conduct/resources/sexualmisconduct.)

The next section of the policy gives Duke's definition of "consent:"

> The university's definition of sexual misconduct mandates that each participant obtains and gives consent in each instance of sexual activity. Consent is an affirmative decision to engage in mutually acceptable sexual activity given by clear actions or words. …
>
> Conduct will be considered "without consent" if no clear consent, verbal or nonverbal, is given. It should be noted that in some situations an individual's ability to freely consent is taken away by another person or circumstance. Examples include, but are not limited to, when an individual is intoxicated, "high," scared, physically or psychologically pressured or forced, passed out, intimidated, coerced, mentally or physically impaired, beaten, threatened, isolated, or confined.

Furthermore, one of the "fundamental principles" of the policy is that "[r]eal or perceived power differentials between individuals may create an unintentional atmosphere of coercion." Students who are found responsible for sexual misconduct face sanctions ranging from recommended counseling to expulsion. The policy also states that the police may be informed and criminal charges may be pursued.

Duke's definition of consent is extremely problematic. Students are said to be incapable of giving consent when they are "intoxicated," "psychologically pressured," or simply in a "circumstance" whereby they "perceive[]" a "power differential[]" and therefore are said to be

unintentionally coerced. Yet on the vast majority of college campuses, a great number of students drink alcohol and then engage in consensual sexual activity. While this circumstance may be lamentable, it is undeniable. By failing to make a distinction between drinking to the point of incapacitation and mere intoxication, Duke's sexual misconduct policy turns what often is an unwise but ultimately personal decision, for which students should hold themselves responsible, into an episode of sexual misconduct subject to official punishment.

North Carolina's own cases and statutes dealing with nonconsensual sexual relations are instructive. Unlike Duke's policy, they take into account both the degree of intoxication and whose decision it was to become intoxicated. The North Carolina Court of Appeals has found that North Carolina's law on rape "does not serve to negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness as defined by *N.C. Gen. Stat. § 14-27.1(3)* (2005)." *State v. Haddock*, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008). Contrastingly, Duke's sexual misconduct policy deems sexual conduct nonconsensual simply when at least one party is at any level of intoxication, regardless of degree and of the choices of the parties involved. Duke thus turns consensual sexual conduct into punishable misconduct, turning normal students into criminals and obfuscating the meaning of true sexual offenses such as rape.

Even worse is Duke's redefinition of nonconsensual sex to include the circumstance of being "psychologically pressured." While some psychological pressure does destroy consent (such as threats or brainwashing), Duke does not appropriately confine its definition to such forms of pressure. What does it mean, in practice, that Duke declares "[r]eal or perceived power differentials between individuals" to be coercive? Does a sexual liaison between a senior and a freshman count as nonconsensual because seniors are "perceived" as being more powerful than freshmen? Is it coercive when a Duke basketball player has sexual contact with someone who admires the player specifically because of his popularity and power? If the university is willing to stipulate that student-on-student sexual encounters can occur in an "unintentional atmosphere of coercion," it is hard to see how any student with perceived "power" could engage in sexual relations without risking a sexual misconduct charge.

In short, Duke's redefinition of consent could criminalize nearly every Duke student who has sexual relations. Most sexual acts forbidden by Duke's policy would not be recognized as "nonconsensual" by virtually anyone outside of Duke. Intoxicated persons are regularly held responsible for their decisions in every facet of life, not just including sexual decisions but also, for instance, driving under the influence. Furthermore, there is no way for Duke to administer this policy fairly, as the vast majority of "nonconsensual" sex will go unpunished.

Duke's Policies for Handling Sexual Misconduct Allegations Are Asymmetrical, Ambiguous, and Inconsistent with Undergraduate Conduct Board Policies

The Duke lacrosse fiasco provided both the university and the nation with perhaps the most telling recent example of what can happen when due process, fair procedures, and equitable treatment are ignored. It is therefore both surprising and disappointing that Duke's new sexual misconduct policy contains so many provisions, described below, that fail to respect these principles.

The Accused is Stripped of Rights That the Complainant Enjoys

Duke's sexual misconduct policy includes several asymmetries between the rights of the complainant and of the accused—all of which favor the complainant.

First, complainants are entitled to "be treated with respect and sensitivity before, during, and after the disciplinary process" while the accused student simply "will be treated with respect throughout the process." This is no innocuous difference, for it establishes a material asymmetry against the accused. For instance, the accused may question witnesses only through and with the approval of the hearing panel, while no such restriction is placed on the complainant. Duke's extra "sensitivity" to the alleged victim, insofar as it involves permitting accusers and witnesses to avoid direct questioning, risks creating an environment in which the accused student's presentation of his or her argument is hindered by his or her inability to address a witness while asking questions. The complainant has no such restriction.

In addition, although the sexual misconduct policy states that "[s]tudents accused of sexual misconduct have the same rights as any student accused of a policy violation," the list of those rights in the sexual misconduct policy does not include all of the rights afforded to the accused under UCB policies. It is unclear whether this ambiguity is an oversight or if Duke intends to give students accused of sexual misconduct fewer rights than they have in other types of cases.

For example, the standard UCB process states that the accused will be able to make opening and closing statements, but the sexual misconduct policy only states that "[c]omplainants will be given the opportunity to make opening and closing statements to a hearing panel" without ever mentioning the accused student's opportunity to do so. Students accused of sexual misconduct are left in the dark regarding whether they will actually be given this opportunity.

Several other rights given to accused students under UCB guidelines are also left out of the sexual misconduct policy. One fundamental right omitted is the right of the accused to examine the evidence to be used against him or her. The standard UCB policy is that the accused has the right "to know of and review written evidence and charges presented to the hearing panel at least 120 hours (five days) in advance." However, no such right is mentioned in the sexual misconduct policy. This is particularly worrisome because it appears that the key provision from the very same UCB guideline was intentionally left out; the advance notice rule, but not the right to examine evidence, is listed in the sexual misconduct policy. This omission suggests that students accused of sexual misconduct do not have this right.

Still other rights that go completely unmentioned in the sexual misconduct policy but which are mentioned in the standard UCB policy are the right to challenge panel members who might have a conflict of interest, the right "to choose the extent to which he or she shares information" (presumably meaning that a student cannot be forced to incriminate oneself), the right to rebut witness testimony (as opposed to the right to question witnesses, which is discussed above), the right "to present additional witnesses or information at the hearing," and the right "to be found responsible only if the evidence meets a clear and convincing burden of proof." Do these rights

exist in sexual misconduct hearings or not? If they do exist in sexual misconduct hearings, why is that not made clear?

The Composition of the Tribunal is Different for Sexual Misconduct Charges than for Other Charges

In at least one area it is plainly not true that students accused of sexual misconduct have the same protections afforded to students accused of other offenses. According to the standard UCB policies, "[h]earing panels charged with determining an outcome in a sanction shall consist of three students and two members of the faculty or staff selected from the UCB." This 3:2 student majority ensures that most of a student's judges are peers. However, the majority is reversed in sexual misconduct hearings, superseding UCB policy: "A three-person hearing panel will preside over a case that is referred to the Undergraduate Conduct Board, comprised of two faculty or staff members and one student." The sexual misconduct policy does not explain the reasoning behind this reversal.

The sexual misconduct policy thus ensures that the majority of members adjudicating a sexual misconduct case—including staff members who can be fired at will—will be directly beholden to Duke. Why? Does Duke intend to have a greater degree of control over the outcome of sexual misconduct cases? Is Duke seeking to serve its own interests or the interests of justice?

Perhaps Duke merely wishes to ensure that specially trained faculty and staff will adjudicate sexual misconduct cases. Unfortunately, such ideas have often led to unjust results. In 2001, Columbia University attempted a similar arrangement in a proposed sexual misconduct policy that was withdrawn after public outcry. The fundamental problem with specially trained panels has been demonstrated by the history of witchcraft trials, Star Chamber courts, and inquisitions; justice tends to suffer under tribunals that are assigned special moral missions. Such tribunals imply that the special offenses are so awful that regular procedures are deemed inadequate to resolve them—as is apparently the case for sexual misconduct at Duke. Thus, such tribunals have an undeniable tendency to prejudge cases and overzealously prosecute the accused in order to meet their "transcendent duty" to redress the evil that necessitated their existence.

Indeed, Duke has bitter experience of the abuse of justice by former Durham County district attorney Mike Nifong, whose conduct in the lacrosse case appears to have been driven partly by his belief that he had a moral obligation to ensure deterrence from similar crimes. Eventually this led to his suppression of DNA evidence and his failure to observe the proper procedure for suspect "lineups," which did grave injustice to the accused in the name of achieving Nifong's moral mission. If Duke really intends to train faculty and staff members to treat sexual misconduct differently from other offenses, the university risks creating a new set of moral hazards, no matter how trustworthy the trained members seem to be.

The Accused Has No Right to Confront His or Her Accuser

Duke allows third-party reporting of allegations of sexual misconduct, and requires such reporting by university officials even when alleged victims choose not to come forward. Third-party complaints may even be anonymous, as the policy permits "[b]lind reporting." This policy

creates a frighteningly unjust situation in which an accused student may face entirely frivolous allegations without ever knowing the accuser. An anonymous or third-party accuser may not be present at the hearing, denying the accused the chance to face the accuser. This problem is serious because when credibility disputes are at issue, courts have held that the ability of the accused student to challenge one's accuser is "essential" to fair process.

The right to face one's accuser diminishes the risk of false, bad-faith, and frivolous accusations by increasing the likelihood of uncovering the truth. This right is considered so important to the fair operation of justice that it is a fundamental principle of American constitutional law under the Sixth Amendment. Although Duke has not completely dismantled this protection in all cases, a student accused of sexual misconduct by a third party, especially an anonymous third party, cannot be said to enjoy the right to face his or her accuser in any meaningful sense. As a private university, Duke is not obliged to agree with the authors of the Bill of Rights about the value of the right to face one's accuser. Nevertheless, Duke ignores their wisdom at the peril of its own students and reputation.

No Right to Representation by an Attorney

The Sexual Misconduct policy also fails to provide either the complainant or the accused with the right to representation by an attorney at a hearing:

> A complainant may have an advisor (a member of the university community) present during a hearing, but as with the accused's advisor, he/she may only confer quietly or through notes with the complainant and may not address the panel.

Although private universities like Duke are generally not required to provide for full legal representation, disciplinary cases that involve allegations of serious crimes like sexual assault and rape may also be matters for local law enforcement, and prohibiting either side from having an attorney present may jeopardize either party's case if the matter is eventually or concurrently tried in a criminal court. Duke should understand that the rights to an attorney and to avoid self-incrimination are not meant to impede justice but to serve it, as the framers of the Fifth and Sixth Amendments knew well. Duke appears to have blinded itself to the fact that its own hearing procedures could effectively nullify the value of the right to an attorney and jeopardize the possibility of a fair trial in a court of law.

Keeping Information Secret Jeopardizes Free and Fair Hearings

The sexual misconduct policy asserts that "[p]articipants are reminded that any information shared during a hearing is confidential." Further, the section of the sexual misconduct policy titled "Rights of complainants" states that "[t]he university will make all reasonable efforts to ensure the preservation of confidentiality, restricting information to those with a legitimate need for it." No such provisions are given for normal UCB hearings except with regard to the "precedent files" of past UCB cases (in which identifying information is removed). It should also be noted that while the sexual misconduct policy specifically emphasizes the preservation of confidentiality for complainants, there is no similar mention of confidentiality for the accused.

This emphasis on confidentiality is yet another departure from Duke's usual hearing policies and from what is generally considered necessary for free trials in the United States. The Sixth Amendment affords a "public trial" in "all criminal prosecutions," mainly because opening the procedural and substantive aspects of a criminal trial to public opinion has historically served as a very effective bulwark against prosecutorial abuse, procedural unfairness, and judicial bias. Americans rightly have been suspicious of secret tribunals, given their historical record of injustice.

FIRE recognizes that there are many situations in which court hearings can be closed and records sealed, including various circumstances arising from sexual crimes and accusations. The decision whether to restrict access is, however, usually made on a narrow basis, after considering a wide variety of factors made known to the court. Duke's sexual misconduct policy does not appear to recognize the delicate balance between maintaining privacy and ensuring justice, given its blanket statement that "any information shared during a hearing is confidential." Such information might include the name of the accuser, the act that the accused is said to have committed, the names of witnesses and the nature of their statements, the verdict of the hearing, and many other aspects of the charge and process.

Duke's sexual misconduct policy thus creates a situation in which a student who is unjustly found guilty has no recourse to clear his or her name because of the ban on publicly revealing even the unjust aspects of the process. The right to seek vindication in the court of public opinion is not denied to even those convicted of the most heinous crimes by our criminal justice system, yet Duke seems comfortable denying this right to its students. Even if a student is found responsible, he or she at the very least should be free to publicly challenge testimony and evidence that he or she believes to be faulty, as well as any procedural errors or unjust policies that might have led to an incorrect verdict.

The university also does not specify when this obligation of confidentiality ends, implying that it is permanent. While a confidentiality mandate may be defensible during the hearing phase in particular cases, there is little justification for the extension of this blanket obligation after a verdict is rendered. This is particularly true for a student who is found not responsible for sexual misconduct, as that student may rightfully wish to clear his or her name in public and may also rightfully have a grievance against an accuser who has acted frivolously. Public discussion was, of course, critical in clearing the names of those students unjustly accused of rape in the Duke lacrosse case, and the same recourse should be available for allegations of sexual misconduct.

Conclusion

Duke may mean well in addressing the evils of true sexual misconduct, but its new sexual misconduct policy in many ways fails to protect against the abuse or misuse of that policy against unjustly accused students. Duke's apparent failure to learn from its experience in prejudging the students accused in the lacrosse case is deeply disappointing. Perhaps more than any other college or university in the United States, Duke has reason to take the utmost care in striking a balance between protecting victims of sexual misconduct and ensuring a fair hearing for those accused of such offenses. Unfortunately, it is evident that such care was not taken in formulating this new policy. Duke has in fact made it more likely that its own students will be

falsely accused, will unjustly be found guilty of sexual misconduct, and will seek legal redress against the university.

As a Duke alumnus, I have already resigned myself to Duke's unfortunate reputation for injustice because of the lacrosse case. Duke may never fully recover from another such outrage were it to become generally known. Alumni, students, and the public are not likely to have any further patience for false sexual misconduct accusations at Duke.

FIRE therefore requests that Duke reevaluate its new sexual misconduct policy with the goals of reaching a reasonable definition of consent and producing a process that is as fair as possible to all parties. The stakes—both for Duke's students and for Duke as an institution—are too high to do otherwise. We request a response on this matter by March 25, 2010.

Sincerely,

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Vice President
Trinity '00, Law '03

cc:
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