SOCIAL MOVEMENT LAWYERING AND DUE PROCESS VALUES

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INTRODUCTION

As I send this Essay off to the *Fordham Law Review* in early January 2025, many people in the United States remain in a state of shock following the recent election of Donald J. Trump to a second term as President. Theories

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abound as to why a person who espoused so much hate[1] won the allegiance of a majority of American voters; some commentators have suggested that "anti-wokeism" is to blame.[2] To be sure, the Trump campaign manipulated conservative social values to gain support.[3] But conservative values are not necessarily anti-woke values. Ancient values oppose treating people badly and interfering with individuals' liberty to live as they choose.[4] These core "woke" values are not the reason for the totalitarian shift reflected in Trump's election.

But there is another brewing social movement trend that does deserve some of the blame for the 2024 presidential election results. This trend is against a related set of deeply rooted values, encompassed in the idea of due process. By due process, I do not mean anything very technical or complicated; I am simply referring to the commonsense notion that persons accused of wrongdoing should receive notice, an opportunity to defend themselves, and fair decision-making before institutions inflict adverse consequences on them.[5] The trend against adhering to due process values can be seen in a myriad of institutions influenced by social movements, including workplaces and universities.[6] But it is not a distinct feature of "wokeism"; to the contrary, both sides of the political spectrum in the United States today display this tendency in abundant measure, as I will discuss below.[7]

Historically, the most developed critiques of due process have come from the "Left," based on arguments that due process ends up helping the socially entitled.[8] In studying the major voices who have made these critiques,

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1. *See* Myah Ward, *We Watched 20 Trump Rallies. His Racist, Anti-immigrant Messaging Is Getting Darker*, POLITICO (Oct. 12, 2024, 1:44 PM), https://www.politico.com/news/2024/10/12/trump-racist-rhetoric-immigrants-00183537 [https://perma.cc/AC6H-A5GB] (chronicling the development of Trump's "xenophobic and racist rhetoric").

2. *See, e.g.*, Hugh Cameron, *James Carville Blames Democrats' Losses on "Woke Era" Politics*, NEWSWEEK (Nov. 7, 2024, 10:50 AM), https://www.newsweek.com/james-carville-harris-loss-woke-politics-1982035 [https://perma.cc/VU9J-5NPP]; Maureen Dowd, *Democrats and the Case of Mistaken Identity Politics*, N.Y. TIMES (Nov. 9, 2024), https://www.nytimes.com/2024/11/09/opinion/democrats-identity-politics.html [https://perma.cc/7XGX-WE5T].

3. *See, e.g.*, Wayne A. Selcher, *A Profile of Trump Voters: The Demographics of His MAGA Enthusiasts and Their Relationship to Him*, OBSERVATORIO POLITICO DOS ESTADOS UNIDOS (Sept. 18, 2024, 12:35 PM), https://www.opeu.org.br/2024/09/18/a-profile-of-trump-voters-the-demographics-of-his-maga-enthusiasts/ [https://perma.cc/LEB3-U2FY] ("Affirmation and praise for America's traditional religious roots has become a vital part of Trump's appeal to conservatives . . . . Trump declared himself to be a 'very proud Christian' (although there is no apparent evidence that he practices that faith) . . . . Prayers are often offered, usually by evangelical religious leaders, at the start of his rallies, before Trump's appearance, consistently portraying him as a righteous man who will lead America back to God, and that only in that spiritual condition can America be 'great again.'").

4. *See* JOHN STUART MILL, ON LIBERTY 90, 142 (J.W. Parker & Son, West Strand, 2d ed. 1859) (praising these as ancient values).

5. *See infra* Part I.A.

6. *See infra* Part I.B.

7. *See infra* Part I.B.2.

8. *See, e.g.*, JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 7 (1986) ("The main reason for the failure [of procedural due process] is

however, I have not yet come across the argument that discarding due process outright would make for a better world. Instead, what critics have tended to argue is that those without social power end up not being accorded due process in any meaningful way.[9] Note that the logical structure of this argument rests on the assumption that some version of due process *is* a good idea. I do not see today's social movement activists who want to discard due process making these arguments. Their view seems to be that due process is not worth it. In their haste to bring about a better world, such advocates regard due process norms as an annoying obstacle—a hindrance—to their goals.

In the short space accorded to me in this Essay, I will make the case that this move is profoundly misguided, strategically counterproductive, and ethically unsound. Indeed, I propose, legal ethicists of social movement lawyering should consider whether law-trained social movement adherents have an ethical duty to encourage the institutions in which they have influence to observe due process values. They should insist on such basic protections for those accused of misconduct—even, and especially, when the zeal of social movement righteousness pushes in the opposite direction.

This Essay is not intended as a contribution to the roiling literature on "wokeism."[10] In my view, "wokeism" is not the reason President Trump won in any simplistic sense and, even if it were, the basic principles of protecting human dignity and allowing people to be who they want to be are values worth fighting for. My argument is that the growing trend toward ignoring due process values in the name of expediency deserves condemnation regardless of which "side" acts this way.

Throughout history, extremists of many political stripes have decided to throw out due process values, always to the great detriment of the societies

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maldistribution of power. Procedural due process is a formally imposed system that attempts to achieve equality of treatment in a social system with dramatically unequal balances of wealth and power."); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 4 (1992) ("[T]he myth of due process repeatedly has been corrupted to enhance the position of the powerful.").

9. *See supra* note 8 and accompanying text.

10. What the term "woke" refers to is hugely contested. *See* Thomas Chatterton Williams, *You Can't Define* Woke, ATLANTIC (Mar. 17, 2023), https://www.theatlantic.com/ideas/archive/2023/03/wokeness-definition-social-justice-racism/673416/ [https://perma.cc/QZE2-E8YQ]; *see also* MUSA AL-GHARBI, WE HAVE NEVER BEEN WOKE: THE CULTURAL CONTRADICTIONS OF A NEW ELITE 24–67 (2024). "Woke" can mean "aware of and actively attentive to important societal facts and issues (especially issues of racial and social justice)" or "politically liberal or progressive (as in matters of racial and social justice) especially in a way that is considered unreasonable or extreme." *Woke*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/woke [https://perma.cc/8VBM-FV5R] (last visited Feb. 14, 2025). According to its critics, the term emphasizes identitarian politics in a way that leads "woke" politics to fall far from classic Left politics. *See* SUSAN NEIMAN, LEFT IS NOT WOKE 6–13 (2023); *see also* SUNJEEV SAHOTA, THE SPOILED HEART (2024) (presenting a humorous fictional account juxtaposing "woke" and classic Left activism). The many subtle distinctions that can be made in considering what "wokeism" is do not matter to my argument, however, because my point is that fervent political movements today show an increasing tendency to disregard due process values regardless of viewpoint.

they believed they were improving.[11] The French Revolution of 1787 to 1791 provides one example. There, in the name of lofty statements about fundamental human rights, zealots sent thousands to the guillotine based on accusations of counterrevolutionary conduct or nonconforming political thought; in one six-week period in Paris alone, 1,300 people met their deaths this way.[12] The end of that period brought Napoleon Bonaparte to power as a dictator who tyrannized large swaths of Europe for the next fifteen years.[13] Other historical examples too numerous to name point to the same lesson[14]: throw out due process for those you view as enemies of your revolution, and soon enough the same treatment will boomerang right back at you.

To be sure, social movement adherents' disregard for due process values in the United States today does not rise to the level of willy-nilly guillotining of nonconformists. But I will make the case that it is a similar phenomenon, just writ on a smaller scale. Like other historical instances, it risks fanning tendencies that contribute to bringing in oppressive regimes that inflict fear and pain on all, including those whom social movement adherents initially sought to protect. Putting my point in such dramatic terms may cause some readers to accuse me of exaggeration. But President Trump's election foretells a troubling future. Without question, we find ourselves in a historical moment that calls for serious reflection to sort the misguided explanations of what has gone wrong in the United States—for instance, "wokeism"—from real missteps that have contributed to a majority of Americans abandoning agendas rooted in fostering human dignity. One of these missteps, I argue, is ignoring due process values.

This Essay will unfold as follows. In Part I, I briefly define what I mean by basic due process and then analyze two well-publicized accounts of due process ignored. Both come from universities, which I focus on because that is the institutional context I know best. My analysis, however, applies equally to other institutions that grant some people power over others. The workplace provides another example, and I draw on my experience as an employment lawyer before entering academia to identify some problems that frequently arise in implementing due process and tentatively propose a few pragmatic fixes, all while acknowledging that due process poses impediments to institutional action. That is the concept's whole point.

In Part II, I discuss a counterexample in which social movement activists are trying to get due process right. This involves the ongoing debate about burdens of proof in campus sexual assault cases. Activists in this debate have pointed out that appropriate due process must be evaluated from the perspective of all persons affected by alleged wrongdoing, and the interests of complainants deserve far more consideration than they traditionally

11. *See generally* UWE BACKES, POLITICAL EXTREMES: A CONCEPTUAL HISTORY FROM ANTIQUITY TO THE PRESENT (2010).

12. *See* JEREMY D. POPKIN, A SHORT HISTORY OF THE FRENCH REVOLUTION 36, 75–78, 81 (1995).

13. *Id.* at 112–17.

14. *See* BACKES, *supra* note 11.

received. Accordingly, they championed reforms in the burden of proof standards to put the interests of survivors on par with the interests of respondents who might be unjustly accused. This is an example of synthesizing social movement and due process values, which is the approach I argue for here. The takeaway is this: criticizing due process from a social movement perspective offers valuable insights, whereas throwing out due process does not.

In Part III, I situate my argument in the legal ethics literature on social movement lawyering. I argue that (A) social movement lawyering should be broadly conceived to encompass the work law-trained persons do in institutions in furtherance of social movement values even when they are not directly representing social movement clients, and (B) legal ethicists focused on social movement lawyering should explore the ethical duty of social movement lawyers to promote due process values along with social movement goals in their work.

Part IV summarizes the interventions I propose by way of conclusion.

I. THE DUE PROCESS PROBLEM

This part briefly lays out what I mean by due process values and then gives two recent examples, drawn from different ends of the political divide, of due process gone wrong.

A. The Due Process Floor

Before proceeding, a few words are in order to define what I mean by due process values. First, to be clear about what I do *not* mean. I am not referring to due process procedures required by law. Those vary by context and generally apply to government actions. But law can help illuminate the basics contained in the due process concept. In classic opinions such as *Goldberg v. Kelly*[15] and *Mathews v. Eldridge*,[16] the U.S. Supreme Court offered helpful guidance about due process, both as a principle arising under the U.S. Constitution, which generally applies only to government action, but also as a set of norms and values that underlie fairness more generally. As the Court explained, due process involves various grades of ever more taxing procedural protections designed to ensure correct and fair results in the exercise of institutional power. The basic concept these cases stand for is this: institutional actions that have less grave consequences to an individual require less due process, whereas institutional actions that have more grave consequences for an individual mandate more due process protection.[17] The full trappings of due process, such as the protections that apply in a criminal trial, require many burdensome safeguards, including full-blown adversarial

15. 397 U.S. 254 (1970). When I was in law school, I had the privilege of taking Civil Procedure with Professor Robert Cover. My memory is that we spent most of the semester on *Goldberg*. At the time, I did not understand why we should spend so long on that one case. Today, I finally get it; due process *is* what law at its core should be.

16. 424 U.S. 319 (1976).

17. *See Goldberg*, 397 U.S. at 262–63; *Mathews*, 424 U.S. at 335.

procedures, the right to confront accusers and cross-examine evidence, appeal, and proceed under a burden of proof skewed in favor of the person accused of wrongdoing.[18] In less consequential matters, less process is due.[19] Its barest fundamentals, the Court has explained, are (1) notice that one has been accused of wrongdoing, (2) some opportunity to give one's side of the story and submit evidence, and (3) consideration by a neutral decision-maker.[20] I will refer to these three aspects of due process, which the Court has described as its "core elements,"[21] or floor, as due process basics.

Other aspects of due process involve such matters as burdens of proof, including how hard they are to meet and which party to a proceeding bears the burden of persuading the decision-maker of the facts.[22] Burdens of proof vary and, as I will suggest in Part II below, some of the best work social movement activists have done on due process today involves criticizing and proposing reforms in how burdens of proof are allocated, based on observations that the interests of affected parties often are not properly acknowledged under traditional schemas.

The classic case law I briefly summarized above addresses government action, but similar principles can apply to nonpublic actors. In simplest terms, due process norms offer a set of assumptions about how to treat individuals fairly, avoid arbitrary and thus unjust exercises of power, and assure others within or affected by institutions that they can expect fair treatment too. The due process floor is as simple as ensuring that institutions provide notice, an opportunity for respondents to give evidence in their defense, and a fair decision-making procedure.

B. Getting Due Process Wrong: Two University Examples

I now turn to two well-publicized examples of university administrators who were motivated by social movement goals and drastically missed the mark on this due process floor. I analyze what went wrong and how due process could have been provided. I purposely chose these examples to drive home my point that due process failures are not confined to any "side" in today's political debates.

18. *Overview of Criminal Cases and Post-Trial Due Process*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-6-1/ALDE_00013767/ [https://perma.cc/CZ3M-NZX5] (last visited Feb. 14, 2025).

19. *See Mathews*, 424 U.S. at 346 (holding that the process due before termination of welfare benefits does not require a pretermination hearing but does require a right to post hoc consideration of written evidence).

20. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533–35 (2004).

21. *Id.* at 533.

22. *See Goldberg*, 397 U.S. at 262–63; *Mathews*, 424 U.S. at 335.

1. The Viren Matter

Consider this fact-checked account from *The New York Times*: several years ago, Sarah Viren, a professor at Arizona State University (ASU), received a job offer at the University of Michigan ("Michigan").[23] The caller who conveyed this happy news promised a formal letter and contract by mail, but the documents never arrived.[24] Months later, Professor Viren learned that Michigan had put her job offer on hold based on anonymous sexual harassment complaints against her same-sex spouse, who was also a professor at ASU.[25] An anonymous accuser then alleged that Professor Viren, too, had engaged in egregious sexual misconduct with students.[26] Eventually, an ASU Title IX investigator interviewed the couple but stated that she could not dismiss the charges despite the lack of any supporting evidence.[27] As their nightmare continued, the couple spent $10,000 on counsel fees and eventually established that a jealous competitor for the Michigan job had faked the allegations.[28] By that time, there was no spousal position at Michigan, so the couple ended up staying at ASU.[29] They decided not to legally pursue the matter because the outcome would be uncertain and they could not afford more counsel fees.[30]

In the Viren case, both ASU and Michigan seriously mishandled the situation. Consistent with the due process floor of providing notice and an opportunity for defense, administrators should have promptly told the couple about the allegations and offered them the chance to refute them. They should have displayed concern for fairness and the respondents' legitimate interests at stake. Even the most cursory fact-checking of the basic allegations would have immediately revealed faked emails, dates, and places.[31] In light of this, Michigan could have honored its job offer to Professor Viren contingent on the investigation eventually clearing her name. Or the administrators could have expedited their investigation and finalized it soon enough to prevent the couple from suffering career harm.

As is so often the case, best intentions underlay bad consequences. The administrators who mishandled the Viren matter were undoubtedly motivated by legitimate, social-movement inspired values: they sought to prevent faculty sexual harassment of students. But that laudable goal should not have stopped them from also concerning themselves with the interests of the accused. Here, the administrators behaved like the ineffectual, no-action

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23. *See* Sarah Viren, *The Accusations Were Lies. But Could We Prove It?*, N.Y. TIMES MAG. (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/magazine/title-ix-sexual-harassment-accusations.html [https://perma.cc/TX9Q-VNK4].
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

bureaucrats Americans are so fed up with today.[32] Because their unjustified delay caused harm, the universities should have reimbursed the couple for their legal expenses and also further compensated them for the harms they suffered that could not be undone because the institutions neither acted quickly nor insulated the hiring and onboarding process from the taint of specious allegations. Instead, they sat on the matter and appeared to assume a "too bad, so sad" attitude about the result. This is an example of institutional ensnarement in bureaucracy, which some commentators blame for Americans' rejection of progressive values in the 2024 national elections.[33]

Professor Viren, a contributing writer for *The New York Times Magazine*, had an outsized voice as a writer when she published her account, but many others who have experienced similar situations never tell their stories for a variety of reasons, including embarrassment, concern for professional reputation, lack of a publishing platform, and inability to afford expensive legal counsel. I know well, from both personal experience and observations over the course of a long career, that Viren's story is not anomalous. It is emblematic of a broad problem caused by the overzealous pursuit of social movement goals without sufficient attention to due process values. But it cannot fairly be blamed on "wokeism," as shown by the following example instigated by New York Republican Congresswoman Elise Stefanik, a fervent adherent of the "Make America Great Again" (MAGA) movement.[34]

2. Columbia University

Consider this: in 2023, a faculty department chair at Columbia University spoke about the October 7, 2023 Hamas attack against Israel using words that some viewed as anti-Semitic.[35] After receiving complaints, the university initiated an internal investigation of the faculty member[36] but failed to notify him that he was under investigation.[37] Nevertheless, during a congressional hearing probing university responses to protests about the Gaza War, Columbia University's president at the time, Minouche Shafik, announced

32. For a discussion of American bureaucratic failure and its political consequences, see JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER 1–22 (2023).

33. *See id.*

34. *See* Charlotte Alter, *The 'Handmaiden of Trump': How Elise Stefanik Went from Moderate to MAGA*, TIME (May 8, 2021), https://time.com/6046674/elise-stefanik-liz-cheney-republican/ [https://perma.cc/YEA5-QRAX].

35. *See* Stephanie Saul, *Who Are the Columbia Professors Mentioned in the House Hearing?*, N.Y. TIMES (Apr. 17, 2024), https://www.nytimes.com/2024/04/17/nyregion/joseph-massad-katherine-franke-mohamed-abdou-columbia-university.html [https://perma.cc/H3EU-HKLK]. What the faculty chair apparently said was that the attack was a "resistance offensive." *Id.*

36. *Id.*; *see also* Katherine Knott, *U.S. Lawmakers Take Aim at Another University President*, INSIDE HIGHER ED (Apr. 23, 2024), https://www.insidehighered.com/news/government/2024/04/23/columbia-president-faces-congressional-pressure-resign [https://perma.cc/6YEP-BZRR].

37. *See* Saul, *supra* note 35 (reporting that the faculty member stated that "he had not been notified by Columbia that he was under investigation").

on national television that this professor was being investigated, condemned him, and promised Congresswoman Stefanik that she would remove this faculty member from his chair position immediately.[38]

Again, in this scenario, the university administrators' mishandling of the situation involved denying minimal due process prior to denouncing someone for bad acts on national television. Although secret investigations of employees may sometimes be appropriate, especially at very preliminary stages to decide whether to conduct a more full-blown inquiry, such investigations should remain entirely secret, handled by trained personnel experts—which this university president clearly was not. Once an investigation takes on any degree of seriousness or has been disclosed so that rumors may spread, due process considerations dictate that subjects of investigations be (1) informed of the general nature of the investigation, (2) invited to give their side of the story and submit evidence, and (3) informed of the investigation's general result in writing.

Universities are hotbeds of gossip, just as many institutions are, and the practice of trial and conviction without due process should not be tolerated, though in my experience it often is. A law-trained participant in the two situations described above should insist on at least this much: individuals accused of misconduct should receive notice of that fact, be offered the chance to give their side of the story and any evidence they wish to offer, provided fair decision-making, and be promptly informed in writing of the result of the investigation. This does not mean that the sources that prompted the investigation need to be revealed or that the subject be provided with all the evidence gathered or an assessment of it. At the same time, targets of misconduct charges should not be treated as if they have no interests that deserve consideration.

Of course, it often is challenging to get due process right. Common problems in my experience include situations in which (1) results of investigations are inconclusive or (2) complainants do not wish to proceed with charges because they worry respondents will retaliate. I offer a few pragmatic suggestions below.

C. Responding to Objections about Adhering to Due Process Basics

One frequent issue in both university and workplace settings—the two settings I know best—is what to do when investigations produce inconclusive results. Take sexual harassment as an example, though these problems come up in many kinds of complaints. There, alleged misconduct often involves private interactions with no witnesses other than the two participants. Even before the Me Too Movement, employers, including universities (and unions, which I represented), struggled with these cases. A Me Too Movement–influenced investigator juggles objectives that are in tension. One is to take

38. *Id.* The faculty member later reported to the press that he was already scheduled to step down. *Id.*

steps to prevent hostile environments. Another comes from the law-related norm of providing basic due process to persons accused of misconduct.[39] Unpopular as my position may be, it seems to me that social movement goals should not override due process considerations in these situations. The dangers of unintended consequences are too significant otherwise. These include the historically proven possibility that other dynamics of social privilege and subordination will come into play, including those around race,[40] gender, disability, and socioeconomic privilege.[41] The burden of proof in these situations involves questions I will discuss in Part III below. Failing to provide due process basics (such as notice, opportunity to present evidence, and fair decision-making[42]) should not be an option.

A related problem arises when potential complainants do not want to pursue complaints if that requires giving notice to the respondent that a charge has been made. In fact, studies show that those who experience workplace discrimination and harassment are reluctant to use legal procedures for redress.[43] One can hardly blame them: studies have further shown, for example, that those who report sexual harassment have worse career outcomes than those who do not.[44] Consistent with supporting individuals' agency, complainants' right to decline to pursue a complaint should be respected. But that means that the due process requirement of notice may interfere with institutions' ability to pursue valid complaints.

These situations require resorting to alternative steps, including developing and widely disseminating better policies, making the risk of disciplinary actions clear, and following up on such commitments while adhering to due process norms. Other steps can include holding trainings and workshops, issuing generalized admonitions, cultivating informal work norms and workplace cultures that promote social movement values without violating due process, and providing trauma-informed counseling to persons

39. *See supra* Part I.B.1.

40. On the large literature addressing how race unfairly prejudices university disciplinary proceedings as well as other contexts, see, e.g., Jeannie Suk Gersen, *Shutting Down Conversations About Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school [https://perma.cc/CV37-3ZXF] (arguing that the "always believe" survivors adage disproportionately creates injustice toward Black men); Jeannie Suk Gersen, *The Public Trial of Nate Parker*, NEW YORKER (Sept. 2, 2016), https://www.newyorker.com/news/news-desk/the-public-trial-of-nate-parker [https://perma.cc/2GWN-H7NU] (giving historical and current examples of unjust results in sexual misconduct cases against Black men).

41. *See, e.g.*, Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 108–09 (2015) (describing a rape case in which a middle-class woman testified that she felt a threat of force from a working-class man during a date based on "the look in his eye," and suggesting that he may have been convicted based on the woman's "middle-class assumptions about how men and women communicate with each other").

42. *See supra* Part I.A.

43. *See* KRISTEN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 99–105 (1988).

44. *See* THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 163–66 (2005).

who have experienced harms.[45] Yet still, I readily acknowledge, providing due process will interfere with institutions' ability to punish alleged wrongdoers. This is a consequence of due process: the calculation is that it is better to leave some cases unredressed than to risk imposing negative consequences on persons who have been wrongly charged. This reasoning perhaps arises from an intuition about justice that comes from putting oneself in the Rawlsian original position: someday, the person unjustly charged might be you, your loved one, or your friend.[46]

To say that basic due process constitutes a value to which institutions should be committed is not to say that due process procedures cannot be improved upon in accordance with social movement insights. Rather than throwing out due process, social movement adherents should work to make due process systems fairer. Continuing unfairness is the problem that critics of due process have long pointed out,[47] and today's social movement advocates should take up the challenge of improving rather than discarding the concept. Some, indeed, have done so, as I discuss below.

II. TRYING TO GET DUE PROCESS RIGHT: THE CAMPUS SEXUAL ASSAULT DEBATE

Aside from the due process floor, such as notice, some opportunity to present a defense, and fair decision-making,[48] due process procedures can work in a lot of different ways. They may prioritize different considerations and balance interests in varying degrees. One mutable feature of due process, as noted above, involves standards of proof. Typically, the standard of proof is higher where the punishment to be inflicted is higher; that is why criminal conviction requires proof beyond a reasonable doubt, whereas civil cases call for preponderance of the evidence, for example.[49] Another question is who bears this burden of proof. In the Anglo-American legal tradition, the party seeking relief from another for a bad act typically bears that burden.[50] But legislatures and courts have experimented with burdens of proof, rebuttable presumptions, and the like,[51] so there is no reason private institutions cannot as well. An example comes from ongoing controversies about how to set the burden of proof in campus sexual assault cases. This example illustrates how social movement activists can fuse social movement and due process values to produce important institutional reforms.

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45. For a discussion of treating discrimination-related trauma, see, e.g., Lobes and Robes Podcast, *Dealing with the Brain Effects of Racism*, AM. U. CTR. FOR NEUROSCIENCE & BEHAVIOR (July 3, 2024), https://www.american.edu/research/dealing-with-the-psychological-effects-of-racial-trauma.cfm/ [https://perma.cc/GL6R-XYTB].

46. *See* JOHN RAWLS, A THEORY OF JUSTICE 19 (1971) (describing how the original position thought exercise can support intuitions about justice).

47. *See* HANDLER, *supra* note 8, at 7; Rutherford, *supra* note 8, at 4.

48. *See supra* Part I.A.

49. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 1.02, at 3–4 (6th ed. 2023).

50. *See* ROBERT P. MOSTELLER, KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D.H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 336, at 763–64 (8th ed. 2020).

51. *See id.*

Even before the Me Too Movement, campus activists worked to reform the procedures universities used for campus sexual misconduct cases.[52] They argued that traditional rules of evidence imported from criminal law were not appropriate for universities' administrative proceedings.[53] Higher burdens of proof, obviously, make proving sexual assault more difficult. Under such standards, abusers were more likely to get off scot-free, signaling a lack of care from universities about the harms survivors of sexual assault experience. In response to pushing from activists, the Office of Civil Rights in the U.S. Department of Education (DOE) in 2011 issued a "Dear Colleague" letter that rejected the use of such higher standards of proof and instructed universities to use the "preponderance of the evidence" standard typical for civil and administrative contexts.[54] This shift recognized that both parties in a sexual misconduct case have important interests at stake.

Some advocates approved of the DOE's preponderance of the evidence standard, but others wanted to go even further. They proposed switching the burden of proof so that respondents would bear the burden of *disproving* allegations made against them.[55] In its 2017 Title IX guidance, President Barack Obama's administration allowed universities to adopt such reforms, and a number did so.[56] This provoked an outcry from many, including a group of prominent feminist law professors and judges.[57] They argued that the proposed corrective for too high a burden of proof had gone too far in the opposite direction.[58] In other words, these feminist advocates' lawyerly commitment to due process meant that they could not abide individuals being found responsible for a morally reprehensible act with the cards stacked against them. To be sure, switching the burden of proof to respondents would

52. *See* Caroline Heldman & Danielle Dirks, *Blowing the Whistle on Campus Rape*, MS. MAG. (Mar. 22, 2015), https://msmagazine.com/2015/03/22/blowing-the-whistle-on-campus-rape-2/ [https://perma.cc/TM4J-G2HA].

53. *See id.* Reform advocates made a host of other suggestions, but limited space requires me to confine my discussion to the burden of proof issue. *See* Jeannie Suk Gersen, *College Students Go to Court over Sexual Assault*, NEW YORKER (Aug. 5, 2016), http://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault [https://perma.cc/RF2J-LZWW].

54. Letter from Russlynn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011), https://www.chronicle.com/article/the-revolt-of-the-feminist-law-profs/ [https://perma.cc/52KZ-F76B] (The DOE later rescinded the letter, but you can view the archived copy.).

55. *See id.*

56. *See* Jeannie Suk Gersen, *Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault*, NEW YORKER (Sept. 8, 2017) [hereinafter, Suk Gersen, *Devos*], https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault [https://perma.cc/CZF7-6HCG]; Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, NEW YORKER (May 16, 2020), https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations [https://perma.cc/T4AX-R5W3].

57. *See, e.g.*, Jeannie Suk Gersen, Hon. Nancy Gertner & Janet Halley, Comment on Proposed Title IX Rulemaking (Jan. 30, 2019); Halley, *supra* note 41; Lara Bazelon, *I'm a Democrat and a Feminist. And I Support Betsy DeVos's Title IX Reforms*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html [https://perma.cc/6GB3-4VDL].

58. *See* Suk Gersen et al., *supra* note 57; Halley, *supra* note 41; Bazelon, *supra* note 57.

result in more findings of responsibility for sexual assault at universities, and many of those findings would be correct. But some would be wrong, and that troubled these advocates committed to both feminist and due process values.

After President Trump took office in 2017, the DOE, under the leadership of its new, controversial Secretary Betsy DeVos, revoked the Obama administration's regulations and promulgated new ones.[59] These rules made complex changes. The feminist law professors and judges who had spoken out against the Obama rules supported some of these changed rules but not others.[60] Most importantly, for purposes of this Essay, the DeVos rules instituted much stricter due process protections for respondents in university student sexual misconduct proceedings.[61] One was to mandate that the standard of proof in such proceedings place the burden of persuasion on complainants; once again, if the evidence as to whether an assault occurred was inconclusive, the complainant would lose.[62] Social movement activists hotly debated the DeVos changes.[63] The result: with the coming of President Joseph R. Biden Jr., the DOE returned to the drawing board once again, and this time promulgated regulations that fell somewhere between the strongly pro-complainant positions of the Obama rules and the strongly pro-respondent positions of Secretary DeVos's approach.[64]

As Professor Jeannie Suk Gersen has explored, appropriate burdens of proof continue to be a major topic of contention, and she continues to offer suggestions and critiques on that front.[65] Here, then, is an example of due process-infused, social movement lawyering striving to come up with creative potential solutions to complex problems. The goal is to recognize the interests at stake on all sides of these proceedings rather than focus primarily on the interests of respondents, as traditional procedures did, which downplayed complainants' harms in favor of respondents' rights.[66] This is an example of social movement advocates offering important contributions by pointing out how conventional due process procedures can end up being unfair. These social movement reformers are trying to make processes fairer; what they are not doing is ceasing to care about fairness.

So far, I have argued that institutions and their agents *should* care about due process. In Part III below, I suggest that law-trained social movement activists may even have an ethical *duty* to do so.

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59. *See* Suk Gersen, *Devos*, *supra* note 56.
60. *See* Suk Gersen et al., *supra* note 57.
61. *See* Suk Gersen, *Devos*, *supra* note 56.
62. *See* Suk Gersen et al., *supra* note 57.
63. *See* Laura Jimenez, *3 Ways DeVos Has Put Students at Risk by Deregulating Education*, CTR. FOR AM. PROGRESS (May 30, 2019), https://www.americanprogress.org/article/3-ways-devos-put-students-risk-deregulating-education/ [https://perma.cc/J922-U9H5]; *see also* Katherine Knott, *Title IX Activists Reflect on Last Decade*, INSIDE HIGHER ED (Nov. 2, 2023), https://www.insidehighered.com/news/government/2023/11/02/title-ix-activists-continue-push-new-rule-reflect-progress-made [https://perma.cc/39Q9-FUXQ].
64. *See* 34 C.F.R. § 106 (2024).
65. *See* Suk Gersen, *Devos*, *supra* note 56.
66. *See id.*

III. LEGAL ETHICS AND DUE PROCESS VALUES

Adhering to due process values not only offers best practice guidance, I argue here, but may also present an ethical duty for law-trained social movement adherents. This is an aspect of the legal ethics of social movement lawyering that has thus far been overlooked. Here, I seek to make two interventions into this literature. First, I propose that the definition of "social movement lawyering" should be expanded to include not only lawyers who are representing social movement clients in legal matters, but also the many law-trained social movement adherents who bring their social movement values to their work in institutions that are not social movements per se. Second, I argue that just as ethicists of social movement lawyering have argued that law-trained social movement adherents have an obligation to promote social movement values in their work, they should also explore whether law-trained social movement advocates have an ethical duty to promote due process values within the institutions in which they carry out their social movement–influenced work.

A. Expanding the Definition of Social Movement Lawyering

As just noted, I propose expanding the term "social movement lawyering" to mean something broader than lawyering for clients that are social movement organizations. Scholars of social movement lawyering should start recognizing that social movements exist as *chains of like-minded individuals located in a wide variety of institutional settings*, who try to bring about social change according to visions their adherents share. On this definition, social movement lawyering refers to all law-related work that law-trained individuals perform within institutions in furtherance of their commitments to social movement values.

As many have observed, it can be hard to draw the line between when law-trained persons acting in furtherance of social movement objectives are engaged in lawyering as opposed to activism.[67] Here, I add another proposition: law-trained activists often engage in social movement lawyering even when they are not formally representing social movement clients. In much the same way as the eye cannot stop seeing, law-trained activists in positions to influence institutions typically bring both their visions of justice and their legal skills to bear on the problems they handle. Their visions of justice may or may not be shared by the leaders of the institutions in which they find themselves. Regardless, law-trained social movement actors typically feel a duty to promote the social movement objectives they hold dear within the institutions they serve. Their formal role

67. *See* Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 455–56 (2018); Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 446 (1996).

in their institutions need not be to implement movement values, but they try to do so anyway because they believe this is the moral or ethical way to proceed. Think of professors, heads of departments, human resources managers, recruiters, administrators, service providers, members of a general counsel's office, and the like.

I thus propose that social movement lawyering encompasses (1) the work of law-trained adherents of social movements that is (2) aimed at pursuing the objectives of those social movements, and (3) takes place within institutions that may, but need not necessarily, share those social movement values, or may do so in some quarters or aspects even though implementing social movement goals is not the institution's core mission. I adopt this broad definition because it is consistent with my observations as to what law-trained social movement activists actually do in institutions, at an empirical level, and because being in positions to influence institutions toward social movement goals appears, at the normative level, to raise legal ethics strictures that attach to lawyers whether they are representing a client or engaging in law-adjacent work.[68]

To date, the literature on the ethics of social movement lawyering has not focused on due process values. But that literature has delved deeply into a wide range of other related ethical considerations, as I briefly summarize below to situate my intervention in context.

B. Due Process Values as Part of Social Movement Lawyering Ethics

Ever since Professor Derrick Bell identified troubling ethics questions about social movement lawyering,[69] scholarship on lawyering and social movements has focused on the special ethical issues social movement lawyers confront.[70] This scholarship has pointed out a wide variety of concerns, which can be loosely gathered into several buckets. First, there is a literature that continues in the vein of Professor Bell's classic article in examining how lawyers, who typically possess a great deal of power and privilege, may deploy those advantages inappropriately by, for example, exerting too much control over the decisions of clients who lack those advantages.[71] A second, related literature examines the microdynamics of client-lawyer interactions where there is a wide gulf between the power and

68. *Cf.* MODEL RULES OF PRO. CONDUCT r. 5.7 cmt. 2 (AM. BAR ASS'N 2024) ("[T]he conduct of a lawyer involved in the provision of law-related services is subject to [the Rules of Professional Conduct] that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services.").

69. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

70. *See, e.g.*, Carle & Cummings, *supra* note 67, at 450 (arguing that social movement lawyering raises ethics concerns not adequately addressed in the American Bar Association's Rules).

71. *See, e.g.*, GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 26–28 (1992). Contributions in this genre often criticized social movement lawyers for being insufficiently accountable to clients and instead imposing their own visions of social movement objectives. *See id.*

privilege of client and lawyer.[72] A third literature focuses on how lawyers may fail to adhere to social movement objectives by being unduly lawyerly.[73] In translating social movement objectives into legal representations, for example, lawyers may dilute or deradicalize social movements or act in ways that contribute to the cooptation of social movement goals.[74] My intervention points in the opposite direction; I argue that lawyers *should* push for certain law-related values to temper social movements' zeal.

All of this literature contributed to the education of new generations of social movement lawyers, in clinics and other law school settings, to recognize and respond with sensitivity and good judgment to ethics issues in social movement related work.[75] In *An Equal Place*, a definitive empirical study of how social movement lawyers represent client organizations today,[76] Professor Scott L. Cummings documents a host of ways in which lawyers contribute to social movements without becoming so self-effacing as to render little value.[77] Most relevant to this Essay, Professor Cummings describes how lawyers help construct frameworks, structures, and processes within institutions.[78] Lawyers help design methods through which movement participants can engage in governance, reach decisions, process conflict, and identify and advance their collective goals.[79]

Professor Cummings's work raises, to my mind, the question whether, in helping to design and/or reform institutional processes consistent with social movement goals, lawyers should engage in translational or bridging work that promotes due process values. In the short space I have left here, I propose that as an important question for legal ethics scholars focusing on social movement lawyering to explore. To date, these scholars have focused most attention on the ethical importance of lawyers furthering the values of

72. *See generally* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 21–28 (1990) (analyzing the relationship between a client—who wanted to offer a subtle, effective case theory focused on her dignitary interest in buying her children Sunday shoes with funds the state mistakenly paid her—and a new legal services lawyer who failed to appreciate her client's goals).

73. *See, e.g.*, LÓPEZ, *supra* note 71, at 40–41 (critiquing "regnant" lawyering models as too deferential to formal law and not creative or responsive enough to the needs of marginalized communities); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 1–9 (1989) (tracing how the regulatory policies that developed to contain the labor movement ended up deradicalizing that movement).

74. *See supra* note 73 and accompanying text.

75. Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on Community Lawyering: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359, 371–75 (2008) (exploring how to promote clinical students' community engagement).

76. *See* SCOTT L. CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES 446 (2021).

77. Lawyers can serve as technicians in assessing complex data, engage in creative problem solving, bridge interdisciplinary divides, and engage in translational work. They can defend legal, political, and policy gains from attack, both in court and by using alternative strategies including electoral and media campaigns, and they can contribute in all these ways to affirmative legal campaigns. *Id. passim.*

78. *Id. passim.*

79. *Id. passim*; Carle & Cummings, *supra* note 67, at 457.

social movements, as just discussed, but scholars should also consider whether lawyers' translational work should include bringing due process values into social movements.

One key consideration supporting this proposal rests on furthering social justice goals. Pointing out the importance of fairness to individuals can help social movements avoid reproducing the problems of injustice they seek to correct. Lawyers can temper social movements, not in ways that co-opt them, but to ensure that they do not turn into the oppressors they oppose, just with different people misusing power. When that happens, institutional actors with power who believe in social movement goals may claim to be furthering social justice but may, in fact, be doing the opposite.

Despite the generally excellent legal ethics training law students receive today, I am not aware of training in due process values in social movement seminars. Some of my students who are deeply immersed in the ethos of various social movements have suggested, for example, that complainants should always be taken at their word. Why, these students express with incredulity, would anyone complain of race- or sex-based misconduct if it had not actually occurred? In response, I remind students of the so-called Scottsboro Boys, young Black men traveling on a train through Tennessee and Alabama whom two white women falsely accused of rape.[80] Those nine defendants were convicted and sentenced to death despite a lack of any evidence,[81] after which the NAACP and others fought for decades for their exoneration.[82] A robust literature attests to how race continues to activate U.S. racial narratives and stereotypes in the worst of ways.[83] And even outside these contexts, sometimes people have motivations, impulses, or misunderstandings that lead them to make claims that are distorted, misleading, or flat-out untrue.

It seems to me important that social movement lawyers remain grounded in the realization that best intentions can go awry to unjust results. Law school educators should offer this tempered, big-picture perspective to future generations of social movement lawyers. Social movement lawyers trained this way can engage in translational work between movement and legal consciousness—in *both* directions—by promoting the use of due process basics aimed at preventing unfairness and injustice, writ large or small, within the institutions they serve.

CONCLUSION

Seeking to contribute to the developing literature on the legal ethics of social movement lawyering, I have put forward the following five propositions.

80. *See* DAVID CATES, THE SCOTTSBORO BOYS 14–20 (2012).
81. *See id.* at 6–8.
82. *See id.* at 34–41, 96–99.
83. *See supra* note 40 and accompanying text.

First, social movements' tendency to disregard due process values presents a troubling trend in the United States today. Both sides of the political spectrum display this tendency in abundance. The results contribute to dangerous levels of political polarization and stoke shifts toward totalitarianism that should send up alarm bells in assessing the results of the 2024 national elections.

Second, law-trained social movement adherents should not only work to further the values of the social movements they believe in, but also to imbue due process values into their work.

Third, the term social movement lawyering should encompass not only the work of lawyers who have social movement organizations as clients, but also the work of law-trained individuals who seek to further the values of one or more social movements within institutions. These institutions may or may not be committed to social movement goals, or may be so committed in part or in some quarters or aspects but not others. Seen from this perspective, social movements are best viewed as inchoate institutions burrowed into other institutions; they are chains of like-thinking individuals located in a wide variety of institutional settings, who are trying to bring about change according to visions shared among social movement adherents.

Fourth, under the definition just proposed, social movement lawyering should be viewed to include the work of law-trained individuals adjacent to law where such individuals bring skills, educational assets, and judgment informed by legal training to their work.

Fifth, legal ethicists focusing on social movement lawyering should evaluate whether such law-trained actors have a duty to encourage institutions to adhere to due process values as they exercise power over individuals in furtherance of social movement goals. History teaches that dangerous dynamics arise when social movements descend into mere interest-group politics in which some people exercise unfair and arbitrary power over others. The ethics precept I propose would help keep social movements pointed toward the objective of bringing about a more just and fair world. This is one place where law-trained participants in social movements can make an important contribution—by synthesizing social movement and due process values and taking steps to reform institutions by developing procedures to enhance fairness and justice goals.