

# READY, FIRE, AIM: How Universities Are Failing the Constitution in Sexual Assault Cases

Tamara Rice Lave\*

## ABSTRACT

*This Article looks critically at the procedural protections American universities give students accused of sexual assault. It begins by situating these policies historically, providing background to Title IX and the different guidelines promulgated by the Department of Education. Next, it presents original research on the procedural protections provided by the fifty flagship state universities. In October 2014, university administrators were contacted and asked a series of questions about the rights afforded to students, including the standard of proof, right to an adjudicatory hearing, right to confront and cross examine witnesses, right to counsel, right to silence, and right to appeal. This Article describes findings and then compares them with prior studies. After arguing that state university students are entitled to procedural due process, this Article uses the balancing test from *Matthews v. Eldridge* to evaluate whether universities are adequately protecting the due process rights of the accused. This Article concludes by considering how universities can more fairly and effectively respond to sexual assault.*

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\* Associate Professor, University of Miami School of Law. BA, Haverford College; JD Stanford Law School, PhD, University of California, Berkeley. I am indebted to Gabriel (Jack) Chin, Donna Coker, Charlton Copeland, Caroline Corbin, Michael Fromkin, Patrick Gudridge, Edward Rubin, Steve Schnably, Scott Sundby, and Bob Weisberg for their insightful comments and criticisms. I would also like to thank the participants at the 2015 New Voices in Legal Theory Roundtable (especially Helga Varden) for their helpful feedback. I additionally owe a tremendous thank you to fabulous research assistants that have helped with this project: Shanise Lawrence, Melanie Spencer, Andrea Sinner, and Dexter Whitley. Finally, I would like to thank the editors at the Arizona State Law Journal for their careful editing.

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## INTRODUCTION

On December 7, 2012, Erica Kinsman,<sup>1</sup> then a freshman at Florida State University (FSU), reported to campus police that she had been raped.<sup>2</sup> Because the attack occurred off campus, Tallahassee police were called.<sup>3</sup> Erica stated that she had been drinking at a popular bar, when she ended up in a taxi with three men, all strangers.<sup>4</sup> They brought her to an apartment

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1. Erica Kinsman is being called by name because she publicly identified herself in a documentary first shown at the Sundance Film Festival entitled, *The Hunting Ground*. Tyler Kingkade, *Erica Kinsman, Woman Who Accused Jameis Winston of Rape, Goes Public for the First Time*, HUFFINGTON POST (Jan. 26, 2015, 12:38 PM), [http://www.huffingtonpost.com/2015/01/26/erica-kinsman-jameis-winston\\_n\\_6539916.html](http://www.huffingtonpost.com/2015/01/26/erica-kinsman-jameis-winston_n_6539916.html).

2. TALLAHASSEE POLICE DEP'T, INCIDENT REPORT 2 (2012), <http://www.talgov.com/uploads/public/documents/assets/news/tpd-documents.pdf>.

3. *Id.*

4. *Id.*

where she claimed that one of them raped her.<sup>5</sup> After being transported back to campus on the back of her assailant's scooter, Erica told a friend what happened, and the friend called the police.<sup>6</sup>

The responding officer wrote that "as the investigation continued several bruises began to appear on the victim."<sup>7</sup> Erica was transported to the hospital where her injuries were photographed, and samples were taken to test for the presence of semen.<sup>8</sup> One month later, Erica told the investigating officer that she recognized the man who raped her from one of her classes.<sup>9</sup> His name: FSU football sensation, Jameis Winston.<sup>10</sup>

Despite the identification, it took eleven months for Jameis' DNA to be tested and compared with the semen found on Erica's underwear.<sup>11</sup> In the meanwhile, the FSU police secured a copy of the Tallahassee report, which they gave to administrators in the Athletic Department, who then turned it over to Jameis' lawyer.<sup>12</sup> All this happened before the prosecutor was even notified of the case. Jameis' lawyer was able to secure signed affidavits from Jameis' friends before they were interviewed by law enforcement, and both swore that they had seen Jameis and Erica having consensual sex. Claiming he would be unable to secure a conviction, the prosecutor chose not to file charges.<sup>13</sup>

Soon after, Jameis won the Heisman Trophy and led FSU to a national championship. Although Title IX requires that allegations of sexual assault be resolved quickly, Jameis' conduct hearing did not take place until twenty-four months after the purported attack.<sup>14</sup> Retired Florida Supreme Court

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. E-mail from Erica Buckley, Investigator, to Jill Allison (Nov. 27, 2013, 12:53 PM) (on file with author); Jill Allison, Report from Fla. Dep't of Law Enf't (Dec. 2, 2013) (on file with author).

12. Kevin Vaughan, *Documents: Police, FSU Hampered Jameis Winston Investigation*, FOXSPORTS (Oct. 10, 2014, 4:23 PM), <http://www.foxsports.com/college-football/story/jameis-winston-florida-state-tallahassee-police-hindered-investigation-documents-101014>.

13. One of the reasons given was that Erica Kinsman had semen from two sources, Jameis Winston and another person. Erica explained that the other person was her boyfriend, but that explanation did not change the prosecutor's decision. Julie Montanaro, *FSU QB Jameis Winston Won't Face Charges*, WCTV (Dec. 6, 2013), <http://www.wctv.tv/sports/headlines/BREAKING-231816891.html>.

14. Jerry Hinnen, *Jameis Winston's Conduct Hearing Concludes on Its Second Day*, CBSSPORTS.COM (Dec. 3, 2014), <http://www.cbssports.com/college-football/news/jameis-winstons-fsu-conduct-hearing-concludes-on-its-second-day/>.

Justice Major Harding conducted the inquiry, and on December 19, 2014, he issued a finding that Jameis had not violated the FSU Code of Student Conduct.<sup>15</sup> Erica voiced dismay at the result and later filed civil suit against the university.<sup>16</sup> On January 25, 2016, FSU agreed to pay Kinsman \$950,000 to settle the case.<sup>17</sup> Although it did not admit fault, FSU did assent to provide five years of sexual assault awareness programs and to publish the results of those programs.<sup>18</sup>

Exactly two years later, on December 7, 2014, San Diego State University (SDSU) sophomore, Francisco Sousa, met Jane Doe<sup>19</sup> at an off-campus party. Although Jane would later claim otherwise, text messages show that they planned on meeting at the event.<sup>20</sup> At one point in the evening, Francisco led Jane by the hand to the bathroom where she orally copulated him.<sup>21</sup> Francisco contended that the sex was consensual; indeed he said that she had done this to him on a prior occasion.<sup>22</sup> Despite a picture of the two kissing a few weeks earlier and flirtatious text messages stretching for several weeks before, and then immediately after, the alleged attack,<sup>23</sup> Jane told the police that she did not know Francisco well. She said the sex was forced.

Two days after the party, San Diego Police arrested Francisco for forcible oral copulation and false imprisonment.<sup>24</sup> He bailed out the next day.<sup>25</sup> On December 9, SDSU issued a notice of interim suspension,<sup>26</sup> and on December

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15. Kevin Vaughan, *Full Copy of Jameis Winston Hearing Decision*, FOXSPORTS (Dec. 21, 2014, 6:27 PM), <http://www.foxsports.com/college-football/story/full-copy-of-jameis-winston-hearing-decision-122114>.

16. *Doe v. Fla. State Univ. Bd. of Trs.*, No. 4:15-cv-00235-MW-CAS (M.D. Fla. Jan. 7, 2015).

17. Marc Tracy, *Florida State Settles Suit over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), [http://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html?\\_r=0](http://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html?_r=0).

18. *Id.*

19. Jane Doe is not her real name.

20. Letter from Michael D. McGlenn, Att’y for Francisco Sousa, to Dr. Lee Mintz, Dir., Ctr. for Student Rights and Responsibilities, San Diego State 2 (Mar. 12, 2015) [hereinafter Letter from McGlenn] (on file with author).

21. *Id.*

22. *Id.*

23. *Id.* at 2–3.

24. Michael Fleeman, *Arrest Made in San Diego Rape, One of a String near College Campus*, REUTERS (Dec. 10, 2014, 4:11 PM), <http://www.reuters.com/article/2014/12/10/us-usa-rape-california-idUSKBN0JO2AQ20141210>.

25. Angie Lee & Richard Allyn, *SDSU Sex Assault Suspect Out on Bail*, CBS8.COM (Dec. 10, 2014, 6:23PM), <http://www.cbs8.com/story/27599987/sdsu-sex-assault-suspect-out-on-bail>.

26. Petition for Writ of Mandate at 18, *Sousa v. San Diego State Univ.*, No. 37-2015-00011119-CU-WM-CTL (Cal. Super. Ct. Apr. 2, 2015), <http://www.avoiceformalestudents.com/wp-content/uploads/2015/04/Petition-for-Writ-of->

12, Francisco was notified that he was alleged to have sexually assaulted a member of the campus community. An investigatory meeting was set with SDSU Title IX Coordinator, Lee Mintz, for December 15.<sup>27</sup> SDSU also issued a community Safety Alert via email notifying students of the alleged assault and naming Francisco as the suspect.

At the hearing on December 15, Francisco requested to review the basis of the allegations against him, including any written statements made by the complainant or any other witnesses. Mintz told Francisco she would turn over this information at some future date and then urged him to make a statement, saying that she could “reach a decision in the Title IX portion of the investigation at any point.”<sup>28</sup> Mintz also informed Francisco that “he would not be entitled to a hearing on the Title IX portion of the matter, he would not have the right to confront his accuser, he had no right to direct participation of counsel, she would make findings of fact and reach conclusions of law and mete out a sanction, and he would not be entitled to an appeal.”<sup>29</sup>

On nine different occasions, from December 12, 2014 to March 12, 2015, Francisco sent letters through his attorneys formally requesting information about the charges against him. On February 6, 2015, he sent Mintz a letter containing evidence that supported his innocence. Five days later, the San Diego County District Attorney’s Office elected not to file charges in the case.

On March 5, Francisco sent another letter to Mintz, this time with copies of the San Diego State Police Report that his lawyer independently obtained. In this letter, Francisco pointed out inconsistencies between Jane’s account (which he was reading for the first time) and text messages and other documentation. Once again, Francisco requested information about the case, including a copy of the complaint that Jane had made with Mintz, which was referenced but not included in the police report. On April 2, after sixteen months of waiting, Francisco filed a writ in superior court, requesting that SDSU be ordered to provide notice of the allegations and evidence against him as well as a reasonable opportunity to provide responsive evidence.<sup>30</sup>

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Mandate-Francisco-Sousa-San-Diego-State-University-filed-2015-4-2.pdf (attached “Notice of Interim Suspension” from Eric Rivera San Diego State University’s Vice President for Student Affairs to Francisco Sousa).

27. Letter from Lee Mintz, Dir., Ctr. for Student Rights and Responsibilities, San Diego State Univ., to Francisco Sousa (Dec. 12, 2014) (on file with author).

28. Petition for Writ of Mandate, *supra* note 26, at 6–7.

29. Letter from McGlenn, *supra* note 20, at 4.

30. Petition for Writ of Mandate, *supra* note 26, at 6–7.

High profile cases like that of Erica Kinsman and Francisco Sousa have brought a much-needed spotlight to campus rape. In 2011, the Department of Education, Officer of Civil Rights (OCR) issued its Dear Colleague Letter (DCL), in which it called the statistics on sexual violence “deeply troubling and a call to action for the nation.”<sup>31</sup> It then cited a study by the National Institute of Justice (NIJ) which, according to OCR, had found “about 1 in 5 women are victims of completed or attempted sexual assault while in college.”<sup>32</sup> As it turns out, OCR’s statement was misleading. The NIJ study looked only at two large public universities, and the findings were not nationally representative.<sup>33</sup> Nor in subsequent communications did OCR ever discuss the results of a nationally representative study conducted by the Department of Justice that found significantly lower rates of rape and sexual assault among college women.<sup>34</sup>

OCR reminded universities that sexual violence constitutes a form of discrimination under Title IX.<sup>35</sup> It told universities that in order to be in compliance, they had to change disciplinary proceedings to more effectively hold rapists accountable.<sup>36</sup> Since college discipline is civil and not criminal, it is not subject to the same constitutional constraints like the accused’s right to confront and cross examine witnesses<sup>37</sup> and the state’s burden to prove its case beyond a reasonable doubt.<sup>38</sup> In no uncertain terms, OCR told universities that they had to reduce the standard of proof in disciplinary proceedings to a preponderance of the evidence, and it strongly discouraged

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31. Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Title IX Coordinators 2 (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. Statistics on campus sexual assault will be discussed in more detail below.

32. *Id.*

33. See CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY vii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

34. SOFI SINOZICH & LYNN LANGTON, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE AGE FEMALES, 1995-2013, at 1 (Dec. 2014). Note that the NCVS has been criticized for underestimating the incidence of rape and sexual assault. See PANEL ON MEASURING RAPE & SEXUAL ASSAULT IN BUREAU OF JUSTICE STATISTICS HOUSEHOLD SURVEYS, NAT’L RESEARCH COUNCIL, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 4–5 (Candace Kruttschnitt et al. eds., National Academies Press, 2014).

35. Dear Colleague Letter, *supra* note 31, at 1.

36. *Id.* at 1–3, 7–14.

37. See U.S. CONST. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (holding that this bedrock procedural guarantee applies to both federal and state prosecutions); see also *Crawford v. Washington* 541 U.S. 36, 61 (2004) (The Sixth Amendment “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

38. *In re Winship*, 397 U.S. 358, 364 (1970).

them from allowing the parties to directly question one another.<sup>39</sup> It also told universities that they should not allow the respondent to review the complainant's statement unless she was able to review his.<sup>40</sup> OCR threatened to withhold federal funding to universities that did not adequately respond,<sup>41</sup> and it later published a list that continues to grow of those under investigation.<sup>42</sup> OCR has found that a number of schools were in violation of Title IX, including Princeton University<sup>43</sup> and Harvard Law School.<sup>44</sup> These schools have since reached settlements with OCR, in which they agreed to change the way they handle sexual assault so as to meet the protocol set forth in the DCL.<sup>45</sup>

Some applaud OCR's efforts,<sup>46</sup> including at least ninety professors who signed a recently released White Paper in support of the DCL,<sup>47</sup> but others contend that universities have gone too far in sacrificing the rights of the

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39. *Id.* at 11–12.

40. *Id.*

41. *Id.* at 16.

42. See *infra* notes 100–01 and accompanying text.

43. *Princeton University Found in Violation of Title IX, Reaches Agreement with U.S. Education Department to Address, Prevent Sexual Assault and Harassment of Students*, U.S. DEP'T OF EDUC. (Nov. 5, 2014) [hereinafter *Princeton Violation*], <http://www.ed.gov/news/press-releases/princeton-university-found-violation-title-ix-reaches-agreement-us-education-department-address-prevent-sexual-assault-and-harassment-students>.

44. *Harvard Law School Found in Violation of Title IX, Agrees to Remedy Sexual Harassment, Including Sexual Assault of Students*, U.S. DEP'T OF EDUC. (Dec. 30, 2014) [hereinafter *Harvard Violation*], <http://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-including-sexual-assault-students>.

45. See *Harvard Violation*, *supra* note 30; *Princeton Violation*, *supra* note 29.

46. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1978 (2016); Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 149–74 (2013); Lavinia M. Weizel, Note, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1642–55 (2012).

47. See KATHERINE K. BAKER ET AL., TITLE IX AND THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 12–15 (2016).

accused.<sup>48</sup> Members of the law faculty at both Harvard<sup>49</sup> and the University of Pennsylvania<sup>50</sup> have publicly called for greater procedural rights for the accused, and a Senior Fellow at Stanford University's Hoover Institute decried OCR's Dear Colleague Letter (DCL) for "institutionalizing a presumption of guilt in sexual assault cases."<sup>51</sup> In addition, the popular press started to call attention to the experiences of men who say their universities never gave them a meaningful chance to defend themselves before finding them responsible for rape and expelling them.<sup>52</sup>

More significantly, Congress and the courts have begun to take notice of the impact the DCL has had on college campuses. On January 7, 2016, in a move that may signal the demise of the DCL in a Republican controlled Congress, Senator James Lankford, Chairman of the Subcommittee on Regulatory Affairs and Federal Management, U.S. Senate Committee on Government Affairs and Homeland Security, wrote a letter to the Acting Secretary for the Department of Education demanding that DOE provide

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48. See William A. Jacobsen, *Accused on Campus: Charges Dropped, but the Infamy Remains*, LEGAL INSURRECTION (May 16, 2015, 8:30 PM), <http://legalinsurrection.com/2015/05/accused-on-campus-charges-dropped-but-the-infamy-remains/>; see also Ryan D. Ellis, Note, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 80–81 (2013); Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 599 (2013); Stephen Henrick, Note, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 50–51 (2013); Naomi Shatz, *Feminists, We Are Not Winning the War on Campus Sexual Assault*, HUFFINGTON POST (Oct. 29, 2014, 6:44 PM), [http://www.huffingtonpost.com/naomi-shatz/feminists-we-are-not-winn\\_b\\_6071500.html](http://www.huffingtonpost.com/naomi-shatz/feminists-we-are-not-winn_b_6071500.html).

49. Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

50. David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty, Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, PHILLY.COM (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf>.

51. Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), <http://www.wsj.com/articles/SB10001424053111903596904576516232905230642>.

52. Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014, 1:12 PM), <http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them>; Teresa Watanabe, *More College Men Are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES (June 7, 2014, 6:15 PM), <http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html>; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html).

statutory authority for the DCL.<sup>53</sup> Although Catherine E. Lhamon, the Assistant Secretary for Civil Rights, wrote a response,<sup>54</sup> Lankford was not satisfied:

I again call on you personally to clarify that these policies are not required by Title IX, but reflect only one of various ways schools may choose to develop and implement policies for the prevention and remedy of sexual harassment and sexual violence that best meet the needs of their students and are compliant with federal law. I further ask that you immediately rein in the regulatory abuses within the Department of Education and take measures to ensure that all existing and future guidance documents issued by your agency are clearly and firmly rooted in statutory authority.<sup>55</sup>

Even if Congress does not pass legislation that specifically strikes down the DCL, courts across the country have been finding that current protections violate procedural due process.<sup>56</sup> For example, in July 2015, a judge ordered the University of California, San Diego to reverse the suspension of a male student because the disciplinary proceedings violated his due process rights,<sup>57</sup> and nine months later, a different judge overturned the suspension of a University of Southern California student on the ground that he was denied a fair hearing and the substantive evidence did not support the Appeal Panel's findings.<sup>58</sup> On March 31, 2016, the Massachusetts District Court ruled in favor of a Brandeis University student who had been found responsible for

53. Letter from Sen. James Lankford, Chairman, Subcomm. on Reg. Aff. & Fed. Mgmt., Comm. on Homeland Sec. & Gov't Aff., U.S. Senate, to The Hon. John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Jan. 7, 2016), <http://www.scribd.com/doc/294821262/Sen-Lankford-letter-to-Education-Department>.

54. Letter from Catherine E. Lhamon, Assistant Sec'y of C.R., to The Hon. James Lankford, Chairman, Subcomm. on Reg. Aff. & Fed. Mgmt., Comm. on Homeland Sec. & Gov't Aff., U.S. Senate (Feb. 17, 2016), <http://chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf>.

55. Letter from Sen. James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., Comm. on Homeland Sec. & Gov't Affairs, U.S. Senate, to The Hon. John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Mar. 4, 2016), <http://www.lankford.senate.gov/imo/media/doc/3.4.16%20Lankford%20letter%20to%20Dept.%20of%20Education.pdf>.

56. See Jake New, *Court Wins for Accused*, INSIDE HIGHER EDUC. (Nov. 5, 2015), <https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges>.

57. *Doe v. Regents of Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at \*6 (Cal. Super. Ct. July 10, 2015).

58. *Doe v. Univ. of S. Cal.*, 200 Cal. Rptr. 3d 851, 877 (Ct. App. 2016).

“serious sexual transgressions.”<sup>59</sup> The court wrote, “Brandeis appears to have substantially impaired, if not eliminated, an accused student’s right to a fair and impartial process.”<sup>60</sup> The court was particularly troubled by the deprivation of the right to cross-examine<sup>61</sup> as well as the lack of notice about the underlying allegations.<sup>62</sup>

Although many have opined on this new world of university disciplinary proceedings, inadequate attention has been paid to the rights actually being afforded to students. A 1999 study by Berger and Berger looked at procedural protections in state and private universities, but they focused on cases of academic misconduct.<sup>63</sup> In 2002, Karjane, Fisher, and Cullen conducted a Department of Justice funded study into how institutions of higher education (IHEs) respond to sexual assault.<sup>64</sup> Their study was extensive, and it included a content analysis of published sexual assault policy materials from a nationally representative sample of IHEs.<sup>65</sup> Although the scope of this work is extraordinary, it took place before the 2011 DCL, and so it may not reflect current practices.

This leaves a major gap in the literature, which this Article attempts to fill. It provides a systematic description, based on original research, of the procedural protections that the fifty flagship state universities provide when a student is accused of sexual assault. Emphasizing the importance of process should not be confused with minimizing the seriousness of rape, which is “one of the most severe of all traumas, causing multiple, long-term negative outcomes, such as posttraumatic stress disorder (PTSD), depression, substance abuse, suicidality, repeated sexual victimization, and chronic

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59. *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at \*4 (D. Mass. Mar. 31, 2016).

60. *Id.* at \*6.

61. *Id.* at \*34–35 (“While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns. . . . Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.”).

62. *Id.* at \*34.

63. Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 301 (1999).

64. See generally HEATHER M. KARJANE, BONNIE S. FISHER & FRANCIS T. CULLEN, CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

65. *Id.* at vi.

physical health problems.”<sup>66</sup> Instead this Article takes the position that rape is a serious problem but that reducing procedural protections is the wrong way to address it.

This Article begins by situating university disciplinary proceedings legally and historically. It then moves to the central contribution—the study of procedural protections afforded at the fifty flagship state universities. After describing research methods, it presents findings and compares them with prior studies. This Article then uses insights from studies on deception and bias to argue that the protections most schools afford are constitutionally inadequate. This Article concludes by considering how universities can more fairly and effectively respond to sexual assault.

## I. BACKGROUND

On July 2, 1964, President Lyndon B. Johnson signed the 1964 Civil Rights Act into law.<sup>67</sup> Although much of the Act was aimed at preventing discrimination on the basis of race, color, religion, or national origin,<sup>68</sup> Title VII—which banned workplace discrimination—specifically included sex as a protected class.<sup>69</sup> Eight years later, Congress extended the protection against sex discrimination to the classroom with Title IX.<sup>70</sup> Enacted as part of the Educational Amendments of 1972, Title IX barred sex discrimination in any education program or activity receiving federal financial assistance.<sup>71</sup> Although there were exceptions, such as for fraternities, any institution that violated Title IX could lose federal funding.<sup>72</sup>

At first, Title IX was interpreted narrowly.<sup>73</sup> In *Grove City College v. Bell*, the Supreme Court held that Title IX did not apply to an entire institution, but

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66. Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical and Health Systems*, 63 AM. PSYCHOLOGIST 702, 703 (2008).

67. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000 (2012)).

68. *Id.* §§ 201, 601 (codified as amended at 42 U.S.C. §§ 2000(a), 2000(d) (2012)).

69. *Id.* § 703(a)(1) (codified as amended at 42 U.S.C. § 2000e-2(a) (2012)).

70. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–03, 86 Stat. 235, 373–75 (1972) (codified at 20 U.S.C. § 1681 (2012)).

71. *Id.*

72. *Id.* §§ 901(a)(5), 902 (codified as amended at 20 U.S.C. 1681(a)(5) (2012)).

73. See Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 113 n.119 (1992); Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1108–09 (1998).

just to the particular program receiving federal assistance.<sup>74</sup> Congress responded by enacting the Civil Rights Restoration Act of 1987 to clarify the “broad application of Title IX.”<sup>75</sup> It explicitly extended Title IX “to all of the operation[s] of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance.”<sup>76</sup>

It took a while for courts to agree that Title IX extended to peer sexual harassment,<sup>77</sup> but in *Davis v. Monroe County Board of Education*, the Supreme Court answered the question definitively, holding that Title IX did apply to peer-on-peer sexual harassment.<sup>78</sup> In an opinion authored by Justice Kennedy, the Court wrote: “Having previously held that such harassment is ‘discrimination’ in the school context under Title IX, this court is constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.”<sup>79</sup>

The Court then determined that a school could be held liable for monetary damages in a private lawsuit if one student sexually harasses another in the school’s program.<sup>80</sup> To prevail, the complainant had to meet the conditions of notice and indifference set forth in *Gebser v. Lago Vista Independent School District*.<sup>81</sup> In *Gebser*, the Court held that the standard of liability set forth in the 1997 Policy Guidance was too lax,<sup>82</sup> and to recover damages the plaintiff had to prove that “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s

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74. *Grove City Coll. v. Bell*, 465 U.S. 555, 573–74 (1984).

75. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 2(1), 102 Stat. 28 (1998).

76. Education Amendments of 1972 § 908(2)(A). Note that the law actually reached more broadly, to extend for instance to “a department, agency, special purpose district, or other instrumentality of a State or of a local government.” *Id.* § 908(1)(A).

77. *See Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir. 1996) (affirming summary judgment in favor of the school district on the ground that Title IX did not impose liability for peer sexual harassment because it only covered acts perpetrated by recipients of federal grants).

78. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 653–54 (1999).

79. *Id.* at 630–31.

80. *Id.* at 640–41. The Court had previously held in *Franklin v. Gwinnet County Public Schools*, 503 U.S. 60 (1992), that students had a private right to damages when their Title IX rights were violated.

81. *Davis*, 526 U.S. at 641–42 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998)).

82. *Gebser*, 524 U.S. at 292–93.

programs” and “refuses to take action to bring the recipient into compliance.”<sup>83</sup>

These rulings are significant because they extended the federal government’s power to police colleges and universities. As long as a school receives federal funding, the institution is required to comply with Title IX.<sup>84</sup> Federal student loans count, which effectively makes every college and university subject to Title IX.<sup>85</sup> And since institutions are now liable for the harassment of one student against another, they can no longer afford to just ignore what happens in dorm rooms and fraternities. At the same time, however, the Court showed that it would not hesitate to reign in the Department of Education (DOE) if the Justices disagreed with its interpretation of Title IX.

Despite the high standard of proof for liability, universities face significant lawsuits. United Educator (UE), which provides insurance to 1,200 member universities, recently began offering insurance to cover sexual assault payouts.<sup>86</sup> Between 2006 and 2010, UE paid out \$36 million; 72% of the settlements were provided to parties suing the schools for incidents of sexual assault.<sup>87</sup> In 2014, the University of Connecticut settled a \$1.28 million suit, and the University of Colorado at Boulder settled a suit for \$825 thousand.<sup>88</sup>

#### A. Department of Education, Office of Civil Rights

Congress explicitly left enforcement of Title IX in the hands of the departments and agencies that allocated federal funds to education programs and/or activities.<sup>89</sup> These agencies were “authorized and directed” to effectuate the prohibition against sexual discrimination.<sup>90</sup> They were supposed to do so “by issuing rules, regulations, or orders of general

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83. *Id.* at 290.

84. *Id.* at 285–87.

85. *Title IX: Title IX Legal Manual*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/title-ix#A.%C2%A0%20Federal%20Financial%20Assistance> (last visited Nov. 6, 2016).

86. *Id.*

87. Gayle Nelson, *The High Cost of Sexual Assaults on College Campuses*, NONPROFIT Q. (June 23, 2015), <https://nonprofitquarterly.org/2015/06/23/the-high-cost-of-sexual-assaults-on-college-campuses/>.

88. LARGE LOSS REPORT 2015, UNITED EDUCATORS INS. 5 (2015), [https://www.ue.org/uploadedFiles/Large\\_loss\\_2015\\_Final.pdf](https://www.ue.org/uploadedFiles/Large_loss_2015_Final.pdf).

89. 20 U.S.C. § 1682 (2012).

90. *Id.*

applicability.”<sup>91</sup> Compliance with these rules could be achieved “(1) by the termination of or refusal to grant or to continue assistance under such program or activity . . . or (2) by any other means authorized by law.”<sup>92</sup> OCR has published three guides to how schools should adjudicate sexual assault cases.<sup>93</sup>

### 1. 1997 Guide

In 1997, OCR published its first official guidance in the Federal Register on how schools should investigate and resolve allegations of sexual harassment.<sup>94</sup> Before drafting the document, OCR met with representatives from interested parties, including students, teachers, school administrators and researchers.<sup>95</sup> It also twice publicly requested comments.<sup>96</sup>

In the 1997 Guide, OCR enumerated certain factors that grievance procedures should contain in order to be in compliance with Title IX. They included provisions providing for notice to students and other interested parties, such as “adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence”; “designated and reasonably prompt time frames for the major stages of the complaint process”; notice of the outcome to the parties; and “an assurance that the school will take steps to prevent reoccurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.”<sup>97</sup> OCR explicitly permitted schools to use a general student disciplinary procedure in responding to sexual harassment.<sup>98</sup>

The 1997 Guide also discussed the due process rights of the accused. OCR wrote: “[t]he rights established under Title IX must be interpreted

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91. *Id.*

92. *Id.*

93. See generally U.S. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>; *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T OF EDUC., [hereinafter *Sexual Harassment Guidance 1997*], <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited Nov. 7, 2016); Dear Colleague Letter, *supra* note 31.

94. *Sexual Harassment Guidance 1997*, *supra* note 93.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

consistently with any federally guaranteed rights involved in a complaint proceeding.”<sup>99</sup> In addition to constitutional rights, OCR recognized that there could be additional rights created by “State law, institutional regulations and policies, . . . and collective bargaining agreements.”<sup>100</sup> OCR emphasized that respecting the procedural rights of both parties was an important part of a just outcome. “Indeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions. Schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.”<sup>101</sup>

## 2. 2001 Guide

In 2001, OCR published a revised guide to sexual harassment under Title IX in the Federal Register principally in response to the Supreme Court’s rulings in *Gebser* and *Davis*.<sup>102</sup> As with the 1997 Guide, the 2001 Guide went through notice and comment.<sup>103</sup> Although the Supreme Court had rejected the standard of liability advocated by OCR for liability in private lawsuits, OCR emphasized that it still had the power to “‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,’ even in circumstances that would not give rise to a claim for money damages.”<sup>104</sup>

As compared with the 1997 Guide, the biggest change to the 2001’s section on adjudication of sexual harassment complaints had to do with its increased emphasis on the rights of the accused. The 2001 Guide now had a section entitled “Due Process Rights of the Accused.”<sup>105</sup> In addition to being slightly reorganized, this newly appointed section told schools “the Family Educational Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment.”<sup>106</sup> It

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99. *Id.*

100. *Id.*

101. *Id.*

102. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 93, at i. In the 1997 Guide, OCR said that the standard of liability for monetary damages should be “known or should have known,” a standard that was clearly rejected in *Gebser*. See *Sexual Harassment Guidance 1997*, *supra* note 93.

103. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 93, at ii.

104. *Id.* (citation omitted).

105. *Id.* at 22.

106. *Id.*

concluded by saying, “[s]chools should be aware of these rights and their legal responsibilities to individuals accused of harassment.”<sup>107</sup>

### 3. 2011 Dear Colleague Letter

In 2011, OCR issued the Dear Colleague Letter (DCL), which it deemed to be a “significant guidance document”<sup>108</sup> (i.e., disclaiming any status as an independent legislative rule). OCR contended that the DCL “does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligation.”<sup>109</sup>

Unlike the 1997 and 2001 Guides, OCR did not post a formal notice requesting feedback on the proposed changes. Some university officials responsible for enforcing Title IX have voiced frustration with OCR for not requesting input. As one administrator explained, “I’m not sure if all of the mandates have been thought through for all universities in all universities’ context, it feels like stuff is missing or there would have been benefit to talking to campus administrators who are already doing this.”<sup>110</sup>

OCR laid out a number of recommendations and requirements in the DCL, which will be discussed at length below. Three modifications to the disciplinary proceedings are of particular note: (1) OCR strongly discouraged schools from allowing the parties to directly question one another;<sup>111</sup> (2) OCR told schools that they “should not allow the alleged perpetrator to review the complainant’s statement without also allowing the complainant to review the alleged perpetrator’s statement”;<sup>112</sup> and (3) OCR required schools to set the standard of proof at preponderance of the evidence rather than clear and convincing evidence that some schools had been using.<sup>113</sup>

OCR justified reducing the standard of proof to preponderance on the grounds that it is the standard used in Title VII hearings,<sup>114</sup> but as will be discussed below, it did not adopt Title VII protections that would have benefited the accused. For instance, the Civil Rights Act of 1991 gives both parties in a Title VII case the right to a jury trial if one party requests

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107. *Id.*

108. Dear Colleague Letter, *supra* note 31, at 1 n.1.

109. *Id.*

110. Telephone Interview with University Administrator (Nov. 14, 2014).

111. Dear Colleague Letter, *supra* note 31, at 12.

112. *Id.* at 11–12.

113. *Id.* at 11.

114. *Id.* at 10–11.

compensatory or punitive damages.<sup>115</sup> The right to trial means that both parties enjoy a panoply of other protections including the right to counsel and the right to confront and cross-examine witnesses. Not only does DOE not mandate or even recommend that these Title VII rights be provided, the DCL affirmatively recommends against some of them. For instance, OCR strongly discourages schools from allowing the parties to directly question one another.<sup>116</sup>

### B. Enforcement

Although a university has never lost federal funding for violating Title IX,<sup>117</sup> DOE seems to be taking a more aggressive stance. As mentioned earlier, OCR has found a number of schools to be in violation of Title IX, including Princeton<sup>118</sup> and Harvard Law School.<sup>119</sup> These schools have since reached settlements with OCR in which they agreed to change the way they handle sexual assault so as to meet the protocol set forth in the DCL.<sup>120</sup>

On May 1, 2014, DOE released a list of forty-four colleges and universities under investigation,<sup>121</sup> and the number has grown to at least 241.<sup>122</sup> This information was released even though the Equal Employment Opportunity Commission (EEOC) is statutorily barred from releasing the names of those under investigation in Title VII cases,<sup>123</sup> and “(a)ny person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.”<sup>124</sup> Similarly, the Department of Justice has an explicit policy against releasing

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115. 42 U.S.C. § 1981a(c) (2012).

116. Dear Colleague Letter, *supra* note 31, at 12.

117. As of May 1, 2014, no university had ever lost funding for violating Title IX. See Tyler Kingkade, *55 Colleges Face Sexual Assault Investigations*, HUFFINGTON POST (July 1, 2014, 11:22 AM), [http://www.huffingtonpost.com/2014/05/01/college-sexual-assault\\_n\\_5247267.html](http://www.huffingtonpost.com/2014/05/01/college-sexual-assault_n_5247267.html).

118. See *Princeton Violation*, *supra* note 43.

119. See *Harvard Violation*, *supra* note 44.

120. See *Princeton Violation*, *supra* note 43; *Harvard Violation*, *supra* note 44.

121. See *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP’T OF EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

122. See *Title IX: Tracking Sexual Assault Investigations*, CHRONICLE OF HIGHER EDUC., <http://projects.chronicle.com/titleix/> (last visited Nov. 7, 2016).

123. See 42 U.S.C. § 2000e-5(b) (2012) (“Charges shall not be made public by the Commission.”).

124. *Id.*

information on current investigations except in unusual circumstances.<sup>125</sup> The reason for this non-disclosure policy is in part because “Justice Department guidelines, rules of professional conduct, and rules of court, as well as considerations of fairness to defendants, require that we not make comments that could prejudice a defendant's right to a fair trial.”<sup>126</sup>

Even if universities do not take the threat of losing federal funding seriously, such public shaming may have an effect. Two recent articles have discussed how universities under suspicion for violating Title IX are receiving fewer applications from prospective students and fewer donations from alumni.<sup>127</sup>

## II. SURVEY RESEARCH: PROCEDURAL PROTECTIONS AFFORDED BY AMERICAN UNIVERSITIES

In October 2014, fifty flagship state universities were contacted by email and asked a series of questions about the procedural protections afforded to students alleged to have committed sexual assault.<sup>128</sup> All were asked about protections considered fundamental to those accused of a crime by the state: the standard of proof, right to an adjudicatory hearing, right to confront and cross examine witnesses, right to counsel, right to silence, and right to appeal. Other than the right to appeal, all are part of the Bill of Rights, which through the incorporation clause of the Fourteenth Amendment has been deemed to apply to the states.<sup>129</sup>

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125. See *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE (June 23, 2015), <https://www.justice.gov/usao-ri/frequently-asked-questions-0>.

126. *Id.*

127. See Gayle Nelson, *The High Cost of Sexual Assaults on College Campuses*, NONPROFIT Q. (June 23, 2015), <https://nonprofitquarterly.org/2015/06/23/the-high-cost-of-sexual-assaults-on-college-campuses/>; see also Tyler Kingkade, *Alumni Are Creating a Network to Put Pressure on Universities over Sexual Assault*, HUFFINGTON POST (May 28, 2014, 4:37 PM), [http://www.huffingtonpost.com/2014/05/28/alumni-network-sexual-assault-college\\_n\\_5401194.html](http://www.huffingtonpost.com/2014/05/28/alumni-network-sexual-assault-college_n_5401194.html).

128. The author used a table from the Journal of Blacks in Higher Education to determine the flagship universities. Because State University of New York (SUNY) was not on the list, the author chose SUNY Albany because it is the capital of New York. See *Ranking the Nation's Flagship State Universities and Historically Black Colleges on Their Success in Enrolling Low-Income Students*, J. BLACKS IN HIGHER EDUC., [http://www.jbhe.com/news\\_views/60\\_lowincomeenrolls.html](http://www.jbhe.com/news_views/60_lowincomeenrolls.html) (last visited Nov. 7, 2016).

129. The Fourteenth Amendment of the U.S. Constitution prohibits states from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. In determining what that meant, the Supreme Court turned to the first ten amendments of the Constitution, otherwise known as the Bill of Rights. Over time, in piecemeal fashion, the Court

Although a few universities responded to the initial inquiry, many did so only after additional emails and phone calls. Some administrators were extremely reluctant to share information,<sup>130</sup> and most of those who agreed to talk more generally about their feelings towards the current climate did so only with the promise that neither they nor their institution be identified. On-line policies were used to fill in the gaps, but even if the written policy answered most or even all the questions,<sup>131</sup> follow-up emails and/or phone calls were attempted to confirm results. As of July 1, 2016, nine universities have not responded: University of Idaho, University of Montana, University of Nevada, University of New Hampshire, University of Oklahoma, University of Oregon, University of Rhode Island, and University of South Dakota. Thus, all the information on those schools' adjudicatory procedures was gleaned from on-line information.

Many of the university officials interviewed voiced confidence that students' rights were being respected. For instance, one administrator said, "A student can always be disappointed with an outcome, but did they think they were treated fairly? I've had letters from students that were expelled but thanked me for the support they were given."<sup>132</sup>

A few, however, were concerned by the current climate. As one official framed it:

The pendulum has shifted so far that it's 'ready, fire, aim' when it comes to the rights of respondents. Whether truly innocent, the reality is that OCR wants you to take action against them because underreporting is such a huge problem so that even if we get it wrong . . . . This system is offensive to legal minds . . . . We are the people breaking the casks of whiskey during prohibition. This is the

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held that almost all of these rights were protected against state action through the Due Process Clause of the Fourteenth Amendment. *See generally* Natalie M. Banta, *Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 WYO. L. REV. 151, 166–78 (2013) (discussing the development of the Supreme Court's interpretation of the Due Process Clause).

130. For instance, one Title IX official stated that he would not answer any questions. Information from that school was obtained from someone in the Dean's office. At another school, the person working as the Title IX Officer hung up the phone, but, fortunately, another person at that institution was willing to answer questions.

131. Only six schools (twelve percent) provided all of the information in their on-line policies: University of Kansas, University of Nebraska, University of North Dakota, Ohio State University, University of South Carolina, and University of Washington. These universities were still contacted to confirm that the information accurately reflected current policy.

132. Telephone Interview with University Administrator (Jan. 29, 2015).

law, but it doesn't feel quite right. To be in the trenches doesn't feel quite right.<sup>133</sup>

### A. Findings

The tables below show the findings of this investigation.

**Table 1: Standard of Proof**

<b>Standard of proof</b>	100% Preponderance of the evidence (50)		0% Unknown (0)
<b>Different standard for non-sex offenses?</b>	14% Yes (7)	80% No(40)	6% Unknown (3)

As Table 1 shows, fifty universities (100%) have the standard of proof set at preponderance of the evidence. Seven states (14%) set a higher standard of proof for non-sex allegations.<sup>134</sup> One of them only used a higher standard for academic violations but used the same preponderance standard for all non-academic misconduct. Of the seven schools that use a higher standard for non-sex allegations, one uses proof beyond a reasonable doubt and the others use clear and convincing evidence.

**Table 2: Right to an Adjudicatory Hearing**

<b>Adjudicatory or Investigatory</b>	84% Adjudicatory (42)	16% Investigatory (8)	0% Unknown
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All schools used either an adjudicatory or an investigatory model for determining whether a violation occurred. For the forty-two schools (84%) that used the adjudicatory model, the first step was almost always an initial investigation, but the determination of whether a violation occurred could be made at an adjudicatory hearing. An adjudicatory hearing is similar to a trial in the sense that evidence is presented in one hearing in front of a fact finder with the accused present. Witnesses testify at the hearing, although schools usually allow hearsay evidence, which means that the fact finder may consider a witness interview conducted by the Title IX investigator.

Eight schools (16%) used an investigatory model. The investigatory model is one in which a single investigator (or sometimes two) prepares a report

133. Telephone Interview with University Administrator (Oct. 17, 2014).

134. Of these, three had additional limitations: one had a higher standard only if there was a formal hearing, one had a higher standard only if the case resulted in expulsion, and one had a higher standard only if the student was facing suspension or expulsion.

after having met with the parties and any witnesses. The accused student does not have the right to be present for these interviews. Sometimes that same investigator determines whether a violation occurred, and sometimes the report is turned over to a third party (or parties) who determine(s) whether a violation occurred based on the contents of the investigation report. That person may request additional information, but there will never be a live hearing in which all of the evidence is presented in one place with the accused present.

**Table 3: Schools that Provide Right to Adjudicatory Hearing**

Adjudicatory Model Detail (% of 42 schools)			
<b>Right to an Adjudicatory Hearing</b>	98% - Yes (41)		0% Unknown
	2% - Yes, Limited-school decides (1)		
	0% - Yes, Limited-evidence (0)		
<b>Panel Composition</b>	17% - 1 staff / faculty / admin / outsider (7)		5% Unknown (2)
	2% - 1-2 faculty / staff / admin (1)		
	14.3% - 3 or more faculty / staff / admin (6)		
	57% - 3 or more faculty / staff / student (24)		
	2% - 3 or more student only (1)		
	2% - 3 or more unspecified (1)		
<b>Right to Challenge Panelist</b>	81% - Yes (34)	5% - No (2)	14% Unknown (6)
<b>Panel vote</b>	64.3% - majority (27)		12% Unknown (5)
	12% - 1 decider (5)		
	2% - 1 or 2 deciders (1)		
	7% - consensus (3)		
	2% - unanimous (1)		

For the forty-two schools that used the adjudicatory model, forty-one (98%) gave the accused the absolute right to an adjudicatory hearing. That meant that if he requested a hearing to resolve guilt, he would get one. One school (2%) allowed for an adjudicatory hearing but only if the school decided it was the appropriate way to determine guilt.

For those schools that used an adjudicatory model, seven (17%) allowed a single person to determine responsibility. One school (2%) had one or two decide. Six schools (14.3%) had a panel of three or more faculty, staff or administrators. Twenty-four (57%) had a panel of three or more, but it included students. One (2%) had a panel of three or more students determine responsibility, and one (2%) had three or more decide, but the exact composition was unknown.

Twenty-seven schools (64.3%) used a majority vote to determine guilt. The minimum size of the adjudicatory body using a majority vote was three.

Five schools (12%) had one person make the decision, and one school (2%) required that one or two make the decision. Three schools (7%) required that the decision be made by consensus, and one school (2%) mandated that the decision be unanimous.

**Table 4: Schools that Use Investigatory Model**

Investigatory Model Detail (% of 8 schools)		
<b>Who Decides Responsibility</b>	50% – Single Model-Investigator & Decision-Maker are the Same (4)	0% Unknown (0)
	38% – Split Model-Investigator Reports & Separate Single Individual Decides (3)	
	12% – Split Model-Investigator Reports & 2 or More Individuals Decide (1)	

All of the schools that used the investigatory model had an investigator prepare a report into what occurred, but they differed regarding who determined responsibility. Four schools (50%) used the single investigator model. That meant that the person who investigated the case was also responsible for determining whether a violation had occurred. Three schools (38%) used a split model in which one person investigated, and a separate person determined whether a violation had occurred. One school (12%) had two or more people (all separate from the investigator) determine whether a violation had occurred.

**Table 5: Right to Confront and Cross Examine**

<b>Right to Confront</b>	Yes – 10% (5)
	Limited through investigator – 6% (3)
	Limited through panel – 66% (33)
	No – 14% (7)
	Unknown – 4% (2)

As Table 5 shows, only five schools give the accused the right to directly question the complainant. One has a referee to ensure there is no harassment, and another discourages direct questioning.

Thirty-six schools provide for a limited right to question the complainant. Three of these schools (6%) require that the question be asked through the investigator who can decide whether to ask it. If the investigator does ask, the accused will not be there to hear the answer. The other thirty-three (66%) that allow a limited right to question require the respondent to submit a question orally or in writing to the hearing officer, who decides whether to ask. Some of these schools explicitly state that the complainant need not be present or

respond, and this author believes that this policy applies to most, if not all, of the schools except the five mentioned above. Seven schools (14%) do not allow any questioning of the other side, either direct or indirect. Two schools (4%) were unknown.

*Table 6: Additional Procedural Rights*

Procedural Right	Yes			No	Unknown
Right to Counsel	Yes, robust 16% (8)	Yes, as advisor but silent in hearing 76% (38)	Yes, but limited role 4% (2)	4% (2)	0% (0)
Right to Remain Silent	Yes, no adverse inference 84% (42)	Yes, but adverse inference may be drawn 6% (3)		0% (0)	10% (5)
Right to Appeal	Yes 98% (49)			2% (1)	0% (0)

As Table 6 shows, the vast majority of universities (48, 96%) gave accused students the right to counsel, but it was almost always an abridged right. Just eight schools (16%) gave a robust right to counsel. That meant the attorney would be allowed to participate fully in the hearing by questioning witnesses and addressing the panel directly. Thirty-eight (76%) allowed counsel but only in an advisory role, and two (4%) allowed counsel but only in a limited role. Two schools (4%) denied the right to counsel completely.

Forty-two schools (84%) gave respondents the right to remain silent. Three schools (6%) allowed the respondent to remain silent but explicitly allowed an adverse inference to be drawn. The results were unknown for five schools (10%).

Finally, all schools but one (2%) promised the right to appeal.

### *B. Comparison with Other Studies*

This author is aware of only two articles published within the last thirty years that have studied university procedural protections afforded to students charged with misconduct. In 1999, Carl and Vivian Berger studied the protections that state and private universities provided to students charged with academic misconduct.<sup>135</sup> They sent letters to 222 public and private universities selected at random and received responses from 159.<sup>136</sup> Berger

135. Berger & Berger, *supra* note 63.

136. *Id.* at 296.

and Berger found that 90% provided for a hearing before an impartial body<sup>137</sup> (as compared with forty-two = 84% here); 90% allowed the accused to remain silent without an adverse finding of guilt<sup>138</sup> (as compared with forty-two = 84% now); and over 90% gave students the right to confront and cross-examine adverse witnesses<sup>139</sup> (as compared with five = 10% that give the right, and forty = 80% that give a limited right now). One area in which universities have improved is the right to counsel. Berger and Berger found that just 58% of the state schools surveyed allowed the advisor to be an attorney<sup>140</sup> (as compared with forty-eight = 92% now that allowed lawyers in at least some situations). Like now, those schools that did provide the right to counsel often prohibited direct participation.<sup>141</sup>

In 2002, Heather M. Karjane, Bonnie S. Fisher and Francis T. Cullen studied how institutions of higher education (IHEs) adjudicate sexual assault.<sup>142</sup> They used a multi-faceted approach including a content analysis of published sexual assault policy materials, email surveys of campus administrators, and field research at eight colleges and universities.<sup>143</sup> Their sample was comprised of 2,438 schools, and they received an overall response rate of 41%.

Karjane et al. found that only 22.4% of schools mentioned the burden of proof used in sexual assault cases (as compared with 100% now), and, of those, 81.4% used preponderance of the evidence (as compared with 100% now), 3.3% used beyond a reasonable doubt, and 15.3% used some other standard.<sup>144</sup> They found that, of the 203 public four-year universities that mentioned who decided if a student had violated the code of conduct, 82.3% had judicial or disciplinary members make that decision as opposed to one individual (as compared with thirty-seven = 74% now).<sup>145</sup> Of those universities that described their proceedings, 68.5% mentioned cross-examination (as compared with forty-one = 86% now),<sup>146</sup> but it was unclear

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137. *Id.* at 297.

138. *Id.* at 298.

139. *Id.*

140. *Id.*

141. *See id.* at 297–98.

142. KARJANE, FISHER & CULLEN, *supra* note 64.

143. *Id.* at vi.

144. *Id.* at tbl.6.12.

145. *Id.* at tbl.6.11.

146. Note that this Article is classifying all schools with the investigatory model as not allowing cross-examination. Suggesting questions to an investigator who will decide whether to ask, and even if he does it will be outside of the accused's presence, does not qualify as cross-examination.

whether that included direct questioning of the complainant and/or whether the complainant had to actually respond.<sup>147</sup> Furthermore, of the 74 four-year public universities that mentioned the type of vote needed for a finding of responsibility, 54% used majority; 2% were unanimous, and the remaining 14% used something else.<sup>148</sup> The present study found that twenty-seven = 54% used a majority vote to determine responsibility; three = 6% required consensus or unanimity; and five = 10% had one person to make the determination.

The above comparison shows a mixed picture of how rights afforded to accused students have changed over time. Some protections have been reduced. In the past, more schools afforded students the right to a hearing. The right to counsel, in contrast, has clearly improved. Although students may not currently have a robust right to an attorney, at least most schools give students the right to have an attorney as an advisor. Unfortunately, there is not enough information to meaningfully analyze either the right to confront/cross examine or the standard of proof over time. Karjane et al. found that 68.5% mentioned cross-examination, but they do not specify whether that means students at those institutions had the right to ask questions and that the complainant had to respond.<sup>149</sup> If that is what their findings mean, then the right has been significantly reduced. If they meant that students were allowed to indirectly question the complainant who need not respond, then more schools afford a limited right to cross-examine now.

In addition, some of the IHEs reported using a higher standard of proof than preponderance, but most did not report what standard they were using. It is possible that those that did not report actually used a lower standard (such as probable cause), but it is more likely that the ambiguity operated to make it even more difficult to find someone responsible because of the “traditional bias against those who lodge claims of sexual assault generally, as well as the bias against those who bring claims of campus acquaintance rape specifically.”<sup>150</sup>

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147. KARJANE, FISHER & CULLEN, *supra* note 64, at tbl.6.9.

148. *Id.* at tbl.6.12.

149. *Id.* at tbl.6.9.

150. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1016–17 (2004).

### III. DO THESE PROCEDURES SATISFY PROCEDURAL DUE PROCESS?

The Fourteenth Amendment to the U.S. Constitution states in relevant part, “no state shall make or enforce any law which shall . . . deprive any person of life, liberty or property without due process of law.”<sup>151</sup> Since the disciplinary proceedings of public universities clearly constitute state action,<sup>152</sup> two questions must be answered: Does the punishment constitute a deprivation of liberty or property, and if so, what procedural protections does due process require?<sup>153</sup>

#### A. *Does the Punishment Constitute a Deprivation of Liberty or Property?*

In *Goss v. Lopez*, the U.S. Supreme Court held that public high school students facing suspension had a property interest in their education as guaranteed by Ohio law as well as a liberty interest in their good name.<sup>154</sup> In support of its decision, the Court noted that since the “landmark” case of *Dixon v. Alabama State Board of Education*,<sup>155</sup> “lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion.”<sup>156</sup>

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151. U.S. CONST. amend. XIV, § 1.

152. See *Duke v. N. Tex. State Univ.*, 469 F.2d 829, 837 (5th Cir. 1972).

153. See Tonya Robinson, *Property Interests and Due Process in Public University and Community College Student Disciplinary Proceedings*, 30 SCH. L. BULL. 10, 10 (1999).

154. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). At first glance it may appear that students at private universities would not have a procedural due process claim because their universities would not be deemed state actors. In *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982), the Supreme Court held that a private school had not acted under color of state law even though the school had to comply with state regulations and over ninety percent of its funds were paid by the state. The Court made it clear however that the actions of a private party would be attributable to the state if “the private party acted in concert with state actors.” *Id.* at 838 n.6. Because OCR has mandated that all universities receiving federal funding lower protections, private universities *are* acting in concert with state actors and thus there is state action. This author gathered data from thirty-five private colleges and universities that will be discussed in Tamara Lave, *A Critical Look at How Private Universities Adjudicate Rape*, 71 MIAMI L. REV. (forthcoming 2016).

155. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert denied*, 368 U.S. 930 (1961).

156. See *Goss*, 419 U.S. at 576 n.8.

Although the Court has never held that university students are entitled to procedural due process, it explicitly assumed it in the cases of *Board of Curators of the University of Missouri v. Horowitz*<sup>157</sup> and *Regents of the University of Michigan v. Ewing*.<sup>158</sup> In addition, other than the Seventh Circuit,<sup>159</sup> all lower federal courts across the country have held,<sup>160</sup> or at least

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157. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84–85 (1978) (“Assuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires.”).

158. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23 (1985) (“But remembering Justice Brandeis’ admonition not to ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,’ . . . we again conclude, as we did in *Horowitz*, that the precise facts disclosed by the record afford the most appropriate basis for decision. We therefore accept the University’s invitation to ‘assume the existence of a constitutionally protectible property right in [Ewing’s] continued enrollment,’ and hold that even if Ewing’s assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.”).

159. *See Charleston v. Bd. of Trs. of the Univ. of Ill. at Chi.*, 741 F.3d 769, 772 (7th Cir. 2013) (“However, our circuit has rejected the proposition that an individual has a stand-alone property interest in an education at a state university, including a graduate education.”). *But see Medlock v. Trs. of Ind. Univ.*, No. 1:11-cv-00977-TWP-DKL, 2013 U.S. Dist. LEXIS 44408, at \*19–21 (S.D. Ind. Mar. 28, 2013) (holding that a student’s procedural due process rights were not violated by a university disciplinary procedure).

160. *Wells v. Columbus Tech. Coll.*, 510 F. App’x 893, 896 (11th Cir. 2013) (“As for procedural due process, a student generally should be afforded notice and an opportunity to be heard before being suspended from a state school.”); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005) (“In this Circuit we have held that the Due Process Clause is implicated by higher education disciplinary decisions.”); *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 440 (8th Cir. 1998) (internal citations omitted) (“We have indicated that procedural due process must be afforded a student on the college campus ‘by way of adequate notice, definite charge, and a hearing with opportunity to present one’s own side of the case and with all necessary protective measures.’”); *Tellefsen v. Univ. of N.C. at Greensboro*, No. 89-2665, 1989 U.S. App. LEXIS 21332, at \*3 (4th Cir. June 14, 1989) (“[A] student facing expulsion or suspension from a public educational institution is entitled to the protections of due process.”); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (“It is also not questioned that a student’s interest in pursuing an education is included within the fourteenth amendment’s protection of liberty and property.”); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) (concluding with “no difficulty” that a nursing student had a property right in her education “and the more prominently so in that she paid a specific, separate fee for enrollment and attendance at the Gordon Cooper School”); *Dixon*, 294 F.2d at 158 (holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct); *Bradley v. Oklahoma ex rel. Bd. of Regents of Se. Okla. State Univ.*, No. CIV-13-293-KEW, 2014 U.S. Dist. LEXIS 58576, at \*7 (E.D. Okla. Apr. 28, 2014) (“[A] student facing expulsion or suspension from a public educational institution is entitled to the protections of due process.”); *Oladokun v. Ryan*, No. 06 cv 2330 (KMW), 2010 U.S. Dist. LEXIS 103381, at \*14 (S.D.N.Y. Sept. 30, 2010) (“It is well-settled that due process concerns are implicated by the disciplinary decisions of public institutions of higher education.”); *Phat Van Le v. Univ. of Med. & Dentistry of N.J.*, No. 08-991, 2009 U.S. Dist.

presumed,<sup>161</sup> that students at public colleges and universities are entitled to procedural due process.

Since the Supreme Court has never explicitly held that students at public institutions are entitled to procedural due process, this question will be explored. Although suspension or expulsion certainly constitutes a “grievous loss”<sup>162</sup> for the accused, the Court has rejected the notion that the importance of the benefit (here a college degree) determines whether it is property for the purposes of the Fourteenth Amendment.<sup>163</sup> Similarly, although the reputational stigma associated with an allegation of sexual assault is significant, the Court has made it clear that due process claims cannot rest on harm to “reputation alone.”<sup>164</sup> Yet, university students still have a strong argument that they are entitled to procedural due process when facing suspension or expulsion.

To begin with, the Court has made it abundantly clear that “the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”<sup>165</sup> In the companion cases of *Board of Regents v. Roth* and *Perry v. Sindermann*, the Court considered when the deprivation of a benefit falls under the protection of the Fourteenth Amendment. In both cases, the benefit at stake was employment, and the specific issue was when a teacher had the right to hearing after his contract was not renewed.<sup>166</sup>

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LEXIS 37672, at \*23 (D.N.J. May 4, 2009) (“It is well-established that the requirements of the Fourteenth Amendment’s Due Process Clause apply to student disciplinary proceedings at public institutions.”); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 15 (D. Me. 2005) (“Here, the Plaintiffs were students at a public university and potentially subject to expulsion or suspension. They are, therefore, entitled to the protections of due process.”).

161. *Lucey v. Nevada ex rel. Bd. of Regents of the Nev. Sys. of Higher Educ.*, 380 F. App’x 608, 610 (9th Cir. 2010) (internal citations omitted) (“On the facts alleged, Lucey’s right to procedural due process at the December 4 Hearing was satisfied because Lucey was subject to sanctions less than suspension or expulsion and received ‘some kind of notice and [was] afforded some kind of hearing.’”).

162. See *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

163. See *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972); see also *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). See generally Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CAL. L. REV. 146 (1983).

164. See *Paul v. Davis*, 424 U.S. 693, 701 (1976). Some courts refer to this standard as “stigma plus.” See *Pendleton v. City of Haverhill*, 156 F.3d 57, 63 (1st Cir. 1998).

165. *Roth*, 408 U.S. at 571–72 (internal citations omitted).

166. *Roth* concerned a teaching assistant who was hired for a fixed one year contract, and the contract was not renewed. *Id.* at 566. *Sindermann* involved a teacher in the state college system of the State of Texas under a system of one-year contracts for a ten-year period, from 1959-69. *Sinderman*, 408 U.S. at 594. After *Sindermann* became involved in some public disputes with the Board of Regents, his contract was not renewed. *Id.* at 595.

The Court began its analysis in *Roth* by discussing previous cases in which it had found that the contested benefit constituted property under the Fourteenth Amendment. It explained at a general level what motivated the decision in these cases:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.<sup>167</sup>

The Court also discussed how a benefit became a property interest. The Court wrote:

[P]roperty interests . . . are not created by the Constitution [but instead] . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.<sup>168</sup>

The Court then determined that Roth did not have a property interest in his employment because his rights were created by his contract, and that contract specifically stated that it would terminate on a certain date.<sup>169</sup> Under no condition did it provide for renewal.<sup>170</sup>

In *Sindermann*, the Court acknowledged a less formal ground for the creation of a property interest. Although a written contract could provide a clear property interest, so could one that is implied. The Court wrote, “[a] person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.”<sup>171</sup>

Based on that definition the Court ruled that Sindermann had the right to a hearing on the grounds that someone like Sindermann, “who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure.”<sup>172</sup>

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167. *Roth*, 408 U.S. at 577.

168. *Id.*

169. *Id.* at 578.

170. *Id.*

171. *Sindermann*, 408 U.S. at 601.

172. *Id.* at 602.

Applying the reasoning from *Roth* and *Sindermann*, students facing suspension or expulsion have a strong claim of entitlement to their education. Although students get secondary benefits from attending college, like learning and making friends, the principal reason people attend university is to obtain a diploma, and schools explicitly refer to the benefits of a diploma from their institution in recruiting students. For example, this author visited the website of one of her alma maters, the University of California, Berkeley. On the Admissions page was the following: “Come to UC Berkeley, the world’s premier public university. Study with Nobel laureate faculty at top research facilities. Meet the best students from the United States and around the globe. And graduate with a diploma that introduces you to a family of more than 450,000 alumni.”<sup>173</sup>

Should a student decide they want to attend a certain school, they must go through significant hurdles in applying. These include: paying a fee to have their application considered, taking standardized tests, requesting and obtaining letters of recommendation, being interviewed, and writing essays explaining why they should be admitted.

Once an offer of admission is made and accepted, the university and student have entered into a contract. The consideration for the contract is as follows. The student will pay substantial fees to matriculate, and he promises to take a minimum number of credits, maintain a certain grade point average, and comply with specified rules of conduct. In return, he will be awarded a degree. As Berger and Berger explained, “[t]he contract, formed when an accepted student registers, arises from the mutual understanding that the student who satisfactorily completes a program’s academic requirements will receive the appropriate degree.”<sup>174</sup>

### *B. What Procedural Protections Does Due Process Require*

Now that this Article has made the case for why students are entitled to procedural due process before they can be suspended or expelled, the next question is how much process is due. At a minimum, the Court held in *Goss* that “the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”<sup>175</sup> Although the Court

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173. See *Be Berkeley*, UNIV. OF CAL. BERKELEY OFFICE OF ADMISSIONS, <http://admissions.berkeley.edu/beberkeley> (last visited Nov. 7, 2016).

174. Berger & Berger, *supra* note 63, at 292.

175. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

stopped short of requiring a school to provide the accused with counsel, the right to confront and cross-examine witnesses, and the right to call his own witnesses,<sup>176</sup> it emphasized the fact that it was only addressing short suspensions, not exceeding ten days, “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”<sup>177</sup> Three years later, in *Board of Curators of the University of Missouri v. Horowitz*, the Court made it clear that students facing disciplinary action are entitled to more stringent procedural protections than those charged with academic misconduct.<sup>178</sup>

In determining whether the current protections are constitutionally sufficient to protect students facing expulsion for sexual assault, the balancing test from *Mathews v. Eldridge* will be employed.<sup>179</sup> But first, two important caveats: This Article acknowledges that students are not entitled to the same procedural protections as criminal defendants,<sup>180</sup> and that, even if they were, “lawyer-based, adjudicatory, adversarial procedure”<sup>181</sup> does not provide a magic solution to the problem of innocent people being found responsible for a rape they did not commit.<sup>182</sup> Yet in this current climate, where colleges are under enormous pressure to comply with OCR’s interpretation of Title IX, this author believes that many have lost sight of why process matters. Thus, this section will use the *Eldridge* test to make the best possible argument for why universities should afford additional procedural protections, even if some of them (like the right to counsel) are probably not constitutionally required in a campus disciplinary proceeding.

In addition, it is important to recognize the problems with the *Eldridge* test, especially as they may bear on the accused students’ likelihood to prevail. Jerry Mashaw famously criticized *Eldridge* because it views “the sole

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176. *Id.* at 583.

177. *Id.* at 584.

178. 435 U.S. 78, 86 (1978).

179. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

180. See *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (“Labeling a school proceeding disciplinary in nature, however, does not mean that complete adherence to the judicial model of decision-making is required.”); *Yench v. Stockmar*, 483 F.2d 820, 823 (10th Cir. 1973) (“Student disciplinary proceedings are not comparable to criminal proceedings.”).

181. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 515 (1986).

182. *Id.* at 517 (“Adversarialism is a plausible mechanism for generating information leading to acceptable outcomes and for validating individual dignity only when the adversaries are roughly comparable—when each side has similar resources. But, as is well known, many who attempt strategic adversarial interaction have few resources, little information, and disloyal, indifferent, or nonexistent agents . . . . When gross imbalances are commonplace and patent, a belief in adversarialism has a hollow ring.”).

purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions.”<sup>183</sup> As a result, it undervalues bedrock constitutional interests like dignity and equality.<sup>184</sup> For example, Mashaw criticized the Court for not acknowledging that some decisions (like an adjudication that a person committed sexual assault) are judgments of “considerable social significance” and thus have “a substantial moral content.”<sup>185</sup> Such decisions require hearings that are “highly individualized and attentive to subjective evidence.”<sup>186</sup> Other scholars continued on this theme contending that *Eldridge* “ignores the dignitary value of additional process.”<sup>187</sup>

In addition, *Eldridge* requires courts to use a balancing test to reconcile the different factors, a methodology that has been roundly criticized. As Edward Rubin aptly put it, “[t]his reliance upon ‘weight,’ which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned.”<sup>188</sup> The cost benefit apparatus has a way of “dwarf[ing] soft variables” and “ignor[ing] complexities and ambiguities,”<sup>189</sup> which makes it difficult for individuals to prevail. As Charles A. Reich put it: “*Mathews v. Eldridge* represents an outlook that treats the government’s claims as having greater urgency than the claims of individuals—even when there is nothing to justify the government claims.”<sup>190</sup>

Recently however, the Court has applied a less parched version of *Mathews v. Eldridge*, one that shows greater concern for the individual interests at stake. In *Hamdi v. Rumsfeld*<sup>191</sup> and subsequent cases involving immigration and national security, application of the *Mathews v. Eldridge* factors has “produced surprisingly rights-affirming outcomes.”<sup>192</sup> As Joseph

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183. Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976).

184. *See id.* at 49.

185. *Id.* at 51.

186. *Id.* at 52.

187. Stan Keillor, James H. Cohen & Mercy Changwasha, *The Inevitable, if Untrumpeted, March Toward “Civil Gideon”*, 64 SYRACUSE L. REV. 469, 481 (2014).

188. Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1138 (1984).

189. Mashaw, *supra* note 183.

190. Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 732 (1990).

191. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

192. Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 882 (2015).

Landau explains, “The Court’s recent rulings involving national security and immigration . . . reveal a Court that is increasingly concerned with the individual interests at stake and especially willing to intervene to ensure that executive and legislative action not go unchecked.”<sup>193</sup>

This author acknowledges that if the *Eldridge* factors are applied the way they were in *Eldridge* itself, then courts are likely to uphold the DCL influenced procedures. If the Court takes the approach that it used in *Hamdi*, however, then students will have a better chance of prevailing.

### C. Applying the *Mathews v. Eldridge* Balancing Test

*Mathews v. Eldridge* dictates that in determining the requirements of due process in a particular circumstance, three factors must be considered:

the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>194</sup>

#### 1. Factor One: Private Interest at Stake

Without question, the private interest at stake is significant. Being suspended or expelled from university has profound consequences on a person’s well being. As the Fifth Circuit explained back in 1961:

It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens . . . . It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which

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193. *Id.* at 925–26.

194. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

the plaintiffs were students in good standing is an interest of extremely great value.<sup>195</sup>

Studies have shown that earning a college degree has been positively linked to a multitude of benefits including better health, longer life, a more fulfilling workplace, and higher lifetime earnings.<sup>196</sup> Graduating from college is particularly important for those coming from disadvantaged backgrounds. A 2011 study found, “the chances of achieving economic success are independent of social background among those who attain a BA.”<sup>197</sup> Thus being denied a college degree is a serious loss.

Furthermore, the reputational harm from being found to have committed sexual assault is significant.<sup>198</sup> Sex offenders are modern day bogeymen, and being adjudicated (or even accused) of being a rapist can destroy friendships and eviscerate the kind of connections that lead to jobs and satisfying long-term relationships, both romantic and fraternal.<sup>199</sup>

John Doe experienced first hand what happens when a person is found responsible for sexual misconduct. In 2014, Doe received a “Disciplinary Warning” from Brandeis University, which left a permanent mark on his educational record for “serious sexual transgressions.”<sup>200</sup> Brandeis students “publicly taunted and accused (him) of rape.”<sup>201</sup> His internship employer explained that he had been “made aware” of John’s situation from “several

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195. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

196. SANDY BAUM ET AL., *EDUCATION PAYS 2013: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY* 5–6 (2013), <https://trends.collegeboard.org/sites/default/files/education-pays-2013-full-report.pdf>; HOWARD R. BOWEN, *INVESTMENT IN LEARNING: THE INDIVIDUAL AND SOCIAL VALUE OF AMERICAN HIGHER EDUCATION* 45–50 (Johns Hopkins Press 1977); LARRY L. LESLIE & PAUL T. BRINKMAN, *THE ECONOMIC VALUE OF HIGHER EDUCATION* 37 (1988).

197. Florencia Torche, *Is a College Degree Still the Great Equalizer? Intergenerational Mobility Across Levels of Schooling in the United States*, 117 AM. J. SOCIOLOGY 763, 798 (2011) (“The finding is largely consistent across all indicators of socioeconomic standing: social class, occupational status, individual earnings, and total family income.”).

198. Ariel Kaminer, *Accusers and the Accused, Crossing Paths at Columbia University*, N.Y. TIMES (Dec. 21, 2014), [http://www.nytimes.com/2014/12/22/nyregion/accusers-and-the-accused-crossing-paths-at-columbia.html?\\_r=0](http://www.nytimes.com/2014/12/22/nyregion/accusers-and-the-accused-crossing-paths-at-columbia.html?_r=0).

199. *Consequences of Registration and Community Notification Laws for Registrants and Their Loved Ones*, HUMAN RIGHTS WATCH (Sept. 11, 2007), <https://www.hrw.org/reports/2007/us0907/8.htm>.

200. *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at \*9–10 (D. Mass. Mar. 31, 2016).

201. *Id.* at 45.

sources” and fired him.<sup>202</sup> Doe also stopped receiving calls from an employer who had promised to hire him only months before.<sup>203</sup>

2. Factor Two: The Risk of Erroneous Deprivation of Liberty and the Value of Additional Safeguards

Next, courts must assess the risk of an erroneous deprivation of liberty due to the procedures used, and the probable value of additional safeguards.

*a. No Right to an Adjudicatory Hearing*

The most concerning trend in university disciplinary proceedings is that of universities moving from a formal, adjudicatory hearing to an investigatory model in which a single person gathers and reviews evidence and then on their own determines whether an assault occurred. The White House has publicly applauded this approach because it seems to “encourage reporting and bolster trust in the process, while at the same time safeguarding an alleged perpetrator’s right to notice and to be heard.”<sup>204</sup> One administrator indicated that training conducted by the Association of Title IX Administrators (ATIXA) recommends against using hearing panels, which means that the practice is likely to spread.<sup>205</sup>

Universities that have moved to the investigatory model insist that they are providing students with a hearing. As another administrator explained:

The term hearing can mean different things. Some people would think of a hearing as a single time where all of the parties and witnesses show up and formally present evidence and each side has an opportunity to present its case to a decision maker. We don’t have that. Our process involves an investigation in which the investigator meets with both parties and witnesses at separate times, and often times multiple times, and collects all of the relevant evidence and makes a determination based on the evidence. Our view is that this is a hearing.<sup>206</sup>

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202. *Id.*

203. *Id.* at 45–46.

204. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 14 (2014).

205. ASS’N OF TITLE IX ADM’RS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 91 (2013).

206. Telephone Interview with University Administrator (Mar. 5, 2015).

Providing accused students with an opportunity to present their case to an investigator may constitute a hearing in some technical sense, but it misses important procedural protections including the right to an impartial fact-finder. As the Court acknowledged in *Withrow v. Larkin*, a “fair trial in a fair tribunal is a basic requirement of due process”<sup>207</sup> and it applies to both court cases and hearings before administrative agencies.<sup>208</sup> “Not only is a biased decisionmaker constitutionally unacceptable,” the Court wrote, “but ‘our system of law has always endeavored to prevent even the probability of unfairness.’”<sup>209</sup>

Congress recognized the importance of role separation when it unambiguously passed the Administrative Procedure Act (APA) in 1946.<sup>210</sup> The APA *specifically* bars an individual from performing both an investigatory and an adjudicatory role.<sup>211</sup> Section 554(d)(2) states that a hearing officer “may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance or investigative or prosecution functions for an agency.”<sup>212</sup> The firewall was strengthened in 1976 with the passage of Section 557(d),<sup>213</sup> and so now the law states:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.<sup>214</sup>

The APA’s separation of roles was not mere happenstance. When President Roosevelt appointed a committee in 1939 to study “existing (administrative) practices and procedures”<sup>215</sup>, one of the the “most intense” attacks was on the combining of roles at formal adjudication.<sup>216</sup> Then state judge and future Supreme Court Justice William Brennan eloquently expressed the concern in a concurring opinion to a 1952 case:

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207. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

208. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

209. *Withrow*, 421 U.S. at 47 (quoting *In re Murchison*, 349 U.S. at 136).

210. See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 231–32 (1986) (internal citations omitted). I am indebted to Ed Rubin for this point.

211. See Administrative Procedure Act, 5 U.S.C. §§ 554 (d)(2), 557 (2012).

212. See *id.* § 554(d)(2).

213. Pub. L. No. 94–409, § 4(a), 90 Stat. 1246 (1976).

214. Administrative Procedure Act §554(d)(2).

215. Louis L. Jaffe, *The Report of the Attorney General’s Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 402 (1941).

216. *Id.* at 418.

Concern with the problem of merger of the powers of prosecutor and judge in the same agency springs from the fear that the agency official adjudicating upon private rights cannot wholly free himself from the influences toward partiality inherent in his identification with the investigative and prosecuting aspects of the case; in other words, that the atmosphere in which he must make his judgments is not conducive to the critical detachment toward the case expected of the judge. In a sense the combination of functions violates the ancient tenet of Anglo-American justice that "No man shall be a judge in his own cause." "The litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards that he has been taught to revere."<sup>217</sup>

Although the Court has held that combining investigatory and adjudicatory functions does not necessarily violate due process, the cases in which it upheld the combination of functions differ in important ways from the university proceedings at issue here. In *FTC v. Cement Institute*, the Court held that it did not violate due process to have FTC Commission Members who had investigated cases later adjudicate them.<sup>218</sup> Central to the Court's holding, however, was the fact that the adjudicatory nature of the hearing helped to prevent Members from being biased:

[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.<sup>219</sup>

In *Withrow*, the Court held that it did not violate due process to have a hearing board investigate allegations of wrongdoing and then decide to suspend the person's medical license.<sup>220</sup> The Court emphasized that the

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217. *In re Larsen*, 86 A.2d 430, 435 (N.J. Super. Ct. 1952) (internal citations omitted).

218. *FTC v. Cement Inst.*, 333 U.S. 683, 702–03 (1948).

219. *Id.* at 701 (alteration in original).

220. *Withrow v. Larkin*, 421 U.S. 35, 56 (1975).

standard of proof was low (probable cause), and that the suspension was only temporary.<sup>221</sup> Most importantly, the accused would have the right to a full adjudicatory hearing before his license could be suspended permanently.<sup>222</sup>

The level of process that helps to protect against bias in both *FTC v Cement Institute* and *Withrow* is nonexistent in the investigatory model. The accused student does not have the right to be present for witness testimony, and he is explicitly prohibited from asking direct questions. Furthermore, the standard of proof is preponderance of the evidence, and the investigator is often making the final determination as to whether a violation occurred. In addition, we know a lot more than we did in 1975 about the way that bias affects judgment and decisionmaking. As will be discussed below, implicit bias and confirmation bias pose profound fairness problems for the investigatory model of adjudication.

*b. Implicit Bias*

Part of the problem with putting everything in the hands of one person is that even an administrator with the best of intentions is almost certainly biased in some way.<sup>223</sup> This poses a concern not just for accused students but the student who alleges that she has been raped. Implicit biases (or unconscious stereotypes) have been shown to affect judgment and produce discriminatory behavior.<sup>224</sup> These include biases based on race, gender, ethnicity, nationality, social status, and weight. Although this author is not aware of any studies on implicit bias in campus disciplinary proceedings, numerous studies have shown its effect in the criminal setting. For instance, unconscious racial discrimination has been shown to affect prosecutors charging decisions in homicide cases (black people were more likely than white people to face the death penalty for similar conduct)<sup>225</sup> and jurors'

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221. *Id.* at 56–59.

222. *See id.* at 37 n.1.

223. For a comprehensive overview of studies showing bias in the courtroom, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

224. *See* John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RESEARCH ORG. BEHAV. 39, 51 (2009).

225. Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587, 617–618 (1985).

willingness to convict black defendants.<sup>226</sup> Researchers have also found that judges hold implicit racial biases, and that it can influence their rulings.<sup>227</sup>

So how should these biases be countered? Specialized training has been shown to reduce bias<sup>228</sup> as has a longstanding and deep personal commitment to eradicating personal bias.<sup>229</sup> Ironically, the commitment to be objective may just exacerbate the problem. Studies have shown that subjects who profess to be objective are more likely to make biased decisions.<sup>230</sup>

Changing the context in which people are rendering decisions, however, may be the most effective way of promoting objectivity. Specifically, a larger and more diverse hearing body has been shown to increase the quality of deliberation and reduce bias. One study looked at the effects of having a racially homogeneous versus a heterogeneous jury.<sup>231</sup> It found that on every relevant measure, racially heterogeneous groups outperformed homogeneous ones. Not only did racially mixed groups spend more time deliberating, but also they discussed a wider range of case facts and personal perspectives. They also made fewer factual errors than all-white juries.<sup>232</sup> This finding means that universities should be increasing and diversifying the number of decision makers not reducing them down to one person.

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226. Samuel R. Sommers & Phoebe C. Ellsworth, "Race Salience" in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599, 601 (2009). These effects were only detected in race neutral trials. When the trial was racially charged, researchers did not see this effect. The theory for this difference is that of "aversive racism," or the idea that whites are loath to appear racist, and so they are especially vigilant in racially charged settings. *Id.* at 601.

227. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1208 (2009).

228. *Id.* at 1227.

229. Gordon B. Moskowitz et al., *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155 (2000).

230. Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).

231. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 597 (2006).

232. A diverse hearing body has another benefit. Ultimately, whoever is deciding the case must assess the credibility of witnesses, which can be difficult when people come from different cultures. See Aldert Vrij, *Why Professionals Fail to Catch Liars and How They Can Improve*, 9 LEGAL & CRIMINOLOGICAL PSYCHOL. 159, 167 (2004).

*c. Confirmation Bias*

Confirmation bias—the tendency for people to seek or interpret evidence in a manner that is partial to existing beliefs, expectations, or an existing hypothesis<sup>233</sup>—poses a particular challenge to the fairness of the investigatory model. Confirmation bias has “proven strikingly robust across diverse domains of human thinking, including logical problem solving, social interaction and medical reasoning.”<sup>234</sup> Nickerson described the phenomenon in his oft-cited 1998 article:

A great deal of empirical evidence supports the idea that the confirmation bias is extensive and strong and that it appears in many guises. The evidence also supports the view that once one has taken a position on an issue, one's primary purpose becomes that of defending or justifying that position. This is to say that regardless of whether one's treatment of evidence was evenhanded before the stand was taken, it can become highly biased afterward.<sup>235</sup>

Researchers have also shown how confirmation bias can infect criminal investigations. Kassin, Goldstein, and Savitsky demonstrated that interrogators who had been cued to believe that most suspects were guilty chose more guilt-presumptive questions, used more interrogation techniques (including the presentation of false evidence), were more aggressive in questioning innocent suspects, and more likely to view a suspect as guilty.<sup>236</sup> They also found that an interrogator's presumption of guilt affected the behavior of those being questioned and made impartial observers more likely to judge them guilty.<sup>237</sup> Ask and Granhag found that experienced investigators judged witness statements differently depending on whether the statement was consistent or inconsistent with their initial theory.<sup>238</sup> Although Ask, Rebelius, and Granhag showed that investigators will be more receptive to certain kinds of evidence (such as DNA), the kind of evidence that is most

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233. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

234. Karl Ask et al., *The 'Elasticity' of Criminal Evidence: A Moderator of Investigator Bias*, 22 APPLIED COGNITIVE PSYCHOL. 1245, 1246 (2008) (internal citations omitted).

235. Nickerson, *supra* note 233, at 177.

236. Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 187 (2003).

237. *Id.*

238. Karl Ask & Par Anders Granhag, *Motivational Bias in Criminal Investigators' Judgments of Witness Reliability*, 37 J. APPLIED SOC. PSYCHOL. 561, 579 (2007).

likely to be proffered at college adjudicatory hearings, witness testimony, is the most subject to confirmation bias.<sup>239</sup>

Confirmation bias means that the accused student is unlikely to be treated fairly when the same person who is conducting the investigation will also be rendering the final determination in the case.<sup>240</sup> As the court explained in *Doe v. Brandeis University*:

The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions.<sup>241</sup>

Although investigators may begin their analysis with an impartial perspective, once they believe that the accused either did or did not commit the act in question, they may be unable to fully consider conflicting evidence. Admittedly, confirmation bias poses a problem for the fairness and accuracy of all investigations and adjudications, but at least in an adversarial hearing the accused has the chance to present his defense before a person/persons who have not already considered the evidence and come to a judgment.

This author acknowledges that ten years as an ardent deputy public defender makes it difficult to imagine a non adversarial legal system. Yet as Bob Kagan demonstrated convincingly in his influential book, *Adversarial Legalism*, the United States' reliance on "lawyer-dominant litigation" for "policymaking, policy implementation, and dispute resolution" is unique in the world.<sup>242</sup> And though the American system can be a potent way of vindicating rights,<sup>243</sup> it comes at a significant price—it is expensive, cumbersome, unpredictable, unequal, and often excessively punitive.<sup>244</sup> In contrast, other countries have avoided these problems and achieved higher levels of legal certainty at significantly less cost by using a bureaucratic, inquisitorial system in which trained judges dominate the evidence-gathering

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239. Karl Ask et al., *supra* note 234, at 1257–58.

240. Although it is beyond the scope of this paper, the author also believes that students should be able to participate in disciplinary proceedings because they add needed diversity to the panel and their involvement increases the legitimacy of the campus disciplinary proceedings.

241. *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at \*36 (D. Mass. Mar. 31, 2016).

242. See 2 ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3–7 (2003).

243. See *id.* at 19–25.

244. *Id.* at 25–33, 62–68.

and decision-making processes.<sup>245</sup> Importantly, however, even those like Christopher Slobogin who support a more inquisitorial model of adjudication seem to agree that the investigator must be separated from the fact-finder.<sup>246</sup>

*d. No Right to Evidence*

The DCL orders universities not to let a respondent review the complainant's statement unless she can read his.<sup>247</sup> The Francisco Sousa case demonstrates the way that this policy works in some universities. San Diego State University refused to turn over the complainant's statement (indeed any evidence in the case) because Sousa had not given a formal enough account about what happened.<sup>248</sup> Apparently the professions of innocence that he made in person and through his attorney were insufficient. Making notice contingent on first meeting some nebulous standard<sup>249</sup> significantly interferes with the accused knowing what he is alleged to have done, and without this information, he cannot decide which evidence or witnesses to introduce, and thus he cannot fully defend himself.

*e. No Right to Question the Complainant*

Not giving the accused the right to question his accuser seriously impairs his right to a fair and accurate determination of responsibility. In *Goldberg v. Kelley*, the Supreme Court wrote that in almost every proceeding "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."<sup>250</sup> The right to ask questions is not a mere formality; the Court has called cross-examination "the 'greatest legal engine ever invented for the discovery of truth.'"<sup>251</sup> As the court in *Doe v. Brandeis University* explained, cross-examination is particularly important in credibility contests where there are

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245. *Id.* at 7, 11, 239–41.

246. See Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 713 (2014).

247. Dear Colleague Letter, *supra* note 31, at 11–12.

248. Dorian Hargrove, *San Diego Universities Botch Sexual Assault Investigations*, SAN DIEGO READER (Sept. 2, 2015), <http://www.sandiegoreader.com/news/2015/sep/02/san-diego-universities-botch-sexual-assault-invest/#>.

249. How detailed must the statement be? Must the accused discuss the entire history between the parties or just the incident in question? Must he discuss everything the complainant did, and if so, how can he do that if he hasn't read her statement?

250. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

251. *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). Note that some venerable scholars disagree with the truth-seeking function of direct questioning, including, Christopher Slobogin. See Slobogin, *supra* note 246, at 705–07, 712.

no witnesses or other extrinsic evidence.<sup>252</sup> Yet as this Article has shown, the vast majority of universities studied do not give an accused student the right to directly question his accuser. Under almost all the procedures studied, the accused must direct his questions through the panel, which may choose whether or not to ask. Even if they do ask, the complainant need not answer.

On July 10, 2015, San Diego Superior Court Judge Joel Pressman held that a University of California San Diego student suspended for a year for sexual assault was denied the right to a fair hearing because of procedures just like those used at many of the flagship state universities.<sup>253</sup> The court ruled that a barricade (which many universities now use) should not have been used to shield the accuser because there was no evidence that Doe was hostile to her.<sup>254</sup> The court also noted “the importance [of] demeanor and non-verbal communication in order to properly evaluate credibility. This is especially true given that the panel made findings in this case from Ms. Roe's testimony and her credibility.”<sup>255</sup> Finally, the court held that allowing the panel chair to review the student's questions before being asked was unfair and that denying him the right to ask several questions “deprived petitioner the opportunity to examine anything about the summary conclusions relied upon by the hearing panel.”<sup>256</sup> In particular, the court did not approve of the panel prohibiting Doe from questioning Ms. Roe about text messages regarding their relationship after the incident in question, which Roe had denied.<sup>257</sup>

Social science supports the importance courts place in cross-examination. Although researchers have shown people are not very good at judging a person's veracity based on his demeanor,<sup>258</sup> cross-examination is still an important vehicle for discerning truth.<sup>259</sup> This is because a witness's cognitive limitations make it demonstrably more difficult for him to consistently

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252. *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at \*35 (D. Mass. Mar. 31, 2016).

253. *Doe v. Regents of Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at \*1 (Cal. Super. Ct. July 10, 2015).

254. *Id.* at \*2.

255. *Id.* at \*3.

256. *Id.*

257. *Id.* at \*2.

258. See Vrij, *supra* note 232, at 166–67; see also Bella M. De Paulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74 (2003) (conducting a meta-analysis of 120 independent samples and finding that behavior commonly associated with deception such as unwillingness to maintain eye contact were not in fact related).

259. See Raymond LaMagna, Note, *(Re)Constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1506 (2006).

answer spontaneous questions under live cross-examination if he is being insincere.<sup>260</sup> In addition, there is certain observable behavior that has been linked to deception, such as vocal tension and pitch.<sup>261</sup> At least one study has shown that subjects are more than twice as effective at detecting deception when they are able to observe a speaker's body and hear his voice as opposed to simply reviewing a written transcript.<sup>262</sup> Thus screens should only be used when absolutely necessary and only to shield the complainant from the accused, not from those who will be deciding whether an assault took place.

*f. Limited Right to Counsel*

The vast majority of universities give students the right to retain counsel, but it is almost always an abridged right.<sup>263</sup> Counsel must play a silent role, meaning that she is not allowed to question witnesses or address the hearing in any way. Denying students the right to have active representation creates a real danger that innocent people will be found responsible.

When a university is deciding whether to allow more robust representation, it should consider why the right to counsel is enshrined in the 6th Amendment of the U.S. Constitution. This Article is not contending that what is at stake in a college disciplinary proceeding is anywhere akin to that of a criminal trial, but it still helps to remember why counsel is a fundamental right. As the Supreme Court wrote in *Argersinger v. Hamlin*, “[t]he assistance of counsel is often a requisite to the very existence of a fair trial.”<sup>264</sup> This is because of the “obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . .”<sup>265</sup> In *Powell v. Alabama*, Justice Sutherland explained why even innocent people need a lawyer: “Without [the guiding hand of counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”<sup>266</sup>

Of course, university grievance procedures are not as complicated as jury trials. For instance, university tribunals do not require participants to know the federal or state rules of evidence. But helping students navigate

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260. Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 332–44 (2004).

261. See De Paulo et al., *supra* note 258 at 95–96.

262. See Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions*, 6 S. CAL. INTERDISC. L.J. 1, 21–22 (1997).

263. *Supra* Section II.A, Table 6.

264. *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972).

265. *Johnston v. Zerbst*, 304 U.S. 458, 462–63 (1938).

266. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

complicated proceedings is not the only purpose of an attorney. Lawyers also aid those who are uncomfortable speaking in public because they may be shy, have difficult thinking on their feet, or lack proficiency in English. For these students, not having an attorney creates a Hobson's choice. Remain silent but forsake the opportunity for vigorous self-defense, or speak but run the risk that they be judged a liar. This conundrum is especially ironic because the stress of public speaking is likely to exacerbate classic symptoms of nervousness like gaze aversion and fidgeting, which many wrongly believe are indicative of deception.<sup>267</sup>

Lawyers may be especially important for students who are in categories of accused more likely to be found responsible based solely on what they look like. Studies show that unattractive defendants receive significantly longer sentences for the same crime as compared with attractive defendants, and African Americans are given longer sentences than whites.<sup>268</sup> Research suggests that if a defendant has a face considered to be more consistent with the charged offense, he is more likely to be convicted of that crime than a person with a face that does not match.<sup>269</sup> This has been found to be true regardless of the strength of the evidence.<sup>270</sup> A good lawyer can help to offset these biases through effective advocacy, such as by bringing out important facts or pointing out possible credibility issues.

*g. Standard of proof—Preponderance of the Evidence*

All of the flagship state universities are known to have adopted “preponderance of the evidence” as their standard of proof. As one university administrator explained, “preponderance of the evidence is 50% plus a feather.”<sup>271</sup> Although this standard almost certainly meets the minimal requirements of procedural due process, this Article contends that universities should use a higher standard of proof given the seriousness of the allegations and the potential consequences.

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267. See Lucy Akehurst et al., *Lay Persons' and Police Officers' Beliefs Regarding Deceptive Behavior*, 10 APPLIED COGNITIVE PSYCHOL. 461, 462 (1996); Vrij, *supra* note 232, at 162.

268. Andrea DeSantis & Wesley A. Kayson, *Defendants' Characteristics of Attractiveness, Race, and Sex and Sentencing Decisions*, 81 PSYCHOL. REP. 679, 682 (1997).

269. A.G. Goldstein et al., *Facial Stereotypes of Good Guys and Bad Guys: A Replication and Extension*, 22 BULL. OF PSYCHONOMIC SOC'Y 549, 551–52 (1984); A.D. Yarmey, *Stereotypes and Recognition Memory for Faces and Voices for Good Guys and Bad Guys*, 7 APPLIED COGNITIVE PSYCHOL. 419, 419 (1993).

270. R. Dumas & B. Teste, *The Influence of Criminal Facial Stereotypes on Juridic Judgements*, 65 SWISS J. PSYCHOL. 237 (2006).

271. Telephone Interview with University Administrator (Jan. 24, 2014).

In determining whether a feather should be enough to tip the scales in a campus disciplinary proceeding for rape, it helps to remember what purpose the standard of proof plays. In *Addington v. Texas*, the Court said that the function of the standard of proof is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”<sup>272</sup> Setting a high or low standard is a way “to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”<sup>273</sup>

The Court then differentiated between types of cases across the spectrum. At one end lies the archetypal civil case involving a pecuniary dispute between private parties. “Since society has a minimal concern with the outcome of such private suits, plaintiff’s burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.”<sup>274</sup> This is contrasted with criminal cases in which “the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.”<sup>275</sup> Because so much is at stake, the state has the burden of proving guilt beyond a reasonable doubt, which is a way of guaranteeing “our society imposes almost the entire risk of error on itself.”<sup>276</sup>

In the middle are cases that use the intermediate standard of clear and convincing evidence. This standard is typically used in civil cases involving “quasi-criminal wrongdoing” like fraud.<sup>277</sup> The rationale for this intermediate standard is that the interests at stake are “more substantial than mere loss of money.”<sup>278</sup> For that reason, “some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.”<sup>279</sup> The Court noted that it also used this higher standard in certain civil proceedings as a way of “protect[ing] particularly important individual interests.”<sup>280</sup> The Court mentioned deportation and

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272. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citing *In re Winship*, 397 U.S. 358, 370 (1970)).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 424.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

denaturalization, and in *Addington* it held that civil commitment also requires this higher standard of proof.<sup>281</sup>

The question then is where a university adjudication of sexual assault falls on this spectrum. Many have argued that the standard of proof should be preponderance of the evidence.<sup>282</sup> They contend that this lower standard adequately protects the accused,<sup>283</sup> while at the same time making it easier for victims whose only evidence is their word to lodge complaints.<sup>284</sup> Finally, some maintain that preponderance is the right standard because it treats the interests of the accused student, the victimized student, and the entire student body as equally important.<sup>285</sup>

A person will not go to jail if he is found to have violated the school of conduct, but his life is still likely to be gravely affected. This is particularly true now that OCR has prohibited schools from reaching any kind of informal settlement in sexual assault cases, even at the request of the victim,<sup>286</sup> and OCR has made it clear that any punishment short of suspension or expulsion is inadequate. Although the Family Educational Rights and Privacy Act (FERPA) generally prohibits the improper disclosure of personally identifiable information obtained from education records, there are exceptions for crimes of violence.<sup>287</sup> Universities may notify the victim of the outcome of the proceedings,<sup>288</sup> and they are allowed to disclose to third parties when they find a student has committed rape or sexual assault.<sup>289</sup> Some universities mark official transcripts to indicate that the person committed non-academic misconduct.<sup>290</sup> Although some students have the savvy and resources to transfer to another school after being expelled, many do not.

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281. *Id.* at 432.

282. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1016–17 (2004); Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 48 (2004); Mathew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 516–19 (2012); Weizel, *supra* note 46.

283. Triplett, *supra* note 282; Weizel, *supra* note 46.

284. Anderson, *supra* note 282, at 1016.

285. Stoner & Lowery, *supra* note 282, at 48–49.

286. See Dear Colleague Letter, *supra* note 31, at 8.

287. 34 C.F.R. §§ 99.31(13)–(14), (16) (2012).

288. 34 C.F.R. § 99.31(a)(13).

289. 34 C.F.R. § 99.31(a)(14).

290. Collin Binkley et al., *Students Easily Transfer After Violent Offenses*, COLUMBUS DISPATCH (Nov. 24, 2014, 8:05 AM), <http://www.dispatch.com/content/stories/local/2014/11/24/hidden-on-campus.html>.

Without an undergraduate degree, a person's earning potential and career opportunities are significantly curtailed.

Furthermore, requiring that the standard of proof be set at preponderance means that some schools have a lower standard of proof for allegations of sexual harassment or assault than for other offenses.<sup>291</sup> As the Massachusetts District Court observed in *Doe v. Brandeis University*, intentionally making it easier to find men responsible for sexual assault compared to other misconduct is particularly problematic in light of the elimination of other basic procedural rights of the accused:

The standard of proof in sexual misconduct cases at Brandeis is proof by a "preponderance of the evidence." For virtually all other forms of alleged misconduct at Brandeis, the more demanding standard of proof by "clear and convincing evidence" is employed. The selection of a lower standard (presumably, at the insistence of the United States Department of Education) is not problematic, standing alone; that standard is commonly used in civil proceedings, even to decide matters of great importance. Here, however, the lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused.<sup>292</sup>

### 3. Factor Three: Government Interest and Burdens of Additional Protections

Under the final *Eldridge* factor, courts must consider the governmental interest at stake and the burdens of additional protections.

#### *a. Preventing Sexual Assault*

The primary function of universities is to provide an education,<sup>293</sup> and Title IX recognized that this end could not be achieved unless women are free from sexual discrimination and assault. The consequences of sexual assault endure

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291. See *supra* Table 1.

292. *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at \*37 (D. Mass. Mar. 31, 2016).

293. See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988).

long beyond the physical injury; victims report feeling the psychological and emotional consequences many years after the attack occurred. Studies show that between 32% and 70% of rape survivors develop PTSD, and 38% to 43% meet the criteria for major depression.<sup>294</sup>

In addition, at least one study found that being the victim of sexual assault had a negative impact on academic success.<sup>295</sup> Specifically, researchers found that women who were sexually assaulted during their first semester of university tended to have a lower GPA by the end of the semester as compared with women who had not experienced sexual assault during that first semester.<sup>296</sup> Importantly, however, it appears that the negative impact did not last long; researchers found that these same women did not have a lower GPA at the end of their second semester as compared with those who had not been sexually assaulted.<sup>297</sup> Finally, the study found that the more traumatic the sexual assault, the more dramatic the impact on academic performance.<sup>298</sup>

Thus it is clear that universities have an interest and a responsibility in preventing sexual assault, but at the same time, it is important not to misrepresent the extent of the problem. OCR justified the procedural changes in the DCL in part on the notion that female college students were at particular risk of being sexually assaulted. A study by the Bureau of Justice Statistics found the opposite to be true, that college students are less likely to be raped or sexually assaulted than their peers.<sup>299</sup>

The incidence of sexual assault should also not be overstated. As mentioned at the beginning of this Article, OCR cited a study by NIJ in support of its claim that “[t]he statistics on sexual violence are both deeply troubling and a call to action for the nation.”<sup>300</sup> Yet the one in five study only reported the findings from a sample size of two universities, and they were not nationally representative. Indeed on December 15, 2014, Christopher Krebs and Christine Lindquist, the lead researchers of the NIJ study published a piece in Time Magazine in which they wrote:

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294. Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUMATIC STRESS 119, 126–27 (2003); Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCI. 206, 221 (2006); Dean G. Kilpatrick et al., *Rape Related PTSD: Issues and Interventions*, PSYCHIATRIC TIMES, June 1, 2007, at 50.

295. See Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE, & ABUSE 191, 196 (2014).

296. Jordan et al., *supra* note 295, at 191.

297. *Id.* at 196.

298. *Id.* at 197.

299. SINOZICH & LANGTON, *supra* note 34.

300. Dear Colleague Letter, *supra* note 31, at 2.

[T]he 1-in-5 statistic is *not* a nationally representative estimate of the prevalence of sexual assault, and we have never presented it as being representative of anything other than the population of senior undergraduate women at the two universities where data were collected—two large public universities, one in the South and one in the Midwest.<sup>301</sup>

The 2015 Association of American Universities Campus Climate Survey though often cited,<sup>302</sup> has similar limitations. That study found one in four women surveyed from twenty-seven Institutes of Higher Education (IHEs) had been raped or sexually assaulted while in college.<sup>303</sup> Yet the authors explicitly stated that the results were not nationally representative and that saying otherwise, “is at least oversimplistic, if not misleading.”<sup>304</sup>

But the Campus Climate Survey may be flawed even with the sample it purports to represent. The study had just a 19.3% response rate, which means that the results could be biased upwards. As the authors acknowledged, if victims are more likely to respond to a survey on sexual assault then the results would be biased to overestimate the amount of rape and sexual assault.<sup>305</sup> To test this, they conducted three different assessments of non-response bias. The results weren’t good: “Two of these three analyses provide evidence that nonresponders tended to be less likely to report victimization. This implies that the survey estimates related to victimization and selected attitude items may be biased upwards (i.e., somewhat too high).”<sup>306</sup>

As a point of comparison, the National Crime Victimization Survey (NCVS) published a study in 2014 that found between 1995 and 2013, 6.1 per 1,000 women in post secondary institutions were the victims of rape or

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301. Christopher Krebs & Christine Lindquist, *Setting the Record Straight on ‘1 in 5’*, TIME, (Dec. 15, 2014), <http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/>.

302. See Michele Gorman, *1 in 4 Women Experienced Sexual Assault While in College Survey Finds*, NEWSWEEK (Sept. 21, 2015, 4:26 PM), <http://www.newsweek.com/1-4-women-sexual-assault-college-374793>; Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), [http://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html?\\_r=0](http://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html?_r=0); Kelly Wallace, *23% of Women Report Sexual Assault in College, Survey Finds*, CNN (Sept 23, 2015, 8:43 AM), <http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey/>.

303. See DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, 23–26 (2015), [https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf).

304. *Id.* at xv.

305. *Id.* at vi–vii.

306. *Id.*

sexual assault.<sup>307</sup> These results were nationally representative. Although the NCVS has a large sample size and very high response rate (historically between 86–91%),<sup>308</sup> it has been criticized for likely underestimating the incidence of rape and sexual assault.<sup>309</sup> Importantly, the NCVS did find that women between the ages of eighteen and twenty-four had a higher rate of rape and sexual assault than those in any other age group.<sup>310</sup> The NCVS also highlighted the intractability of the problem; it reported that the rate of sexual assault among female college students did not differ significantly from one year to the next between 1997 and 2013.<sup>311</sup>

Since universities have such different incidences of sexual assault, it isn't clear why a one shoe fits all policy should be instituted. Why is OCR requiring all schools to change their procedural protections when all schools do not have a problem with rape? Where is the evidence that there is any correlation between the level of procedural protections and the incidence of rape and sexual assault?

Furthermore, whatever the rate of sexual assault, it is an open question whether lowering procedural protections actually furthers the government's interest in protecting women. It is true that some universities have an appalling record of punishing rape and sexual assault,<sup>312</sup> but as the Erica Kinsman case showed, lowering the standard of proof does not necessarily solve the problem. More to the point, states across the country were able to increase reporting and prosecution of rape without lowering procedural protections.<sup>313</sup> They did it by instituting reforms that included: changing evidentiary standards (many states had previously required a witness to corroborate the allegation), redefining the crime of rape to include more than just vaginal/penile penetration, eliminating the resistance requirement and creating rape shield statutes, which barred evidence about the victim's dress

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307. SINOZICH & LANGTON, *supra* note 34, at 4.

308. See NAT'L RESEARCH COUNCIL, DIV. ON BEHAVIOR & SOC. SCI. & EDUC., ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 55 (Candace Kruttschnitt et al. eds., 2014).

309. *Id.* at 4.

310. SINOZICH & LANGTON, *supra* note 34, at 3.

311. *Id.*

312. See Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL'Y & L. 1, 6 (2015); Binkley et al., *supra* note 290; Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, THE CTR. FOR PUB. INTEGRITY (July 14, 2014, 4:50 PM), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault>.

313. See Jody Clay-Warner & Callie Harbin Burt, *Rape Reporting After Reforms: Have Times Really Changed?*, 11 VIOLENCE AGAINST WOMEN 150, 165 (2005) (finding that a rape occurring after 1989 was eighty-eight percent more likely to be reported than a rape that happened before 1975, which was when rape reforms began).

or prior sexual history unless a judge found that it was particularly relevant to the facts of the case.<sup>314</sup> Importantly, however, researchers found that although reporting of aggravated rape (defined as stranger rape, use of a weapon, or resulting in injury)<sup>315</sup> went up, there was no change to reporting of simple rape.<sup>316</sup> Since a college campus is more likely to involve rape between people who know each other, the reforms described above may not increase reporting. Instead colleges will have to take other measures, which will be described in greater detail below.<sup>317</sup>

One obvious first step, however, is curbing the consumption of alcohol on campus because it has been shown to play a major role in sexual assault.<sup>318</sup> Schools must also identify and get control of high-risk sports teams and fraternities that report higher levels of hostility and sexual aggression towards women.<sup>319</sup> Outside the university, police departments need to take so-called date rape more seriously, and universities must support those women who do want to report to the police.

*b. Fair proceedings*

The university also has a “vital interest” in fair proceedings because they “serve[] the goals of both students and schools alike.”<sup>320</sup> Finding an innocent person responsible for rape means the university will unnecessarily lose that person’s tuition as well as any contribution they would otherwise make to the community, such as through participation in sports or student government. If the case was one of mistaken identification then a wrongful finding means that there will still be a dangerous person at large on campus.

On a more general level, ensuring that disciplinary proceedings are fair may actually promote community safety by increasing respect for campus rules. Although many believe that it is the threat or use of punishment that

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314. CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM 20–29 (1992).

315. Clay-Warner & Burt, *supra* note 313, at 169.

316. *Id.* at 167.

317. See Meichun Mohler-Kuo et al., *Correlates of Rape While Intoxicated in a National Sample of College Women*, 9 J. OF STUD. ON ALCOHOL 37, 37–38 (2004) (discussing that one issue colleges should address is intoxication).

318. See *id.*

319. Stephen E. Humphrey & Arnold S. Kahn, *Fraternities, Athletic Teams, and Rape: Importance of Identification with a Risky Group*, 15 J. OF INTERPERSONAL VIOLENCE 1313, 1320 (2000); see Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 145–48 (2007).

320. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14–15 (1st Cir. 1988).

shapes compliance with the law,<sup>321</sup> social psychologists like Tom Tyler contend that legitimacy is a more powerful force. “Legitimacy is a feeling of obligation to obey the law and to defer to the decisions made by legal authorities.”<sup>322</sup> In his 1990 book *Why People Obey the Law*, Tyler argued that the basis of legitimacy is procedural justice.<sup>323</sup> Subsequent research laid out the six components of procedural justice: representation (the belief to which parties believe they had the opportunity to take part in the decision-making process), consistency (similarity of treatment over time and as compared with like parties), impartiality (when the legal authority is unbiased), accuracy (ability to make competent, high quality decisions which includes the public airing of the problem), correctability (whether the legal system has a mechanism for correcting mistakes), and ethicality (when the authorities treat parties with dignity and respect).<sup>324</sup> Importantly, Tyler found that it was perceived fairness and not case outcome that influenced people’s evaluation of their courtroom experience.<sup>325</sup>

In addition, increasing perceived fairness may be the best way to achieve bystander intervention, which many advocates believe is critical for lowering sexual assault on campuses.<sup>326</sup> Bystander intervention (which includes “a full range of options and levels of action, from speaking to a resident assistant about an encounter in a residence hall to calling the police”)<sup>327</sup> requires “a paradigm shift in the thinking of the campus community.”<sup>328</sup> Tyler and Fagan found that people were more likely to view police as legitimate when they believed they were using fair procedures in the way they interacted with the

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321. Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 3 (1998). Reviewing studies on the impact of deterrence, Nagin states, “I now concur with Cook’s more emphatic conclusion that the collective actions of the criminal justice system exert a very substantial deterrent effect.” *Id.*

322. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. OF CRIM. L. 231, 235 (2008).

323. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 103 (1990); *see also* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7-18 (2002); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375–76 (2006).

324. *See* Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 163, 167–69 (1997).

325. Tom R. Tyler, *The Role of Perceived Injustice on Defendants’ Evaluations of Their Courtroom Experience*, 18 LAW & SOC’Y REV. 51, 63–66 (1984).

326. *See* Joetta L. Carr, *Preventing Sexual Violence Through Empowering Campus Bystanders*, in SHIFTING THE PARADIGM: PRIMARY PREVENTION OF SEXUAL VIOLENCE 16, 16–18 (2007), [http://www.acha.org/documents/resources/ACHA\\_PSV\\_toolkit.pdf](http://www.acha.org/documents/resources/ACHA_PSV_toolkit.pdf).

327. *Id.* at 18.

328. SHIFTING THE PARADIGM: PRIMARY PREVENTION OF SEXUAL VIOLENCE, *supra* 326, at 3.

public.<sup>329</sup> They also found that members of the public who viewed police as legitimate were more likely to report crime and criminals, and more likely to work with others in their community to fight crime.<sup>330</sup> Assuming Tyler and Fagan's findings hold in the university context—students may be more likely to intervene when they see someone being assaulted if they feel confident that the perceived attacker will be treated fairly.

From a procedural justice standpoint, OCR's justification for setting the standard of proof at preponderance of the evidence is particularly problematic. OCR argues that the standard of proof should be preponderance because that is what the government uses in Title VII hearings. If OCR wants to base its procedural protections on Title VII, however, then it should require all of the same rights afforded at Title VII hearings. Under Title VII, the EEOC is barred from releasing the names of those under investigation,<sup>331</sup> and if someone does release a name, they can be fined, jailed, or both.<sup>332</sup> If the DCL wants to pattern its proceedings on those under Title VII, then it should also penalize releasing the names of schools under investigation.

In addition, the Civil Rights Act of 1991 gives both parties in a Title VII case the right to a jury trial if one party requests compensatory or punitive damages.<sup>333</sup> Having the right to trial under Title VII means that employers enjoy a panoply of other protections including: the right to counsel; the right to a jury<sup>334</sup> comprised of jurors who have not been excluded on account of race or gender;<sup>335</sup> the right to strike jurors for cause;<sup>336</sup> the right to three peremptory challenges;<sup>337</sup> the right to confront and cross-examine witnesses (including the complainant); the right to depose witnesses;<sup>338</sup> and the right to the rules of evidence (thus barring hearsay evidence unless it is subject to a

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329. Tyler & Fagan, *supra* note 321, at 267.

330. *Id.* at 252.

331. 42 U.S.C. § 2000e-5(b) (2012) ("Charges shall not be made public by the Commission.").

332. *Id.*

333. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100 (codified as amended in scattered sections of 42 U.S.C.).

334. FED. R. CIV. P. 48.

335. See *J.E.B. v. Alabama*, 511 U.S. 127, 144-46 (1994) (holding that jurors should not be struck based on gender); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-28 (1991) (holding that the prohibition against discriminatory peremptory challenges based on race applies in civil cases); *Hernandez v. New York*, 500 U.S. 352, 369-71 (1991); *Batson v. Kentucky*, 476 U.S. 79, 87-98 (1986).

336. 28 U.S.C. § 1870 (2012).

337. *Id.*

338. U.S. CONST. amend. VI.

recognized exception).<sup>339</sup> Finally, an employer cannot be found responsible for violating Title VII unless the jurors are unanimous.<sup>340</sup>

Not only does the DOE not mandate or even recommend that these rights provided by Title VII be provided, the DCL affirmatively recommends against some of them. For instance, OCR strongly discourages schools from allowing the parties to directly question one another,<sup>341</sup> and it tells schools that they “should not allow the alleged perpetrator to review the complainant’s statement without also allowing the complainant to review the alleged perpetrator’s statement.”<sup>342</sup> Cherry picking the provisions of Title VII that lower a student’s procedural rights while ignoring the provisions that strengthen them undermines the legitimacy of a school’s disciplinary proceedings because accused students will understandably feel like they are not being treated fairly.

*c. Cost*

Finally, *Eldridge* requires courts to consider what the additional procedural requirements will cost because they “entail the expenditure of limited resources, [and] . . . at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection.”<sup>343</sup> Fortunately, the direct costs of the additional protections described above are not unduly burdensome. Providing a legal advocate will not require substantial additional resources, and elevating the standard of proof, allowing direct questioning, providing full notice of the evidence against a person, and granting an adjudicatory hearing need not cost any extra money.

These additional protections are likely to slow down proceedings, however, which can have a significant indirect cost. Many have criticized formal rulemaking under the APA, especially the cross-examination of witnesses, as being “unduly burdensome.”<sup>344</sup> As one scholar wrote, “Trial-type proceedings in rulemaking tend to be drawn out, repetitious, and unproductive . . . .”<sup>345</sup> In his 2011 testimony before the House Committee of

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339. FED. R. EVID. 101, 1101.

340. FED. R. CIV. P. 48(b).

341. Dear Colleague Letter, *supra* note 31.

342. *Id.*

343. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (1988) (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1276, 1276 (1975)).

344. Arthur Earl Bonfield, Symposium, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617, 647 (1991).

345. *Id.* at 623.

the Judiciary, Harvard Law Professor Matthew Stephenson described formal rulemaking as typically resulting in “substantial” costs and delays.<sup>346</sup>

Yet, even those hostile to formal rulemaking still believe robust procedures are important for adjudicating questions of fact.<sup>347</sup> Professor Stephenson invoked Judge Richard Posner to distinguish between how cross examination might be vital (and thus worth the cost) for factual determinations (which is what we have in sexual assault adjudications) as opposed to general policy questions:

[T]rials are to determine adjudicative facts rather than legislative facts. The distinction is between facts germane to the specific dispute, which often are best developed through testimony and cross-examination, and facts relevant to shaping a general rule, which . . . more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires.<sup>348</sup>

#### D. Balancing all the Factors

The last step under *Eldridge* is balancing the different factors. This Article has already acknowledged that courts are not going to require the appointment of counsel in campus disciplinary proceedings,<sup>349</sup> although they may find that students have the right to the assistance of an attorney of their choice.<sup>350</sup> In *Lassiter v. Department of Social Services*, the Court stated that

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346. *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability Before the Subcomm. on Courts, Commercial & Admin. Law of the House Comm. on the Judiciary*, 112th Cong. 9 (2011) [hereinafter *Formal Rulemaking and Judicial Review*] (statement of Matthew C. Stephenson, Professor of Law, Harvard Law School).

347. See Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO STATE L.J. 237, 254 (2014).

348. *Formal Rulemaking and Judicial Review*, *supra* note 346, at 7–8 (internal citations omitted).

349. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”). See generally Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 968–72 (2012); Keillor et al., *supra* note 187, at 469.

350. See *Gabrilowitz v. Newman*, 582 F.2d 100, 106 (1st Cir. 1978) (affirming that because of a pending criminal case, the denial to a student of the right to have a lawyer of the student's own choice consult with and advise him during a school disciplinary hearing without participating further in such proceeding would deprive the student of due process of law).

there is a presumption against the right to counsel where there is no threat of incarceration,<sup>351</sup> and although students face serious consequences at university disciplinary proceedings, jail time is not one of them. Illustrating just how reluctant the Court is to require counsel in non-criminal cases, it held in *Lassiter* that a parent was not entitled to counsel when they were facing permanent loss of their children even though it agreed that assistance of counsel would likely increase the accuracy of the proceedings,<sup>352</sup> and in *Turner v. Rogers*, the Court held that there was no categorical right to counsel in proceedings that involved possible civil contempt and incarceration for non-payment of child support.<sup>353</sup> Thus, the best that a student can hope for is that a court will decide that due process calls for the appointment of counsel in his particular case,<sup>354</sup> for instance if he has a cognitive, emotional or physical disability that prevents him from adequately representing himself.

This Article also concedes that preponderance of the evidence is likely to be deemed constitutionally sufficient<sup>355</sup> even though the stakes are considerable, and raising the standard would not directly cost universities any money.<sup>356</sup> Some courts have actually upheld the lower standard of “substantial evidence” in university disciplinary proceedings.<sup>357</sup> Others have found substantial evidence too low and have required preponderance of the evidence.<sup>358</sup> This author is aware of no court that has required the standard be set at clear and convincing, although at least one has stated that such a higher

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351. *Lassiter*, 452 U.S. at 27.

352. *Id.* at 31.

353. *Turner v. Rogers*, 564 U.S. 431, 438 (2011).

354. In *Lassiter*, the Court wrote: “[S]ince the *Eldridge* factors will not always be so distributed, and since ‘due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed,’ neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli*, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.” *Lassiter*, 452 U.S. at 31–32 (citation omitted).

355. See generally Weizel, *supra* note 46, at 1613.

356. Elevating the standard of proof could slow down the proceedings, which would result in the opportunity cost of how the participants could otherwise be spending their time.

357. See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975) (holding that the procedures utilized, including the standard of proof, satisfied procedural due process); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005); *Edwards v. Bd. of Regents of Nw. Mo. State Univ.*, 397 F. Supp. 822, 831 (W.D. Mo. 1975); *Gagne v. Trs. of Ind. Univ.*, 692 N.E. 2d 489, 493 (Ind. Ct. App. 1998).

358. See *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1119 (E.D. Wis. 2001) (“I observe here only that no lower standard of proof than ‘preponderance of the evidence’ could be acceptable.”).

standard may be appropriate. In *Smyth v. Lubbers*,<sup>359</sup> the U.S. District Court for the Western District of Michigan stated in dicta that the standard could not be lower than preponderance of the evidence in a case in which a student was charged with conduct that also constituted a crime.<sup>360</sup> In fact the Court wrote, “given the nature of the charges and the serious consequences of conviction, the court believes the higher standard of ‘clear and convincing evidence’ may be required.”<sup>361</sup>

A better approach might be to base the level of proof on the degree of punishment.<sup>362</sup> Indeed we need look no further than federal anti-trust law as an example. The state must prove the *same* conduct beyond a reasonable doubt if a person faces prison time but need only meet preponderance of the evidence if he faces fines.<sup>363</sup> Requiring a student to receive counseling or to live in a substance-free dorm is significantly less punitive than expulsion, and so it seems fair that they could be adjudicated on a lower standard of proof.

With regards to the right to have a copy of the complainant’s statement, however, the Supreme Court has arguably already settled the issue of whether an accused student has the right to know the evidence against him. *Goss* carefully distinguished between the initial notice requirement and what a school has to provide once a student has denied the charges against him.<sup>364</sup> The initial notice requirement is not that high, it requires only that a student first be told what he is accused of doing and what the basis of the accusation is.<sup>365</sup> As the Second Circuit put it, “[n]otice must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”<sup>366</sup> Once the student denies the charges, however, the university has a higher burden. It must provide “an explanation of the evidence the authorities have” against him.<sup>367</sup> Although a university could argue that it is complying with its due process obligations by providing the accused with a synopsis of the accusations through its Title IX coordinator, the accused student has a good

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359. *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975).

360. *Id.* at 799.

361. *Id.*

362. I am indebted to Ed Rubin for this point as well as for the anti-trust example.

363. See *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Nov. 8, 2016).

364. *Goss v. Lopez*, 419 U.S. 565, 581–82 (1975).

365. *Id.* at 582.

366. *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)), *cert. denied*, 496 U.S. 941 (1990).

367. *Goss*, 419 U.S. at 581.

argument that the university is only meeting its notice obligation, not its more weighty obligations under the “explanation of evidence” portion of *Goss*.

Balancing the *Eldridge* factors, students should have a right to cross-examine their accuser as well as other witnesses. Courts have split on whether students should have the right to cross-examine witnesses in disciplinary proceedings,<sup>368</sup> but this author contends that in allegations of sexual assault, direct questioning is necessary. Unless it appoints counsel or paid advocates to conduct the questioning, cross-examination doesn’t cost the university any money, and the extra time it takes is a small price to pay for more accurately determining what happened. As the court explained in *Donohue v. Baker*,<sup>369</sup> “if a case is essentially one of credibility, the ‘cross-examination of witnesses might [be] essential to a fair hearing.’”<sup>370</sup> This author recognizes that the university has an interest in reducing trauma to the complainant and urges universities to require lawyers or legal advocates to conduct the questioning on behalf of the accused. If the accused has not retained an attorney or advocate on his own, then the university should appoint one. Although appointing an attorney would be expensive unless the attorney agreed to handle the case pro bono, providing a legal advocate would not.

At the very least, universities should allow the accused to ask questions through the hearing panel, and since—as Professor McCormick famously put it—“a brick is not a wall,”<sup>371</sup> the default should be to allow the question. It may not be immediately apparent why the accused wants a certain question

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368. See *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (“This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required.”); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (“The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding.”). *But see Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (holding that the accused student had a right to confront his accuser because the rape case turned on the credibility of two individuals and thus more formal procedures were required in light of the possibility of expulsion); *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff’d* 594 F.2d 699 (8th Cir. 1979) (where a witness was known, present, and “her testimony was critical . . . due process clearly demanded that the plaintiff should have been given an opportunity to question her before the school board at its disciplinary hearing concerning the details of his alleged misconduct”); *Gonzales v. McEuen*, 435 F. Supp. 460, 469 (C.D. Cal. 1977) (“[W]here the student is faced with the severe sanction of expulsion, due process does not permit admission of ex parte evidence by witnesses not under oath, and not subject to examination by the accused student.”).

369. *Donohue*, 976 F. Supp. 136.

370. *Id.* at 147 (citing *Winnick*, 460 F.2d at 550).

371. CHARLES TILFORD MCCORMICK, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 317 (1972).

asked, but that doesn't mean it isn't relevant to establishing his innocence. Furthermore, unlike the practice at most universities, the complainant should be required to be present and respond.

Finally, students should have the right to an adjudicatory hearing. Although the author recognizes that the investigatory model is informal and may demand fewer resources (two values articulated by *Goss*), it is inadequate for what is at stake. Although most agree that students facing expulsion have the right to a hearing of some sort, several courts have held that when a student is facing expulsion for a disciplinary matter, they have the right to a more formal hearing in which they have the opportunity to hear the evidence against them, ask questions and present evidence on their own behalf.<sup>372</sup> In *Dixon v. Alabama State Board of Education*,<sup>373</sup> the Fifth Circuit explained why such a formal hearing was necessary:

By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved.<sup>374</sup>

#### IV. RESTORATIVE JUSTICE—A VIABLE ALTERNATIVE

There is a better way of responding to sexual assault if both parties agree, and that is restorative justice. As Tom Tyler explains: “Restorative Justice argues that the social goal that should dominate reactions to transgressions is to resolve the dispute via reintegrative shaming [which] . . . combines strong disapproval of bad conduct with respect for the person who committed those bad acts. The goal is restoring victims, offenders and the community.”<sup>375</sup> Unlike mediation, which treats parties as neutral, the starting point for restorative justice is that “harm has been done and someone is responsible for

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372. See *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (“Although *Dixon* was decided more than twenty years ago, its summary of minimum due process requirements for disciplinary hearings in an academic setting is still accurate today.”); *Dixon*, 294 F.2d at 158–59; *Donohue*, 976 F. Supp. at 147.

373. *Dixon*, 294 F.2d at 158–59.

374. *Id.*

375. See Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking: Dealing with Rule Breaking*, 62 J. SOC. JUST. 307, 315 (2006).

repairing it.”<sup>376</sup> This distinction is important because the 1997 Guidance Document<sup>377</sup> and the 2001 Guidance Document<sup>378</sup> told schools that they could not use mediation in cases of sexual assault, even if voluntary.

Restorative justice provides a marked contrast to the way that OCR has told schools to handle sexual assault. The OCR approach could be characterized as “progressive exclusion” meaning that as the seriousness of the offense increases, the offender is further separated from the institution.<sup>379</sup> This approach may increase community safety and convey community disapprobation, but it “directly conflicts with the aspirations of rehabilitation and reintegration, which aim to restore the student’s personal well-being and relationship to their school community.”<sup>380</sup> In addition, unlike restorative justice, traditional disciplinary proceedings are only able to address the assault on a micro level (between the parties involved) instead of looking beyond to the forces that helped to create the situation in the first place.

Although restorative justice is geared towards reintegrating the transgressing student back into the community, it is also dedicated to helping the victim heal and move forward. “A consensus of published studies is that sexual assault victims need to tell their own stories about their own experiences, obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them, (and) receive support that counteracts isolations and self-blame.”<sup>381</sup> Restorative justice responds to these needs. In conferencing (the most widely used model of restorative justice), the first meeting begins with the responsible person (otherwise known as the respondent or the accused) describing and taking responsibility for what he did and the victim describing the impact of the

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376. Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246 (2014). Koss argues that this distinction is important: Judicial “responses to sexual misconduct must acknowledge and obviate the negative effects of societal and individual norms that operate to silence victims and create opportunities for reabuse. When someone has been harmed by another person, mediation that provides neutrality and treats parties as equal partners in the resolution process is inappropriate.” *Id.* at 245–46. Koss also argues that because of this difference, colleges can adopt restorative justice and not be in violation of the DCL. *Id.* at 246.

377. *Sexual Harassment Guidance 1997*, *supra* note 93.

378. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 93, at 21.

379. David R. Karp & Olivia Frank, *Restorative Justice & Student Development in Higher Education: Expanding “Offender” Horizons Beyond Punishment and Rehabilitation to Community Engagement and Personal Growth*, in OFFENDERS NO MORE: AN INTERDISCIPLINARY RESTORATIVE JUSTICE DIALOGUE 143 (Theo Gavrielides ed., 2016).

380. *Id.*

381. Koss et al., *supra* note 376, at 246–47.

violation.<sup>382</sup> Family and friends of both are present for support and are given the opportunity to explain the impact of the harm.<sup>383</sup> A written redress plan is later formalized that describes “the concrete means through which the responsible person will be held accountable and remedy the impacts on victims and the community.”<sup>384</sup> This can include counseling (sex offender treatment, drug and alcohol interventions, and anger management), community service, and victim restitution.<sup>385</sup> A one-year supervision period is put in place to monitor the responsible person and make sure that he meets his commitments.<sup>386</sup>

Restorative justice has been shown to be effective at lowering recidivism and empowering victims in both academic and non-academic settings. A 2014 study by David Karp and Casey Sacks compared outcomes across three different college disciplinary processes: model code (a term used for the more traditional hearing conducted by a single hearing officer or panel),<sup>387</sup> restorative justice, and a combination of the two.<sup>388</sup> Karp and Casey used data from the STARR project, which has a total of 659 complete cases,<sup>389</sup> gathered from eighteen colleges and universities across the United States.<sup>390</sup> Although they cautioned that their results may be limited by the fact that they had few suspension-level cases, their findings showed that restorative justice provided a positive alternative to more traditional disciplinary proceedings. They “consistently found that restorative justice practices have a greater impact on student learning than model code hearings.”<sup>391</sup>

Furthermore, restorative justice has been successfully adopted for juvenile sex offenses and adult sex crimes. RESTORE is one such program that uses conferencing, a widely-used restorative justice methodology.<sup>392</sup> Mary Koss evaluated RESTORE using a sample of sixty-six cases involving sex crimes.

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382. *Id.* at 248.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. David R. Karp & Casey Sacks, *Student Conduct, Restorative Justice, and Student Development: Findings from the STARR Project: A Student Accountability and Restorative Research Project*, 17 CONTEMP. JUST. REV. 154, 156 (2014). “The model code calls for a hearing process that is conducted by a single hearing officer or a volunteer board, often composed of students, faculty, and staff. While proponents of the model code highlight that the hearing is not a criminal trial, it has many of the similarities to the courtroom process.” *Id.*

388. *See id.*

389. *Id.* at 162.

390. *Id.* at 160.

391. *Id.* at 169.

392. *See* Koss et al., *supra* note 376, at 248.

Although caution is necessary due to the small sample size, the results are promising. Koss found that 63% of victims and 90% of responsible persons chose restorative justice; 80% of responsible persons completed all elements of their redress plan within one year (twelve months), and post-conference surveys showed that in excess of 90% of all participants, including the victims, agreed that they felt supported, listened to, treated fairly and with respect, “and believed that the conference was a success.”<sup>393</sup> Importantly, there were no incidents involving physical threats, and standardized assessments showed decreases in victim posttraumatic stress disorder symptoms from intake to post conference.<sup>394</sup>

But perhaps the most persuasive case for restorative justice can be made from those who have participated in the process. In 2014, the dental school at Dalhousie University in Canada was shaken by male students posting sexist remarks about female students on a private Facebook page.<sup>395</sup> The female students elected to go through a restorative justice process despite considerable external pressure to do otherwise. At the end, the women released a written statement:

We made this choice informed of all of the options available to us and came to our decision independently and without coercion. . . . Our perspective and decision to proceed through this process has often not been honoured or trusted but dismissed or criticized based on the decisions or perspectives of others. . . . The restorative process has provided a very important space for us to engage safely and respectfully with our colleagues and others to convey our perspectives and needs. The process allows us to be involved in a manner that both respects and values our unique perspectives and the level of commitment and connection we desire. Additionally, it allows us to address underlying systemic and institutional issues influencing the climate and culture in which we live and learn. We want this process to make a significant contribution to bringing about a change in that culture and hope that we will be given the respect, time and space needed to do this work.<sup>396</sup>

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393. *Id.* (internal citation omitted).

394. *Id.*

395. JENNIFER J. LEWELLYN ET AL., REPORT FROM THE RESTORATIVE JUSTICE PROCESS AT THE DALHOUSIE UNIVERSITY FACULTY OF DENTISTRY 2 (2015), <http://www.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf>.

396. *Id.* at 67–68.

Prominent scholars like Koss<sup>397</sup> and Donna Coker<sup>398</sup> have called for universities to include restorative justice in addressing allegations of sexual assault. Koss has outlined how restorative justice can be used not solely as an alternative resolution process but also as a complement to a formal adjudicatory hearing.<sup>399</sup> For instance, it could be used to determine the appropriate sanction after a finding of responsibility has been made and/or as a reintegration process once the responsible student has finished his sanction. However restorative justice is used, Coker emphasizes that the responsible person's statements during restorative justice proceedings must be protected so that they cannot be used by the state in a future prosecution, otherwise restorative justice will just become a discovery gathering opportunity for the state.<sup>400</sup>

### CONCLUSION

The treatment that Erica Kinsman and Francisco Sousa received is appalling. It is inexcusable that FSU dragged its feet for two years before finally holding Jameis Winston's disciplinary hearing, and it is unpardonable that the university sabotaged its own case and that of the state of Florida by turning over Erica's statement when it did. But taking rape seriously should not mean stripping students of fundamental fairness. SDSU refused to provide Francisco with the most basic information necessary for defending himself.

Safety and fairness are not a zero-sum game; universities can successfully lower the incidence of rape while at the same time protecting the rights of the accused. To achieve this, universities need to focus on preventing rape. One obvious first step is curbing the consumption of alcohol on campus and better educating students about the risks of alcohol. Researchers have found that in seventy-two percent of cases in which a male rapes a woman college student, the woman is intoxicated.<sup>401</sup> Frequent, heavy episodic drinking increases a woman's chance of being raped by a factor of eight,<sup>402</sup> and researchers have

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397. See generally Koss et al., *supra* note 376.

398. See Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. (forthcoming 2017).

399. See Koss et al., *supra* note 376, at 250, 252–53.

400. See Coker, *supra* note 398.

401. Meichun Mohler-Kuo et al., *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65 J. STUD. ON ALCOHOL 37, 42 (2004).

402. *Id.* at 40–41.

found that sixty-four percent of men who raped women were using drugs or alcohol before the assault.<sup>403</sup>

Schools should also confront the culture that invites men to treat women as sexual objects, and they must get control of those groups that condone sexual violence. Fraternity membership and athletic participation have been associated with a higher rape-myth acceptance and a higher self-report of sexual aggression,<sup>404</sup> but not all such groups are dangerous.<sup>405</sup> Universities need to identify the high-risk fraternities and sports and either disband them or change their behavior. One particularly promising approach is “The Men’s Program,” which has been shown to be effective at both changing male participants’ attitudes towards rape and lowering the number of sexually coercive acts that they commit.<sup>406</sup>

In addition, universities must encourage bystander intervention, so that students take care of those around them and stop assault before it happens. Finally, women should be educated about factors that place them at risk (like alcohol consumption) and trained to defend themselves. A 2015 study from Canada found that women university students who received certain training had a significantly lower risk of rape than those who were just given brochures about sexual assault.<sup>407</sup>

Unfortunately, even if a university commits to taking all of these actions, rape and sexual assault will still occur. When an allegation of rape is made, it must be taken seriously. Investigation should be timely and vigorous, but unlike what happened with Erica and Francisco, the campus must pursue both sides of the story.

As this Article has shown, most of the universities studied did not give students what would be considered fundamental rights in the criminal context. Since universities are rightfully being pressured to punish rape more seriously, it is especially important that accused students are treated fairly. Although accused students do not face prison time, they do face expulsion, which can create a profound and lasting stigma that undercuts the individual’s chance of successful completion of education and career pursuits. With stakes

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403. Leanne R. Brecklin & Sarah E. Ullman, *The Roles of Victim and Offender Alcohol Use in Sexual Assaults: Results from the National Violence Against Women Survey*, 63 J. STUD. ON ALCOHOL 57, 59 (2002).

404. See Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 145 (2007).

405. Humphrey & Kahn, *supra* note 319, at 1319–20.

406. John D. Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 J. STUDENT AFF. RES. & PRAC. 728, 745 (2008).

407. Charlene Y. Senn et al., *Efficacy of a Sexual Assault Resistance Program for University Women*, 372 NEW ENG. J. MED. 2326, 2332 (2015).

this high, universities need to have a procedure that is fair, which requires a robust right to counsel, an adjudicatory hearing with direct questioning, the right to evidence, and a standard of proof set at clear and convincing evidence. Anything less runs the real risk that innocent men and women will be found responsible for offenses they did not commit. Moreover, emphasizing process benefits more than just the accused. Studies have shown that procedural fairness promotes law abidingness and increases cooperation with the police and community participation in fighting crime.

But this emphasis on procedural justice should not be construed as an unequivocal endorsement of traditional adjudication. There are other ways of responding to sexual assault, and if both parties agree, universities should offer restorative justice processes. Restorative justice empowers victim/survivors by giving them control over how their case is handled, which is what studies show they want and need. Restorative justice also has been demonstrated to successfully reintegrate offenders back into the community while also lowering recidivism and keeping victims safe. For universities seeking an approach to sexual assault that is pro-victim, pro-offender, and pro-community, restorative justice should be an obvious choice.