

Friends and family,

Below is a Guest Editorial Kelly Page and I wrote and the Denver Post published last Sunday, March 11. We realize it deals with difficult matters and that not everyone will agree with us. Nevertheless, we believe it raises important issues that should be thought about and discussed. To be clear, we wholeheartedly and enthusiastically support the #MeToo movement. We simply urge, as the editorial says, appropriate due process for those accused. Let us know what you think.

My best, Dan

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The #MeToo movement's due process problem

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By Dan Recht and Kelly Page



As lawyers, we proudly and zealously represent people accused of sexual assault and sexual misconduct. While victims of sexual misconduct are forced to endure a living nightmare, so too are those wrongfully accused of such terrible acts. The #MeToo movement has given voice to many victims of sexual misconduct kept silent for far too long. But before we all join the crowd in condemning the accused, we want to issue a warning.

With the continued escalation of allegations across the country, we need to make sure everyone accused is afforded due process and that the innocent are protected. While criminal courts are generally good at enforcing important constitutional protections, other institutions, such as legislatures, employers, the media, and colleges often are not.

College disciplinary proceedings sadly provide a cautionary example of a terrible lack of appropriate due process. Instead of conducting a thorough and impartial investigation, they rush to judgment in the name of political correctness, oftentimes

prioritizing protecting their institutional reputations over serving their students. We have seen too many innocent students branded as sex offenders after having had nothing resembling a neutral or fair hearing.

Typically, when a student is accused of sexual misconduct at a college or university, the school enlists members of its own staff to conduct an “investigation” behind closed doors. During the entire disciplinary process and investigation, the student never lays eyes on the accuser, never hears the accuser’s voice, and, most importantly, never receives an opportunity to ask the accuser questions to challenge the credibility of the allegations. Instead, the entire “process” is done entirely in secret. And that lack of adequate due process too often leads to students being wrongfully expelled.

Just as alarming as the secrecy surrounding the process are the issues of who is the decision-maker, what is the standard of proof, and what punishment is imposed for the alleged misconduct. The school chooses people to investigate and decide the accused student’s fate.

Who are these decision-makers? Not lawyers, not judges, but untrained bureaucrats, who are employees of the same school that is trying to expel the accused student.

These employees rarely challenge the accuser’s allegation. In addition, unlike in a criminal case where a jury of citizens must find beyond a reasonable doubt that a person committed a crime, in order to substantiate the assertions in a disciplinary hearing, the decision-maker need only determine that it’s more likely than not that the act of sexual misconduct occurred. In other words, by a “preponderance of the evidence.”

Therefore, to expel a student from college and make him or her wear the scarlet letter of “sex offender” forever, the school policies require a mere “more likely than not” standard. When this standard of proof is combined with the complete lack of basic due process, the end result is often catastrophic.

For too long these star chamber proceedings operated at colleges and universities with little to no pushback from the outside. Recently, though, a string of civil lawsuits has put these disciplinary hearings in the spotlight. Many reputable universities, including Brandeis, Yale and Brown, have faced lawsuits from students alleging they were wrongfully expelled from school after a flawed disciplinary hearing. Last week, Duke University announced it would be reaching a settlement with a student who sued the school for withholding his diploma after an unfair disciplinary hearing found him responsible for sexual misconduct.

We have witnessed the failing school disciplinary process and worry that legislatures, work places and the media, to name just a few institutions, may also fall prey to similar problems. These systemic problems, combined with the outpouring of allegations generated by the #MeToo movement, makes it necessary for us to utter words of caution. As allegations against politicians and others in positions of power continue to make headlines, the lead editorial in last Sunday’s Denver Post wisely suggests that

such accusations will “force the more serious minded to contemplate... the complicated question of justice.” We agree.

All allegations of sexual misconduct must be dealt with seriously, carefully, judiciously and with an appropriate level of due process. Indeed, none of us should ever tolerate a rush to judgment that destroys an innocent person’s life.

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