

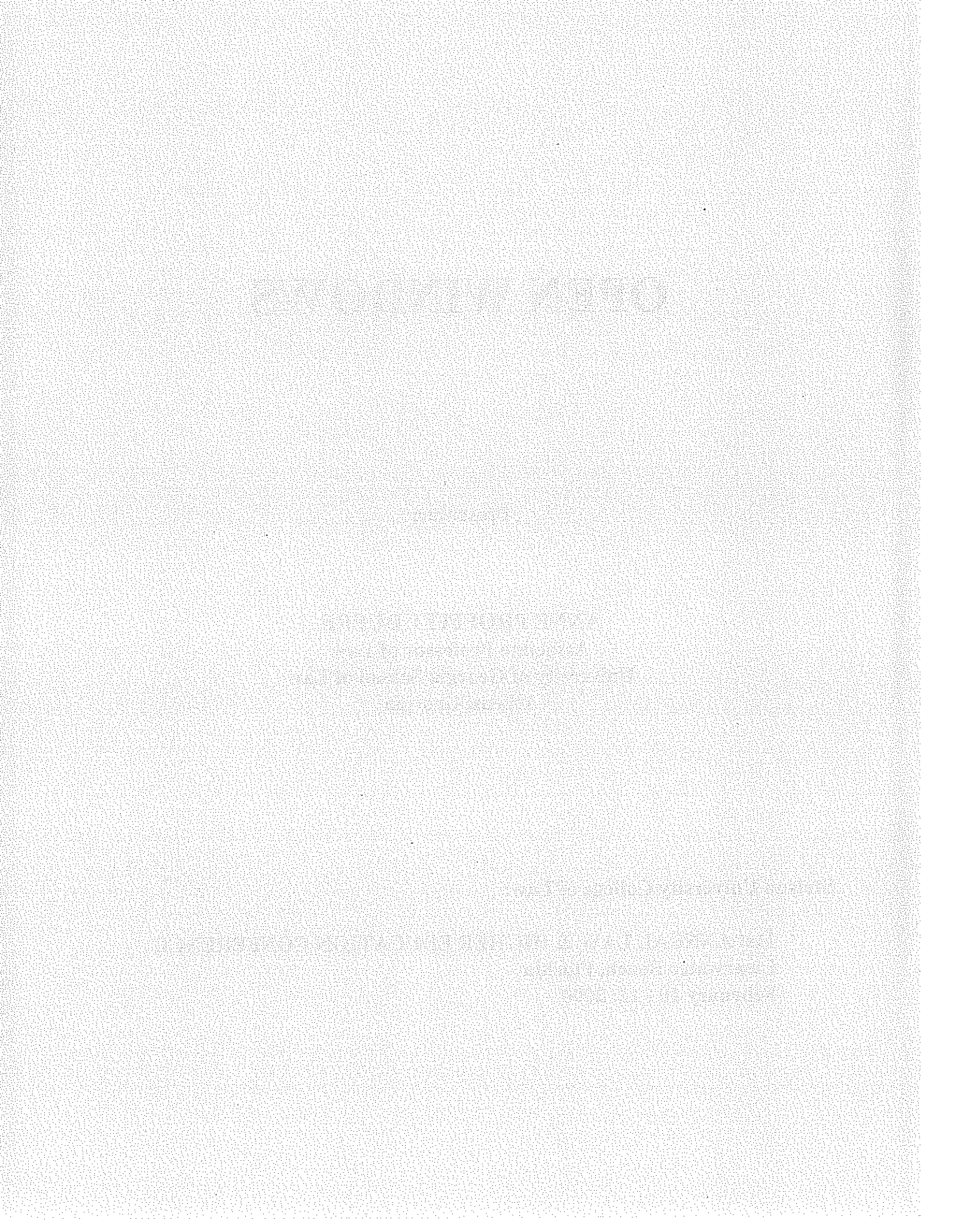
OPEN WINDOWS

Presenter:

ANNE PROFFITT DUPRE
Associate Professor of Law
University of Georgia School of Law
Athens, Georgia

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Open Windows

Anne Proffitt Dupre
Associate Professor of Law

University of Georgia School of Law
Herty Drive
Athens, Georgia 30602

706/542-5294
adupre@uga.edu

Student misconduct and incivility in instructional or research environments has a debilitating impact on the community of learning in the college and university. Misconduct and incivility affects more than the teacher and the student at issue. It affects all the students in the class, as they receive the signal that the academic environment may be subject to the whims of those who would sabotage it. Sadly, as we are all aware, our world is becoming increasingly uncivil. Almost daily we see examples of misconduct, even incivility, in the political sphere, on the sports field, in the media, and in daily life. We have become reconciled to taunting in sports, personal attacks in politics, road rage, and music lyrics that graphically degrade women. Behavior that would have been either unthinkable, or at least frowned upon, even ten years ago, is now part of our culture.¹ Courteous and polite behavior is viewed as

¹See Anne Proffitt Dupre, *Civility and Academic Freedom* (draft law review article). Professor Dupre is currently working on a longer, more detailed version of this

dreary and stuffy -- a sign of weakness. The message that our students have been getting is loud and clear: there are often few, if any, consequences for boorish behavior. Indeed, some are even rewarded for it. Many of us can remember a time when cultural and societal norms supported those who treated others with basic courtesy and repudiated those who did not. But increasingly -- ever more increasingly -- our students cannot remember such a time.²

The changes in the norms of civility have been especially stark in our nation's public schools.³ Those in higher education have watched as educators in lower education have suffered from loss of prestige, respect, and even basic personal security. It is almost impossible for an American who grew up in the last twenty years to imagine the respect society has previously granted teachers⁴. Once a society that generally respected the authority of teachers in elementary schools and high schools, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect and disorder as routine occurrences.⁵

paper, to be entitled *Civility and Academic Freedom*.

² *Civility and Academic Freedom* (draft in progress).

³ See Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996).

⁴ Jonathan Yardley, *We Have Met the Future and It is Us*, WASH. POST, June 11, 1995, at 3 (Book World) (Reviewing DAVID GELERNTER, 1939: THE LOST WORLD OF THE FAIR (1995)).

⁵ See Dupre, *supra* note 3, at 50.

Higher education is not immune. Most students entering higher education today will have come of age during a time when incivility was an accepted part of their culture . . . our culture. What does this mean for the colleges and universities that these students will be attending? It means that more students will think that it is unnecessary to be respectful to faculty. It means that more students will believe that it is acceptable to insult fellow students. Of course, a certain amount of disrespect and taunting has been present on the college campus for years. But the coarsening of the culture in which our students have been immersed before entering our campuses will continue to inspire more uncivil behavior. Put simply, teachers in higher education must brace themselves for increased incivility and even increased violence on the campus and in the classroom.

Perhaps the first question to address is the extent to which misconduct and incivility is something that we can afford simply to ignore. After all, these are adults who have the freedom to be rude in many other contexts of their lives if they so wish. Why should we even care about civility? If students choose to disregard classroom rules and procedures, to taunt others, to insult, to demean, why should we care? If the college and university community of learning is to be a “marketplace of ideas,” as the Supreme Court has stated, don’t these student have a right to be – in the words of rap group Two Live Crew – “ as nasty as they want to be?”

In my view, the answer is no. In fact, allowing misconduct and incivility to

remain unchecked would undermine the very essence of the academic environment in the community of learning. James Q. Wilson and George L. Kelling published a trenchant essay entitled *Broken Windows* in 1982.⁶ Although the essay dealt with police and neighborhood safety, it resonates powerfully with the issues surrounding student misconduct. The essence of the essay is that “disorder and crime are usually inextricably linked, in a kind of developmental sequence.”⁷ The “broken windows” are a symbol of disorder. According to social psychologists and police, if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.⁸ This is not because there are larger populations of window breakers in some areas, but because the unrepaired broken window is a signal that no one cares.⁹ Just as untended property becomes fair game—even for people who generally would not plunder the property of others—“untended” behavior “leads to the breakdown of

⁶James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, March 1982, at 29.

⁷ *Id.* at 31.

⁸*Id.* See also WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS, (1990) (supplying empirical support for the “broken window theory”); *But see* Bernard E. Harcourt, Reflections on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 MICH. L. REV. 291, 295, 309-331 (claiming that Skogan’s data do not support the claim that reducing disorder deters more serious crime).

⁹ Wilson & Kelling, *supra* note 6, at 31.

community controls.”¹⁰

Professor Dan Kahan builds upon the notion of broken windows and criminality, arguing that criminal law scholars have underestimated the impact of social norms upon the incident of crime.¹¹ When people believe that others are committing crime and getting away with it (or gaining enhanced status in the relevant community), the crime rate will be higher.¹² Moreover, public order offenses—like prostitution, petty drug dealing, and public drunkenness, lead to “the breakdown of community controls” because they signal that people in that community either do not value or do not expect order.¹³ The broken windows idea can readily be applied to the problem of misconduct and incivility in the classroom. The problem is the *message* that is sent -- both to the community of learning in the classroom schools and to the larger community.

Think about how crime in a neighborhood can have a devastating effect on the elderly, the young and the vulnerable. Even if they have not been a victim of crime themselves, they stay indoors and are afraid to participate as members

¹⁰ *Id.*

¹¹ Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1977); but see Harcourt *supra* note 8, at 300 (claiming Kahan’s “sociology” is “not adequately theorized”).

¹² *Id.* at 350.

¹³ *Id.* at 369 (quoting Wilson & Kelling, *supra* note 6, at 31).

of the community. Likewise, classroom incivility can emasculate others.¹⁴ It is a form of bullying, and it can harm the educational process within the classroom. Those who are quiet, unsure, insecure or a member of a minority group may be less likely to participate in the community of learning in the classroom when incivility controls the discussion. Students inhibited by incivility are prevented from enjoying a significant benefit of participating in the educational enterprise.

Civility is necessary for a community to function as a community – and for all those in the community to participate fully and freely. “Civility is essential to the functioning of a civil society. By civil society, I mean the existence of a private sphere of human interaction that is separate from any independent of government control. Civil society has long been one of the hallmarks that has made America unique, even exceptional, in the world. We Americans have relied primarily on the private interactions between individuals and private institutions, such as schools, churches, businesses, and civic and professional organizations to organize our society. To be sure, every society needs government to protect life, liberty and property and to handle foreign relations, though we may argue at the margins concerning which issues are best handled

¹⁴Of course, behavior need not devolve to the point of incivility to chill the debate of others. See Michael Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third Essential Freedom*, 45 STANFORD L. REV. 1835, 1855 (describing incident where author was called on in class four times in a row after privately questioning his law professor about insensitive remarks about Native Americans).

by the government and which by private actors. But there can be little doubt that one of the important factors that has contributed to the stability and success of our nation has been the existence and growth of a civil society."¹⁵

If we cannot treat a person with respect, we imply that we do not value that person as an individual in our society. The student who ignores a professor's rules or procedures signals the student's disrespect for the professor and for the community of learning in the classroom. The student who insults the views of other students signals that other students in the community of learning are not worthy. Perhaps even more significantly, such behavior stifles the sober debate and the considered deliberation that is so important to participation in our democratic institutions. When this discourse is debased, "conflict of interests within democratic society cannot be resolved."¹⁶ No one takes debate or deliberate seriously¹⁷ or feels like participating in the debate or deliberation only to be humiliated. Put simply, incivility is an anathema of true *academic* freedom in the college and university community, because it does not further the educational mission. Indeed, incivility actually undermines the goal of achieving a marketplace of ideas in the academic community.

Behavior does have a consequence beyond the immediacy of the

¹⁵Clarence Thomas, *Civility* 39 S. TEX. L. REV. 655 (1998).

¹⁶J. Peter Byrne, *Academic Freedom: "A Special Concern of the First Amendment"*, 99 YALE L.J. 251, 260-61 (1989).

¹⁷*Id.*

moment. Incivility, is a bit like violence. It is about power and domination. Many students in a college classroom are away from home for the first time and they may be dealing with the difficult social issues that accompany becoming an adult. Professor Mari Matsuda has observed that college students are particularly dependent on the university for community, for intellectual development and for self-definition.¹⁸

To be sure, educators have a significant role to play in the continued viability of our nation's democratic institutions. In fact, those of us in higher education will "train nearly everyone who exercises leadership within our society."¹⁹ Part of the function of education is to "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."²⁰ The Supreme Court has reflected the essence of this statement, stressing the "incolca[tion of] fundamental values necessary to the maintenance of a democratic political system."²¹

These fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and

¹⁸ Mari J. Matsuda, *Public Response to Racist Speech, Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370-71.

¹⁹ *Id.* at 261.

²⁰ C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968).

²¹ *Bethel School District No. 403 v. Frasier*, 478 U.S. 675 (1986).

religious views, even when the views expressed may be unpopular. Although scholars receive the protection of academic freedom when their teaching and research involves controversial or unpopular ideas, this protection is not a license for those involved in scholarly inquiry to insult, degrade and demean others. "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."²²

Opinions from the United States Supreme Court and lower courts have given university and colleges the tools that they need to hold the line against the encroachment of incivility in the community of learning. In supporting the concept of academic freedom, the Supreme Court has stated that the classroom is "*peculiarly the marketplace of ideas.*"²³ The nation's future, said the Court, "depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."²⁴ If academic freedom is not an end in itself, but a means to another end, those analyzing the concept of academic freedom must

²²Bethel School District No. 403 v. Frasier, 478 U.S. 675 (1986).

²³Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (emphasis added).

²⁴ *Id.*

focus on how the marketplace of ideas metaphor functions in the community of learning on the university campus.²⁵

The Supreme Court describes "a robust exchange of ideas which discovers truth out of a multitude of tongues."²⁶ Does the robust exchange of ideas and a multitude of tongues mean that shouting, sarcasm, and ridicule--by student or teacher-- should be an accepted method of arriving at truth? Just how uncivil a marketplace should we aim for --- or tolerate? "In the context of the special characteristics of the school environment, the power of the government to prohibit lawless action is not limited to acts of a criminal nature. Also prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school.'"²⁷ No less than the AAUP has stated that the claim to freedom of teaching is reserved only for those who carry on their work in the temper of scientific inquiry. The 1915 declaration on academic freedom states, "The liberty of the scholar within the university to set forth his conclusions, be what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit ... they should be set forth with *dignity*,

²⁵See Linda S. Lovely, *Beyond "The Freedom To Do Good and Not to Teach Evil:" Professor's Academic Freedom Rights in Classrooms of Public Higher Education*, 26 WAKE FOREST L. REV. 711 726 (1991) (citing Haddon, *Academic Freedom and Governance: A Call for Increased Dialogue and Diversity*, 66 TEX. L. REV. 1561, 1566 (1988)).

²⁶ Keyishian, 385 U.S. at 603. .

²⁷Tinker v. Des Moines Independent School District, 393 U.S. 503, 513 (1969).

*courtesy and temperateness of language.*²⁸ This language is relevant to all those in the community of learning.

The courts have also recognized certain standards of discourse in the university community. When he was a federal appeals judge, Justice Blackmun wrote that a college has the inherent power properly to discipline, to protect itself and its property and that it may expect that its students adhere to generally accepted standards of conduct.²⁹ Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.³⁰

Of course, deprivation of a property interest in education for students in public colleges and universities is subject to the due process requirements of the Fourteenth Amendment. Student disciplinary actions by private colleges and universities are analyzed most often under contract law.³¹ Yet even with these distinctions in how misconduct can be addressed, some courts seem to understand how student misconduct can undermine the community of learning.

²⁸ AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS DECLARATION OF PRINCIPLES REPRINTED IN ACADEMIC FREEDOM AND TENURE APP. A at 157-76 (emphasis added). See also *Weiman v. Updegraff*, 344 U.S. 183, 196 (1952) (teachers "must have the freedom of *responsible* inquiry")(Frankfurter, J., concurring) (italics added).

²⁹*Esteban v. Central Missouri State College*, 413 F.2d 1077 (8th Cir. 1969).

³⁰ *Healy v. James*, 408 U.S. 169, 188 (1972).

³¹ Scott R. Sinson, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 DRAKE L.REV. 195 (1997) (noting that definition of student-private university relationship remains one of the true doctrinal dilemmas of this century).

One court used the doctrine of implied contract to allow a private college to discipline a student stating, "Under this concept, a student impliedly agrees not to be guilty of misconduct that would be subversive to the discipline of the college. A court may not review a college's decision of expel a student if the school made its decision based on facts within its knowledge and in the exercise of its honest discretion."³² One federal court has stated emphatically that "A private university may prescribe the moral, ethical and academic standards that its students must observe; it is not the court's function to decide whether student misbehavior should be punished or to select the appropriate punishment for transgressions of an educational institution's ethical or academic standards."³³

State university and colleges must be scrupulous to adhere to notice and hearing procedures, but "when these requirements are met, the judgment of a duly constituted disciplinary committee functioning in a normal manner by well-defined procedures will not be lightly disturbed"³⁴ Recently, a city school system was allowed to terminate the student teaching practicum of a college senior, in part because of his behavior and demeanor when talking to a teacher. The court stated that the school's strong interest in preserving a collegial atmosphere and harmonious relations among teachers outweighed the student's

³² *Tedeschi v. Wagner College*, 402 N.Y.S. 2d 967 (1978) (where student was disruptive in class, did not participate and tore up examination).

³³ *Holert v. University of Chicago*, 751 F. Supp. 1294 (1990)

³⁴ *Woody v. Burns*, 188 So. 2d 56 (Fl. Ct. App. 1966).

interest in proselytizing his chosen cause.³⁵ A dental student who refused to follow a classroom rule (that no one sit in the last row of the classroom) was placed on disciplinary probation after numerous warnings. The Sixth Circuit held that the conduct was not protected under the First Amendment because it disrupted the educational process.³⁶

We educators have the exquisitely difficult task of balancing the right to express and receive information in a robust debate against the rights of all students to obtain a serious education -- and the rights of faculty to teach and write in an atmosphere where a certain modicum of civility and order is present. How do we perform this difficult task? One way that we can start is to raise the level of discourse in our own behavior every day --- with students, colleagues, family and friends ---in the classroom, in the office and --yes-- even in a faculty meeting. Ask that your students do the same and explain your purpose, with all its complexities. As Chief Justice Warren observed, "No one should underestimate the vital role in a democracy that is played by those who guide and train our youth."³⁷ Indeed, "the interaction between teacher and student is still the

³⁵ *Hennessey v. Melrose*, 1st Cir., No. 98-2011 10/22/99.

³⁶ *Salehpour v. University of Tennessee*, 159 F.3d 199 (6th Cir. 1998). The court observed that the student had received a hearing. *See also* *Abramson v. Florida Int'l Univ.*, 704 So. 2d 720 (1998) (finding substantial evidence that student violated student conduct code).

³⁷ *Sweezy v. New Hampshire* 354 U.S. 234 (1957).

uncontested heart of the university."³⁸ Teacher can foster "habits of open-minded and critical inquiry" which in turn help to form a responsible and responsive citizenry.³⁹ "Beyond whatever specialized learning our graduates assimilate, they ought to be persuaded that careful, honest expression demands an answer in kind."⁴⁰ Teachers can be exemplars of the nobility and dignity that imbues the academic process. By exhibiting civility and professionalism each and every day in the classrooms and in the corridors, we are showing our students, not only a model of an ordered society, but a model of democracy.⁴¹

³⁸Olivas, *supra* note 14, at 1840.

³⁹Lovely, *supra* note 25, at 728.

⁴⁰Byrne, *supra* note 16, at 261.

⁴¹*Cf.* Byrne, *supra* note 16, at 260 (pointing out that the First Amendment should also be aspirational). "Society ought to strive toward speech that is truthful, gracious, well-considered and generous to opponents." *Id.*