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Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?

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I. INTRODUCTION

"The campus is . . . a world apart from the public square . . . and [students] must abide by certain norms of conduct when they enter an academic community."[1]

Lawyers belong to a profession that generally takes pride in its "professional status" and is hypersensitive about its image.[2] Yet, there is increasing discomfort within the profession with both the state of professionalism exhibited by lawyers and the perception of a lack of professionalism held by the general public.[3] Unfortunately, the unprofessional behavior of some lawyers has birthed a plethora of lawyer jokes and other unsavory illustrations of the practice of law.[4] Lack of civility, rudeness, vulgarity, physical altercations, inappropriate dress, and poor behavior—or plain lackluster behavior (including falling asleep in court)—illustrate the growing population of attorneys whose actions lack professionalism.[5] Unprofessional behavior exhibited by some lawyers has led to the fair conclusion that young attorneys have failed to absorb the significance of practicing professionalism.[6] Hence, the question: do law schools have the responsibility to integrate professionalism "teaching" and/or training? If so, are law schools adequately fulfilling that responsibility?

Law schools effectively equip their students with substantive legal knowledge; however, intellectual pursuit should not be the sole charge of legal education. In addition to pedagogical acquisition, standards of professional conduct should be instilled: standards which may very

1. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2997 (2010) (Stevens, J., concurring).
2. Nicola A. Boothe-Perry, *Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517, 520 (2009).
3. Richard Abel, *Book Review*, 57 J. LEGAL EDUC. 130 (2007) (reviewing MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005)); *see also* CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 9 (1999) (suggesting that "the Court should continually assess the social factors that affect the legal profession and its various institutions to maximize resources, publicize its positive attributes, and address its shortcomings and liabilities").
4. For a general discussion of lawyer jokes, see MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005).
5. Boothe-Perry, *supra* note 2, at 518.
6. *Id.* at 523.

well be substantially influenced by the models of those persons or institutions from whom professional competence is acquired.[7]

Law schools provide aspiring lawyers with their first exposure to the appropriate standards necessary to preserve the spirit of the law and the profession.[8] As such, law schools have not just the opportunity, but arguably the responsibility, to develop attitudes and dispositions consistent with professionalism.[9] Throughout the tenure of a lawyer's professional life, law schools are the singular institutions with the opportunity, the resources, the institutional capacity, and the leverage to effectuate meaningful training in professionalism. It is therefore critical that they should have the right to promulgate and administer reasonable rules and regulations to fulfill that responsibility.

One critical method in fulfilling this responsibility is through the enactment and enforcement of student honor codes. Awareness and conformance to rules and regulations governing the appropriate and acceptable scope of behavior for students pursuing law degrees will provide practice and reinforcement for professional behavior in subsequent practice. Currently, most American law schools have an honor code or some variation thereof.[10] The underlying bases for the codes are to provide instruction and education as to acceptable types of behavior and to advise of specific consequences for violation or non-conformance to the governing rules of behavior.[11]

As law schools strive to enforce their codes of student conduct, enforcement has called into question the legal standing of the schools,

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7. *See* Paul Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339, 394 (noting that "[o]ur standards of professional conduct are substantially influenced by the models of those from whom we acquire professional competence and with whom we first share professional responsibility"). For an explanation of Emile Durkheim's concept of secular morality in which teachers act as a critical link in cultural transmission, see generally EMILE DURKHEIM, MORAL EDUCATION (Everett K. Wilson & Herman Schnurer trans., 1961) and EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 1–41 (Cornelia Brookfield trans., photo. reprint 1983) (1958) (discussing the author's theory of morality and social rights that should dominate a person's work and life).

8. Jack T. Camp, *Thoughts on Professionalism In the Twenty-First Century*, 81 TUL. L. REV. 1377, 1394 (2007); *see also* Douglas S. Lang, *The Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism*, 42 S. TEX. L. REV. 509, 511–12 (2001) (noting that new law students come to school with no knowledge of professional standards).

9. Boothe-Perry, *supra* note 2, at 542.

10. Leigh Jones, *Cheating 2.0*, NAT'L L.J. (May 25, 2009), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430936451&slreturn=1&hbxlogin=1

11. One proposed purpose of the Codes is that they should "provide fair notice as to what is to be expected . . . as to the university's or college's standards of conduct." Larry A. DiMatteo & Don Wiesner, *Academic Honor Codes: A Legal and Ethical Analysis*, 19 S. ILL. U. L.J. 49, 58 (1994).

since enforcement affects the fundamental rights of students. Consequently, this Article will address the following question: to what extent can law schools fulfill their responsibility and opportunity to enforce behavioral codes—specifically codes governing non-academic conduct—with a goal of improving professionalism? Through analysis of law schools' enforcement capabilities, this Article will suggest a practical framework by which law schools can promulgate and enforce codes and rules affecting students' non-academic conduct.

Part II of the Article will briefly address the necessity of professional code enforcement. Part III will discuss the nomenclature and types of law school conduct codes in section III.A, address the unclear delineation between academic and non-academic codes in section III.B, endorse enforcement of non-academic conduct in law schools in section III.C, and discuss the potentially different standard for private law schools versus public law schools in section III.D.

Part IV will discuss law schools' governing bodies' guidance (or lack thereof) regarding appropriate rules and regulations governing student conduct. Part V will address constitutional constraints in enacting and enforcing student codes, with a focus on First Amendment implications in section V.A, the application of the Fourteenth Amendment in section V.B, and the deference afforded to institutions of higher learning regarding regulation of student behavior in section V.C. Section V.C also proposes that law schools be allowed more latitude in enacting and enforcing student codes within the constraints of the United States Constitution.

Part VI provides suggestions for drafting Codes of Conduct in keeping with current jurisprudence differentiating between speech control in section VI.A, and conduct control in section VI.B. Section VI.C suggests general guidelines for drafting law school conduct codes which specifically address behaviors consistent with the ideals of professionalism for lawyers.

II. NECESSITY OF PROFESSIONAL CODE ENACTMENT

The etymology of the word "profession" comes from the latin word *professionem*, meaning "public declaration"—originally referring to taking the vows of a religious order.[12] Prior to the nineteenth century a true professional needed no written instruction in how to behave.[13] Professional ethics was about "character, honor and dishonor, virtue and vice" and had nothing to do with formal codes of conduct.[14] Over the years, however, the need for specific *written* guidance regarding

12. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 938 (1984).
13. Robert Baker, *Codes of Ethics: Some History*, PERSPECTIVES ON PROFS., Fall 1999, at 3, *available at* http://ethics.iit.edu/perspective/v19n1%20perspective.pdf.
14. *Id.*

appropriate behavior norms has been recognized by professional groups resulting in various codes and oaths.

Codes of ethics governing different professions "commonly require that adherents must," at the least, "be good citizens and act in a way that is beneficial to society."[15] Good citizenship, however, is insufficient for one who is deemed a professional. Professionals are generally held to a higher moral standard than the average citizen.[16] Oaths and codes governing various professions have therefore been propounded in an effort to exact behavior commensurate with this higher moral standard.[17]

Lawyers in the United States are governed by the Model Rules of Professional Conduct (MRPC) which were created by the American Bar Association in 1983[18] and replaced the prior Model Code of Professional Responsibility created by the American Bar Association in 1969.[19] Prior to 1983, the *Canons of Professional Ethics*, dating back

15. DiMatteo & Wiesner, *supra* note 11, at 60.

16. *Id.* at 61.

17. The medical profession has one of the oldest of all professional ethical codes: the Hippocratic Oath, from which evolved the *American Medical Association Code of Ethics*. Sworn to by all practicing physicians, the Hippocratic Oath, attributed to the Greek philosopher Hippocrates, is an oath to practice medicine ethically. For general information on the Hippocratic Oath, see Baker, *supra* note 13, at 3. For a library of codes of ethics for professions from agriculture to media, religion, sports and athletics, and travel and transportation, see *Index by Professional Category*, ILL. INST. TECH. CENTER FOR STUD. ETHICS PROF., http://ethics.iit.edu/index1.php/Programs/Codes%20of%20Ethics/Index%20Of%20Codes (last visited Mar. 14, 2011). Dating back to 1946, the National Society of Professional Engineers released its *Canons of Ethics for Engineers and Rules of Professional Conduct* which evolved into the current *Code of Ethics* adopted in 1964. *History of the Code of Ethics for Engineers*, NAT'L SOC'Y PROF. ENGINEERS, http://www.nspe.org/Ethics/CodeofEthics/CodeHistory/historyofcode.html (last visited Mar. 14, 2011). Certified Public Accountants and other accounting professionals may be subject to Codes of Conduct promulgated by three different organizations: the American Institute of Certified Public Accountants (AICPA), the Institute of Management Accountants (IMA), and the Institute of Internal Auditors (IIA). *See* AM. INST. CPAs, http://www.aicpa.org/Pages/Default.aspx (last visted Mar. 14, 2011); INST. MGMT. ACCT., http://www.imanet.org/ima_home.aspx (last visited Mar. 14, 2011); INST. INTERNAL AUDITORS, http://www.theiaa.org/ (last visited Mar. 14, 2011).

18. *See generally* MODEL RULES OF PROF'L CONDUCT (1983), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html; MODEL CODE OF PROF'L RESPONSIBILITY (1980), *available at* http://www.abanet.org/cpr/mrpc/mcpr.pdf. The MRPC was adopted by the ABA House of Delegates, in part due to the Watergate Scandal.. Don J. Young & Louise L. Hill, *Professionalism: The Necessity For Internal Control*, 61 TEMP. L. REV. 205, 205 (1988).

19. CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at xiii–xiv (2006).

to 1908, was the primary written documentation for lawyer regulation.[20]

All these professional codes erect explicit standards as a condition for those who have fulfilled the educational and practice requirements for inclusion in the legal profession. Violation of the codes carry consequences ranging from reprimand to disbarment. The requirements and potential ramifications for violation embodied in these codes highlight the importance of compliance with the codes as a benchmark of a successful lawyer.

However, simply providing an individual with a set of requirements without providing guidance for compliance could render the rules inapplicable and obscure, and it could potentially be met with either misunderstanding, disregard, or scorn. In order to emulate and cultivate compliance, a true appreciation for, and postulation of, the fundamental essence of the rules is necessary. Providing a foundational basis for compliance would ensure the achievement of behavior the codes seek to promote. The foundation for the rules governing lawyers could be instilled during the preparation and educational phase prior to entering the profession, thereby advancing the opportunity for full compliance upon entrance to the practice of law. The process of "learning occurs both formally in a classroom setting and informally outside of it."[21] Aspiring professionals need some infrastructure in order to appropriately interpret and adhere to governing rules of professional conduct. An important element of the necessary infrastructure is familiarity with standards and rules governing both academic and non-academic issues.

Law schools provide aspiring lawyers with their first exposure to the appropriate standards necessary to preserve the spirit of the law and the profession.[22] As such, they have not just the opportunity, but arguably a responsibility to develop attitudes and dispositions consistent with professionalism. This responsibility could be met, in great part, by the enforcement of codes of conduct governing non-academic behavior.

20. For more history of the Model Rules of Professional Conduct, see generally Boothe-Perry, *supra* note 2, at 530.

21. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2999 (2010) (Kennedy, J., concurring) (citing Bd. of Regents v. Southworth, 529 U.S. 217, 233 (2000)).

22. Camp, *supra* note 8, at 1394; *see also* Lang, *supra* note 8, at 511–12 (noting that new law students come to school with no knowledge of professional standards).

III. TYPES OF LAW SCHOOL CONDUCT CODES

A. Academic v. Non-Academic Student Conduct Codes

The relationship between students and universities historically was defined by the doctrine of *in loco parentis*.[23] Over the years, the interpretation of the student–university relationship has abated the *in loco parentis* custodial standard and has replaced that standard with a common view that the relationship between a student and an institution of higher learning is educational rather than custodial.[24] This relationship gives rise to the students' requirement to conform their conduct to the university's rules for matters involving both pure academic performance and those matters involving non-academic behavior.[25]

As a result, student conduct codes generally reflect two functions. First, they establish the standards of (a) academic responsibility and (b) honesty, and second, they provide for enforcement and sanctions for violation.[26] Titled "honor codes," "conduct codes," "disciplinary codes," or "ethics codes,"[27] the codes generally govern the responsibilities of students[28] in an effort to cohesively affect the characteristics of a professional lawyer.

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23. *See* Bradshaw v. Rawlings, 612 F.2d 135, 138–39 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980).

24. *See, e.g., id.* at 137; Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987) (holding that an intoxicated student's injuries sustained at a campus-located fraternity house were not the responsibility of the University); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 562 (Ill. App. Ct. 1987) (holding that the University, by its handbook, regulations, or policies, did not voluntarily assume or place itself in a custodial relationship with its students, so as to impose upon it a duty to protect a student from injury resulting from a prank occurring during a fraternity party); Beach v. Univ. of Utah, 726 P.2d 413, 419–20 (Utah 1986) (holding that the University had no general affirmative duty to supervise and protect a student against voluntary intoxication); *see also* Robert D. Bickel & Peter F. Lake, *Reconceptualizing The University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 266–68 (1994) (discussing the doctrine of *in loco parentis*).

25. *See, e.g.*, Jarzynka v. St. Thomas Univ. Sch. of Law, 310 F. Supp. 2d 1256, 1269 (S.D. Fla. 2004) (holding that under Florida law a private university may prescribe rules of conduct and students who enroll in the university impliedly agree to conform to the university's rules).

26. DiMatteo & Wiesner, *supra* note 11, at 62.

27. Different terms, apparently chosen indiscriminately, have been used to identify regulatory codes governing student conduct, such as "honor code," "conduct code," "ethics code," and "disciplinary code."

28. The purpose of student codes has generally been divided into three areas: (1) aspirational, (2) educational, and (3) regulatory. *See* Betsy Stevens, *An Analysis of Corporate Ethical Code Studies: Where Do We Go From Here?*, 13 J. BUS. ETHICS 63, 64 (1994) (citing Mark S. Frankel, *Professional Codes: Why, How, and With What Impact?*, 8 J. BUS. ETHICS 109 (1989)).

Despite their interdependence, a practical division is often made between academic and non-academic issues.[29] The thesis of this Article revolves around codes that specifically regulate law students' non-academic conduct and responsibility to the law school community. As such, throughout the body of this Article the terms "conduct code" or "codes of conduct" will be used interchangeably to highlight the focus of law students' behavior and the rules governing their actions while in law school. In order to fully appreciate the need for non-academic codes of conduct, a brief review of the propriety of academic-only regulatory codes is appropriate.

1. Academic-Only Regulatory Codes?

Scholarly suggestions have been made that institutions of higher learning should curtail enforcement of student behavior to academic-only regulatory codes.[30] Literature on the subject of colleges and universities incorporating non-academic misconduct within the scope of their student conduct codes generally deals with the enforcement of those codes by undergraduate institutions—not specifically schools of advanced degrees with a responsibility to instill traits of professional behavior in students.[31]

Institutions of higher education have rules and regulations that specifically address academic responsibility against actions such as cheating and plagiarism.[32] Law schools are no exception. In addition to issues of academic responsibility, universities and colleges also often seek to regulate other non-academic conduct of its students.[33] While non-academic conduct of law students has generated little comment, the regulation of undergraduate students has been addressed and criticized by scholars such as John Friedl, Dean of College of Arts and Sciences at the University of South Alabama.[34]

Dean Friedl posits that the implementation of "dragnet" codes of student conduct that include a wide range of non-academic behavior poses a serious problem.[35] He notes that in addition to concerns for those on university campuses, concerns over racial tensions and binge drinking by college students are two prominent reasons many universities have broadened their scope of authority over student misconduct

29. *See, e.g.*, John Friedl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701 (2000).
30. For an insightful discussion of the issues addressed in terms of schools applying sanctions in non-academic misconduct cases, see *id.*
31. *See, e.g.*, *id.*
32. For a review of legal implications of plagiarism, see Ralph D. Mawdsley, *The Tangled Web of Plagiarism Litigation: Sorting Out the Legal Issues*, 2009 BYU EDUC. & L.J. 245 (2009).
33. *See, e.g.*, Friedl, *supra* note 29.
34. *Id.*
35. *Id.* at 704.

(on and off campus) to areas "unrelated or only marginally related" to academic activities.[36] Dean Friedl surmises that student codes are an inappropriate method to "promote political correctness on university campuses."[37] He provides strong support for universities to abjure involvement in non-academic justice,[38] but he does acknowledge that a university's approach to non-academic conduct should be linked to the institutional mission.[39]

Antithetically, educational philosopher Ernest Boyer, in his book *College: The Undergraduate Experience in America*, recommended that colleges take a stronger position on non-academic misconduct.[40] Boyer wrote: "[I]t is our position that a college needs standards not just in academic matters, but in nonacademic matters, too. . . . Standards regarding simple courtesy and the rights of others are good examples."[41]

Boyer's critics argue that his message is inapplicable to our nation's large colleges and universities.[42] However, the critics concede that in smaller settings it "may be appropriate for the college to become involved in the student's non-academic life, as long as that expectation is clearly communicated to, and shared by, the student prior to matriculation."[43] In keeping with Dean Friedl's caveat of a necessary linkage to the mission, certainly in the smaller settings of the traditional American law school, Boyer's message is befitting.

B. An Endorsement of Non-Academic Regulation in Law Schools

A college student's senseless actions such as name calling, smoking in unauthorized areas, and telling jokes or making disparaging comments about other people, may be inconsequential to the student's ability to succeed in his or her chosen career; they may also very well convey infinitesimal significance to the reputation of others in that student's career.[44] A law student's similar actions, however, may result in documentation that could easily affect the student's ability to

36. *Id.* at 705, 707.
37. *Id.* at 709.
38. Friedl, *supra* note 29.
39. *Id.* at 723; *see also* ALAN CHARLES KORS & HARVEY SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 53 (1998) (quoting the American Association of University Professors' 1967 *Joint Statement on Rights and Freedoms of Students* and warning that a university's standards should be limited to what "it considers essential to its educational mission and its community life").
40. ERNEST BOYER, COLLEGE: THE UNDERGRADUATE EXPERIENCE IN AMERICA (1987).
41. *Id.* at 204.
42. *See, e.g.*, Friedl, *supra* note 29, at 724.
43. *Id.*
44. *See generally id.* at 713–14.

pass the scrutiny afforded by many states' boards of bar examiners and subsequently obtain a license to practice law. Moreover, the law school environment is not necessarily an extension of the university campus, and the values and ideals necessary for quiescent administration will differ in many respects.

The transition from college student to law student is not a fluid one. It may best be described by Paul's writing to the church of Corinth: "When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things."[45] Law students have matriculated from an undergraduate institution and voluntarily entered into hallowed law school halls to gain insight into the ways of "being" a lawyer. Succinctly stated by a Supreme Court Justice:

> Law students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way.[46]

Students enrolled in law schools subject themselves to the teachings of how to become a lawyer and should be accountable for a higher standard of conduct in preparation for their lives as lawyers.[47] From the moment they enter the doors of a law school to commence their legal studies, law students, as they are often told during orientation, begin to lay the foundation for their law career.[48] Their actions during their tenure as law students are critical to the assessment of their certification of "character and fitness" necessary for graduation and entry into a state bar.[49]

Despite the importance, it is a sad, conspicuous fact that graduating law students often are unequipped with the tools of professionalism. Instead, what they often carry into society are attributes of "bad lawyering," leading to further decline in the reputation of the legal

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45. 1 *Corinthians* 13:11.
46. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2999 (2010) (Kennedy, J., concurring).
47. *See generally* Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 118 (2001).
48. *See* Kara Anne Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEGAL ETHICS 815, 825 (1999).
49. FLA. BD. OF BAR EXAMINERS, http://www.floridabarexam.org/ (last visited Mar 14, 2011); ILL. BD. OF ADMISSIONS, https://www.ilbaradmissions.org/home.action? (last visited Mar 14, 2011); *Character & Fitness Committee*, STATE BAR OF MICH., http://www.michbar.org/generalinfo/characterandfitness.cfm (last visited Mar. 14, 2011); *Rules of Procedure of the Commission of Character and Fitness of the Supreme Court of Montana*, STATE BAR OF MONT., http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=6 (last visited Mar. 14, 2011); *Office of Bar Admissions*, SUPREME COURT OF GA., http://www.gabaradmissions.org/ (last visited Mar. 14, 2011).

profession as a whole.[50] Empirical evidence suggests that, in part, such bad lawyering is related to mental health.[51] Statistics indicate that:

> Of all professionals in the United States, lawyers suffer from the highest rate of depression . . . and . . . are 3.6 times more likely to suffer from major depressive disorder than the rest of the employed population [and] are also at a greater risk for heart disease, alcoholism and drug use than the general population.[52]

These problems allegedly afflict not only practicing lawyers, but law students as well, with studies evidencing elevated levels of depression, stress, anxiety, and significantly higher levels of alcohol and drug use than college and high school graduates of the same age.[53] The substance of what is taught in law schools is one posited cause of law student unhappiness.[54]

Elizabeth Mertz, an anthropologist, law professor, and senior fellow at the American Bar Foundation, studied first-year classes taught by professors at eight different law schools, and she found that in all of the classes students were taught to think like lawyers by discounting their own moral values, setting aside their own feelings of empathy and compassion, and substituting a strictly analytical and strategic mode of thinking.[55] Mertz concludes that law school has the "goal of changing people's values."[56] If Mertz's analysis is correct and value changing occurs during the course of law school, it provides affirma-

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50. *See generally* JOHN BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 5:28 n.37 (2d ed. 2009) (reporting a number of judicial decisions imposing professional disciplinary measures upon attorneys for possessing a disruptive or insulting demeanor in the courtroom); Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 147–48 (2001) (providing examples of ineffective counsel including being asleep at a death-penalty trial); George L. Blum, Annotation, *Reciprocal Discipline of Attorneys—Noncriminal Misconduct Towards Clients Not Involving Client Funds*, 44 A.L.R. 6TH 75 (2009); John J. Michalik, Annotation, *Conduct of Attorney In Connection with Making Objections or Taking Exceptions as Contempt of Court*, 68 A.L.R. 3D 314, § 7 (1976); John J. Michalik, Annotation: *Attorney's Addressing Allegedly Insulting Remarks to the Court During Course of Trial as Contempt*, 68 A.L.R. 3D 273 (1976).

51. Todd David Peterson and Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 359–60 (2009).

52. *Id.* at 358 (citing William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1083 (1990); Martin E.P. Seligman, Paul R. Verkuil & Terry H. Kang, *Why Lawyers Are Unhappy*, 10 DEAKIN L. REV. 49, 53 (2005)).

53. *Id.* at 359–60.

54. *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007).

55. *See id.* at 4, 6, 94–95.

56. *See id.* at 1, 4.

tion of the esteemed position that law schools have to influence the psyche of law students.[57]

Further evidence of law school's value changing ability is apparent from a review of the typical law school tenure. The first three or four years of legal "infancy" (the law school tenure) are akin to the first years of life—a fertile landscape for the enhancement both of analytical skills and professional behavior.[58] With such inherent power, it stands to reason that as law schools change the values of law students, the values being inculcated should include the values inherent in promulgating professionalism. Exposure to the boundaries for appropriate behavior in matters of integrity and civility; and acceptable standards against rudeness, vulgarity, physical altercations or plain lackluster behavior should be key elements of the law school career and would lend to the increase in both law school and lawyer professionalism.[59] An aptly described void exists in American legal education that could be filled with values and traditions supporting the professionalism necessary for a successful lawyer.[60] One expedient method of filling the void is to highlight behavior and ideals that enhance professionalism through enforcement of student codes that regulate both academic and non-academic matters.

Perhaps recognizing a need to highlight the importance of non-academic matters, the trend in American law schools has been to establish two separate codes for law students: one code addressing academic responsibility (including issues of cheating and plagiarism) and a second code specifically addressing non-academic issues and conduct.[61] It has been suggested that because of general difficulties codes have in achieving aspirational objectives, along with tensions between codes' regulatory and aspirational functions, aspirational goals should be eliminated from law school codes and reassigned a separate honor oath or pledge.[62] Paradoxically, the elimination from

57. *Id.* at 1, 4, 99.

58. Boothe-Perry, *supra* note 2, at 546 (noting that the opportunity to educate first year law students beyond pedagogical and institutional skills should be wholeheartedly embraced by legal academia in its esteemed position on the front lines of the professionalism debate).

59. For examples of unprofessional behavior exhibited by lawyers, see *id.*

60. Phillip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 253 (1986) ("The decline of law school professionalism and the gradual abandonment of traditional values that have long characterized American legal education have created a void for new values and traditions to fill.").

61. Insofar as a discussion regarding academic-only codes (as opposed to codes also governing non-academic behavior) is necessary to address constitutional limitations, specifics regarding substance or enforcement of academic-only codes are beyond the scope of this Article. For a thorough analysis of academic honor codes, see DiMatteo & Wiesner, *supra* note 11, at 62.

62. Steven K. Berenson, *What Should Law School Student Conduct Codes Do?*, 38 AKRON L. REV. 803 at 807–08 (2005).

the general codes may very well undermine the importance of those goals. To highlight the aspirational goals, law schools may consider embodying such goals in a separate code (e.g. an "Honor Code/Student Conduct Code for Non-Academic Issues") and then referencing such code in the general student code which delineates academic issues.

For academic or non-academic behavior regulation, the standard applied may differ for a private law school than for a public law school. Inasmuch as this Article focuses on the regulation of behavior in public law schools, it is important to briefly discuss the differing standards. Even in their contrariety, both standards highlight the deference afforded institutions of higher learning in regulating academic and non-academic behavior.

C. Different Standards for Private and Public Law Schools

Both public and private institutions have moral, ethical, and educational duties to treat accused students with respect, dignity, and fairness, regardless of these institutions' legal duties.[63] Private institutions, however, are not bound by the same restrictions imposed by the United States Constitution on public institutions. Public education in our nation is committed to the control of state and local authorities.[64] As such, public institutions are obligated by law to provide a level of due process protection of constitutional rights because the university's acts constitute state action under the Fourteenth Amendment.[65] Private institutions, on the other hand, have been held to be bound not by the United States Constitution, but by their own rules regarding disciplinary action taken against students.[66] Judicial review of decisions by private school authorities concerning discipline for academic honor code violations is generally inappropriate.[67] Although the private institutions' actions are subject to judicial scrutiny, the applicable standard for review in those cases is whether the institution has acted in good faith or whether its action was arbitrary or

63. Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 B.Y.U. EDUC. & L.J. 1, 5 (2003).

64. Goss v. Lopez, 419 U.S. 565, 578 (1975); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

65. *Goss*, 419 U.S. at 574.

66. Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1303, 1305 (N.Y. 1980) (holding that when a private university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed).

67. *See, e.g.*, Woodruff v. Ga. State Univ., 304 S.E.2d 697, 699 (Ga. 1983) (stating that "[a]bsent plain necessity impelled by a deprivation of major proportion, the hand of the judicial branch alike must be withheld"); Blaine v. Savannah Country Day Sch., 491 S.E.2d 446 (Ga. Ct. App. 1997).

irrational.[68] In situations where judicial scrutiny has been applied, the courts have been careful to note that any infringement upon the rights of private schools' freedom of expression would be based on a compelling state interest and would be narrowly tailored.[69] For Fourteenth Amendment standards to apply, the query is whether the alleged infringement of rights is "fairly attributable to the State."[70] Only where there is a finding that the private institution has acted under color of state law will the private institution be subject to the same standard of review applied to public institutions.[71] A private institution's receipt of state funds will not suffice to make it an actor under color of state law subject to suit under federal statutes governing civil actions.[72] Nor will the private institution's provision of a service or performance of a function which serves the public render its acts state action.[73]

Absent a finding of state action, private colleges and universities are simply not required to afford the same due process mandated of public colleges and universities.[74] Therefore, while a student at a public institution facing dismissal is entitled to notice and a hearing permitting him or her to rebut the evidence of the allegedly wrongful conduct or to put it into context,[75] a similarly situated student at a private institution will have no such constitutional right to a hearing

68. *Tedeschi*, 404 N.E.2d at 1304.

69. Circle Sch. v. Phillips, 270 F. Supp. 2d 616, 627–28 (E.D. Pa. 2003) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)), *aff'd*, 381 F.3d 172 (3d Cir. 2004).

70. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

71. 42 U.S.C. § 1983 (2006); *see also* Hernandez v. Don Bosco Preparatory High, 730 A.2d 365, 370 (N.J. Super. Ct. App. Div. 1999) (holding that a private school is held to the constitutional requirements of due process only if the private school has "substantial involvement with the state").

72. Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (addressing the question of state action regarding an employment decision made by a private school that received most of its funding from public sources); *see* 42 U.S.C. § 1983 (2006); Blum v. Yaretsky, 457 U.S. 991, 1012 (1982) (holding that the dependence of private nursing homes on funds from the State did not make the actions of the physicians and nursing home administrators acts of the State); Stone *ex rel* Stone v. Cornell Univ., 510 N.Y.S.2d 313 (App. Div. 1987) (holding that the fact that Cornell University receives some financial assistance from the State alone is insufficient to constitute a sufficient degree of State involvement so as to allow an intrusion into the University's disciplinary policies); Tedeschi v. Wagner Coll., 401 N.Y.S.2d 967, 970 (Sup. Ct. 1978), *aff'd*, 417 N.Y.S.2d 521 (App. Div. 1979), *rev'd on other grounds*, 404 N.E.2d 1302 (N.Y. 1980).

73. *Rendell-Baker*, 457 U.S. at 842. For further analysis on the determination of when a private school will be considered a "state actor," see Vanessa Ann Countryman, *School Choice Programs Do Not Render Participant Private Schools "State Actors,"* 2004 U. CHI. LEGAL F. 525 (2004).

74. *See, e.g.*, Centre Coll. v. Trzop, 127 S.W.3d 562 (Ky. 2004).

75. Martin v. Helstad, 578 F. Supp. 1473 (W.D. Wis. 1983); De Prima v. Columbia-Greene Cmty. Coll., 392 N.Y.S.2d 348 (Sup. Ct. 1977).

with respect to his or her expulsion.[76] Students at private institutions are entitled only to the procedural safeguards to which the school specifically agrees.[77] Private schools, absent the potential constitutional restraints, are nevertheless required to act in accordance with their published policies.[78] The published policies need merely be considered reasonable and enforced for the purpose contemplated and not maliciously or arbitrarily.[79]

In the absence of constitutional restraints, student disciplinary proceedings at a private institution do not leave the students bereft of rights, particularly where expulsion or dismissal is sanctioned. Private school students often rely either on the contractual nature of the relationship between the school and the student[80] or on the law of associations, arguing a similarity to a private association and safe-

76. *See* Clayton v. Trs. of Princeton Univ., 608 F. Supp. 413 (D.N.J. 1985) (upholding the University's decision to suspend a student from the University based on the student–university relationship as defined in the law of associations); Coveney v. President & Trs. of the Coll. of the Holy Cross, 445 N.E.2d 136 (1983).

77. *See Clayton*, 608 F. Supp. at 439 (merely requiring adequate procedures "to safeguard a student from being unfairly convicted of cheating"); *Centre Coll.*, 127 S.W.3d at 562.

78. *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984) (holding that a student's expulsion from the University was improper because the student had not been given a right to a hearing before expulsion as provided for in the student handbook); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157–58 (5th Cir.1961) (stating that because there is no government interest, the relationship between a student and a private university is contractual in nature and thus not subject to due process protections); Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 245 (D. Vt. 1994) (finding that the College breached its contractual duty when it failed to put student on notice of charge against him); Holert v. Univ. of Chi., 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (student entitled to the procedural safeguards that school agreed to provide); Lyon Coll. v. Gray, 999 S.W.2d 213, 217 (Ark. Ct. App. 1999) (holding that, because the College had followed the procedure set out in the student handbook regarding suspension for cheating, there was no violation of procedural due process); Schaer v. Brandeis Univ., 735 N.E.2d 373, 381 (Mass. 2000) (a university should follow its established rules); Anderson v. Mass. Inst. of Tech., 3 Mass. L. Rep. 293 (Mass. Super. Ct. 1995) (courts may intervene when school's action was arbitrary and capricious); Napolitano v. Trs. of Princeton Univ., 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982) (finding that a university's withholding of student's degree for one year violated university's own rules because the student was not informed in a timely manner that she had the right to cross examine witnesses).

79. Teeter v. Horner Military Sch., 81 S.E. 767, 769 (N.C. 1914) (affirming order justifying expulsion of a student whose "continued presence in the school would be disastrous to its proper discipline and to the morals of the other pupils").

80. *See, e.g.*, Jarzynka v. St. Thomas Univ. Sch. of Law, 310 F. Supp. 2d 1256 (S.D. Fla. 2004) (denying school's motion to dismiss student's breach of contract claim and finding that the school failed to follow its Code of Academic Integrity affording the student procedural protection including, but not limited to, a right to know the allegations, a right to have the allegations investigated, and a right to make an opening and closing statement to the disciplinary committee).

guards inherent in protection of its member's rights.[81] On a finding that the private school's decision is neither "arbitrary nor capricious," i.e., having a "rational basis, founded on reason and fact, and . . . not shown to be the product of bias and prejudice," the decision will be "accorded great deference."[82] The fairness of any procedure need only be reasonable; reasonableness depends on the individual circumstances of each case.[83]

The distinction between the standards imposed for review of public versus private institutions will affect a student's available avenues to challenge disciplinary action meted out pursuant to a school's code of student conduct.[84] Regardless of the applicable avenues for challenge based on attendance at a public versus a private institution, all students enrolled in a law school arguably have a basic right to enforce the contractual obligation arising from the offer and acceptance of admission with consideration.[85] Private institutions by nature are currently afforded great latitude in the enactment and enforcement of

81. *See* Swanson v. Wesley Coll., Inc., 402 A.2d 401 (Del. Super. Ct. 1979); *see also* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999) (discussing the associations doctrine and its limitations).

82. McCawley v. Universidad Carlos Albizu, Inc., 461 F. Supp. 2d. 1251, 1258 (S.D. Fla. 2006).

83. *Swanson*, 402 A.2d 401, 403; *see also* Wisch v. Sanford Sch., Inc., 420 F. Supp 1310, 1315 (D. Del. 1976) ("Basic procedural fairness is an elusive concept, the specific content of which is dependent upon the specific factual context."); *Schaer*, 735 N.E.2d at 373 (applying the standard of basic fairness to address challenged student discipline at a private university).

84. It has been argued that the distinction between the requirements for public versus private universities is "artificial." Robert Gilbert Johnston & Jane D. Oswald, *Academic Dishonesty: Revoking Academic Credentials*, 32 J. MARSHALL L. REV. 67, 83–84 (1998). Some courts have agreed with this argument. *See, e.g.*, Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975) (stating that there was no need to draw a distinction between public and private university requirements). This Article does not purport to support either a continued separation or proposed unification of standards for private and public institutions. It stands to reason, however, that the currently applied distinction must be addressed to effectively extrapolate the legality of rules and regulations governing student conduct.

85. The proposition that the relationship between a student and the college or university to which he has accepted an offer of admission is in effect a contractual relationship has been cited by a number of courts. *E.g.*, *Wisch*, 420 F. Supp. at 1310; *Swanson*, 402 A.2d at 403. Without the constitutional safeguards afforded public school students, students at private schools rely on the contract theory to provide protection from arbitrary school action, protections which, one author has noted, are oftentimes "greater than those afforded by due process." Jayme L. Butcher, Comment, MIT v. Yoo*: Revocation of Academic Degrees for Non-Academic Reasons*, 51 CASE W. RES. L. REV. 749, 767 (2001).

their student codes.[86] Arguably, public institutions can similarly enjoy such leeway even within the Constitutional constraints.

Students at both public and private institutions are entitled to certain procedural safeguards. Administrators and faculty, whether at public or private institutions, should therefore be inured with the ability to enforce the boundaries within those safeguards, particularly where enforcement will support the goal of holistic preparation for the practice of law recognized as necessary by the public, the judiciary, and the practicing bar.

Guidance for the inculcation of this all-important professionalism trait in American law schools is theoretically provided by regulatory bodies such as the American Bar Association and the Association of American Law Schools. Yet, little practical guidance is available regarding the form and substance of codes that govern student conduct.

IV. GOVERNING BODIES' GUIDANCE

The American legal system is built upon a system of precedents used to establish current and future laws and rules and to instruct how to prevent recurrence of mistakes and pitfalls encountered in the past. Less mentioned, but just as important, is the reliance on precedent to guide the conscientious lawyer and law student in the ways and appropriate behavior commensurate with the profession. The doctrine of precedent in classical theory is complex and possesses inherent flexibility.[87] With such inherent flexibility, as laws governing the profession change and evolve, coherence and continuity in the status of the profession needs to be maintained. Thought should therefore be given to the context of how precedent for behavior is set: behavior that will ultimately govern the professional behavior of lawyers.

In *Educating Lawyers: Preparation for the Profession of Law* (also known as the "Carnegie Report"), Sullivan and colleagues observed a non-exclusive list of the professional traits that law schools should promote.[88] Following the obvious first three—knowledge, skills, and attitude—are six additional tenets that go beyond historical instruction in the law school classroom.[89] As elaborated by Professor Mark

86. As of 2009, there were more than fifty state law schools and forty-eight religiously affiliated, private law schools in the United States whose missions are defined or influenced by particular faiths. For a general overview of the role of religiously affiliated law schools, see John Garvey, *Introduction, AALS Symposium on Institutional Pluralism: The Role of the Religiously Affiliated Law Schools*, 59 J. LEGAL EDUC. 125 (2009).

87. *See* ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 21–37 (1989) (discussing the theory of common law).

88. WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22 (2007).

89. *Id.*

Jones, the enumerated tasks require "[s]kill, honesty, trustworthiness, reliability, respect for legal obligations, responsibility, civility in dealings with others, personal integrity and empathy" as traits that require aggrandizement of what is currently required in formal legal education.[90] These stated traits reflect the basis for enhancing professionalism of those in law school and throughout their legal careers.

Two regulatory bodies offer guidance for enhancing the necessary professionalism traits relating specifically to law schools and instruction regarding the management of law students' conduct. The follow subsection extracts some nugatory guidance from both the American Bar Association and the Association of American Law Schools as it specifically relates to the content and substance of codes governing student conduct in law schools.

A. The American Bar Association's Role

The American Bar Association (ABA) has traditionally taken a leadership role in promulgating standards of conduct for practicing lawyers. Oftentimes sparked by the complicity of lawyers in cases of bribery, unscrupulous behavior, or general crises of the social order, the mechanics of law as a profession has undergone scrutiny, resulting in rules and codes governing lawyer behavior.[91] Model standards promulgated by the ABA have progressed from the Canons of Professional Ethics (1908) to the Code of Professional Responsibility (1969) to the Model Rules of Professional Conduct (1983) and amendments to the Model Rules (2002).[92] The ABA formed its Center for Professional

90. *See generally* Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework—A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041 (2006).

91. Lawyers' involvement in scandals such as Watergate and Enron, bribery accusations involving judges, and a general demise in the reputation of the profession brought attention to the practicalities of laws governing lawyer behavior. *See, e.g.*, Young & Hill, *supra* note 18 (noting that occurrences such as Watergate led to the scrutiny of the current mechanics of law as a profession); Mary Joe Frug, *The Proposed Revisions of the Code of Professional Responsibility: Solving the Crisis of Professionalism, or Legitimating the Status Quo?*, 26 VILL. L. REV. 1121, 1122 (1981) (noting that the perceived crisis in legitimacy of professionalism, manifested in the undermining of the current role of legal profession in social order, purportedly has prompted the legal profession to revise its ethical rules).

92. MODEL RULES OF PROF'L CONDUCT (1983), *available at* http://www.abanet.org/cpr/mrpc/mrpc-toc.html; MODEL CODE OF PROF'L RESPONSIBILITY (1980), *available at* http://www.abanet.org/cpr/mrpc/mcpr.pdf; AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, *reprinted in* HENRY S. DRINKER, LEGAL ETHICS 309 (1953). The Model Rules of Professional Conduct were adopted in 1983 in part due to the determined ambiguous and contradictory nature of the Code of Professional Responsibility. *See* Robert J. Kutak, *Model Rules: Law for Lawyers or Ethics for the Profession*, 38 REC. ASS'N B. CITY N.Y. 140, 144 (1983) ("Where the articulation of that law in other codes was ambiguous, or contradictory, or silent,

Responsibility (CPR) in 1978 to provide "national leadership and vision in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism and client protection."[93] In an effort to encompass provision of resources for both law students and law graduates, the CPR provides resources for those in every arena of the legal profession, including resources for law students and young lawyers.[94]

Additional enlightenment is provided by the ABA's Standards and Rules of Procedure for Approval of Law Schools. Standard 301 dictates that "[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and *responsible* participation in the legal profession."[95] Standard 302(a)(5) further dictates that "[a] law school shall require that each "student receive substantial instruction in . . . the history, goals, structure, values, rules and responsibilities of the legal profession and its members."[96] The interpretation of Standard 301, Interpretation 302-9, states that "[t]he substantial instruction in the history, structure, *values*, rules, and *responsibilities* of the legal profession and its members required by Standard 302(a)(5) includes instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association."[97]

This "substantial instruction" has historically been provided through instruction in a professional responsibility class or something akin to it in the law school curriculum. A survey conducted by the American Bar Association Center for Professional Responsibility indicated that seventy-five percent of law schools required a two-credit course in professional responsibility and sixteen percent required a three-credit course.[98] Judging by the number of reported complaints of unprofessional behavior and the general demise of the reputation of the profession, it is apparent that the cursory treatment of professionalism in the historical law school tenure is deficient.

Further evidencing the need for reinforcement and expansion of the law school curricula as it relates to increasing professionalism is

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the Rules seek to clarify, to rationalize (in the finer sense) and to guide the conscientious lawyer in what conscientious lawyers have always done: balancing competing duties in the professionally responsible representation of clients.").

93. *See Center for Professional Responsibility*, AM. B. ASS'N, http://www.abanet.org/cpr/ (last visited Mar. 14, 2011).

94. *Id.*

95. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. B. ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 19, *available at* http://www.abanet.org/legaled/standards/2009-2010%Standards.pdf (emphasis added).

96. *Id.* at 21.

97. *Id.* at 23 (emphasis added).

98. CTR. FOR PROFESSIONAL RESPONSIBILITY, AM. B. ASS'N, A SURVEY ON THE TEACHING OF PROFESSIONAL RESPONSIBILITY 3 (1986).

the recommendation of the ABA's Outcome Measures Committee.[99] In 2008, the Outcome Measures Committee recommended an accreditation model reducing reliance on input measurements in favor of increasing emphasis on outcome measurements utilized.[100]

Support for this recommendation was provided by the National Organization of Bar Counsel (NOBC), a non-profit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States, Canada, and Australia.[101] In 2009, the NOBC issued the *NOBC Law School Professionalism Initiative Report* (the *Report*).[102] The *Report* advocates changes in legal education that emphasize the development of practical skills and professional identity. It recommends that as part of the accreditation process, law schools be required to submit plans for the development of professionalism and professional identity in their students, including detailed and concrete goals and measurements.[103] The *Report* states: "A school's plan for achieving the goal of instilling professional values and identity in its students should go beyond curriculum and extend to tracking student behavior, remediation of students with observed and demonstrated problems and holding students accountable for their behavior in the law school environment."[104] The NOBC's report has been submitted to both the ABA and AALS for further consideration.

B. The Association of American Law Schools' Input

Notwithstanding any outcome directives from the NOBC's report, the Association of American Law Schools (AALS) provides instruction regarding law schools' obligation in the area of inculcating values of professionalism.

The Executive Committee Regulations of the Association of American Law Schools Handbook, Section 6-7.9a, on "course content," provides:

> In order to effectively implement Bylaw 6-7(a) (addressing the Juris Doctor Degree Program; Curriculum and Pedagogy), member schools shall offer courses in a wide variety of subject matters, and provide students with an

99. LAW SCH. PROFESSIONALISM INITIATIVE COMM., NAT'L ORG. OF BAR COUNSEL, LAW SCHOOL PROFESSIONALISM INITIATIVE REPORT 2 (2009), *available at* http://nobc.org/template_main.aspx?id=3072&terms=law+School+Professionalism+Initiative+Report (citing AM. BAR ASS'N, OUTCOME MEASURES COMMITTEE REPORT 2 (2008)).

100. *Id.*

101. NAT'L ORG. OF BAR COUNSEL, http://nobc.org (last visited Mar. 14, 2011).

102. LAW SCH. PROFESSIONALISM INITIATIVE COMM., *supra* note 99.

103. *Id.* at 2.

104. *Id.* at 3.

> opportunity to study some areas of the law in depth and to *gain an understanding of the lawyer's professional responsibility.*[105]

In its amicus Brief filed on March 15, 2010, in *Christian Legal Society v. Martinez*,[106] the AALS stated as follows:

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105. ASS'N OF AM. LAW SCH., EXECUTIVE COMMITTEE REGULATIONS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS HANDBOOK (2005) (emphasis added), *available at* http://www.aals.org/about_handbook_regulations.php.

106. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010). On June 28th, 2010, in a 5–4 decision, the Supreme Court ruled against a student group seeking official recognition at Hastings (Calif.) College of Law in San Francisco. *Id.* at 2995. Justice Ruth Bader Ginsburg, writing for the Court, ruled that Hastings College of Law can lawfully deny official recognition to the Christian group because the group does not allow actively gay students to become voting members. *Id.* at 2980, 2995. Justice Ginsburg and the majority agreed that "in requiring CLS—in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations." *Id.* at 2978. The CLS argued that the school's nondiscrimination policy violated their First Amendment right to free speech and association. *Id.* at 2986. The Court ruled, however, that because the school's policy was "viewpoint neutral" it did not "transgress constitutional limitations." *Id.* at 2978, 2994. In addressing the issue of whether the First Amendment, and its attendant rights of free speech and free association, permit a college to require a group to admit members that offend its religious ideology as a condition for access to limited public forum resources, the Court upheld the Ninth Circuit's ruling, holding that a college can require groups to admit members despite the groups' rights to free speech and association. *Id.* at 2995. Justice Samuel Alito and fellow dissenting Justices called the Court's decision a "serious setback for freedom of expression in this country." *Id.* at 3920. Within hours of release of the Court's opinion, blog posts discussing the ruling applauded it for making "inclusiveness explicit," while others decried the ruling as "slippery reasoning," claiming the decision to be a "sucker-punch" to First Amendment rights and a "shocking setback for religious freedom." Gabriel Arana, CLS v. Martinez*: Supreme Court Makes Inclusiveness Explicit*, TAPPED (June 28, 2010), http://www.prospect.org/csnc/blogs/tapped_archive?month+06&year+2010&base-name+supreme_court_makes_inclusiven; Jamshid Ghazi Askar, *Professor Calls Supreme Court Decision Against Christian Legal Society 'slippery reasoning,'* DESERET NEWS (June 29, 2010), www.deseretnews.com/article/700044257/U-professor-calls-Supreme-Court-decision-against-Christian-Legal-Society-slippery-reasoning.html (quoting Wayne McCormack, University of Utah law professor); Adam Goldstein, *Supreme Court's CLS Decision Sucker-Punches First Amendment*, THE HUFFINGTON POST (June 29, 2010), http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html; Ken Klukowski, *Shocking Setback for religious Freedom in Supreme Court*, TOWNHALL.COM (June 30, 2010) http://townhall.com/columnists/KenKlukowski/2010/06/30/shocking_setback_for_religious_freedom_in_supreme_court. Regardless of the criticisms and agreement, the decision has been characterized as a "win" for schools that want to cultivate an inclusive campus culture. Gabriel Arana, CLS v. Martinez*: Supreme Court Makes Inclusiveness Explicit*, THE AM. PROSPECT (June 28, 2010) www.prospect.org/csns/blogs/tapped_archive?month=06&year=2010&base_name=supreme_court_makes_inclusiven. Indubitably, the Court's decision provides institutions of higher learning with the ability to enforce policies which can cultivate a culture on which the institutions' mission is based.

> The core values of the AALS shape the efforts of the Association as well as define the obligations of its member schools. AALS Bylaw Section 6-1. . . . The core values also embody inter-related commitments to a self-governing academic community, to academic freedom, and to diversity of viewpoints. Member schools commit to support all of these objectives in an environment free of discrimination and rich in diversity among faculty, staff, and students. The core values are framed by the idea that institutional autonomy should be honored whenever possible because wide latitude will encourage the development of strong and effective educational programs and learning communities. The core values combine to provide an environment *where students have the opportunity to study law in an intellectually vibrant institution capable of preparing them for professional lives as lawyers instilled with a sense of justice and an obligation of public service.*[107]

The plain meaning of the edicts issues by both the AALS and the ABA charge law schools to undertake actions outside of rote curricular measurements to enhance professionalism. Such actions would necessarily include the rules and regulations governing student conduct.

However, neither the ABA nor the AALS provides any specific dictates for the substance of student conduct codes. For guidance regarding substantive provisions, current jurisprudence addressing whether student conduct codes impermissibly infringe Constitutional rights must be examined.

V. CONSTITUTIONAL LIMITATIONS

Public universities have been recognized as instrumentalities of the state, thereby granting constitutional protection to their students.[108] Writing for the Court in 1960, Justice Stewart declared that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools."[109] However, it "does not follow that the [university or college] campus ought to be equated with the public square."[110] As schools strive to shape the norms of conduct, lawsuits inevitably arise challenging school disciplinary actions and relying on the constitutional freedoms and protections provided by the First and Fourteenth Amendments.[111]

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107. Brief of Amicus Curiae Association of American Law Schools in Support of Respondent at 1–2, Christian Legal Soc'y v. Martinez, 130 S. Ct. 795 (2009) (No. 08-1371), 2010 WL 928039 (emphasis added).

108. *See, e.g.*, Miller v. Long Island Univ., 380 N.Y.S.2d 917 (N.Y. App. Div. 1976); Smith v. Univ. of Tenn., 300 F. Supp. 777 (E.D. Tenn. 1969).

109. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

110. *Christian Legal Soc'y*, 130 S. Ct. at 2997.

111. Cases applying the First Amendment include *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968) (action to restrain alleged violation of First Amendment rights by state university students against whom disciplinary action had been taken). Cases applying the Fourteenth Amendment include *Nash v. Auburn University*, 621 F. Supp. 948 (D. Ala. 1985), *aff'd*, 812 F.2d 655 (11th Cir. 1987) (denying plaintiffs' claims that their procedural and substantive due process rights under the Constitution were violated).

The First Amendment prohibits governmental infringement on the right of free speech.[112] The Fourteenth Amendment prohibits the states from denying federal constitutional rights and guarantees due process.[113] Congress prohibits interference with federal rights under color of state law through 28 U.S.C § 1983, which was enacted pursuant to Congress' authority to enforce the Fourteenth Amendment.[114] University codes governing conduct are treated as state action and therefore governed by provisions of the First and Fourteenth Amendments.[115]

A. The First Amendment and Students' Rights

More than a century ago, Thomas Cooley, Justice of the Michigan Supreme Court, reasoned that even if speech "exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion."[116] Courts have since heeded Justice Cooley's advancement of an expansive interpretation of the First Amendment. Such an expansion suggests a certain leeway, within Constitutional limits, of schools' ability to regulate the behavior of their students, providing latitude in which conduct codes can operate.

In the pivotal case of *Tinker v. Des Moines Independent Community School District*, the Supreme Court focused on the free speech rights of students.[117] In *Tinker*, the Court addressed the constitutionality of punishment imposed on several students who wore black armbands to protest the Vietnam War, and it held that the school could not restrict symbolic speech that did not cause "undue interruptions" of school activities.[118] Justice Abe Fortas writing for the Court stated

112. The First Amendment states that "[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

113. Civil Rights Cases, 109 U.S. 3, 11 (1883); *see* Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

114. The Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

115. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see* Morse v. Frederick, 551 U.S. 393 (2007).

116. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 429 (Leonard W. Levy ed., 1972).

117. 393 U.S. 503 (1969).

118. *Id.* at 503. The Court held that a school could regulate student speech or expression only when it could show that the speech did or reasonably could be foreseen

that "schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students . . . are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[119] The Court established that the rights of students and teachers[120] are "applied in light of the special characteristics of the school environment."[121]

Courts have since limited the applicability of *Tinker*[122] but have not departed from the core holding extending free speech rights to students. A citizen does not surrender his "civil rights upon enrollment as a student in university."[123] Student expression may therefore not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school."[124] Juxtaposed to this right, however, is the fact that enrolled students obtain neither a right to immunity nor special consideration.[125]

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to "materially and substantially disrupt the work and discipline of the school" or "impinge upon the rights of other students." *Id.* at 509, 513.

119. *Id.* at 511.

120. For an in-depth examination of First Amendment protection afforded educators, see JoNel Newman, *Will Teachers Shed Their First Amendment Rights At the Schoolhouse Gate? The Eleventh Circuit's Post-Garcetti Jurisprudence*, 63 U. MIAMI L. REV. 761 (2009).

121. *Tinker*, 393 U.S. at 506.

122. *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007) (holding that schools could, consistent with the First Amendment, restrict student speech at school-sponsored events, on or off campus, if such speech involves the promotion of "illegal drug use"); *see also* Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988) (finding that school newspapers enjoyed fewer First Amendment protections and are subject to school censorship); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that a student could be punished for his sexual innuendo-laced speech before a school assembly).

123. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); *see* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); *see also* 28 U.S.C. § 1343 (2006) (granting U.S. district courts jurisdiction over constitutional violations); 42 U.S.C. § 1983 (2006) (creating remedies for constitutional violations).

124. *Morse*, 551 U.S. at 394 (quoting *Tinker*, 393 U.S. at 513); *see also* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989–92 (9th Cir. 2001) (upholding the suspension of a high school student based in part on poem describing shooting of students); Boucher v. Sch. Board, 134 F.3d 821, 827–28 (7th Cir. 1998) (upholding the expulsion of a high school student for writing an article in the underground newspaper outlining techniques for hacking into school computers); J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 422 (Pa. Commw. Ct. 2000) (upholding expulsion of a student for placing a picture of a severed head of a teacher on a website and soliciting funds for her execution); DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008) (holding Temple University's anti-harassment policy unconstitutionally overbroad and thus a violation of students' First Amendment rights); Murakowski v. Univ. of Del., 575 F. Supp. 2d 571 (D. Del. 2008) (finding student's comments on his website did not constitute a "true threat" or "material disruption").

125. *Buttny*, 281 F. Supp. at 286.

In the years following *Tinker*, the courts have upheld disciplinary action taken against students' speech, rather than expanding students' speech rights.[126] The determination of those rights has been complicated by the advent and exponential growth of the internet.[127] For example, in the twenty-first century, courts have been faced with issues involving students' "speech" published on networking sites.[128]

In a 2007 case, a high school student posted a public message on a social networking site referring to school officials as "douchebags," forwarded misleading and potentially false information, and called on students and their parents to write the school superintendent in order to "piss her off more."[129] The Second Circuit, in a panel opinion joined by then-Judge Sotomayor, upheld the lower court's ruling that the student's speech was not protected and that the school could therefore suppress her "uncivil and offensive speech."[130] The court's opinion in *Doninger v. Niehoff* referenced "constitutional concerns" that brought in to question the First Amendment's application to student speech and the novel question of whether the deference afforded school officials extends to the school's choice of disciplinary measures.[131]

126. *See, e.g., Morse*, 551 U.S. at 394 (stating that the school could regulate student speech, i.e. waving a banner declaring "Bong Hits 4 Jesus," that could "reasonably [be] viewed as promoting illegal drug use"); *Bethel*, 478 U.S. at 685 (1986) (upholding student suspension where students assembly speech contained "pervasive sexual innuendo").

127. This Article does not purport to present an analysis of students' cyber rights under the Constitution. Arguably conduct related to cyberspeech should come under the purview of reviewable conduct for discipline inasmuch as such speech will impact the educational environment at law schools. Professor Philip T.K. Daniel and Dr. Patrick Pauken discuss the role of educators in controlling inappropriate and dangerous internet based student conduct and helping students strike a proper balance between traditional notions of education and the growth of cyberspace communication in *The Electronic Media and School Violence: Lessons Learned and Issues Presented*, 164 ED. LAW REP. 1 (2002) (examining "the tools educators have to address student conduct on the Internet with a focus on school authority and students' constitutional and statutory rights."); *see also* Sally Rutherford, *Kids Surfing The Net At School: What are The Legal Issues?*, 24 RUTGERS COMPUTER & TECH. L.J. 417 (1998) (focusing on areas of possible liability that public schools face from connection to the internet).

128. The internet has further muddied the traditional First Amendment analysis of student speech. *See generally* Caitlin May, *"Internet-Savvy Students" and Bewildered Educators: Student Internet Speech is Creating New Legal Issues for the Educational Community*, 58 CATH. U. L. REV. 1105 (2009) (discussing the constitutionality of public secondary school regulation of student internet speech and noting that the Supreme Court has yet to clarify the issue of student "cyberspeech" cases); Tiffany Emrick, *When MySpace Crosses the School Gates: The Implications of Cyberspeech on Students' Free-Speech Rights*, 40 U. TOL. L. REV. 785 (2009).

129. Doninger v. Niehoff, 514 F. Supp. 2d 199, 202, 206 (D. Conn. 2007).

130. *Id.* at 215; Doninger v. Niehoff, 527 F.3d 41, 49–50, 53 (2d Cir. 2008).

131. *Doninger*, 514 F.3d at 53; Ponce v. Socorro Indep. Dist., 503 F.3d 765, 766, 772 (5th Cir. 2007) (holding that "Columbine-style" attack writings of student quali-

The years after *Tinker* have seen more "speech limiting" cases like *Doninger*.[132] Justice Sotomayor joined the majority of the Court in 2010 as the Court reaffirmed its position regarding students' speech rights.[133] The Court stated, "The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum . . . ."[134] So long as a public university "does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing."[135]

The trend continues in First Amendment actions with the Supreme Court "wisely defer[ing] to school officials' expertise to regulate the educational environment."[136] In granting such deference, the Court has not specifically addressed the issue of *what* punishment is allowable or applicable for violations of regulatory rules or codes.[137] In school disciplinary actions the First Amendment inquiry ends after

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fied as threatening speech unprotected by the First Amendment, the court declined to consider whether the punishment of expulsion was excessive); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35 (2d Cir. 2007) (affirming the dismissal of student's First Amendment claim and the right of school authorities to impose a one-semester suspension of an eighth grade student who shared a crude drawing suggesting that a named teacher should be shot and killed on grounds that the drawing would "materially and substantially disrupt work and discipline of the school" and was therefore not subject to First Amendment protection); Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002) (holding that student's use of vulgar comments regarding molestation, rape, and murder constituted a true threat and the school's disciplinary action did not violate the student's First Amendment rights and noting that it lacked authority to assess the "wisdom" of the expulsion imposed by the school).

132. *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007) (stating that the school could regulate student speech, i.e., waving a banner declaring "Bong Hits 4 Jesus," that could "reasonably [be] viewed as promoting illegal drug use"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (upholding student suspension where students assembly speech contained "pervasive sexual innuendo").

133. Christian Legal Soc'y v. Martinez 130 S. Ct. 2971, 2975 (2010).

134. *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

135. *Id.* at 2976.

136. James F. Ianelli, *Punishment and Student Speech: Straining The Reach of The First Amendment*, 33 HARV. J.L. & PUB. POL'Y 885 (2010). Ianelli argues that courts should follow the Supreme Court's reasoning in obscenity cases by refusing to scrutinize the extent of school punishment of unprotected speech. *Id.* at 887.

137. *See generally id.* Ianelli notes that the issue of punishment in the context of student speech has, to date, not been examined by the Supreme Court. *Id.* at 886. He notes that the Court has engaged in "analogous inquiries in two other areas of First Amendment jurisprudence: defamation and obscenity," *id.* at 887, and argues that the courts should follow the Supreme Court's reasoning in obscenity cases by refusing to scrutinize the extent of school punishment of unprotected speech, *id.* at 906.

determination that the speech is unprotected.[138] Schools must therefore utilize their rights as a state entity to experiment in prescribing appropriate sanctions for violations of disciplinary rules.[139]

B. The Fourteenth Amendment and Students' Rights

From the Fourteenth Amendment's Due Process Clause, the Supreme Court explicates that the amendment provides two different types of constitutional protection: (1) substantive due process and (2) procedural due process.[140] Substantive due process bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them."[141] Stated differently, the substantive due process question is simply whether the government action was arbitrary and capricious to the point of irrationality.[142] This substantive component protects those rights that are "fundamental"; that is, rights that are "implicit in the concept of ordered liberty."[143]

The Supreme Court has, oftentimes with obvious reluctance, extended substantive due process protection to certain unenumerated rights, but it apparently remains hesitant to expand the concept much further.[144] In *Board of Curators, University of Missouri v. Horowitz*, the Court assumed, without deciding, that federal courts can review

138. *See, e.g.*, Ponce v. Socorro Indep. Dist., 508 F.3d 765, 772 (5th Cir. 2007); Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 626–27 (8th Cir. 2002).

139. One established benefit to federalism is a state's right to peirastic laws, within constitutional limitations. *See* Perry A. Zirkel & Mark N. Covelle, *State Laws for Student Suspension Procedures: The Other Progeny of* Goss v. Lopez, 46 SAN DIEGO L. REV. 343, 351 (2009) (citing Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 778 n.28 (2007) (Thomas, J., concurring); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 418 (1999); EEOC v. Wyoming, 460 U.S. 226, 264–65 (1983); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 617 (1982) (Burger, C.J., dissenting); New State Ice Co. Liebmann, 285 U.S. 262, 310–11 (1932)).

140. *Cf.* Zinermon v. Burch, 494 U.S. 113, 125 (1990); *see* McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994). An alternate substantive due process test finds a violation if the challenged governmental conduct "shocks the conscience" of the court. This standard, adhered to in criminal proceedings, is generally inapplicable to a civil lawsuit. *See, e.g.*, Gilmere v. City of Altanta, 774 F.2d 1495, 1511 n.21 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986).

141. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

142. Harrington v. Harris, 118 F.3d 359, 368 (5th Cir. 1977).

143. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

144. The range of interests protected by due process is not infinite. U.S. CONST. amend. XIV; *see* Collins v. City of Harker Heights, 503 U.S. 115 (1992). The Court's reluctance seems especially applicable when the alleged right is created by State law. McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994) ("[A]reas in which substantive rights are created only by state law . . . are not subject to substantive due process protection . . . because 'substantive due process rights are created only by the Constitution.'") (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985)).

an academic decision of a public educational institution under a substantive due process standard.[145] The Court has, however, expressed its "reluctance to trench on the prerogatives of state and local educational institutions and [the Court's] responsibility to safeguard [the state and local educational institutions'] academic freedom."[146]

The procedural component of the Due Process Clause protects against deprivation by state action of a constitutionally protected interest in "life, liberty, or property" where such deprivation occurs *without due process of law*.[147] "Liberty" has been construed to encompass a student's interest in obtaining an education.[148] The Supreme Court has reviewed procedural due process claims as they relate to the student's liberty interest in his or her education by utilizing a two step analysis: (1) whether the appellant was deprived of a protected interest and (2) if so, what process is due.[149] Where disciplinary action rises to suspension or expulsion, imposition of those sanctions by a state educational institution affects a student's property and liberty interests. Thus, in these cases the courts will scrutinize the procedural aspects of the code allowing for such sanctions and its operation to ensure that it meets the minimal requirements of procedural due process.[150] The right afforded is based on the substantive liberty interest in the education, not the procedures themselves.[151]

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145. 435 U.S. 78, 91–92 (1978).

146. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985).

147. Parratt v. Taylor, 451 U.S. 527, 537 (1981) (emphasis added); Carey v. Piphus, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."); Picozzi v. Sandalow, 62 F. Supp. 1571 (E.D. Mich. 1986) (stating that plaintiff's protected interest in his education triggered due process).

148. Goss v. Lopez, 419 U.S. 565, 574 (1975) (holding that public school students have both a property interest and a liberty interest in the education that state government provides). The *Goss* case has influenced school discipline cases by creating an apparent "incentive for educators to ruminate the decisions regarding punishment for code violations." Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After* Board of Education v. Earls, 56 S.C. L. REV. 1, 40 (2004); *see also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that segregation in public education is not reasonably related to any proper governmental objective and thus imposes a burden that constitutes an arbitrary deprivation of liberty in violation of the Due Process Clause).

149. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

150. *Goss*, 419 U.S. at 574; Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

151. Olim v. Wakinekona, 461 U.S. 238, 250–51 (1983); *accord* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 771–72 (2005) (noting that an individual does not acquire a substantive interest in specific procedures developed by the state); *see also* Jackson v. Tex. Southern Univ.-Thurgood Marshall Sch. of Law, 231 S.W.3d 437, 440 (Tex. Ct. App. 2007) (rejecting student's argument that he had a property interest in the rules and regulations codified by the law school).

Procedurally, in these areas, there is no bright line test. Asserted denial of procedural due process is tested by an appraisal of the "fundamental fairness" in light of the totality of facts in a given case.[152] Even in application of the fundamental fairness test, it has been suggested that school authorities should not be expansive in determining what fundamental fairness requires, and courts should not be "too deferential in satisfying themselves through hindsight that fundamental fairness was provided."[153] Thus, while well-settled that there is no specific procedure required for due process in school disciplinary proceedings,[154] the cases establish the bare minimum requirements of: (1) adequate notice of the charges; (2) reasonable opportunity to prepare for and meet them; (3) an orderly hearing adapted to the nature of the case;[155] and (4) a fair and impartial decision.[156] In situations

152. Lassiter v. Dep't of Social Servs. of Durham Cnty., 452 U.S. 18, 25 (1981) (stating that application of the Due Process Clause is "therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake"); Gideon v. Wainwright, 372 U.S. 335, 339 (1963); Betts v. Brady, 316 U.S. 455, 462 (1942); *see also* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970) ("[T]he standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter, and the circumstances involved."); Sigma Chi Fraternity v. Regents, 258 F. Supp. 515 (D. Colo. 1966) (noting that the test of whether a party has been afforded procedural due process is one of fundamental fairness in light of the total circumstances). Commentators suggest that despite the public vs. private nature of a university, the test of "fundamental fairness" is equally applicable. *See, e.g.*, Bickel & Lake, *supra* note 24, at 269 n.35 (citing the National Association of Student Personnel Administrators, Inc. 1992's language that "students should have protection through orderly procedures against prejudiced or capricious academic evaluation").

153. William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545, 552 (1971). Professor Buss notes that "school authorities should not be too niggardly in determining what fundamental fairness requires." *Id.*

154. *See Lassiter*, 452 U.S. at 24 ("For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined."); *see also* Jenkins v. McKeithen, 395 U.S. 411, 426 (1969) ("'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.").

155. The timing and nature of a required hearing under the Due Process Clause will depend on appropriate accommodation of competing interests involved, including importance of private interest and length or finality of deprivation, likelihood of government error, and magnitude of governmental interests involved. U.S. CONST. amend. XIV; *see* Logan v. Zimmerman Brush Co., 433 U.S. 422, 434 (1982); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); Goss v. Lopez, 419 U.S. 565, 579 (1975); Wolff v. McDonnell, 418 U.S. 539, 561–63 (1974).

where the student admits guilt, some courts have ruled that there is no right to a hearing.[157] Where disciplinary measures are imposed pursuant to non-academic reasons (e.g., fraudulent conduct), as opposed to purely academic reasons, the courts are inclined to reverse decisions made by the institutions without these minimal procedural safeguards.[158]

Students' Fourteenth Amendment rights were addressed in the seminal 1961 decision of *Dixon v. Alabama State Board of Education*, which prohibited a state college from expelling students without providing any of the procedural safeguards required by due process.[159]

156. *Lopez*, 419 U.S. at 574; *see also* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (holding that the Fourteenth Amendment Due Process Clause does not require a university to provide a hearing before dismissing a student on academic grounds); Matthews v. Eldridge, 424 U.S. 319, 334 (1976) (noting that due process is a flexible concept calling for such procedural protections as the situation demands); Smith v. Goguen, 415 U.S. 566, 572–73 (1974) (striking down criminal statute restricting flag desecration as facially void for vagueness because it allowed "policemen, prosecutors and juries to pursue their personal predilections") (*citing* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (noting the Fourteenth Amendment's incorporation of notions of fair notice or warning); Rogers v. Tenn. Bd. of Regents, 273 Fed. App'x 458 (6th Cir. 2008) (upholding a dismissal of nursing student after receiving failing grade in a clinical nursing course when the student had received the minimal level of constitutional due process); Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997) (discussing the constitutional infirmity of a regulation that is vague); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961) (observing that due process should include notice of the specific charges and grounds which would, if proven, justify expulsion and a hearing which gives the expelling authority an opportunity to hear both sides in considerable detail—that is, the rudiments of an adversary proceeding, which provides the accused the names of witnesses, an oral or written summary of the facts to which they will testify, and the opportunity for the accused to present his own defense); Califoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997) (applying due process standards to students' claim that school's policy was void for vagueness as, per the school disciplinary scheme, the students faced a potential deprivation of their property interest in attending public school); Walker v. Bradley, 211 Neb. 873, 873–74, 320 N.W.2d 900, 900–01 (1982) (discussing notice requirements).

157. *See, e.g.*, Bolster v. Philpot, 645 F. Supp. 798, 800 (D. Kan. 1986) (holding that where the disciplined students had admitted their guilt, no hearing was necessary); Montoya v. Sanger Unified Sch. Dist., 502 F. Supp. 209, 213 (E.D. Cal. 1980) (holding that if a student admits all relevant facts, then an informal hearing is not necessary); *cf.* Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975) (stating that students have the right to present their views even if guilt has been admitted, where students discipline was based, in part, on unsubstantiated charges).

158. *See, e.g.*, Morris v. Fla. Agric. and Mech. Univ., 23 So.3d 167 (Fla. Dist. Ct. App. 2009) (finding that the primary reason for the student's expulsion was alleged fraudulent misconduct rather than poor academic performance entitling the student to a hearing commensurate with the school and the state's administrative hearing rights).

159. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

John Patterson, then-Governor of the State of Alabama, and also then-Chairman of the State Board of Education, recommended expulsion of six "Negro" students.[160] The recommendation came as a result of the students' participation in a sit-in demonstration at a local restaurant and a large demonstration at the county court house.[161] The students sought injunctive relief from the expulsion.[162] The court of appeals rejected the argument that the students had no constitutional right to attend the state college and held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."[163] The court of appeals cited Professor Warren A. Seavey's oft-quoted Harvard Law Review article that stated:

> 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 elements 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.[164]

Then, in 1975, the Court, in a split decision in *Goss v. Lopez*,[165] struck down an Ohio statute permitting student suspensions from school without a hearing. Predictions were made that school administrators and faculty would find the task of disciplining students more difficult and the decision would drastically change the life of every school board member in the United States.[166] Apparently, however, "[these] commentators were neither diligent historians nor reliable prophets."[167] Subsequent cases evidence that, in fact, the courts generally have upheld school officials' decisions regarding disciplinary actions.[168]

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160. *Id.*
161. *Id.* at 153.
162. *Id.* at 152.
163. *Id.* at 158.
164. Warren A. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957). Professor Seavey noted that "the harm to the student may be far greater than that resulting from the prison sentence given to a professional criminal . . . . A law-school student dismissed for cheating will not be admitted to practice even if he is able to complete his legal education." *Id.* at 1407.
165. 419 U.S. 565 (1975).
166. Linda L. Bruin, *School Discipline: Recent Developments in Student Due Process Rights*, 68 MICH. B.J. 1066 (1989) (quoting Albert Shanker, *Where We Stand*, N.Y. TIMES, Feb. 9, 1975; Nolte, M. Chester, *New Strictures on School Board Members*, THE AM. SCH. BD. J., 50–53 (1975)).
167. *Id.*
168. *See, e.g.*, Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (stating that because there is no government interest, the relationship between a student and a private university is contractual in nature and thus not subject to due process protections); Corso v. Creighton Univ., 731 F.2d 529, 533 (1984) (holding that a student's expulsion from the university was improper because the student had not been given a right to a hearing before expulsion as provided for in the student handbook); Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 244 (D. Vt.

C. Deference Afforded Schools Regarding Student Behavior Regulation

Traditionally, colleges and universities possess broad discretion in the administration of their internal affairs.[169] Subvention of an inherent general power to maintain order on campus and to exclude those who are detrimental to its well being has long been recognized.[170] Regulations and rules which are necessary to maintaining order and discipline invariably are considered reasonable.[171] The Supreme Court assigned high value to giving colleges and universities final authority to make educational judgments as far back as the nineteenth century.[172] This value was also recognized by lower courts analyzing university students' non-academic issues.

In 1866, in *People ex rel. Pratt v. Wheaton College*,[173] the Illinois Supreme Court upheld the college's authority to forbid its students from joining secret societies. The court recognized the school's charter giving the trustees and faculty "the power 'to adopt and enforce such rules as may be deemed expedient for the government of the institution,' a power . . . indispensable to the successful management of the college."[174] The Court noted that in enforcing discipline, the college possessed a

> discretionary power . . . to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law [the court had] no more authority to interfere than [the court has] to control the domestic discipline of a father in his family.[175]

Since that time, the Court has reinforced the autonomy of institutions of higher education[176] and has evidenced a commitment to pro-

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1994) (college breached its contractual duty when it failed to put student on notice of charge against him); Holert v. Univ. of Chi., 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (student entitled to the procedural safeguards that school agreed to provide); Schaer v. Brandeis Univ., 735 N.E.2d 373, 381 (Mass. 2000) (a university should follow its established rules); Anderson v. Mass. Inst. of Tech., 3 Mass. L. Rep. 293 (Mass. Super. Ct. 1995) (courts may intervene when school's action was arbitrary and capricious); Napolitano v. Trs. of Princeton Univ., 453 A.2d 279 (N.J. Super. 1982) (university's withholding of student's degree for one year violated university's own rules because the student was not informed in a timely manner that she had the right to cross-examine witnesses).

169. Martin-Trigona v. Univ. of N.H., 685 F. Supp. 23 (D.N.H. 1988).

170. *See, e.g.*, Goldberg v. Regents of the Univ. of Cal., 57 Cal. Rpt. 463, 472 (Cal. Ct. App. 1967); Morris v. Nowotny, 323 S.W.2d 301 (Tex. Civ. App 1959).

171. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo 1968) (quoting Dickey v. Ala. State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967)).

172. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

173. 40 Ill. 186 (1866).

174. *Id.* at 1 (quoting school's charter)

175. *Id.*

176. *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (upholding a public university's dismissal of a student who failed a key exam and noting that "academic judgments . . . require an expert evaluation of cumulative information

tect rights of state universities to govern themselves within constitutional limitations.[177] This traditional rule of nonintervention has generally been applied to academic-only matters and not specifically to review of disciplinary action by educational institutions.[178] However, in cases where disciplinary action taken is challenged, courts, cautious not to allow violations of students' rights under the pretext of academic discipline, are still apt to determine that the disciplinary action is "essentially academic" and subject to judicial review under an arbitrary and capricious standard.[179] School authorities are therefore granted latitude to regulate student activity (both on and off campus) that affects matters of legitimate concern to the school community.[180] This includes disciplinary regulations and enforcement generally deemed to be within the purview of state and local police.[181]

Courts have sought to balance this deference to the institutions' administration and faculty with the constitutional rights of students.

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and [are] not readily adapted to the procedural tools of judicial or administrative decision making"); Wood v. Strickland, 420 U.S. 308, 326 (1975) (emphasizing the deference owed to school official's discretionary decisions); Sweezy v. N.H., 354 U.S. 234, 250 (1957) (questioning of a university lecturer's content of his lectures was "unquestionably . . . an invasion . . . of academic freedom and political expression—areas in which the government should be extremely reluctant to tread"); Wash. Univ. v. Rouse, 75 U.S. (8 Wall.) 439, 440 (1869) (stating that it was not the province of the Supreme Court to pass on wisdom of provision of charter of Washington University); Stetson Univ. v. Hunt, 102 So. 637 (Fla. 1924) (holding that the university could suspend a student for behavior that was offensive or intruded upon the rights or "comforts" of others); Gott v. Berea Coll., 161 S.W. 204, 205 (Ky. 1913) (upholding the college's authority to announce and enforce a rule prohibiting its students from visiting "places of ill repute, liquor saloons," etc.).

177. *See, e.g.*, Univ. of Nev., Reno v. Stacey, 997 P.2d 812 (2000).

178. Mahavongsanan v. Hall, 529 F.2d 448, 449–50 (5th Cir. 1976).

179. *See, e.g.*, Jansen v. Emory Univ., 440 F. Supp. 1060 (D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); Jung v. George Washington Univ., 875 A.2d 95 (D.C. 2005), *amended,* 883 A.2d 104 (D.C. 2005); Susan M. v. N.Y. Law Sch., 556 N.E.2d 1104 (N.Y. 1990); Bender v. Alderson Broaddus Coll., 575 S.E.2d 112 (W. Va. 2002).

180. *See, e.g.*, Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring) (concurring with the decision to uphold a school's exercise of authority to regulate distribution of an allegedly "morally offensive, indecent, and obscene" publication on school property); Due v. Fla. A&M Univ., 233 F. Supp. 396 (N.D. Fla.1963) (upholding suspension of students under rule governing disciplinary actions taken against students for misconduct while on or off campus.). Deference is clearly the standard for decisions relating to discipline for academic issues. *See, e.g.*, Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978). In *Ewing*, the Court stated that courts should not override academic judgments unless they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 225. The line blurs considerably when the behaviors are non-academic. For an in-depth analysis of punishment for non-academic issues, see Friedl, *supra* note 29.

181. Fee v. Herndon, 900 F.2d 804, 809 (5th Cir. 1990).

In 1961, the Fifth Circuit in *Dixon v. Alabama State Board of Education* rejected the argument that principles of judicial deference to college disciplinary action should control and held that public, tax-supported universities may not infringe on the constitutional rights of students on the sole ground that the university has authority to discipline students.[182] In subsequent years, the United States Supreme Court rendered a succession of salient rulings upholding the rights of students at public institutions to engage in constitutionally-protected activities.[183]

The Court subsequently re-focused on the latitude granted institutions. In *Widmar v. Vincent*, the Court noted that "a university's mission is education . . . and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[184]

More recently, in a concurring opinion, Justice Stevens noted that "[a]cademic administrators routinely employ . . . rules to promote tolerance, understanding, and respect, and to safeguard students from invidious forms of discrimination."[185] These values can, in turn, "advance numerous pedagogical objectives."[186]

Recognizing the school's role and position in our democracy, Justice Stevens, issuing a separate concurrence in the majority decision in *Christian Legal Society v. Martinez*, astutely noted that "[a]s a general matter, courts should respect universities' judgments and let them manage their own affairs."[187]

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182. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 155–56 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

183. *See, e.g.*, Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (stating that state university may not censor editorial content of student newspaper on the basis that newspaper's views are "offensive" to university constituents); Healy v. James, 408 U.S. 169 (1972) (noting that a public university may not deny recognition of a student organization solely on the basis of its disagreement with the political views of the organization); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (recognizing students' rights to wear black arm bands protesting United States political actions).

184. Widmar v. Vincent, 454 U.S. 263, 265–67 (1981).

185. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2997 (2010) (Stevens, J., concurring).

186. *Id.* at 3000 (Kennedy, J., concurring). Justice Kennedy issued an additional concurring opinion, noting that:

> [l]aw students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations.

Id.

187. *Id.* at 2998 (Stevens, J., concurring).

Standards of conduct, so long as they are reasonable and relevant to the lawful mission, process, or function of the education institution, will generally be upheld.[188] Care should therefore be exercised to ensure that non-academic codes are reasonable and relevant.

VI. CODE DRAFTING SUGGESTIONS

Beyond the clearly constitutionally protected rights, courts have seldom spoken regarding the content of student codes, signaling either a reluctance to enter this arena or extending deference to university administration and faculty in defining the content necessary to effectively manage the university environment. Law schools are no different. In fact, the courts' apparent reluctance seems to signal a belief that law schools should be allowed latitude in rule enactment and enforcement to govern the law school community. Student codes should be viewed as a permissible effort by law schools to preserve the value of this community. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[189] Constitutional rights, however, do not exist in a vacuum and are not subject to exercise without boundaries.[190] For example, the exercise of freedoms guaranteed in the Constitution cannot pose an infringement on the rights or duties of others.[191] Any limitations on law students' constitutional rights should be narrowly construed to effectuate the academic and professional mission of the institution.

It has been posited that "[a]ny [person] voluntarily entering the arena of academia whether student, professor, or administrator, should be held to a professional level of conduct."[192] Students, by seeking admission to and obtaining benefits of attending a law school, arguably agree that they will "abide by and obey rules and regulations promulgated for orderly operation of that institution and for effectuation of its purposes."[193] The rules and regulations necessary to main-

188. Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *order aff'd*, 440 F.2d 1351 (5th Cir. 1971); Calbillo v. San Jacinto Junior Coll., 305 F. Supp. 857 (S.D. Tex. 1969).

189. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

190. *See* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972) (citing Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971) (stating that "[p]ersonal freedoms are not absolute; they must yield when they intrude upon freedoms of others").

191. *See, e.g.*, Locurto v. Guiliani, 447 F.3d 159, 178 (2d Cir. 2006) (finding, as a matter of law, that the mayor was justified in terminating a police officer and firefighter employees for what would otherwise be protected racist speech because the Government may "legitimately regard as 'disruptive' expressive activities that instantiate or perpetuate a widespread public perception of police officers and firefighters as racist").

192. DiMatteo & Wiesner, *supra* note 11, at 61.

193. 14 C.J.S. *Colleges and Universities* § 35 (2011); *see* Wright v. Tex. S. Univ., 392 F.2d 728 (5th Cir. 1968); Cornette v. Aldridge, 408 S.W. 935 (Tex. Civ. App. 1966); State *ex rel.* Sherman v. Hyman, 171 S.W.2d 822 (Tenn. 1942).

tain a "professional level of conduct" are generally incorporated in institutions' codes of student conduct.

In 2009, the NOBC issued a report recommending that "[c]onduct codes should clearly state mandatory expectations for student conduct and should call upon law students to conduct themselves as though they were governed by the applicable ABA Model Rules of Professional Conduct or the Rules of Professional Conduct of the jurisdiction where the law school is located" and "should establish standards of professional behavior that promote core professional and character values going beyond minimal compliance with mandatory standards of conduct."[194] Arguably, these standards of conduct should encompass words, actions, and deeds.

Establishing the conduct necessary for professional compliance may require a construction of a value system that supports the necessary tenets of professionalism. In a consulting report to the Florida Supreme Court Professionalism Committee, Professor Chinaris noted that law schools play three distinct roles in the evolution of law students' value systems: gatekeeper, developer, and evaluator.[195] Chinaris emphasized that:

> [l]aw schools are in a unique position to both evaluate and influence the level of professionalism demonstrated by their applicants, students and graduates . . . [by acting] as a gatekeeper by deciding which applicants it will admit to the study of law; and [by acting] as a developer of professionalism in two ways. First, all law schools require their students to receive instruction in professional ethics . . . . Second, all law schools maintain some type of code that governs behavior of students . . . . [L]aw school [also] acts as an evaluator by certifying to bar admission authorities that its graduates possess sufficient character and fitness to qualify them to sit for the bar exam or join the ranks of the legal profession.[196]

Simplified, law schools have a binary obligation: (1) instruction of the rule of law (application of which includes the oft-noted requirement of "thinking like a lawyer") and (2) instruction of the spirit of the law. A law school's interest in the regulation of these two separate, distinct, yet interwoven areas is highlighted by its internal regulatory rules of conduct which insure an orderly academic environment.[197]

The conduct regulated often focuses on student speech and behavioral norms. Recognizing the constitutional limitations, in addition to

194. LAW SCH. PROFESSIONALISM INITIATIVE COMM., *supra* note 99, at 14.

195. TIMOTHY P. CHINARIS AND MARIN DELL, NEW DIRECTIONS IN PROFESSIONALISM: REPORT PREPARED FOR THE FLORIDA BAR'S HENRY LATIMER CENTER FOR PROFESSIONALISM (2009), *available from* The Florida Bar, Henry Latimer Center for Professionalism, 651 East Jefferson Street, Tallahassee, Florida 32399.

196. *Id.*

197. Bickel & Lake, *supra* note 24, at 266 (stating that the issue in seminal cases [discussing a university's discretion as to matters of student discipline] is clearly the college's interest in the regulation of student conduct, "i.e. to demand diligence in study and to insure an orderly academic environment").

applicable academic-specific issues (e.g., cheating, plagiarism, etc.), students' speech and behavior nevertheless must be monitored to ensure professionalism in practice begins during law school. Application of enforceable standards may vary where speech, as opposed to conduct, is the focus of regulation.[198]

A. Speech Control

"Schools are generally held to have the authority to censor on-campus speech that school authorities consider to be vulgar, offensive, or otherwise contrary to the school's mission to inculcate the habits and manners of civility."[199] In *Hazelwood School District v. Kuhlmeier*, addressing censorship of certain articles in a school newspaper, Justice White in the opinion of the Court noted that schools are "able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and may refuse to disseminate student speech that does not meet those standards."[200] Schools therefore need not tolerate student speech that is inconsistent with the school's "basic educational mission."[201]

Per the dictates of the AALS, one of the core values of law schools is the preparation of law students for their "professional lives as lawyers."[202] This necessarily encompasses elements of competency, advocacy, and, equally important, professionalism. In the law school environment, oral and written speech require a standard commensurate with the tenets of professionalism—a key element to the comprehensive education of lawyers.

198. *See, e.g.*, Christian Legal Soc'y v. Kane, 319 F. App'x. 645 (9th Cir. 2009), *aff'd*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2991–92 (2010) (noting that school policy that says no to discrimination targets discriminatory conduct and is not equivalent to speech).

199. Doninger v. Niehoff, 514 F. Supp. 2d 199, 213 (D. Conn. 2007) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

200. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *see also* Poling v. Murphy, 872 F.2d 757, 758 (6th Cir. 1989) (upholding the disqualification of a student from running for student council president on the basis of the "admittedly 'discourteous' and 'rude' remarks about his schoolmasters in the course of a speech delivered at a school-sponsored assembly").

201. *Bethel*, 478 U.S. at 684.

202. *See* Brief of Amicus Curiae Association of American Law Schools in Support of Respondent, *supra* note 107, at 2.

B. Conduct Control

When challenged, regulation of more benign conduct issues (such as student dress or personal appearance) leads to divergent results.[203] In regulating conduct, instances will exist where immediate action by law school officials would be appropriate: for example, where alleged misconduct directly threatens members of the university community or university property.[204] In non-emergency situations, however, students' rights are viewed as "sacred" and therefore "more carefully guarded by the common law than the right of every individual to the possession and control of his own person."[205] This entails a right to be "free from all restraint or interference of others, unless by clear and unquestionable authority of law."[206]

A large body of jurisprudence regarding the challenges inherent in enforcing the right to be free from "restraint and interference" is demonstrated in the dress or grooming code cases, particularly those considering male student hair length regulations.[207] Yet, even within the narrow purview of the "hair length regulation" cases, the Supreme Court has not specifically addressed the question of the constitutionality of these regulations or the constitutionality of dress codes in general.

In oft-cited opinions, both Justice Douglas's and Justice Black's perspective of the issue are illustrative of the two poles of the debate. In the 1972 case *Olff v. East Side Union High School District*, Justice

203. Regulation of student conduct often calls into review behavior that may violate antidiscrimination statutes. The scope of this Article does not include issues insofar as challenges have been raised to the enforcement of such antidiscrimination statutes (including any sexual discrimination statutes). For an overview of the application of antidiscrimination statutes in education generally, see 15 AM. JUR. 2D *Civil Rights* §§ 281–363 (2010).

204. Friedl, *supra* note 29, at 712 (listing examples of situations where immediate action and suspension of the student is appropriate pending a hearing, including "where a student is accused of setting fire to his dormitory room, or of communicating threats of rape of a fellow student, or of selling drugs").

205. Bishop v. Colaw, 450 F.2d. 1069, 1075 (8th Cir. 1971) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)). The Court in *Union Pacific* also noted that "the right to one's person may be said to be a right of complete immunity; to be let alone." Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

206. *Bishop*, 450 F.2d. at 1075 (quoting *Union Pac.*, 141 U.S. at 251).

207. *See, e.g.*, Long v. Zopp, 476 F.2d 180 (4th Cir. 1973) (holding it unlawful to deny football player a "letter" of participation where player, after the football season, allowed his hair to grow beyond the prescribed length); Mick v. Sullivan, 476 F.2d 973 (4th Cir. 1973) (finding no justification for school code regulating the style and length of male students' hair and holding that the right to choose one's hairstyle is one aspect of the right to be secure in one's person guaranteed by the Constitution); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972) (reversing finding that regulation of hair length was justified); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970) (requiring compelling justification in case involving athletic team grooming code).

Douglas, dissenting from a denial of a petition for writ of certiorari, stated that "[i]t seems incredible that under our federalism a State can deny a student education in its public school system unless his hair style comports with the standards of the school board."[208] "Hair style" he added, "is highly personal, an idiosyncrasy which I had assumed was left to family or individual control and was of no legitimate concern to the State."[209]

A discordant position was expressed by Justice Black in *Karr v. Schmidt*.[210] Writing as a Circuit Justice, Justice Black stated that "the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys."[211]

The antagonistic positions on the issue aside, when faced with challenges to the validity of these regulations, courts oftentimes hold that the regulations raise no substantial constitutional questions.[212] Other courts uphold the validity of the regulations only where supported by a compelling or necessary justification, a substantial justification, or by a rational or reasonable basis.[213]

Similar outcomes have been derived in cases considering clothing regulations on items such as buttons, armbands and other political insignia,[214] and on other personal appearance regulations.[215]

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208. Olff v. E. Side Union High Sch. Dist., 404 U.S. 1042, 1042 (1972) (Douglas, J., dissenting).

209. *Id.* at 1043; *see also* Freeman v. Flake, 405 U.S. 1032, 1032 (1972) (Douglas, J., dissenting from the denial of petition for writ of certiorari and reiterating his beliefs set forth in *Olff*, 404 U.S. at 1042).

210. Karr v. Schmidt, 401 U.S. 1201 (1971) (Black, Circuit Justice) (denying motion for stay of injunction).

211. *Id.* at 1203.

212. *See, e.g.*, New Rider v. Bd. of Educ. 480 F.2d 693 (10th Cir. 1973); *Freeman*, 448 F.2d at 258; King v. Saddleback Junior Coll. Dist., 445 F.2d 932 (9th Cir. 1971) (reversing judgments for students and holding that hair length regulations were reasonable and therefore valid, and concluding that assertion that boys were treated differently from girls did not create any substantial constitutional question); Alberda v. Noell, 322 F. Supp. 1379 (E.D. Mich. 1971); Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447 (Tex. 1995) (holding that inquiry regarding dress code was not such an affront as to warrant court intervention).

213. *See, e.g.*, Epperson v. Bd. of Tr., 386 F. Supp. 317 (S.D. Tex. 1974); Copeland v. Hawkins, 352 F. Supp. 1022 (E.D. Ill. 1973) (requiring substantial justification for the regulation); Bishop v. Cermenaro, 355 F. Supp. 1269 (D. Mass. 1973) (regulation must have a rational, or reasonable basis); *see also* Zeller v. Donegal Sch. Dist. Bd. of Educ., 517 F.2d 600 (3d Cir. 1975) (Rosenn, J., concurring in part and dissenting in part) (requiring "a rational basis for hair regulation").

214. *See* Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971) (upholding prohibition of wearing armbands where prohibition extended to all armbands and not to a particular symbol, and was motivated by reasonable apprehension of disruption and violence); *cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (rec-

Be it prevention of a hostile environment or maintenance of decorum, regulation of clothing and appearance will be validated only where there is, at the very least, a reasonable basis for the regulation.[216] In the absence of unusual circumstances, so long as the regulations meet the "minimum test of rationality," the regulations will generally be held rational as a matter of law.[217] The standard of re-

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ognizing that regulation must be motivated by more than undifferentiated fear or apprehension of disturbance).

215. Health, safety, and sanitary rules that do not specifically address students' clothing or personal appearance may directly or indirectly have the effect of regulating clothing or appearance. For a detailed discussion of schools' ability to implement mandatory codes regarding students' dress without violating students' First Amendment rights, see Alison M. Barbarosh, *Undressing The First Amendment In Public Schools: Do Uniform Dress Codes Violate Students' First Amendment Rights?*, 28 LOY. L.A. L. REV. 1415 (1995); *see also* Stevenson v. Bd. of Educ., 426 F.2d 1154 (5th Cir. 1970) (affirming the dismissal of an action filed by high school students suspended for violation of the school's "good grooming rule" and holding that the evidence supported a finding that a failure to shave was a departure from the norm that had a diverting influence on the student body); Bar-Navon v. Brevard Cnty. Sch. Bd, 290 F. App'x 273 (11th Cir. 2008) (finding that a high school student who desired to express her individuality by wearing non-otic jewelry on her tongue, nasal septum, lip, navel, and chest, in violation of school board policy, failed to meet her burden of showing that she was entitled to First Amendment protections); Olesen v. Bd. of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987) (holding that a school's anti-gang rule prohibiting the wearing of earrings by male students was rational and did not unconstitutionally curtail students' freedom to choose their own appearance); Farrell v. Smith, 310 F. Supp. 732 (D. Me. 1970) (upholding vocational school's grooming regulation prohibiting beads, mustaches, and long hair); Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447 (Tex. 1995) (rejecting a class action challenge to the school district's rules regarding earrings and hair length for young men in high school).

216. *See, e.g.*, Torvik v. Decorah Cmty. Sch. 453 F.2d 779 (8th Cir. 1972) (stating that before the state can intrude into recognized areas of privacy and freedom by enactment of male student hair length code, there must exist some rational basis to justify paternalistic control); Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972) (affirming the dismissal of action filed by several black members of state university's football team challenging their dismissal from the team for their announced intention to wear black armbands during a game against Brigham Young University in order to protest that university's stance on racial matters and finding that the state university's action was reasonable and lawful as it protected against invasion of the rights of others by preventing a hostile expression against them, and the prohibition was not violative of the team members' First Amendment right of expression); Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (holding that rule prohibiting the wearing of "freedom buttons" was warranted where the record showed an unusual degree of commotion, boisterous conduct, collision with the rights of others, and undermining of authority as a result of wearing and distributing the buttons); Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F. Supp. 488 (D.S.C. 1997) (upholding school's prohibition on jacket made to look like Confederate flag where there was a reasonable basis for determining that the jacket would result in a substantial and material disruption of and interference with the educational process at the school in light of prior incidents).

217. *See* Karr v. Schmidt, 460 F.2d 609, 615 (5th Cir. 1972).

view is whether the regulation is reasonably intended to accomplish a constitutionally permissible state objective.[218]

Codes governing non-academic behavior meet the legal standard because they have a reasonable basis—to effectuate values of professionalism in its students—including standards of appropriate dress and appearance for the practice of law. To withstand judicial scrutiny, law schools should ensure that any proposed regulations regarding student dress or personal appearance possess some rational or reasonable basis in the educational mission.[219] This may be accomplished by regulating "professional attire" in keeping with the missions of law schools to holistically prepare students for professional practice. In addition, since regulations and rules which are necessary to maintaining order and discipline are always considered reasonable,[220] a law school's regulation of students' dress and/or personal appearance may be upheld inasmuch as it reduces or prevents disruptive distractions or behavior. The challenger would bear the burden of showing that the restriction is wholly arbitrary in order to defeat its validity.[221]

Law schools are charged with the educational mission of equipping their students with all the necessary elements for their "professional lives."[222] To avoid the teaching of professionalism would be to discount its value and necessity and lead to the loss of the monopolistic holding that the law profession has long strived to strengthen.[223]

With the foundational basis clearly articulated by the courts, a few issues regarding enforceable student codes warrant highlighting.

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218. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955); Ferrara v. Hendry Cnty. Sch. Bd., 362 So. 2d 371 (Fla. Dist. Ct. App. 1978).

219. *See, e.g.*, *Torvik*, 453 F.2d at 779 (finding that a rule requiring male high school students to wear their hair "in a short, neat and orderly fashion" was invalid, as it lacked a rational basis); Bishop v. Colaw, 450 F.2d 1069, 1075–76 (8th Cir. 1971) (stating the public school hair length regulation must be necessary to the attainment of educational goals).

220. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968) (quoting Dickey v. Ala. State Bd. of Educ. 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot*, Troy St. Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968)).

221. *Karr*, 460 F.2d at 617.

222. *See* Brief of Amicus Curiae Association of American Law Schools in Support of Respondent, *supra* note 107, at 2.

223. *See* Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 822–23 (2000) (reasoning that the legal profession's justification for monopoly over law practice rests on a level of technical competence which must be acquired through formal training and maintained through licensing requirements and self-regulation).

C. Guidelines for Drafting Law School Non-Academic Conduct Codes

1. Specificity

The specificity of the codes is paramount. The codes must provide adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply the prohibition.[224] To avoid validity challenges, codes must avoid vagueness which could translate to a denial of due process. Students of common intelligence should not have to "guess at [the] meaning" of enacted codes.[225] For instance, wording requiring students to be "civil to one another" may be deemed overbroad and unconstitutional.[226] Yet, language prohibiting "unlawful" discrimination "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation" will withstand judicial scrutiny.[227]

In advancing professionalism, law schools can utilize language to reflect the ideals, traditions, and tenets that have been historically associated with the practice of law. For instance, "competence," highly principled "conduct" of a lawyer's character, and "commitment" should be noted.[228] In addition, without the overbroad statement of being "civil to one another," civility as it specifically relates to the courtesy and respect that lawyers should have for their clients, adverse parties, opposing counsel, the courts, court personnel, witnesses, jurors, and the public should also be required of law students.[229] For example, a requirement that students be courteous, respectful, considerate, civilized, and benevolent to all members of the law school community (fellow students, faculty, administration, and all staff) should be incorporated into law schools' conduct codes. This would provide specificity sufficient to withstand challenges of being vague or broad, and it would provide fair notice to students. Desired behaviors should also

224. Doe v. Univ. of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (citing Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973)).

225. *Broadrick*, 413 U.S. at 607.

226. *See* Coll. Republicans at S.F. St. Univ. v. Reed, 523 F. Supp. 2d 1005, 1018 (N.D. Cal. 2007) (defining "civil" as "broad and elastic—and its reach . . . unpredictably variable in the eyes of different speakers").

227. *See, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2995 (2010) (Stevens, J., concurring).

228. *See* Wm. Reece Smith, Jr., *Teaching and Learning Professionalism*, 32 WAKE FOREST L. REV. 613, 615 (1997) (defining professionalism as "competence, character, and commitment").

229. Among a cross section of state bar associations surveyed, "the most common definition of professionalism related to the courtesy and respect that lawyers should have for their clients, adverse parties, opposing counsel, the courts, court personnel, witnesses, jurors, and the public." WORKING GROUP ON LAWYER CONDUCT AND PROFESSIONALISM, CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 36 (1999), *available at* http://ccj.ncsc.dni.us/natlplan/NatlActionPlan.html.

be considered within the constraints of regulatory guidelines such as the Model Rules of Professional Conduct as adopted in the school's jurisdiction. Any student conduct code should consider requiring adherence to the ethical and legal standards imposed by these guidelines relating obligations to the public and the profession itself.[230]

2. Speech Regulation

Codes regulating speech must be treated punctiliously in order to ensure they are narrowly drawn to address only the specific evil at hand.[231] Laws regulating speech will be deemed overbroad if they "sweep[ ] within [their] ambit a substantial amount of protected speech along with that which [they] may legitimately regulate."[232] The Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad.[233] Controversial expression must be provided protection in order to avoid a chilling effect on speech.[234] Attempts to control language must take into account the speaker's intent, rather than merely requiring offense taken by the recipient of the words.[235]

Law school officials should be mindful that they do not possess unbridled authority to apply "their own notions of indecency" and a constitutional responsibility to "insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the

230. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010).

231. Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 972 (9th Cir. 1996).

232. Doe v. Univ. of Mich., 721 F. Supp. 852, 864 (E.D. Mich. 1989).

233. *Id.*; *see also, e.g.*, Houston v. Hill, 482 U.S. 451, 460–65 (1985) (striking down an ordinance which provided that "[i]t shall be unlawful for any person to assault or strike or in any manner oppose, molest, and abuse or interrupt any policeman in the execution of his duty" since the ordinance was overbroad; it forbade citizens from criticizing and insulting police officers, although such conduct was constitutionally protected); Gooding v. Wilson, 405 U.S. 518, 518–21 (1972) (finding overbroad and striking down a Georgia statute which made it a misdemeanor for "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace").

234. *See* Coll. Republicans at S.F. St. Univ. v. Reed, 523 F. Supp. 2d 1005, 1017–18, 1024 (N.D. Cal. 2007).

235. *See, e.g.*, Dambrot v. Cent. Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993) (finding that the university's discrimination policy was facially overbroad and did not take into account the speaker's intent). The University's policy read in part:

> [a]ny intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, epitaphs [sic] or slogans that infer negative connotations about an individual's racial or ethnic affiliation.

Id. at 481.

vulgar."[236] As such, a law school code that addresses speech control should note that any alleged abuse will be determined in the context of the situation taking into account all circumstances surrounding the publication of the speech to determine the speaker's intent and the reasonable interpretation thereof. Therefore, a situation involving profane and/or abusive language used by a student and directed to a faculty member or fellow student would not automatically subject the student to sanctions. The circumstances would necessarily need to be analyzed to assess the situational meaning of the language used.

3. *Procedural Guidelines (And Consideration of Available Resources)*

It is noteworthy that students do not acquire a substantive interest in specific procedures developed by schools.[237] Schools should also be aware that establishment of procedures which do not warrant strict adherence will expose the school to reversal or annulment of imposed disciplinary action.[238] Cumbersome procedures for enforcement of student codes should therefore be enacted with close consideration of the applicable risks. Sanctions for disciplinary violations in law schools do not have to rise "to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution."[239] As such, law schools should carefully consider enactment of procedures that warrant strict adherence.

Some rudimentary elements, which provide constitutional safeguards when expulsion might occur for serious misconduct from a state college or university, could provide guidance for enforcement procedures law schools can adopt:

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236. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring). For an interesting exploration of the dangers (as seen from the viewpoint of a former defendant in a student disciplinary case) in allowing public university officials limitless authority to suspend or expel students for disciplinary reasons, see James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132 (1987).

237. Olim v. Wakinekona, 461 U.S. 238, 250–51 (1983); *accord* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 771–72 (2005) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement . . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, or course, but in making that choice the State does not create an independent substantive right.").

238. *See, e.g.*, Mary M. v. Clark, 460 N.Y.S.2d 424 (N.Y. App. Div. 1983) (requiring school's determination of cheating be annulled and all references to the alleged cheating expunged from student's record where school failed to follow the state's Administrative Procedure Act and its own internal procedures).

239. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986).

(i) The student should receive notice of the specific charges and grounds which, if proven, would justify disciplinary action under the law school's conduct code;

(ii) The student should be given the names of the witnesses against him and an oral or written report of the facts of potential witness testimony;

(iii) The student should be afforded the opportunity to present his defense against the charges, in the form of either oral testimony or written affidavits in his behalf, to a school official; and

(iv) The results and findings of the hearing should be presented in a report open to the student's inspection.[240]

It has been suggested that the above enumerated safeguards are insufficient to ensure protection of student rights. Suggestions have been made for additional "vital" protections such as the right to counsel, access to a hearing transcript, adequate time to prepare, the right to confront and cross-examine adverse witnesses, notification of the school's witnesses and evidence, and the right to call one's own witnesses.[241] Proponents of these safeguards admit that these procedures approach the process mandated by the Constitution for criminal trials.[242] Student conduct codes need not be as detailed as a criminal code which imposes criminal sanctions.[243] Additionally, suggestions such as "open proceedings" may be thwarted by federal legislation such as the Family Education Rights and Privacy Act which protects the privacy of student records.[244]

A major concern with the proposition of added procedural safeguards in codes is the potential for backlash as a result of the exercise of the right to confrontation. The relatively small size of a typical law school highlights this potential concern. Also of issue is the inescapable fact that although additional safeguards may be feasible in institutions with sufficient faculty, staff, administration, and resources, the burden they could impose would prove to be onerous in a typical law school setting where the decisions governing its students are within the purview solely of those faculty and administration specifically employed or affiliated with the law school itself and not ad-

240. Dixon v. Ala. St. Bd. of Educ., 294 F.2d 150, 158–59 (5th Cir. 1961).

241. Berger & Berger, *supra* note 81, at 354–55; *see also* Bach, *supra* note 63, at 15 (concluding that adequate procedural due process will not be met unless accused student receives adequate notice, fair hearing, right to cross-examine witnesses, the right to be represented by counsel, the right to an open hearing, and a fair evidentiary standard of proof).

242. Berger & Berger, *supra* note 81, at 355.

243. *Bethel*, 478 U.S. at 686 ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

244. 20 U.S.C. § 1232g (2006).

ministered by the greater university community. Law schools must ensure that the procedures for enforcement of student conduct codes are feasible in light of available resources.

D. Adherence to State Administrative Procedures

Law schools must also ensure that their procedures are in accordance with any applicable state administrative procedures, particularly where discipline is meted out for non-academic reasons.[245] Recently, in *Morris v. Florida Agricultural and Mechanical University*, Florida's Fifth District Court of Appeals held that where the primary reason for the student's expulsion was alleged fraudulent misconduct (rather than poor academic performance) the student was entitled to a hearing with procedures commensurate with both the school and the state's administrative hearing rights.[246]

E. Adequate Notice of Published Codes

Once the law school code of conduct has been drafted in accordance with constitutional and statutory requirements, it is imperative that proper notice be provided to students regarding the applicable rules and regulations to which they must adhere. This can be fulfilled by forwarding a copy of the code to the student upon acceptance to the law school; provision of the applicable code during the pre-semester orientation process; requirement of either a written and signed or oral oath during orientation; opportunity during the first week of classes to review and discuss the code; and, importantly, incorporation of ethics and professionalism discussions throughout the law school tenure and beyond the professional responsibility class.[247] The incorporation of the professionalism discussion throughout the law school tenure is crucial, because to restrict it to a single professional responsibility class marginalizes its importance.[248]

245. *See, e.g.*, Mary M. v. Clark, 460 N.Y.S.2d 424 (N.Y. App. Div. 1983) (requiring school's determination of cheating be annulled and all references to the alleged cheating expunged from student's record where school failed to follow the state's Administrative Procedure Act and its own internal procedures); Morris v. Fl. Agric. & Mech. Univ., 23 So. 3d 167 (Fla. Dist. Ct. App. 2009) (finding that the primary reason for student's expulsion was alleged fraudulent misconduct rather than poor academic performance and concluding that student was entitled to a hearing commensurate with the school and the state's administrative hearing rights).

246. *Morris*, 23 So. 3d at 170.

247. *See generally* DiMatteo & Wiesner, *supra* note 11, at 61 (urging that students should be held to professional level of conduct); *see also* Kimberly C. Carlos, *The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes*, 65 UMKC L. REV. 937, 971–72 (1997) (proposal for better introducing students to and informing students about school honor codes).

248. For an overview of the assimilation of professional responsibility courses into American law schools, see James L. Baillie & Judith Bernstein-Baker, *In The*

VII. CONCLUSION

Justice E. Norman Veasey aptly stated that "we are engaged in a battle for the soul of our legal profession."[249] The soul of the legal profession is suffering from a lack of professionalism which has become intricately woven into the fabric of the profession. The Supreme Court once observed that a stated purpose of the American school system is to "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[250] Law schools need to answer the call to discharge their duty to indoctrinate law students with these fundamental values in an effort to enhance professionalism in the legal community.

Universities have an inherent general power to maintain order on campus and to exclude those who are detrimental to its well being.[251] Traditionally, colleges and universities possess broad discretion in the administration of their internal affairs.[252]

"By seeking admission to, and obtaining benefits of attending a college or university, a student agrees that he or she 'will abide by and obey rules and regulations promulgated for orderly operation of that institution and for effectuation of its purposes.'"[253] Particularly relevant to law schools is effectively teaching students the values of civility and respect, which is a legitimate school objective.[254] Standards of conduct serve as paradigms for creating an environment of profession-

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Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education, 13 LAW & INEQ. 51, 63 (1994) (addressing ABA Standard 302(a), as written in 1974, and noting that the standard "reflects the profession's view that learning professional responsibility is a fundamental educational objective of legal education"); *see also* Robert Granfield & Thomas Koenig, *"It's Hard to be A Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 521–22 (2003) ("Ethical issues need to be integrated into the whole curriculum in a pervasive manner, rather than ghettoized into a single professional responsibility course.").

249. LAW SCH. PROFESSIONALISM INITIATIVE COMM., *supra* note 99, at 26 (citing E. Norman Veasey, The Role of State Supreme Courts in Addressing Professionalism of Lawyers and Judges, Keynote Address at ABA Conference: Regulatory Authority over the Legal Profession and the Judiciary: The Responsibility of State Supreme Courts (Mar. 14–15, 1997)).

250. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES AUSTIN BEARD & MARY RITTER BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (William Beard ed., 3d rev. ed. 1968)).

251. Goldberg v. Regents of the Univ. of Cal., 57 Cal. Rptr. 463, 473 (Cal. Ct. App. 1967); Morris v. Nowotny, 323 S.W.2d 301, 312 (Tex. Civ. App. 1959).

252. Martin-Trigona v. Univ. of N.H., 685 F. Supp. 23, 25 (D.N.H. 1988).

253. 14A C.J.S. *Colleges and Universities* § 35 (2011) (quoting Wright v. Tex. S. Univ., 392 F.2d 728, 729 (5th Cir. 1968)).

254. *See Bethel*, 478 U.S. at 681.

alism, since those standards are reasonable and relevant to the lawful mission, process, or function of a law school.[255]

Private law schools' enforcement of student conduct codes is perhaps easier to support, since private law schools are not subject to the same constitutional reasoning as public law schools. Therefore, they are vested with substantial discretion in matters of student discipline. Public law schools should not be daunted or inhibited in their practice of discussing, implementing, and enforcing student discipline simply because they do not possess a similar level of discretion. Observance of the limitations of the Constitution should not weaken public law school's ability to address, implement, and enforce student discipline in keeping with the American Bar Association's directive to prepare students for "effective and responsible participation in the legal profession."[256]

Actions of public law schools in enforcing student conduct codes must be allowed to reach results similar to the results experienced by private law schools, since professionalism amongst lawyers is incumbent on the limitations imposed during their training, whether private or publicly educated. Fundamental values of "habits and manners of civility"[257] essential to a democratic society should undoubtedly be at the crux of values required of those who will become the lawyers and leaders of our communities and our nation.

Law schools should take full advantage of the wide latitude allowed by the courts in formulating student codes to require a high standard of conduct in keeping with the ideals and tenets of the legal profession. The permitted prerogative has been granted, and rules and regulations can be formulated within applicable constitutional limitations. Fear of redress for violation of constitutional protections should not impede efforts to fulfill the obligation to administer rules and regulations that require a high standard of conduct from burgeoning lawyers. Professionalism should not be made to suffer for fear of retaliation or retribution by disciplined students.

"The process of educating our youth for citizenship . . . is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[258]

255. *Cf.* Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971); Calbillo v. San Jacinto Junior Coll., 305 F. Supp. 857, 858 (S.D. Tex. 1969).

256. AM. BAR ASS'N, 2010–2011 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 301(a), at 17 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter3.authcheckdam.pdf.

257. *Bethel*, 478 U.S. at 681 (quoting BEARD & BEARD, *supra* note 250, at 228).

258. *Id.* at 683.