PART III:
PROCEDURAL FAIRNESS AT PRIVATE UNIVERSITIES

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

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

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

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

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

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

[illegible]

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

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

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

However, when your university clearly has failed to live up to its obligations to you, then you have a genuine chance of obtaining judicial relief. For example, in the case of [illegible] (1994), the U.S. District Court for the District of Vermont cleared the disciplinary record of a Middlebury College student who

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

[illegible]

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

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

That's the good news. The sobering news is that no matter how courts in your jurisdiction define "arbitrary

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

Definitions:
Arbitrary and Capricious

[illegible]

—AMERICAN HERITAGE DICTIONARY

FIRE's

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

The United States Constitution does not prohibit private organizations, such as universities, from making rules limiting the speech of those who choose to join them. Some state constitutions, however, establish what is known to lawyers as an "affirmative right" to free speech that belongs to every citizen. In states with such

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

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

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

FIRE's [illegible]

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

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

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

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

While Title IX's guarantee of fair grievance procedures was intended to create a sound system for victims of sexual discrimination, such procedures, of course, should also work to the benefit of persons accused of

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

[illegible]

Some sectarian institutions—seminaries, colleges, or universities that are associated with churches, synagogues, or mosques, for example—have strict rules governing student conduct. Private colleges are allowed to establish and advertise such rules, of course, as long as their regulations do not violate antidiscrimination laws or other statutes. Even then, some religiously required practices that may appear to be discriminatory—above all in aionf0-in YJzWnawsal WJ

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

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