**FREEDOM WATCH**

A recent SJC ruling will expand students' rights by forcing colleges to honor their word — even though the student who brought the case lost

# By the book

**BY HARVEY A. SILVERGLATE**

JUDGING BY THE media coverage of the Massachusetts Supreme Judicial Court's September 25 ruling in *Schaer v. Brandeis University*, you'd think that Brandeis and the 10 colleges that filed friend-of-the-court briefs in the case had won an important victory. But if Brandeis and its allies won this particular battle over institutional authority, their efforts also secured the principle of student civil rights. In *Schaer*, the SJC made clear that campus disciplinary boards — which too often operate like kangaroo courts — must now adhere to the procedures outlined in student handbooks. They can no longer make up rules as they go along.

In its majority opinion, the SJC reaffirmed that a university's student handbook serves as a contract between the school and its students. With this ruling, the court gave some measure of protection to Massachusetts students brought before campus tribunals. But the court went even further: it applied to private colleges the old common-law principle that a private association must treat its members with a minimal level of fairness. (Public colleges are bound by the fairness requirements in the Constitution's Bill of Rights.) This means that even if a university were to eliminate all mention of student rights from its handbook, it would still be legally bound to treat students with some degree of fairness.

The opinion is of tremendous importance in Massachusetts; the SJC's decisions are highly influential, especially in the area of academic law. Higher education is a major industry in the Bay State, and the court's affirmation of students' rights can only be good news for the tens of thousands studying here. The decision also has national implications, for among state supreme courts throughout the US, the SJC has long been considered the foremost interpreter of common-law doctrines.

But if the decision supported students' rights, why did the *Globe* write that "the majority of judges said colleges may discipline and punish students as they see fit, without interference from the courts"? And why did the *Herald*, as well, fail to grasp the import of the court's opinion? Remarkably, neither paper seemed to understand that the point of this case wasn't whether campus tribunals must follow the same standards used in a court of law. Instead, it was whether they must follow their *own* standards as set forth in student handbooks. The answer to the latter question is "yes." And that's a welcome development in the evolution of students' civil liberties.

THE *GLOBE* and the *Herald* may have been thrown off by the fact that in this case, the student lost. If the case is so good for students, then why did that happen? Two words: date rape. Actually, two more words: politically correctness.

Schaer was charged by a former girlfriend with having "unwanted sex" with her, thereby creating a "hostile environment" that interfered with her education. On March 25, 1996, six weeks after the alleged crime took place, she filed a complaint with Brandeis's disciplinary board claiming that Schaer had spoken with her by phone, visited her dorm room, and then engaged in foreplay with her. At this point the two parties' stories diverge. She claims that she told him she did not want to have intercourse, but that she fell asleep and awoke to find that he'd entered her. He claims that she willingly had sex with him and that her complaint arose not from an instance of date rape, but from one of "regretted sex." Here was a quintessential "he said/she said" situation.

Brandeis's student handbook does indeed accord certain rights to students accused of misconduct. Students are entitled to a careful investigation, a verdict "based solely upon evidence and testimony introduced at the hearing," and a record of the hearing consisting "of a summary of the testimony and evidence presented, and of the decision rendered." But in this case, Brandeis complied with its own regulations in a less-than-robust fashion. Although 13 witnesses testified at Schaer's hearing, the formal record of the hearing was just 12 lines long. The testimony of individual witnesses did not even warrant a full line each! University officials never interviewed Schaer himself and never granted him an opportunity to provide witnesses at the investigatory stage. They even allowed witnesses to offer testimony that the woman in this case "looked like a rape victim" and that Schaer was a "self-motivated egotistical bastard." In the end, Schaer stood convicted as charged.

In his lawsuit, Schaer charged that Brandeis's disciplinary board was supposed to abide by the rules laid out in the student handbook — but didn't. (Colleges have jurisdiction over criminal matters such as rape because colleges and universities regard such crimes as an offense against the school, as well as against the victim. In many cases, they refrain from hearing the matter until public prosecutors are finished with it. In this case, however, the woman never pressed criminal charges against Schaer.) All five justices were troubled by Brandeis's conduct, and all agreed on the first point: the university was legally bound to follow its own stated procedure and to treat the accused with a minimal level of fairness.

But the court split over the question of whether the school had followed its own rules. The majority wrote of the 12-line summary of 13 witnesses' testimony that the disciplinary board should have written a "more complete report." But they concluded that it met the standard set forth in Brandeis's student handbook. On the other hand, both dissenting justices found that the board's weak record-keeping violated the contract between the school and Schaer: "While it is true that the [contract] provision does not set a minimum length requirement, it does require a summary of the testimony and evidence," wrote Justice Judith Cowin, concluding that "a twelve-line record does not summarize a hearing with thirteen witnesses."

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THERE IS much pressure, and rightly so, to take seriously the charges of a woman who claims she's been raped. Sometimes, however, that pressure can provoke justice — which is supposed to be blind — into peeking to see what some constituency or other wants it to do. If Schaer had been accused of larceny — a less emotionally and politically contentious charge — would the court have reacted the same way? It is doubtful. Procedural rights, or "due process of law," should be applied uniformly in all cases. Nonetheless, colleges and universities, which have already earned a national reputation for conducting "kangaroo courts" in most disciplinary matters, have been cutting even more corners in politically loaded cases where a "politically correct" result is expected. Politically correct majorities on some courts — unfortunately including the SJC — have likewise succumbed to the pressure to produce preordained results regardless of the facts.

Indeed, last spring the Columbia University faculty senate established a special tribunal for dealing with charges of sexual misconduct. Under its rules, an accused student cannot even be present when the accuser testifies. The justification for this assault on defendants' rights was that rape victims should not be forced to sit in the same room as their attackers — this, even before the accused has been shown to be an attacker.

Locally, Harvard University tries students accused of rape before an administrative board that does not include a single student member, and even prohibits the accused from presenting witnesses directly to the board. Instead, a three-member subcommittee of the board interviews witnesses and presents "summaries" to the full board membership. Nowhere in the US but on college campuses would a system that treats the accused in this fashion be deemed constitutional. And when the charge is sexual assault, even the minimal rights set forth in student handbooks are rarely honored, if at all.

Brandeis escaped by a single vote a humiliating defeat on the question of whether it followed its own procedural standards. But any college administration that took comfort from this decision would be foolish. The status of student-college relations in disciplinary matters remains very much a work in progress. And the significance of this case is that the court unanimously affirmed the rights of students to be treated fairly. With another victory like that, colleges' disciplinary authority might truly come undone.

Students can only hope so.

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