

January 15, 2008

Members of the Judicial Affairs Review Committee:

I am writing to contribute my thoughts and research to your deliberations on the policies and practices of the Office of Judicial Affairs. My work with the Office of Judicial Affairs has consisted thus far of exchanging emails and memoranda with officials in the Division of Student Affairs, documenting changes in written policies apparent from archived versions of the *Bulletin of Information and Regulations*, and interviewing University officials concerning those policies and the associated changes. Articles,¹ memoranda,² and emails³ documenting these discussions are attached to this letter.

I am grateful to you for taking your time to give these issues your consideration. Having attempted to tackle many of them myself, I am cognizant of the commitment involved. Your time is being well spent, as these issues strike to the heart of what it means to be an undergraduate at Duke. Through undergraduate policy, the University communicates its expectations of what we should and shouldn't do during our time here. Through the procedures used to adjudicate alleged policy violations, the University communicates the esteem in which it holds undergraduates by establishing the rights and protections it affords us as members of the Duke community.

Unfortunately, however, the importance of the undergraduate disciplinary process to our community stands in contrast with well-documented concerns about the conduct of the Office of Judicial Affairs and the current state of undergraduate policy. To that end, I am in agreement with the policy concerns and recommendations emerging from DSG's review of Judicial Affairs. Instead of rehashing them, however, this letter and the associated documentation will focus on three issues raised by my research that were either omitted by DSG or of secondary importance to the arguments it presented:

- (1) Portions of the undergraduate judicial code that are inconsistent with one another, inconsistent with the practices of the Office of Judicial Affairs or otherwise incoherent;
- (2) Portions of the undergraduate judicial code that are inconsistent with the (admittedly vague) articulation of Judicial Affairs' educational mission;
- (3) The importance of considering undergraduate judicial policy separately from undergraduate judicial procedure and structuring the judicial system accordingly.

Before I begin, I would like to make a concession on a point often raised in discussions surrounding undergraduate policies and judicial procedure: the University has no legal obligation to do what DSG, other undergraduates, or I are asking. Private universities can punish or even expel students as they wish.⁴ At issue in these discussions is not whether Judicial Affairs' policies and practices are legal, but whether they are internally consistent and consistent with the

¹ See attachments [1]-[4].

² See attachments [6] and [7].

³ See attachments [8] and [10].

⁴ Among other extreme examples, Bob Jones University prohibits students from wearing Abercrombie & Fitch clothing because of said company's "unusual aversion to Christ-likeness."

mission of the University as a whole. Unfortunately, my research has led me to the strong belief that they are neither, to the detriment of the undergraduate judicial system, to the detriment of the undergraduate experience, and to the detriment of the University as a whole.

Without further ado:

(1) Portions of the undergraduate judicial code that are inconsistent with one another, inconsistent with the practices of the Office of Judicial Affairs or otherwise incoherent

Many of these issues are simple oversights and constitute the “low hanging fruit” if your work. In addition, their presence in the bulletin implies that Judicial Affairs is neither consistently enforcing University policy nor following its own procedures, as following the wording of one policy may involve contravening another policy. These contradictions, inconsistencies and ambiguities are listed in roughly descending order of significance:

(a) *The Failure to Comply Policy*

In 2004, the following statement was inserted into the *Bulletin of Information and Regulations*:⁵

A student may be held accountable for failure to comply with:

- directions, requests, or orders of any university representative or body acting in an official capacity, or impeding with the carrying out of such directives; and/or
- sanctions rendered during the disciplinary process (including sanctions issued by a residential staff member).

Such a policy is problematic because:

- It fails to define what constitutes “any university representative or body;” (i)
- It fails to define what constitutes “acting in an official capacity;” and (ii)
- It fails to address the potentiality that such “directions, requests, or orders” may conflict with written University policies or “directions, requests or orders” of other “university representatives.” (iii)

Considerations (i) and (ii) make the scope of the Failure to Comply policy unnecessarily and dangerously broad. Anyone with any claim to the title of “university representative” can order any student to do anything, and the student can be subsequently adjudicated for not complying. That this policy was inserted into the judicial code strikes to the heart of our concerns about the undue reach of the Office of Judicial Affairs. No member of any academic community should be arbitrarily “direct[ed], request[ed], or order[ed]” to do anything and be expected to comply unconditionally. As written, however, the Failure to Comply policy removes all academic or personal freedom that might be afforded students.

Duke not having the outward appearance of a police state, it is clear that the Failure to Comply policy is not consistently enforced in all instances when a “university representative” “direct[s], request[s], or order[s]” a student to do something and that student resists. That fact, however,

⁵ Currently on page 24.

constitutes an inconsistency between Judicial Affairs' practices and written policy. The mere existence of the policy suggests that it is being applied in some circumstances, and given that it cannot be applied consistently and universally, it is only applied arbitrarily. Such a situation opens the door to selective prosecution and potential abuse.

In addition, the existence of the policy in its present form gives Judicial Affairs' staff such wide latitude as to preclude influence from the institution as a whole. The Judicial Affairs Review Committee is undertaking this effort precisely in to define when and how student behavior should be restricted and how those restrictions should be enforced. Such an effort may be less fruitful if the judicial code continues to permit any "university representative" to say "jump," and expect the student to respond, "how high?"

Consideration (iii) has even broader tangible implications:

Page 45 of the 2007-2008 *Duke Community Standard in Practice* bulletin outlines the procedural rights afforded students facing a hearing before the Undergraduate Judicial Board; page 62 contains the University Statement on Privacy. With the gradual weakening of these protections over the past eight years, these two statements remain the only written rights afforded undergraduate students at Duke University.

Despite these protections, according to a literal reading of the Failure to Comply policy, students can be directed, requested or ordered to abdicate certain rights "guaranteed" them in other parts of the judicial code. This contradiction is problematic for two reasons: it prevents students from knowing what to expect while being adjudicated and it affords Judicial Affairs and other University officials a means to encourage students to abdicate "guaranteed" procedural protections.

This present ambiguity is highly problematic from the onset of a formal investigation. When a student is being investigated by Judicial Affairs, the judicial officer handling the case initiates contact with the accused by sending him/her a form letter stating what policies are alleged to have been violated and "requesting that you submit a written statement to me explaining the situation from your perspective." The letter makes no mention of explicitly guaranteed procedural protections or that the student can decline to give the statement. It instead refers students to the Judicial Affairs website, where they find that "requests" fall under the Failure to Comply policy. This contradicts one of the few remaining procedural rights afforded students, the right to "determine the extent to which [they] share information."

There are several documented instances when the Failure to Comply policy has been used in an attempt to convince students to abdicate various privacy protections. Attachment [10] includes an email exchange between Director of Judicial Affairs Stephen Bryan and sophomore Scott Casale, who videotaped a fight on the last day of classes between members of the football team and an off-campus fraternity. After Casale declined to cooperate with Bryan's investigation, Bryan specifically referred to the Failure to Comply policy in asking him to turn over his video file; the implication of the language is quite clear. However, after being questioned on the matter, Dean of Students Sue Wasiolek confirmed that Bryan had no authority to adjudicate Casale, and Bryan eventually dropped the matter. The exchange demonstrates, however, the unfortunate liberality with which the Failure to Comply policy is used to encourage students to abdicate their rights.

Along similar lines, this ambiguity also influences sanctions imposed by Residence Life and Housing Services personnel. Despite the University Statement on Privacy, Resident Assistants frequently cite students for “Failure to Comply” when they refuse to open the doors to their rooms or apartments upon request. One Residence Life dean (Deborah LoBiondo) indicated that students can be held responsible for Failure to Comply if an RA suspects a policy violation and asks a student to open a door to allow him/her to investigate and the student refuses to cooperate. Another dean (Joe Gonzalez) indicated that it was not the case. The authority of Resident Assistants, who have significantly less experience with University policy and are thus likely to apply it more haphazardly than Judicial Affairs and RLHS staff, must be clearly spelled out in order to prevent students from being encouraged or forced to abdicate their rights under University policy. Thus far, this has not been done.

This conflict could be easily remedied by the insertion of text similar to that of the 9th Amendment to the Constitution⁶ as follows:

“This policy shall not be construed to deny or disparage rights otherwise guaranteed to students.”

(b) *The Standard of “Probable Cause”*

Page 42 of the *Duke Community Standard in Practice* bulletin states:

“In order for a case to be referred for disciplinary action, there must be sufficient information to believe that a policy violation *may* have occurred and that the alleged individual/group *may* be responsible [emphasis added].”

Attachment [9] illustrates how this statement is logically equivalent to a student being “not demonstrably innocent,” meaning that he/she cannot, with absolute certainty, prove that the action in question was either not a violation of University policy or that he/she was not responsible for it.

The current standard can be applied as follows:⁷ University policy bans students from constructing or possessing a potato gun,⁸ a hollow tube capable of launching a potato or some other projectile using compressed air. Having taken required introductory engineering courses and having access to basic laboratory facilities, the entire student population of the Pratt School of Engineering has the requisite skills to create and use such a device; it *may* have happened, someone *may* have done it. Based on a literal reading of the standard of “probable cause” in the bulletin, the entire population of Pratt should be “referred for formal disciplinary action”⁹ for violating the University weapons policy.

Since the entire student population, being theoretically capable of and not demonstrably innocent of any violation of any University policy, is not under investigation, this standard is not

⁶ “The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.”

⁷ Used in attachment [1].

⁸ *Duke Community Standard in Practice*, page 37.

⁹ *Ibid*, page 42.

consistently applied. It is, however, incoherent and opens the door to selective adjudication. It should be revised to better reflect Judicial Affairs' true procedures.

(c) The Use of Anonymous or Unavailable Witnesses

In the 2006-2007 *Bulletin of Information and Regulations*, an accused student's right to "confront any witness presenting testimony against him or her" was replaced with a right to "rebut any witness testimony presented against him or her." Both the 2007-2008 and 2005-2006 bulletins, however, also include the following statement:

"If a witness is unidentified or unavailable to attend a hearing, his/her statement may not constitute a sole or substantial basis for determining responsibility."

The latter statement would suggest that unidentified or absent witnesses cannot contribute meaningful information to a hearing panel. On the other hand, "confront[ation]" requires a witness to be neither "unidentified [nor] unavailable," while "rebut[tal]" allows a witness to be absent or unidentified. Sources cited in attachment [3] suggest that this change may have been enacted to allow police reports to serve as a substantive basis for a finding of responsibility.¹⁰ In an August 2007 interview, however, Bryan arguably contradicted the wording of the policy and indicated that the intention was broader:

EW: But why not give the student the benefit of the doubt and say that if you don't have the [ability] to directly confront someone who is accusing them of something, that that information shouldn't be considered?

SB: Well, because, I think they're excluding a lot of *potentially valuable* information. [emphasis added]¹¹

In addition, the Greek Judicial Board has specific procedures for using anonymous witnesses:

In the case of a witness requesting to remain confidential, the principal investigator(s) will interview him/her prior to the hearing and will provide a written and oral summary of the witness' testimony. If further questioning if the witness is necessary during the course of a hearing, arrangements may be made for the principal investigator(s) to question the witness outside of the hearing room or the chair may call a recess and reconvene the hearing later to make time for further investigation/questioning.¹²

Considering extensive historical documentation of the unreliability of absent or anonymous witnesses in any investigation (see the Inquisition, the Red Scare, the Salem Witch Trials, a drumhead court-martial, Stalin's purges, the Chinese Cultural Revolution, and the Lacrosse Incident, among many others), this ambiguity may have significant implications for the integrity of Duke's judicial system. At the very least, Judicial Affairs must explain exactly when and how anonymous witnesses can be used in the course of an investigation, an Administrative Hearing, or and Undergraduate Judicial Board Hearing.

¹⁰ Beginning in 2005-2006, the University began aggressively pursuing judicial action against students cited by law enforcement agents for actions committed off-campus, meaning that written reports and testimony from police officers became a significant factor in University judicial proceedings. In an interview, however, Durham Police Sgt. Dale Gunter indicated that neither he nor any other officer he knew had testified or would be willing to testify at a UJB hearing, suggesting a possible motivation for the change in the policy.

¹¹ August 16, 2007, interview with Stephen Bryan; page 10 of transcript.

¹² *The Duke Community Standard in Practice*, page 48.

(d) Procedural Rights Afforded Students Facing Administrative Hearings

In all versions of the code published between 1999 and 2007, enumerated “procedural rights” were declared to apply to students “facing a hearing before the Undergraduate Judicial Board.” In 2001-2002, however, students lost the right to request a hearing before the Undergraduate Judicial Board in all cases of alleged misconduct. Instead, only students facing possible suspension or expulsion can have their cases heard before a panel. As a result, those rights are no longer explicitly granted to students whose cases are heard through the Administrative Hearing process.

In conversations surrounding procedural rights, however, it has always been assumed that students facing an Administrative Hearing are entitled to the same rights as those facing an Undergraduate Judicial Board Hearing. If that is indeed the case, the policy should be clarified to ensure that students facing an Administrative Hearing are fully cognizant of their rights. If that is not the case, then the vast majority of those adjudicated by Judicial Affairs are not even afforded the already insufficient procedural rights enumerated in the *Guide to the Duke Community Standard*. If this is the case, the current situation is potentially more problematic than was originally articulated.

In either case, this question needs to be answered explicitly in the bulletin.

(2) Components of the undergraduate judicial code that are inconsistent with Judicial Affairs’ articulated educational mission

For the sake of argument, I will assume that the University’s “educational mission” with respect to the undergraduate judicial system is as articulated on the Judicial Affairs website.¹³

The Office of Judicial Affairs strengthens personal responsibility and accountability through investigation and resolutions of alleged violations of university policies

Two additional assumptions are requisite to the decision to expunge procedural rights from the undergraduate judicial code: (i) that a set of guaranteed procedural rights interfere with the vaguely articulated “educational mission” and “introspection” that Judicial Affairs pursues, and (ii) that if the two are mutually exclusive or require some trade-off, the merits of said “introspection” trump those of fundamental due process protections.

Momentarily entertaining that the institution’s educational mission is correctly articulated by Judicial Affairs and that both of the above premises are indeed correct,¹⁴ various policies and practices of the Office of Judicial Affairs still run counter to that mission. Such practices either send mixed messages to or instill resentment in the student body:

(a) The Absence of an Exclusionary Rule

¹³ <http://judicial.studentaffairs.duke.edu/>.

¹⁴ I feel strongly that they are not, but at present they underlie Judicial Affairs’ policies and practices.

In 2000, a policy excluding evidence “obtained through unlawful search and seizure or in violation of the University Statement on the Privacy of Students’ Rooms and Apartments”¹⁵ was expunged from the judicial code. More recently, both Bryan and Vice President for Student Affairs Larry Moneta publicly indicated their willingness to adjudicate students on the basis of information collected in contravention of the University Statement on Privacy and the Fourth Amendment protection against unreasonable search and seizure.¹⁶ In 2005, Judicial Affairs adjudicated 73 students issued citations by Alcohol Law Enforcement agents for underage alcohol consumption *after* the citations were invalidated on Fourth Amendment grounds.

Cases where evidence was collected in contravention of the University Statement on Privacy and/or the Fourth Amendment can be divided into two classes: offenses that constitute an extreme and direct threat to the University warranting suspension or expulsion in order to protect the Duke community, and other, lesser offenses where the University’s intervention is designed to be “educational.” In the extreme cases, the interim suspension policy can and should be used to ensure the safety of the community, even when the evidence in question might have been collected illegally or in contravention of University policy. The following arguments apply only to the “lesser” class of offenses where the University’s intervention is designed to be primarily “educational.”

Judicial Affairs uses enforcement of University policy as a proxy for its ultimate mission of instilling “personal responsibility and accountability”¹⁷ in students. In any case where it uses evidence collected in contravention of the University Statement on Privacy to adjudicate a student, however, it is using a violation of University policy to teach a student the importance of not violating University policy.

Beyond the mixed message to the student being adjudicated, a refusal to exclude such evidence indicates to the wider student body that Judicial Affairs it is not willing to hold itself accountable under University Policy. Doing so would require an attempt to remedy any violation of University Policy perpetrated by a University official. In the case of evidence collected against the University Statement on Privacy, such restitution would require that Duke ignore said evidence. Since Judicial Affairs refuses to exclude evidence collected in contravention of the University Statement on Privacy and thereby uphold University policy, students are left to ask why we should uphold University policy ourselves.

The implications of Judicial Affairs’ current practices (and their relationship to Student Affairs’ counterargument) were best articulated by Justice John Clark in *Mapp v. Ohio*, which required states to exclude evidence in contravention of the Fourth Amendment. Although Duke is not bound by the exclusionary rule, the same logic applies when considering Duke’s use of evidence collected in contravention of its own policy:

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine “[t]he criminal is to go free because the constable has blundered.” *People v. Defore*, In some cases this will undoubtedly be the result. But, as was said in *Elkins*, “there is another consideration - the imperative

¹⁵ 1999-2000 *Bulletin of Information and Regulations*, page 32.

¹⁶ See attachments [3] and [4]. Also see [6], [7], and [8], in which Judicial Affairs denied a Duke Student Government request to exclude illegally obtained evidence.

¹⁷ <http://judicial.studentaffairs.duke.edu/>.

of judicial integrity.” The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”¹⁸

A similar argument calls into question the University’s use of evidence collected in contravention of the Fourth Amendment.

When considering alleged violations of the law that occurred off-campus, the University is acting (or at least initiating its investigation) on the basis of information collected by law enforcement officers, who only issue citations if they have probable cause to believe that the student involved violated a local or state ordinance. Such alleged violations of law fall into two categories:

- Activities that, in the absence of a law prohibiting them, the University would prohibit out of its own volition; and
- Activities that, in the absence of a law prohibiting them, the University would not prohibit out of its own volition.

For all intents and purposes, we can define the latter as “benign”¹⁹ violations of the North Carolina Alcohol Statute and the former as “everything else.” Judicial Affairs claims the authority to adjudicate all violations of local, state and federal law,²⁰ but the argument will be considered separately for both classes of offenses.

In the case of activities that offend the sensibility of the university independently of their illegality, the argument against using evidence collected in violation of the Fourth Amendment relies on the argument already presented by DSG; law enforcement officers will be less likely to uphold Constitutional protections and more likely to treat students unfairly if they know that the University will adjudicate students on the basis of their misconduct. Since the University is not breaking its own policy in the course of promulgating its sensibilities, its educational imperative²¹ is less compromised by the use of this evidence. The primary, and very crucial, reason for excluding it, however, is to ensure that students are fairly treated by law enforcement officers.

Both Duke’s educational prerogative and its interest in ensuring that students are treated fairly by law enforcement are undermined by the use of evidence in the latter class of offenses.

“Benign” instances of underage drinking fall into this category because: prior to the institution of the national 21-drinking-age, Duke did not have a 21-drinking-age on its books; university

¹⁸ *Mapp v. Ohio*, 367 U.S. 643.

¹⁹ Instances of underage drinking that do not rise to the level of disturbing the peace, public intoxication, or involve driving while intoxicated.

²⁰ “Students may be subject to disciplinary action for . . . violating local ordinances or state or federal laws (as determined through the university’s disciplinary process), including those related to noise, housing occupancy, and the use or distribution of alcohol.”

²¹ In this case, Judicial Affairs’ educational imperative would be to encourage students to recognize whatever intrinsic “wrong” associated with the activity that would prompt the University to ban it were it not already illegal. I.e. “drunk driving is a direct threat to the safety of the community.”

officials (including Moneta and Bryan, who effectively control University policy²²) have publicly expressed a belief that the drinking age should be 18; and, various University officials already ignore numerous instances of underage drinking on-campus. Since citations for underage alcohol possession constitute the vast majority of citations issued both legally and illegally to Duke students, the use of illegally obtained evidence should be considered largely in the context of such violations of the law.

In the case of activities that do not offend the sensibility of the university, save their illegality, the University's educational imperative can only be rooted in a desire to instill a respect for the law in its students. Judicial Affairs rightfully seeks to teach students that they must respect local, state and federal laws in all circumstances, not just when it is convenient or when students agree with the laws at issue. Consequently, when a student is adjudicated for an action that the state frowns upon but that the institution does not, Judicial Affairs' educational imperative is equivalent to teaching the student the importance of upholding the law.

That imperative, however, is wholly inconsistent with the use of evidence collected in contravention of the Fourth Amendment. Violations of the Fourth Amendment strike to the very core of our values and offend our most sacred of laws—those contained in the Constitution. If the University is seeking to instill in students a respect for the law, it cannot ignore, much rather act upon, a violation of the Constitution in the course of enforcing some other law.

As a matter of the most basic common law precedent,²³ the Constitution trumps federal law, which trumps state law, which trumps county law, which trumps local law. Entertaining the premise that the University could assign a relative “seriousness” to violations of the law and weigh its response accordingly, violations of the Fourth Amendment are clearly “worse” than violations of the North Carolina Alcohol Statute.

Duke simply cannot fulfill its educational prerogative of teaching students to uphold the law by openly flouting and potentially encouraging violations of the Fourth Amendment protection to punish underage drinking.²⁴

(b) The Likely Result of Judicial Affairs' Intervention

At the core of Judicial Affairs' educational mission is the desire to prompt “introspection” in a student who violated the law or University policy—to, in the words of Bryan, “[help] students learn from their actions and help them be better citizens and think through their moral development.”²⁵ Judicial Affairs' educational imperative²⁶ requires a student to recognize what

²² See attachment [2].

²³ *McCullough v. Maryland*, 17 U.S. 316; established the Constitution defined the authority of the Federal Government, which could not be superceded by individual states.

²⁴ I reiterate my belief that the University's interest in preventing unfair treatment of students by law enforcement officers trumps any “educational” imperative, but I offer this argument in addition to those already presented by DSG.

²⁵ See attachment [5], page 5.

²⁶ I am in no way endorsing the “educational mission” of Judicial Affairs, as it has not been articulated satisfactorily and as I feel that due process rights are more important than almost all other considerations. I am merely trying to explicate said mission on the basis of what little has been explained by Judicial Affairs.

s/he did wrong, recognize why it was wrong and change his/her behavior as to not do it again.

An intuitively satisfying argument holds, however, that the absence of substantive due process in the University's judicial system will interfere with any "introspection" that Judicial Affairs might prompt within a student. If a student feels that s/he was denied rights s/he felt were his/her due, and particularly that the denial of such rights substantially influenced the outcome of the hearing, s/he is very likely to resent and reflect on the process itself, more than on his/her actions. If anything, the absence of basic due process protections will cause a student to externalize responsibility for his/her actions and therefore undermine the University's educational mission, not bolster it.

While the above argument is unfalsifiable and likely to apply to some students but not others, it is presented in addition to all of the other arguments advanced by DSG and by me. The counterargument presented by Bryan (also without qualification), is as follows:

What happens, Elliott, is that when you have a legalistic framework people act legalistic [sic]. And what happens then is you have folks who come in who can't accept responsibility for their behavior, and we can't get to the ultimate goal of helping students learn from their actions and help them be better citizens and think through their moral development instead. Instead you have a student focusing on "what do I do to get off?" And what do they learn from that? They learn to get off.²⁷

Frankly, I don't buy it.²⁸

(3) The importance of considering undergraduate judicial policy separately from undergraduate judicial procedure and structuring the judicial system accordingly

At present, the Office of Judicial Affairs exerts significant influence at every level of the disciplinary process. In the case of alleged violations handled through the Administrative Hearing process, the "hearing officer" is responsible for investigating the allegation, meeting with the accused student, hearing his/her side of the story, making a finding of fact and assigning a sanction in the event of a "responsible" verdict.

In the case of alleged violations handled through the Undergraduate Judicial Board process, the "hearing officer" is responsible for investigating the allegation, meeting with the accused student, deciding whether the case should be forwarded to the UJB,²⁹ presenting the case to the UJB, and advising the deliberations of the UJB.³⁰ In addition, the Director of Judicial Affairs plays a prominent role in selecting members of the UJB³¹ and has more or less personal control³² over undergraduate policy, judicial procedure, and sanctioning guidelines.

²⁷ See attachment [5], page 5.

²⁸ Such reasoning is notably circular, as there is an assumption that "their behavior" is indeed a violation of University policy that requires an acceptance of "responsibility." In addition, the assertion that a legalistic framework makes (guilty) students focus merely on "getting off" is given without qualification.

²⁹ According to the 2006-2007 disciplinary statistics, only two students were found "not responsible" by the Undergraduate Judicial Board in the 2006-2007 academic year.

³⁰ From to statements by several UJB members and the lawsuit recently filed by three unindicted lacrosse players.

³¹ The process involves a combination of Judicial Affairs' staff and UJB members; in 2007, Judicial Affairs refused a request by Duke Student Government to reinstate a requirement that new UJB members be confirmed by the DSG senate.

³² See attachment [2].

Duke's model is not consistent with that of other Universities. In stark contrast to Duke, Stanford University currently has a "Judicial Advisor" who is obliged to "serve as a neutral party in all cases," assign hearing panels and "inform all parties, in writing, of their rights" under the Stanford Judicial Charter. A separate "Judicial Officer" investigates allegations of misconduct and "present[s] evidence at Judicial Panel Hearings;"³³ at Stanford, the person investigating and collecting evidence in a case is not the same person assigning a hearing panel or sitting in judgment of the accused. And more importantly, s/he is not in charge of writing judicial procedure:

The provisions of this Charter are subject to amendment in any and all respects. Amendments shall be enacted by a majority vote of the Board on Judicial Affairs,³⁴ and shall go into effect immediately upon approval by *the Undergraduate Senate of the Associated Students of Stanford University, the Graduate Student Council of the Associated Students of Stanford University, the Senate of the Academic Council, and the President of the University* (emphasis added).³⁵

Duke's concentration of authority in Judicial Affairs staff, particularly in Director of Judicial Affairs, is at the root of concerns about the state of undergraduate policy and the behavior of the office of Judicial Affairs. One person has assumed the roles of law-maker, educator, investigator, prosecutor, (and in most cases) judge, jury and executioner, undermining restrictions on the scope of Judicial Affairs' authority and conflating formerly separate responsibilities. The natural urges of an investigator and prosecutor towards expediency are now, quite inappropriately, reflected in judicial procedure.

The most problematic example of such conflation, however, is the seeming equivalence between the objectives of university policy (what the University bans) and judicial procedure (how the University goes about making findings of fact and assigning sanctions). By its own admission, Judicial Affairs has sought to integrate the Duke Community Standard and other arbitrary moral constructs into judicial *procedure*.³⁶ As Bryan indicated, "We have gone from a system that was very legalistic and took the emphasis off of what our goals were to a system where, 'listen, we're in a community where we all make mistakes, we want to help you learn from those mistakes.'"³⁷

In doing so, Judicial Affairs has made encouraging students to "accept responsibility for their behavior"³⁸ the primary objective of both the Administrative Hearing process and the Undergraduate Judicial Board process. This approach assumes, however, that some "behavior" occurred that warrants an acceptance of responsibility, or that the accused student is indeed guilty. Attachment [11] is an unfortunate indicator of its (lack of) commitment to the presumption of innocence.³⁹

The tacit assumption of guilt made by Judicial Affairs undermines the most fundamental objectives of any judicial system: making an accurate determination as to whether a policy

³³ <http://www.stanford.edu/dept/vpsa/judicialaffairs/judicialprocess/sjc1997.htm#III-D>

³⁴ Consists of 6 faculty members, 3 staff members and 6 students, none of whom have a connection to the Stanford Judicial Affairs Office.

³⁵ <http://www.stanford.edu/dept/vpsa/judicialaffairs/judicialprocess/sjc1997.htm#IV-B>

³⁶ That Judicial Affairs has changed judicial procedures in order to further its "educational mission" is self-evident from the above discussions.

³⁷ See attachment [5], page 5.

³⁸ See attachment [5], page 4, and attachment [11].

³⁹ Was from the Judicial Affairs Blog, previously available at <http://judicial.studentaffairs.duke.edu/>.

violation occurred and, if so, assigning a sanction appropriate to the violation. The former is a finding of fact. The latter should involve a determination of sanctions issued in similar circumstances, perhaps with a consideration of the student's past disciplinary history. Neither involves "education" or "ethical" considerations, but objectivity.

Consequently, I ask that you consider judicial procedure and judicial policy as separate entities with separate objectives that should be under the control of separate individuals. Only undergraduate policy, and not judicial procedure, should flow from the Duke Community Standard or any "educational mission" the Institution seeks to embody in the judicial code. Duke can maintain high standards by setting clear expectations for how students should behave and committing to punish them (potentially harshly) if a clear and fair procedure judges that they indeed violated those expectations.

Leave it to Torquemada⁴⁰ to design and implement a set of judicial procedures that will ensure students "think through their moral development,"⁴¹ purify their souls, find Jesus and submit to the almighty Duke Community Standard.

Conclusion

I would like to reiterate that the above is not exhaustive of my concerns about Judicial Affairs; it is meant to be taken in conjunction with the concerns and recommendations already articulated by DSG. I hope that my research has proven valuable to your discussions, and, if so, I would be happy to discuss it further before your committee. You can also contact me personally via email (egw4@duke.edu) or phone (301-518-1632) if you have any questions. Thank you again for your time and for giving this issue the diligence it is due.

Sincerely,



Elliott Wolf
Duke University, Class of 2008
Columnist, The Chronicle
2006-2007 President, Duke Student Government

Attachments:

- [1] *Dude, Where're my Rights? (Part I)*; 9/6/2007 Chronicle editorial; detailed changes enacted between 1999 and 2007 to the procedural rights afforded students facing adjudication.

⁴⁰ 1420-1498; the first Inquisitor General of Spain.

⁴¹ See attachment [5], page 5.

- [2] *Dude, Where're my Rights? (Part II)*; 9/13/2007 Chronicle editorial; detailed the effects of changes enacted between 1999 and 2007 to the judicial code on “ordinary” students not facing adjudication.
- [3] *Dude, Where're my Rights? (Part Po-Po)*; 9/20/2007 Chronicle editorial; detailed the effects of recent changes to the judicial code on students’ interactions with local law enforcement.
- [4] *Dude, Where're my Rights? (The Coup de Grace)*; 9/27/2007 Chronicle editorial; summarized changes to the judicial code and their overarching implications.
- [5] Transcript of 8/16/2007 interview with Stephen Bryan in preparation for *Dude, Where're my Rights?* series.
- [6] 3/28/2007 DSG memorandum to Stephen Bryan requesting the exclusion of evidence obtained illegally by local law enforcement from University judicial proceedings.
- [7] 4/17/2007 response from Stephen Bryan denying DSG’s request to exclude illegally obtained evidence.
- [8] 5/17/2007 response to Stephen Bryan’s memorandum of 4/17/2007.
- [9] Mathematical logic proof that the current University standard for “probable cause” is unfalsifiable.
- [10] Email message from Stephen Bryan illustrating the unfortunate liberality with which the “Failure to Comply” policy is used.
- [11] Google Cache of a since-removed posting on the Judicial Affairs Blog raising questions about how committed the University is to the presumption of innocence.