

THE NATIONAL CENTER FOR HIGHER EDUCATION RISK MANAGEMENT

THE ELEMENTS OF CAMPUS JUDICIAL JURISDICTION:

A MONOGRAPH

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College Judicial Jurisdiction: Cornerstone of an Institution's Code of Conduct

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The issue of college judicial jurisdiction is a complex one addressing many competing aspects, including legal, moral, and practical. Judicial jurisdiction, simply, is the personal, geographical, temporal and legal limits of an institution's code of conduct. Judicial jurisdiction establishes the *who*, *where* and *when* of the kinds of policy violations that can be addressed by an on-campus judicial process. The what of judicial jurisdiction is the subject matter of a college's code of conduct, and as each is unique, this aspect will not be discussed in this article. Judicial jurisdiction provides a foundation for every college's code of conduct.

A college's jurisdiction should be expressed clearly in a written policy statement setting forth each element of its jurisdiction: who falls within the college's jurisdiction, the geographic reach of the jurisdiction, the time frames covered, and the legal framework governing the jurisdiction. Each of these elements will be discussed in detail in this article. Concerned with due process and fundamental fairness, colleges will want to balance these elements in the formulation of jurisdictional rules that will give notice to students about how, when, where, to what extent, and to whom the campus code of conduct applies.

Personal or "Physical" Jurisdiction Concerns who is Subject to a College's Code of Conduct

Personal or physical jurisdiction concerns which persons will be covered by a college's rules. Most colleges stipulate that their policies will apply to all full and part-time, day and evening students. Some colleges will also extend the coverage of their codes of conduct to encompass faculty and staff. Beyond students and employees, the college's jurisdictional reach

becomes less certain. Can or should campus policies extend to campus visitors, or trespassers? Can outsiders make accusations against students and employees? Beyond addressing student incidents and infractions, which is standard practice in higher education, what should the outer limits of physical/personal jurisdiction be for colleges?

Faculty and employees. At the very least, colleges need an apparatus for taking jurisdiction over faculty and employee incidents. Even if that apparatus is separate from the student judicial process, it must be coexistent and cross-accessible. Many colleges use one judicial process, while others have separate systems; even devoting one process to academic issues, one to student behavior infractions, one to faculty misconduct, one to residence hall infractions, etc. Some institutions have separate Greek Life misconduct bodies. Students must be able to file grievances against faculty and other employees, and faculty and other employees must be able to file grievances against offending students.

Non-students against students. Additionally, colleges should seriously consider taking jurisdiction over complaints made by non-students against students for violent incidents. The student-status of the complainant should be irrelevant. If, for example, committing sexual assault is prohibited as an offense against students, it should be prohibited against non-students as well. Behavior is wrong or not, regardless of the status of the victim. The confluence with risk management practices is strong here. If a college has a policy where it will not take jurisdiction over an incident unless all parties are members of the college community, it may encounter self-defeating and liability-enhancing results. For example, suppose the younger sister of a student is staying on-campus for a visit. At an on-campus party, she is sexually assaulted by a student. She will not go to the prosecutor, because she is 17 years old, and was drinking alcohol at the time. The campus will not address her complaint judicially, because of its

jurisdiction policy. However, the college now has a possible sex offender present on campus, and it cannot do anything about it. The institution cannot manage the risk of a repeat incident, and cannot do anything to protect other students. If he does it again, lawsuits by the victim and financial damages against the college are a strong possibility. This untenable position can be avoided by a broader jurisdictional policy.

Non-student offenders. Another issue to consider is the practice of some colleges of taking jurisdiction over non-student offenders. Such a policy is largely a scare tactic without enforceable teeth, but can be an effective scare tactic, nonetheless. In practice, very few colleges follow such a policy because it has no internal legal basis. That does not mean it is illegal, rather if a visitor, trespasser, or other non-student refuses to accept and abide by the college's judicial system or punishment, the college is limited in its ability to enforce its policies and judicial sanctions. Of course, the college is free to suggest that a non-student consent to a college sanction in lieu of the college's pursuit of criminal charges. Once a non-student decides to accept a sanction, a contractual agreement can be made between the non-student and the college with respect to remedying the violation.

The only sanction at the college's disposal is an order to keep off college property, and even that sanction is only enforceable by the college in a trespass action, not through any internal judicial proceeding. However, the college is not without recourse simply because it is limited in its pursuit of institutional judicial charges. Where a non-student has committed a policy infraction that is also a violation of criminal law, the college is well within its rights to pursue criminal charges, restraining orders, or trespass actions.

Change in a student's status. Physical jurisdiction is also influenced by changes in student status. For example, if a student is charged with an infraction, and instead of submitting

to the college judicial process, opts to leave school, the college is still faced with jurisdictional concerns, unless the student formally withdraws. In cases where students just leave, many colleges will formally withdraw students from the institution immediately upon their departure. At private colleges, minimal dismissal procedures are necessary to provide fundamental fairness. At public colleges, dismissal hearings should be held, even in the absence of the student being dismissed, and due process must be accorded. Some colleges follow a different approach, holding judicial procedures in abeyance until the self-withdrawing student seeks to return.

The important principle here, whatever your institutional practice, is to ensure that no student may evade the reach of your judicial jurisdiction by leaving college. To be clear, a voluntary departure by a student is different than an informal resolution of the charges. In an informal resolution, a student accepts the truth of the charges against him/her, and chooses to accept without contest the college's recommended sanction. Instead, what we are discussing here is an attempt by a student to circumvent the judicial process by removing him or herself from the reach of the college policy. It is important that colleges do not count time periods of voluntary withdrawal toward service of judicial sanctions unless there has been an informal resolution.

Geographical Jurisdiction Addresses Issues Relating to On and Off Campus Conduct

Nearly every college extends the reach of its code of conduct to violations that occur on campus, either on the grounds, in campus facilities, or in residential areas. Jurisdiction becomes more complicated when a college considers whether it will take jurisdiction over events that occur off-campus. There is a convergence of personal and geographical issues—the who and where—such as in the case of an off-campus policy violation by a non-student against a student or employee.

Incidents that happen off-campus. The most controversial issue of geographic jurisdiction comes in the case of incidents that occur off-campus. Colleges have disparate approaches to this issue, essentially breaking down into four groups. Some colleges never take jurisdiction over off-campus incidents. Some colleges always take jurisdiction over off-campus incidents. Some colleges only take jurisdiction over violent off-campus incidents. Still others only take jurisdiction over off-campus incidents if they are likely to have a significant on-campus impact. Is there a right approach or a best approach? The risk management ethic calls for a balancing of the needs, duties, and rights of students and colleges. Generally, when risk management principles are applied, the balance falls fairly strongly in favor of a broad jurisdictional policy. The basic principles are these:

1. Colleges have a duty to warn and protect their students from known foreseeable dangers;
2. Because of fundamental fairness and due process concerns, the best and fairest way to protect students is by using the college judicial system to suspend or expel students who pose such dangers to other members of the campus community. At public colleges, the law demands that students, who face the loss of their right to continue at an institution, be assured certain rights, including a disciplinary hearing. At private colleges, the law requires that any student deprived of continued attendance at an institution be treated to judicial procedures that are fundamentally fair, meaning they are not arbitrary or capricious.
3. Any rule or policy that unnecessarily curtails an institution's ability to hear and resolve such charges is a detriment to a college's risk management practices.

The following situation illustrates a broad jurisdictional policy reflecting these principles. A male student is a sexual predator. Knowing that the college policy specifically does not allow for the taking of jurisdiction over off-campus events, the student forms a plan to make sure that

his assaults take place in his apartment, just one block off-campus. When campus officials receive two reports of assault by the same student, they investigate and determine that although evidence exists to support allegations against the student, the college cannot hold a hearing on the charges, because of their jurisdictional limitation (the assaults did not take place on campus). The college now becomes powerless as two more reports are made by two new victims.

An institution should never intentionally create a policy that renders it impotent in the face of a crisis like this. Colleges cannot rely solely on local police and prosecutors to ensure the safety of students. The same situation of self-created powerlessness would exist where four non-student women came to complain about a male student, and the college turned them away because under the college policy, only students could file charges in the campus judicial system.

Institutions Must Balance Concerns When Considering Asserting Jurisdiction Over Off-Campus Incidents

Colleges that refuse to take jurisdiction over off-campus incidents do so because their administrators and legal advisors fear that if a college takes jurisdiction over off-campus incidents, it can also be held liable for causing or negligently responding to those incidents. The fear is strong enough to influence decision-making, and prudence is a valuable risk management principle. However, prudent avoidance of over-exposure to legal risk must be balanced against the need and duty to protect students. The colleges that take jurisdiction over off-campus *violent* incidents have found a viable compromise. With such a policy, these colleges are often seeking to avoid taking jurisdiction over off-campus alcohol incidents, because of the potential for rampant and minor alcohol violations to encumber a judicial system. Yet, off-campus alcohol violations have the potential to cause injury to students on and off-campus. So, perhaps drawing the line at violent incidents may be drawing the line too narrowly for some institutions.

Other institutions address this precise issue with a jurisdiction policy that allows them to address any off-campus incident that the administration deems to be likely to have a significant on-campus impact. For the most part, this can be a valuable standard, as long as the standard has true meaning, and is not used to arbitrarily exclude incidents from jurisdiction. For example, a mid-western university with such a policy recently used it to exclude an off-campus date rape from jurisdiction, but did take jurisdiction over an off-campus incident of sexual harassment. In making what appears to be a very arbitrary distinction here, the university based its decision on the fact that the sexual harassment was highly likely to be repeated on campus, but the date rape was not. Such a decision misses the point of how this policy should operate meaningfully. The issue is broader. If the date rape is likely to have a substantial effect on the victim's on campus life and pursuit of an education, this is a sufficient on-campus impact, and this incident is suitable for on-campus judicial resolution. The importance of a meaningful standard must be emphasized. For example, can you imagine an incident of date rape that is not likely to have a significant on-campus impact? Many colleges escape such pitfalls by recognizing the true meaning, import and application of this standard, and have implemented it beneficially and successfully.

Such a jurisdiction policy can have a valuable deterrent effect. It sends a clear message to students that any of their behaviors, anywhere, at any time can possibly subject them to college judicial charges, and this knowledge may cause desired modifications to student behavior. If nothing else, such a policy counters the terrible deterrence of a "no off-campus jurisdiction" policy, the clear message of which is, "just take it off campus and the college can't touch you."

A college’s administrative and physical control of an off-campus site could confer jurisdiction.

A geographic “control” element relates to both the geographical and legal aspects of jurisdiction. This control element functions to give colleges the duty or right of off-campus jurisdiction, not because the college owns the property where the incident occurs, but because the college, college employees, or a college organization controls the physical area where the incident occurred. Control functions to give colleges constructive ownership, making them responsible for extending campus policy to incidents occurring on college-controlled properties or at college controlled events . For example, if a college offers adult education classes at a local high school several nights a week, the college might constructively control that high school during those times, and should extend jurisdiction to incidents happening there. Similarly control can function to deprive a college of jurisdiction. For example, if a college owns a property as a landlord, but the property is in all ways controlled by the tenant party, the college may not have to take judicial jurisdiction over incidents occurring at that venue.

Temporal Jurisdiction Describes Period of Time During Which Violations Can Be Adjudicated

The primary manifestations of temporal jurisdiction are the campus period of limitation, and retained jurisdiction. The period of limitation is the college-created equivalent to a federal or state “statute of limitations,” a time period after which the college will not take jurisdiction over a policy violation. Retained jurisdiction allows colleges to punish graduated students for policy violations (committed before graduation, or sometimes after) by revoking a diploma. Retained jurisdiction can also be useful for addressing policy violations that occur between semesters, during breaks, semesters abroad, and even during leaves of absence.

Many colleges have an expiration period after which campus charges cannot be filed. Some colleges have a 30 day, 60 day, or 90 day period of limitation. Other colleges use a six month, one year or two year period. The genesis of such short periods of limitation is unclear, as are the benefits. There is a belief that a short reporting limit encourages the fast reporting of incidents, thereby ensuring better access to witnesses and evidence, the “freshness” of which tends to wane with each passing day. Were that the primary concern, we could expect that the criminal justice system would similarly shorten reporting statutes, in order to encourage the prompt reporting of crimes. However, that is not the case. Criminal statutes of limitation are often years long, and the more serious the offense, the longer the reporting period.

Historically, certain crimes, especially sex crimes, had a fresh complaint rule. If victims did not report the crime within very short windows of time, they had no chance of prosecuting. During the last 20 years, nearly every state criminal justice system has banished or eviscerated the fresh complaint rule because it did not comport with reality. Most victims of sex crimes do not make immediate reports, especially in known-offender cases. The analogy to the criminal justice system is important because of the justification for the long statutes of limitation most states have for violent crimes. Society has a strong interest in addressing crime. Short statutes of limitation unnecessarily impinge upon the ability of the state and of victims to seek redress for wrongs done to them. Similarly, short periods of limitation unnecessarily impinge on the ability of institutions of higher education to address policy violations by students. In fact, there is a poignant need for long periods of limitation in the college environment that has no analogue in the criminal justice system. Specifically, criminal systems are not usually liable for failing to address crimes or protect society, while colleges often can be liable.

Freshness of witnesses and evidence, while important, should only be of secondary importance to colleges. Colleges have a legal duty to protect students that, when abrogated, can lead to negligent or intentional tortious liability. Thus, colleges have a higher duty to ensure that policy violations are adequately addressed. Any policy that unnecessarily limits a college's ability to fulfill its legal duties offers insufficient risk management. A worst case scenario will demonstrate this assertion.

Suppose a group of fraternity members intentionally burns down a neighboring, competing fraternity house. The district attorney cannot press arson charges because she doesn't have enough evidence to prove beyond a reasonable doubt that the fraternity did it. The college thinks it can prove that it was more likely than not that the fraternity set the fire, but the college has a rule that charges must be filed within 30 days of an incident. By the time the district attorney rules out prosecution, 40 days have passed. Now, the college's own rules are going to prevent any action from being taken for this incident of arson, and questions of the fraternity's future behavior are raised. Will they burn down another fraternity house? What will the next "prank" be? Whatever it is, the college is powerless to stop it, or those it thinks may now present a danger to other students. Why adopt a policy that curtails the ability of a college to protect its students?

Outsiders often misinterpret campus time limitations. One of the issues that college administrators need to be sensitive to is that those who are outside the world of higher education do not understand the rationale for short limitations policies. Instead, they see short period of limitation as an attempt by colleges to avoid taking cases and addressing campus crime. They do not understand that many times, a short period of limitation is designed to help college investigators and adjudicators amass evidence while it is still fresh. And, it is sometimes the

case that when incidents are not reported quickly, there is no way to prove a case. But, there are other ways to address this situation than by use of an unnecessarily short period of limitations, and the concomitant poor public relations image it creates.

Some colleges take a more proactive approach. These institutions have a period of limitation policy that allows them to take jurisdiction over any incident, as long as the student being accused is still a matriculated student. The taking of jurisdiction during that time period is permissive, not mandatory. This method allows colleges to take jurisdiction over incidents as long as it is feasible, and in some cases where reports have been delayed, evidence has been hard to collect, and witnesses are scarce, it may not be possible to pursue charges. This approach allows flexibility, rather than an automatic cutting-off of redress.

Colleges that pursue such open-ended policies have a strong motivation for doing so. These colleges believe that they have an obligation to address policy violations by students. They understand that reporting policy violations, especially violent ones, is usually up to the victim, and something over which the institution has little control. Left in such a powerless position, colleges want to make sure that they are well-empowered to address the offenses that are reported, as they are reported. These colleges feel that in order to adequately protect students, they must have the judicial authority to remove from campus any student(s) who pose a threat to others, at any time that the threat is posed. They accurately view a period of limitations as an artificial impediment to achieving that goal.

Some colleges achieve the same result with the opposite approach. These colleges create closed-ended periods of limitation for offenses, but create flexibility by making clear that any period can be extended by the college when sufficient justification exists for so doing.

Meritorious as they may be, these two approaches to longer periods of limitation are still missing a significant, though rarely encountered, issue: post-graduation and retained jurisdiction.

Retaining jurisdiction over students who have graduated. If a period of limitations only lasts during the time in which a student is matriculated, there is no way to bring the judicial process to bear against policy-violating graduates. Retaining jurisdiction is the only way around this. There are two variations of retained jurisdiction. In the first type, a college would retain the power to revoke a diploma from a graduate who committed serious policy or criminal violations after graduation. This type of retained jurisdiction is extremely rare, though practiced by small numbers of often religiously-affiliated colleges. Withdrawing a diploma is a weighty decision, and is likely to lead to a lawsuit by the person from whom it is withdrawn. It is hard to say whether such a policy is good or bad, workable or unworkable. A decision to adopt this type of policy is often laden with moral values, and adoption of this type of retained jurisdiction policy should be based on varying institution-specific factors and judgments.

The second type of retained jurisdiction is more concrete than the first. This type of jurisdiction is used to address incidents that happen before the graduation of the accused, though the report of the incident is not made by the victim until after graduation. Many colleges will retain jurisdiction in such cases, to address any policy violations that occur while the accused was a student, even if he or she has graduated. Mainly, this type of retained jurisdiction exists to address policy violations that occur on the eve of graduation by students who soon expect to be beyond the college's reach. Personal and temporal jurisdiction merge here, because this type of policy addresses both the *who* and *when* issues. As a matter of policy development, it is often phrased by colleges as an aspect of the period of limitations.

Typically, a period of limitation policy statement that includes retained jurisdiction might provide that the institution will take jurisdiction over any policy violation committed *during* the time in which a student is enrolled, including time between semesters, during breaks, semesters abroad, and even during leaves of absence, even if the report of the incident is made after graduation. Many colleges have found it helpful to create limitations on retained jurisdiction, so that it is not open-ended. For example, some colleges will create a policy that states that the institution will take jurisdiction over any policy violation committed during the time in which a student is enrolled, as long as the report of the incident is made within one year of the graduation of the accused. Without a time limitation on retained jurisdiction, the college could be in a position of having to adjudicate charges many years after the incident, which may often create complications. Here, it is perfectly acceptable risk management to encourage victims to come forward within a certain time after graduation, especially since a justification for long periods of limitation--the protection of other students--that exists before graduation no longer exists after a violator has left the college community.

Some colleges have found it helpful, in adopting longer period of limitation policies, with and without retained jurisdiction provisions, to create a categorical limitation, in addition to or rather than a time limitation. These colleges use long periods of limitation and retained jurisdiction only in the case of violent incidents or those that result in physical injury. This limitation has proved to be workable for many colleges, allowing longer periods in which to exercise judicial authority, while narrowing the scope of that reach to the most serious of policy infractions.

Legal Jurisdiction Must Take into Account Contractual Obligations and Federal and State Statutory Constraints

The existence of jurisdiction between a college and its students and employees is often a matter of contractual agreements. Colleges and students form a legally binding contract upon matriculation. Students pay their tuition and agree to recognize, abide by and be subject to college policies and authority. Colleges in return guarantee certain rights to students, including the right to minimum due process and/or fundamental fairness, in the event that the college should need to adjudicate a policy violation. Also included is the right to have college policies materially adhered to by college authorities, including the jurisdiction policy, from which major deviations should not be made. A major deviation is one that could materially influence the fairness or outcome of the judicial process. Colleges and employees form contractual agreements upon the formation of the employment relationship.

Violations of the contracts can be remedied and enforced by the civil justice system in disputes between colleges and students. For example, when a college policy states that the college will take jurisdiction over on-campus cases, an affirmative legal obligation exists requiring the college to adhere to that policy, and monetary damages may be awarded in a lawsuit against a college that failed to do so. Not only can contracts extend and establish college jurisdiction, but can limit it as well. For example, most colleges will adjudicate violence between students, such as battery or sexual assault, but will not take jurisdiction over cases where one student murders another.

State law reaches into campus. In addition to a contractual constraints, a college's judicial jurisdiction is prompted indirectly by state tort laws. Colleges can face liability under common law and statutory torts for failure to warn, and in some cases protect, students from known, foreseeable dangers. Thus, if a college fails to take jurisdiction over an incident, it may be negligently placing students in danger of a repeat offense by the same perpetrator under state

law. The establishment of college jurisdiction is in some ways not so much a legal requirement as a means to avoid legal liability. In practice, that distinction is less significant, because the result is an obligation by colleges to take jurisdiction, regardless of the impetus. Many people argue that the role of the criminal justice system is being glossed over here, and that the importance of prosecutions in relieving college judicial responsibilities cannot be so easily overlooked. Clearly, there is a nexus between the criminal justice and college judicial systems. Yet, risk management demands that they must be able and willing to function separately and autonomously, without relying on the other to do the job, even though there may be intersection and cooperation in certain cases.

Federal law also plays an important role. The most direct legal requirements conferring jurisdiction on colleges come from federal statutes and case law, such as Title IX, which frames broad requirements for some form of college jurisdiction over sexual harassment and sexual assault incidents. Federal and state constitutions, civil rights and hate crimes acts also create judicial obligations for colleges. To detail each would be impossible in this article, but an example will help to explain this point. Take the case of a homosexual male student who is beaten by another student, a male football player, at a public college. The attack was motivated by the anti-gay bias of the assailant, and clearly can be classified as a hate crime. In reporting the beating, the college refuses to take jurisdiction over the victimized student's complaint based on a jurisdictional technicality, because the assault occurred over a year ago, and the college has a one year period of limitation. The college's action (or lack of action) may have violated state and federal civil rights and hate crimes laws. In addition, by refusing jurisdiction, the college becomes an indirect party to the hate crime or discrimination. Liability by and money damages against the college could result. When formulating jurisdictional rules, colleges must ensure that

policies, procedures and protocols are sufficient to meet federal and state constraints and obligations.

Jurisdictional rules are gatekeepers to the college judicial process. Keeping those gates open to aggrieved students by having a broad jurisdictional policy will help to minimize institutional liability risks in many contexts. But, flinging open the gates with abandon is not risk-averse institutional behavior. Instead, reasonableness and balance must color jurisdictional decisionmaking.