

[8] 5/17/2007 response to Stephen Bryan's memorandum of 4/17/2007.

Subject: More on evidentiary standards....

From: Elliott Wolf <egw4@duke.edu>

Date: Wed, 16 May 2007 16:09:57 -0400

To: Stephen Bryan <sbryan@duke.edu>

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Stephen,

Thanks a lot for getting back to me and sorry about the delay; this is the first chance I've had to respond amidst exams, commencement and the Board of Trustees meeting. Because my term has ended and Paul Slattery is now President, he is copied and can chime in as to the current position of DSG on this matter. I have also copied others who have been involved in this conversation, including Chairman Steel and Professor Gustafson.

A lot has changed since my original memorandum was sent in early April, before the charges were dropped and additional revelations about the actions of the District Attorney and the Durham Police Department came to light. For that reason, the scope of this response extends further than the issue of illegally obtained evidence. I apologize in advance for its length.

General thoughts:

You noted that "events in our community over the last two years have raised significant and widespread concerns about the treatment of Duke University students in the Durham criminal justice system." That is a given; the lacrosse case itself, the startlingly inadequate Baker/Chalmers report has described much of DPD's conduct during the lacrosse case as "typical," and other incidents involving Duke Students and Durham Police officers exemplify problems on all levels of the Durham criminal justice system--from investigators and uniformed officers to the leadership of the Durham Police Department to the Office of the District Attorney. In the current environment, neither the Durham Police Department nor the DA can be considered credible organizations.

Because of their lack of credibility, it concerns me greatly that your office acts on "*all* [emphasis yours]" information provided by DPD and the DA's office, often without waiting for the courts to decide the validity of the charges and with limited regard to the admissibility of the evidence. As I told the Trustees on Friday, the one enduring lesson from this case is that the Police and the DA mishandled the case and, for the time being, can't be trusted. Your memorandum did not seem to indicate that Student Affairs will re-evaluate the ways it deals with information provided by DPD and the DA in response to these startling realizations. As a student who will be living off-campus in Trinity Park next year, I very much want to know: do the events of the past two years change anything about the relationship/collusion/cooperation between the University and the Durham Police Department and the Durham District Attorney?

If so, how? If not, then why not?

The more immediate, broader question is outside the scope of Student Affairs, but is still important to this conversation: the Durham Police and the Durham District Attorney have demonstrated a clearly prejudicial approach in their dealings with Duke Students. What is the University community, and particularly the University administration, going to do about it? (I implore many of those cc'd on this email who are empowered to act on behalf of the University to consider this).

Specifically regarding the use of illegally obtained evidence:

Your response emphasized three reasons why the University would use evidence against a student that was ruled by a judge to have been obtained illegally:

(1) Ignoring such evidence would deprive a student of a "learning opportunity"

(2) There is significantly less at stake in the University judicial process than in the criminal justice system

(3) A blanket policy against such evidence would "be irresponsible, especially if the information is of a nature such that someone's safety may be at risk."

I will address these points separately:

Point (1) requires me to call into question the "educational value" associated with the University's intervention in cases of students' violations of the law. Since we are only considering cases where evidence was subsequently thrown out by a judge or not substantive enough to proceed in a court, that process began with student originally being cited or charged--a process that, in itself, brings about significant consternation and reflection. The added value of a "conversation" with a member of the Student Affairs staff is questionable at best, especially considering that the University's intervention could have the unintended effect of incentivizing illegal or unprofessional treatment of Duke students by Durham Police Officers. And based on conversations with senior administrators, I am relatively certain that the University's response to the ALE raids was rooted in a desire to pacify members of the community, not provide a "learning opportunity" for the students involved.

With regard to point (2), you are correct in a limited sense: the worst case scenario of a University judicial sanction (suspension or expulsion) is not as severe as the worst case scenario of the criminal justice system (generally imprisonment). As Dr. Gustafson pointed out, however, there are numerous instances where a violation of the law will result in a relatively minor sanction imposed by a judge (a fine or community service), compared to a sanction of suspension or expulsion from the Undergraduate Judicial Board. In the specific cases where evidence is thrown out, the end result is that the criminal justice system will do absolutely nothing while the University judicial system could still be in a position to issue a severe sanction or otherwise negatively affect a student's citizenship record. Now that the University has positioned itself to suspend students for "repeated non-egregious violations" of University policy, there is often significantly more at stake in the University process than in the legal system.

With regard to point (3), although this opens up a whole other can of worms, currently the Vice President of Student Affairs has the authority to issue an interim suspension in any instance where s/he judges a student to be a risk to the University community. Although the lacrosse case demonstrated that the University needs to take steps to verify the validity of information provided by the DA's office, this and other policies allow the University enough discretion to act on whatever information they see fit and ensure the safety of the university community. Underage drinking citations and noise violations, however, represent no imminent threat to the safety of University community and thus, for at least "minor" violations, (3) is an invalid justification. Regarding other violations, an officer should not have a reasonable expectation that if he or she collects evidence illegally, that the University will act on it; the University can still take steps to ensure the safety of the community without instilling that impression.

Considering the University's specific response to the ALE citations, I recognize your sensitivity to the fact that the evidence was collected illegally. I still maintain, however, that taking any action, especially when doing so is not necessary to ensure the safety of the University community, is problematic. When students are facing potential disciplinary action, they are told that their "cooperation" (admitting their

guilt) will result in a lighter sanction, whereas "lying" (maintaining their innocence) would prejudice them significantly were they ultimately found responsible. In a situation like that, where students are not allowed experienced advocates or unbiased representation, those students were pressured to admit their guilt unnecessarily. I presume you did not outline your policy for dealing with the citations to the students ahead of time? My understanding is that those were all "administrative hearings," which do not involve any process of discovery.

One issue we raised that you did not address is the ideological implication of the University's use of such evidence. To condemn students' violations of the law while not similarly condemning (indeed, while taking advantage of) the illegal actions that helped bring those violations to your attention is morally inconsistent and seemingly contrary to the educational mission you described. In the specific case of underage drinking--something that is against University policy only because it is against a law that almost the entirety of the University administration disagrees with--the only moral high ground the University can claim in enforcing it is that it has the law on its side. Considering that the Constitution trumps federal law, which trumps state law, which trumps county/municipal law, it's hard to say, particularly when you are enforcing the drinking age, that the University indeed has the law on its side when it is at best turning a blind eye to and at worst tacitly encouraging violations of students' constitutional rights in order to enforce a state statute.

Our disagreement on this issue ultimately comes down to our different priorities. In writing our memo, our paramount concern was that students Constitutional rights' are upheld and that they are not unnecessarily subjected to either judicial action or criminal prosecution, while the safety of the University community is maintained. I understand your primary concerns to be the safety of the university community and the furthering of judicial affairs' educational mission, with a lesser emphasis on the protection of rights. The reason why we are having this conversation, however, is because of the lacrosse case--which demonstrated the drastic consequences that can fall upon both students and the institution if rights are not respected and proper procedures are not followed--two things that we feel Judicial Affairs' current practices contribute to. The institution should recognize that Lacrosse upended university prerogatives with respect to student rights; Mike Nifong and DPD investigators' erroneous pursuit of the Lacrosse Case caused the University far more of a headache than a few neighbors in Trinity Park calling for Duke to engage in "neighborhood stabilization."

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Elliott,

Attached is my response to your memo. Thanks for your patience.

Sincerely,
Stephen

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More on evidentiary standards....

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