INDIVIDUAL AND COMMUNITY RIGHTS
WITHIN UNIVERSITY CONDUCT SYSTEMS

A Thesis Presented to
The faculty of
The College of Arts and Sciences
Ohio University

In Partial Fulfillment
of the Requirements for Graduation
with Honors in Political Science

By
Gabrielle Marie Bacha
April 2016
Table of Contents:

INTRODUCTION .................................................. 3

CHAPTER 1: HISTORY OF STUDENT CONDUCT .......... 16

CHAPTER 2: CONSTRUCTING THE CODE ................. 39

CHAPTER 3: LIBERALISM AND COMMUNITARIANISM ... 54

CHAPTER 4: ‘QUASI’ SYSTEMS AND DUE PROCESS ..... 71

CONCLUSION ..................................................... 94

FIGURE 1 ......................................................... 101

BIBLIOGRAPHY .................................................. 102

CASES CITED ..................................................... 109
Introduction

Higher education institutions in the United States have the mission to educate their students through scholarship and to create knowledgeable practitioners in their fields of study. While many view the mission of higher education as taking place within the classroom, much of the learning takes place in the campus community. Thus we see the emergence of a campus culture that dictates the behaviors of students from their study habits to their weekend habits. These behaviors help form a campus community where students work and play. However, not all behaviors displayed on campus help create a harmonious environment. In fact some behaviors can be disruptive, thus obstructing the educational goal of the university community. When university codes dictating behavior are broken, students are sent through the educational process of the student conduct office to remedy their actions personally and towards the community.

Not all students understand why they have to follow university codes and behave accordingly. In fact, many pay no mind to the student conduct code until they break university rules. And even then, students will often claim that their business is not of concern to the university. Students entering universities are typically 18 years old, and are capable of being fully functioning citizens of society. In this sense, students feel that they have a sense of autonomy and freedom that society has finally given them. The transitional period into the university often means that these students are moving away from home, thus furthering the notion that they are free to do and say as they please. It is these expectations that university codes challenge. When a student
receives a formal sanction for a behavior deemed to be ‘disruptive’ by the university, the student will often assert that they have ‘rights’ and that the university cannot dictate what these are. There is the notion that universities do not have a legitimate interest in guiding the behaviors of their inhabitants – after all, most students are legal adults. However, the argument is far more complex. Universities, especially with residential campuses, are responsible with educating the masses and furthering the personal growth of citizens. This goal is achieved within a specific atmosphere that must be conducive to behaviors that can create success. For example, having a party in your private residence in your hometown may not be disruptive, but when living in a residence hall with 200 other people, this party could disrupt the study and sleep habits of others. The comments around the family dinner table may be contentious, yet stay in that residence. But when these comments are said in a lecture hall of 100 people, students may react negatively and even feel unsafe. Thus the assertion of rights on behalf of the average citizen can be limited within the university community as the university works to provide an atmosphere of success towards their educational mission. When students enter into a university, they sign a contract acknowledging the rules, and must honor this.

One of the most notable tenets of university conduct system and conduct code is the fact that it does not have true legal sanctioning. True legal sanctioning is outside the realm of the university, it includes entrance into the justice system and interaction with police. Instead, this system has university conduct and responsibility standards, and university designed sanctions. Essentially this places the university system on a
separate and lower level from that of a criminal court. The goals, actions, and repercussions are designed differently to create a different effect. While criminal justice systems focus on penalizing citizens, university systems use educational discipline to help both the student and community rehabilitate. This separate ‘legal’ entity is also known as a quasi-legal system. Quasi-legal systems have many benefits but also disadvantages not necessarily seen in a sanctioned legal system. From this we often see the difference in the rights of the individual versus the rights of the group (collective rights). However, these battles do not always play out so clearly.

Universities have a history in weighing the rights of the community versus the individual, which is enabled by several aspects of quasi-legal institutions, and can be seen today in two areas of focus: free speech rights and due process rights.

Modern university conduct systems came to fruition in the 1960’s. This was prompted by the Supreme Court decision in Dixon v. Alabama (1961). This case deals with the due process rights of civil rights activists on campus grounds. The ruling in Dixon abolished in loco parentis which means ‘in place of the parent.’ In loco parentis was employed by many higher education institutions across the nation. Because of this, students were held to discretionary standards of administration and the decisions they made about student’s behavior. The abolishment of this practice then called for a formal procedure to be created. This new procedure takes into account the due process rights of students; however more due process requirements have been included through cases involving incorporation. The process of incorporation, and the qualms
of limited due process within the university can be compared to the quasi-criminal juvenile justice system.

As due process started to be a campus hot-topic in the 1960’s, so did free speech on college campuses. During this period the nation experienced several social movements, including the student rights movement. Many of these movements were characterized by protest on campus. The Kent State massacre is just one example of an institutional response to assertion of free speech. With campus activism taking place, the university took notice of the possible disruptive effects on the surrounding community. It is during this time we see the university allocating ‘free speech zones’, and enforcing speech aspects of their student codes of conduct. The university viewed the disruptions as a threat to their academic mission, and thus decided to act on behalf of the community to restore order.

Throughout the evolution of the student conduct process there emerges three main actors: the accused (student), the administration, and the community. The accused student is guaranteed a set of rights to ensure they are being treated fairly throughout a conduct process. The administration can determine what to ‘charge’ the student with and has discretion in what sanctions they can give a student. The community can play a role in determining student sanctions (in some university settings), but also has a role as a reactionary body to student behavior. The community well-being can play a significant role in administrator’s decisions. In some instances the process is fair, cut, and dry. However, there are a number of contentious issues on university campuses that require a delicate balance of an individual’s rights and the community’s rights.
Individual students’ rights in this case are specified as due process and Constitutional rights. Community rights are defined as rights exclusive to the community – i.e. the right to a safe environment. Often time employment of rights can hinge on the student code process, and the discretion employed by administrators. The quasi-legality of university conduct systems allow for some positive outcomes towards students, but also some negative outcomes. These decisions can ultimately throw off the balance of individual versus community rights.

**Research Question**

It is evident that the quasi-legal structure of university conduct systems can have different intentions and effects than actual legal institutions. This is made possible through different approaches to justice. The United States currently uses a crime-control model of justice. That is, the desire to control crime by penal sanctions. However, other approaches to justice, such as rehabilitation or restorative justice models, thrive better and more easily within a quasi-legal structure. Quasi-legal systems allow for discretion, specialty, and unchecked power. With this I wish to seek the following: How does the quasi-legal status of university judiciary systems affect individual and community rights? Does this quasi-legality hurt students in cases of suspension and expulsion? Should students be guaranteed full due process rights to ensure equity? This analysis will identify what aspects of quasi-legality lend themselves more towards community rights, or individual rights and whether quasi-legality has the capacity to be consistent in determining and balancing these rights.
In regards to quasi-legality there is a subset of questions that need to be addressed. Why is it important that universities have a quasi-legal system? What is the role of specificity to these university systems? This thesis explores whether quasi-legal systems allow a university to thrive and if it is of importance that university systems have these. This will illuminate which aspects of university communities are deemed most important, and whether this correlates with the rights of the individuals and the community. Additionally, this analysis will determine the strength and roles of discretionary authority presented by quasi-legal systems. Does this authority help or hurt students? The community? Ultimately I seek to know whether the university is properly balancing community and individual rights. And if it is not, what set of rights is more important to protect?

**Justification**

The literature pertaining to student affairs shows the ongoing struggles universities have had in making certain that students retain rights, especially due process and First Amendment rights. However, in contrast to this is the pull of the community and the role this plays in sanctioning and conduct guidelines. There is a great deal of literature that demonstrates and teaches how to write student conduct codes and what integral elements are necessary in order to prove fair and equal, however much of the literature utilizes a standard structure for a code of conduct. The literature reveals the journey that many universities underwent to find a suitable code of conduct. It includes the history of university conduct codes, and some contextual information (Dannells). Additionally, there is a focus on how to incorporate individual rights within campus
conduct systems, especially examining the element of flexible due process required for
the student and the essential rights that must be afforded to all students during conduct
processes (Caruso, Travelstead). Modern thought on university conduct codes focuses
directly on university due process and free speech within conduct codes (Lancaster,
Waryold). The knowledge surrounding student conduct codes lacks greater historical
context, and the multitude of pressing issues and scenarios conduct systems are
currently facing. Additionally, it does not provide specific discussion on the idea of
community rights.

To analyze the tension between conduct and rights, it is useful to frame it with the
philosophical roots of individual rights and community expectations. Thus, this thesis
analyzes scholarship regarding the political theories of liberalism and
communitarianism. Modern notions of liberalism called procedural liberalism, focus
on the individual and the individual’s particular rights within the confines of society
(Taylor) These individual rights are referenced in American governing documents and
give power to the people against the government, for example the Bill of Rights. This
is illustrative of the due process and individual rights that students claim in
universities. The communitarian debate criticizes the individualization of liberalism
and challenges that individuals should work in community settings for the greater
good of society. Philosophers of communitarianism believe that society has lost its
sense of social-solidarity and collective decision making. Some versions of
communitarianism blend of the two philosophies, citing that individualism has to rely
on commonalities of life and culture (Theobald, Dinkelman). Communitarianism in
education focuses on the incorporation of collective decision-making and the enhancement of social and moral responsibility in young people (Arthur, Bailey). The literature surrounding communitarianism and liberalism demonstrates why there is tension between students, conduct codes, and the university. Students have an expectation on individual rights through the liberalism lens. Universities realize that they employ tenants of communitarianism in shaping academic communities. The code is tasked with balancing these expectations.

In order to discuss how universities are able to apply certain rights, and not others, this thesis identifies how ‘quasi functions’ within these systems provide limited rights. The current juvenile justice system of the United States provides the opportunity to examine some of the parallels of due process incorporation, and issues within quasi-legal systems. There are two main ideas within the quasi-criminal juvenile justice system. The first idea discusses how quasi-criminality, or the civil nature of this system, enables the educational mission of the juvenile justice system. The second idea shows the progression of due process in quasi-legal systems through court cases (Feld). As due process becomes incorporated within juvenile justice systems, there have been several examinations of the minimal due process standard in juvenile justice systems, and why this low level of incorporation could mean the abolishment of the juvenile justice system altogether (Feld, Dawson). The literature pieces on the juvenile justice system are helpful in illuminating some of the incorporation of due process in universities, and in giving credence to claims that university due process is not enough in conduct matters. Critics of the limited student conduct code shed light on the
inconsistencies of the quasi-legal university conduct system (Rohrbacher).

Holistically, the literature regarding the juvenile justice systems is vast, thus giving my research a breadth of comparison when it comes to quasi-legal institutions.

**Expected Findings**

Quasi-legal framework may suggest that students ultimately benefit from university judiciary systems. Increased discretion and the hope to preserve university values and retention would most definitely support this notion. However, with the given cases, I think we will find that student’s individual rights are continually in flux as opposed to the rights of the community.

A look through the time and history of criminal justice systems shows that the government has tried many criminal justice systems over time. For example, society has tried rehabilitation systems for prisoners, although this system did not thrive. The greater ‘community’ was afraid of this system; they felt that it was too soft on those breaking the rules. Thus we have reversed into a system that is mainly punitive. I do not expect universities to revert to a purely penal system. However, I do expect to learn that the university values the greater community and its reputation far more than the individual themselves. I believe that when in researching university conduct codes, I will find that efficiency in process will overtake the educational mission. Furthermore, I believe that we will find that discretion and a non-adversarial conduct system will hurt students rather than help them. In the case of procedural rights, students have a lot of investment to lose at the hands of limited due process. In the
case of free speech, universities will censor controversial student speech, instead of using these instances to spark educational conversation.

However, I believe that I will also find that the university conduct system has no other choice other than being quasi-legal, because of the special goals of this community. To uphold the integrity and educational pillars of that community it must not be actually legally binding, it must be quasi-legal to instill educational discipline. I believe my research will show the value of creating a university community, and explain why the university generally acts more in the interest of this community, as opposed to the interest of individual students.

If I find that university conduct codes hurt individuals’ rights, I may be faced with a difficult and ethical question: is it better to bridge the rights of one for the betterment of the community, or is it better to allow an individual to retain their rights and let the community suffer the results? This may leave my thesis open to more questions than it has solved. This topic is important to research because higher education aids in the forming of citizens for the future. Furthermore, the cost of education is ever increasing, and going to a higher education institution is an investment. Thus the student has a lot at stake if they are removed from the university. If a student’s behavior is being dictated by university codes and values, it must be ensured this is being done effectively and fairly to the parties involved to uphold the true mission of the institution and for the general welfare of the students attending the institution.
Approach

This study employs several types of methodology to answer various research questions. This analysis draws from a variety of sources, the history and creation of conduct codes, quasi-legal systems, juvenile justice systems, and theories on liberalism and communitarianism. The history and development of student conduct codes will offer contextual evidence surrounding the creation and modification of conduct codes to illuminate how universities handle societal challenges. Scholarship regarding ‘quasi’ systems provides the basis for my analysis. Recognizing how quasi-legality functions illuminates how quasi-legal institutions balance discretion, and use this toward their greater mission. Review of juvenile justice systems enabled me to draw parallels with university conduct codes. From this point, there is a basis to compare basic due process, and effectiveness of how this due process actually affords rights within procedure. The communitarian liberalism debate illuminates the balance of rights the university has to weigh. Understanding the communitarian perspective gives credence to the communitarian aspects of a university’s conduct code, and shows the benefits of these tenets. Liberalism informs show why students feel they are entitled to individual rights, although they are members of a larger community. In addition to scholarly articles, I have examined numerous court cases. Many of the contentious issues between individual and community rights play out in a state or federal court. Examining these court cases enabled the identification the legality and legal reasons as to why or why not somebody has particular rights.
Another approach I have utilized is case studies. This required examining student conduct codes, and utilizing secondary sources such as local and national news coverage to determine the facts and outcomes of the case. The Foundation for Individual Rights in Education (FIRE) aided in finding substantial free speech cases on university campuses. FIRE has a database that determines school ratings for students’ rights. They have green light, yellow light, and red light policies. This database goes through university conduct systems and highlights which aspects are the worst for students and the best, based on an individual university basis. This database assisted in determining which issues are most contentious for rights, and which schools have more restrictive or less restrictive policies. Additionally, Men’s Rights Activist groups functioned as a springboard to find large due process cases, and material surrounding these cases. While I understand these groups are controversial, they do compile reliable databases of current and ongoing case investigations, and can be utilized as a tool to find better-substantiated information on campus sexual assault and due process cases.

I fully acknowledge that my research has limitations. One such limitation is the fact that almost all university records pertaining to student conduct are protected by the Family Educational Rights and Privacy Act, also known as FERPA. This law limited the ability to look at the common speech or due process issues within a university to determine how rights are regularly applied in these instances. Thus, the only way to access these internal proceedings was when students and attorneys made them public. This typically occurred in cases involving scandal, or egregious denial of rights. Thus
this thesis utilizes conduct case studies, instead of a comparative analysis of many universities. Additionally, this meant that much of the information about these cases came from secondary sources, unless there were formal court documents to view. Another limitation was access to university statistics involving student conduct. According to the research there is not a comprehensive database that illuminates current student conduct rates across the country. Without this resource I am unable to analyze trends from a statistical perspective, and can only do so from a cultural and observational perspective. Finally, there is little variation in how student conduct codes are structured. Looking at resources from the 1990’s, and today, the structure of the code has virtually gone unchanged. Thus, many resources regarding student conduct codes provide the same, or similar information. In the knowledge surrounding the topic, there is a lack of critical literature towards student conduct codes in general.

It is important to note that I chose to redact the names of those in the sexual assault cases. I felt that the focus of the case studies should be on the content of the study. Furthermore, the due process issues raised in these case studies demonstrates that the outcomes for the accused in these cases may not be truly reflective had they received a hearing with full due process rights.
Chapter One: History of Student Conduct

Within universities exist hallmarks of university culture: intense academics, research, and rich campus life. Universities have historically been viewed as a place of learning, but not necessarily a place where one merely goes to class and then leaves for home. Universities have a rich culture where learning is viewed as a lifestyle, not just an activity. Because of this, campus life is governed by a set of rules, known today as student conduct codes, which students have to abide by. From a historical perspective, these rules were sometimes informal, although sometimes they were embedded in student honor codes. As higher education became more popular in the early republic, the rules that governed campuses became wider in scope and various levels of sanctioning started to become prominent. Some of the issues between students and university conduct codes even escalated to the Supreme Court of the United States. Through the history of university conduct codes there are two crucial periods; the period when universities practiced *in loco parentis* (1600’s-1960), and more recently (1960-now) the time when *in loco parentis* was disregarded. These social and legal shifts have greatly changed university relations over time. During *in loco parentis*, universities could create virtually any rules they wanted to create the community atmosphere they desired. But as students began to assert themselves, universities were tasked with still maintaining the community atmosphere while honoring the individual rights that students were fighting for. These institutions could no longer hide behind paternalistic doctrine, and were confronted with striking the
balance of their community with the demands of their students. This evolution is clearly outlined in the history of student conduct codes.

**Colonial Times**

The earliest student conduct codes trace back to colonial times. Early colonial colleges were established to mainly educate young men about civics and religion, and instill a moral code in these men. This moral code often dictated the rules of the student conduct code. The men in these ‘collegiate’ learning environments were typically of high school age and, “were subject to a curriculum and an authoritarian form of governance that did not distinguish between mental and behavioral discipline, or between religious and intellectual training” (Dannells 3). The moral doctrine was overwhelming Calvinist in these cases. The trustees and presidents of these early institutions created and enforced a strict code for their students. Every moment of the day was scheduled, and any misbehavior was accounted for and typically punished in some way (Dannells 3). Punishment for misbehavior went from counseling to expulsion and some of the physical punishments imposed on students were flogging and boxing. Sometimes students were publicly humiliated in the form of public reprimand and confessions. Occasionally students faced fines, loss of privileges, and extra assignments (Dannells 4). The boards that imposed such harsh conduct codes for students were supported by the colonists and the colonists themselves often imposed harsh sanctions for their own youth. They even allowed the governments of the colonies to act *in loco parentis*, seeing as the parents were not always within the same jurisdiction as their children. Schools and conduct codes in this time period resemble
what many would characterize as a boarding school. Students had hardly any outlined rights, and schools acted as parental figures. This is demonstrated in behavior such as flogging, a particular brand of punishment often utilized by parents. Another example of extra assignments may resemble the parental punishment of doing extra chores around the house due to misbehavior. These institutions were often aligned with community values, which were strict and religious. At this time the United States did not necessarily have a commitment to citizen rights as it would come to cultivate in later years. Thus, it would make sense that educational institutions in the United States followed their European leaders when it came to stricter education policies.

**Early Republic - Through Civil War**

In the Early Republic of the United States through the Civil War, many colleges and universities continued to carry the same strictness in codes and punishments as they had before. However, these codes were far more difficult to enforce in the Southern states where many of the punishments students faced were ‘reserved for slaves’ (Dannells 5). In this era, universities expanded to include on-campus housing and dining halls, and thus more supervision was necessary to ensure that the young men behaved according to the prescribed codes. Universities in England had created new supervisor roles for these increased duties, however in the United States it was expected that faculty would take on these roles. These new establishments for students promoted feelings rebellion, strikes, and even crime as students were constantly being monitored. (Dannells 5). Seemingly, the strict rules seemed to backfire as students often rebelled against their institutions in a multitude of ways.
Because of these small rebellions universities began to create ‘milder’ codes for the students. Counseling became a more common sanction to some of the more minor infractions of the code, and university boards and presidents became less directly involved in disciplinary matters. Additionally, disciplinary specialists were selected to join faculty, taking this burden off of the educators of the university (Dannells 6). During this time universities started to experiment with student government and democratic processes to help adjust codes and university rules. In this time frame there was also a rise in participation of various student activities, and the emergence of sports clubs. (Dannells 6) This period saw the beginning of ‘school’ pride. A common symbol that originated in Harvard and remains today was the varsity letter sweater. Allegedly a baseball player from Harvard drew a giant ‘H’ on his sweater to represent his school and status. From there, it seemed to take off, “… if you were a good enough player, you were allowed to keep your jersey and the letter but if you rode pine all year and never saw the field, you were forced to return your jersey at the end of the season, thus adding to the competitive allure of the letters” (Gallagher). The emphasis and prestige placed on extracurricular activities demonstrated that institutions were not solely about academics. These extracurricular activates gave students a point of pride in their accomplishments at their institution, and thus a greater feeling of belonging in that community.

Collectively, this period began with strict rules and rebellion, and ended with better behavior and more student involvement. The factors leading to better student behavior have largely to do with greater student attachment to the institution. When
punishments were lessened, students felt safer and more comfortable being their natural selves in their environments. Counseling to help correct behaviors demonstrated the institutions’ concern for the student. Thus the students were able to forge stronger bonds as they felt their learning environments were responding to them. Because faculty were no longer issuing punishments, faculty and students did not have the same barriers in their relationships. Clubs and participatory government made students feel as if they could make a difference in their institution, thus they were more likely to abide by community guidelines in these instances.

**Post Civil War – Progressive Era**

The Progressive Era in the United States was a time characterized by reform, especially reform with regard to children’s services and child labor laws. Much of the focus of this reform came within urban areas, and was carried out by ‘child savers’. The child savers believed in the reform of how society treated children and that children were entitled to certain rights, “normal birth, physical protection, joyous infancy, useful education, and an ever fuller inheritance of the accumulated riches of civilization” (Marten 68). That is, children were entitled to a childhood of fulfillment and education, not a childhood of work in a factory. One such area of fulfillment that was ‘lacking’ according to researchers was opportunities for children in urban areas to have recreational outlets, “…a shortage of appropriate recreational opportunities led children to inappropriate behavior and even to crime. Their studies told of idle boys and girls descending into juvenile delinquency because they had no safe places in which to play and no adult supervision” (Marten 71). Thus the creation of innocence
and childhood lead to the ‘othering’ of troubled children who did not fit this role – juveniles. And from there, the United States even created a legal system to address the troubling behaviors of these juveniles. The specialization of children in the Progressive Era made children a special class, separate from the rest of society. Thus those who were of college-age were in contrast to this sense of innocence. They were ready to move away from home, they had reached the end of adolescence. Yet, they were not yet having children of their own. The creation of ‘childhood’ put college-aged adults in a unique position. They were old enough to leave, yet still housed in an educational facility, and thus under paternalistic aspects of education in the Progressive Era.

Progressive ideas towards student discipline continued to take shape in the post-Civil War period. During this time there began to be a shift in how society viewed college students; they were viewed less as children and more as adults during this time. Charles Eliot, the president of Harvard from 1869 to 1909 championed this change. Under his presidency, Harvard was one of the first universities to stop combing academic grades and delinquency demerits to demonstrate the character of students on campus (Dannells 7). As higher education progressed in America, faculty did not play as large of a role in the sense of a total institution. Instead, faculty took after German trends in education and removed themselves from student and campus life. The reasoning for this was that Germans believed that the expectation of faculty to be involved in campus life was ‘demeaning’ (Dannells 7). Specialization became prominent in the Progressive Era. Prior to this, the ‘professions’ of society were
medicine, law, and theology. However in the Progressive Era, these professions grew to include teaching, engineering, accounting etc. (Law, Sukkoo 724). It is at this point that one may be able to say that academia and higher education emerged as two different interests operating at the same institution, due to specialization of these two fields.

In the Early Republic, disciplinary specialists were added to universities to lessen the burden of discipline on both the faculty and the president. As behavior and personal development became more valued in the collegiate experience, specialists became more likely in these communities. These specialists were titled ‘deans’, and they became popular as the Dean of Men and later the Dean of Women became a regular aspect of university life. Deans played a large role in helping to create an environment that catered to the ‘whole student’. That is, many universities saw two spheres emerging, the academic sphere and the extracurricular sphere. The dean in charge at the time made sure these spheres came together, and that the whole student was behaving appropriately and making progress in both of these areas (Dannells 8). In the history of student conduct, deans contributed to this discipline, “with the ultimate goal of student self-control and self-discipline …” (Dannells 7). During the Progressive Era, student conduct codes progressed once again and began to allude to the independence of the student. The emphasis on student self-control is evidence that universities began to move away from paternalism, although not completely. The introduction of the dean position shows the progression towards the university
experience being about the ‘whole student’, and towards of a period of student
development in many ways, not just solely academic.

The early 20th century saw the rise of the personnel movement in campus life. As
universities grew, so did the need for certain student services to aid with student
development. A key aspect of this period was the disagreement between these
emerging professionals and the early deans of universities. These new professionals
believe that when deans had the ability to discipline, this aspect of their role eroded
the aspect that focused on student development (Dannells 9). In this sense, the deans
were known as the ‘punishers’ of the university. With this reputation came a host of
stereotypes and anxiety towards the deans on behalf of students. However, early deans
believed their work to be meaningful towards development, adopting the traditional
ideas of student development of character and citizenship. Thus in this sense, while the
punishments lessened, the students did not view the punishments doled out by the
deans as a way to help them holistically. Instead, deans took on the image of the
authoritarian parent, set out to ‘punish their children.’

Post WWII

A pivotal point in student conduct came just after World War II. The end of the
war meant that many more college-aged students were enrolling than ever before, due
in part because of the G.I. Bill. These new students were older, and tended to reject the
behavioral guidelines proposed by deans. However, because of their military
background, they did not start a crisis or rebellion as those in the early years did
(Dannells 9). During this time, student conduct was largely regarded as calm. Additionally this era was marked by an increase in rehabilitation efforts of the students, and an increase in trained and professional counselors. Hearing boards composed and faculty and students came to rise during this time (Dannells 10). In this time, it starts to become evident that students are removing themselves farther from the missions and values of student conduct. However this generation, not known to make waves, did not actively oppose student conduct and sanctioning. The availability and access to higher education became a hallmark of this period, and it remains so today.

The 1960’s and 1970’s

In the 1960’s and 1970’s, the country was experiencing massive social change. The Civil Rights Movement to combat racism and Jim Crow laws in the South in the late 1950’s sparked peaceful protests and civil disobedience. One of the most commonly employed forms of resistance was sitting at all-white lunch counters. In fact, college students started the largest wave of civil rights protests in Greensboro North Carolina in 1960. The protests then spread to other large cities with large numbers of black college students, “Thousands of college students with little or no prior activist experience joined the sit-ins or related picket lines, demonstrations, and marches” (Biggs, Andrews 419). College students continued their involvement during this time with the Freedom Rides. The Freedom Riders utilized interstate transportation to fight segregation on public transportation. Although the movement did not originate with college students, these students engaged in this style of protests
in large numbers throughout the Civil Rights Movement. In addition to equal rights for African Americans, women and gender were also at the forefront of contention. Men often challenged the notions of masculinity that their fathers’ bore – long hair, wearing suits, and unsupportive of the war (Evans 335). However, while this masculinity appeared to be breaking gender-norms, it still found dominance in the student movement. Women, who had greater access to higher education and who had an inclination to rebel against the patriarchy found that, “As they defied the boundaries of traditional womanhood, claiming public roles previously defined as male, they clashed with the expectations of their male comrades who were busy proving their manhood” (Evans 338). Women found themselves in an interesting position – empowered by the student movement, yet limited by the prevailing masculinity within that movement. African American women had an even more difficult time managing their intersectionality and finding their voice in this time. The defiance of college students, and their dedication towards peaceful and impactful protest played an instrumental role in fueling the Civil Rights movement. Their activism was seen and heard on campuses, and often inspired other students.

The Civil Rights and gender struggle culminated themselves in a larger movement titled the student movement. This movement created the ‘New Left’; more politically inclined than the ‘hippies’, yet culturally adopting the ideas of freedom and revolution. The student movement sought more political power for students as they yearned for recognition on a number of issues, especially the Vietnam War. This generation was the ‘baby-boomers’; they were able to financially attend college, and their record
attendance at universities bolstered the size of academia. The student movement in the United States started in Berkley. Berkley, a branch of the University of California, was instrumental in military science and took on more conservative views. In 1964 the university told student organizations they could no longer use the student union for political speeches or to pass out literature on social issues. From there, student groups combined together to fight their suppression of speech (Cruden 20-28). Students all across the United States entered into this struggle, joining in the Free Speech Movement. Military involvement in Vietnam only heightened the students’ pushback. Students borrowed protest tactics from the Civil Rights Movement and staged sit-ins in university buildings. They protested, and even shut down campuses. They demanded to be heard on a number of political issues.

As these students became empowered, campuses often found themselves facing protests against society and against their policies, and they did not always know how to respond. Although conduct policies were far more lenient than they were at the inception higher education in the United States, they were often sexist and applied arbitrarily. Because paternalism was still widely occurring, universities did not have a standardized set of sanctions for students. The arbitrary application and outcomes of cases often infuriated students. As well, many of the student conduct codes were sexist, not allowing women the same freedoms of men on campuses. Students sought more control in their campus life and governance as a result. During this time period, \textit{in loco parentis} was finally abolished throughout universities in \textit{Dixon v. Alabama} (1961). The notions of traditional parenting were already breaking down, and the
demand for college-aged students to be treated as adults was heard. This is evident by the ratification of the 26th Amendment to the U.S. Constitution allowing those 18 years old of age to vote.

Of the many events that characterize the history of student conduct, the abolition of *in loco parentis* has made the largest impact. This doctrine was ended in the outcome of *Dixon v. Alabama State Board of Education*. In *Dixon* several African American students were participating in local campus rallies supporting the Civil Rights movement. Their university president had warned them that such behavior was disrupting the university and community and would not be tolerated. However, the students believed in their right to free speech and right to assemble, and carried on attending and holding rallies. The president of the university submitted the names of six students to the Alabama State Board of Education, and thus they were expelled. After a series of appeals the case made its way to the Supreme Court. The Supreme Court ruled in favor of the six students (the plaintiff). Their reasoning was such that the university did not afford these students due process, and thus the Supreme Court goes on to offer a guide by which due process can be granted in these situations. *Dixon* defeated *in loco parentis* by acknowledging the university could not act as a ‘parent’ and institute punishment without any formal process or do so arbitrarily. The Court recognized that students who attended universities were legal adults, and were entitled to certain Constitutional rights guaranteed to them in their institution of learning. The abolishment of *in loco parentis* forced universities to create a formal student code of conduct, and formal processes by which the student can have
their case heard. In judiciary processes they are to be guaranteed due process. This marked the beginning of a new era for student conduct, and shaped conduct as we see it today.

1980’s – 1990’s

The 1980’s and 1990’s brought a culture that was ‘tough on crime’. There was a general emphasis on victim identity. The ‘victims’ were white, suburban, and middle-class. Those committing the crimes were always radicalized. While this is not necessarily an accurate picture of the true nature of crime in this period, it was the picture posed to lawmakers. Because of this, lawmakers became tough on crime to protect the white middle class (Simon 76). Law-making related specifically to a greater ‘control’ over crime actually became prominent in 1968 with the Omnibus Crime Control and Safe Streets Act. This acts viewed the law as, “… a conglomerate of numerous measures addressing a wide variety of crime and law enforcement-related topics” (Simon 90). The act contained numerous ‘titles’ and employed a new all-encompassing strategy toward eliminating crime. Lawmakers continued making laws that fit the needs of the ‘victim identity’ paradigm. This is exemplary in the Violent Crime Control and Law Enforcement act of 1994. The size and scope of the bill suggests that many governmental issues have been recast as issues of crime and victimization. The bill had the support of several groups: women’s groups, minority citizens living in urban poverty, the elderly, as well as law-enforcement agencies. President Clinton pushed the bill forward with themes of being tough on crime, and preventative programming for at-risk youth (Simon 103). Both acts were in some ways
a response to the war on drugs, and the idea that drugs were luring our youth into
dangerous lifestyle. The acts are also responsive to governmental interests; every
politician wants to appear as if they are ‘looking out for the community’, thus they
support these acts. The tough on crime attitude makes crime appear as if it’s a larger
issue than it is, taking victims regularly, when in actuality it could be cast as a political
motive.

Within the narrative of the victim identity came a second ‘war’, the war on women.
It was often projected that the victims of this violent crime were overwhelmingly
white, middle-class women. Second-wave feminists often utilized the ‘raped woman’
as having been betrayed by the criminal justice system. The criminal justice system
‘overidentified’ with criminals, and often made the used the victim’s sexual history as
an excuse for their rape. Victims of sexual battery were shown as being abandoned by
police and courts alike (Simon 108). This narrative was transformed into legal action
in the Violence Against Women Act within the Violent Crime Control and Law
Enforcement act of 1994. The act allocated for federal spending towards the
investigation and subsequent prosecution of crimes against women. Additionally, it
imposes mandatory restitution on behalf of those convicted towards those considered
victims. Finally, the law allows victims to take up a civil suit with the alleged in cases
where the prosecutor declines to prosecute. In response to the politicization of
violence against women and domestic assault, feminists have found themselves fearful
of the popularized image of the ‘crime victim’. The politicization of violence against
women has lead to the expectation that the assault is at a ‘high level’, when in reality,
the experience for the domestic violence victim does not always fit the level of intensity of the crime victim. Domestic violence is not always blatant, and ‘normal’ abuse can be seen as legitimate because it is egregious (Simon 190).

In the 1990’s there is a surge in literature pertaining to student conduct codes. During this time, universities began to apply different methods of mediation and development to student issues. There was also an increase in violence on campuses. According to the 1990 U.S. Congressional Hearings on Campus Crime from 1985-1989, “campus crime steadily increased, more than 80 percent of campus crime involved students both as perpetrators and victims, and 95 percent of campus crime involved alcohol or other drugs” (Dannells 14). Among the most popular crimes were burglary, theft, vandalism, and crimes that were drug and alcohol related. Although the amount of truly violent crime was limited, a *Chronicle of Higher Education* study conducted in the 1990’s showed that violent crime was increasing on campuses with 5,000+ students. This challenged universities to develop preventative measures to keep students safe, as well as disciplinary action to bring justice in these situations, especially in cases of sexual assault. The Student Right-to-Know and Campus Security Act of 1990 made sure that all universities receiving Title IX funding, in compliance must report crime statistics and campus security policies (Dannells 14-15). In context, the federal government’s reaction fits in well with theme of protecting the white middle class, especially women who frequent universities across the country. Because of the campus reports there is now a national data collection on universities and the
crimes they are experiencing and how they are being handled. This is helpful in formulating conduct policies, and tackling common campus issues.

**Supreme Courts and Codes**

Although *Dixon* may have made the largest impact in terms of student conduct and student rights at universities, there have been other Supreme Court cases that have impacted student conduct history. It is not until the 1960’s and 1970’s that we see the majority of these cases come to the Supreme Court. Historically, courts have had a limited participation in the shaping of conduct codes. As stated in *Enhancing Campus Judicial Systems*, “Although case law reflects a significant increase in judicial activity in the affairs of colleges and universities since 1950, the courts have, for the most part, been wary about interfering with academic decisions. Even when court decisions have gone against an institution of higher education, the element of judicial caution is clearly visible” (Caruso, Travelstead 4). The restraint practiced by the Court towards higher education likely has to do with notions presented in *Hamilton v. Regents of the University of California* (1934). The decision in *Hamilton* rests on the idea that education is a privilege and not a right, thus those choosing to engage in education or educational institutions are willingly entering into ‘contracts’ with these entities and consenting to their provisions as an institution. However, when *in loco parentis* was abolished, many cases arrived on the Supreme Court’s docket that questioned universities’ constitutionality in practice, which is weighted heavily by the Supreme Court. The only case that truly tested student conduct codes prior to the 1950’s was *Waugh v. Board of Trustees*, which examined a university’s expulsion of a student due
to his affiliation with a fraternity. The Court sided with the university, and upheld the expulsion, stating that the 14th Amendment did not properly apply in this case (Waugh).

The first stream of cases asserting student rights in a university setting came in the form of access to universities, specifically with relation to race. Several notable cases emerged from the late 1930’s through the 1950’s including: Missouri ex rel. Gaines v. Canada (1938), Sweatt v. Painter (1950), and McLaurin v. Oklahoma State Regents (1950) examined students’ 14th Amendment rights to access of higher education. In McLaurin, the Supreme Court ruled that campus codes of segregation were unconstitutional. The reasoning behind this decision was that McLaurin was unable to obtain an equal education because he did not have access to educational opportunities like engaging with other students because of the mandated segregation issued by the university. As a graduate student pursuing a Master’s in education, it was necessary that McLaurin had the ability to interact with other students. In addition to McLaurin, there had been First Amendment cases that asserted notions of constitutionality. One such case, Widmar v. Vincent (1981) challenged a university provision that did not allow religious groups to utilize on-campus facilities for their meetings. The Court sided with the students and stated that this regulation violated students’ free speech and freedom of religion. In another case, Rosenberger v. Rector and Visitors of the University of Virginia (1995), the university denied to fund a religiously affiliated publication Wide Awake. The students in charge of the publication brought the university to court, saying that their First Amendment rights had been violated. The
Supreme Court ruled in favor of the students, expressing that denial of this funding amounted to discrimination based on viewpoint. The purpose of the student funding was to provide a forum. Denial of the religiously affiliated publication would mean the university would have to deny funding to any viewpoint publications.

It is evident from these cases that the Supreme Court began to realize that universities were struggling in creating fair and consistent processes once the university could no longer act as ‘parent’. Many of the cases involving 14th Amendment concerns arose in the 1960’s, and have since come to pass. These cases were the pinnacle of the Civil Rights movement, and as states and the federal government began to enforce de-segregation, these concerns started to slow down. However, two constitutional concerns have continued: the concerns over due process and free speech concerns. Dixon set the standard of due process in university conduct codes for students. But since this time, there have been a host of issues with regards to due process. While many of these cases have not made it to the Supreme Court, there are an abundance of cases currently questioning the fairness and application of student conduct code processes, especially in response to Title IX and sexual assault at universities. Similarly, free speech and freedom of religion cases are still being heard in courts. Many of these cases have not made it to the Supreme Court, because it is easier to settle the case, and because these cases are not breaking ‘new ground’. But as students continually find new ways to assert expression, university student conduct systems are inclined to respond. These cases have made headway when they border
hate-speech on college campuses. Currently, student conduct is continually pushed in these two areas.

**Sexual Assault as an Issue**

The first legislative remedy for campus sexual assault occurred in 1973, when President Nixon signed into law Title IX as a part of the Education Amendments of 1972. The Education Amendments sought to eliminate discrimination and re-adjust federal financial aid. Title IX is primarily a tool used to eradicate standards in education based on sex. Those who believe their institution has discriminated against them based on sex or race are able to make a complaint in the Office of Civil Rights Compliance (OCR). While Title IX and OCR have been in place for a long time, as they are the product of movements demanding equality for race and gender in education, they have only recently been utilized to combat sexual assault and demand justice on college campuses. Another puzzle piece instrumental in assessing sexual assault and campus safety was the Crime Awareness and Campus Security Act (Clery Act). This act was amended in 1990, and 1992 to supplement Title IX. This provision of the act addresses sexual violence in the following ways, “… schools must inform individuals reporting rape of their options to notify law enforcement, grant both the accuser and the accused the same opportunity to have others present at any proceedings, inform both parties of the outcome of any disciplinary proceeding, and notify the individual reporting rape of available counseling services and options to change academic and living situations” (Novkov 594). The Dear Colleague Letter of 2011 marked a new era of federal response to sexual assault on campus. The letter was
written by Russlynn Ali, the former assistant secretary for civil rights at the U.S. Department of Education. It aimed to clarify for universities their role in sexual assault matters, and put responsibility on universities to create clear and effective steps to address and end sexual misconduct.

As evident by the mass amount of legislation, sexual assault is a large issue on college campuses and has come under the spotlight especially in recent years. For example, the film *The Hunting Ground* explores sexual assaults on college campuses, and shows the Title IX and investigation processes from the victim’s perspective. But when these stories appear in the news, we are exposed to the true aftermath of what happened in the investigation, “… a claim of wrongdoing not adequately investigated, a police department considering the campus status of the accused, and concerns raised by both the complainant and the accused about due process and fairness” (Novkov 592). In May of 2014, the Office of Civil Rights Compliance (OCR) provided a public list of universities that mishandled sexual assault cases, and were currently under investigation with Title IX (Novkov 598). The heat on this subject urged universities to quickly scramble and remedy sexual assault cases, for fear that their institution would soon be the next on this very public list. However, in doing so, many universities are being accused of not properly applying due process in hearings regarding sexual assault. The complexity of these situations can be difficult for universities to grapple with, “To the complainant, the university owes a resolution of her claim and a safe university environment, but also a protection of her (or his) rights to gender equality. To the accused, the university also owed an equitable resolution of
the complaint, but, in addition, it must respect his (or her) procedural due process rights. And in the background lurks the university’s responsibility to its own communal aims” (Novkov 605). Because of this complexity, the accused do not always receive full due process in these cases, although they are supposed to be guaranteed this due process according to federal law and university conduct codes. Thus in 2016 there are public lists of universities that mishandled these due process rights. Universities are now faced with the question of an individual’s rights, and the rights of the university community around them, including the complainant.

**Free Speech as an Issue**

Just as due process is a constitutional guarantee afforded to citizens, so is the First Amendment right to freedom of speech. And just as due process is a contentious issue on campus, so are the First Amendment rights of students. Free speech has been contested in education in a multitude of ways. *Tinker v. Des Moines Independent Community School District*, a Supreme Court case from 1969, is one of the most well-known free speech cases with regards to education. In this case, the Court ruled that students could express themselves in previously prohibited ways, and allowed students to express themselves symbolically in schools. Typically when considering free speech on campuses, there are two categories in which to place speech. Content-based speech is typically limited because of the viewpoint it presents. However, content-neutral speech focuses on time, manner, and place of speech (Humrighouse 151). A university may want to limit both types of speech for different reasons.
The free speech movement itself truly exploded on campuses in the wake of campus protests such as Kent State in 1970, “The Kent State shootings, considered a tragedy by all accounts, exemplify the government’s interest in regulating speech activities on university campuses to ensure public order and safety, preventing these types of harrowing consequences” (Humrighouse 149). Because of the incident at Kent State, campus speech that is regulated is often characterized as content-neutral and is based on time, manner, and place. Some universities have even taken to ‘permit schemes’, where they require any student wanting to engage in any speech activity to first obtain a permit. Many regard this limitation unfair to speech, especially those who want to combat this speech and who cannot obtain a permit to do so (Humrighouse 150). Content-based speech comes under fire when the speech may be offensive to a university community. One such example may be racist speech, or hate-speech on campuses. In cases such as Widmar, the Supreme Court in their opinion looks at the scope of speech. They may be the allowance of speech that may be contested, if it does not disrupt the education environment or impinge on the rights of other students. But the issue with hate-speech, or racist speech, is that is makes members of the community incredibly uncomfortable, to the point where they may not perform academically, or be able to live comfortably in a university residence hall. In this scenario, the university has an interest in regulating the content of some speech, but still has to allow freedom of speech to occur. The Foundation for Individual Rights in Education (FIRE) reported that in the year 2013 out of the 427 colleges and universities in their database, 251 have campus regulations that violate First
Amendment rights (Humrighouse 150). It is evident that universities have to honor free speech, but at the same time, they must balance the needs of a community which may react to that speech.

The history of student conduct dates back to the inception of American university culture, and the inception of America itself. Student conduct had started strict, and underwent some dramatic changes. As student conduct codes became less severe, universities gravitated towards a mediation approach to solve behavioral issues. Universities even sought and established extra staff to help handle behavioral problems, and student development. Perhaps the largest change occurred to university conduct codes in the 1960’s and 1970’s, with the abolishment of in loco parentis, and the demand for students to be recognized as adults. From this point forward, universities have maintained the struggle to balance the needs of their community with the needs and rights of their individual students. Today, due process and speech rights are continually challenged throughout university settings.
Chapter Two: Constructing the Code

The unique aspect about university conduct codes is that they are quasi-legal documents. That is, they are not legally binding, but they are bound to a student’s status at a university. Because of this, conduct codes employ processes and procedures that often look different from a court of law, although some due process standards will be reflective in the university conduct process. As a result of this quasi-legal status, university conduct codes need to be comprehensive and wide in scope. These documents govern university accepted and unaccepted behaviors, who determines the status of these behaviors, and gives a set of pre-determined sanctions for these behaviors. In order to be effective documents, university conduct codes need to address a multitude of concerns, procedures, and behaviors. In the creation of these codes, various actors are considered in this process. Additionally, the needs of a particular community need to be factored into these documents. As a result, the structure of a conduct code, and the application of this code greatly impact the university community.

After the Supreme Court had ruled against in loco parentis, universities were tasked with creating a fair and balanced student conduct code that afforded due process, yet retained the quasi-legal aspects they were seeking. In the 1990’s universities across the nation started to create similar student conduct codes, modeling their codes after the standards set by the Council for the Advancement of Standards (CAS). In 1986 CAS started to create a recommended set of standards for student
affairs professionals (Caruso, Travelstead 19). Since this time, universities and student affairs affiliated organizations began to create templates of best practices with regards to student conduct. While conduct codes may vary slightly from campus to campus, most codes contain the same foundational formats, definitions, rights, and processes. At the base level, these elements should be described in the student code of conduct: authority for the system, application and jurisdiction of the system, philosophy of the system, the rights of the students, conduct regulations, procedural safeguards, prehearing and hearing procedures, appeals procedures, the hearing bodies and their jurisdiction, emergency suspension procedures, disciplinary sanctions, disciplinary records, ethical standards of the hearing body, and a glossary of terms utilized in the code (Caruso, Travelstead 24). A model student conduct code may include these elements under larger umbrellas, typically divided into articles, and then sub-articles. There are 5 large themes, which delineate the articles often seen in conduct codes: definitions of elements in the code, student code authority, proscribed conduct, student conduct code procedures, and interpretation and revision of the code (Lancaster, Waryold 57-70).

**Institutional Factors**

A university may take into account several institutional factors. One such factor is if the institution is public or private. A private institution may meet the minimum requirements for fairness as described by their publications. However, since public universities are state and federally funded, they have to allow minimum due process rights, in accordance with the Constitution (Caruso, Travelstead 44-45). Another
factor universities may look at is the residency of their students. Campuses that are predominantly residential may have a different set of standards as opposed to a mainly commuter campus. Additionally, an on-campus residency requirement may establish a tier-system where judicial conduct is handled within the residence halls by residence hall staff, as an extension of the student conduct office (Caruso, Travelstead 45). This closely relates to the size of the institution. Large institutions have the task of making sure staffing is consistent. Campuses with several branches may have one distinct judicial system, or several judicial systems that cater to the character of the individual branch. As well, one must think about student accessibility to various campuses (Caruso, Travelstead 45). Most importantly, a judicial system and conduct code need to take into account the needs of the community. New conduct codes and student conduct offices may not be taken as seriously by the university community. However, communities with longstanding and unchanging conduct codes may not react well to changing these systems. Thus, these needs may dictate the implementation of these codes altogether (Caruso, Travelstead 46). As well, certain reputations or traditions may largely influence the construction of student conduct codes. For instance, Ohio University has a long-standing reputation as a ‘party school’. Because of this, the university created a two-strike rule. According to this rule, a student’s second infraction to the student conduct code while on probation automatically makes them eligible for suspension. In this case, the conduct code is responding to a university issue.
**Institutional Actors**

Within the student conduct system there are a host of ‘actors’ instrumental to the process and code itself. One such actor is the judicial affairs officer. This person is chiefly in charge of hearing cases, determining when to charge students, conducting student hearing boards, and conducting follow-up conversations with students. The complainant is the one who files charges against the student, sometimes this is a conduct administrator, or another student. The respondent is the student who supposedly committed a prohibited act. Witnesses are those who witnessed the alleged act and can speak to the conduct. Witnesses can also testify to the character of the alleged students. These actors all typically appear within hearings. However, other university agencies may also be included with regards to student conduct. One such entity is campus police, who may serve as witnesses or refer a student for their conduct. Faculty also serve a large role. Faculty may make a complaint against a student for behavior such as academic honesty. However, faculty may also appear on hearing boards, as they are members of the university community. Additionally, a hearing board chair may be designated amongst the university community. This chair position is instrumental in guiding a fair process, are responsible for being well-trained and well-versed in student conduct. Another helpful point of contact may be university legal counsel. Legal counsel has an important connection to judiciaries because they may need to respond to alleged misconduct, or take care of processes that question constitutional rights (Caruso, Travelstead 26-27). Some universities may provide student advisors to aid students walking through the conduct process. These student
advisors are not lawyers, but can give the student advice as they work heavily with student conduct.

**Definitions**

Student conduct codes often outline the terms they use by including a section of the code dedicated solely to definitions. Universities need to be clear about the terms they use and the context in which they use them. For example, many codes outline who is considered a student to the university. This could be important in a case where a student is affiliated with a university, yet takes classes only online, but never steps foot on campus. If a student code of conduct is primarily focused on action that occurs on-campus, it would be helpful to understand that although this student is an online student, they are affiliated with the university and thus are subject to the student code of conduct. The model code presented in *Student Conduct Practice* recommends a definition that defines a university community thoroughly, including any and all members. This distinction is important to make because it outlines what components constitute a community, and allows the parties involved to self-identify if they are in that community. It also provides clear boundaries where areas may be gray – i.e. the university is located in a ‘college town’, and thus off-campus behavior constitutes community action, or affiliates of the university may be included in the terms of the community. Clarifying and defining terms eliminates confusion in the adjudicatory process, and makes certain that the student is better informed of conduct processes (Caruso, Travelstead 49). Additionally, since student conduct codes are viewed as quasi-legal, they are often equated with law and legal terms. When a student is entitled
to a hearing, they may believe that includes and judge and jury, with legal counsel to represent them. But because the process is not legally binding, it is important to define the terms used in procedure, “The definitions should not reflect or mimic circumstances not related to an institution of higher learning” (Caruso, Travelstead 49).

**Authority**

A student conduct code must identify who has authority, and in what capacity this entity has authority. For example, many conduct codes will outline authority in the following context:

- The student conduct administrator can determine conduct boards and appellate boards, and which board is authorized to hear a particular matter.
- The student conduct administrator will develop the policies that administer the conduct system, and procedural rules for conduct hearings that align with provision of the student code of conduct.
- Decisions made by the student conduct administrator are final, but are subject to a formal appeal process. (Lancaster, Waryold 58).

It is important that a code self-identifies those who are able to amend it and change the code (Caruso, Travelstead 48). This formality allows for the Board of Trustees and other decision-making entities within a university to clearly and transparently vest the power and authority to those who handle disciplinary procedures. The self-identification also demonstrates that those who create this authority are solely linked
with those who bore the responsibility of upholding the code. Additionally, it makes certain that the application of the code is uniform (Caruso, Travelstead 48). Clearly identifying the authority in a student code of conduct gives the student a sense of who is handling the process, and ensures continuity of those specialized in student conduct processes to continue to assess and create conduct standards.

**Proscribed Conduct**

There are typically three main areas that fall under prescribed conduct: the jurisdiction of the university conduct code, conduct rules and regulations, and violation of law and university discipline. First, it is helpful to identify where the university jurisdiction lies. Universities must consider two important factors related to jurisdiction. First, will the university seek internal action, external action, or both when a student violates criminal law? And second: should the university code govern behaviors off-campus? (Dannells 22). Codes generally look towards their educational philosophy and mission statement for the answer. If the behavior in question disrupts the educational mission of the university, then conduct codes will likely pursue criminal behavior and behavior that occurs off-campus (Dannells 22). Some students argue that when they are punished by law, and disciplined by the university, that they are receiving ‘double jeopardy’. Similarly students often contend that behavior off-campus likely has little effect of disruptions on campus. In addressing these concerns the justification behind these provisions in student conduct codes is that students are consenting to be a part of a university community that has the greater goal of developing student character. It is not mandated they become a part of this
community, they are choosing to do so, and thus they are subject to the standards of that community.

University conduct rules and regulations include the list of behaviors that are prohibited at the university. These behaviors include consumption of alcohol underage, use of illicit drugs, assault, conduct that is a breach of the peace, and other conduct thought to harm the university community. The list of prohibited behaviors reflects the educational philosophy of the university. Often this educational philosophy includes the mission that universities are, “Concerned with maintaining order and a proper environment on campus so that the institution can go about reaching its philosophical goals and missions” (Caruso, Travelstead 47). The key is that the university wants to maintain order to effectively fulfill their mission of creating a safe learning environment, that is why some behaviors that may be more serious to communitarianism, than to society itself. It is important that the conduct rules and regulations are presented with specificity so that students are easily able to match their behaviors with the behaviors described in the code. Leaving this area too vague may enable students to escape from discipline even though they displayed behavior that may be considered ‘egregious’. At the same time, the university has an interest in keeping some of the language vague, so that all situations are covered (Caruso, Travelstead 49). Additionally, the university owes it to students to list the conduct rules and regulations in a legible manner so that students feel comfortable with the conduct system, and are not anxious to engage with the student conduct code, or student conduct office within a university.
The last section under proscribed conduct handles the violation of both law and university discipline. Under this section it is crucial that the university notes that these two processes are separate from each other. The legal process and the quasi-legal process of universities have a different set of standards, and a different set of sanctioned outcomes. However, it is equally as crucial for a university to note that breaking the law can result in the university launching its own process and investigation (Caruso, Travelstead 48). It is also important that the university delineates that the outcomes of a criminal process are not to change the outcomes of the university conduct process. Also, the university conduct process does not have to act in accordance with the timeline of any criminal proceedings (Lancaster, Waryold 62-63).

**Conduct Procedures**

The typical topics contained in ‘conduct procedures’ are: charges and conduct boards, sanctions, interim suspension, and the appeal process. Conduct Procedures make up the bulk of a student’s interaction with the university student conduct process. As it pertains to charges, most codes outline that anyone is capable of filing charges against another student within the university community. This section outlines the fact that the university Student Conduct Administrator may or may not decide to pursue an investigation into the charge. As an element of due process, all charges must be submitted to the student in written form. Additionally conduct procedures outline the types of student conduct boards and hearings that may be utilized in the process (Lancaster, Waryold 63-64).
The type of student board used in an incident may be dependent on any number of factors including, but not limited to: severity of the incident, prior incidents, and urgency of the incident. Student conduct codes will directly state where and when each board or hearing is applicable depending on these factors. The construction of a conduct board is truly a decision to be made by the individual university. Boards may be utilized to listen to cases involving behavioral issues, or academic issue or both. However, universities also have the option of creating separate boards based on the factors above. There may also be boards that serve only organizational interests – such as Greek judicial boards that hear complaints and charges exclusively against those in the Greek community (Lancaster, Waryold 103). There may also be student conduct boards that respond to the needs of those in a particular academic major or community. Law boards and Medicine boards are not uncommon because these program are training those who are expected to be ethical in their fields (Lancaster, Waryold 103). Another common type of board is the appellate board. Students may dislike the outcome of their hearing or sanction, and thus are looking for someone to grant them an appeal to have the case heard again. The composition of boards and their jurisdiction is totally up to the university, although most universities take advantage of allowing students and faculty to hear conduct cases on a certain level. Regardless of how a university decides on board composition, size, and jurisdiction, this process must be clearly outlined in the student conduct code so that students know their options.
When a student decides to utilize a hearing for their charges, it imperative that the university student conduct code outlines the essential elements of the hearing. In this section, universities often outline the rights of the accused (the student in question). A table outlining the essential elements of a hearing can be found in Figure 1, located at the end of this thesis.

The hearing process must afford students minimal due process rights, and must clearly outline the policies and procedures that govern the hearing. In addition to the hearing process, many universities will conduct a pre-hearing interview. This interview allows judicial affairs officers to go through the hearing process so that the student understands all that it entails, and can ask questions. It is also a way for a judicial affairs office to communicate to the student their rights throughout the process. Pre-hearing interviews are not mandatory, and not coming the pre-hearing interview will not deter the hearing from happening (Caruso, Travelstead 50).

The potential sanctions a student may receive shall also be specifically listed in the student conduct code. Among these sanctions may be expulsion, suspension, probation, community service, educational classes, loss of privileges, residence hall suspension, academic program suspension, restitution, and revocation or withholding of a degree (Lancaster, Waryold 67-68). The purpose behind the imposed sanctions must have an educational mission, and support the mission of the code of conduct. The intention of the imposed sanctions are to protect the campus community from harmful behaviors and help students determine the limitations and impacts of their behaviors. The severity of the sanction should be determined upon the severity of the infraction.
In this process, the sanctions imposed should have some developmental piece to the student (Caruso, Travelstead 52). Often multiple sanctions may be given to a student to meet the objective of protecting the community, and making certain this infraction is a learning experience for a student. However sometimes the behavior is egregious, or multiple infractions make it appear that the student is not learning from these mistakes. In these situations removing them from the university community altogether may be the best option.

Within conduct procedures is a section reserved for interim suspension. This type of suspension is used in cases where the nature of the allegation against a student, and the supported, known, facts indicate that that student may be an active threat to the university community. Thus they must be removed before they are able to have a hearing (Caruso, Travelstead 53). The process by which interim suspension shall be applied must be very specific, seeing as removing a student is controversial, especially when removal is typically a sanction applied after a fair hearing. It is in the best interest of the university to outline the ways in which the student is unable to interact with the university community. Failure to do this may present ‘gray’ areas, which permit a threat that could have been avoided. Additionally, it is important to note that application of interim suspension does not replace the hearing process itself (Lancaster, Waryold 69).

The final aspect is the appeals process. Allowing for appeals allows for fundamental fairness in the student conduct hearing process, and enables for corrections of defects that may have occurred in the first hearing (Caruso, Travelstead
Some considerations for the appeals process may be the time frame of the appeal, so that students feel their concerns are valued and heard. Another consideration would be the grounds for the appeal. Grounds can claim an error in the initial hearing, the presentation of new information, or even that the sanction was too severe for the infraction (Caruso, Travelstead 53). The appeal process includes an appeal board that hears the appeal, but does not decide the case itself. If the appeal were granted, the student would receive another hearing. Appeals in the student conduct system give credence to the quasi-legality of the student conduct system. Appeal processes recognize that student conduct systems are not perfect, and that the dictation of behavior can be difficult to interpret.

**Interpretation and Revision**

In this section of student conduct codes, there are two main components: who handles interpretations of the code, and how often the code reviewed. Identifying who interprets the code when questions are raised ensures a consistent perspective and frame of mind for how the code is to be interpreted. Even if it is not the same person, but rather the same position, it is likely that the person fulfilling that position will have knowledge of judicial best practices and student development. In response to revision of the code, an avenue of change would be a policy board. This board should be composed of university community members, especially faculty and students. These members can evaluate relevant aspect of the code, and make special recommendations based on the particular community they live in (Caruso, Travelstead 54). Essential to this practice is a detailed record keeping of personal student accounts, but also record
keeping of the numbers, types of infractions, and most commonly imposed sanctions. Dividing this data into period may also help policy boards identify particular community issues and how to address them accordingly. Policy boards bring a sense of shared governance to university conduct systems.

**Disciplinary Mechanisms**

As previously stated, student conduct codes are quasi-legal. The hearing process, the actors, and the sanctions are non-legally binding. The only instance in which the code intersects with true legal authority is when a university may conduct their own investigation when a criminal act may have occurred. But even then, the worst university disciplinary action would be expulsion, which is a loss of privilege yet retention of freedom. In these instances a student breaks a community contract, not the contract between state and citizen. However, like legal systems, universities employ various monitoring mechanisms to ensure that harmful behaviors are not committed.

One such university sanction that employs an act of ‘monitoring’ is probation. Legal systems across the U.S. utilize probation to ensure good behavior from those convicted. This sanction promotes a fear for committing another crime, thus the person under probation is less likely to commit harmful or criminal behavior. Universities employ probation for the same purpose. Both types of probation require the person on probation to report back a higher authority figure. In the legal system this person is a probation officer, in the student conduct system this would be a student conduct administrator. However the role of probation, and the authority that oversees
probation, has an incredible amount of discretion because of its quasi-legal capacity, “… behavior which is normally undesirable but not unlawful, conditions of probation intrude upon or become substitutes for certain formal judicial processes” (Czajkoski 11). This discretion can subject citizens, or students, to disciplinary mechanisms that can be more taxing than originally planned. The due process fight within juvenile courts suggests that the discretion is more harmful than helpful in these instances. The constant surveillance and discretionary evaluation does not necessarily ensure a fair or consistent process while someone carries out their sanctions. This discretion can be seen in a multitude of disciplinary sanctions on university campuses. Community service, mandatory behavior-correcting classes, and discretionary sanctions are some of the most commonly assigned sanctions in addition to probation on university campuses. There is constant monitoring of these activities. Community service hour sign off sheets, attendance at behavior-correcting classes, and sometimes written assignments are frequently filed within the student conduct office. This constant monitoring combined with the quasi-legal discretion creates disciplinary mechanisms that allow for greater and direct control over a community. Because no formal processes are outlined for how these sanctions need to be monitored, they can be subject to no control or even total control. This control ensures an outcome the university wants, and is in some ways it is paternalistic over the community. It is a way of wielding a great amount of authority without having to carry the weight and complexity of the law.
Chapter Three: Liberalism and Communitarianism

Most American universities have a strong sense of community, a strong sense of pride. They value school spirit and they value the ideal of that particular university. Yes, in this community, there are a large number of individuals. At some large universities, there are more than 20,000 individuals attending that particular educational institution. Within this institution there is particular set of mores, norms, and university guidelines that all students seem to follow. They shape the university community and contribute to harmonious learning and the common good of this community. Elements of this environment can be characterized by the idea of communitarianism. However, regardless of this community aspect on a campus, students also are members of the state, and thus they are guaranteed certain freedoms and rights. Communitarianism and liberalism often clash at many points within their arguments. Regardless of this, universities must maintain the balance of these two concepts within their own communities. This chapter will define these terms, outline their debate, and examine the communitarian agenda within education.

Liberalism

Liberalism itself is founded on equality and liberty. Philosophers such as John Rawls, Thomas Hobbes, and John Locke conceived the modern concept of liberalism in the Age of Enlightenment. During this time, people sought an individual connection with God, which is in contrast to the notion that one’s individual contribution was what he or she could give and contribute to the state (Dinkelman, Theobald 7).
Additionally, with the fragmentation of the Catholic Church, people found an even greater emphasis on self, as they were able to choose how they worshipped (Dinkelman, Theobald 7). Descartes joined this early debate by connecting two already existing tenants of liberalism, autonomy of oneself and human rationality (Dinkelman, Theobald 7). With the 17th century Scientific Revolution, liberalism and individualism became even more prolific. Moving away from the central theme of divinity, people felt they had even more choice and autonomy, and that this must be protected. This is where Locke’s theory of state comes into play. The republican state must allow autonomy of individuals, and it is the state’s responsibility to defend this, yet also maintain order throughout this process. However, another philosopher Johann Herder was concerned about the state having too much authority in this situation. He felt that individuals could not find themselves in the world around them, and that by doing this they could lose originality to one’s own ideals (Dinkelman, Theobald 9).

Charles Taylor identifies one specific type of modern liberalism titled ‘procedural liberalism’. Procedural liberalism is best defined as: “… society as an association of individuals, each of whom has his or her conception of a good or worthwhile life, and correspondingly, his or her life plan.” (197). Taylor goes on to explain that society is unable to be founded on any notion of the ‘good life’. That is, the view of the good life may fit with the ideologies of some citizens and not others. He notes that society is currently after what is right rather than what is good. This focus is on individual freedoms as a right and solely looks at how goods are advanced not what goods will be furthered by society, thus it is seen as procedural (Taylor 197). Procedural
liberalism works in that society has a sense of patriotism, which persons in this society identify with one another in this common enterprise, and that they defend the idea of liberty with those who also share that view. This is like a familial history, because people show solidarity for the principle of liberties and freedoms for oneself. The citizens will always fight for the liberal republic because only those, “who live and cherish a free regime will be motivated to fight for themselves.” (Taylor 202). In this instance, there is the motivation for self-imposed discipline, which is essential for a free regime. Thus citizens will always gather in a community or a state to protect their own freedoms, and those who they feel in solidarity with because of these freedoms. Nonetheless, this is still a view based on individualism.

**Communitarianism**

Communitarianism seeks to transcend this individual view and calls for individuals to identify and work towards a ‘greater good’ while retaining these freedoms. This school of thought Communitarians sharply critique liberalism because it has become too ‘individual’ in that in our individual lives we are starting to care less about communities and the common good for all. Communitarians believe that we should be committed in belonging to a place and shouldering mutual obligations to ensure that all are living well in that place. There is the belief that the Enlightenment failed because placed morality solely in the individual, instead of placing this value as a learned concept from relationships with others (Dinkelman, Theobald 11). Liberalism fails because it does not take into account the social decisions made by individuals, and how these decisions can have a large impact on society. Additionally,
there is typically no thought to the long-term consequences of decision-making when it comes from individuals. When decision-making comes from a collective group, having articulated what will constitute the ‘good life’, they are able to take into account how these decisions will greatly impact society once they are made.

Communitarianism critiques the glorification of rights above all other social values, although they believe rights can help bring out the good life that all are seeking (Dinkelman, Theobald 13-14). Communitarianism also challenges the idea that the state can be neutral in their administration and creation of public policy (Dinkelman, Theobald 15). They challenge that acknowledging and creating bias legislation would often benefit diverse and unique communities – thus actually leveling the playing field.

Communitarians obviously center their ideology on the idea of community. They believe that self is created from a community that has shared values, interests, and practices. A person’s own values are formed in this social context (Arthur, Bailey 7). Communitarianism is a more modern thought on societal interaction, and does not have the roots that liberalism has. Thus many of the philosophies surrounding this ideology are recent. Communitarians believe that modern Western culture has lost its sense of ‘social solidarity’ (Arthur, Bailey 8). Two communitarian theorists: Avineri and De-Shelit are critical of 20th century liberal theorists who appear to ignore the moral and social nature of citizens in society. They state that communitarians believe that attachment to community is not voluntary, that our social attachments are not often chosen, and that our values are often adopted as the result of the community we
live in (Arthur, Bailey 10). Communitarians largely believe that communal decisions are the best for the individual and the longevity of society. However, communitarianism itself can take on two forms: thin and thick communitarianism. Thin communitarianism is when individuals give up few rights to form a cohesive society, yet still enjoy many freedoms. The United States can be viewed as having thin communitarianism because the citizens pay taxes, and generally respect laws for the good of society, yet they enjoy a plethora of rights. A thick-communitarian society could be a communist country. In this society individuals give up many rights for the good of society and retain very few personal liberties such as keeping large sums of money they’ve garnered through work.

Emerging from the liberalism and communitarian debate is a ‘third-way’ of thinking, known as communitarianism-liberalism’. This can also be characterized as thin-communitarianism because it includes elements essential to a functioning community, yet still provides a healthy amount of individual rights. Many philosophers from these two schools of thought acknowledge that each ideology is unrealistic for modern society. John Gray says the third way is essential because it of the social nature of individuals (Mulhall, Swift 18). In order for individualism to exist, it has to depend on commonalities of life and culture of individuals in order to create solidarity and the will to keep fighting for these principles. As James Arthur notes, “Autonomy, the condition in which persons can be at least part authors of their lives, will only have value if it is exercised in a community providing worthwhile options and supporting individual well-being” (Mulhall, Swift 19). This third way manifests
itself greatly in our educational institutions. It is clear our schools provide a community of learning and comradery, often energized with school spirit as a unifying force among students. There is incentive to do well and come together to make your parents and peers proud of your institution. However, within schools there is individualistic competition and an emphasis on the liberal notion of rights. Any civics course in school will demonstrate that this liberal theme is near and dear within curriculum. Furthermore, societal notion of expressing self are often protected by First Amendment rights to free speech, even if they do disrupt the school community. Schools are unique institutions where the community joins on Friday for the school football game, but competes on Monday morning in the classroom. How do these institutions create a harmonious community, but also provide balance of rights?

**Education and Communitarianism**

*Schools and Community, the Communitarian Agenda in Education* states that there needs to be an increase in community within the child’s life, “… there needs to be a renewed emphasis on an ethical base for political action that encourages the intermediate institutions that stand between the individual and the state: family, schools, trade unions, religious groups, the neighborhood and voluntary organizations” (Arthur, Bailey 9). There are many avenues to which this goal can be achieved. One such suggestion is self-esteem programs, which are thought to develop a group opinion and make students feel like they are valuable contributors to a group. This in turn would hopefully provide justice in young people, seeing everyone in the group as equal, and valuing their self-esteem can reduce homophobia, sexism, and racism
Another suggestion is that we teach our students conflict management from a young age so that they can properly retain solidarity within community groupings (Arthur, Bailey 63). In this process the condemnation of selfish behavior is also key. Students must maintain that they are a part of a larger group, a greater good. The biggest way that an educational institution can support a renewed emphasis on ethics and community would be to allow students decision-making power within the community. Students can understand their impact if they are to participate in forming dress-code regulations, participating in a grievance procedure, or even participating in student government (Arthur, Bailey 91).

However the question remains in this scenario, how do we teach our students about civics? Surely they must be taught about the both the Constitution and democratic processes, but they should also feel free to participate in these processes and not forced into being citizens of the state. In this scenario, the communitarian agenda leans heavily upon liberalism (Arthur, Bailey 53). For most publicly funded schools, it is the state’s mission to teach and educate students to be future citizens of the country. Parents and other institutions that shape community have little say in this process. Even schools that want to be fully communitarian cannot reject the state mandate to teach civics and prepare future students to become full citizens. There is a crossroads between the parental education of the child, and the will of the state. However in this process we can seek a happy medium: that children be introduced to civics and tenants of liberalism, but are necessarily forced to into accepting them (Arthur, Bailey 77). Communitarians aim to enhance social and moral responsibility in young people, and
educate them to be committed by choice of full participation as citizens. Although this is problematic in that citizenship is then seen as a privilege and not a choice.

**Case Studies**

The transformation of students into full citizens of society is a process best seen through university life. Universities are unique in that they are built often on liberal tenets – competition, individualism, and a deep culture that values rights and justice. Yet most universities are governed by a quasi-legal code known as the code of conduct. This code enforces rules and regulations in support of a harmonious community environment. Some examples of items in this code may be residence hall rules pertaining to noise, and censorship of offensive material in public spaces. Some major items in the code made deal with sexual assault and plagiarism in a class.

Consequences of violating this code are not legal, yet they greatly impact the student’s life. These consequences may amount to probation, community service, or even removal from the community in the form of suspension or expulsion. It is clear that in this respect, universities often follow a communitarian agenda in their living environments, even if their academic environment falls more in line with liberalism.

That is why in some cases universities are able to bridge the rights of students.

Students attending a university enter into a contract, and thus a community with the institution. A large part of this community is the guarantee that students within this living environment are guaranteed a safe space to learn. That is why minor disruptions to this learning are often prohibited. But sometimes these infractions are not minor – they are large. The liberalism communitarian debate comes to head particularly when
one student asserts their right to freedom of expression, making other students uncomfortable and unable to learn in that environment. The case studies below will outline these disputes and the communitarian reaction to these disputes.

In spring of 2015 there was a video released of members of the University of Oklahoma Sigma Alpha Epsilon Fraternity singing, “There will never be an n***** in SAE. You can hang him from a tree, but he’ll never sign with me, there will never be an n***** at SAE.” Once the video went viral, the outrage began. In response, university officials started scrambling. In the aftermath, the fraternity was removed from campus, and two leaders within the fraternity expelled under Title VI of the Civil Rights Act of 1964. The President of the University of Oklahoma stated that the video and chant, “created a hostile learning environment for others,” and that, “The chant was not only heard by those on a bus, but also impacted the entire university community as it was also distributed through social media.” (Hollingsworth). It is evident that the university president provided a communitarian response to the incident in this case. He let it be known that while these students were indeed practicing freedom of speech, this speech was offensive and harmful to the community, and the environment it created was hostile to students. Thus these students were removed from their community and community attachments in various ways.

The University of Oklahoma code of conduct only has three provisions that might apply in this case. First, “The student has the right to establish and/or disseminate publications free from any censorship or other official action controlling editorial policy or content in accordance with University policies.” Second, “Unwelcome
conduct that is sufficiently severe and pervasive that it alters the conditions of education or employment and creates an environment that a reasonable person would find intimidating, harassing or humiliating. These circumstances could include the frequency of the conduct, its severity, and whether it is threatening or humiliating. This includes physically abusing a person or holding a person against his or her will. Simple teasing, offhanded comments and isolated incidents (unless extremely serious) will not amount to abusive conduct.” And third: “Mental harassment: Intentional conduct that is so extreme and outrageous that a reasonable person would not tolerate it” (“The University of Oklahoma”). From analysis of these ‘speech codes’ it can be determined that the students did not necessarily have the duty to censor themselves. However, the racist chant may fall in-line with the second provision listed. The speech was determined to be severe and pervasive by way of social media. The speech was also determined by the university president to be intimidating, harassing, or humiliating, and this was confirmed by the public and media outrage that followed the incident. It can be questioned if the speech constitutes mental harassment, seeing as it was one incident not directed at any one individual.

Regardless of the inevitability that the fraternity men broke the code of conduct at the University of Oklahoma, outrage over free speech consumed the argument. Many scholars criticized the use of Title IV in the Civil Rights Act of 1964 in the university’s action against the Fraternity men. According Dillon Hollingsworth of The Oklahoma Daily, “Title VI prevents programs receiving federal financial assistance from discriminating against individuals based on race, color or national origin. In
terms of education, it prohibits anything that would create a hostile learning environment.” What is up for debate is what constitutes a hostile environment. *Papish v. Board of Curators of the University of Missouri* (1973) explains that the hostile environment constitutes more than the ‘mere dissemination of ideas’. Under this ruling, the racist chant would not have been enough to create the hostile environment, thus this type of speech using the *Papish* standard is actually protected. Additionally, many are concerned that such swift and provocative action on behalf of the university will have a ‘chilling effect’ on campus speech. The SAE controversy demonstrates that the quasi-legal capacity of universities and their codes of conduct may mean fewer protections of rights in order to serve a larger community.

Another case concerning speech comes from George Washington University. In this instance, a student racked up conduct charges and suspension for posting an Indian swastika on a bulletin board in the International House of the university. The young man also happened to be a part of a Jewish fraternity on campus. Prior to this, there had been swastikas posted in various places around campus and many in the campus community were upset. However, the student in question posted the Indian swastika to highlight the fact that many other cultures used this symbol for ideas other than hatred. Police were called to handle the issue, as the university was attempting to pursue this case as a hate crime (Jaschik). This comes after the fact that many universities were put under fire for not taking these matters seriously. As *Inside Higher Ed* reports, “Some Jewish organizations have criticized some colleges and universities for not responding strongly enough (in the view of these groups) to
swastika vandalism. Nineteen organizations wrote to GW President Stephen Knapp, saying he had not done enough, in March, after the first round of swastikas on campus this year.” (Jaschik). In this instance there is the repetition of symbols and expressions that were starting to make the university community very uncomfortable and the university felt pressure to act fast on this issue.

Although the university took swift action against the student in this case, they have clear outlined rights for students in their code of conduct. Under Basic Assumptions in the Guide to Student Rights & Responsibilities, there is an extensive section on freedom of expression that contains two specific provisions. The first, “Student organizations and individual students shall be free to examine and to discuss all questions of interest to them and to express opinions publicly and privately. They shall be free to support causes by orderly means that do not disrupt the regular and essential operation of the institution. At the same time, it shall be made clear to the academic and the larger community that in their public expressions or demonstrations the students or student organizations speak only for themselves.” The second provision speaks more toward the freedom of the academic community, “The students have the rights and responsibilities of a free academic community. They shall respect not only their fellow students' rights but also the rights of other members of the academic community to free expression of views based on their own pursuit of the truth and their right to function as citizens independent of the University” (“Basic Assumptions”). The university code clearly asserts that students have the right to speech, as long as that speech is only speaking for them. However, the placement of
the swastika in a public space compromises this. It may appear as if the university was issuing this type of speech as opposed to the student. Additionally, there is the provision that speaks to mutual respect between students and their ability to express themselves in a safe and comfortable manner. The swastika may prevent students from effectively doing this. There are also notes of communitarianism in the second provision speaking to an individual’s place within the university community.

After the student had received punishment from the university he hired a lawyer to represent him. Eventually suspension was ended and the threat of expulsion was taken off the table. The *GW Hatchet*, the campus newspaper for George Washington University, had noted community responses to the incident. Several from George Washington University’s law school commented that the universities response could have violated the student’s freedom of religion (Eberhardt). The Foundation for Individual Rights in Education, also known as FIRE, noted that even if the swastika was an intentional symbol used to promote Nazi Germany, that it still would have been protected speech in this instance (Berger). The New York Times even acknowledged the educational possibilities stemming from this incident, “Referring to the student’s desire to stimulate discussion by displaying a swastika, educators note that this is precisely the kind of thorny exercise universities must foster.” (Berger). In this incident many are advocating for the liberal-based argument, that this student has the complete ability to exercise his rights, with no to little consideration for the community. The university, feeling the pressure, backed away from their communitarian agenda to allow individualism in this instance.
One of the most famous First Amendment cases that challenged the communitarian tenants in education was *Rosenberger v. University of Virginia* (1995). A campus newspaper titled *Wide Awake* had requested funding for their publication via the student activities fee, which is composed of a mandatory student fee. The university group that gives out student funding denied the funding to the publication, citing they did not want to violate the Establishment Clause of the First Amendment. It was university practice and code to follow the Constitution and not allow funding that is generate from the public at a state university to go towards religiously affiliated projects and publications. In this instance, the university believed it had a community responsibility to not spend student money in ways that promoted one religion or idea over another spirituality. However, students felt that this denial of funds suppressed their rights of expression. According to a *Washington Post* article from this time in history, “Lower federal courts had upheld the policy. The U.S. Court of Appeals for the 4th Circuit said providing the subsidy would have breached the First Amendment mandate that government "shall make no law respecting an establishment of religion" (Biskupic).

What is of particular interest in this case was that the university was suppressing speech in one form to uphold another Constitutional ideal of separation of church and state. While many universities allow freedom of speech in their conduct codes, the issue here is that the university would be funding speech that carries a particularly religious message. Thus the concern comes from the idea that this religious message would appear to be ‘endorsed’ by the university if it were funded through university
money. In this instance, the university could then be seen as violating the student’s right to freedom from religion, especially if they have to pay the mandatory fee that could help subsidize the religious publication. The liberalism ideal plays out in the following way, “Michael W. McConnell, the students' lawyer, compared the university's policy of subsidizing student publications with an enticing carrot. But to get the carrot, he said, students have to censor their religious views and refrain from quoting the Bible” (Biskupic). In this sense, the students are embodying their right to free speech, and the university is acting in terms of censorship. However, it can also be said that by ultimately paying for this publication, students are paying for speech they disagree with, which also impinges on their individual rights. In the communitarian view, the university must decide whether the rights of the few outweigh the community expectation of separation of church and state at a public institution. This argument becomes increasingly complex when both sides have valid Constitutional claims and points.

Ultimately, the Court decided that the students from Wide Awake had a legitimate Constitutional claim. In a 5-4 decision the Court reasoned that by denying the publication financial resources, it financially burdened speech, and thus amounted to ‘viewpoint discrimination’. The Court explained that if the university funds one type of speech, for example speech via the College Democrats, then they must promote all types of speech. Thus in a sense, the Court sided with the liberalism argument towards student rights in higher education. While the decision appears fair, there may be further implications that disrupt the university community. Ensuring that all university
publications be financed means that publications with discriminatory viewpoints must also be financed, or else the university is engaging in ‘viewpoint discrimination’.

While *Wide Awake*, may have a positive religious message, it could be just as feasible that this message includes religious notions that are anti-LGBT. Thus the university, which is also a state actor, is now promoting discriminatory views via student dollars. This can create a disruption to the community, and can make students feel unwelcome in their community.

Only four years after the decision in *Rosenberger* the Supreme Court once again decided a case regarding student activity fees that support political and cultural groups in *Board of Regents of the University of Wisconsin v. Southworth* (2000). In this case, a group of students contended that they should not have to pay student activity fees that promote speech from particular political and cultural groups through a mandatory student activity fee. The Court ruled that universities can mandate this fee, even if students do not necessarily agree with the viewpoints represented by the money. In the wake of the *Rosenberger* decision, some universities enabled students to opt-out of the student fee, until the decision in *Board of Regents of the University of Wisconsin v. Southworth* (2000) made this infeasible (Chipsowski, Marchetti). The furthering of this issue demonstrates the tension between the individual rights of the students in choosing to assert their speech rights, and the community response. University policy is trusted to speak on behalf of the community and their needs. However, communitarian ideals where members give up certain rights in order to participate in a particular community does not always fair well with university expression policies. To
many students expression is personal and essential for education, as seen the Student Movement of the 1970’s. Yet to university communities, compliance with Constitutional standards and expectations for the general wellbeing come with immense pressure from the state.

The liberalism view is a champion for individual rights, and focuses on exclusively what the individual in society wants. The communitarian view notes that individuals may give up some of their rights to live in a harmonious and peaceful society. The world of education strikes a delicate balance between these two areas. In a sense, an individual’s right to free speech is essential to the personal growth of the individual, and to the educational mission of the university. At the same time, the university is a unique community that fosters inclusion and the free exchange of ideas. If an individual’s speech prevents this process, or harms this process, the university has an interest in limiting this speech. The case studies provided reveal the internal tension faced by universities in ensuring an equilibrium that satisfies both the educational mission of the institution, but also the community aspects that foster this very educational mission.
Chapter Four: ‘Quasi’ Systems and Due Process

The early 1900’s Progressive Movement saw the rise of services and laws aimed specifically at children, including the juvenile justice system. The establishment of the juvenile justice system hinged on the fact that children were a special class of citizens. As evident by other aspects of the Progressive agenda for children, progressives felt that children needed extra protections in the labor force, needed education, and needed to have actual childhoods. Thus, children were not to be exposed to the harsh realities of the adult justice system. Children could still be ‘saved’, and they could be rehabbed so that they could act as proper citizens once they completed sanctions for their illegal behaviors. The state in these cases acted as parens patriae. They were able to make paternal decisions as to the welfare of the child when the parents were negligible, similar to in loco parentis, in the way the school acted as parent to help protect the children (Feld, "Criminalizing Juvenile Justice” 148). Thus the juvenile justice system was born. During the same era disciplinary professionals were being introduced into universities, and university conduct processes became more complex with the introduction of these personnel. Thus, conduct codes took on similar quasi-legal characteristics as the juvenile justice system. In this chapter I will discuss the quasi-nature of the juvenile justice system, the incorporation of certain Constitutional freedoms into this system, and parallels between the juvenile justice system and university conduct systems.
Quasi Functions

Both juvenile justice systems, and student conduct systems are regarded as ‘quasi’ procedures. In the juvenile justice system this means that the proceedings and sanctions are meant to be non-adversarial and provide an alternative system to the actual legal system employed by the United States, thus it is quasi-criminal. Similarly, conduct systems have proceedings and sanctions that are considered non-adversarial, and fit the mission and goals of the university, thus this system is considered quasi-legal. The proceedings of the juvenile justice system were initially regarded as civil, “The civil nature of the proceedings fulfilled the reformers’ desire to remove children from the adult criminal system and allowed greater supervision of the children and greater flexibility in treatment (Feld, “Criminalizing Juvenile Justice” 149). This also meant that behaviors not necessarily considered illegal in the eyes of the law, could be considered ‘illegal’ in this quasi example. Thus behaviors such as smoking, sex, truancy, immorality, vagrancy, and other undesirable behaviors could be punished (Feld, “Criminalizing Juvenile Justice”149). Essentially any behaviors that angered the Progressives could be incorporated into this system as behaviors that needed sanctioning – much like universities today. For example, an 18 year old smoking in their bedroom at home does not warrant punishment by law, but would warrant punishment within the university. While a judge administers the proceedings of the juvenile justice system, they are assisted by social services personnel, clinicians, and probation officers (Feld, “Criminalizing Juvenile Justice”150). The idea was that the
judge would be more benevolent towards the children, especially after hearing a holistic opinion on the child’s upbringing.

Because the juvenile justice system chose to recognize children separate from adults, there was also a rejection of procedures founded in criminal prosecution. Additionally, this juvenile system, “… introduced a euphemistic vocabulary and a physically separate court building to avoid the stigma of adult prosecutions, and it modified courtroom procedures to eliminate any implication of criminal proceedings” (Feld, “Criminalizing Juvenile Justice” 151). Within juvenile systems proceedings are petitioned for the welfare of the child, instead of a criminal complaint. Youth in these systems were delinquent, rather than guilty. In an effort to make proceedings more personal, judges sat next to the children, and the ‘trial’ could occur for as long as necessary to aid the child and unearth the rehabilitation efforts necessary, regardless of the type of offense (Feld, “Criminalizing Juvenile Justice” 151). These actions were thought to be in the best interest of the child, and were utilized to make the process seem less like a punishment, and more like an intervention. Universities often employ intentional characteristics that made them separate from a criminal court. There is a separate room for proceedings, and conduct codes use vocabulary that does not carry legal connotations. For example, the ‘prosecution’ is known as the complainant, the jury is known as the ‘hearing board’, and ‘sanctions’ replace sentencing. Often, all involved parties sit around a conference table. There may even be tissues on the table to console the student in question.
Due Process Incorporation

Once explained, the quasi-criminal juvenile justice system appears to be benevolent, and beneficial to the youth going through the system. However, this quasi-criminality has highlighted the fact that while discrepancy can be used in positive ways, it can also be used in ways that harm children. For example, children going through the juvenile justice system are not afforded a jury at their trial. Thus the fairness and leniency once associated with the juvenile justice system may not be applicable if one receives a harsh judge, or a misunderstanding probation officer. Because of perceived inequality, there have been some juvenile cases that have made it to the Supreme Court. This would be impossible without a small due process revolution that occurred in the 1920’s and 1930’s. During this time, the Court interpreted the 14th Amendment to the U.S. Constitution to ensure that African Americans had equal footing in society. Some of the most notable cases during this time were Moore v. Dempsy (1923), Powell v. Alabama (1932), and Brown v. Mississippi (1936). These cases were focused on the fact that African Americans did not always receive fair trials in the segregated South (Feld, “The Politics of Race” 771). The 1960’s focused on similar race relations, and how they played out in Courts. This is when the larger due process revolution occurred. Under the Warren Court, there was a great expansion of due process. Gideon v. Wainwright (1963) requires that any person convicted of a crime has a right to counsel on local and federal levels, provided by the government. Miranda v. Arizona (1966) provided that those being apprehended are read their rights prior to being arrested. In Mapp v. Ohio (1961), the
Supreme Court held that evidence seized in illegal searches cannot be used by prosecutors. These cases paved the way and gave citizens a guarantee to their due process rights through incorporation. However, it was not until *In re Gault* in 1967, that juveniles began to see an extension of due process towards the juvenile justice system.

The contextualization of *In re Gault* demonstrates why the climate of the juvenile process was calling for change. Left wing politicians said the juvenile justice system was ‘discriminatory towards the poor and minorities’, as well as a coercive tool to control the youth (Feld, “The Politics of Race” 772). Conservatives felt that rehabilitative practices ‘coddled criminals’ and wanted a tough on crime attitude (Feld, “The Politics of Race” 772). Because of this, there was a great emphasis on consistency, uniformity, and proportionality (Feld, “The Politics of Race” 772). These guidelines of practice turned this quasi-criminal system into a system that more accurately matches the objectives of the regular justice system. Beyond this, it loses the ability for discretion to be used to help aid the individual going through the juvenile justice system. In *Kent v. United States* (1966), the Court, for the first time, realized that juveniles in the juvenile justice system were victims to an eroded political ideal. An excerpt from the majority opinion reads: “… that there may be grounds for concern that the child receives the worst of both worlds [in juvenile courts]: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”
In re Gault tackles the notion that children were not receiving proper procedural safeguards during their trials. In this case, a 15 year old boy named Gerald Gault had been arrested for making inappropriate telephone calls to his neighbor. Gault claims his neighbor was the one who made the call. Gault’s mother was unable to see him in the Detention Center the night he was arrested, and was notified of his arrest. Gault’s family was unable to see the arresting officer’s filed petition until two months later, at Gault’s hearing. In this hearing, there were no transcripts or recordings, nobody was sworn in prior to testifying, and only the judge quested Gault. He was held and then released a few days after. At the next trial, the woman who alleged Gault was not present, although Gault requested her to be present. Gault was put into a juvenile detention facility for 6 year, while the charge of lewd phone calls carries a maximum fine of $50 and two months in jail for adults. The report from the trial was not disclosed to the Gault family. Gault’s trial highlighted two deficiencies of the juvenile justice system: the theory and actuality of juvenile rehabilitation, and the discrepancy between procedural safeguards afforded to adults and children. The resulting ruling in Gault provided some foundational safeguards for juveniles: advance notice of charges, fair and impartial hearing, right to counsel, right to confront and cross-examine witnesses, and privilege against self-incrimination (Feld, “The Politics of Race” 773). After these safeguards were provided by law, the juvenile justice system was no longer classified as civil, or non-adversarial.

In re Gault marks the beginning of the Court taking decisive action towards improving the juvenile justice system. In re Winship (1970) established the standard of
proof as ‘beyond a reasonable doubt’ for juvenile cases, to protect these juveniles from abuse of power (Feld, “The Politics of Race” 774). In *Breed v. Jones* (1975), the Court rules that juveniles cannot be re-prosecuted as an adult resulting in double jeopardy. While both of these cases are viewed as ‘wins’ for the juvenile justice system, not all cases provided safeguards. In *McKeiver v. Pennsylvania* (1971), the Court had ruled that juvenile trials did not require a trial by jury. This was because the satisfaction for due process is met by ‘accurate fact finding’ (Feld, “The Politics of Race” 774). Many state courts also felt that having a jury would, “… destroy the unique benefits derived from juvenile hearings”. It was clear the Court pivoted on the values and mission of the juvenile justice system as it went from, “… “real needs” to “criminal deeds” and shifted the focus of delinquency proceedings from a social welfare inquiry into a quasi-criminal prosecution” (Feld, “The Politics of Race” 775). This pivot eroded the hopeful Progressives’ message, and made it easier to impose punitive style punishments for juveniles.

**Remove the Juvenile System?**

As due process became incorporated into juvenile justice systems, many started to see the differences between the adult and juvenile systems as ‘narrow’. Because of this, there have been recent inquiries into whether the juvenile justice system should be abolished or merged with the adult system. There are numerous similarities between both systems worth noting. Both require the issuing of Miranda Rights when both children and adults are taken into custody. There are the same rules for searches and pretrial. Both systems face heightened plea bargaining as the result of backlog in
courts. Beyond a reasonable doubt is the burden of proof in both systems, and exclusionary rules are applied equally in both systems. Additionally, in both systems, there is a separate sentencing phase, and a phase for determination of innocence and guilt (Dawson 139-40). Additionally, there are similarities in the language used in both systems. While there are often differential terms, they each apply to the same type of process. Thus the two systems are already strikingly similar, yet there is still a discrepancy of constitutional protections for the juvenile.

Many make the case for abolition for the juvenile justice system on the basis of resource savings. Currently, in some parts of the county, both systems are already merged because of lack of resources, specifically in rural areas. Having one system would allow for integration of resources, and the elimination of duplicate staff positions (i.e. auditors, receptionists, separate parole officers) (Dawson 142). There is also ‘frictional’ costs to consider. One such cost is transfer costs, when a juvenile is moved into adult court. While this is rare, it takes an enormous amount of resources to do. Additionally, having one system eliminates the uncertainty about the age of the detained. Again, it is a rare instance that the police cannot identify the age of someone detained, but lack of reliable documentation does occur. Also, there is the case for continuity of service. Once a juvenile enters the adult system, their record is wiped clean. This fresh start may be valuable for some, but for others, especially repeat offenders, there could be substantial harm done to the community (Dawson 142-44). The idea of abolishing the juvenile justice system sheds light on the complexity of ‘quasi’ systems. Quasi-legal systems, such as the university conduct system, must
incorporate certain due process rights into their proceedings. As this principle is applied to these quasi-systems, they lose their luster, and become strikingly similar to actual legal systems. But in this process, they also lose the capability of providing room for positive discrepancy, in order to rehab a juvenile instead of punish them. It could be said if the juvenile justice system was actually fulfilling their goals, the emphasis on a fairer process may not be necessary. But the issue with these ‘civil’ systems is their great ability to be abused or overtaken by bureaucracy, rendering them useless.

University Due Process

Like the juvenile justice system, the quasi-legal university conduct system also provides some minimal due process standards. Initially, university conduct systems functioned much like juvenile justice systems. There was an emphasis on rehabilitation, and the educational philosophy of discipline. Within the scope of due process, there are two areas to examine, procedural and substantive due process. Procedural due process refers to the rules and standards necessary to carry out an accusatory proceeding. Substantive due process concerns itself with how the state and federal government regulates the fundamental rights of citizens (“FIRE’s Guide to Due Process”). Thus, university conduct systems may see changes pertaining both types of due process. Within the university system, the due process rights that must be afforded to students are as follows:
• The right to have your case heard under regular procedures used for all similar cases.
• The right to receive notice of the charges against you.
• The right to hear a description of the university’s evidence against you.
• The right to present your side of the story to an impartial panel (“FIRE’s Guide to Due Process).

The precedent for due process in university conduct systems originates from the Supreme Court’s decision in Dixon v. Alabama (1961). In Dixon, the Court established minimal due process standards, ruling that students must have notice of the specific conduct violations, and a hearing for the accused student to be heard.

After Dixon, there have been a plethora of cases that incorporate due process into conduct systems at universities. In Goss v. Lopez (1975), the Supreme Court implicated that students have a property or liberty interest stemming from the fact that they pay tuition to go to that particular institution. Therefore, there is valid 14th Amendment claims. This case established that the university must provide notice is the student is up for suspension or expulsion (Rohrbacher 97). Donhue v. Baker (1997) explored whether or not the accused are able to cross-examine witnesses. A New York State District Court ruled that cross-examination was essential to establish the credibility of the accuser in such matters. Courts have also commented on the idea of ‘arbitrary and capricious’. In Greenberg v. the State of New York, University at Albany (2003), a state court ruled that a director in a student conduct office could not change the decision of a disciplinary hearing panel. To do so would fall under the arbitrary
and capricious standard, thus making the student’s hearing irrelevant. While courts have often commented on procedural and substantive due process in higher education, they generally choose not to comment academic policies and behaviors. In Regents of the University of Michigan v. Ewing (1985), the Supreme Court ruled that the academic standards and guidelines on behalf of the university in an academic suspension case were constitutional. In this sense, the Court realized that behavioral infractions, and academic infractions constituted different levels of protection. Behavioral infractions deal directly with the idea of a liberty interest. However, academic interests intersect with academic autonomy, and the idea that an academic community has the right to shape their own standards.

Similarly to the juvenile justice system, the quasi aspects and limited due process of university judiciary systems have also been criticized. One such criticism stems from the property and liberty interest discussed earlier. While some courts have said there is no constitutional right to higher education, other courts have said that attaining this education is a fundamental aspect of their liberty. Because of this constitutionality, there is the opinion that when a student compromises their access to higher education, the resulting hearing should provide full due process. Especially critical to this is the burden of proof. Most university conduct systems utilize ‘preponderance of evidence’ as opposed to ‘beyond a reasonable doubt’. If the emphasis is placed on a student’s right to liberty, the burden of proof may need to be higher. Another criticism of university judiciary systems comments on the inherent imbalance of power throughout proceedings. While the student is afforded ‘fairness’,
they are often pitted against the well-resourced, and powerful institution (Rohrbacher 99). Because of this, there are calls to allow for a larger role of student conduct advisors, and even the right to allow attorneys a designated place in the proceedings. There is also the call to allow all witnesses, and both parties to be present at the initial first hearing. This is important because students often feel ‘pitted’ against the institution from the beginning, and thus they do not feel that their proceedings are fair. Allowing the third-party to act as the moderator in this instance would help the student to feel like their process was unbiased, seeing as the institution (and person with the power), is both the complainant and the one leading the initial hearing. Another way to remedy this would be to provide and allow students a conduct-trained advocate from the beginning (Rohrbacher 99).

Case Studies

In hearing a conduct case, the university has to walk the tightrope between providing rights for the individual and rights for the community. The limited due process standard for universities ensures that individuals have some guaranteed rights. Full due process rights, as provided in the adult justice system, are not afforded students in university conduct systems. This is because the biggest ‘loss’ this student could face is loss of the privilege of education, not loss of freedom. However, the tightrope walk becomes increasingly more difficult when a university is handling a sexual assault case. In these cases, there is cause and concern for the community. If a student is a ‘predator’, or does not understand the concept of consent, they can be a threat to the community. Additionally, there is concern for the victim’s rights, privacy,
and well-being. At the same time, the accused student is entitled to rights throughout the hearing, seeing as being found in violation can drastically change their life. This system becomes further complicated because the burden of proof is ‘preponderance of evidence’. Many university sexual assault cases include evidence that is ‘gray’, and not necessarily black and white. For example, consent is difficult to establish when both parties are drunk, incapacitation standards are often undetailed, and text messages the next day complicate matters. This gray matter usually means that criminal charges are difficult to file, and thus the university conduct system is perceived to be the more effective way to achieve justice. However, the recent Title IX tidal wave demonstrates the complexity of university conduct systems, and the tension between students and universities when the expectations are legal, but the reality is quasi-legal. When the Office of Civil Rights Compliance released their public list of universities mishandling sexual assaults in 2014, the result was universities quickly adjudicated their sexual assault cases. This was partly to show their responsibility toward the victims, and to avoid other negative publicity from Title IX claims. But in actuality, many universities rushed the due process standards of these cases, and now some face lawsuits from the accused that feel they didn’t receive a fair hearing.

One such case arrives from San Diego State University. In this case, a student, John Doe, was suspended from the university for an act of sexual assault. The local prosecutor declined to file charges on the basis that there was not enough evidence to file the corresponding charges considering the act. KPBS, a well-known news outlet in the San Diego area, did an interview with John Doe’s attorney in April of 2015. The
attorney said they are suing the university because they did not apply proper due process in the hearings of John Doe. Doe was found guilty of violating Title IX, suspended, and denied access to the information involving the investigation before the hearing was even over (Cavanaugh, Sharma, Will). The attorney claims the university failed to provide Doe, or his attorney, with any information that could be used to clear his name. They did not provide any reports, or witness statements after they were promised these pieces of evidence. Shortly after they were promised this evidence, this promise was retracted via the university. Even so, the report only contains a summary of the accusations, the finding of facts, and the conclusions. This report is entered as evidence into the hearing. Doe’s attorney claims that this is unfair because he cannot question the facts before they are entered into evidence (Cavanaugh, Sharma, Will). Thus John Doe is claiming he should have a right to question the evidence or the report because of the witness testimony held within that report, although there is no cross-examination of evidence afforded in the student process. In addition to the investigation, the university sent out a mass email naming Doe, calling him a predator and listing the allegations against him.

In an Executive Order issued by the San Diego State University, revised on June 23rd 2015, there is an outline of the students’ due process rights when it comes to campus conduct. The executive order states the most basic due process rights: right to an advisor (even an attorney is sexual misconduct cases), notice of charges, and an impartial hearing. The executive order states that the complainant and accused both have opportunities to present witnesses, “The Complainant and the Respondent shall
have equal opportunities to present relevant witnesses and evidence in connection with
the investigation. Upon inquiry, the Complainant and Respondent shall be advised of
the status of the investigation” (White). The biggest contested item in Doe’s case is
the investigation report. San Diego State University provides the following statement
about the investigation report, “Within the investigation period stated above, the
Investigator shall prepare an investigation report. The report shall include a summary
of the allegations, the investigation process, the Preponderance of the Evidence
standard, a detailed description of the evidence considered, and appropriate findings.
Relevant exhibits and documents, if any, shall be attached to the written report. The
report shall be promptly provided to the DHR Administrator or Title IX Coordinator,
if applicable. The DHR Administrator or Title IX Coordinator shall review the
investigation report to assure compliance with this Executive Order before proceeding
further” (White). It is evident that there is the ability to have discretion affect the
investigation report. The summary itself has the ability to paint the picture in various
brushstrokes, which can fit the needs of the institution in these scenarios. Thus, the
inability to question this report as it is considered evidence can hinder a proper due
process ‘check’ on the institution on behalf of the accused.

In the aftermath, the university decided to drop the charges against Doe, seeing as
there was not enough evidence. This is inevitably after Doe’s attorney put the heat on
the university and their hearing practices. The coverage surrounding the story was
mainly local, although there was some minimal national coverage. After the charges
were dropped against Doe, fliers started to appear on campus stating: “You Could Be
Expelled Even If She Consented” (Berteaux, Waletzko). The school paper, *The Daily Aztec*, then sparked discussion on the idea of affirmative consent, which was brought to light during Doe’s case. They even commented on the limited due process afforded in campus hearings: “… unbiased juries, impartial judges, representation by counsel, and restrictions on unreliable evidence such as heresy. While most college campus Title IX policies do allow for lawyers into sexual-misconduct hearings, they do not permit them to speak. In most cases, students are left defending themselves in a hearing” (Berteaux, Waletzko). Doe’s attorney commented that he believes schools are rushing the Title IX process, “[John Doe] was, I think, the first and most prominent person that they caught when they threw out their net,” (Warth). This case demonstrates the university’s commitment to the community by their campus-wide email naming Doe, and the accusations. Their lack of due process shows how quickly they were willing to react to community frustrations and needs. However, the school’s choice to back-down demonstrates their response in knowing they did not provide due process. Here we see a tension on behalf of the university, which ultimately hurts both the individual and community when handled poorly. There starts to be a loss of trust in the system when due process is not properly attained. Witnesses may not want to come forward if they realize the accused will not be charged when the university mishandles investigations. Likewise, the accused may be falsely sanctioned if they cannot afford an attorney to help ensure they are receiving due process. Doe says he plans to sue San Diego State.
The next case comes from the University of South Florida. A student at the university was expelled for not responding to university emails summoning him for a sexual assault hearing. He deleted them because he believed them to be spam, and he did not recognize the name of the sender. This John Doe said the university violated his rights under Title IX, and violated his due process rights. “Doe, a military veteran, claimed the school violated his due process rights because he wasn't adequately notified that he was facing sexual assault charges. Doe said he received two "suspicious" emails from Chiqui Aldana, an administrative specialist with USF's student affairs office -- but he deleted them because he thought they were spam” (Kingkade, “USF Student”). The first email came April 2nd 2012, and notified Doe of three student conduct charges against him. It instructed him to arrange a meeting with the hearing officer within a week. After Doe failed to comply with the request, another email was sent May 2nd and explained that failure to comply with the request would mean that the university would presume him to be guilty. According to court documents the first email was titled: “USF Rights & Responsibilities No Contact Letter - DO NOT DELETE” and the second email was titled, “USF Rights & Responsibilities No Contact Letter - DO NOT DELETE”. Once Doe received a phone call from a university official discussing his suspension, he asked that it be lifted because he felt he did not receive proper warning (Kingkade, “USF Student”). He took the university to court under Title IX, citing that males are often found guilty regardless of the evidence in sexual assault cases. Thus, Doe felt the process was unfair, and that it started with the component of notice on behalf of the university.
The University of South Florida has a comprehensive Sexual Harassment Guide that outlines policies and procedures on behalf of the school for both the complainant and the respondent (the accused). Under the section titled ‘Review Process’ the university states that, “When a complaint is filed with a USF System designated office, the office will review the complaint and provide an appropriate response which may include counseling, mediation, and/or referral for disciplinary action (up to and including termination from employment and/or expulsion from the USF System). Additionally, the reviewing office will report any conduct that may be criminal in nature to the appropriate law enforcement entities” (“Title IX/Sexual Harassment Guide”). Thus, the first email to Doe was the result of ‘referral for disciplinary action’. This leads into the provision of the University of South Florida’s code titled ‘Student Conduct Process and Proceedings’. Under this section there is the appointment letter that states: “A written correspondence to a student, which states that a referral has been made and informs the student of an opportunity for a meeting and any interim temporary restriction or sanction if appropriate. If the student chooses not to attend, the Conduct Officer reserves the right to have an In Absentia Review, at which point a disposition letter will be sent to a student” (“Student Conduct Codes”). The letter sent to the student outlines all hearing and appeal rights. Finally, one of the most relevant sections to this case is the ‘Failure to Appear’ provision, “Failure to Appear - If a student against whom charges have been made fails to appear for any proceeding, the matter may be resolved in his/her absence” (“Student Conduct Codes”).
While John Doe filed under Title IX, his case rests on the due process standard of ‘the right to receive notice of the charges against you’. Once the case was brought to court, the court ultimately denied his claims. They noted that the accused did not exhaust all of his options, nor pursue an appeal, which is afforded to him through the student conduct process. Thus the state did provide adequate due process (Doe). As for the Title IX Claims, the judge said the following, “Based on the unique facts alleged in this case, where Plaintiff admittedly deleted the e-mails informing him of the charges filed against him and USF followed its procedures (as outlined in the Code of Conduct) when it accepted his silence as an agreement with USF’s findings, it is doubtful that Plaintiff can allege a viable Title IX case” (Doe). In this case, John Doe seeks a more legalistic process than the one the university affords. The method of notification on behalf of the university is indicative of the quasi-legality of their conduct system. John Doe was not ‘served’, he was emailed. He sought an appeal via the justice system, but denied the appeal procedure of the conduct code. It is clear his expectations are that his fundamental due process rights be outlined more clearly as they are in the current justice system. Ultimately the judge sides with the university, because the university’s code did its main job in satisfying limited due process. Thus, it is clear that the court of law recognizes quasi-legality, and notes the distinction between legal and quasi-legal systems. The university followed their procedure thoroughly, and stuck with their code of conduct. Yet, students do not fully understand this process and its mission towards the community. This shows the struggle between the individual student seeking a more legalistic approach towards rights, and the
university maintaining its mission towards a non-adversarial system for the greater good of the community.

The final case stems from the University of Michigan. John Doe and a young woman had sexual intercourse in Doe’s residence hall room. Five months after the encounter, the woman who was with Doe made a formal complaint to the Office of Institutional equity (OIE) that Doe engaged in sexual misconduct with her. Shortly after this meeting, Doe received a phone call from a university official saying a charge had been filed against him, and that she would like to speak with Doe via Skype. In this conversation Doe admitted to a sexual encounter with the woman that filed the complaint, but claimed it was consensual (Counts). During the Skype interview, Doe asked if he could speak to an attorney before continuing. He was told that the investigation would still continue without him if he chose not to answer the questions. This was Doe’s only interaction with university officials throughout this process. Doe never received the formal charges in writing, was unable to question his accuser, was unable to have access to the summary of evidence from his Skype conversation, and he was never told the names of the witnesses involved in the hearing (Yoffe). These are the essential and minimal due process standards provided in university conduct systems in compliance with the law. Regardless, Doe was found in violation, and his civil suit towards the university claims the decision was founded on the fact that he ‘regretted’ the encounter, and that the woman was too intoxicated to give consent.

The Student Code of Conduct at the University of Michigan provides the accused student of several rights and protections. The specifics of these rights and protections
can be found under the section for Parents, Family, Attorneys, and Friends. Among the rights essential to this case are the following:

- Written notice of allegations against a student.
- Sufficient time to prepare for an arbitration or other meeting.
- Knowledge of the names of witnesses who may provide information.
- Access, in advance, to the information that may be considered during an arbitration. Note that this information may be redacted to protect the privacy rights of individuals not directly involved in the resolution process.
- The opportunity to present verbal or written information in their own support, including information from witnesses.
- The opportunity to pose questions to the RC, complainant and any witnesses.
- The opportunity to hear / read all information presented at an arbitration.
- In an arbitration, all students are presumed not responsible unless clear and convincing evidence is presented that a violation of the Statement has occurred (“FAQ’s for Parents”)

The code also provides that students have the right to be protected from ‘capricious decision-making by the University’. The student conduct code at the University of Michigan provides all the essential elements of due process, and does so in a fairly accessible way. These codes suggest a devotion on behalf of the university towards due process, and fair procedure. They even tout, “… an enduring commitment to provide students with a balanced and fair system of dispute resolution” (“FAQs for Parents”). The reality is that the University of Michigan is being investigated federally
via the U.S. Department of Education for Title IX infractions. Thus the university is forced to react quickly in favor of the community in these instances, in effort to avoid further infractions and investigations. Their action hinges on the political heat they are receiving.

In 2015, the University of Michigan vacated its finding against Doe. In response to the lack of due process, Doe filed a Title IX claim against the university, and claimed that they did not provide due process to him during his hearing. The Court threw out the Title IX claim, but allowed the litigation to continue for Doe regarding the due process claim (Kingkade, “Students Accused”). Reactions to this case mirror the critics of the juvenile justice system in that many are calling for universities to abandon their quasi-legal efforts, or simply allow sexual assault cases to be carried out solely by the current justice system. Emily Yoffe, writer for Slate magazine advocates for this type of disciplinary action, “If a young man has committed felony sexual assault, simply kicking him out of school is an insufficient punishment and does nothing to keep society safe. Felonies belong in the criminal justice system” (Yoffe). Yoffe continues to explain that university conduct administrators are ‘ill-suited’ to handle these sexual assault cases. Again, there is the legalistic expectation of this quasi-legal system. However, Yoffe makes the point that reducing the quasi-legality may actually provide better rights to the community. Thus, full due process rights and a legal trial would be both beneficial for the accused, and safer for the community. The risks associated with quasi-legal conduct systems do not benefit either party from this perspective. In Doe’s case, where there is an egregious lack of due process, the
university failed to protect the accused student, and thus put the community at risk. Cases such as this put quasi-legality at risk, and can harm the educational and community-based philosophy of the university conduct code.

Quasi functionality allows for minimal due process standards for those who are accused of breaking laws, or even rules. For juveniles, quasi-criminality can be harmful when trials appear to have legalistic outcomes, but minimal procedural safeguards. The interest in rehabilitating the delinquent is lost. While university due process cases may have legalistic expectations, their outcomes often fall short of providing due process. The failure to provide minimal due process harms the individual student, puts the greater community at risk, and instills a sense of mistrust in the community. Because of these low due process standards, and the resulting faltering outcomes, there have been calls to end quasi-legality. When complex quasi-legal systems are not providing maximum support, or fulfilling their mission, they are often failing the very individuals they are meant to help.
Conclusion

When a student decides to enroll at a university, the student usually acknowledges that they have to sign various contracts with the university in order to schedules classes and live on campus. However, what most students may not realize is that within these contracts is a host of rules they must follow in order to be exclusively involved in that particular university community. These rules manifest themselves in housing handbooks, honor codes, scholarships, and even within a field of study. These university created rules are not legal, if you break them you do not go to jail. However breaking these rules can have serious implications for the student that attends that university. In this we see the true struggle between a student’s expectations and the university’s expectations. When in signing contracts, students are consenting to the ‘laws’ and ‘ways’ of the university, although students often have the expectation of freedom and liberty as guaranteed to them within society. The mission of the university is to create and maintain an environment suitable for education and personal growth, and it is their expectation that students act accordingly. While universities and students are able to foster harmonious relationships the majority of the time, their expectations and realities can be a point of contention.

The student’s expectations and the university’s expectations have roots in two political philosophies: liberalism and communitarianism. Liberalism focuses on the individual and their rights in society. Governing documents such as the Bill of Rights is a perfect example of how liberalism functions in society. These students, who are
also citizens, have it engrained in them that they are guaranteed these rights – especially freedom of expression as well as due process. Communitarianism focuses on the idea that citizens give up a portion of individual rights to live harmoniously in society. While not purely communitarian, universities do have communitarian tenets in order to create a desirable environment that enables them to achieve their mission. Universities seek to blend liberalism and communitarianism in order to balance academic freedom, and the freedom of students, but also complete their mission within their smaller community. Thus students may have some of their rights ‘limited’ in order to preserve the university’s mission. Freedom of expression is often limited to ensure that students are not hostile toward each other, and to encourage a safe living space. Due process rights are limited because universities are not giving punishments by law, and they do so in order to preserve the educational philosophy of conduct within the university community.

Communitarian tenets thrive within a university conduct system because this system is quasi-legal. The ‘limited’ rights given to students at university are only possible because they are not legally binding. Quasi-legality gives the university tremendous discretion in allowing certain behaviors, and punishing others. This discretion enables the university to carry-out their educational philosophy as they seek to dictate behavior. If a citizen is caught consuming alcohol underage, they could face fines or even probation. But at a university, this individual may have to only pay a fine and then undergo course that educates the student on the dangers of alcohol consumption. Thus, there is a clear difference in the sanctioned legal system, and
quasi-legal system. However, quasi-legality faces its fair share of issues. As seen through the parallel of the juvenile courts, conduct systems are similarly seeing a rapid increase of individuals going through their systems. Thus, the few rights provided to these individuals are more likely to be breached or neglected. Furthermore, the more egregious the accusation, the more necessary it is to have full due process protections. Quasi-legality enables the university to create and direct a desirable community, however, this same style of legality allows for discretionary harm of the individuals within this particular community.

The mission of the university is to foster a sense of engagement and learning, thus ultimately it may be in the best interest of the university to limit the speech of students. When it comes to speech, and especially the case studies in this thesis, it is clear that assertion of freedom of expression can appear to be harmful to the community. It could disallow individuals to feel safe, or learn in an environment where they feel accepted. The educational disciplinary sanction of university conduct codes, provided through quasi-legality, allows for remedies to free speech concerns in ways that are non-legal, and promote positive university relationships. This is not to say that all speech, or critical speech should be eliminated. Eliminating any type of contentious speech puts the university in grave danger of hindering academic freedom, and would be a disservice to the students as they attempt to learn about the world around them. There is a clear difference between a racist chant, and a critical comment about the culture of a group of people. Both could be viewed as negative, but one prompts conversation helpful to the community, and one makes members of the
community feel unwanted. The case study involving the swastika is a perfect example of contentious speech that was meant to drive conversation. While this speech makes the community uncomfortable, it also prompts a discussion on political propaganda and culture. *Rosenberger* demonstrates the university’s attempt to provide a non-biased learning environment at a public institution. But the Court’s decision shows clearly that some expression should be enabled because it is not offensive. Freedom of expression cases are of special interest to universities because they are in the unique position to help or hinder university missions of safety, education, and academic discourse. Thus, the university has significant interest in regulating speech, and using it’s quasi-legality to examine how student are using this right within the university community.

While the university has a valid interest in using conduct systems to examine speech, it may not have such an interest when it comes to matters of sexual assault. The quasi-legality of university conduct systems provides limited due process, as opposed to limited speech. The procedural limits that universities employ does not always live up to the standard of fairness they are supposed to. Each of the case studies has shown that the university has struggled with meeting these limits. Some cases are definitely more egregious than others, but the Title IX tidal wave has demonstrated that quasi-legality in due process is creating just as many issues as it seeks to solve. The university has a duty to protect its students from sexual predators and those who could commit harm. Faulty due process can mean that survivors are unlikely to come forward if assaulted because they fear that the accused can sue the
university on procedural defect and gain access back into the university, or prolong the proceedings. But more than this, those unfairly removed from the university community are losing a valid property interest and years of investment. While earning a degree is considered a privilege, and not a right, the student accused of sexual assault or sexual misconduct has a significant amount to lose if they are removed from the community, and thus the university should weigh this responsibility carefully. Much like juvenile justice system reform, university conduct systems may be better off allowing sexual assault cases to be handled exclusively within the legal system. In this case, the difficulties faced by the university are different from those of free speech. In speech cases, the university is able to use educational discipline and is able to remedy the situation even through their limitations. But in sexual assault cases the struggles of universities can jeopardize the actual safety of the community, harm survivors, harm the accused, and create a stigma that is difficult to erase. Thus, there is vital interest in reforming these procedures for all parties, as it seems that universities may not be equipped to handle the complexity of these cases.

It should be noted that although universities may not be equipped to handle full-blown sexual assault cases, their quasi-legal conduct systems might still be able to handle other sexual misconduct cases. For example, mild sexual harassment cases brought to the attention of the university may actually function better within the university conduct system. The system is designed so that the accused will receive educational disciplinary action, thus this type of education may be more effective in helping correct behaviors than sending someone through the courts. Additionally,
offenses such as this would likely be met with lower sanctioning than a full-blown sexual assault case, thus the individual student has less to lose. Furthermore, sending every single sexual misconduct case to the local police department will overburden the department and contribute to an even larger backlog on cases. However, since each case is vastly different, it may be difficult to decipher the level of ‘severity’ that guarantees the case functions solely in one system or the other. Creating these guidelines may be difficult and setting the standard of a ‘case by case’ basis could also lead to harmful discretion in these decision making practices by institutions.

The conclusions I have drawn are based on the limited data I was able to acquire. In order to get true sense of how universities handle free speech and due process complaints and cases, it is essential for these universities to start keeping statistics and release these statistics. These statistics can be general, and in no way should violate FERPA. However, it is essential for universities to start releasing this statistical analysis. It is simple to pick apart a university’s conduct code to see which pieces are too discretionary, and which pieces are limiting, but this research needs another dimension in realizing how often these aspects of the code are utilized, and what their general outcomes are. Students are saying their speech is limited, thus we must know if this is a trend in higher education, or if these are isolated incidents. From there, universities can modify codes based off that information. When it comes to sexual assault and misconduct, universities typically keep statistics, but in the future it would be essential to know how many complaints of unfair processes there are, and the general nature of these complaints. When it comes to this particular issue, universities
will likely be hesitant to release statistics. A statistical analysis would enable me to
add the missing dimension to this project. Utilizing statistics I would be able to study
these concepts more in depth, and pinpoint the most problematic aspect of university
codes. From here, we would be able to provide better solutions, and more effectively
weigh how universities are managing individual and community rights. Thus I could
create a policy analysis that could lead to real change within university conduct
systems.
<table>
<thead>
<tr>
<th><strong>Actors</strong></th>
<th><strong>Records</strong></th>
<th><strong>Specific Student Rights</strong></th>
<th><strong>Hearing Board Procedure</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The complainant, accused student, and advisor are entitled to stay throughout the duration of the hearing, excluding periods of deliberation. The admission of others into the hearing is at the discretion of those in charge of the hearing.</td>
<td>Records, exhibits, and statements can be included as information for consideration is allowed by the conduct board chairperson.</td>
<td>The accused student can hear and question all presented information.</td>
<td>The conduct board shall determine if the accused student is in violation of the student code of conduct by a majority vote (and shall be done for each charge the student may face). The ‘burden of proof’ used to make this decision is: more likely than not they committed the behavior that put them in violation.</td>
</tr>
<tr>
<td>The Student Conduct Administrator has the ability to decide for a joint hearing or a separate hearing for incidents involving several people.</td>
<td>Criminal court procedure, rules, process that are utilized in legal courts do not apply to this process.</td>
<td>The accused student can challenge the objectivity of the board or hearing officer.</td>
<td>Procedural questions are subject to the final decision of the chairperson of the conduct board.</td>
</tr>
<tr>
<td>The complainant and accused student are able to have advisors from the university community, and in some cases lawyers. A student is responsible for presenting information on their behalf, and the advisor is unable to do this for them.</td>
<td>There shall be tape recordings of student conduct board hearings, excluding deliberation periods.</td>
<td>The students in hearings or investigations are entitled to confidentiality provided by FERPA.</td>
<td>If a student fails to show for their hearing, and has received notice of this hearing, the hearing will continue to take place without the student.</td>
</tr>
<tr>
<td>The complainant and accused student are able to bring witnesses into the hearing. The witnesses with answer questions from the conduct board, and the complainant and accused students.</td>
<td></td>
<td>The accused student can decline to make self-incriminating remarks about their conduct or experience.</td>
<td>The student conduct board may make special accommodations for hearings, while not compromising the hearing process itself.</td>
</tr>
</tbody>
</table>

(Caruso, Travelstead) (Lancaster, Waryold)
Bibliography


"The University of Oklahoma Student Rights and Responsibilities Code 2015-2016."


Court Cases

*Board of Regents of the University of Wisconsin System v. Southworth* 529 U.S. 217 (2000)

*Dixon v. Alabama* 294 F. 2d 150 (5th Cir. 1961)


*Hamilton v. Regents of the University of California* 293 U.S. 245 (1934)

*In re Gault* 387 U.S. 1 (1967)

*Kent v. United States* 383 US 541 (1966)


*Papish v. Board of Curators* 410 U.S. 667 (1973)

*Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995)

*Univ. of Michigan v. Ewing* 474 U.S. 214 (1985)

*Waugh v. Mississippi University* 237 U.S. 589 (1915)
