On College Campuses, a Presumption of Guilt

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SWARTHMORE, Pa. -- On Feb. 22, in celebration of its sesquicentennial, Swarthmore College proudly hosted "The Liberal Arts in Action: A Symposium on the Future of Liberal Arts."

In what seemed an unrelated event, a month before, a former Swarthmore student expelled by the college in the summer of 2013 filed a lawsuit in federal court of the eastern district of Pennsylvania. The student, identified as "John Doe," was found guilty under campus disciplinary procedures of sexual misconduct. (Pseudonyms were used to protect both the accused and the accuser.) His legal complaint alleges that Swarthmore "failed to follow its own policies and procedural safeguards" and violated his "basic due process and equal protection rights."

The litigation was not mentioned at the high-minded, if self-congratulatory, afternoon symposium. Yet the future of liberal education is closely connected to John Doe's assertion that in the course of expelling him Swarthmore trampled on fair process—and to the willingness of the federal judiciary to examine it.

Liberal education is the culmination of an education for freedom. Among its crucial components are the offering of a solid core curriculum, the promotion of liberty of thought and discussion, and the cultivation of intellectual diversity.

Another vital feature of liberal education consists of fostering an appreciation of the principles of due process. They are principles free societies have developed over the centuries to adjudicate controversies, establish guilt, and mete out punishment in ways that justly balance the rights of those who claim they have been wronged with the rights of those who have been accused of wrongdoing.

In cases involving serious accusations, due process requires a presumption of innocence, settled rules and laws, timely notice of charges, adequate opportunity to prepare a defense, the chance for the accused to question the accuser, and an impartial judge and jury.

Although college disciplinary procedures have been roiling campuses for decades, none of this was discussed at the Swarthmore symposium. Instead, the keynote address, "The Role of the Arts in Liberal Arts Education"—delivered by Mary Schmidt Campbell, Swarthmore class

of ’69 and dean of the Tisch School of the Arts at New York University—as well as the subsequent panel discussion on “The Future of Knowledge” and the concluding panel on “Fostering a Democratic Society Through Education,” were of a piece.

The speakers—Swarthmore graduates who have risen to prominence in the world of college and university administration—properly praised the importance to liberal education of certain skills: questioning effectively; thinking critically; weighing evidence and analyzing arguments; solving problems; seeing things from a multiplicity of perspectives; taking the initiative; innovating and creating; collaborating; and working across interdisciplinary boundaries.

Yet with the notable exception of Tori Haring-Smith, president of Washington & Jefferson College, who spoke compellingly about the vigorous measures adopted by her institution to teach students the importance of listening to opinions different from their own and of learning to live with the people who hold them, the panelists spoke as if our liberal arts colleges are doing a bang-up job. The only question they raised was how to extend to broader segments of the nation the lessons of freedom and democracy that Swarthmore is purportedly already teaching so well to its own students.

John Doe’s lawsuit gives a different impression of the school’s commitment to the principles of freedom. He contends that 19 months after three separate consensual sexual encounters—a kiss, sexual conduct not including sexual intercourse, and sexual intercourse—a fellow student reported to Swarthmore the first two and claimed she had been coerced. The accuser, according to the complaint, “offered no physical or medical evidence, and no police or campus safety reports.” After a two-month long investigation, Swarthmore appeared to conclude the matter without taking disciplinary action.

Approximately four months later, according to John Doe, Swarthmore suddenly re-opened the case against him. The college did this, he maintains, in response to public accusations—including a complaint filed with the U.S. Department of Education by two Swarthmore female undergraduates—that the school mishandled a number of sexual misconduct cases. And John Doe asserts that in the second round of hearings, which culminated with his expulsion based on a finding that he had merely “more likely than not” committed sexual misconduct, Swarthmore repeatedly and egregiously violated its own rules for disciplinary procedures explicitly set forth in the official student handbook.

John Doe’s lawsuit presents one of the nation’s finest small liberal arts colleges acting in haste and panic, railroading a young man in order to convince the public and the federal government that it had, in the words of Swarthmore President Rebecca Chopp, “zero tolerance for sexual assault, abuse and violence on our campus.”

Swarthmore, for its part, has filed a motion to have the John Doe complaint dismissed. “The College believes that the suit is without merit and will vigorously defend the litigation,” Swarthmore’s attorney Michael Baughman said in a written statement. “The College is committed, and always has been committed, to providing all students with a fair process of adjudication in student conduct proceedings.”

A trial court will determine the merits of John Doe’s allegations, but in light of the sorry condition of due process at our colleges and universities, the charges against Swarthmore are plausible.

For example, in 2006, the Duke faculty and administration were quick to treat as guilty three lacrosse players accused of rape by a black woman whom their fraternity had hired as an exotic dancer. After a year-long investigation, the North Carolina attorney general dropped all charges and took the remarkable step of pronouncing the accused players innocent.

In 2010, a campus tribunal found University of North Dakota student Caleb Warner guilty of sexual assault. The Grand Forks police department investigated the case and not only declined to charge Warner but charged his accuser with making a false report. Nevertheless, the university refused to reconsider its verdict. Only when the Foundation for Individual Rights in Education stepped in a year and half later was the school impelled to revisit the case and eventually overturn the judgment.

Just a few weeks ago, Dartmouth Sexual Abuse Awareness coordinator Amanda Childress asked at a University of Virginia conference on campus sexual misconduct, “Why could we not expel a student based on an allegation?” To clarify where she stood on the question, Childress went on to say, “It seems to me that we value fair and equitable processes more than we value the safety of our students. And higher education is not a right. Safety is a right. Higher education is a privilege.”

Safety, however, is not a right. It is a goal. Due process is a right. Moreover, history has shown that honoring it is the best way over the long run to achieve the greatest amount of safety and security for all.

John Doe’s account of his encounter with Swarthmore disciplinary procedures suggests the invidious effects of Ms. Childress’s reasoning—and of allowing the verdicts of pseudo-judicial proceedings to stand without legal review. An honors student in high school (with an excellent record in college) who chose Swarthmore over other elite schools because his parents met and married there, Doe is now effectively blackballed from higher education. He had completed his junior year when the school abruptly ordered the second investigation. After being expelled, he inquired about admission to some 300 colleges, all of which told him that Swarthmore’s verdict rendered him ineligible for transfer to their school. Of the 19 colleges that didn’t have such bright-line rules, 18 required disclosure. Only one of those accepted him—and required him to enroll as a junior.

This case occurs in a context in which our colleges and universities have aggressively eroded due process protections for those accused of sexual harassment and sexual assault. Over and over, colleges and universities have transformed disciplinary procedures into kangaroo courts that appear to operate on the assumption that an accusation creates a presumption of guilt and the burden is on the accused to prove his innocence. Due process is equally offended, it should not be necessary to add, when universities cover up for star athletes accused of sexual misconduct.

For the sake of genuinely liberal education, faculty and administrators must get out of the business of investigating the most serious forms of sexual misconduct, particularly sexual assault. Professors and university officials must be educated to recognize their woeful lack of the expertise necessary to properly gather and analyze evidence, establish guilt, and ensure fairness for the accuser and the accused. And they should be taught to promptly advise all students who believe they have been sexually assaulted to report their allegations to the police.

And as an indispensable element of their obligation to teach the principles of freedom, colleges and universities must be persuaded to restore to disciplinary procedures that they rightly conduct the presumption of innocence—a cornerstone of justice—and all the ancillary protections that follow from it.

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