

Balancing Legalism and Developmentalism in Campus Judicial Proceedings

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For those with a keen eye on judicial affairs, the issue of creeping legalism or judicializing the campus conduct process is receiving some due discussion.

Commentators are weighing in, and consensus is forming. Most will agree that a balancing of legalism with developmentalism is desirable. The substance of how that balance is struck is what is debated. I think the underlying supposition has merit:

Judicial proceedings exist on a continuum where legalism and developmentalism lie at opposing poles. Most judicial procedures are out of balance.

Some err on the side of creeping legalism. Some err by being excessively developmental at the expense of vital legal safeguards. The dichotomy is not borne of a distinction between public and private institutions. It is borne of historical practices, sedentary procedural revision practices, the sway of campus interest groups, the role of faith and rehabilitation, and the fear of litigation, among other competing factors.

Mostly though, judicial procedures are out of balance because balance is hard to achieve. It is not simple. It is not effortless. It takes hard work, a true understanding of institutional culture, and the skill to navigate campus politics. Most of us do not work hard enough at achieving balanced procedures. Partly, we misunderstand the nature of achieving balance. Balance is not a static state. We may achieve and then lose it as

dynamics change around us. Achieving balance is the skill. Maintaining balance is the art.

In striving toward maintaining balance, we should seek to understand how our own preconceptions and biases affect our decisions. I engaged in a great debate last month with a Dean of Students that prompted this article. He argued with great passion the absolute detriment to developmentalism presented by any judicial system organized around the use of direct cross-examination by the parties of each other. Yet, he would not countenance the same argument applied to allowing students a right to refuse to answer the questions of a judicial body.

I think this is a thought-provoking analogy. We desire processes that challenge students to evaluate their behaviors and reflect on their wrongdoing. Yet, some 60% of colleges allow students to refuse to answer the questions of a hearing panel; questions that are designed to prompt this self-examination. Is it consistent with our developmental objectives to allow students to subvert the structures we have created for the express purpose of helping foster their maturation? Without question, a “right to remain silent” is legalistic. The question is whether it is overly legalistic, thereby creating an imbalance (it may be a legal requirement for some state institutions, in which case there is little that can be done about the resulting imbalance).

That question can really only be answered in the context of the overall process on each campus. I am not arguing that a “right to remain silent” always strikes an imbalance, just

that we must examine every aspect of our processes, and make conscientious judgments as to what role they are playing. A colleague often argues to me that legalistic rights are important even if they imbalance the process because they teach students about fair processes and American notions of dispute resolution. My only response is to question whether imparting American values of fair play should be the primary objective the judicial process is meant to achieve?

What I tend to see is legalism where it is unneeded, and developmentalism where it is unwarranted. To some extent, excessive legalism creeps mostly into the written procedures, whereas rampant developmentalism asserts itself more in the practice aspect. Take the example of a college with a judicial procedure incorporating the legalistic concepts of a burden of proof placed on the complainant, a high standard of proof (such as “clear and convincing evidence”), a right to remain silent and a right to have advice of an attorney. Yet, this same legalistically-structured process (at least on paper) does very little to control admissibility of evidence in the practice of conducting a campus hearing. Such a procedure imposes legalism to an unhealthy extreme in the written procedures at the expense of developmentalism. And it emphasizes developmentalism in the extreme in the practical conduct of the hearing, where more legalism with respect to controlling evidence and testimony might be called for.

Recently, Dr. Donald Gehring wrote in the NASPA Journal (Vol. 39, No. 1 Fall) that legalism creeps when we allow our judicial processes to become adversarial.

Adversarialism is anathema to developmentalism. There is truth in his thesis. The article begs a question, and that is whether “confrontational” means “adversarial?”

I think confrontation is an important ingredient of a developmental process. Where this often plays out is in how we conduct cross-examination of accused students, which brings us around full-circle to my debate of last month, with the Dean. There are a number of different levels of confrontation possible. In one, the institution is the complainant, and makes the argument against the accused student, who responds for him or herself.

Another system allows the parties to confront each other, and make their arguments.

A variation of this system allows the parties to represent themselves as complainant and respondent, but does not allow for direct questioning of one party by the other. Either separate meetings are held in which each party meets individually with the hearing officer(s), or a joint meeting is conducted in which all questions are first funneled through the hearing officer(s), who then conduct all direct questioning of the parties.

In yet another variant, other students or proxies represent the parties, and make arguments for them. Some campuses use an advocate system, a very few even allow attorneys to serve this function. This is full adversarialism in the legal sense.

None of these systems is clearly dominant within the campus judicial field, but a preference for non-confrontational hearings appears to be emerging. As it does, I caution the judicial affairs field to strive to create a balance. Many offenses do not have victims.

Where they don't, it is efficient and effective for the institution to function as the complainant, because it is in fact the wronged party. Its policies have potentially been violated.

For offenses that do have victims, there are two perspectives from which to view balance. In some complaints, credibility is in question. The facts are not established. In others, suspension or expulsion are potential outcomes if the hearing officer(s) determine the accused student to be in violation of policy. In both circumstances, our trend toward non-confrontational hearings may not strike the ideal balance.

In all other situations, such as a complaint in which there is a victim, but there are no credibility issues, a confrontational hearing would not likely strike the best balance. Conventional wisdom in judicial affairs seeks to shield, for example, victims of sexual misconduct from direct confrontation with those they have accused. Striving for balance means challenging conventional wisdom. Credibility is often in play in sexual misconduct complaints, as well. Shall we automatically shy away from confrontation in these cases? Why? If we seek to serve the legal rights of the accused, and suspension or expulsion is available, it can be argued that higher levels of process are due. Certainly, and Dr. Gehring acknowledges this in his article, confrontation may be imperative to address credibility issues. But, it may also serve a strong developmental function, for both the accused student and the alleged victim.

If we sideline the alleged victim to mere witness status, in a hearing in which the institution serves as complainant, are we ignoring the potentially developmental healing and cathartic impact that allowing the alleged victim to make her own case may serve? Don't we have an obligation to consider that possibility? I assert that we do. While it may not hold true for all cases, I am asking whether the balance of developmentalism and legalism is better served by a fixed format in which this is never possible, or a more flexible procedure that allows a willing and capable alleged victim to make her own argument, should she want to do so. Developmentalism should serve all parties to a hearing, not just the accused. And, this strikes the balance, because the alleged victim's credibility may be in issue, and suspension or expulsion is likely possible, so the legal rights of the accused student are adequately addressed by permitting some level of confrontation.

I have heard it stated that a non-confrontational hearing is preferable for the accused student, to protect his or her rights. The fate of a student accused of a policy violation should not hinge on his or her facility or inability to make cogent arguments, and be persuasive to the hearing officer(s). Is this an acceptable rationale, or is this code language for an anti-developmental enabling behavior that fails to teach the life-skill of answering for one's actions, and putting together the words and phrases needed to explain oneself?

If a student has not gained this facility by the end of college, we have left them poorly equipped to defend themselves if called to answer for their actions or decisions later in

life. Shouldn't hearing officers be able to discriminate between a poor defense and a poorly structured defense? This is what a hearing officer is supposed to do, rather than rearrange the process to accommodate the possible weakness of a student's argumentation skills. This is why so many of our processes now allow advisors and advocates, so that the parties have assistance in making their best cases.

Confrontation, to me, is one of the vital developmental tools we possess. Confrontation, where appropriate, can help us to achieve better balanced processes. Sometimes, confrontation should be conducted by a hearing officer. Sometimes, it should be done by the parties themselves. Where credibility is in issue, or suspension or expulsion are possible, I think we need to enable within our processes the flexibility to utilize the format that creates the optimum balance for that complaint. Not for all complaints. Each one is different.

To strike the optimum balance, we must not confuse a healthy confrontation with unhealthy fomenting of adversarialism. Sometimes, funneling questions through the hearing officer(s) can preserve confrontation while minimizing adversarialism. Sometimes, credibility can only be established by allowing the parties to question each other. A skilled hearing officer will be able to ensure that a healthy confrontation does not disintegrate into legal adversarialism. Are we up to that challenge?