

What is a Burden of Proof Requirement Doing in Your *Campus* Judicial Procedures?

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Student development theory commonly holds that the campus conduct process ought to be educational, in order to assist students in ethical development. From policies to procedures to sanctions, the conduct process is not intended to be punitive, but to function as a learning experience that provokes students to reflect on their behaviors, their values, and how their behavior impacts other members of the campus community. We make great efforts to differentiate the campus conduct process from the criminal and civil legal realms, which have different methods and goals.

Rights are Different from the Criminal Process

We use non-legalistic language intended to set apart the campus process, and we have jettisoned trappings common to the criminal process. In fact, we even deny rights that are constitutionally given to citizens, because the level of fundamental fairness and due process owed by a college is far different from the level of process owed by criminal courts. In both public and private colleges, it is common not to offer students a right to representation by counsel. Many do not offer a right to remain silent, or a right to be presumed innocent. Even cross-examination of witnesses is not a technically a right. Hearsay is admissible. While these rules cause no end of confusion to those outside the college world, they are essential to preservation of the function and operation of the campus process.

College Give More Than Is Required

While the foregoing is generally true, some colleges voluntarily offer more rights. Some even approximate full constitutional protections. Some public colleges have to, because they are governed by administrative procedures acts or state constitutional provisions. Campus conduct processes fall on a continuum between legalistic and developmental. Where a college falls on this continuum is a matter of institutional choice, leadership, and history. The public/private distinction is not dispositive. Cornell University, basically a private, has a rather legalistic system, mostly by legacy. The University of North Carolina, Greensboro, has a highly developmental approach, by choice of its leaders.

Developmentalism Reduces Liability

In addition to the preference higher education theory gives to developmentalism, many higher education attorneys have correlated a more developmental system with lower exposure to liability, for a number of reasons. One reason is that the more rights you give, the more rights you can potentially violate. Another is that judges tend to hold legalistic systems to legalistic standards, which makes the deferential review standard that most judges customarily give to college judicial decisions less deferential. Occasionally, even highly developmental systems incorporate legalistic trappings, such as a right to remain silent. The burden of proof is one of these procedural rights that most public and private colleges are not legally required to provide, but that many colleges give voluntarily. This article asks why, and challenges those colleges that

use it to reflect on the need for this concept, the desirability of this concept, and its practical operation.

The Standard of Proof

To be clear, we are not talking here about the standard of proof, which is the amount of evidence needed to find a policy violation. A standard of proof is a necessary element of conducting a hearing. Most colleges use a “more likely than not” standard of proof, though clear and convincing evidence is used by a fair number of colleges and universities, whose judicial processes tend to be more legalistic and rights-focused. Those at the far right of the continuum use a proof beyond a reasonable doubt standard, and those whose systems can be placed toward the left end of the continuum have adopted the reasonable conclusion/substantial evidence standard. To differentiate the burden of proof think of it simply as the placing on one party or the other the entire obligation to provide the evidence and persuasion that will meet the standard of proof.

Complainant Bears the Burden

On campus, this obligation is placed on the complainant, whether the complainant is a victim, or the institution itself. As a legal matter, the burden of proof is the holistic joining of two burdens, the burden of production and the burden of persuasion. The burden of production is the obligation to produce evidence adequate to move the legal process through various motions designed to end the trial before it is finished. If the burden of production is met, the trial

proceeds to conclusion. If it is not, the trial ends, in favor of the person on whom the burden was not. The burden of persuasion is the obligation to sway the judge or jury, to convince them that the standard of proof has been met.

Two Other Rights

To be made meaningful, the burden of proof is usually accompanied by two concomitant rights, the right to remain silent, and the right to be presumed innocent until proven guilty. Here's how it often works in the criminal legal context. Mr. Hugh Felonist is charged with a burglary. The only way to link Felonist to the crime is through the testimony of Ms. Renta Dweller, the occupant of the apartment Felonist allegedly burgled. Ms. Dweller was in the apartment at the time of the break-in, and observed Felonist in the act. She later picked him out of a police lineup. No other evidence connects Felonist to the crime. Once indicted, Felonist will stand trial. At the trial, he will be presumed innocent until he is proven guilty by the prosecution. Felonist will refuse to take the witness stand in his own defense, and will refuse to answer any of the prosecution's questions on the basis of his 5th amendment right to avoid self-incrimination. Please be clear that these are rights that attach only in the criminal legal context. There is no right to remain silent in a civil proceeding. There is also no presumption of innocence. In fact, in certain circumstances, liability (civil guilt) can be presumed, as was the case in an IRS audit until last year. The burden was on the taxpayer to prove they had not cheated on their taxes.

Taken together, Felonist's rights to remain silent and to be presumed innocent create the burden of proof that the prosecution must bear. In order for Felonist to be convicted, the prosecution

must meet the burden of production and the burden of persuasion. This means that the prosecution must produce the inculpatory evidence. Felonist can remain silent, and need not prove any exculpatory evidence. The prosecution must call Ms. Dweller as a witness. And, Ms. Dweller's testimony, alone, must convince the jury beyond a reasonable doubt that Felonist committed the burglary. If the prosecution cannot do so, Felonist goes free.

If You're Going to Use it, Use it Right

To apply this construct to the college context, one thing should be clear now, at a minimum. Those colleges that place the burden of proof on the complainant should also provide a right to remain silent, from which silence no negative presumption will be drawn. And, such colleges should presume the respondent innocent until proven guilty. If you are going to go the legalistic route, at least make it cohesive.

Not Required by Due Process

But, as many of you know, we don't prove "guilt" in a campus hearing. We prove responsibility. We don't have to offer the rights due a criminal defendant. Just as we can argue that we owe no right to representation by an attorney (with very limited exceptions), we can also argue that at most colleges the concept of the burden of proof is not germane to campus proceedings, and the case law is fully supportive. These three rights are not requirements within the panoply that constitute campus due process.

You Have an Obligation Not to Remain Silent

Most colleges do not have to allow a right to remain silent. Nor should they. Developmentalism and ethical decisionmaking are not served by allowing a student to refuse to participate in the process, or to subvert it with selective answering of questions. The criminal implications of compelling information are quite simply not your worry. And, you do not need to provide a right to be presumed innocent until proven guilty. Not that you should presume guilt, but recognize that no presumption is actually necessary, when the other two rights are not given either.

Totality of the Evidence

It is entirely permissible and desirable for you to decide complaints on the basis of the totality of the evidence presented, regardless of who presents it. There is also a practical reason for this contention. Campus conduct boards do not tend to heed a burden of proof requirement, even when the code contains one, because we naturally tend to consider the totality of the evidence presented to us. Using a burden of proof requirement can actually expose us to greater liability, because when we ignore it, we open ourselves to a charge of violating the procedural rights of the respondent.

Burden of Proof Anathema

In fact, it is arguable that in certain circumstances, the operation of a burden of proof is actually anathema to the goals and philosophy of the campus judicial system. Imagine a complaint for

which your procedures state that the complainant has the burden of proof. Innocence is presumed, and you have a “more likely than not” standard of proof. The respondent has a right to remain silent, from which silence no negative inference may be drawn. During the course of the hearing, the complainant victim convinces you of the responsibility of the respondent only by a 40% certainty. The respondent refuses to testify personally, but calls an alibi witness, who proves to be a very weak alibi. This witness’ testimony, when coupled with the complainant’s, convinces you of respondent’s violation by 51%. Do you find the respondent responsible or not responsible? You’re convinced by the totality of the evidence that the respondent violated the policy. But, your policy requires the complainant to meet the burden of proof. Has he? Does the concept of a burden of proof help you here, or hurt you? Why do you need it? Aren’t we really asking the basic question: Is it more likely than not that the respondent violated our policy? We’re not asking: Did the complainant prove it more likely than not that the respondent violated our policy?

Imagine instead that the university is the complainant, and has the burden. Does this change the situation? Yes, but it overcomplicated the process. Think about it. The university presents the victim’s testimony as a witness, and calls the alibi witness. The hearing panel is 51% convinced. The standard of proof is met. The burden issue makes no difference. It adds nothing but another right the respondent can allege was violated when he sues you.

Reflect on Your Procedural Rights

You know where your institution falls on the legalistic/developmental continuum. You also have a duty to your institution to manage risk in your daily practice of student affairs. Ask yourselves what you gain from the use of a burden of proof? Then, see what you might lose. What is a burden of proof requirement doing in *your* campus judicial procedures?