

HOTCHKISS, LOCKE LORD AND THE FUTURE OF THE SCHOOL :

A Commentary with Recommendations *

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A requested by Trustee Robert Gould (Trustee Gould) following the Class of '72 Zoom conference on October 15, 2020, this is to provide a detailed analysis and recommendations on rectification of the Locke Lord (LL) report and also on other issues raised in the teleconference.

Any recipient should feel free to distribute these comments to colleagues in the Hotchkiss community, subject to the above restriction against on-line distribution, so that the vital discussion can continue and hopefully in a productive and meaningful way.

While I originally intended this submission to be brief, as there are many layers of issues, I have provided a more complete examination.³

Purpose and Action

The purpose of these comments specifically is to prompt reflection and actions by the Trustees on key issues, and to involve a broad cross-section of alumni and outside stakeholders in this process to help the School better navigate its challenges and deliver on its promises and potential for the future.

It's easy (as the attached Atlantic article points out) to generate policies and procedures reflecting current political and societal concerns but much more difficult because of a lack of self-reflection

¹ Included in students is HAFRAH, www.hafrah.org, Fair Hotchkiss, www.fairhotchkiss.org, and any other Hotchkiss student or alumni group.

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³ My comments are a follow up to multiple class of '72 communications with the School on these subjects. Attached or referenced for convenience for background with this submission are Trustee Gould's comments at the Zoom meeting on Locke Lord (misspellings are purely Zoom's); an Atlantic article relevant to the challenge of change in institutions; and the LL 2018 Report itself, which can be found here : https://www.hotchkiss.org/uploaded/documents/Hotchkiss_FINAL.pdf?1534530340087; and a recent supplemental 2020 report found here : https://www.hotchkiss.org/uploaded/documents/Hotchkiss_Supplemental-Report-to-the_Board.pdf?1596804840092. Other materials are cross-referenced in this submission.

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or institutional courage to actually make changes that confront mistakes and alter a course of action.

It's fair to say that many of us, based on the principles on which we were educated, accordingly look forward to and indeed expect changes as a result of this dialogue.

Issues and Context

The LL report is part and parcel of larger issues facing the School and its community which were touched upon however briefly during what turned out to be a well-meaning but ultimately one-way conversation .⁴

They include as follows :

1/ The grave defects in the LL report and the Hotchkiss 'single (law firm) investigator'⁵ approach to inappropriate sexual behavior or contact between faculty or staff and students, to which Hotchkiss appears still committed today (apparently) by assigning to LL continued investigative and others powers, which resulted in yet another published report (2020) using the same model at least where employees, not other students, are involved, ref : <https://www.hotchkiss.org/our-school/sexual-misconduct-response>.

2/ Elitism coloring the School's entire approach to education. While we learned that the School has an apparent commitment to the Chicago principles (ref. : <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>), a commitment to free speech and thought must include an equal commitment to debate on all issues, including specifically how to properly address the due process in sexual harassment cases (*or any material disciplinary proceeding that could lead to dismissal, or civil or criminal actions*), the equally critical issues raised by BLM, and any other pressing issues including economic inequality, social divisiveness, climate change, and many other critical questions.

3/ Social and economic diversity in the student body, where School's statistics indicate that Hotchkiss is worryingly disproportionately weighted towards recruitment of students who can pay tuition from non-US countries (25 % apparently)⁶, leading to the very high risk of perpetuation of

⁴ The '72 Zoom' conference was scheduled to last 1.5 hours ; over half was taken up by Trustee and administration statements; only a few speakers were allowed to speak in the format from over 40 participants and no time was allocated or provided to contribute to issues or comments in any form of dialogue; nor were comments of any participants visible to other participant if submitted during the session. Although the statements of the Trustees and administration were informative to a point, the lack of dialogue resulted in a one- way discussion which was not conducive to probing any larger issues. Whether by design or not, what we had and went way beyond, as the old movie goes, a simple 'failure in communication' (*Cool Hand Luke*) which has to be corrected.

⁵ The term 'single law firm investigator' model has been adapted wholesale (with all its flaws)in the New England boarding school reports referenced in these comments; many institutions of higher learning at the same use the same 'single investigator model' with or without law firm involvement, which delegates investigation, sifting of evidence and recommendation of results, in disciplinary actions, to a committees or other organs of the institutions, and have resulted, in the same kinds of due process , fairness issues and bias issue (including against male students) evident herein (see further discussion below).

⁶ The School indicated that 16 % of students needed visas (hence were not US students) and 9 % were expat children, whereas other statistics indicate the School has less than 4 % Latinos (vs a US population of about 15,5% per the 2019 Census), a substantial overweighting of Asians (vs. the less than 6% in the US population); and no Native Americans (ref. : <https://www.niche.com/k12/the-hotchkiss-school-lakeville-ct/students/>). As there are no

a global elite as a main outcome of Hotchkiss education, something far removed from the original mission of the School and any logical progression of its values.

4/ As a corollary of the third point, the money issue - the purposes and function of fundraising and the budget, where, we were told, a substantial part of fundraising is geared to maintaining substantial endowed plant and properties *as a necessity of stewardship*, with questionable relevance to the overall focus of higher education (high end recital hall, two indoor hockey rinks, an expensive track and field house with multiple squash courts, another top of the line field gymnasium and pool facility, a farm, dozens of tennis courts etc), and a burgeoning (and some claim a bloated) administrative staff, to the potential detriment of keeping costs reasonable and lowering the cost of tuition so that Hotchkiss can achieve a more balanced student body providing equal opportunities for a broader cross-section of US based society to enjoy the excellence which Hotchkiss is supposed to offer within its own country.

The overall umbrella of this discussion is fundamentally therefore the very purpose itself of the School, what its values are and where it is heading.

It's submitted that if the School doesn't face these and other issues raised by concerned alumni head on, there is a material risk that the School will lose its course and credibility as a leading light in higher education, exactly the opposite of what most of us want to achieve.

This can't be achieved with one-way conversation or stubborn adherence to the status quo, which many of us can no longer support.

Locke Lord and Fundamental Values

Core Questions, Core Principles

Any objective review of Trustee Gould's comments would find fault in both the premises and the results of the report which I outline below and which require immediate and sincere rectification for the greater purpose of reconciliation and healing.

We can go into many specifics which can be argued and rebutted by all sides. The essential analysis, however, has to be based on core principles and values :

Does the School stand for honesty, fairness and due process, and is it committed to protecting students, teachers and its employees in any investigation involving any of them from potentially false allegations of any kind by having robust, fair and impartial investigations with an appeals process ?

Is the School committed to dealing with any disciplinary matter, including any conduct which could give rise to dismissal of or faculty/ employees or students, or in civil or criminal litigation, in a deliberate manner, taking into account the strength of the evidence, the passage of time, mitigation factors and remedies appropriate to each transgression, acknowledging that remedies and actions can only be appropriate and contextual depending on the nature of the offense and the facts of each case ?

readily available statistics of the average income or net worth of the families attending the School, socio-economic diversity is unclear.

Does the School recognize the indelible harm engendered by social media and the dangers of unrestricted publication of accusations on the world wide web, whether supported in whole, part or not at all, concerning both the living and dead ? And if so, will take a stand against naming and shaming as a principle not only in cases of possible offenses by faculty or employees across a whole range of misconduct but also as between students themselves, which can include the entire range of misconduct (including sexual misconduct) as well ? and if not, what is are its own principles for publicizing School disciplinary issues if any and what is being taught or implied to the student body by these standards ?

Fair Process, Due Process

As demonstrated noted, both the report and apparent current system for protecting students from sexual misconduct adapt a 'single law firm investigator' model which is inherently biased and entirely lacking in both fair process and due process by its nature and therefore is fundamentally flawed, as courts have increasingly recognized, a fact which Hotchkiss cannot ignore and is compelled to review and rectify.

Private institutions have a basic duty in any investigation, whether between students, staff, faculty and students or any of these other groups: they have to provide at a minimum a fair and *unbiased* review of the facts, an opportunity to rebut, to have and produce witnesses, to have an advocate, and depending on the level of the accusation, be represented by counsel and to challenge the evidence against them and also have a fair and balanced right of appeal or reconsideration.

This is called 'fair process' and it arises out of basic principles of justice, common sense and common law and is an inherent part of any institutional disciplinary process, and it is also an implied term of any employment contract with faculty and staff, and an essential implied duty of the school, including in contracts with their parents in enrolling their children in the school, with respect to disciplining of students (which is normally codified in school disciplinary systems).

The basic process itself used by LL was inherently biased from the start as being 'victim led' as Trustee Gould admitted, staffed by prosecutorial advocates and following a template approach *whose entire design as a template and methodology* was to find, name and shame accused and also past administrators.

Because Hotchkiss (apparently) divested itself of any responsibility in weighing the evidence, adjudicating it and deciding who and what to 'Name', other than making an ultimate decision publish the report's conclusions (although not underlying evidence) in toto, LL had particular responsibility, especially with the enormous risks in publicizing false or unsubstantiated narratives, to tread with extreme care.⁷

⁷ The law firm in the St George's investigation recognized that such reports based on anonymous allegations... "with a price—the prospect that unreliable allegations could become part of a public report. "Naming Names" can lead to drastic consequences for a teacher or former student who may be wrongly accused. This issue is not new. The Right to Confrontation adopted as part of the Constitution's Sixth Amendment was designed to protect citizens against "flagrant abuses, trials by anonymous accusers, and absentee witnesses," Cal. v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring). To be sure, our investigation is not a trial, but the principles that animated the adoption of the Sixth Amendment are deeply engrained in our country's basic sense of fairness. This issue stands in even sharper relief here. In some instances, 45 years have passed since the events at issue; the passage of time, and the problem of

But whatever its motives, it could not do so, as the template approach itself lacked the disciplined process of true independent judicial or quasi-judicial review with the right to contest evidence and cross-examination accusers, or an independent right to appeal, traducing fundamental requirements of equal protection of the accuser and the accused, and creating a massive breach of fairness and decency, as well as constitutional due process rights (which the School should respect regardless of whether it is a private institution).⁸

The additional decision to punish, also taken unilaterally, through extra judicial shaming on the worldwide web, regardless of the accuracy or extreme age of some of the allegations, patently constitutes and encouraged mob justice, gives rise to possible intentional defamation in some instances, and a massive invasion of privacy of the accused in others, and/or of their families where the accused are deceased, and therefore commits a fundamental assault on basic human rights, *without creating any definable good, and indeed quite the opposite.*

This has resulted in harm to both the integrity of the School and the reputations of potentially innocent accused and/or the families of the accused, including the long since deceased which can never be outweighed by the desire to protect victims or deliver 'justice' (to the extent it was ever expected or asked for in this form).

The School must recognize that flawed justice is never real justice, taking into account also that due to the passage of time not only are some of the allegations may be inherently unreliable but more importantly that the report's publication served no definable purpose except to injure, not heal - *and ultimately to deflect the ultimate responsibility of the Trustees as a whole and individually in failing to protect students during the periods mentioned.*

There are better, fairer and more constructive and healing approaches to these issues – both past and present – available and more effective which demand immediate consideration and adaptation, which meet (and rightly so) the fully legitimate concerns of victims and survivors – and which also protect the integrity of the School and the rights of any accused in any violation, no matter how severe, including those by other students.

faded memories and deceased witnesses, can confound even the most diligent fact finders “, and yet of course, St George’s counsel proceeded based on their own judgment to internet publication as did Hotchkiss.

⁸ The concept of due process derives from the US Constitution’s 14th Amendment, and traditionally has referred to guaranteed rights of fairness and impartiality in any governmental proceedings, a requirement of many state constitutions or laws, see generally : <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws.>

However, while this guaranty has usually applied to governmental action, it also applies by statute to educational institutions receiving federal (or state by extension) aid (e.g., Title IX requirements for non-discrimination), it is a base line requirement that can be applied voluntarily by any institution as a matter of policy; second the courts have increasingly found (ref. discussion below on University of Michigan and Rhodes College cases) that cases such as these in public or private institutions demand a high level of procedural integrity, including the right to confront accusers, which derives from the 6th Amendment and common law (which deals with that right in criminal cases but of course has been extended by common law in almost all countries to civil proceedings as well as a matter of natural justice).

Specific Flaws in the Locke Lord Report

Action and Reaction vs Reflection

What the School admittedly did was as follows, as expressed by Trustee Gould and as demonstrated in the report itself:

First, the School acted in a very reactive way to a wave of publicity following the Catholic Church investigations by the Boston Globe which then began to investigate sexual abuse at boarding Schools starting with St Georges and then St Paul's, *prompted by an inherent fear of bad publicity and exposure*, as Trustee Gould alluded to.

This prompted a wave of Schools acting in an identical or almost identical manner (St George's, St Paul's, Choate, Andover, Exeter and others)⁹, appointing law firms with unfettered discretion to investigate incidents going back decades, inviting anonymous reports through hotlines and general publicity, and then providing those firms with the same unfettered mandate to judge the evidence, declare certain cases as supported or not and deciding based on their own judgment whether certain 'supported' files merited public disclosure and naming of the accused (but not the accusers) in public reports on the worldwide web.

The second instigation as Trustee Gould explained were the demands noted above for an 'independent' investigator by former students (HAFRAH)(who experienced tremendous abuse and an unsafe atmosphere during a particular period of time when some of the Trustees were in fact students at the School), leading to a change in firms to Lock Lorde on the basis that the initial firm had represented the Catholic Church in some cases against it, possibly an 'apparent' or 'issue' conflict (as lawyers like to say) *but no less a conflict than the process itself having a predisposition against any accused because of its mission.*¹⁰

It was not surprising therefore that LL team's lead counsel practitioner *from a prosecutorial background* who set up the same process as occurred at St George's and St Paul's using the same template (or 'cookie cutter') right down to most of the 'Naming' Principles, with the predictable outcomes as above.

It is by no means clear that HAFRAH (whose intentions and work have been at all times both necessary and vital, even if misguided in this respect, I would submit) demanded a public airing

⁹ St George's report (2016) <https://foleyhoag.com/-/media/files/publications/generic/sexual%20abuse%20at%20st%20georges%20school%20and%20the%20schools%20response%201970%20to%202015%20report%20of%20independent%20investigator%20martin%20of%20murphy%20with%20exhibits.ashx>

St. Paul's Report (2017) https://sps.myschoolapp.com/ftpimages/36/download/download_2034339.pdf

Choate (2017) : [http://www.choate.edu/uploaded/Documents/eNotify/Report to the Board of Trustees of Choate Rosemary Hall.pdf?1492107268673](http://www.choate.edu/uploaded/Documents/eNotify/Report%20to%20the%20Board%20of%20Trustees%20of%20Choate%20Rosemary%20Hall.pdf?1492107268673)

Phillips Exeter : (2018); ref : <https://nypost.com/2018/08/24/11-former-staffers-at-prominent-prep-School-accused-of-abuse/>; report : https://exeter.edu/sites/default/files/documents/Holland%20and%20Knight%20Overview%20Aug24_2018.pdf

¹⁰ An apparent conflict is a potential conflict giving rise to arguments of a real conflict; an issue conflict sometimes is used to disqualify law firms on the basis that they represented an opposing point of view on an issue and hence could not be institutionally unbiased or provide most vigorous advocacy on the same issue from the opposing viewpoint.

of accusations against specific individuals, and I am informed that at least one member of that group in fact objected to such handling.

In these circumstances, in any event Trustee Gould indicated nonetheless the School felt that in essence it had *no choice (his words)* to delegate the responsibility to investigate, judge and in essence condemn, presumably with the pre- cleared intention of publishing the results on the world wide web just as the other Schools had already done, *without any objective brake mechanism or review process independent of LL or the Trustees for any of the accused*. Indeed the 'independence' of the law firm to make judgments including who to name and how to name remained solely with the law firm.

We have no information on what other options the School considered, if it even contemplated any alternatives, or were ever advised on the dangers of the 'single investigator law firm' model, or if did receive any independent advice on alternative methods why it disregarded them.

In any event to this day, the School offers still no explanation or justification on why the report as written was released in toto (as opposed to example in summary for with names excised or anonymized), the purpose of Naming, particularly in cases over 40 years old, and what it meant to achieve through mass publication in its form other than, as Trustee Gould admitted, the School felt pressured as a possible defensive measure, due to the Globe itself investigating boarding Schools sexual abuse on the back of its Spotlight team Catholic Church investigation.

Current Process at Hotchkiss

There is no doubt that there must be a clear line to be maintained, as Hotchkiss does now, for zero tolerance for sexual relations between faculty and the student body of any kind, whether consensual or not or even if prompted by a student past the age of consent, because of the nature of faculty student relationships, the imbalance of power, and above all, the ultimate and fundamental responsibility of any School to protect all students from any harm.

That being said, that does not mean, however, that for purposes of any investigation that an investigation itself should be geared towards anything but making findings of fact with due process vs a predisposition toward a 'victim led' process (Trustee Gould pretty much admitted this predisposition) exactly because truth and fairness protects the School as a whole including the interests of the victims and the protection of those who may be wrongfully accused.

Here we have to examine the basic purposes of institutional investigations and disciplinary proceedings in view of the demands of 'fair process' and 'due process'.

The Proper Role of Independent Counsel in Institutional Investigations

The inherent flaw in the LL process was misperceiving the role of independent counsel, which Trustee Gould submits required full independent authority to investigate, judge, and punish by Naming.

This is plainly not true. An independent counsel does not normally produce a public report which is then published on the internet with all the rest that that entails, although that can happen – and did happen with multiple boarding schools because of the tsunami of investigations and possible disclosures by an independent press.

The St. George's report acknowledged this flat out – but also did not also articulate any reason to plow ahead with this kind of reporting.¹¹

An independent counsel's function in the corporate or institutional setting is usually in contrast quite different, *even in face of adverse publicity, and particularly because of that threat.*

Such counsel usually have complete leeway to examine the evidence as like LL did, but then the historic and current norm is that the law firm reports to its client under attorney client privilege (the Trustees here, or the board of any corporation or institution) which has the ultimate responsibility in weighing the report and deciding, through its own administrative arms, including its disciplinary procedures, what steps to take both internally to rectify wrongs and what if anything to announce publicly about the results of the investigation and the details of any individual case, taking into account differences between historical incidents and current issues, with due protections for both the anonymity of the victims and the rights of the accused.¹²

Most institutions including corporations and Schools such Hotchkiss now have or should have robust systems to deal with reports or allegations of sexual misconduct – or any other misconduct for that matter by faculty, employees or by the students themselves.

Bad acts include sexual misconduct and but can also include racism, discrimination of any kind, shunning or other psychological abuse, physical assault, alcohol and drug abuse, theft, fraud, or any other serious misconduct between faculty and employees, either and students, between students themselves.

The purpose of any disciplinary system is or should be in all these cases to impartially review allegations, come to conclusions and take appropriate action – or not – if the allegations are not founded, or if they fall in a grey area (such as inadvertent crossing of boundaries, or first offenses

¹¹ The report stated : *“Most reports of this kind, whether done by independent counsel or an organization’s own lawyers, are prepared with the expectation that they will be delivered to the organization’s leaders and board under the protection of the attorney-client privilege. Because the goal is often to give the institution the broadest range of information, and there is no expectation of public disclosure, lawyers often tell organizations’ leaders all the allegations they have heard, no matter what the source, and no matter the lawyer’s own views of the witness’s credibility....Because this report is intended for publication, we do not have that luxury...”* St George’s Report, supra, p.18.

¹² Voluntary publication via the internet or by traditional means (press distribution, e.g.) is vastly different than an institution’s possible mandatory reporting requirements which can include required reporting of potential sexual misconduct against a student under 19 to the state authorities, as referenced with respect to Connecticut law in the Choate report above, ref. page 8 of the Choate report.

in some areas) to reinforce expected norms and better educate faculty and the student body as to policies, rules and laws, and in the area of sexual misconduct, to reinforce the red lines between those involved.

In any setting, whether in a public or private institution, as in the corporate world, a proper investigation *is not and cannot be victim or accuser driven*

All investigations are meant to be objective, the accused usually have a right to a fair hearing, to have witnesses or counsel present, depending on the nature of the charge, to review the evidence and also usually – and this is critical to the employer – employee relationship : to have independent counsel in many cases provided or paid by the employer if they face possible dismissal or civil or criminal charges, at least if they are operating within the scope of their duties and deny the allegations against them.

Employees can also refuse to participate in investigations, especially if they are flawed or based on false accusations and can require corporate indemnities to defend themselves or rely on common law or statutory rights to be protected by the employer as part of the basic employer- employee relationship.

If charges are found to result in required disciplinary action, absent a consensual resolution acceptable to all sides, there is usually an appeals process, or a formal or informal review of the outcome, but in any event, the purpose is to resolve the issue and support the victim in the case of sexual misconduct, or the institution's policies, if the allegations are proven, and decision on the proper disciplinary action, which can of course include dismissal, or reference (even during an investigation) to the criminal authorities.

It would be highly abnormal – except where there have been public arrests or civil litigation, which are then a matter of public record, to publicly shame an accused as a result of a non-adjudicated accusation as an institutional measure through publication by internet, an outcome that does not help the victim, especially where sexual misconduct is involved¹³, and in all cases, because, among other reasons, the existence of doubt in non- judicial proceedings also creates a risk that the institution 'got it wrong'; thereby exposing itself to claims against it for wrongful discharge, defamation, false light invasion of privacy or worse.

At the same time, separate and apart from the internal process, institutions may (depending on the situation) be required to assist complainants in any civil suits or criminal proceedings against the accused, or at least act as a neutral witness in providing evidence voluntarily.

They may also be subject to legal actions themselves, for example as contributors, giving rise to the complaint or incidents, which can get very tricky (as where a School or company 'looks the other way' or fails to take action in the case of student or employee abuse); or they can of course

¹³ Many victims can be identified from certain fact patterns of allegations, and hence widespread publication cannot be assumed to be a desired outcome and it can amplify the issue within any institution thereby exposing the accuser possibly to peer pressure or even in the worst case shunning or ridicule, or otherwise to further emotional distress as there is no protection when a highly charged personal matter of any kind is loosed on the world wide web; therefore publicity as a means to a productive and just outcome cannot be assumed to lead to healing or any kind, but often can result in quite the opposite, and indeed worse, as many cases of student suicide after public disclosure of private incidents, including where they victims.

be sued for wrongful dismissal, or on a host of other theories including discrimination, or in case of wrongfully dismissed students, breach of contract and loss of educational opportunity.

The School in essence therefore has multiple responsibilities including to itself as an institution, and many of these responsibilities are conflicting, but for any allegations of serious misconduct, the process has to remain the same, and itself be treated with utmost respect as a matter of principle.

That's where fairness, due process and privacy as default principles come in as adhering to those principles and rejecting a policy of shaming in addressing those conflicts provides the best possible outcomes for all parties concerned, including the victims, survivors and the School itself.

It is not clear if Hotchkiss has in-built any of these protections in its current disciplinary and investigative processes.

But it is clearly has not done so by continuing to retain LL with its prosecutorial pre disposition to investigate student complaint of sexual misconduct, a certainly inappropriate choice, as one must assume that LL continues to have the same unfettered discretion without time limit (either) on harvesting reports and updating its findings by public declaration as it recently did in its updated report on past events . Ref :

https://www.hotchkiss.org/uploaded/documents/Hotchkiss_Supplemental-Report-to-the_Board.pdf?1596804840092

Indeed, just on fairness and due process grounds, any continuation of the 'one law firm investigator' model would neither be advisable or consistent with the growing recognition by the courts which have found them, for example in Michigan, where such processes were enjoined under Title IX and in the recent Hofstra and Rhodes College cases where similar findings were made finding such a model or aspects of it inherently biased or unreliable, including because the model in sexual misconduct cases may have an inherent bias/ predisposition for one sex against another (female v. male hence violating equal protection requirements).¹⁴

If Hotchkiss has proceeded with the traditional model, there would be no grounds for any of these kinds of complaints, because its deliberations would be protected by attorney client privilege, and the responsibility for the results would rest squarely with the Trustees, where conclusions would be supported by their own independent review of that investigation (including by their own counsel or indeed separate counsel): separating the process of investigation, decision and judgment, which by no means had or has to be public - whereas now the Trustees

¹⁴ Doe vs. x Baum, University of Michigan, et al. <https://www.opn.ca6.uscourts.gov/opinions.pdf/18a0200p-06.pdf>

Menaker v Hofstra (inadequate procedures) : <https://law.justia.com/cases/federal/appellate-courts/ca2/18-3089/18-3089-2019-08-15.html> ; v. Rhodes College

Doe vs Rhodes College: https://www.insidehighered.com/sites/default/server_files/media/Rhodes061419.pdf; Article : <https://www.insidehighered.com/news/2019/06/25/rhodes-college-ruling-opens-door-due-process-private-universities>

See more cases involving due process at : <https://www.thefire.org/research/campus-due-process-litigation-tracker/>

are divesting themselves of responsibility as if LL was a 'random particle' which cannot be unwound or put back in a box (on that more later – again a false assumption)

Indeed, while it would have been perhaps more difficult politically for the Trustees to have controlled the process in a more traditional sense, it would have been the right thing to do and the failure to do so is an enormous failure of courage and common sense in understanding its own role and responsibilities in both the handling of the issues and its outcomes which cannot purge the ultimate finding that the School itself as an institution was to blame.

Grappling with the Past and Specific Substantive Defects

In the design and execution of the LL report, none of these principles were adhered to in design or outcome **as to past cases**, where the entire purpose of the investigation and distribution was to create a type of public catharsis, as if a public trial, shaming and hanging (or unhanging as is the case of the Olsen and White portraits) of the accused could rid the institution of its history and the Trustees of their own institutional and personal responsibilities.¹⁵

The multiple defects in the report itself, include the following, aside from the inherent flaws of 'template approach'

i/ No investigation, review or comment on the role of individual Trustees when they were students, or as Trustees if applicable during prior investigations, as possible witnesses and therefore having possible conflicts of interest in the decision to pursue this model or allow the report to go public. Indeed, one would think all Trustees during the period of investigation should have been interviewed, and yet the report is bereft of any such information. This is important because the Trustees themselves at the time of the incidents must bear individual responsibility in their capacity as Trustees, as must the School ultimate responsibility. This goes to motive and the apparent deflection of responsibility to the accused rather than to the School itself as an institution.

¹⁵ There are of course legal sanctions which codify public shaming particularly in the area of sexual offenders where many countries have allowed or mandate publication of sexual offenses through e.g., sexual offense registers - and some communities even go further to require the guilty to publish their own activities in their own community to protect the community. **But this 'allowed shaming' comes after adjudicated findings in a court of law.** There was also clearly no obligation of the accused to respond to any allegations in this manner particularly on the threat of publication. Hotchkiss had other choices here - including to release a board report which came to conclusions about past activities, actions to be taken as a result, and even provided anonymized details about them (on both the accuser and accused sides) but did not do so, abdicating its responsibility as an institution and of the Trustees for any wrongs, where the problem in fact squarely within its own governance or lack of it. The resulting harm is all the more glaring because as the Trustees knew very well, there are very few remedies for the accused, as in the United States there is no law of privacy generally and even though the statute of limitations has passed for many of these cases or the accused have died, for those who are living the only recourse to a false report is through a defamation action or false light invasion of privacy case, which, particularly because of the passage of time, is not easy to bring and very costly to do so leaving the accused essentially with no practical remedy other than to protest their innocence or to remain silent having been shamed in such a disgraceful and universal manner - a brutal imbalance in the whole procedure. For the families of the accused for these decades old incidents there is no recourse whatsoever, **as the US does not recognize the 'right to be forgotten' which allows private individual even those convicted of crimes to remove their histories from the public internet** (among other things) based on many of the principles discussed herein. See generally : https://en.wikipedia.org/wiki/Right_to_be_forgotten

ii) Second guessing of the decisions of past administrators (Olsen and White) based on LL's 'judgment' without any objective exploration of either past legal advice (which in some cases can be an absolute defense of good faith conduct), the evidence or circumstances in which decisions were made, and or personal analyses of those administrators in making those decisions, casting instead the jaundiced eye of hindsight on specific administrators (for whom the Trustees were responsible) as if institutional blindness was a personal defect rather than a institutional defect, thereby creating convenient scapegoats.

iii) Questionable applications of LL's own safeguards (such as they were) where I understand that in one major Named case, the accused was not told he could be interviewed with a lawyer; and in the case of a shamed administrator, a full hearing was not provided either, because reportedly the investigator 'had heard enough' disclosing patent bias and a rush to judgment which not only cannot be defended *but throws into doubt the integrity of the entire report*.

iii) Erratic application of judgments on the evidence, where while there was substantial corroborating evidence in some past cases, in others where the accused were named, the evidence amounted to only one or more 'indirect witnesses' to 'contemporaneous exclamations' ¹⁶ (which are not themselves proof conduct occurred), vs. more current cases where the evidence appeared strong or 'ticked' the boxes of key naming factors in view of, for example, the severity of the misconduct, *yet remain both unpublished and without a trace of subsequent investigation or follow up*, which gives rise to the specter of arbitrary (and capricious) application of standards for whatever motives LL had (which could include avoiding litigation against the School where the current statute of limitations has not expired). This does not mean of course that uncorroborated accusations should also be published, but it does squarely bring into question the motives for publishing decades old scandals ¹⁷

iv) Disregard for the families of the deceased : while any investigator should have free license to investigate past misconduct or crimes, where publication is at play, there is a compelling need on the basis of decency alone to consider the families including ex-spouses, children and grandchildren of the deceased in dealing with the outcome of any such investigation, especially those which have not been proven in any judicial process

Here you had completely disparate set of results, from the grotesque treatment of the Carlisle case, a metaphorical exhumation for a Pinata-like bashing, concerning *events largely known by many of our and surrounding classes for years*, with complete disregard of his family, to the second guessing of Headmaster Olsen's stewardship including a rather mocking appendage of his letter to Thorne Thomsen as if any misjudgments he made or may have made were 'signature portraits ' of bad stewardship when in fact the entire handling of the report for the reasons submitted showed similar if not worse mistakes in fundamental principles, which can happen

¹⁶ A contemporaneous exclamation is classic hearsay – where one person reports that they heard an accuser repeat that an incident occurred near the time of the incident, which courts have traditionally admitted into evidence as probative but not definitively giving weight to the existence of a charge (example : John told me that Bob tried to hit him with a baseball bat that night it happened because he supported Biden).

¹⁷ As just one example, that LL treated 'rubbing shoulders' or messaging etc. as conduct which was not serious shows a bias toward protection of the School for recent incidents within the statute of limitations – any lawyer knows that unconsented to touching which offends a reasonable standard of dignity is a battery, even if a misdemeanor, and in any event certainly isn't allowed by current school policies.

every day an in any disciplinary context, lacking any kind of measured perspective on past events and how they should be handled to achieve a positive benefit as opposed to a destructive one.

v) Silence on any misconduct in the recent years (general reports end in the late 80's or early 90's), which is simply not credible. Statistics indeed demonstrate that in the US at least 30 % of students have been sexually harassed by their teachers both men and women and a much higher percentage by fellow students ¹⁸ It's a given that this kind of misconduct and other types as well will continue between teachers, employees and students and between students themselves and will continue in the future at any educational institution, which leads back to the issue of *not if the School will stamp out misconduct but how to deal with it properly when it happens*.

vi) Rubber stamping of the Report without independent review which would have exposed many of these flaws in the 'rush to judgment' and public purging, including the failure of the Trustees who were students Trustees at the time to recuse themselves from any such review or indeed the decision to publish the report and the recent supplemental report, a dereliction of responsibility as Trustees, a conflict of interest and/or, as noted, a massive failure of judgment and common sense.

It is irrelevant whether LL contests any of this analysis or the Trustees insist on the purported fairness of the investigation, because of the inherent conflict of LL as an investigator judge and executioner (and in LL's own application of its own judgment which resulted in inherent bias, even if only in some cases only as to the decision to name (shame), itself an specific decision which is not supportable on any ground *because it was not necessary* to achieve the same effect).

The issue was and remains process and the lack of fair process and due process which is evident in the report and its publication which cannot be excused by post facto rationalizations.

HAFRAH and Healing

As Trustee Gould admitted, what has been done cannot be readily undone.

But this is true only with respect to damages caused, not rectification of flawed actions.

If we go back to the initial outrage which legitimately prompted these investigations across New England and the LL report, hindsight, wisdom and core principles can reconcile the just aims of the victims and survivors and the equally legitimate interests of all faculty, employees, and other students and the School community itself in fairness, due process and dispassion in how cases are investigated, adjudicated and resolved.

The overall goal should be justice, not mob justice or shaming, and the enforcement of standards on clear policies on material misconduct, including sexual, of any kind, as well as on any other equally important governance issues which threaten students and the School community's well-being.

Healing from the past occurs when both interests are protected and the system to address the past is merged with a fair and proper system of investigation and enforcement.

¹⁸ Ref. generally studies cited in

https://en.wikipedia.org/wiki/Sexual_harassment_in_education_in_the_United_States#:~:text=One%20survey%20that%20was%20conducted,sexual%20interaction%20with%20their%20students.

It is submitted that the job of the School and Trustees is to do just that - their job and re-assume responsibility – which cannot be done by outsourcing that responsibility to outside advisors - other than to investigators in a limited role to assist the Trustee (vs. a major law firm , an extremely inefficient ¹⁹and expensive way to gather evidence and interview witnesses which Hotchkiss is apparently continuing to do).

Free Speech – the Chicago Principles and Addressing Social Issues

A good part of the recent discussion with the Trustees resulting in the October Zoom concerned the School’s handling of issues surrounding Black Lives Matter.

The BLM argument, however, in the context of free speech is a broader issue: diversity of thought versus cultural conformity – that is, the risk of taking a particular point of view and espousing it as a basis for learning at the School, not whether BLM isn’t vitally important (which it objectively is and should be a core event integrated into the fabric of issues which are challenging the School, students and of course society as a whole).

The distinction is important because it feeds directly into the handling of any similar issues, including the extreme self-protective reaction to the Catholic Church and boarding School investigations and the need to address both ownership of the past (by the Trustees and the School itself) and currently how to deal with these issues properly, including in the context of the MeToo movement, another vital social movement which has triggered a great deal of positive change but which can have its own negative consequences, including the use of public shaming and retributive justice.

While one can be very satisfied by the comments of Craig Bradley as Head of School in supporting and actually promoting the Chicago principles of free speech as a core value of the School, similar principles must also be applied in examining all key issues

Just as a full and fair debate should be held on Black Lives Matter from all points of view in order to enrich the education of students on these critical social issues, any debate on issues of core governance should and must include proper diligence and control of process, as demonstrated above and use of social media among faculty and students, including mutual respect, honesty and lack of targeting all of which was sadly lacking in the Locke Lord report as noted above

Surely, if we support free speech and open debate as a core value of the School across all issues, we must also support the control of shaming as well as hate speech through social media and the Internet because of its devastating consequences and harm that can be done to the object of such publications.

The failure to do so results simply in more and more miscarriages of justice and decency as we have seen also at other institutions such as with the Duke Lacrosse case and the University of Virginia false rape cases, which case lead to substantial litigation and millions in settlements. ²⁰

¹⁹ Lawyers are trained to be advocates and not fact finders and to take sides, not to be dispassionate; nor are they trained in the wide range of sexual misconduct or other offenses from the standpoint of interviewing or psychology, hence lawyer interviews tend by their very nature to be skewed to a specific viewpoint or outcome.

²⁰ At Duke in the well-known case, the university administration rushed to judgment and took prompt action against the Lacrosse coach and students after a reported rape off campus involving the team. The allegations proved to be groundless, and the university paid out millions in settlements with some of the students who were

Hotchkiss should lead by principle not by headlines.

Elitism and Where Goes Hotchkiss

In contrast to the discussion about free speech, the discussion on the make-up of the student body and the extent of student aid was deficient and disheartening

It is clear that Hotchkiss has been endowed in recent years with a great deal of new infrastructure and expensive investments as pointed out above.

At the same time, the tuition has also steadily mounted as with other private Schools which leads to the issue of the breakdown of the current student class composition and its demographics rich remains somewhat hidden.

The fact is that from what one can tell and by the Schools on admission during the conference, about 25% of the student body comes from outside the United States from ex-pat families (9%) and an even greater amount (16%) from those requiring visas, which points to a tendency (not denied by the Trustees) to admit more students who can pay their way than admit students who cannot, leading to painful choices Craig Bradley alluded to.

There is also the larger issue of 'globalization' of the School's mandate, which while attractive in concept, in fact risks changing Hotchkiss from a US institution, which in theory should be open to all US students regardless of income or background, to a global finishing School populated by the students of the world's elite.

This was never at the mission of the School, nor should be, notwithstanding the need to change and evolved.

During our time at the School, it would probably be correct to say that the School was geared to perpetuating the accomplishments of families from the Northeast who wanted the School to be launching pad for admission to the best colleges for their sons and later daughters, notwithstanding marginal efforts such as the GO program (Greater Opportunities) that sought under the leadership of Bill Olsen to extend this privilege to severely disadvantaged students from the US (or Northeast ghettos).

As an ever evolving institution with new goals, however, it's important to challenge the goal of globalization where the School has little or no full scholarships for students within the United States, and is vastly underrepresented from its own statistics by students from the Latino community (less than 4 % while the US population is 13 %), no Native Americans, and no clear percentages of students of any kind from the lowest oncome levels across all segments of American society, who cannot afford the privileged education that Hotchkiss provides.

forced to leave school as well as apparently the coach (the District Attorney was also disbarred for perverting the course of justice). See generally :

https://en.wikipedia.org/wiki/Duke_lacrosse_case#:~:text=The%20case's%20resolution%20sparked%20public,County%20District%20Attorney%20Mike%20Nifong.

Similar false allegation pervaded UVA's handling of allegations which were published in Rolling Stone, see generally : https://en.wikipedia.org/wiki/A_Rape_on_Campus

One would expect and hope that the Trustees and the School would revisit the mission in this respect as well and take a long hard look about the student body we have and what kind of student body the School should have in the future and how to get there

Which brings us squarely to the final subject.

Where's the Money and What's the Plan

The Head of School eloquently spelled out in his remarks of the tension between maintaining the assets of the School and building a new endowment for financial aid.

That comment speaks volumes to the challenge of transparency and fundraising and budgeting and where and for what purposes is fundraising targeted and how the money is spent.

In particular one must question whether perpetual endowments are provided by donors when plant and equipment is donated and accepted so that maintenance of new Hotchkiss assets is taken out of the general budget so that more fundraising money can be spent for student aid to ensure the diversity, economic and social, which is or should be a core value of the School.

I cannot recall any instance of any fundraising drive directed specifically for financial aid, only general drives with references to the option of donating to special funds which seem completely inadequate, as financial aid should be a core mission, not background mission, of any fundraising.

I have also heard from a number of my classmates about potentially large increases in administrative staff, substantially increasing the annual budget, aside from the financial requirements of maintaining the current assets of the School, which may be correct or incorrect in part or in whole – the point being that advanced staffing creep, together with mission creep and special endowments, turn many institutions of higher learning into, in effect showcases for their donor projects, vanity or well intentioned, but not showcases for education (as in the parallel university context, where universities can morph into centers of the 'university industrial complex' involving compromise of core values for corporate or foreign grants).²¹

We return again simply to a matter of principle – the need for a public and transparent review of School funding and priorities including a review of the conditions under which endowments are received and for what purpose, for if the School is to achieve its objectives for diversity and inclusion from across the spectrum of social and economic backgrounds, then it must as a principle focus its fundraising efforts on achieving that goal and reassessing how to finance its physical assets by proper management so as not to detract from the School mission.

²¹ See e.g., [https://www.iatp.org/sites/default/files/Is the university-industrial complex out of co.htm](https://www.iatp.org/sites/default/files/Is%20the%20university-industrial%20complex%20out%20of%20co.htm), commentary on risks of corporate donations and grants in the context of university research in the bio-agricultural field.

Recommendations

My recommendations are as follows:

1/ Broadening the Discussion

Involve all alumni and other stakeholders in a consistent way across all major principles and planning issues through conferences and independent polling on key issues as well as seeking specific written input from thought leaders in the Hotchkiss community with expertise in particular areas of education, fundraising and management without additional cost.

2/ Locke Lord

i/ Recall the LL report and all subsequent LL public reports from the Hotchkiss web site and request removal including links from all major search engines and replace it by a 'lessons learned' statement from the School reflecting on the period surrounding these investigations (2016 et seq) and affirming how the School intends to deal with such allegations in the future on a principles based process responding the due process, fairness and the rights of the accuser and accused including in any process involving material misconduct by faculty, staff or students. Note that apparently Andover and Exeter may have already removed their reports from their web sites.²²

ii/ Retire Locke Lord from any further involvement with Hotchkiss, including the hot line process and retain a neutral fact gathering firm (not an expensive law firm, and there are many such investigators skilled in neutral fact finding techniques) for such hotlines to report back to Trustees or its administration or a Committee as assistants (not as adjudicators and executors based on their own judgments) , reclaiming for the Trustees and the School administrators the sole responsibility to review the evidence and decide on it as well as the disciplinary or other appropriate actions resulting from the accusations (with the assistance as needed of any outside advisors including School counsel, a process protected by the attorney – client privilege) ²³.

iii/ Reach prompt and fair settlements and reconciliations with all accused disclosed in the report where the evidence is inconclusive or flatly denied or where due process was denied:

I refer specifically to the teacher referenced above who has openly published a flat denial and whose interactions with LL raise severe issues of 'prosecutorial' bias and deliberate disregard of the rights of any accused, and the former headmaster who was not allowed the opportunity to discuss his side of the story and who also, according to Trustee Gould, was not meant to be shamed (a rather bizarre characterization of what happened), inviting any other living accused to meet privately with new counsel for the School (in person or by submissions) to provide their side of the story if they wish to address the record (which they may not chose to do, given either the evidence disclosed or the futility of 'beating a public rap', whether deserved not).

²² A link to the Andover report shows the original report, which is available through another link, may have been removed. The Exeter report is no longer readily available from Exeter itself . That may be because these reports are blocked from access in Europe (from where these comments are written) under the aforementioned 'right to be forgotten' which Google Europe and other search engines have to comply with on request- or it may be that the reports are available in the US : whatever the case any School withdrawing its reports from the internet is good precedent for Hotchkiss considering the same.

²³ Investigator findings if channeled through counsel (i.e., the School outside counsel retains the investigator) can also be protected by attorney work product privilege).

iv/ Issue apologies to the family of the deceased for exposing unadjudicated matters which were never at the internet level of public exposure and take independent advice including by polling of Alumni or by review with a range of experts from the Community, on restoration of the Olsen and White prizes and their portraits to the School corridors, in effect restoring their reputations and standing in School annals, regardless of mistakes and hindsight on their judgments.

v/ Continue to provide counseling and support for all victims and survivors of past (and any future) misconduct by or between faculty, staff and students, including victims of sexual harassment at the hands of anyone at Hotchkiss (which can of course include false accusations of sexual misconduct by teachers or by students).

3/ Ensure Disciplinary Processes Have Due or Fair Process and Insure those Responsibilities

Ensure that all material misconduct processes at the School, particularly those which could result in civil or criminal actions, protect the accuser and the accused, including with respect to any charges against or between faculty, staff and students themselves: with all parties having the right to witnesses of their choosing at any hearing, a record of any such hearings being made available, and teachers and staff being entitled to independent counsel (or School counsel if they agree) at the School's expense (subject to applicable law where the Schools' duty to protect its employees may not necessarily extend to providing counsel in certain instances)²⁴, as well as a right of appeal or review, and ensure that the School's insurance policy covers those costs, which should be a benefit of any faculty or staff employment contract.

4/ Formulate or Update a Strict Policy Against Cyberbullying inclusive of Rumor Mongering or False Accusations

As part of its due process commitment, and commitment to student well-being, educate the entire Hotchkiss student, faculty and staff on the proper use of social media, on or off campus, and have strict standards against cyberbullying and making accusations against an faculty, employee or fellow student of any kind on the world wide web or otherwise including orally, requiring all material complaints of misconduct be channeled through a proper independent process above – not to diminish free speech with respect to complaints and points of view but to protect all concerned including students (who, in passing, can be sued for defamation or criminally accused of false complaints in the worst case, as can the School itself if it fails to take action in policing harmful non-protected speech which it knew or should have known about) including as part of the principles of due process and equal protection of the accuser and accused in these instances²⁵.

5/ Teach the Chicago Principles as a Core Value

Ensure that the Chicago principles are at the heart of every discussion on important issues including of course those which are particularly vital such as BLM, MeToo, social and economic equality, etc., making it clear that all points of view are welcome at all ends of the political spectrum, while at the same time reinforcing traditional limits on hate speech, intolerance, bigotry and suppression of contrary viewpoints. This includes welcoming participation by students of

²⁴ For example, in cases of criminal investigations, depending on the nature of the charge and applicable state law.

²⁵ The prevalence of bullying and shaming on the internet is as wide and as serious a problem as sexual harassment, leading to extreme emotional distress, breakdowns and suicide of course. Ref.e.g. <https://www.accreditedschoolsonline.org/resources/cyberbullying-prevention-and-support/>

opposing views and inviting speakers, virtual or otherwise, from different perspectives on major issues.

6/ Refocus Fundraising and Recruitment to Reflect and Fund US-based Diversity and Completeness

Undertake a wholesale review of student composition including demographics and social economic status of the student body and refocus the School's mission on diversity and social economic inclusion, with focused efforts on major donors and other sources to fund a truly dynamic student body which truly encompasses all segments of our own society without reliance on non- US students (who can certainly add a degree of diversity of campus but should not be a focus of recruitment), so that Hotchkiss can lead as a truly national (not international) institution.

This is a great opportunity for Hotchkiss to leave behind its currently elitist reputation and become a beacon and leader in diverse secondary education at all levels, which will attract a deeper student body, a broader School experience and generate a much wider base for support and growth in the future.

This approach would not and should not restrict Hotchkiss from engaging in learning centers or co-ventures (including offshore virtual campuses) or exchanges with other Schools abroad (as many universities do) as long as internationalization does not detract from the core function of the School and campus.

7/ Review and Refocus the Budget

Concurrent with rededicating Hotchkiss to diversity at home at all levels, reexamine the Hotchkiss budget, including the process of soliciting and accepting new grants of plant or equipment, requiring (if not done now) a full life time maintenance endowment up front for all such grants, review of administrative staffing levels, exploring possible sale, leasing or co-sharing of more assets, seeking corporate funding where appropriate with 'no strings' attached and refocusing on student aid fundraising through specific approaches to major donors and others to provide the economic basis to attain and maintain true diversity on campus.

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