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Forming a More Perfect Honor System: Why the Trend of Over-Legalizing Academic Honor Codes Must be Reversed

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Forming a More Perfect Honor System: Why the Trend of Over-Legalizing Academic Honor Codes Must be Reversed

Cover Page Footnote

Company TAC ('Teach, Advise, Coach') Officer, The Citadel, the Military College of South Carolina. The author is also a retired Army Judge Advocate and former Assistant Professor in the Department of Law at the United States Military Academy. The views expressed here are the author's personal views and do not necessarily reflect those of the Department of Defense, the United States Army, the United States Military Academy, The Citadel, or any other department or agency of the United States Government or the state of South Carolina.

FORMING A MORE PERFECT HONOR SYSTEM: WHY THE TREND OF OVER-LEGALIZING ACADEMIC HONOR SYSTEMS MUST BE REVERSED

Christopher M. Hartley⁺

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The prominent honor systems at our nation's colleges and universities have evolved significantly since their origin. While chronicling the honor system at the United States Military Academy at West Point, Lewis Sorley wrote in *Honor Bright*, “[a]s in any system or proceeding in which values in conflict are mediated, some desirable attributes are given up or attenuated in order to attain others.”¹ He speaks, of course, about the increased focus on the due process rights of students who attend a school with such a revered honor system. Indeed, these institutions have attempted to correct both the Fifth and Fourteenth Amendment honor system deficiencies that may have existed in earlier years by injecting legal-oriented processes aimed squarely at protecting those rights.² Sorley continues, “two aspects [of the modern West Point honor system] stand out: swiftness has given way to what many might view as ponderousness, or at least burdensome and time-consuming process; and helplessness of the accused has been replaced by a robust set of rights, rules, procedures, representation, and appellate judgment (Superintendent’s discretion).”³

The second of those attributes is undeniably a noble goal: educational institutions with austere but respected honor codes take measures to align their honor systems with the due process requirements of the Constitution and as they move away from previous practices when due process protections in the systems were more often subordinated.⁴ Despite how noble that goal is, however, the shift to more due process protection has precipitated undesired results that frustrate both the intent and spirit of the codes, as well as infringe upon other aspects of individual liberty.⁵ Further, some have observed a correlating shift from student focus on compliance with honor codes to a fixation on exoneration, given the increased opportunity for fighting and defeating honor allegations using legal recourses.⁶ While more process undeniably ensures more protection of students’ rights, it also deprives the accused of a swift resolution, a less than desired outcome for all parties involved.⁷

This article proposes that there has been an “overcorrection” of due process in college and university honor systems such that there is now simply too much process. More importantly, this article urges educational institutions to take a close look at their honor processes to detect and excise such procedural excesses. While this article does not endeavor to identify the specific processes where scale-backs could be made, it reviews relevant case history and suggests schools

1. LEWIS SORLEY, *HONOR BRIGHT: HISTORY AND ORIGINS OF THE WEST POINT HONOR CODE AND SYSTEM* 143 (McGraw-Hill Learning Sols. 2009).

2. *Id.* at 114–15.

3. *Id.* at 143.

4. *Id.* at 114.

5. *See id.* at 140, 143.

6. LANCE BETROS, *CARVED FROM GRANITE: WEST POINT SINCE 1902* 297 (Tex. A&M Univ. Press, 2012).

7. SORLEY, *supra* note 1, at 143.

have latitude to reverse the trend of over-legalized honor systems. Further, this article considers how the negative byproducts of these over-processed honor systems conflict with the purpose of their underlying codes. These trends of continually adding legal protections to our schools' honor systems will only escalate in our increasingly litigious society. For these reasons, this article is a clarion call for institutional introspection and change: the time is nigh for reversing course and ensuring honor systems are legally efficient rather than legally oversaturated.

I. HONOR CODES: TRADITION, PURPOSE, AND CHANGE

A. *Tradition: To Ourselves and Our Posterity*

Certain schools are particularly well-known for their honor codes. These institutions include the College of William and Mary, Brigham Young University, and the University of Virginia.⁸ Of course, such discussions will also likely include the honor systems at our nation's service academies and senior military colleges such as the United States Military Academy, the United States Naval Academy, the United States Air Force Academy in the Virginia Military Institute, and the Citadel.⁹ Virtually all of the renowned honor codes at these schools champion tradition as a key pillar of their endurance.¹⁰ The traditional argument, as these schools may contend, is that their institution's prestige is largely derived from the longevity of their unbending honor codes.

B. *Purpose: To Bind by Oath or Affirmation*

While there may not be a universal aim or goal of these institutions, one purpose of honor codes is to provide the schools with a mechanism to ensure a

8. See, e.g., Rudy Abramson, *A Matter of Honor: Cheating. Lying. Stealing. With these Kind of Scandals Dogging College Campuses, it Would Seem Integrity has Fallen from Favor. But in Reality, Codes of Conduct are on the Rise—And It's Often the Students who are Pushing Them*, L.A. TIMES (Apr. 3, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-04-03-vw-41646-story.html>; Samuel T. Jay, *A Higher Power Produces Greater Problems: How Religious Honor Codes and Religious Schools Exacerbate Campus Sexual Assault*, 25 AM. U. J. GENDER SOC. POLY & L. 179, 185–86 (2017).

9. See Abramson, *supra* note 8.

10. See, e.g., *The Honor Code & Honor Councils*, COLL. OF WILLIAM & MARY, <https://www.wm.edu/offices/deanofstudents/services/communityvalues/honorcodeandcouncils/honorcode/index.php> (last visited Jan. 20, 2021) (“Among the most significant traditions of William & Mary is its student-administered honor system. The essence of the honor system is individual responsibility. We entrust students to maintain the Code and adjudicate matters involving alleged violations of the Code. The Honor Code is an enduring tradition at the University with documented history that originates as far back as 1736. Today, students administer the Honor pledge to each incoming student and educate faculty and administration on the relevance of the Code and its application to students' lives at the University. Students administer the Code through six Honor Councils and the Council of Chairs.”).

minimum standard of ethical behavior within their student bodies.¹¹ Another could be to ensure graduates of these institutions have inculcated a baseline code of ethics for their postgraduate entry into professions that value those attributes.¹² Yet another purpose is to simply prolong a virtuous historical characteristic of the institution which, in theory, will fuel *esprit de corps* to help drive honorable compliance. This, in turn, will help facilitate the two previously mentioned purposes.¹³ Whatever the intent of these systems, universities and colleges with active and noteworthy honor codes are few and far between.

Recently, however, honor codes have been introduced at schools that do not lack for academic prestige but have never had an honor code. Harvard and Columbia are two such examples.¹⁴ The impetus for these additions is born from a concern about declining academic integrity within the schools' student bodies, and the associated worry that such erosion of honor will harm the schools' credibility and reputation.¹⁵

An obvious starting point for the newcomers on the honor code scene is to look to those institutions for well-established honor systems for tried and true blueprints. However, the notion that such historic institutions, such as our service academies and the University of Virginia, have long-standing and unaltered honor systems is somewhat of a fallacy. While the honor codes at these schools may indeed have remained unchanged for scores of years, the honor systems that facilitate the codes are an uber-evolving product that must confront the changing contemporary views about integrity and the advent of new technology.¹⁶ Perhaps, more importantly, these evolutions are fueled by the noble goal of building a more perfect and more fair system for all stakeholders.

C. Change: To Form a More Perfect Honor System

It is this last goal that perhaps catalyzes the most change, and turbulence, within the honor systems at colleges and universities. These revisions, though noble, sometimes exacerbate the tensions between the often competing goals of (1) doing what is effective and efficient and (2) doing what is fair and just from the perspective of both the institutions and the students they serve. Ironically, the exact same goals for both stakeholders creates the most friction.

11. See, e.g., *The Honor System*, UNIV. OF VA. SCH. L., <https://www.law.virginia.edu/academics/honor-system> (last visited Apr. 5, 2020).

12. See, e.g., *About West Point*, U.S. MIL. ACAD. W. POINT, <https://www.westpoint.edu/about> (last visited Apr. 5, 2020) (setting forth as part of the West Point Military Academy's mission character and honor components to prepare its graduates for professional and career excellence).

13. See, e.g., *The Honor Code & Honor Councils*, COLL. OF WILLIAM & MARY, <https://www.wm.edu/offices/deanofstudents/services/communityvalues/honorcodeandcouncils/honorcode/index.php> (last visited Apr. 5, 2020) (referring to the honor code as “[a]mong the most significant traditions of William & Mary” and an “enduring tradition”).

14. Sam Goldman, *The Problem with Honor Codes*, MINDING THE CAMPUS (May 8, 2014), https://www.mindingthecampus.org/2014/05/08/the_problem_with_honor_codes/.

15. *Id.*

16. See *id.*; see also SORLEY, *supra* note 1, at 147.

Presumably, one way to strike the right balance with these goals is to ensure these honor systems, whose stakeholders indeed have much at stake, are legally sound. An easy metric for such validation is to ensure the systems are impervious to challenges in court. The legal issues involved with court challenges of honor systems usually surround the property and liberty rights associated with the Fifth and Fourteen Amendments, and the corresponding process required to protect these rights.¹⁷ Unsurprisingly, the honor systems of today include much more in the way of legal processes and constitutional protections than the honor systems of yesterday.¹⁸ Not only do these protections help make the honor systems litigation-proof, they also aim to ensure that these systems, which are primarily run by students, do not revert to the in-house, frontier-justice practices of yesteryear when the students administering the systems were unchecked by institutional control measures.¹⁹

II. THE ISSUE

A. Unintended Consequences: Judiciary, the Least Dangerous Branch?

Along with the desired byproducts of the well-intended legal development of honor systems come unintended consequences. Such consequences include procedures or by-laws that are lengthy, complex, and, as a result, not universally known or comprehended by the student bodies they serve.²⁰ Further, and perhaps most concerning, these unwieldy rulebooks often yield more lengthy processes measured from the discovery of the alleged honor infraction until the issue's final resolution.²¹ The prolonged sagas of students living under a cloud of suspicion as they await resolution of a protracted honor investigation are an undesirable byproduct of these well-developed systems.²² Indeed, the far-from-swift justice that results from adhering to arduous legal processes also negatively impacts both the schools and individuals involved. Ironically, the development of these more perfect and legally sound systems often results in less efficient, less effective, and, by extension, less fair systems because of the time it takes to navigate them.

17. See, e.g., *Henson v. Honor Comm. of Univ. Va.*, 719 F.2d 69, 70, 73 (4th Cir. 1983) (challenge to a state school's honor system, implicating the Fourteenth Amendment); *Andrews v. Knowlton*, 509 F.2d 898, 900–03 (2d Cir. 1975) (challenge to a federally operated school's honor system, implicating the Fifth Amendment).

18. See *SORLEY*, *supra* note 1, at 142–43.

19. *Id.* (referring at one point to the erstwhile tradition of “silenc[ing]” a cadet-organic *en masse* tactic of avoiding communication with a cadet previously found guilty of an honor violation but allowed to remain at the Academy due to administrative, political, or judicial intervention).

20. See UNIV. OF VA., *Honor Audit Commission: 2017–2018 Report* 11 (2018), https://honor.virginia.edu/sites/honor.virginia.edu/files/HAC%20Report_Final.pdf (last visited Apr. 5, 2020) (discussing results from University of Virginia's Honor Audit Commission).

21. See *id.* at 19–20 (discussing the case process).

22. *Id.*

This conundrum poses some tough questions. Have these educational honor systems gone too far by inserting legal processes into honor systems otherwise designed to be administrative and academic rather than litigious and adversarial? Does the time and resources required by a methodical legal process result in a less efficient and effective system? Most importantly, and in line with the theme of this article, can a less legally burdensome system exist while at the same time satisfying constitutional due process requisites?

B. The Time for Introspection: When in the Course of Human Events . . .

The goal of this article is not to parse the by-laws of the various honor systems in order to point out the exact areas where legal processes may be truncated. Rather, it is to posit theories based on case precedent that illustrate how institutions of higher education have the latitude to make such adjustments. The time to do so is now. The argument falls into three major categories and generally outlines the structure of this article.

First, this article explores the somewhat tenuous nature of whether due process property rights are in fact triggered when a school's honor system decision affects a student's enrollment status. Identifying the interests at stake when administering a system that could ultimately lead to a student's dismissal from the institution helps determine whether the due process clause is even applicable. If due process rights are implicated, further examination will help determine what processes courts have required from a procedural standpoint. It is enlightening to look at court cases that consider these issues from the perspective of both the educational institutions, in general, and their honor systems, in particular. The case law that accompanies this discussion reviews the rights and processes at play when a school's honor system faces a constitutional challenge.

Second, this article suggests a renewed emphasis on the nature of the institution's interest within the balance of rights between the individual and institution. A review of relevant case law introduces the legal test courts often apply to evaluate whether an honor process passes constitutional muster. While the focus of these legal disputes often centers on the right of the individual, one of the reviewed cases cautions against the tendency to neglect and subordinate the school's interests to that of the student. With the *Mathew* decision in mind, this article will point out how the due process "test" articulated by *Mathew*, the landmark case, for balancing interests affords the schools flexibility to streamline their honor system legal processes.

Finally, this article identifies the largely contractual nature between the student and the educational institution *vis a vis* the schools' honor systems. This contractual flavor is particularly prevalent at those institutions with well-established honor systems. As a general matter, contractual challenges attract less procedural and substantive judicial scrutiny in court than due process cases without a contractual nexus. Noting that the honor systems at some of the most prestigious schools include a form of contract between the school and its

students, this article posits that refocusing the defense of honor system challenges through the prism of contract would more often be favorable to the school. This refocus, in turn, yields more space for the schools to move towards more legal efficiency within their honor processes.

Much has been written about the question of due process rights in education, particularly with respect to a student's rights when faced with potential academic or disciplinary dismissal.²³ Indeed, the issue is robust with debate since it deals with basic constitutional rights of the students and their alignment with the goals, honor, and prestige of the colleges and universities. Courts have struggled to more clearly define both the existence of those students' rights and the process required to protect them.²⁴ Section one of this articles' three sections described above includes a summary of the due process rights at play. A survey of the honor system challenges in court speaks to the required processes and balance of interests discussed in section two. Finally, a closer look at selected schools' honor procedures and their desired outcomes fills out the third section.

Before attempting to answer any of these questions, a short comparative survey of several noteworthy honor systems is in order. Though many honor systems are worthy of review, this article primarily focuses on the honor systems at the University of Virginia and the United States Military Academy at West Point.

III. A TALE OF TWO HONOR CODES

Some of the most well-known honor systems in the United States are those at our nation's service academies, senior military colleges, and several colleges and universities nationwide. Some of the oldest and most revered honor systems among those are found at the University of Virginia, the College of William and Mary, the Virginia Military Institute, and the United States Military Academy at West Point.

Thus, a discussion about due process in honor systems would naturally focus on these schools. Their honor systems have stood the test of time by both keeping true to their core principals yet evolving in the interest of improving their processes.²⁵ To be sure, austerity is the watchword in such honor systems. However, many of the recent changes are implemented in the interest of making

23. Fernand N. Dutille, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L.J. 243 (2001).

24. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975).

25. *See* UNIV. OF VA., *Honor Committee By-laws* (Feb. 24, 2020), <https://honor.virginia.edu/sites/honor.virginia.edu/files/Honor%20Committee%20By-laws%20February%2024%202020.pdf>. The purpose statement of the by-laws indicates the process operates within the parameters of "fundamental fairness:"

Purpose: The Honor Committee is the body responsible for the administration of the Honor System. In discharging this function, the Committee's principal purpose is to maintain the Community of Trust on which the Honor System rests within a framework of fundamental fairness to students involved in Honor proceedings. *Id.*

more fair systems while staying true to the unyielding principles. A quick survey of the honor systems at the United States Military Academy and the University of Virginia illustrate these points.

A brief scan of the most recent revisions of the honor system procedures at West Point and the University of Virginia is quite revealing. For what may seem like straightforward codified dictates to not lie, cheat, or steal in systems that are either “single sanction,” or that keep the remedy of expulsion as a very real option amongst a menu of other less severe sanctions, the rule books are quite lengthy.²⁶ The “By-Laws” of the University of Virginia’s honor system is forty-nine pages long, whereas the pamphlet outlining the procedures of the cadet honor code at West Point has grown in recent years to ninety-one pages.²⁷ With such straightforward expectations, both rulebooks seem longer than one might presume they would be. However, the procedure manual for West Point’s honor system is conspicuously twice as long as its fellow renowned system at the University of Virginia.

Further inspection of the two systems bring out a contrast starker and more substantive than page-count differences. While the processes afforded students accused of honor violations in the University of Virginia’s honor system rules appear more subtly designed to protect those students’ due process rights, the procedures of the West Point honor system are unabashedly legalistic.²⁸ For example, the root word “law” is used twice in Virginia’s rules but is used sixteen times in West Point’s.²⁹ The root word “legal” is used four times in Virginia’s, but fifty-eight times in West Point’s.³⁰ The word “attorney” is absent from Virginia’s By-Laws but is used five times in West Point’s procedures.³¹ Finally, the word “rights” is used five times in Virginia’s By-Laws and sixty-five times in West Point’s procedures.³²

This is not to say the University of Virginia or other institutions mentioned are abandoning constitutional rights and protections in its by-laws. To be sure, the Virginia By-Laws include plentiful legal-tinged processes and protections, as evidenced by the word “counsel” showing up twenty-one times more in the Virginia rules than it does in West Point’s.³³ This reference to counsel describes the advocacy—albeit not from an actual, practicing lawyer—to which a

26. See U.S. CORPS OF CADETS, Pamphlet 15–1, *The Cadet Honor Code, System, and Committee Procedures* (Oct. 1, 2018) (documenting rules and process for United States Military Academy Honor System) (document on file with author); see UNIV. OF VA., *supra* note 25 (documenting rules and process for University of Virginia Honor System).

27. See sources cited *supra* note 26.

28. See sources cited *supra* note 26.

29. See sources cited *supra* note 26.

30. See sources cited *supra* note 26.

31. See sources cited *supra* note 26.

32. See sources cited *supra* note 26.

33. See U.S. CORPS OF CADETS, Pamphlet 15–1, *supra* note 26.

University of Virginia student is entitled during the hearings.³⁴ Thus, a comparison of certain terminology exposes the legal bedrocks of University of Virginia's honor system and shows how West Point is not the only school that has embedded due process components into its honor system processes. Indeed, most honor systems have, throughout the years, adjusted their rules to ensure they comport with constitutional requirements in order to maintain both the legal and moral high ground, but also to achieve the practical goal of being litigation-proof. Thus, since both institutions have their fair share of legal terminology and process embedded in their honor systems, the better question may be to assess whether so much legalese is necessary for either of them.

Regardless of whether the honor system procedures are riddled with legal terminology—West Point for example—or cloaked with less conspicuous lingo to protect constitutional rights—as is the case with the University of Virginia—it is worth asking whether these honor systems at educational institutions have gone too far in terms of infusing legal procedures into what are intended to be administrative processes rather than criminal trials. Sometimes forgotten in these conversations is that, when a school presents its graduates with diplomas, it is certifying that the student meets all qualifications to earn a degree from the institution, to include confirmation that the student lived honorably under the standards of the school's honor codes and, by extension, will similarly do so in their professions and in society.

However, have the efforts by institutions of higher educations to make their honor systems litigation proof decreased these systems' efficiency in the form of increased time to resolve honor allegations? Have the same efforts also reduced the systems' efficacy by producing undesired outcomes? More directly, has the effort to be fairer in terms of constitutional protections resulted in a less fair process in the form of prolonged justice?

This article concludes the answers to all of these questions is "yes," and explores the next question of whether there are margins for schools to better achieve legal efficiency within their honor systems. To do this, a review of the implicated due process interests and procedures required to satisfy these interests is in order.

IV. DUE PROCESS REQUIREMENTS: OF PROPERTY OR LIBERTY?

The issues of what due process requirements apply to university and college students and how those requirements are to be applied inspires passionate debate. On the student side, protection of basic constitutional rights is of critical importance, particularly when an educational degree, a potential career, and the student's personal and professional reputation may be at stake.³⁵ However, the student is not the only party in this equation with a reputation to uphold. Institutes of higher education certify, by way of their diplomas, that their

34. UNIV. OF VA., *supra* note 25, at 6, 23–24, 29, 42.

35. See Dutile, *supra* note 23, at 259.

graduates will uphold the academic, honor, and other standards the school expects of its graduates. Thus, in a pure contractual setting—that is, the graduate must satisfy the institution in order to receive that certifying diploma—one might ask, what property rights of the students even exist that would trigger due process protection?

A. Property Interests: Without Just Compensation

The question of whether property rights exist in higher education has inspired ample journalistic analyses, several of which are especially helpful in tackling the honor system riddle. Professor Ferdinand Dutile's *Students and Due Process in Higher Education: of Interests and Procedures* provides perhaps the most comprehensive analysis focusing on the various types of student dismissals, academic, discipline, and honor, from the perspective of both public and private institutions.³⁶ Professor Barbara A. Lee's *Judicial Review of Student Challenges to Academic Misconduct Sanctions* is a must-read because it reiterates points made in Professor Dutile's work, and focuses on how the courts deal with academic, as opposed to disciplinary, penalties and dismissals, which is the focus of most higher education honor systems.³⁷ Finally, in *The Due Process Clause and Students: The Road to a Single Approach of Determining Property Interests in Education*, Dalton Mott tackles the preliminary issue of whether courts have found a property right in continued higher education.³⁸ He notes that most courts have neglected to decide the issue affirmatively and implores them to do so.³⁹

In short, courts have often found that property rights do exist in a student's education.⁴⁰ However, the question of whether and how this right applies to higher education is far from settled. Though it deals with primary and secondary education settings, *Goss v. Lopez* is considered the seminal case that identifies both a property and liberty interest for students facing unfavorable action by their schools.⁴¹ The *Goss* court relies on *Board of Regents of State Colleges v. Roth* to assert that the determination of whether a due process right is triggered depends upon the nature of the interest at stake, rather than the weight of the interest.⁴²

To be sure, however, the property right identified by the *Goss* court was predicated on a positive source for those rights, independent of the

36. See, e.g., Dutile, *supra* note 23.

37. Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J. COLL. & U.L. 511, 518 (2013).

38. Dalton Mott, *The Due Process Clause and Students: The Road to a Single Approach of Determining Property Interests in Education*, 65 U. KAN. L. REV. 651, 652–53 (2017).

39. *Id.* at 652.

40. See Dutile, *supra* note 23.

41. *Goss*, *supra* note 24.

42. *Id.* at 575–76 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570–71 (1972)).

Constitution.⁴³ In *Goss*, the right is born from a state's mandate and providence of a public school education.⁴⁴ The theory follows that if the state requires education and your taxpayer dollars fund it, then withholding that education from a student via a school suspension or expulsion would encroach on a property right protected by the Fourteenth Amendment. As such, the court asserts that the Due Process Clause of the Fifth and Fourteenth Amendments are not independent sources of property rights; rather, those rights must emanate from an independent source of law.⁴⁵

However, courts are far from consistent in ruling that property rights exist in education.⁴⁶ While *Goss* is the seminal case, its factual predicate involves a high school, rather than a secondary or post-secondary educational institution.⁴⁷ While some courts, like *Goss*, maintain that only an independent source of law can create a property right in education, many courts punt on that issue when it involves a higher education setting, assume such right exists, and proceed directly to discussing the required procedural components.⁴⁸ "Assume[d]" and "generalized" property interests are theories that Mott takes issue with in *The Due Process Clause and Students: The Road to a Single Approach of Determining Property Interests in Education*.⁴⁹ The frustration with these assumed property rights theories is that (1) they are not grounded in firm law or precedent, and (2) leaving the issue unresolved results in disparate treatment amongst judicial circuits.⁵⁰ Despite these critiques, many courts inevitably still proceed with a procedural due process analysis on the grounds that the underlying property right is assumed to exist.⁵¹

From another angle, the question might be posed as to whether education at any level is a fundamental right, at all. This was the issue in the landmark case, *San Antonio Independent School District v. Rodriguez*, where the court found that education is not a fundamental right.⁵² *Lee v. University of Michigan-Dearborn* cites the *Rodriguez* case in remarking that, "[w]hile a high school student is entitled to procedural due process in pursuit of a free public education, a student's right to attend a public high school is not a 'fundamental right' for purposes of substantive due process analysis."⁵³ The *Lee* court further posits

43. *Goss*, *supra* note 24, at 572–73 (citing *Roth*, 408 U.S. at 577).

44. *Goss*, *supra* note 24, at 573–74.

45. *Id.* at 572–73.

46. See Dutile, *supra* note 23, at 254–58.

47. *Goss*, 419 U.S. at 567.

48. *Id.* at 261, n.127.

49. Mott, *supra* note 38, at 652–53.

50. *Id.* at 656–67.

51. See Mott, *supra* note 38.

52. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

53. *Lee v. Univ. of Mich.-Dearborn*, No. 5:06-CV-66, 2007 U.S. Dist. LEXIS 72236, at *13 (W.D. Mich. Sept. 27, 2007) (first citing *Rodriguez*, 411 U.S. at 33–37; and then citing *Seal v. Morgan*, 229 F.3d. 567, 575 (6th Cir. 2000)).

that “[a] post-secondary student such as plaintiff has even a lesser claim that her attendance at a college or university is a fundamental right.”⁵⁴

Given this erratic case history, there remains an understandable tension between stakeholders in this educational landscape that would coax us to view this determination of rights as a balance of interests. That is, from the individual student perspective, the question of whether a right exists in continued education may not be an all or nothing proposition. Rather, whether a student has a property interest in continued education, may depend on how much of his or her interest has vested, based on the amount of coursework already completed, time and money invested, etc. However, educational institutions would counterargue by pointing out that such interests cannot be so easily vested if the state, in the case of a public institution, has discretion over the “entitlement” of education.⁵⁵

The service academies, by virtue of commissioning each graduate as an officer in their respective armed force, throw another variable into this determination of educational rights.⁵⁶ That is, an enrolled cadet or midshipman may assert a right to the commission in that they have a vested interest that is commensurate with their investment in the service academy curriculum. Such argument would be similar to the one above suggesting the amount of completion would determine how much of that “right” has actually vested. However, this argument lacks support in case precedent.⁵⁷ A simple review of the physical and health requirements for mere entry into the military would suggest that, similar to other skills-based professions, the military has a legitimate interest in ensuring its inductees meet certain baseline medical criteria.⁵⁸ It follows that such entry requirements would mirror other Fourteenth Amendment minimal scrutiny analyses and need only rationally relate to the legitimate state interests.⁵⁹ Such minimal scrutiny is a far cry from the proposition that service in the military is a fundamental right deserving of a more stringent application of due process, amongst other constitutional strictures.

Despite the cases and arguments that recommend caution against merely assuming property interests exist in higher education, it is not difficult to comprehend the attractiveness of adopting that assumption. First, the issue is far from well-settled as illustrated above. Second, there is too much case history that does find property interests in continued post-secondary education to

54. *Id.*

55. Mott, *supra* note 38, at 655.

56. See Justine P. Freedland, *All the Process That is Due: An Article on Cadet Disenrollments for the United States Military Academy and the Army Reserve Officers' Training Corps*, 2015 ARMY LAW. 5, at 8–9 (2015); John H. Beasley, *The USMA Honor System – a Due Process Hybrid*, 118 MIL. L. REV. 187 (1989).

57. See Charlie Dunlap, *Does the Constitution Really Require the Military to Induct Everyone who Wants to Join?* LAWFIRE (Aug. 4, 2017), <https://sites.duke.edu/lawfire/2017/08/04/does-the-constitution-really-require-the-military-to-induct-everyone-who-wants-to-join/>.

58. *Id.*

59. See Dutile, *supra* note 23, at 255.

summarily overrule such a conclusion.⁶⁰ Third, with such absence of clarity, the real “battleground” of this debate probably more appropriately resides in the question of whether the amount of processes is adequate. Finally, some case precedent supports the notion that the “other” of the two due process rights (the liberty interest) is implicated in the post-secondary education scenario.⁶¹

However, every one of these indeterminate arguments also beckon the opposing analysis that due process property rights do not automatically exist in higher education. Thus, further analysis of the appropriate amount of process due should always consider whether the foundational property interest was not universally found or was merely assumed to exist.

B. Liberty Interests: Securing the Blessings

Regardless of the unsettled property right issue, students who assert due process challenges in light of a school sanction have a “second string to his constitutional bow” as espoused by the *Doe v. Rector & Visitors of George Mason University* decision.⁶² That is, due process could also be implicated based on liberty interests.⁶³ Unlike the courts that assumed a property right exists in higher education, the *Doe* court set the course for interpreting whether a liberty right exists much more broadly than just assuming they do.⁶⁴ The court refrained from simply equating Fifth and Fourteenth Amendment breaches to infringements on custodial or bodily restraint.⁶⁵ They further rejected the previous articulation of a rigid rights-versus-privileges dichotomy when determining when due process liberty is triggered.⁶⁶ The 2015 *Doe* case and similar cases that represent an expanded scope of both property and liberty rights are evidence that the “Due Process Revolution” that Mott referenced has had a long lasting impact.⁶⁷

With the liberty table set, *Doe* and other courts theorize that school sanctions such as suspension and expulsions carry with them future reputational costs that can qualify as liberty interests.⁶⁸ The *Donohue v. Baker* case noted that “[i]t is well settled that an expulsion from college is a stigmatizing event which implicates a student’s protected liberty interest.”⁶⁹ One could then persuasively argue that suspension or expulsion, especially when based on a failure of honor

60. See *San Antonio Indep. Sch. Dist.*, *supra* note 52.

61. See *id.*

62. *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 721 (E.D. Va. 2015).

63. *Id.*

64. *Id.*

65. *Id.* (quoting *Roth*, 408 U.S. at 572).

66. *Doe*, 132 F. Supp. 3d at 721.

67. See Mott, *supra* note 38, at 654, 675.

68. See *Doe*, 132 F. Supp. 3d at 721–22 (citing *Goss*, 419 U.S. at 575).

69. *Donohue v. Baker*, 976 F. Supp. 136, 145 (N.D.N.Y. 1997).

rather than an academic shortcoming, could saddle the student with an extremely significant and negative stigma for future endeavors.

However, this is not to say that a school's adverse action towards a student always triggers a liberty interest. Some courts have failed to recognize a liberty interest in continued education or in other facets of the educational experience, such as the mere threat of suspension, or rejection of a proposed thesis topic.⁷⁰ A Ninth Circuit court held there was no liberty interest in a medical student's dismissal based on substandard performance, though it did find a property interest.⁷¹ Despite the courts' erratic posture on the liberty interest, it would appear the stronger consensus is that an honor violation expulsion would more naturally reside among the cases where the court found an educational liberty interest. A prospective school or employer may harbor more sympathy for a student who was dismissed from another school because he or she just could not measure up academically than for the student expelled because they attempted to cheat.

As discussed later, a reputational interest is but one side of the equation balancing the interests of the individual and the institution.⁷² Further, as discussed above, there are many arguments abound for and against a finding of a property or liberty interest in education, continued enrollment, graduation, or military commission upon graduating from a service academy or senior military college. Authors such as Mott have sounded the chorus for courts to clarify this issue.⁷³ In the meantime, if we were to assume such liberty rights are triggered, we could then move to the next part of the due process analysis bearing in mind that the foundational rights upon which that analysis is based are indeed tenuous.

Assuming there is either a property or liberty interest invoked by a school's adverse action against a student, the next logical question to tackle is what type of process is required?

C. Procedural Due Process Requirements

With due process in play, what procedures are required to satisfy due process for schoolhouse actions that negatively impact students? To help answer that question, the landmark *Goss v. Lopez* case invoked the tried and true basic due process components of notice and a hearing and quoted the *Grannis v. Ogden* case in attempting to clarify those terms.⁷⁴ Since *Goss*, the courts have provided little clarity about the details of what constitutes notice and a hearing, suggesting

70. See Dutile, *supra* note 23, at 258 (citing *Ndefru v. Sherwood*, No. 93-4127-SAC, 1993 U.S. Dist. LEXIS 18621 (D. Kan. Dec. 29, 1993)).

71. See Dutile, *supra* note 23, at 255, 260 (citing *Stretton v. Wadsworth Veterans Hosp.*, 537 F.2d 361 (9th Cir. 1976)).

72. See *infra* Part B.

73. See Mott, *supra* note 38, at 652-53.

74. *Goss*, 419 U.S. at 578 (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

that “some kind of notice” and “some kind of hearing” will satisfy Fifth and Fourteenth Amendment Due Process requirements.⁷⁵

This is not to say that courts have issued absolutely no guidance as to what constitutes appropriate notice and hearing. Various courts have helped define the contours of those due process requirements to some extent, however the situation still remains murky.⁷⁶ One line of jurisprudence contends the amount of process due increases or decreases depending on the level of individual interest at stake.⁷⁷ Another line of reasoning is that those institutions, schools and the military, remain on the right side of the constitutional line so long as they follow their own processes and procedures.⁷⁸ This guidance still falls short of precisely defining requirements to satisfy the “some type of notice” and “some type of hearing” are requirements.⁷⁹

Alas, along comes the *Mathews v. Eldridge* case which provides a test for helping determine whether the amount of process given is adequate in due process scenarios.⁸⁰ A social security benefits case, *Mathews* introduces a three-factor test to help determine if the processes afforded are adequate:

First, the private interest that will be affected by the official action; [(2)], the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [(3)], the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.⁸¹

While the *Mathews* court provided a much-needed template for defining the contours of due process requirements in a generic sense, follow-on court cases have bifurcated due-process for educational institution sanctions into two categories: academic and disciplinary.⁸² In short, courts accord more deference to school educators and administrators on questions of academic failure, going

75. Dutile, *supra* note 23, at 245.

76. *Id.*

77. *Hagopian v. Knowlton*, 470 F.2d 201, 210–11 (2d Cir. 1972) (discussing how administrative discipline measures such as demerits at a service academy that “invokes at most the relatively minor immediate consequence of disciplinary punishments or withdrawal of weekend or other privileges” would not require as much process as an infraction that would threaten expulsion. The court further opined, “the procedures available to a cadet (explanation of a reported delinquency, request for reconsideration, and appeal to superior authorities) are ample to satisfy the demands of due process, even with respect to demerits awarded by the Tactical Officer for delinquencies reported by the Tactical Officer himself. This is so because the sanctions imposed are slight, the nature of the proceeding is corrective and educational, and the burden on the proceedings which [the additional process right of] a hearing would impose is excessive.”).

78. *Friedberg v. Resor*, 453 F.2d 935, 938 (2d Cir. 1971); Dutile, *supra* note 23, at 279.

79. *See* Dutile, *supra* note 23, at 245.

80. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

81. *Id.* at 335.

82. *See* Dutile, *supra* note 23, at 265.

as far as to dispense altogether with the hearing requirement.⁸³ From a procedural due process angle, *Board of Curators of University of Missouri v. Horowitz* explains that academic decisions must be “careful and deliberate.”⁸⁴ From the substantive due process angle, the *Regents of University of Michigan v. Ewing* court advised that the judiciary was loathe to overturn the decisions of school administrators unless the decision reveals “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”⁸⁵ In short, courts have afforded the greatest degree of deference to school administrators when dealing with academic failure. As a policy matter, courts bestow this latitude to avoid cultivating an atmosphere in which every academic failure determination ends up in the courts of law.⁸⁶

For disciplinary sanctions, courts have generally required a bit more in terms of process requirements than for academic failure sanctions.⁸⁷ Perhaps the most patently obvious difference is that courts generally have not fully dispensed with the requirement of a hearing. In *Ingraham v. Wright*, the court applied the three *Mathews* factors as they pertain to disciplinary hearings as follows: “[1] The nature of the interest protected, [2] the danger of error and the benefit of additional or other procedures, and [3] the burden on the government such procedures would present.”⁸⁸

Follow-on cases continued to apply and shape the *Mathews* criteria to formulate several themes. First, that the level of severity of the sanction is an important factor in the calculus for determining how much process is due.⁸⁹ Second, while courts generally agree that disciplinary cases require some kind of notice and some kind of hearing, having legal representation present at the hearing is not a protected right.⁹⁰ Finally, while the courts have generally required more procedural rights for disciplinary cases, there still is a significant amount of deference yielded to the educational institutions in deciding how to best administratively achieve their goals to avoid the undesired effect of having their disciplinary processes devolve into criminal trials.⁹¹

83. *Id.* at 282 (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978)).

84. *Horowitz*, 435 U.S. at 85.

85. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

86. *See, e.g.*, *Horowitz*, 435 U.S. at 88–90.

87. *See* Dutile, *supra* note 23, at 267.

88. *Id.* at 265 (citing *Ingraham v. Wright*, 430 U.S. 651 (1977)).

89. *Id.* at 266.

90. *Id.* at 272, n.211 (citing multiple cases spanning several circuits that failed to recognize the right to have counsel present at school disciplinary proceedings).

91. *See* *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) (“[A] school disciplinary proceeding is not a criminal trial, nor is a student accused of cheating entitled to all the procedural safeguards afforded criminal defendants.” citing *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992, 1000 (5th Cir. 1975)); *Betts v. Bd. of Educ.*, 466 F.2d 629, 633 (7th Cir. 1972); *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1089–90 (8th Cir. 1969); *Jackson v. Dorrier*, 424 F.2d 213, 217 (6th Cir. 1970) (“To hold that the relationship between parents, pupils

D. Is Honor Academic or Disciplinary?

Regardless of whether the sanction at issue falls into the academic or disciplinary category, the required process for either category has not been coherently articulated. That presents the key conundrum for determining appropriate process in honor systems. Irrespective of an honor infraction's categorization, the natural institutional reaction is to be overly cautious. To be safe rather than sorry is the watchword, especially when a school's administrative action dances close to the margins of infringing upon students' constitutional protections. Maintaining a fail-safe posture, a school might theorize, would also help stave off legal challenges of their honor systems, especially challenges that turn out to be successful.

In the eyes of the courts, where do educational institutions' honor systems fall in this dichotomy between academic and disciplinary dismissals? That answer, much like the determination of what rights are at play, is not 100% clear. Due to the components of most honor codes, there is a natural bifurcation depending on the nature of the offense. For a typical code which prohibits lying, cheating, or stealing, two of those three elements are a bit easier to categorize. Stealing, a conduct offense that also incorporates an honor element, routinely would be viewed as a misconduct, rather than as academic, since the offense is also likely to be enumerated in the school's discipline code and could even constitute a criminal offense.⁹² Lying would likely find itself in the misconduct camp as well. Even though lying would not necessarily invoke a criminal violation, the proscription would normally be nested within the school's conduct code. An even deeper analysis would suggest lying and stealing are appropriately categorized as misconduct offenses since these actions are forbidden because of their "behavioral component."⁹³ Further, labeling these offenses as misconduct would parallel with the institution's desire to eradicate such behavior. In short, student dispositions based on allegations of lying and stealing seem to naturally reside in the misconduct camp.

That leaves us with cheating. Most of the time, but certainly not always, allegations of cheating emanate from the academic classroom. As discussed, academic failure dismissals generally elicit the most judicial deference as courts loathe interfering with the professional judgment of educators in determinations of academic merit.⁹⁴ Would it not follow, then, that a school's sanction based

and school officials must be conducted in an adversary atmosphere and accordingly the procedural rules to which we are accustomed in a court of law would hardly best serve the interests of any of those involved.").

92. See, e.g., *Church Educational System Honor Code*, BYU, <https://policy.byu.edu/view/index.php?p=26> (last visited Apr. 10, 2021) (enumerating standards of the BYU Honor Code, and noting that many of these offenses of the honor code overlap with conduct standards and may indeed be found in conduct codes of other schools, rather in their honor codes).

93. See Lee, *supra* note 37, at 518.

94. See, e.g., *Ewing*, 474 U.S. at 225 (articulating the substantive due process review standard for questions regarding academic failure, and explaining that "[w]hen judges are asked to review

on alleged classroom cheating should also command such deference? Here again, the courts have been rather inconsistent with their findings. Cheating on an exam, for example, possesses a “behavioral component” that most courts would likely categorize as misconduct.⁹⁵ Considering this, recall that the latitude granted to school faculty in academic matters is based on a professional judgment assumption. That is, for academic merit questions, the courts generally conclude that instructors and professors, academic professionals, are better equipped to evaluate those matters requiring their professional expertise than a court.⁹⁶ However, a faculty member’s professional academic expertise is not always necessary to discern whether the act of cheating occurred. It follows that some courts might not yield the same broad degree of deference to academic institutions for academic misconduct, cheating, as they typically do for academic performance.

Given that logic, one might also be tempted to conclude that courts would defer to the educators on whether or not an academic plagiarism offense was committed, given the educators familiarity with published works. However, the courts have been rather inconsistent on that issue, as well. On one hand, one court went so far as standing firm to its deferential default when professors resolve student plagiarism questions, even if the allegations turn out to be unfounded.⁹⁷ The court justified this stance by explaining the appropriate scope of review was limited to assessing whether the professor had “a legitimate basis to conclude that Plaintiff had plagiarized and should be expelled” and whether the professor “used their professional judgment in making those decisions.”⁹⁸ Still other courts categorize plagiarism as academic misconduct, given that behavioral component, and apply the same standard of review to student misconduct cases.⁹⁹

Regardless of whether academic honor violations are categorized as misconduct, or academic offenses, or a type of hybrid offense where an institution casts the offense as a type of ‘academic misconduct,’ courts have required educational institutions to afford some type of process.¹⁰⁰ Depending on the flavor of offense, however, the distinction between the three would be the degree of deference the court affords the educational institution. Further, while some judicial decisions subscribe to Justice Powell’s concurrence in *Ewing* that

the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment”).

95. See Lee, *supra* note 37, at 518.

96. *Id.* at 516–18.

97. See *Mawle v. Tex. A&M Univ.–Kingsville*, No. CC-08-64, 2010 U.S. Dist. LEXIS 42496, at *24–25, 28 (S.D. Tex. Apr. 30, 2010).

98. *Id.* at 28.

99. See Lee, *supra* note 37, at 518.

100. See Dutile, *supra* note 23.

academic misconduct cases do not involve the fundamental rights necessary to trigger substantive due process, the questions of the need for and degree of procedural due process protections remains.¹⁰¹

V. HONOR SYSTEMS IN COURT: ESTABLISHING JUSTICE

Considering the due process discussion above, a brief survey of some relevant court challenges to college and university honor systems is in order. This review demonstrates a trend that honor systems from some of the well-established schools have generally fared well against legal challenges. That is, courts generally have found the processes afforded those accused of honor violations at these schools comport with the Due Process Clause of the Fifth and Fourteenth Amendments.

A. *The Virginia Schools: Give Me Liberty*

I. *Henson v. Honor Committee of the University of Virginia.*

A 1983 challenge of the University of Virginia's Honor Committee was brought by a former law student whose expulsion from the University was ultimately due to a non-honor infraction.¹⁰² Josiah Henson faced both academic deficiency struggles as well as an honor violation allegation.¹⁰³ After an extended honor system process which included retrials and appeals, the students originally alleging the violation ended up dropping their charges.¹⁰⁴ However, Henson was still dismissed from the university for his academic shortcomings.¹⁰⁵

The *Henson* case still involved a constitutional challenge to the University's Honor System. The rationale to Henson's honor complaint was that his having to expend time and resources fighting the honor allegations ultimately interfered with his ability to ensure his academic grades were in order.¹⁰⁶ His constitutional argument was that the University of Virginia Honor System fell

101. See *Ewing*, 474 U.S. at 229-30 (Powell, J., Concurring) (casting doubt as to whether substantive due process even exists in the higher education due process equation, stating, "[w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution," and further remarking that a purported interest higher education "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution"). The substantive due process component of higher education sanctions has not received as much attention in this article because, to a large extent, there is a bit of overlap in the standards of the two. The components of the substantive due process jurisprudence that bear the most relevance to these issues are reviewed in this article.

102. *Henson v. Honor Comm. of Univ. Va.*, 719 F.2d 69, 70 (4th Cir. 1983).

103. *Id.* at 70.

104. *Id.* at 71.

105. *Id.*

106. *Id.* at 72-73.

short of due process protections guaranteed by the Fourteenth Amendment.¹⁰⁷ Thus, Henson's theory was essentially that this constitutionally inept honor system impeded his academic standing.

The court rejected Henson's logic that his demise was the fault of either the academic or the honor systems.¹⁰⁸ Rather, since his own actions prompted the honor processes, the conundrum was one of his own making.¹⁰⁹ In doing so, the court listed a number of processes afforded students navigating the University's honor system and deemed them ample under the Fourteenth Amendment.¹¹⁰ It cited *Horowitz* in reminding that a template of stringent, inflexible procedures, or those afforded to a criminal defendant, are not required in the educational institution setting.¹¹¹ The court quoted *Mathews*'s statement that "the judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances."¹¹² Further, "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it.'"¹¹³ The court also referred to the landmark *Goss* case which "recognized that the requirements of due process may be satisfied by something less than a trial-like proceeding."¹¹⁴

To be sure, the *Henson* court did not issue a blanket endorsement of the University of Virginia Honor System's procedures, suggesting they do not "represent a model for assuring constitutional due process in all administrative settings."¹¹⁵ However, the court noted that in the wake of a "substantial" personal stake, Henson and others similarly situated have in the potential outcome of the honor process—for example loss of law degree, inability to enter the legal profession—the University of Virginia Honor System's procedures were "constitutionally sufficient to safeguard his interest from an erroneous or arbitrary decision."¹¹⁶

107. *Id.* at 73.

108. *Henson*, 719 F.2d at 72.

109. *Id.* at 73 (citing *Carey v. Piphus*, 435 U.S. 247, 254–55 (1978) (explaining that the University or the University Honor Code did not cause Henson's misfortunes, either academic or honor related, and the damages he incurred in the form of distractions and time spent dealing with the honor allegations could not be constitutionally compensable "unless it was caused by the University's actions"))).

110. *Henson*, 719 F.2d at 74–75.

111. *Id.* at 74.

112. *Id.* at 73–74.

113. *Id.*

114. *Id.* at 74.

115. *Id.* at 74–75.

116. *Henson*, 719 F.2d at 74–75.

2. *Butler v. Rector and Board of Visitors of the College of William and Mary*

Emanating from the University of Virginia's sister school in Williamsburg, Virginia the *Butler* case at the College of William and Mary is similar to the *Henson* case at the University of Virginia in that the student's ultimate challenge was not based on an honor violation expulsion.¹¹⁷ In fact, the court made clear to dissociate the student-run Honor Council's not-guilty finding from the faculty-directed disciplinary processes that ultimately led to *Butler*'s dismissal.¹¹⁸ The case is still instructive as it illustrates how courts might deal with disciplinary dismissals that involve collateral honor violation allegations. The court also highlights an often-marginalized component in education related due process analyses: the interests of the school.¹¹⁹

The Honor Council also reviewed the misconduct which ultimately led to *Butler*'s dismissal from William and Mary, since the conduct in question included five allegations of lying.¹²⁰ During *Butler*'s appeal, the William and Mary faculty designee to review honor appeals found a jurisdictional defect in four of the honor counts and concluded that the remaining count was not grounded on evidence to prove guilt beyond a reasonable doubt.¹²¹ *Butler* cited the Honor Council's eventual acquittal for support when challenging her disciplinary expulsion.¹²²

While the *Butler* court logically does not center its analysis around the dismissed honor allegation, the court's analysis provides three insightful points to help describe its honor system jurisprudence. First, the court categorized the core issue as disciplinary, subjecting it to the more stringent misconduct dismissal due process standards.¹²³ It then applied the *Mathews* test in dismissing the procedural due process challenge and set aside *Butler*'s substantive due process argument under the more accommodating "arbitrary" and "egregious" analysis.¹²⁴ Thus, in evaluating a challenge to a dismissal based on professional misconduct—misconduct similar to what honor systems seek to

117. *Butler v. Rector & Bd. of Visitors of the Coll. of William & Mary*, 121 F. App'x. 515, 518 (4th Cir. 2005).

118. *Id.* at 519.

119. *See id.*

120. *See id.* at 518.

121. *Id.* (Gregory, J., concurring).

122. *Butler*, 121 F. App'x. at 519.

123. *Id.* at 520 n.2 (citations omitted) ("We assume for purposes of this appeal, but need not decide, that *Butler*'s expulsion was for disciplinary and not academic reasons. Disciplinary dismissals require greater procedural safeguards than academic dismissals. It is unnecessary to reach this issue because we conclude that William and Mary's conduct satisfies even the more exacting standard.").

124. *Id.* at 519.

prevent—the court ruled in favor of the educational institution while applying the same *Mathews* test that can also be used for pure honor matters.¹²⁵

Second, the court's concurring opinion applauded William and Mary for following its Honor Code procedures in addition to the requirements in its Counseling Program handbook, both of which Butler was accused of violating.¹²⁶ This opinion aligns with a consistent theme that courts are less likely to reject a school's procedural due processes for disciplinary or honor sanctions, so long as the school follows its own process.¹²⁷

Third, in evaluating the first prong of the *Mathews* decision, the Butler court notably made a point that often gets less attention when analyzing cases of student dismissals.¹²⁸ For while it is true that courts appropriately focus their analyses of constitutional individual liberty deprivations on the *individual*, the court made clear to appreciate the counterbalancing interests of the school, in this case, the College of William and Mary. Essentially, the court reasoned that because “William and Mary’s interest in controlling the integrity of its graduate programs is also high,” that interest counterbalanced the individual’s interest articulated in the first *Mathews* prong.¹²⁹ Because the first and third prongs of the *Mathews* test essentially canceled each other out, the court hinged its decision on the second *Mathews* factor—“the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards.”¹³⁰ As seen in many of these cases critiquing schools’ honor and discipline processes, the balance of that *Mathews* prong fell in favor of the College of William and Mary.¹³¹

3. *The Virginia Military Institute cases: A Well Regulated Militia*

A “hybrid” between our public university schools and military schools, the Virginia Military Institute is one of the few remaining educational institutions that unabashedly maintains a pure “single sanction” honor system.¹³² The system’s simplicity is evident on the school’s website where it explains,

The VMI Honor System is a single sanction system. The system does not recognize degrees of honor. The sanction for any breach of honor is dismissal. So, when new cadets sign the book on matriculation day they are committing themselves to a life of honesty and integrity. If

125. See *Mathews*, *infra* note 154.

126. See *id.* at 521–22 (Gregory, J., concurring).

127. See Dutile, *supra* note 23, at 279.

128. See *Mathews*, *infra* note 154, at 520.

129. *Id.*

130. *Id.*

131. See *id.* at 519.

132. *Honor System*, VA. MIL. INST., <https://www.vmi.edu/cadet-life/cadet-leadership-and-development/honor-system/> (last visited Jan. 20, 2021).

their commitment is not complete, their stay at the Institute may be short.¹³³

With such an austere prologue, one might imagine that the Virginia Military Institute's honor system would be especially susceptible to due process challenges. While not as lengthy as the University of Virginia's honors system by-laws or the College of William and Mary's honor constitution, Virginia Military Institute's system nonetheless includes at least some process for ensuring "adequate" notice and an opportunity for the student to be heard.¹³⁴ How has the Virginia Military Institute system fared? The *Pack v. Virginia Military Institute* and *Smith v. Military Institute* cases bookend two decades of unsuccessful court challenges to the Institute's honor system.¹³⁵

In *Pack v. Virginia Military Institute*, a cadet challenged both the procedural and substantive due process aspects of his conviction by the Honor Court that led to his expulsion from the Institute.¹³⁶ Rejecting his procedural due process challenge, the court held,

[E]ven a cursory inspection of the Appendix indicates that the appellant assuredly was advised of the charges against him, of the factual evidence underlying those charges, of his right to trial, and was afforded a full trial with the right to present evidence the right to cross examine prosecution witnesses, [sic] and the right to counsel. There can be no doubt that procedural due process was *amply* provided in this case.¹³⁷

Regarding Pack's substantive due process claim, the court made two key pronouncements. First, as a preliminary matter, the court considered the complainant's claim of a substantive due process violation based on deprivation of a fundamental right—in this case, impeding his completion of the Virginia Military Institute program.¹³⁸ In declining to sustain that assertion, the court cited case law where the Supreme Court has "consistently held that education is not one of the 'core' or 'fundamental rights.'"¹³⁹ Second, it agreed with the lower court's evidentiary analysis that concluded there were no substantive "contractual, legal, and constitutional infirmities of the Honor System," as Pack had alleged.¹⁴⁰

133. *Id.*

134. See *VMI Summer Session Honor System Standard Operations Procedure*, VA. MIL. INST., <http://catalog.vmi.edu/content.php?catoid=2&navoid=9> (last visited Apr. 10, 2020).

135. *Pack v. Va. Mil. Inst.*, No. 89-2012, 1989 U.S. App. LEXIS 21409 (4th Cir. July 24, 1989) (per curiam); *Smith v. Va. Military Inst.*, No. 6:09-cv-00053, 2010 U.S. Dist. LEXIS 52900 (W.D. Va. May 27, 2010).

136. *Pack v. Va. Mil. Inst.*, No. 89-2012, 1989 U.S. App. LEXIS 21409, at *1–2 (4th Cir. July 24, 1989) (per curiam).

137. *Id.* at *3 (per curiam) (emphasis added).

138. See *id.* at *5–6 (per curiam).

139. *Id.* at *4 (per curiam).

140. *Id.* at *5 (per curiam).

Twenty-one years later, Virginia Military Institute's Honor System again faced a challenge in *Smith v. Virginia Military Institute*.¹⁴¹ In that case, the appellant alleged the Honor Court's process to be procedurally deficient in the context of both property and liberty interests.¹⁴² While the court expressed doubt about Smith's claim that he had a property interest in continued enrollment at the institute—based on the theory that the state must create that entitlement for that right to exist—it took the position similar to many courts in simply assuming such an interest existed.¹⁴³ In dismissing the claim that Virginia Military Institute's honor processes were inadequate, the court cited the thorough factual and procedural record of Smith's honor proceedings, asserting Smith was “given adequate notice” and “provided an opportunity to be heard” which included “pre-trial processings; a trial in a student run VMI Honor Court, monitored by one of the defendants, Captain Reiser (the Superintendent's Representative); a review of the Honor Court's decision by General Peay, Superintendent of VMI; and the Board of Visitor's denial of plaintiff's appeal.”¹⁴⁴ In short, the court applied a minimalist view of what procedures in an educational honor setting satisfy the due process clause. Because Smith received adequate notice and was provided an opportunity to be heard, the court found Virginia Military Institute's Honor System as applied to Smith to be constitutionally sound.¹⁴⁵

4. *West Point Cases: Providing for the Common Defense*

A review of the storied and fluid history of the Honor System at West Point would not be complete without discussing the court-influenced underpinnings of the current system. On the crest of the “due process revolution” wave, a disciplinary case out of the United States Merchant Marine Academy provided some legal contour for service academy dismissal processes.¹⁴⁶ *Wasson v. Trowbridge* championed a flexible approach to procedural due process as a balancing test of the private vs. government interests involved.¹⁴⁷ For service academies, the court reasoned, the government interest exceeds that of its civilian university counterparts.¹⁴⁸ The court maintained that such misconduct dismissals trigger the due process-required notice and hearing, and even went as

141. See *Smith v. Va. Military Inst.*, No. 6:09-cv-00053, 2010 U.S. Dist. LEXIS 52900 (W.D. Va. May 27, 2010).

142. *Id.* at *12.

143. *Id.* at *13.

144. *Id.* at *14–15.

145. See *id.*

146. *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967).

147. See *id.* at 812.

148. *Id.* (contrasting the *Wasson* facts from the landmark *Dixon v. Alabama State Board of Education* case in that when dealing with a service academy, “the private interest must yield to a greater degree” to the “vital and sensitive areas of government concern such as national security and military affairs” whereas *Dixon* did not involve any “such paramount government interest.” citing *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)).

far as requiring the availability of defense counsel for the cadet.¹⁴⁹ However, the court asserted that in the non-adversarial spirit of such boards and dismissals, due process does not require a lawyer to be physically present at the disciplinary hearing.¹⁵⁰

The United States Military Academy case of *Hagopian v. Knowlton* similarly involved a due process challenge disciplinary dismissal from a service academy.¹⁵¹ The *Hagopian* court relied on *Wasson* as precedent to promote a flexible and non-adversarial approach to the due process question.¹⁵² To further elaborate, the court asserted that the process due is relative to the potential adjudged sanction, such that, a potential expulsion from the school would warrant more substantial processes to protect the interests of the individual.¹⁵³ As such, and perhaps a harbinger for future jurisprudential development on the issue, the *Hagopian* court's philosophy finds some congruency with the test eventually articulated in the *Mathews* case.¹⁵⁴ However, the court did not mandate any particular level of formality for the procedures, nor did it require the hearing component to occur at a particular time in the process.¹⁵⁵ The primary revelation from the *Hagopian* decision is: for disciplinary expulsions—as opposed to academic removals—the school must afford the student the ability to appear and present witnesses on his behalf.¹⁵⁶ The court also reiterated the mantra that by following their own rules and procedures, these institutions would minimize premature due process missteps.¹⁵⁷

Andrews v. Knowlton, a consolidated appeal with a similar case, *White v. Knowlton*, involved challenges to West Point expulsions due to honor code violations.¹⁵⁸ The cases also represented a turning point for the Academy's honor system in terms of procedural due process, contemporaneous with the “due process revolution.”¹⁵⁹ The court ultimately ruled in favor of the appellee,

149. *Id.* at 810.

150. *Id.* at 812.

151. *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972).

152. *Id.* at 207–09.

153. *See id.* at 208.

154. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

155. *See id.* at 212 (“The foregoing is intended merely to convey, for the guidance of the Academy, the rudiments of due process required for disciplinary proceedings. It will be for the Academy within this rough framework to determine the precise procedures to be employed.”).

156. *Id.* at 211.

157. *See id.* at 208 (quoting *Friedberg v. Resor*, 453 F.2d 935, 937 (2d Cir. 1971) (“With respect to decisions made by Army authorities, ‘orderly government requires us to tread lightly on the military domain, with scrupulous regard for the power and authority of the military establishment to govern its own affairs within the broad confines of constitutional due process.’”)). *But see id.* n.23 (citing *Friedberg*, 453 F.2d at 938) (“[W]here military ‘regulations prescribed specific steps to be taken to insure due process they must be substantially observed.’”). In addition, “[n]o claim is made in this case that the Academy failed to follow its own procedures.” *Id.*

158. *Andrews v. Knowlton*, 509 F.2d 898, 900 (2d Cir. 1975).

159. *See Mott, supra* note 38.

Knowlton, by holding that the overall honor processes, which included the right to appeal to a board of officers independent of and above the cadet honor committee and Academy, were adequate.¹⁶⁰ The court's conclusion, however, did not issue a blanket endorsement of the cadet-run honor committee's processes. Indeed, the court remarked that the cadet procedures were "wholly lacking in procedural safeguards."¹⁶¹ However, consistent with the judiciary's aversion to micromanaging military affairs, the *Andrews* court concluded that "the Due Process Clause does not require the utilization of any particular procedure by the Cadet Honor Committee."¹⁶²

Part in response to the due process infirmities pointed out in the *Andrews v. Knowlton* decision, somewhat because of the cheating scandal of the mid-1970s, and to some extent as a reaction to cadet cynicism as to whether the honor-related decisions are actually made by cadets in the cadet honor committee, the Academy shifted course in the mid-1970s.¹⁶³ Essentially, it abandoned the former dual-tier system, Cadet Honor Committee adjudication with the option to appeal to a Board of Officers, in favor of a single-tier system incorporating due process protection.¹⁶⁴ This change set the foundation for the due-process honor system West Point adheres to today.

As court challenges to West Point honor expulsions have persisted since this due process shift, the 1996 *Phillips v. United States*¹⁶⁵ case is worth a review. In considering the cadet's plea for injunctive relief against the Academy's honor sanctions, the *Phillips* court reviewed West Point's honor system procedures in order to render a judgment as to whether the student-plaintiff was likely to succeed on the merits of his claim.¹⁶⁶ In ruling against the student, the court found, amongst other things, that Phillips was provided "ample notice" and a "full and fair hearing."¹⁶⁷ Above, all the court noted that the Academy "scrupulously"¹⁶⁸ followed its own regulations. In short, the court gave a post "due process shift" era endorsement to both the honor system procedures and the Academy's proclivity to follow them.

In short, the honor systems of the University of Virginia, the College of William and Mary, the Virginia Military Institute, and the United States Military

160. *Id.* at 907–08.

161. *Id.* at 907.

162. *Id.*

163. *See* SORLEY, *supra* note 1, at 114–15 ("[T]he cadets completely eliminated the two-tier system in favor of a single 'due process' hearing at the Cadet Full Honor Board level."). The enumeration of events that precipitated this change is certainly not exhaustive. Other critical events that compelled the changes were the Academy's Electrical Engineering cheating scandal and convening of the Borman Commission to evaluate both the Academy's response to the cheating scandal and the overall efficacy of the honor system.

164. *See id.* at 115.

165. *Phillips v. United States*, 910 F. Supp. 101 (E.D.N.Y. 1996).

166. *Id.* at 107–08.

167. *Id.* at 108–09.

168. *Phillips v. United States*, 910 F.Supp. 101, 109 (E.D. N.Y. 1996).

Academy at West Point have all withstood legal challenges in recent years. While this is just a sampling, a more thorough review of cases involving challenges to schools' honor systems finds few others that ended up in the court system and even fewer of those that resulted in successful challenges.

Perhaps the most instructive outcomes of these cases are threefold. First, aside from the *Andrews* case, courts routinely endorse the procedural due process attributes of college and university honor systems.¹⁶⁹ While *Andrews* was an outlier in this regard, the court still endorsed the overall process and prompted West Point to apply the requisite due process protections in place at the Board of Officers level to the cadet honor committee level.¹⁷⁰

Second, the courts found that these schools routinely followed their own enumerated procedures for dealing with honor or collateral dismissals.¹⁷¹ While following their own rules is a fail-safe method for schools to stay on the right side of the procedural due process line, some courts admitted that failure to do so does not always equate to a fatal constitutional flaw.¹⁷²

Finally, some of these cases, especially *Butler*, amplified the recognition of the interests of the schools. This provides educational institutions with a counterbalance to a challenge that is inordinately focused on the individual's interests and rights. This is especially noteworthy in light of the increasing amount of due process rights courts are finding in the educational sanction context as well as the upward trend of focus on the individual's rights in these matters. All three of these observations feed into this article's theme that the path to a more perfect honor system must not be adorned with more legal protections.

V. ANALYSIS: FOUR REASONS SCHOOLS HAVE LATITUDE TO CURB HONOR SYSTEM LEGALIZATION

A. *The Imperative for Change*

Before delving into this article's primary message that educational institutions have latitude to streamline their honor systems' legal components, it is an opportune time to review reasons why these honor systems, in general, need to be simplified. First, while the educational institutions may promote and pride their honor systems as being non-adversarial, and, by extension, non-litigious, the opposite is happening on college campuses. Indeed, by creating more of a legal structure in which the students involved with honor code violations can operate, students will assume there is a legal solution to their problem. This is

169. See *Butler*, *supra* note 117.

170. See *SORLEY*, *supra* note 1, at 114–15.

171. See *Butler*, *supra* note 117.

172. See, e.g., *Dutile*, *supra* note 23, at 278–79; *Jones v. Bd. of Governors of Univ. of N.C.*, 704 F.2d 713, 717 (4th Cir. 1983) (discussing how a state's failure to follow its own procedures would not necessarily amount to a due process violation, except for when such a departure invoked an unfair and prejudicial detrimental reliance that those procedures would be followed).

not to mention the natural tendency for a student to avoid ownership of their alleged transgressions when a legal solution could potentially exonerate them, clear their good name, and sidestep the liberty harms some courts have found to be at stake. In short, a legal system begets a litigious process. In the long run, an overly litigious honor system does not benefit either the individual or the institution.

This lean towards litigiousness feeds into a second imperative for schools to revise their honor systems: time. While the austere honor processes of yesteryear may, in some cases, have deprived students of constitutional due process rights, the processes at many schools today have become extremely lengthy. As an example, in the not too distant past, the Secretary of the Army required the United States Military Academy to complete its honor cases within 60 days.¹⁷³ A recently publicized occurrence of honor violations at the Academy reveal that the length allegation to resolution timeline for those cases was almost a year.¹⁷⁴ The case history reviewed above reveals that other schools have similarly time-consuming honor processes, and that is so even before the cases enter the court system.

This is not to assume the leadership at West Point or other institutions do not agree that their honor processing times should be shortened; indeed, they continually work towards striking the right balance between individual rights and the mission of their institution.¹⁷⁵ A review of West Point's modern honor processes leads to the logical conclusion that embedded legal processes are a significant contributor to the system's unwieldiness. An overly lengthy honor process inordinately taxes any educational institution's resources while dragging out a process that leaves both the institution and the student in the lurch, in terms of status and final resolution. The University of Virginia's Honor Audit Commission released a 2017–2018 report which found a faculty "perception that cases take too long and the process is overly burdensome."¹⁷⁶ While most of the court challenges to the mentioned institutions' honor systems have related to inadequate procedural due process, it seems that it is only a matter of time before

173. See, e.g., *Phillips*, 910 F. Supp. at 106 ("The sixty (60) days for the processing of Cadet Honor cases commence, under the rule, with the report of a violation to a CHR and conclude (if a violation is found) when the case is received by Headquarters. . . . Certain days are excluded in computing the sixty (60) days within which Headquarters is required to receive the case." (citing a previous edition of USCC Pamphlet 15-1, 2-19, 2-20)). This 60-day rule was implemented pursuant to the Secretary of the Army.

174. See *West Point Concludes Honor Code Investigations, Discontinues Willful Admission Process*, UNITED STATES MILITARY ACADEMY WEST POINT (Apr. 16, 2021), <https://www.westpoint.edu/news/press-releases/west-point-concludes-honor-code-investigations-discontinues-willful-admission>.

175. See, e.g., SORLEY, *supra* note 1. Mr. Sorley's entire book is dedicated to a history of change aimed at perfecting the West Point Honor System and so invokes the notion that its current conception is overly time consuming. To assume the Academy leadership is not aware of the lengthy process and aims to shorten it would be a shortsighted conclusion.

176. *Honor Audit Commission: 2017–2018 Report*, *supra* note 20, at 11.

the central issue—as opposed to a collateral matter—of future challenges is the inability of the process to provide requisite swift justice.¹⁷⁷

Finally, as honor systems sustain and even increase their level of intricacy, the degree of understanding by all stakeholders will naturally decrease. Staff and faculty of educational institutions will flounder to understand their roles in honor processes. More distressingly, the faculty and students alike will also fail to garner a mutual understanding about how the byzantine system works. The same University of Virginia Honor Audit found “78% of students do not know who their [honor] representative is and 68% do not know who to contact about a possible Honor violation” and that “survey results indicate a general lack of knowledge about the Honor System among the faculty.”¹⁷⁸ The Commission also found that “22% of faculty members indicated that the biggest deterrent to reporting an Honor offense is that reporting and following through with a case takes too much time.”¹⁷⁹ Thus, with such convoluted processes, it is only when a student gets accused of an honor violation that they will become interested in how the process works. And if it takes a lawyer to figure out the system, guess who the students will hire to help them navigate it?

The foregoing illustrates the imperative for schools to streamline their honor systems. Because the propagation of legal processes is a primary cause of the systems’ current complexity, this article not only endeavors to explain why the institutions have the leeway to do so, but urges the time is nigh for such introspection and change.

B. The Latitude for Change.

1. Interests on Shaky Ground?

While the courts experienced a “due process revolution” and society has become increasingly litigious, it is difficult to imagine the courts reversing their trend of finding property or liberty interests for students under investigation for honor infractions. Whether it be a reputation interest, a vested interest in continuing higher education towards a degree, or the prestige or profession upon which that degree bestows, the courts will probably still find an interest or presume one when presented a due process challenge of an honor system.

However, that is not to say the prospect that honor system dismissals are on firm due process grounds in the eyes of the courts. To the contrary, there have been cases in which no such interest has been found, an outcome which would obviously benefit the educational institution that finds itself in the middle of a

177. See, e.g., Steven Reed Armstrong, *The Argument for Agency Self-Enforcement of Discovery Orders*, 83 COLUM. L. REV. 215, 218 n.16 (“The sixth amendment and rule 1 of the Federal Rules of Civil Procedure are only two of the significant legal documents that recognize the necessity of swift justice if justice is to be had. This basic precept of law is no less essential in the realm of modern day justice administered by administrative agencies.”).

178. *Honor Audit Commission: 2017–2018 Report*, *supra* note 20, at 8, 11.

179. *Honor Audit Commission: 2017–2018 Report*, *supra* note 20, at 11.

due process challenge. But assuming that courts continue to typically find or assume that property or liberty interests are affected by an honor system sanction, the more prudent approach for the schools would also to assume the student has an individual interest, as well. This is not to minimize this article's proposal that the schools' have latitude to truncate the processes designed to protect those interests. Rather, it shifts the focus of the analysis to the *Mathews* judicial test, which helps lend some balance to the equation.

2. *Mathews Test (reprise)*

Perhaps the best support for the notion that higher education institutions have leeway to trim down the due process requirements within their honor systems lies in the very test that was formulated to help determine the "specific dictates of due process."¹⁸⁰ This proposal invokes the *Mathews* test and is anchored in three premises. First, court precedent indicates the balance between *Mathews*' first and third prongs could easily tilt towards the interests of the institution, particularly if schools ramp up their efforts in articulating those interests. Second, if schools do not aggressively assert their interests within the *Mathews* equation and courts consequently start consistently ruling against them, we would be left in the unenviable position where the interests of higher education are essentially eviscerated by court precedent. By default, this means that educational interests would therefore be controlled and created by the courts. Finally, if a stalemate persists between *Mathews*' first and third prongs as occurred in *Butler*,¹⁸¹ the court history reviewed above reveals that schools are currently faring well in terms of adequate processes. By default, a safe assumption would be that more processes would be overkill. One could then conclude that there are currently legal excesses that just have not been "discovered." Thus, it is high time for schools to find ways to streamline the legal processes within their honor systems by finding and excising legal excesses.

A good starting point for discussing the *Mathews*' prongs would be the *Butler* case. Recall that the *Butler* court notably emphasized the rights of the school, *Mathews*' third prong, after identifying the rights of the individual student, *Mathews* first prong.¹⁸² Indeed, the court felt that the school had an equal and counterbalancing interest in "controlling the integrity of its graduate programs" that essentially canceled out prongs one and three.¹⁸³ *Mathews*' second prong, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," would therefore be the controlling variable.¹⁸⁴ This prong, in itself,

180. *Mathews*, 424 U.S. at 334–35.

181. *Butler v. Rector & Bd. of Visitors of the Coll. of William & Mary*, 121 Fed. App'x 515, 520 (4th Cir. 2005) (per curiam).

182. *Butler*, 121 F. App'x at 520 (per curiam).

183. *Id.*

184. *Mathews*, 424 U.S. at 335.

evaluates the balance between what procedures the school is currently using and the risk that these procedures would violate an individual's due process rights. A closer look at that balance counsels us that the interests of the school are a pivotal component of the due process equation, and that the ball is often in the school's court when it comes to successfully defending against honor system challenges.

First, higher educational institutions with well-established and revered honor systems should not relent in asserting their interests into this equation. Much like the *Butler* court proposed, higher educational institutions do have an interest in protecting the integrity of their programs. In one respect, they are protecting the integrity of their certifications granted upon a student's graduation. That is, a diploma is a school's seal of approval that the graduate met or attained the institution's high standards. In the case of honor systems, the school certifies that the individual student met the ethical and honorable standards of their institution and, by extension, guarantees the graduate will thus act similarly in their professional endeavors. That said, the certification loses meaning if what it guarantees—graduates who have inculcated the school's honor-seeking reputation—applies to a lesser extent when the school allows the system it employs to be diluted to ensure these attributes in favor of the rights of the students.

Second, there are significant, though unintended, long-term perils associated with schools failing to convincingly promote their own interests in preserving effective honor systems. That is, by not consistently counterbalancing student's individual rights arguments, the schools will, by losing these cases in court, start losing the ability to shape and maintain the integrity of their own honor systems and codes. In these circumstances, the school's honor codes will eventually become more of a product of the courts, and less a reflection of what the institutions desire to uphold. The good news for the institutions is that, to date, that really has not happened given the relatively relaxed court dictates of "some kind of notice" and "some kind of hearing."¹⁸⁵ However, one can only be pessimistic that the courts will remain as deferential as they have, given the laws proclivity to "find" more and more fundamental rights and individual liberties where they did not exist before, and a litigious society's taking advantage of this space in which the courts allow it to roam.

In short, schools should follow the *Butler* court's lead and more vigorously defend their interests in keeping their honor systems effective. A reduction of legal processes would in turn reduce the inclination for a student to view the system as something they can beat, rather than a code to which they should aspire to adhere. Fostering such a positive honor climate would better achieve the institutions ends' as well as benefit the students they serve.

185. See Dutile, *supra* note 23, at 245.

3. *It's a Contract: On My Honor . . .*

Another perspective that could influence a school's decision to abbreviate the legal processes within its honor system is to consider the process as a form of a contract. That is, if an institution treats its honor policy more as a contract between the school and its students, the courts would be forced at least to consider the contractual nature of the transaction, in addition to applying the requisite due process review. While contractual principles are more of a function of the private school relationship with its students, case precedent supports infusing contractual principles into the public school-student relationship.¹⁸⁶

Such a contractual perspective would, theoretically, make the school less susceptible to successful legal challenge. This is because the defending school would only need to show that its decision to dismiss a student, termination of the contract, given the student's breach by misconduct or failure to uphold the contract's provisions, was not "arbitrary and capricious."¹⁸⁷ Indeed, this contractual framework is the standard applied to most private institutions of higher education when dealing with involuntary student dismissals.¹⁸⁸

In *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, Barbara A. Lee reviews several cases involving challenges to private schools' procedures for academic misconduct dismissals.¹⁸⁹ Because of their private

186. See, e.g., *Ross v. Pa. State Univ.*, 445 F. Supp. 147, 152, 155–56 (M.D. Pa. 1978) ("Thus, this Court must decide whether Ross had a property interest under the law of Pennsylvania in continuing his course of study as a graduate student at Penn State and in his employment as a graduate student at that institution. Pennsylvania courts have long recognized that the relationship between a student and a private college is contractual. As a result, students have been permitted to bring contract actions against institutions of higher learning for alleged breaches of that contract. The fact that Ross attended a public institution does not provide a sufficient basis for changing this approach. A student has a reasonable expectation based on statements of policy by Penn State and the experience of former students that if he performs the required work in a satisfactory manner and pays his fees he will receive the degree he seeks." (citations omitted)). Thus, students at public institutions are afforded the benefits of both contractual and constitutional protections. See also Jonathan Flagg Buchter, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 254 (1973) ("Courts still view the student-university relationship as one of contract with certain constitutional protections required if the institution is public.").

187. See, e.g., *McCawley v. Universidad Carlos Albizu, Inc.*, 461 F. Supp. 2d 1251, 1257 (S.D. Fla. 2006) ("Courts are generally reluctant to interfere with or substitute their judgment regarding decisions of academic institutions to award degrees. Such decisions are afforded great deference and are generally not disturbed absent an abuse of discretion."). After reiterating this common theme, the court went on to apply the arbitrary and capricious standard in holding that the school's action was not improper in light of the student's academic misconduct.

188. See Lee, *supra* note 37, at 527. Although Professor Lee's discussion primarily centers around a student's contractual leverage to challenge a school sanction based on an academic misconduct, the reverse could be said to be true if indeed there is a contractual relationship. That is, the school could use contractual leverage to ensure a student adheres to the dictates of an honor code, and would only be subject to constitutional challenge if its actions are deemed arbitrary and capricious.

189. See *id.* at 528–30.

status, these schools are normally held to principles of contract law when evaluating such cases.¹⁹⁰ This generally requires schools to simply follow their own processes, from a procedural standpoint, and that their decisions not be arbitrary and capricious if the facts require an more in-depth substantive review.¹⁹¹ Lee summarizes this review by acknowledging that under contract principles, private institutions of higher education fare exceptionally well when faced with legal challenges.¹⁹² She notes that some critique the blanket use of contractual standards for both academic and academic misconduct cases at private schools and the inherent disparity that creates between public and private schools.¹⁹³ However, Lee points out that there is no corresponding dip in judicial deference afforded to the public institutions that are required to apply the *Goss*-guided due process standards in academic misconduct issues in comparison to private universities who are not so required.¹⁹⁴

Though it is normally a private school privilege to treat academic misconduct as contractual, some public schools adorn their honor systems with the trappings of contract law by putting students on notice of honor violation consequences. Consider this “pledge” read and signed by both applicants and newly matriculating University of Virginia students.

I have read the explanation of the Honor System. I understand that as a student at the University of Virginia, I will be participating in this system. I agree to support and abide by the Honor System, which prohibits lying, cheating, and stealing. I understand and accept that the Honor System is administered entirely by student representatives, including investigations, adjudications, and appeal review, and that violations may result in permanent expulsion and revocation of any University degree.¹⁹⁵

From another angle, consider the agreement newly matriculating cadets sign within the first few hours of arriving at West Point.

II. Agreement to Serve

190. *See id.* at 527.

191. *Id.* at 530.

192. *Id.*

193. Lee, *supra* note 37, at 527–30.

194. *See id.*

195. *See, e.g.,* Jane Kelly, *Class of 2023 is Officially Welcomed to UVA at Opening Convocation*, UVA TODAY, (August 25, 2019), <https://news.virginia.edu/content/class-2023-officially-welcomed-uva-opening-convocation>; Anne E. Bromley, *Rite of Passage: First-Year Students Join the Community of Trust*, UVA TODAY (August 25, 2014), <https://news.virginia.edu/content/rite-pdassage-first-year-students-join-community-trust> (describing how the pledge is signed by newly matriculating students). Various University of Virginia courses require this pledge on individual assignments: “On my honor, I pledge that I have neither given nor received help on this assignment.” *The Honor System*, UNIV. OF VA. SCH. OF ENG’G & APPLIED SCL., <https://engineering.virginia.edu/online/the-honor-system> (last visited Jan. 20, 2021). More complete information about the University of Virginia Honor System is available at the Honor System website <https://honor.virginia.edu/>.

I, having been appointed a cadet of the United States Military Academy, do hereby agree, with the consent of my parents or guardian if I am a minor:

a. To complete the course of instruction at the United States Military Academy;

b. If tendered an appointment as a commissioned officer in one of the armed services upon graduation from the United States Military Academy, to accept such appointment and to serve under such appointment on active duty for at least five consecutive years immediately after such appointment; if my initial appointment hereunder is in a Reserve Component, to accept a commission in a Regular Component if subsequently tendered during the five consecutive years immediately after my initial appointment, and to serve on active duty for the remainder of such period under such appointment.

c. If I am permitted to resign my commission in a Regular Component of one of the Armed Services prior to the eighth anniversary of my graduation, to accept an appointment as a commissioned officer in the Select Reserve (SELRES) of one of the Armed Services and remain therein until such eighth anniversary.

d. To serve a total of eight (8) years from graduation from the United States Military Academy. Any part of that service not completed on active duty must be served in the SELRES (not on active duty), unless I am discharged from the SELRES by proper military authority.

e. That if I fail to complete the course of instruction of the United States Military Academy, breach my service agreement as defined in paragraph 1.g.(3), Statement of Policies on the next page, or decline to accept an appointment as a commissioned officer, I will serve on active duty as specified in paragraphs 1.b. through 1.g., which are contained in the Statement of Policies on the next page;

f. That if I, as a result of misconduct, a volitional act or omission, fail to complete the period of active duty specified in paragraphs IIb, c, d or e above, I may be required to reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided me as the unserved portion of active duty bears to the total period of active duty I have agreed to serve;

g. Further, that if I am separated from the United States Military Academy for breach of this service agreement, as defined in paragraph 1.g. (3), Statement of Policies on the next page, and the Army decides that I should not be ordered to active duty because such service would not be in the best interests of the Army, I shall be considered to have either voluntarily or because of misconduct failed to complete the period of active duty and may be required to reimburse the United States as described above;

h. For the purpose of this paragraph: (1) The term “volitional act or omission” refers to an inability to meet any of the standards prescribed in Chapter 6 of Army Regulation (AR) 210-26, United States Military Academy, to include, but not limited to, conscientious objection, resignation from the United States Military Academy or United States Army, marriage or support obligation while a cadet, failure to meet weight control program standards, and failure to meet Army Physical Fitness Test standards. (2) The term “misconduct” includes, but is not limited to, termination of my service by the United States Army because of criminal conduct, conduct violating the Cadet Honor Code, conduct deficiency under the Cadet Disciplinary System, conduct violating the provisions of AR 210-26, and conduct violating regulations for the discipline of the Corps of Cadets. (3) The term “course of instruction” is synonymous with the term “educational requirements” as the term is used in 10 USC 2005.¹⁹⁶

To both the University of Virginia and the United States Military Academy, their institutional standards are matters of profound importance. This is self-evident from the contracts provided above.

For the University of Virginia, new students are thus provided notice of the school’s revered honor code before and upon entry. Not only does the pledge provide early awareness of the University’s honor system, but it also summarizes the consequences for failure to abide by the honor code. Presumably, the University requires such a pledge by entering students to not only ensure their awareness of the code, but to also leverage compliance. As such, it would be difficult for a court not to acknowledge that the pledge is a type of contract. Indeed, to earn what the University of Virginia will award you upon completion of their program—a diploma that carries with it all of the prestige and qualitative endorsement of the University—the University requires you to successfully complete its regimen, a significant part of which is done while concurrently

196. See, e.g. *USMA Form 5-50: USMA Post for Active Duty Service Obligation Contract*, UNITED STATES ARMY CAREER SATISFACTION (Mar. 2014), <https://www.career-satisfaction.army.mil/resources/contracts/USMA-Post-Contract.pdf>.

abiding by the honor code. A classic bargained for exchange, memorialized by the pledge.

For the United States Military Academy, the agreement to serve is, by its terms, nothing short of a contract by the Academy as an agent of the Department of Army and Department of Defense. It not only provides ample details about consequences from not upholding the agreement, but refers to the specific requirements of the Cadet Honor Code, Cadet Disciplinary System. It is indeed a contract that requires successful completion of multiple components of the Academy curriculum.. Failure to satisfactorily complete any of these programs will prevent a cadet from earning a West Point diploma and receiving a commission in the United States Army. It is quite difficult to imagine misunderstanding or varying interpretation of these standards at either the University of Virginia or the United States Military Academy, given the straightforwardness of the language and contractual flavor of the University of Virginia Honor Pledge and United States Military Academy Agreement to Serve.

What does this all mean? For starters, applying a contractual legal template to honor processes helps private institutions immunize themselves from honor code legal challenges, especially when they follow their own procedures. Second, institutions such as University of Virginia and the United States Military Academy at West Point that require students to sign an honor pledge or an agreement that includes adherence to an honor code most likely would have standing to assert a contractual defense to such legal challenge. This defense would be rooted in much more than just an implied contract theory: both University of Virginia and the United States Military Academy at West Point have a written contract in hand! Thus, even though both schools are indeed public institutions, there is sufficient contractual nexus to their honor code requirements such that the schools should not hesitate to assert contract principles as a component of their defense, when challenged. It follows that this contract law latitude is yet another component that gives these institutions space to streamline the legal components within their honor systems.

VI. CONCLUSION

Does this article imply that students do not have due process rights when sanctioned by an institute of higher education for violating their honor code? Further, does this article recommend removing all legal protections in college and university honor systems? The answer to these rhetorical questions is obviously no. However, this article does suggest that some honor systems are oversaturated with legal processes. This due process overcorrection could be a result of a combination of factors, including the desire to steer far and away from the systemic due process deficiencies of years past, and the morally correct aspiration to insure students that the institutions have gone above and beyond in preserving and protecting their constitutional rights.

However noble these efforts, that does not mean that these honor systems have been right-sized, legally. Based on their good track records in court, we know that the schools' honor systems are constitutionally sufficient. What we do not know is exactly how much of the legal apparatus at each of these schools is overkill. However, given the observations and legal philosophies discussed, it is highly likely there are legal redundancies. Given that the "Due Process Revolution" has not ended and will likely continue, the time is ripe for schools to inspect their honor systems for legal oversaturation, excise any excess processes, and resist the temptation to cave to the "revolution's" pressure and unnecessarily add legal components to their honor systems.

VII. RECOMMENDATION

One of the initial purposes of this article was to identify specific components of educational honor systems that were excessive and recommend that those institutions make appropriate adjustments. However, it became evident that including such recommendations would exceed the scope in four ways. First, it would take away from the more generally applicable focus of this article on honor systems, writ large, and how the legal philosophy and court history suggest there is institutional latitude to make adjustments. Second, given the court history reviewed and the courts' propensity, hopefully an enduring propensity, to avoid legislating in the guise of mandating specific procedures, there is little judicial guidance as to where these legal excesses may reside. Third, such a school and process-specific study may be better suited for follow-on articles and studies, based on researched data and metrics. Finally, given the variance in legal complexity amongst honor systems, this is not a one-size-fits-all situation. Some schools may find their honor systems are legally oversaturated whereas others find theirs to be already right-sized. It is therefore an institutional imperative to probe their own systems to determine what legal processes may be excised while at the same time staying true to the constitutional principles espoused by the courts.

