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ESSAY

RESTORING HONOR: ENDING RACIAL DISPARITIES IN UNIVERSITY HONOR SYSTEMS

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INTRODUCTION

In student-led academic honor systems, students establish policies governing lying, cheating, or stealing (referred to as “academic misconduct”); adjudicate reports of academic misconduct among their peers; and determine appropriate sanctions.¹ These systems have been a common feature of American universities since the early eighteenth century,² and they are growing in popularity.³ Today, student-led honor systems are already in use at five of the top six public universities, as ranked by *U.S. News and World Report* in 2020⁴: the University of

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¹ David A. Rettinger & Douglas Searcy, Student-Led Honor Codes as a Method for Reducing University Cheating, 12 *Econ. & Envtl. Stud.* 223, 225 (2012) (discussing the features of student-led honor systems).

² *Id.* at 224.

³ *Id.* (finding that student-led honor systems are “growing in popularity”).

⁴ See UVA Honor Comm., Honor Audit Commission 2017–2018 Report 16–17 (2018), https://honor.virginia.edu/sites/honor.virginia.edu/files/HAC%20Report_Final.pdf

California (Los Angeles), the University of California (Berkeley), the University of Michigan, the University of Virginia, and the University of North Carolina at Chapel Hill. Student-led honor systems are also in place at George Mason University, James Madison University, Virginia Tech, William & Mary, Indiana University, and The Ohio State University, among others.⁵

Universities have chosen to adopt student-led honor systems in part because of a correlation between low levels of academic dishonesty and the use of a student-led honor system.⁶ Student-led honor systems also reflect a preference for students enforcing community norms in peer-to-peer settings, free from the influence of faculty and administrators.⁷ Despite many universities' beliefs that honor systems are effective and enhance community values, however, student-led honor systems are not immune from the racial discrimination that pervades the administration of public elementary and secondary school disciplinary policies and the criminal justice system.⁸

The experience of Johnathan Perkins, a Black student in his final year at the University of Virginia ("UVA") School of Law, serves as an example of the racial discrimination present in university, student-led honor systems. In the spring of his graduating year, Perkins wrote an editorial about having been racially profiled and harassed by campus police.⁹ Shortly thereafter, an FBI agent used "high-pressure interrogation

[<https://perma.cc/X99A-M3RN>] (providing additional detail about the level of faculty and administrator involvement in each system). The only top public university that does not have an honor system is the Georgia Institute of Technology. Top Public Schools 2020, U.S. News, <https://www.usnews.com/best-colleges/rankings/national-universities/top-public> [<https://perma.cc/QS5Y-35FP>] (last visited May 27, 2020).

⁵ See UVA Honor Comm., supra note 4, at 16 (identifying UVA's peer schools with honor systems).

⁶ E.g., Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, Honor Codes and Other Contextual Influences on Academic Integrity: A Replication and Extension to Modified Honor Code Settings, 43 Res. Higher Educ. 357, 368 (2002) (finding a statistically significant correlation between the use of a student-led honor system and lower levels of cheating).

⁷ See Larry A. DiMatteo & Don Wiesner, Academic Honor Codes: A Legal and Ethical Analysis, 19 S. Ill. U. L.J. 49, 62 (1994) (discussing the history of honor codes and their legal and ethical purposes).

⁸ See infra Section I.A.

⁹ Johnathan Perkins, Editorial, Re-examining Honor, Cavalier Daily (Oct. 2, 2018) [hereinafter Re-examining Honor], <https://www.cavalierdaily.com/article/2018/10/perkins-re-examining-honor> [<https://perma.cc/HA6F-C7SN>] (explaining how the editorial he wrote in 2011 led to him being reported to the Honor System).

tactics” to force him to recant.¹⁰ The campus newspaper called him a “race hoax hustler,” and a community member reported him to UVA’s student-led honor system for lying.¹¹ Because the charges hinged on Perkins’s credibility in alleging that he had been the victim of racially discriminatory policing, during his trial, the student jury was “confronted with their own potential [racial] biases.”¹² According to Perkins, the jurors “struggled to understand how their biases may have been influencing their evaluation” of the charges and asked questions that “clearly indicated a lack of thoughtful perspective on race.”¹³

The jury exonerated Perkins in the summer of 2011, but Perkins did not feel free to speak of his experience until 2018, when the statute of limitations for criminal charges for making a false statement had passed.¹⁴ His freedom to speak coincided with the February 2019 release of the UVA Honor Committee’s Bicentennial Analysis report,¹⁵ which confirmed what Perkins alleged: racial disparities in the administration of the UVA Honor System.¹⁶

Perkins’s experience and the data from UVA are not anomalies: other universities’ student-led academic honor systems likely discriminate against students of color, but most universities do not collect or publicize data about their honor systems. This lack of data, combined with legal obstacles, prevents students who have experienced racial discrimination in their university’s honor system from taking advantage of legal remedies that protect their educational rights. External pressure, however, can mitigate these obstacles by bolstering the evidence available to litigants and compelling universities to adopt procedural protections that better protect students’ rights. This issue takes on heightened importance as students of color, who are historically underrepresented at universities,

¹⁰ *Id.*

¹¹ Denise Lavoie, *Man Says FBI Pressured Him To Recant Racial Profiling Claim*, U.S. News (Mar. 28, 2018), <https://www.usnews.com/news/us/articles/2018-03-28/man-says-fbi-pressured-him-to-recant-racial-profiling-claim> [<https://perma.cc/LA3Y-3M74>].

¹² Re-examining Honor, *supra* note 9.

¹³ Johnathan S. Perkins, *Justice in America Has Never Been Colorblind: U.Va.’s Honor System Is No Different*, in *Honor Bicentennial Report* (Feb. 11, 2019) [hereinafter *Justice in America Has Never Been Colorblind*], <https://report.honor.virginia.edu/implicit-bias-spotlighting-and-dimming> [<https://perma.cc/6SQL-6Q8V>].

¹⁴ Lavoie, *supra* note 11.

¹⁵ Honor Assessment & Data Mgmt. Working Grp., *Bicentennial Analysis* (2019) <https://report.honor.virginia.edu/sites/report.honor/files/honor-bicentennial-analysis.pdf> [<https://perma.cc/UQU3-53YP>].

¹⁶ See discussion *infra* Section I.A.

have begun enrolling in increasing numbers,¹⁷ and as student-led honor systems have grown in popularity.¹⁸ The U.S. Department of Education should use its regulatory authority to compel universities to publish data about racial disparities in university honor systems and promulgate regulations mandating the minimum procedural protections that honor systems must provide. Honor systems should also amend their policies in ways that will make racial disparities less likely to occur.

Part I discusses what is known about racial disparities in student-led honor systems and institutional obstacles preventing a deeper understanding of these disparities. Part II examines the claims students can bring under federal law in response to discrimination in honor systems and the difficulties associated with prevailing on these claims. Part III presents solutions for how the federal government and universities can mitigate these disparities.

Given the prevalence of student-led honor systems at leading public universities and the specific legal remedies available to address discrimination by state actors,¹⁹ this Essay is limited to the discussion of public universities²⁰ where students²¹ adjudicate issues of academic misconduct. This Essay does not address procedures used to adjudicate behavioral misconduct, which includes sexual, drug, or alcohol offenses.²²

¹⁷ Black and Hispanic students comprised 13.6% and 18.9% of the college population, respectively, in 2017, as compared to 11.7% and 9.9%, respectively, in 2000. Nat'l Ctr. for Educ. Statistics, Fall Enrollment of U.S. Residents in Degree-Granting Postsecondary Institutions, by Race/Ethnicity, https://nces.ed.gov/programs/digest/d18/tables/dt18_306.30.asp [<https://perma.cc/96HR-3T59>] (last visited May 27, 2020).

¹⁸ Rettinger & Searcy, *supra* note 1, at 224 (finding that student-led honor systems are “growing in popularity”).

¹⁹ Although administered by students, honor systems are state actors under the Fourteenth Amendment because universities ratify honor systems’ decisions as their own for the purposes of altering students’ grades and student status. E.g., *Thompson v. Ohio State Univ.*, 92 F. Supp. 3d 719, 729 (S.D. Ohio 2015) (allowing an Equal Protection claim against Ohio State’s student-led honor system), *aff’d* 639 F. App’x 333 (6th Cir. 2016); *Cobb v. Rector & Visitors of Univ. of Va.*, 69 F. Supp. 2d 815, 830 (W.D. Va. 1999) (allowing an Equal Protection claim against UVA’s student-led honor system).

²⁰ Private universities are not state actors. E.g., *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157–58 (5th Cir. 1961) (holding that a private university was not a state actor where a student alleged due process claims from his dismissal from an academic program); *Althiabat v. Howard Univ.*, 76 F. Supp. 3d 194, 197 (D.D.C. 2014) (same).

²¹ Additional research is needed to examine university-led models.

²² Because universities must report annually on the frequency of behavioral offenses, 20 U.S.C. § 1092(f)–(m) (2018), behavioral misconduct falls outside the forces that prevent public understanding of racial disparities in honor systems.

I. RACIAL DISPARITIES IN HONOR SYSTEMS

A. Documented Racial Disparities in Honor System Outcomes

The best information available about racial disparities in university honor systems comes from UVA, which has maintained a student honor code since 1825.²³ At UVA, cases originate when a faculty member, student, or community member reports suspected academic misconduct to the Honor Committee.²⁴ After a student Support Officer investigates,²⁵ the accused student may plead guilty to the violation and complete a two-semester leave of absence,²⁶ or their case will be heard before a jury of students drawn from across the University.²⁷ Since the first recorded trial in 1851, expulsion from UVA has been the only punishment available if the jury finds the student guilty.²⁸

UVA began tracking the demographics of students reported for and found guilty of honor offenses after the University became racially integrated in the 1960s.²⁹ From that time to the present, the Honor Committee has observed racial disparities in the students reported to the Honor System.³⁰ According to the UVA Honor Committee's 2019 Bicentennial Analysis report, its most recent and comprehensive effort to analyze system outcomes over the past thirty years, White students are underrepresented among students reported to the Honor Committee.³¹ White students constituted 58% of all enrolled UVA students in 2017, but they comprised only 29.7% of reported students that year.³² Asian and Asian-American students were over-represented among reported students in 2017, making up only 12% of the UVA domestic student population but constituting at least 27.1% of reported students, a difference of 15.1

²³ Coy Barefoot, *The Evolution of Honor: Enduring Principle, Changing Times*, UVA Magazine (Spring 2008), http://uvamagazine.org/articles/the_evolution_of_honor/%20 [https://perma.cc/2Z8F-JGBR] (discussing the history of the UVA Honor System).

²⁴ See Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 2.

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ *Frequently Asked Questions*, UVA Honor Comm., <https://honor.virginia.edu/frequently-asked-questions> [https://perma.cc/LLA2-8YWE] (last visited May 25, 2020).

²⁸ Barefoot, *supra* note 23; see Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 1.

²⁹ Barefoot, *supra* note 23.

³⁰ *Id.*

³¹ Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 25.

³² *Id.*

percentage points.³³ Similarly, Black students were over-represented by 2.7 percentage points in 2017, at 6% of the UVA student body but 8.7% of reported students.³⁴

The Honor Committee attributes these disparities in reporting to the effects of what it calls “spotlighting” and “dimming.”³⁵ Spotlighting occurs when a student becomes more visible because they are part of a minority group, thus watched more closely, and, as a result, more likely to be reported.³⁶ By contrast, dimming occurs when a student is less visible because their identity falls within the majority, making the student less likely to be reported.³⁷

The Bicentennial Report also revealed racial disparities in sanctioning.³⁸ From 1987 to 2009, Black students faced sanctions “at a rate that was significantly disproportionate to their population at the University.”³⁹ From 1987 to 1989, Black students made up at least 41% of all students dismissed from UVA,⁴⁰ but they were only 9% of the UVA student body in 1991, the earliest year for which the Honor Committee could find demographic data.⁴¹ From 2010 to 2016, Black students made up at least 12% of sanctioned students,⁴² but they were only 6% of the university population in 2016.⁴³

The proportion of sanctioned students who are Asian or Asian-American has increased over the past thirty years, and they are now over-represented among sanctioned students.⁴⁴ Asian and Asian-American students comprised at least 6% of sanctioned students from 1987 to 1989 and were 6% of the UVA student body in 1991.⁴⁵ Yet, from 2010 to 2016,

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 29.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 12–13.

³⁹ *Id.* at 12.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 13.

⁴³ Enrollment Details, UVA Office Institutional Research & Analytics, <https://ira.virginia.edu/university-stats-facts/enrollment> [<https://perma.cc/X7B2-JJ7X>] (last visited May 27, 2020).

⁴⁴ Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 13.

⁴⁵ *Id.* at 12–13 (the earliest year for which data were available).

Asian and Asian-American students comprised at least 50% of sanctioned students,⁴⁶ but they were only 11% of the student body in 2016.⁴⁷

The Honor Committee recognized that these racial disparities “could be more significant than they appear” due to “significant unknown proportions in [its] race data, reaching up to 20% of sanctioned students in some time periods.”⁴⁸ The Committee said that the percentages should be regarded as a “floor” and the racial disparities might be even higher than observed.⁴⁹

The UVA Honor System is unique in that it has conducted and publicized in-depth analysis about racial disparities exhibited in its system. Of the aforementioned public universities that have student-led honor systems,⁵⁰ only UVA, the University of North Carolina at Chapel Hill (“UNC”), and The Ohio State University (“Ohio State”) have published *any* reports about the number of students reported for and found guilty of honor offenses,⁵¹ and only UVA has provided a public report analyzing the number of students reported to and sanctioned by the university honor system broken down by race and ethnicity.⁵² Ohio State and UNC’s reports do not provide information about students’ race or ethnicity.⁵³

The only other information about racial disparities in university honor systems comes from unofficial data reported by a student-leader in the UNC Honor System. During a February 2016 meeting of UNC’s Faculty Council, the student told faculty that 56% of UNC’s academic misconduct

⁴⁶ *Id.* at 13.

⁴⁷ UVA Office Institutional Research & Analytics, *supra* note 43.

⁴⁸ Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 16.

⁴⁹ *Id.* at 17.

⁵⁰ See *supra* notes 4–5 and accompanying text.

⁵¹ See Committee on Academic Misconduct Annual Report: Summer Semester 2018 – Spring Semester 2019, at 2–3 (2019) [hereinafter *Ohio State Annual Report 2018–2019*], https://senate.osu.edu/sites/default/files/links_files/AcademicMisconduct_Annual_report_2018-19.pdf [<https://perma.cc/G6RJ-8GRE>] (providing analysis about the outcomes of Ohio State’s honor system); UNC-Chapel Hill Undergraduate Honor System, Annual Report 2017–2018, at 6–7 (2018) [hereinafter *UNC Annual Report 2017–2018*], <https://studentconduct.unc.edu/sites/studentconduct.unc.edu/files/documents/2017-2018%-20Undergraduate%20Annual%20Report.pdf> [<https://perma.cc/B8WP-DRDJ>] (analyzing UNC’s outcomes). A search of each university’s honor system website and student newspaper archives demonstrates that no other named universities have publicly released information about honor system outcomes.

⁵² Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 12–13, 16–17.

⁵³ See *Ohio State Annual Report 2018–2019*, *supra* note 51; *UNC Annual Report 2017–2018*, *supra* note 51.

cases concerned students of color,⁵⁴ while the UNC student body was only 37% non-White.⁵⁵ The student-leader declined to provide additional detail to UNC's student newspaper when asked for comment,⁵⁶ and UNC has never officially reported these data.

B. Institutional Forces Prevent a Deeper Understanding of These Disparities

The absence of data, however, does not mean racial disparities do not occur in other universities' honor systems. The racial disparities in reporting and sanctioning identified by the UVA Honor Committee have also been documented for many years in other similar institutions, such as the criminal justice⁵⁷ and public school disciplinary systems.⁵⁸ Racial disparities likely exist in other universities' honor systems, and the absence of information reflects two institutional obstacles that prevent publication of these data.

First, it is not in universities' or honor systems' self-interests to voluntarily make honor system data public because information about widespread racial disparities might expose them to litigation or bad

⁵⁴ Meeting of the General Faculty & Faculty Council, UNC Office of Faculty Governance (Feb. 19, 2016), <https://facultygov.unc.edu/faculty-council/meeting-materials-past-years/-meeting-materials-2015-16/february-19-2016/> [<https://perma.cc/3VNW-WYQZ>] (documenting the report).

⁵⁵ Kelly Jasiura, *More than Half of Honor Court Academic Cases Are Students of Color*, Daily Tar Heel (Apr. 26, 2016), <https://www.dailytarheel.com/article/2016/04/more-than-half-of-honor-court-academic-cases-are-students-of-color> [<https://perma.cc/AA7W-XJNK>] (discussing the meeting).

⁵⁶ *Id.*

⁵⁷ Individuals of color are significantly over-represented in the prison population, compared to the population at large. E.g., E. Ann Carson, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2016*, at 13 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/P3JW-EZF3>]; Jennifer L. Eberhardt, *Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do* 78 (2019) (finding racial disparities in police stops, searches, handcuffs, and arrests).

⁵⁸ Black, Latino, and Native American students are disciplined at higher rates and receive harsher and longer punishments than their White peers, even when controlling for other variables. E.g., U.S. Dep't of Educ. Office for Civil Rights, *Civil Rights Data Collection, Data Snapshot: School Discipline 1* (Mar. 2014), <https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/23FW-7L67>] (finding that “[b]lack students are suspended and expelled at a rate three times greater than white students [and] [o]n average, 5% of white students are suspended, compared to 16% of black students”).

press.⁵⁹ For example, in the public school system, where the U.S. Department of Education's Office for Civil Rights ("OCR") requires public elementary and secondary schools to annually report data about the outcomes of school discipline proceedings broken down by race,⁶⁰ parents and non-profits regularly use these data to challenge the schools' policies.⁶¹ OCR also uses these data to investigate complaints of alleged discrimination under Title VI of the Civil Rights Act of 1964.⁶² OCR does not require honor systems to submit similar data about academic misconduct, but honor systems are not legally prevented from voluntarily releasing data.⁶³

Second, the organizational structure of student-led honor systems does not lend itself to robust data collection and analysis procedures. Honor

⁵⁹ See Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 1 ("Too often, the Honor System's available data has been guarded, a disservice to the University seeking to improve its most revered tradition.")

⁶⁰ See U.S. Dep't of Educ. Office for Civil Rights, 2017–18 Civil Rights Data Collection: List of CRDC Data Elements for School Year 2017–18, at 2–3 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/2017-18-crdc-data-elements.pdf> [<https://perma.cc/3R3T-V4UR>] (last visited May 24, 2020).

⁶¹ E.g., Nirvi Shah, *Uneven Discipline Yields Civil Rights Complaint Against Texas District*, Educ. Week (Feb. 20, 2013), http://blogs.edweek.org/edweek/rulesforengagement/2013/02/groups_say_texas_district_tickets_black_students_disproportionately.html [<https://perma.cc/UEH3-M32D>] (discussing a complaint filed using discipline data from a Texas school district); Press Release, ACLU of Va., *Federal Civil Rights Complaint Challenges Discrimination in City of Richmond Public Schools* (Aug. 24, 2016), <https://acluva.org/en/press-releases/federal-civil-rights-complaint-challenges-discrimination-city-richmond-public-schools> [<https://perma.cc/WF3N-5HUD>] (using data to support claim that Black students with disabilities were 12.91 times more likely than White students without disabilities to receive short-term suspensions).

⁶² U.S. Dep't of Educ. Office for Civil Rights, *Civil Rights Data Collection: Frequently Asked Questions*, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/-crdc.html> [<https://perma.cc/YJ49-DEP9>] (last visited May 24, 2020) (explaining the purpose and statutory authority for OCR to collect CRDC information).

⁶³ Although the Family Educational Rights and Privacy Act ("FERPA") protects students' disciplinary records from unauthorized disclosure to third parties, universities do not violate FERPA by releasing generalized, aggregate information about disciplinary proceeding outcomes that does not personally identify students. 20 U.S.C. § 1232g(b)(1) (2018) (FERPA statutory requirements); 34 C.F.R. § 99.1 et seq. (2019) (implementing regulations). UVA, UNC, and Ohio State's reports demonstrate how honor systems can report data without violating FERPA. See Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 1 ("No personal information, aside from aggregated and de-identified case data, has been disclosed from otherwise confidential Honor files."); Ohio State Annual Report 2018–2019, *supra* note 51, at 2–3 (providing aggregate data that would not identify students); UNC Annual Report 2017–2018, *supra* note 51, at 6 (declining to provide information where there were five or fewer cases of a hearing type, so as not to identify students).

systems experience constant personnel turnover because students attend universities for only a few years, which may affect efforts to maintain consistent data. Students work in honor systems in addition to taking classes and participating in other extracurricular activities, so they have less time than full-time university administrators to develop detailed reports that could be helpful to outside parties seeking to challenge discrimination.

Even UVA, which periodically releases reports analyzing Honor System outcomes,⁶⁴ has struggled with these institutional capacity issues. Until the Honor Committee's Bicentennial Report,⁶⁵ Honor System outcome data were available only by searching the UVA student newspaper's online archives for stories about historical reports.⁶⁶ Moreover, the Honor Committee acknowledged in its Bicentennial Report that there were "significant" gaps in their records about students' race, preventing them from conducting additional analysis to further explain the racial disparities they observed.⁶⁷

II. INSTITUTIONAL AND LEGAL OBSTACLES PREVENT STUDENTS FROM RECEIVING RELIEF THROUGH TRADITIONAL LEGAL REMEDIES

Over the past sixty years, students, parents, and their families have turned to federal courts seeking remedies for racial discrimination within educational institutions.⁶⁸ Students who believe they have been subjected

⁶⁴ See UVA Honor Comm., History of Reports and Commissions, Honor Bicentennial Report, <https://report.honor.virginia.edu/history-reports-and-commissions> [<https://perma.cc/F843-D959>] (last visited May 20, 2020) (listing these reports).

⁶⁵ *Id.*

⁶⁶ See, e.g., Cameron Feller, Honor Committee Statistics Reveal Racial Inconsistency in Cases Reported, *Cavalier Daily* (Apr. 6, 2009), <http://www.cavalierdaily.com/article/2009/04/honor-committee-statistics-reveal-racial-inconsist> [<https://perma.cc/GT97-Z5CY>]; Annie O'Brien, Under-Represented and Over-Reported, *Cavalier Daily* (Mar. 5, 2014), <http://www.cavalierdaily.com/article/2014/03/under-represented-and-over-reported> [<https://perma.cc/TUU3-94N6>]; Cavalier Daily Staff, Editorial, Pinpointing Bias, *Cavalier Daily* (Apr. 10, 2001), <http://www.cavalierdaily.com/article/2001/04/lead-editorial16276> [<https://perma.cc/C2WH-2Q2M>]. In addition, at the time of this writing, the historical case reports referenced in these articles were not available on the UVA Honor Committee website. See UVA Honor Comm., Public Summaries, <https://honor.virginia.edu/public-summaries> [<https://perma.cc/J45Y-YTD4>] (last visited June 1, 2020). As of this writing, the only way to see historical Honor System data is to look at the new analysis performed for the Bicentennial Report or past *Cavalier Daily* articles.

⁶⁷ Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 16.

⁶⁸ E.g., *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 302 (2013) (challenging affirmative action policies on Equal Protection grounds); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411

to discrimination within their university honor system may bring claims under (1) the Fourteenth Amendment's Equal Protection Clause; (2) Title VI of the Civil Rights Act of 1964; or (3) the Fourteenth Amendment's Due Process Clause. However, students are unlikely to find relief in the federal courts due to the legal standards associated with these claims and the lack of data available about racial disparities, crystallizing the need for regulatory oversight.⁶⁹

A. Equal Protection Claims

The Fourteenth Amendment's Equal Protection Clause⁷⁰ has been the traditional vehicle through which students have challenged discrimination in public educational institutions.⁷¹ In an Equal Protection challenge, a student must show that the honor system (1) has a discriminatory effect and (2) that it was motivated by discriminatory intent.⁷²

Under the first prong, students must prove that the honor system subjected them to differential treatment based on their race.⁷³ Examples of differential treatment might include a jury that found a minority student guilty when, presented with similar evidence, they would not have found a White student guilty; a jury that gave a minority student a harsher punishment than they would have given a similarly situated White student; or a professor who reported a minority student to the honor system when they would not have reported a White student.

In all three examples, students would face challenges obtaining evidence necessary to prove differential treatment. Because these proceedings are confidential,⁷⁴ it would be difficult for minority students to identify a White student to serve as a comparator. Statistically

U.S. 1, 6, 35 (1973) (challenging Texas's public education funding system on substantive due process and Equal Protection grounds); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that racially segregated public schools violate the Equal Protection Clause).

⁶⁹ See discussion *infra* Part III.

⁷⁰ U.S. Const. amend. XIV, § 1.

⁷¹ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 250 (2003) (challenge to affirmative action policies on Equal Protection and statutory grounds); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (challenge to the use of race in public university admissions under the Equal Protection Clause); *Brown*, 347 U.S. at 495 (challenge to school segregation).

⁷² *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985) (holding that a facially neutral law must have a discriminatory effect and a discriminatory intent in order to violate the Equal Protection Clause); see also *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (holding that selective-prosecution claims use “ordinary equal protection standards” (citation omitted)).

⁷³ See *Hunter*, 471 U.S. at 227 (explaining differential treatment).

⁷⁴ See discussion *supra* note 63 regarding federal privacy law.

significant evidence of disparities can demonstrate differential treatment,⁷⁵ but honor systems do not publish and may not maintain data regarding findings of guilt and sanctions assigned, correlated with the race of each student, which would be necessary to prove differential treatment during trial or sanctioning.⁷⁶ Moreover, for claims of selective reporting, even if an honor system had data showing that students of color were reported at disparate rates, these data would only capture disparities among students who *were* reported to the honor system and would not capture instances where professors did *not* report students. As a result, data would not be comprehensive enough to show that a particular student was subject to differential treatment in reporting.⁷⁷

Second, a lack of data would also make it difficult for a student to meet the discriminatory intent prong, in which a student must prove that race was a motivating factor in disciplinary action taken against the student.⁷⁸ Discriminatory intent is most easily proven using direct evidence,⁷⁹ such as discriminatory statements made by a juror, honor system representative, or reporting faculty member. A student is unlikely to have such ‘smoking gun’ evidence, however, as discrimination is often subtle,⁸⁰ and these statements may be made during confidential jury deliberations when the student or other potential witnesses are not present to hear them.

⁷⁵ See *Tasby v. Estes*, 643 F.2d 1103, 1108 (5th Cir. 1981) (“[A]bsent a showing of arbitrary disciplinary practices, undeserved or unreasonable punishment of black students, or failure to discipline white students for similar misconduct, the plaintiffs have not satisfied their burden”); *Sweet v. Childs*, 507 F.2d 675, 681 (5th Cir. 1975) (“There was no showing of arbitrary suspensions or expulsions of black students nor of a failure to suspend or expel white students for similar conduct.”); *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812, 815 (C.D. Ill. 2000) (“[Plaintiffs’] statistics failed to establish that any similarly situated Caucasian students were treated less harshly.”), *aff’d* on other grounds, 251 F.3d 662 (7th Cir. 2001).

⁷⁶ See discussion *supra* Section I.B.

⁷⁷ See *Armstrong*, 517 U.S. at 459, 470 (finding that defendants’ “study” listing twenty-four defendants by race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case, did not prove elements of selective-prosecution claim).

⁷⁸ *Hunter*, 471 U.S. at 228 (defining element of discriminatory intent); *Tasby*, 643 F.2d at 1108 (applying this standard to discriminatory discipline cases).

⁷⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

⁸⁰ Eberhardt, *supra* note 57, at 11–43 (arguing that racial discrimination often ends up being more subtle or implicit); Emily Chiang, *The New Racial Justice: Moving Beyond the Equal Protection Clause To Achieve Equal Protection*, 41 Fla. St. U. L. Rev. 835, 842 (2014) (“[M]ost of the racism that remains in America is of the subconscious variety, as opposed to the explicit state-driven Jim Crow variety.”).

Circumstantial evidence, such as data about widespread and longstanding racial disparities in honor system outcomes, can also be used to prove discriminatory purpose,⁸¹ but subsequent cases show that statistical evidence is rarely stark enough to be sufficient on its own.⁸² In particular, when a system of punishment explicitly allows for discretion based “on the particularized nature of the crime and the particularized characteristics of the individual defendant,”⁸³ as some honor systems do,⁸⁴ the Supreme Court has said it is lawful to presume that the sentence was imposed appropriately.⁸⁵ Thus, absent direct evidence of discriminatory intent that would overcome this presumption, statistical evidence of an honor system’s disparate impact on minority students is typically insufficient to prove discriminatory intent.⁸⁶

B. Claims Under Title VI of the Civil Rights Act of 1964

Students may also bring claims under Title VI of the Civil Rights Act of 1964. Title VI prohibits recipients of federal financial assistance, including public universities, from discriminating on the basis of race,

⁸¹ Circumstantial evidence includes the racial “impact of the official action,” the “historical background of the decision,” the “specific sequence of events leading up to the challenged decision,” procedural or substantive “[d]epartures from the normal . . . sequence,” and “legislative or administrative history.” *Arlington Heights*, 429 U.S. at 266–68.

⁸² *Id.* at 266 (finding that it will be “rare” that circumstantial evidence provides a “stark” and “clear pattern, unexplainable on grounds other than race” that the action was motivated by discriminatory intent); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059, 1066 (2011) (“[T]he Court has . . . created a framework for equal protection analysis that all but ensures only a narrow group of discrimination claims will be actionable or succeed.”).

⁸³ *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (Stewart, J., plurality opinion)) (denying a Black prisoner’s challenge to his death penalty sentence).

⁸⁴ UNC allows jurors to consider the “gravity of the offense,” the “value of learning through experience,” and “[o]ther compelling circumstances” when determining an appropriate sanction. Univ. of N.C. at Chapel Hill, *The Instrument of Student Judicial Governance 9* (Amended July 25, 2017) <https://studentconduct.unc.edu/sites/studentconduct.unc.edu/files/documents/Instrument.pdf> [<https://perma.cc/4DNP-N43P>].

⁸⁵ *McCleskey*, 481 U.S. at 306–08.

⁸⁶ E.g., *Thompson v. Ohio State Univ.*, 92 F. Supp. 3d 719, 729–32 (S.D. Ohio 2015) (finding a professor’s reasons for reporting a Black student to the honor system were not pretextual even though there was evidence that the professor had “singled out” African Americans for discipline), *aff’d* 639 F. App’x 333 (6th Cir. 2016); *Cobb v. Rector & Visitors of Univ. of Va.*, 84 F. Supp. 2d 740, 747 (W.D. Va. 2000) (finding the “plaintiff reliev[ed] on raw statistics to argue that a greater number of minority students are charged with and convicted of honor violations. However, . . . statistics, standing alone, do not create a constitutional violation”).

color, and national origin.⁸⁷ Under Title VI, litigants may bring both disparate treatment⁸⁸ and disparate impact⁸⁹ claims.

Litigants bringing Title VI disparate treatment claims will face the same evidentiary challenges as they would with Equal Protection claims, as the elements for Title VI disparate treatment claims are identical to those for Equal Protection.⁹⁰ Accordingly, Title VI's disparate treatment provisions are not a viable legal remedy for discrimination in university honor systems.

Under Title VI's disparate impact regulations, universities are liable for administering programs in ways that subject individuals to discrimination.⁹¹ In a case involving an honor system, relevant evidence may include reliable statistical evidence about the honor system's outcomes, broken down by race.⁹² The university can rebut this evidence by demonstrating a legitimate and non-discriminatory justification for the policy or practice.⁹³

Two obstacles would hinder disparate impact litigation. First, most honor systems do not publish or maintain reliable statistical evidence about system outcomes that would establish that an honor system has a racially disparate impact.⁹⁴ Second, only the U.S. Department of Justice's Civil Rights Division ("CRT"), not private litigants, may bring Title VI disparate impact claims.⁹⁵ Students may file complaints with CRT to

⁸⁷ 42 U.S.C. § 2000d (2018) (prohibiting recipients of federal financial assistance, including public universities, from discriminating on the basis of race, color, and national origin).

⁸⁸ *Id.*

⁸⁹ 28 C.F.R. § 42.104(b)(2) (2019).

⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause" (citation omitted)).

⁹¹ 28 C.F.R. § 42.104(b)(2).

⁹² U.S. Dep't of Justice, Civil Rights Div., Title VI Legal Manual Section VII, at 11 (2019) [hereinafter Title VI Manual], <https://www.justice.gov/crt/case-document/file/923556/-download> [<https://perma.cc/Q8WG-GQ24>] (explaining elements of Title VI disparate impact claims); see also *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 996 (1988) ("[C]ourts . . . [are not] obliged to assume that plaintiffs' statistical evidence is reliable."); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (holding that statistics can be used to prove disparate impact, but they must be contextualized).

⁹³ See Title VI Legal Manual, *supra* note 92, at 9.

⁹⁴ See discussion *supra* Section I.B (discussing the lack of data about university student-led honor systems).

⁹⁵ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding Title VI does not create a private right of action to enforce disparate impact regulations).

bring litigation on their behalf,⁹⁶ but CRT's enforcement is discretionary; it is not obligated to investigate every complaint.⁹⁷ Under the Trump Administration, CRT has opened 60% fewer civil rights cases (including all civil rights cases, not just complaints regarding discriminatory school discipline) than under the Obama Administration, and 50% fewer than under the Bush Administration.⁹⁸ Among the complaints that CRT has pursued, CRT has prioritized enforcement of religious liberty violations, while decreasing enforcement in other areas of civil rights law.⁹⁹ Given these priorities, CRT may choose not to litigate disparate impact claims arising out of discrimination in university honor systems.

C. Due Process Claims

Students can also seek relief under the Fourteenth Amendment's Due Process Clause.¹⁰⁰ Unlike Title VI or Equal Protection claims, which would directly challenge university honor system actions as being racially discriminatory, Due Process Clause claims would allege that an honor system's disciplinary policies are unfair, in the hope that relief would incidentally mitigate racial disparities. Within Due Process Clause jurisprudence, the Supreme Court distinguishes between procedural due process—the right to be heard at a “meaningful time and in a meaningful manner” before the government can deprive a citizen of life, liberty, or

⁹⁶ U.S. Dep't of Justice, Civil Rights Div., How Does the Division Find Out About Possible Civil Rights Violations?, <https://www.justice.gov/crt/how-does-division-find-out-about-possible-civil-rights-violations> [<https://perma.cc/4LVU-TD6B>] (last visited May 20, 2020).

⁹⁷ U.S. Comm'n on Civil Rights, Are Rights a Reality? Evaluating Federal Civil Rights Enforcement 87 (2019), <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> [<https://perma.cc/TH9M-LPAJ>] (“With the exception of [Americans with Disabilities Act] complaints, CRT is not under any obligation to investigate each complaint it receives.”); see also 28 C.F.R. § 35.171 (2019) (obligations under the Americans with Disabilities Act).

⁹⁸ Rob Arthur, Trump's Justice Department Is Investigating 60% Fewer Civil Rights Cases than Obama's, *Vice News* (Mar. 6, 2019), https://www.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas [<https://perma.cc/C9EZ-PSJL>].

⁹⁹ *Id.*; see also U.S. Comm'n on Civil Rights, *supra* note 97, at 83 (finding CRT had a 30% increase in the number of religious liberty cases in fiscal year 2018 over fiscal year 2017).

¹⁰⁰ U.S. Const. amend. XIV, § 1.

property¹⁰¹—and substantive due process—the right to be free from governmental deprivation of a fundamental right.¹⁰²

University students should not expect to prevail on substantive due process claims. Although the Supreme Court has never addressed the issue of a fundamental right to higher education, it has explicitly rejected a fundamental right to public elementary and secondary education.¹⁰³ If *compulsory* public elementary and secondary education is not fundamental, it is unlikely that a court would find that university students have a fundamental right to *optional* public higher education.¹⁰⁴ Moreover, even if a court recognized a fundamental right to higher education, it might still find that students who committed academic misconduct forfeit that right through their conduct.¹⁰⁵

University students may have more success alleging a violation of their procedural due process rights, although they would still face significant hurdles. In procedural due process claims, students must show (1) they were deprived of a protected interest (2) without due process.¹⁰⁶

First, it is unclear if students have procedural due process interests in higher education. Although the Supreme Court recognized in *Goss v. Lopez* that public elementary and secondary school students have these

¹⁰¹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted); see also *id.* at 349 (holding that, under the Due Process Clause, an evidentiary hearing is not required prior to termination of disability benefits).

¹⁰² E.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (claim alleging a fundamental right to public education).

¹⁰³ *Id.* at 35 (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).

¹⁰⁴ Several federal courts have explicitly rejected a constitutional right to higher education. See, e.g., *Press v. State Univ. of N.Y. at Stony Brook*, 388 F. Supp. 2d 127, 134 (E.D.N.Y. 2005) (“[I]t is well-settled that access to education is not a constitutional or fundamental right.”); *Cady v. S. Suburban Coll.*, 310 F. Supp. 2d 997, 1000 (N.D. Ill. 2004) (“There is no general constitutional right to higher education.”), *aff’d as modified*, 152 F. App’x 531 (7th Cir. 2005).

¹⁰⁵ This has been true in state court cases where the state constitution recognizes a fundamental right to education. E.g., *In re RM v. Washakie Cty. Sch. Dist. No. 1*, 102 P.3d 868, 874 (Wyo. 2004) (finding that, although there is a fundamental right to education under Wyoming’s constitution, “[t]he actual receipt of educational services is accordingly contingent upon appropriate conduct in conformity with state law and school rules”); *Doe v. Superintendent of Sch.*, 653 N.E.2d 1088, 1096 (Mass. 1995) (“[A] student’s interest in a public education [under Massachusetts’s constitution] can be forfeited by violating school rules.”).

¹⁰⁶ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (establishing these elements).

interests,¹⁰⁷ the Court has avoided deciding whether *Goss* extends to public higher education.¹⁰⁸ In two cases involving university discipline, the Court assumed the existence of a property or liberty interest to higher education, but it held the processes provided would satisfy the Fourteenth Amendment.¹⁰⁹ The lower courts are split on this issue. The First, Sixth, and Tenth Circuits have explicitly held that university students have procedural due process interests,¹¹⁰ while the Seventh Circuit has held that university students do not.¹¹¹ The Third, Fourth, Eighth, and Ninth Circuits have followed the Supreme Court's lead and, assuming *arguendo* a property or liberty interest in higher education, have held that challenged university procedures satisfied any due process requirements.¹¹² If *Goss* applies to public universities or a court assumes *arguendo* that a property or liberty interest exists, students must then

¹⁰⁷ 419 U.S. 565, 576 (1975).

¹⁰⁸ James M. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 *Yale L.J.* 2132, 2133 (1987) (finding that the Supreme Court "has carefully avoided any further definition of the scope or extent of due process protections in university disciplinary actions").

¹⁰⁹ See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 79, 84–85 (1978) (in a case in which a medical student who had been dismissed for poor academic performance without a hearing, "[a]ssuming the existence of a liberty or property interest," the university "awarded at least as much due process as the Fourteenth Amendment requires"); see also *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23 (1985) (assuming that although a student who had been dismissed from a university program for failing a required licensing exam had a constitutionally protected property interest, he had not been denied due process).

¹¹⁰ *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005) ("[W]e have held that the Due Process Clause is implicated by higher education disciplinary decisions."); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1181 (10th Cir. 2001) ("Mr. Gossett had a property interest in his place in the Nursing School program that is entitled to due process protection."); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("[A] student facing expulsion or suspension from a public [university] is entitled to the protections of due process.>").

¹¹¹ *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 772 (7th Cir. 2013) ("[O]ur circuit has rejected the proposition that an individual has a stand-alone property interest in an education at a state university . . .").

¹¹² *Austin v. Univ. of Or.*, 925 F.3d 1133, 1139 (9th Cir. 2019) ("We assume, without deciding, that the student athletes have property and liberty interests in their education Nonetheless, they received 'the hallmarks of procedural due process[.]'" (citation omitted)); *Richmond v. Fowlkes*, 228 F.3d 854, 859 (8th Cir. 2000) (assuming that a due process right exists, holding based on the facts that the student received the process that would be due); *Mauriello v. Univ. of Med. & Dentistry of N.J.*, 781 F.2d 46, 52 (3d Cir. 1986) ("[F]ollowing the lead of the Supreme Court, we will assume *arguendo* that a constitutional right is implicated."); *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 73 (4th Cir. 1983) ("Assuming Henson had a protected liberty or property interest in the Honor Code proceeding, we conclude that the procedural protections afforded him were sufficient . . .").

prove that the honor system deprived the student of the process due to them. Students will face two hurdles.

First, procedural due process applies only to disciplinary proceedings for behavioral matters, not academic matters.¹¹³ A disciplined student would need to distinguish an honor system's finding that the student engaged in academic misconduct from a professor's subjective determination that the student's academic performance is unsatisfactory. One scholar has suggested that cheating and plagiarism are more "disciplinary" than "academic" because they are "more of a matter of misconduct than failure to attain a standard of excellence" and "in many situations proof of academic wrongdoing will not require an instructor's singular expertise."¹¹⁴ Accordingly, some lower courts have found academic misconduct sufficiently disciplinary such that procedural due process protections apply.¹¹⁵

Second, courts allow universities significant deference to determine appropriate procedures.¹¹⁶ The Court said in *Goss* that students facing suspensions of ten or fewer days must receive "some kind of notice" of the charges against them and "some kind of hearing" to present their side of the story and hear evidence against them.¹¹⁷ Suspensions longer than

¹¹³ *Horowitz*, 435 U.S. at 92 ("Courts are particularly ill-equipped to evaluate academic performance.").

¹¹⁴ Perry A. Zirkel, *Are Procedural and Substantive Student Challenges to Disciplinary Sanctions at Public Institutions of Higher Education Judicially More Successful than Those at Private Institutions?*, 41 J.C. & U.L. 423, 429–31 (2015) (internal quotation marks and citations omitted).

¹¹⁵ E.g., *Henson*, 719 F.2d at 74 (concluding that cheating was disciplinary, rather than "evaluating the academic fitness of a student"); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 624 (10th Cir. 1975) (finding that academic dishonesty is "on the conduct or ethical side rather than an academic deficiency"); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984) ("[C]heating should be treated as a disciplinary matter."), *aff'd mem.*, 787 F.2d 590 (6th Cir. 1986); *Lightsey v. King*, 567 F. Supp. 645, 648 (E.D.N.Y. 1983) ("This is a disciplinary matter, rather than an academic one.").

¹¹⁶ E.g., *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005) ("All that is required by the Due Process Clause, which sets a floor or lower limit on what is constitutionally adequate, is 'sufficient notice of the charges . . . and a meaningful opportunity to prepare for the hearing.'" (citation omitted)); *Gorman v. Univ of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (explaining the need for flexibility because the court was reluctant to lessen a university's ability to use these hearings as a learning tool); *Seals v. Mississippi*, 998 F. Supp. 2d 509, 526 (N.D. Miss. 2014) (denying the university student's due process claim because "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint" (citation omitted)).

¹¹⁷ *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

ten days or expulsions “may require more formal procedures,”¹¹⁸ although due process requirements from criminal and civil trials are unnecessary in university disciplinary proceedings.¹¹⁹ Given this deference, students are unlikely to prove the university denied them procedural due process rights as long as they received some version of a hearing.

III. REGULATORY OVERSIGHT AND PROCEDURAL PROTECTIONS CAN MITIGATE RACIAL DISPARITIES

Viable legal options to address racial disparities in university honor systems may not exist, but regulatory and procedural changes can mitigate the institutional obstacles that block public understanding of these disparities and can provide procedural checks against the effects of racial bias.

A. New Data Reporting Requirements

The U.S. Department of Education through OCR is authorized to enforce Title VI,¹²⁰ including by requiring educational institutions to report on disciplinary proceeding outcomes. Although OCR historically has been hands-off with regard to university academic misconduct policies,¹²¹ OCR regularly exercises its Title VI enforcement power to collect data about the outcomes of public elementary and secondary school disciplinary proceedings.¹²²

¹¹⁸ *Id.* at 584.

¹¹⁹ See Elizabeth Ledgerwood Pendlay, Note, Procedure for Pupils: What Constitutes Due Process in a University Disciplinary Hearing?, 82 N.D. L. Rev. 967, 974–76 (2006); see also *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (citing *Goss*, 419 U.S. at 583) (explaining that due process in universities does not rise to the same level of rights and protections at stake in civil or criminal trials).

¹²⁰ 34 C.F.R. § 100.1 et seq. (2019).

¹²¹ See U.S. Dep’t of Educ. Office for Civil Rights, Office for Civil Rights Recent Resolution Search, <https://ocrcas.ed.gov/ocr-search> [<https://perma.cc/H8AH-PR2L>] (last visited June 1, 2020) (filtering searches by “Post Secondary Institutions,” “Race and National Origin Discrimination,” “Discipline” and “Post Secondary Institutions,” “Race and National Origin Discrimination” and “Not Listed Above” demonstrates that there have not been any investigations of university honor systems for racial discrimination in the past five years); U.S. Dep’t of Educ. Office for Civil Rights, Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools, <https://www2.ed.gov/about/offices/-list/ocr/docs/investigations/open-investigations/tvi.html> [<https://perma.cc/JXF8-A9YD>] (last visited May 25, 2020) (demonstrating that there are not any open investigations categorized as being against university honor systems).

¹²² See U.S. Dep’t of Educ. Office of Civil Rights, Education and Title VI, <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/QC2V->

OCR should likewise require public universities to annually report on the outcomes of honor system proceedings and to make these data publicly available. External reporting requirements would remove the institutional incentives that prevent honor systems from collecting or publicizing data about honor system outcomes. Access to this information may bolster Equal Protection or Title VI claims brought by students and the CRT,¹²³ as well as empower student activists to lobby honor system leaders and university administrators to adopt policy changes.¹²⁴ The UVA Honor Committee's Bicentennial Report provides an example of the data OCR could collect from university honor systems,¹²⁵ including the race and ethnicity of each student found guilty of an honor offense compared to the student body at large, as well as the punishment awarded for each offense broken down by race and ethnicity.

Universities have demonstrated their institutional capacity to comply with OCR reporting requirements, as they annually report information about violations of their behavioral misconduct policies to the U.S. Department of Education under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.¹²⁶ Additionally, universities could use their Student Information Systems¹²⁷ to run reports about students whose student status reflects an honor code sanction and determine how many students, by race, are sanctioned for academic misconduct.¹²⁸

W3AK] (last visited May 25, 2020); School/District Search, Civil Rights Data Collection, <https://ocrdata.ed.gov/DistrictSchoolSearch> [<https://perma.cc/GL96-3Q9P>] (last visited May 20, 2020).

¹²³ See discussion *supra* Part II regarding the evidentiary burden for these claims.

¹²⁴ See discussion *infra* Section III.C regarding university-initiated changes.

¹²⁵ See Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 16.

¹²⁶ 20 U.S.C. § 1092(f) et seq. (2018); see also Campus Safety and Security Data Analysis Cutting Tool, U.S. Dep't of Educ., <https://ope.ed.gov/campussafety/#/> [<https://perma.cc/S5CB-NEAT>] (last accessed May 25, 2020) (database compiling university reports).

¹²⁷ Universities are increasing data collection efforts to improve student outcomes and save money. See Meghan Bogardus Cortez, Universities Make Positive Changes Through Data Collection, EdTech (Sept. 16, 2016), <https://edtechmagazine.com/higher/article/2016/09/-universities-make-positive-changes-through-data-collection> [<https://perma.cc/9N4N-8LAZ>]; Ashley A. Smith, Push for Student-Level Data the Feds Don't Collect, Inside HigherEd (Dec. 21, 2018), <https://www.insidehighered.com/news/2018/12/21/student-data-system-advocates-want-more-colleges-and-universities-join-them> [<https://perma.cc/3MG7-EZG2>].

¹²⁸ This is, in part, how the UVA Honor System conducted its analysis for its Bicentennial Report. Honor Assessment & Data Mgmt. Working Grp., *supra* note 15, at 5. These data reports would not eliminate the need for honor system leaders to maintain records about the

Student-leaders in the honor system likely lack the capacity to collect and report these data without the support of university administrators.¹²⁹ Working with university administrators to compile these data reports would not, however, alter the principles that define student-led honor systems: students would still be responsible for adjudicating reports of academic misconduct among their peers and determining appropriate sanctions.¹³⁰

B. Administrative Rules Specifying Minimum Procedural Protections

OCR should also adopt administrative rules specifying the minimum procedural guarantees honor systems must provide. OCR already provides this oversight for public elementary and secondary schools through administrative guidance about schools' obligations to prevent racial discrimination in public school discipline.¹³¹ And since 2011, OCR has provided requirements regarding the minimum procedural guarantees universities must provide in sexual misconduct proceedings.¹³² In the context of university academic misconduct proceedings, OCR should consider adopting rules regarding the evidentiary standards, the ability of accused students to present and cross-examine witnesses, provisions for assistance of student or legal counsel, and rights of appeal. Improved procedural checks will help protect students' educational interests and may help mitigate issues of bias, including racial bias, within honor systems.

Political obstacles may prevent OCR from adopting administrative rules to this effect. Under the Trump Administration and Secretary of Education Betsy DeVos, OCR rescinded policy guidance for

type of violation for which each student was reported and found guilty, but they would be a starting point for compliance with OCR reporting requirements.

¹²⁹ See discussion *supra* Section I.B regarding the issues with student leaders' capacity to collect and publish data.

¹³⁰ See discussion *supra* Introduction regarding defining features of student-led honor systems.

¹³¹ See U.S. Dep't of Educ. Office for Civil Rights, Policy Guidance, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html> [<https://perma.cc/7C7M-D-6KC>] (last visited May 25, 2020) (historical policy guidance under Title VI).

¹³² *Id.* (historical guidance and rulemaking on sexual violence disciplinary proceedings under Title IX). The Trump Administration recently completed a notice and comment period regarding a replacement set of Title IX rules. Press Release, U.S. Dep't of Educ., Secretary DeVos Takes Historic Action To Strengthen Title IX Protections for All Students (May 6, 2020) <https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students> [<https://perma.cc/FPQ6-YNWV>].

discriminatory elementary and secondary school discipline, sexual violence on college campuses, and protections for transgender students,¹³³ instead adopting policies that reflect the enforcement priorities of their administration.¹³⁴ It seems unlikely, given these recent policy changes, that the current administration would take on a new area of policy enforcement related to racial discrimination in university honor systems.

C. Honor System-Initiated Policy Changes

In addition to, or in the absence of, external oversight from OCR, honor systems should amend their policies in ways that seek to eliminate racial disparities. If honor systems are not internally motivated to make these policy changes, external pressure from student activists may be necessary.

Honor system leaders should begin by addressing racial disparities in the reporting rates of minority students. University employees, particularly professors, are often the parties who report students to honor systems.¹³⁵ Honor systems, in coordination with university administrators, could implement implicit bias training as a method to address issues of spotlighting by faculty. While there are limitations to the effectiveness of implicit bias training,¹³⁶ this training might help faculty become more self-aware of their biases.¹³⁷

To mitigate the effect of racial bias during the trial phase, honor systems should ensure that the hearing panel is racially mixed.¹³⁸ The

¹³³ U.S. Dep't of Educ. Office for Civil Rights, Policy Guidance, *supra* note 131.

¹³⁴ *Id.* (showing changes to policy guidance over time).

¹³⁵ At UVA, faculty, teaching assistants, and university administrators accounted for approximately 73% of all reports from 2012–2017. Justice in America Has Never Been Colorblind, *supra* note 13.

¹³⁶ E.g., Gregory Mitchell, An Implicit Bias Primer, 25 Va. J. Soc. Pol'y & L. 27, 28 (2018) (“Consensus now exists among implicit bias researchers that current measures of implicit bias cannot reliably identify who will or will not discriminate in any given situation and that programs aimed at changing implicit bias produce very limited effects.”).

¹³⁷ E.g., Eberhardt, *supra* note 57, at 279 (arguing that implicit bias training’s purpose is to make individuals “aware of how our minds work and how knee-jerk choices can be driven by stereotypes that cloud what we see and perceive,” not to “magically wipe out prejudice”); Elizabeth Levy Paluck & Donald P. Green, Prejudice Reduction: What Works? A Review and Assessment of Research and Practice, 60 Ann. Rev. Psychol. 339, 357–58 (2009) (finding that evidence-based diversity training efforts “succeed because they break down stereotypes and encourage empathy”).

¹³⁸ See, e.g., Shamera Anwar et al., The Impact of Jury Race in Criminal Trials, 127 Q.J. Econ. 1017, 1017 (2012) (finding that, in the criminal justice system, “juries formed from all-white pools convict black defendants significantly (16 percentage points) more often than

method by which honor systems select jurors affects each jury's composition. Honor systems that use a standing jury pool, like UNC,¹³⁹ must recruit students of color to apply to join the pool to help ensure that selected jurors, on the whole, represent the racial demographics of the student body. Honor systems that randomly select jurors from the student body, like UVA,¹⁴⁰ must monitor the composition of selected juries to ensure adequate representation of the student body at large, rather than waiting for accused students to raise objections.¹⁴¹

Honor systems could also provide implicit bias training to help jurors be more aware of their racial biases during honor system proceedings.¹⁴² During Johnathan Perkins's honor trial, for example, the jury panel asked questions that Perkins believed "indicated a lack of thoughtful perspective on race,"¹⁴³ including "why didn't you just tell the police to leave you alone?" and "why would the police have stopped you, if you weren't doing anything wrong?"¹⁴⁴ At his trial, a law school professor testified to the history of racially discriminatory policing,¹⁴⁵ which Perkins described as "vital" to his exoneration.¹⁴⁶

Jury selection methods will affect honor systems' ability to implement this training. For example, with a standing jury pool, system leaders can provide training once and know that every selected juror will have received it. In a system where jurors are randomly selected, it may not be possible to conduct the same level of training with every juror, and thus potential benefits from this training may be more limited.

Finally, if universities allow jurors to consider particularized, subjective factors during sanctioning, like at UNC,¹⁴⁷ honor system policies should provide clear guidance on what constitutes mitigating

white defendants" but that "this gap in conviction rates is entirely eliminated when the jury pool includes at least one black member").

¹³⁹ The Instrument of Student Judicial Governance, *supra* note 84, at 21.

¹⁴⁰ Frequently Asked Questions, UVA Honor Comm., <https://honor.virginia.edu/frequently-asked-questions> [<https://perma.cc/XU4Y-94QK>] (last visited May 25, 2020).

¹⁴¹ During Johnathan Perkins's trial, he formally requested that the jury "not be all-white." Justice in America Has Never Been Colorblind, *supra* note 13.

¹⁴² See discussion *supra* notes 136–37 regarding the purpose and efficacy of implicit bias training.

¹⁴³ Justice in America Has Never Been Colorblind, *supra* note 13.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See The Instrument of Student Judicial Governance, *supra* note 84, at 9.

factors, as racial bias can affect the sanctioning phase.¹⁴⁸ Honor system leaders should also regularly review sanctioning decisions to see if hearing panels consistently apply sanctions across ethnic and racial groups. This issue may be less salient at UVA, where expulsion is the only punishment available for students found guilty at trial.¹⁴⁹

CONCLUSION

Many universities have adopted student-led honor systems because they believe they are effective and foster values like integrity and student self-governance. If universities intend to maintain student-led honor systems, change is necessary to prevent and remedy racial discrimination. External oversight from OCR will bolster the evidence available to litigants in Title VI and Equal Protection litigation and compel universities to adopt procedural protections that better guarantee students' rights. Additionally, more data and improved public understanding of racial disparities in university honor systems would assist campus activists in advocating for honor system policy changes.

¹⁴⁸ In the criminal justice system, Black prisoners are more likely than White prisoners to receive harsher sentences, even when controlling for non-racial factors that could influence sentencing. See Eberhardt, *supra* note 57, at 128; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *Cornell L. Rev.* 1638, 1727–29 (1998).

¹⁴⁹ See discussion *supra* Section I.A.