A FEATHER ON ONE SIDE, A BRICK ON THE OTHER: TILTING THE SCALE AGAINST MALES ACCUSED OF SEXUAL ASSAULT IN CAMPUS DISCIPLINARY PROCEEDINGS

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I. INTRODUCTION

One night in early-August 2009, Joshua Vaughan met a woman and fellow soon-to-be Vermont Law School (VLS) student at a bar in South Royalton, Vermont.[1] After enjoying a few beers together, they left and went to Joshua's apartment where they had what he described as consensual sex.[2] The woman later contacted Joshua, and for a few days, the two exchanged friendly text messages.[3] But Joshua's story does not end there.

Months later, the woman discussed what happened that August night with two VLS "student ambassadors."[4] The ambassadors reported this conversation to the Dean of Student Affairs and Diversity, Shirley Jefferson.[5] And based on that conversation, the woman decided to file a complaint with VLS claiming that she and Joshua had not had consensual sex that night.[6] After speaking with Joshua, the Dean decided it was more likely than not that he had violated VLS's Code of Conduct, so she asked if he would like to proceed straight to a formal hearing or if he would like an investigation into the complaint.[7] Joshua requested the investigation, and Jefferson appointed independent investigators.[8] Prior to the investigators' report, the woman emailed Dean Jefferson stating that she did not want to participate any further in the investigation or subsequent hearing.[9] When the investigators' filed their report, it stated that the woman had "expressed uncertainty about whether she verbally said 'no' " and, as a result, that the investigation would not be able to reveal

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[1] Christina Hoff Sommers, *In Making Campuses Safe for Women, a Travesty of Justice for Men*, CHRON. OF HIGHER EDUC. (June 5, 2011), http://www.chronicle.com/article/In-Making-Campuses-Safe-for/127766.

[2] *Id.*

[3] *Id.*

[4] Vaughan v. Vt. Law Sch., No. 2:10-cv-276, 2011 WL 3421521, at *1 (D. Vt. Aug. 4, 2011).

[5] Sommers, *supra* note 1.

[6] *Vaughan*, 2011 WL 3421521, at *1.

[7] *Id.*

[8] *Id.*

[9] *Id.*

whether the sex was consensual.[10] Nevertheless, after reviewing the investigative report and even though the woman wanted no involvement in the case, Jefferson informed Joshua that VLS would be charging him with sexual harassment and sexual assault in violation of VLS's Code of Conduct.[11]

The following months were a nightmare for Joshua. Once word of the case leaked, his classmates ostracized him.[12] Instructed by school officials that he would be expelled if he discussed the case with anyone, Joshua could not defend himself or tell the "he said" side of a "he said, she said" story.[13] When he attempted to transfer, the school refused to release his transcript, leaving him trapped.[14] When VLS finally held a hearing—nearly eight months after the complaint was filed—the campus Code of Conduct Panel unanimously cleared Joshua of all charges.[15] But by then the damage to Joshua had already been done; he had endured eight months of unimaginable stress while trying unsuccessfully to stay focused on his legal studies.[16] Vaughan would later file suit against both his accuser and VLS for intentional and negligent infliction of emotional distress.[17]

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[10] *See id.* at *2 ("[T]hey could not] say that Mr. Vaughan understood that [the woman] did not want to have intercourse with him." (first alteration in original)).

[11] *Id.*

[12] *See id.* at *3 ("[Joshua] asserts that an erroneous belief that he sexually assaulted [the woman] has become prevalent in the VLS community and that, as a result of this, his law school experience has suffered in a number of ways. For example, he alleges that as a result of the rumors, he has been barred from entering Crossroads Bar & Grill for official VLS functions and informal social gatherings and that he has been afraid to speak out in classes. He also complains that, because of the rumors, many students have declined to socialize with him.").

[13] Sommers, *supra* note 1.

[14] *See Vaughan*, 2011 WL 3421521, at *2 ("[D]uring the course of the investigation, VLS refused to release grade reports or a transcript to [Joshua]."). The transcript was eventually released after the hearing, but the delay "prevented him from completing transfer applications in a timely fashion." *Id.*

[15] *See id.* ("At the conclusion of the hearing, the panel found that both charges against Vaughan were 'unfounded.' ").

[16] *See id.* at *3 ("[Joshua] believes that his grades suffered during the Spring 2010 semester as a result of the time he was required to spend responding to RH's complaints and the resulting stress.").

[17] Sommers, *supra* note 1 (referring to the suit).

As troubling as Joshua Vaughan's story is, even more concerning is that similar situations have occurred on college and university campuses throughout the country.[18] These situations raise serious concerns about the need to protect innocent students falsely accused of sexual assault. Of course, these concerns must be delicately balanced against legitimate interests in protecting true victims of sexual assault and bringing actual assailants to justice.[19]

Some suggest that cases like Joshua's are the result of a trend among colleges and universities to "institutionaliz[e] a presumption of guilt in sexual assault cases."[20] And because most sexual assaults are perpetrated by men,[21] this presumption, to the extent it exists, falls disproportionately on men. One explanation for why university disciplinary systems seem to presume male guilt can be found in reports that suggest a crisis-level epidemic of acquaintance rape on college campuses.[22] These reports, in turn,

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[18] *See, e.g.*, Monte Whaley, *Lawsuit over False Rape Accusation*, DENV. POST, Mar. 23, 2009, at A14 (describing how University of Northern Colorado student Paul Seabrooks was accused of rape by a fellow student and banned from campus, although it was later discovered the claim was a false story concocted by the accuser upon her mother discovering she had written a check to Planned Parenthood); Kieran Crowley, *Hofstra Student May Face Criminal Charges*, N.Y. POST (Sept. 17, 2009), http://www.nypost.com/p/news/local/item_h5t0waaqEStcxyRbSzBk0J (telling the story of a Hofstra University student who falsely accused five men of gang-raping her, when in fact the event was consensual); Jacob Sullum, *At the University of North Dakota, Yes Also Means No*, REASON MAG. HIT & RUN BLOG (July 21, 2011, 6:55 PM), http://reason.com/blog/2011/07/21/at-the-university-of-north-dak (relating the story of Caleb Warner, a student at the University of North Dakota who was accused of rape by a fellow student and suspended for three years, a punishment that was not overturned despite the fact that local police determined the sex was consensual and brought criminal charges against the accuser for filing a false police report).

[19] *See* Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 293 (2009) ("[S]chools do not have to choose between the rights of the accused student or the rights of the student complainant. The due process doctrine and Title IX instead allow schools to choose fairness for both students.").

[20] Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J., Aug. 20, 2011, at A13.

[21] According to the Center for Sex Offender Management, "[n]ational criminal justice statistics reveal that of all adults and juveniles who come to the attention of authorities for sex crimes, females account for less than 10% of these cases." CENTER FOR SEX OFFENDER MANAGEMENT, U.S. DEPARTMENT OF JUSTICE, FEMALE SEX OFFENDERS 1 (2007), *available at* http://www.csom.org/pubs/female_sex_offenders_brief.pdf.

[22] *See* Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary*

have put pressure on campus officials to clamp down on sexual misconduct as a means of addressing this perceived crisis. Comprehensive studies on campus-based, peer sexual violence indicate that rape is the most common violent crime on American college campuses.[23] Surprisingly, it has been claimed that "a person is more likely to be a victim of a crime on a college campus than almost anywhere else in the country."[24] Other studies claim that one in four college women will be victims of either attempted rape or sexual assault at some point during their college careers.[25] This means that college women are at a higher risk for rape and other sexual assaults than women of the same age who are not in college.[26]

The overwhelming majority of these sexual assaults, however, go unreported.[27] Researchers attribute this partly to confusion about what constitutes "sexual assault"[28] and partly to fear of not being believed or of hostile treatment.[29] Researchers further claim that the college atmosphere encourages sexual assaults.[30] Alcohol appears to play the biggest role in creating this atmosphere, with

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Through the Ordinary, 35 J.C. & U.L. 613, 619 (2009) (explaining how the data from surveys focused on the prevalence of sexual violence on college campuses reveals a picture "of epidemic gender-based campus violence that overwhelmingly does not reach the light of day, with both the violence and the silence surrounding it having serious consequences"). The article then explains that studies suggest colleges and universities play a key role in creating the problem by failing to properly address it. *See id.*

[23] *Id.* at 615–16.

[24] Ass'n of Trial Lawyers of Am., *Crime on College Campuses: Institutional Liability for Acquaintance Rape*, *in* 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 499 (2004).

[25] *Id.*; Justin Neidig, Note, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16 WM. & MARY J. WOMEN & L. 179, 179 (2009).

[26] Ass'n of Trial Lawyers of Am., *supra* note 24, at 1.

[27] *See* Cantalupo, *supra* note 22, at 618 ("Ninety percent or more of victims of sexual assault on college campuses do not report the assault.").

[28] Neidig, *supra* note 25, at 180.

[29] *See* Cantalupo, *supra* note 22, at 618–19 (claiming that fear of how their claims will be perceived as well as "not seeing the incidents as harmful; not thinking a crime has been committed; not thinking what had happened was serious enough to involve law enforcement," among other reasons, keep victims of sexual assault from reporting assaults).

[30] *See* Ass'n of Trial Lawyers of Am., *supra* note 24 ("Frequent unsupervised parties, single adults being required to live on campus, the availability of private rooms, and the abundance of alcohol and drugs on campus contribute to the sexual assaults. In addition, the schools instill a false sense of security to the students who are typically away from home for the first time and unaware of dangers.").

75% to 90% of acquaintance rapes on campuses involving either drugs or alcohol and nearly three-quarters of rape victims reporting being intoxicated at the time of attack.[31] If the alleged prevalence of sexual assaults on campuses were a reality, one would expect the most direct concern for educational institutions to be that "an unreasonably unsafe learning environment is not an appropriate learning environment for their students."[32] This is because victims of sexual assault often experience negative effects to their physical and emotional well-being.[33]

There are good reasons, however, to doubt the existence of an epidemic of campus sexual assaults, despite the significant amount of attention paid to it.[34] A closer look at the studies claiming a crises-level of collegiate sexual assaults reveals their dubiousness. For instance, one study that claims 90% of collegiate rapes go unreported explained that this was partly because the victims did not see the supposed assault as harmful or did not think that a crime had been committed.[35] In other words, the rapes were not reported because, despite the researchers' categorization of the incidents as rapes, the individuals actually involved did not view them as such. Consequently, one of the most criticized aspects of sexual assault studies is the definition used to determine what constitutes an "assault."[36]

Consider the study cited in a recent "Dear Colleague" letter issued on behalf of the Department of Education's Office of Civil Rights (OCR).[37] That study's definition of "rape" included "forced

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[31] *Id.*

[32] *Id.*

[33] *See id.* (explaining that women who are victims of sexual assault on college campuses "experience shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction," and many drop out of school as a result).

[34] *See* Sommers, *supra* note 1 (explaining the notorious difficulty in gathering accurate sexual assault data and pointing to other studies showing vastly lower prevalence of assaults on campuses than those previously cited).

[35] Catalupo, *supra* note 22, at 619 (citing BONNIE S. FISHER ET AL., NAT'L INST. OF JUSTICE & BUREAU OF JUSTICE STATISTICS, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23–24 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/182369.pdf).

[36] *See* Sommers, *supra* note 1 (criticizing a report prepared for the National Institute of Justice for its expansive definition of sexual assault).

[37] *See* RUSSLYNN ALI, U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, DEAR COLLEAGUE

kissing" and "attempted forced kissing" as well as automatically counted any sexual contact with someone when they were unable to give consent because of intoxication or incapacity as "rape" or "assault."[38] But the intoxication-or-incapacity question was framed in such a way that it likely included many gray areas: "Has someone had sexual contact with you when you were unable to provide consent or stop what was happening because you were passed out, drugged, drunk, incapacitated, or asleep?"[39] One critic of the study explained why this question is unclear: "Does 'unable to provide consent or stop' refer to actual incapacitation—given as only one option in the question—or impaired judgment?"[40] Another critic opined, "If sexual intimacy under the influence of alcohol is by definition assault, then a significant percentage of sexual intercourse throughout the world and down the ages qualifies as crime."[41]

Bolstering the argument that overbroad definitions of sexual assault and ambiguous survey questions have greatly exaggerated the prevalence of sexual assaults is the fact that only 2% of the survey's respondents who reported being sexually assaulted while incapacitated also reported experiencing *any* emotional or psychological trauma.[42] Given how low this percentage was, the authors of the report asserted that the percentage was actually much higher.[43] Most victims of sexual violence suffer from posttraumatic stress disorder (PTSD) in the aftermath of their attack.[44] Between one-half to two-thirds of victims develop PTSD

LETTER: SEXUAL VIOLENCE 2, Apr. 4, 2011, *available at* http://www.whitehouse.gov/sites/default/files/dear_colleague_sexual_violence.pdf (citing CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf).

[38] KREBS ET AL., *supra* note 37, at A-1.

[39] *Id.* at A-2.

[40] Cathy Young, *Sexual Assault on Campus--Is It Exaggerated?*, MINDING THE CAMPUS (Apr. 18, 2011), http://www.mindingthecampus.com/originals/2011/04/_by_cathy_young_1.html.

[41] Sommers, *supra* note 1.

[42] KREBS ET AL., *supra* note 37, at 5–18.

[43] Young, *supra* note 40.

[44] Heather Littleton & Craig E. Henderson, *If She Is Not a Victim, Does That Mean She Was Not Traumatized? Evaluation of Predictors of PTSD Symptomatology Among College Rape Victims*, 15 VIOLENCE AGAINST WOMEN 149 (2009). PTSD symptoms include:

post-attack, and the adverse effects can, and often do, last for years.[45] As noted above, college students often do not report or classify their experience as sexual assault.[46] And while some studies suggest that victims who do not acknowledge their victim-status suffer less negative consequences from their attack,[47] other studies have found that as many as 30% of these victims suffer from PTSD.[48] Given the prevalence of emotional and psychological trauma following both acknowledged and unacknowledged sexual assaults, one would expect the disruptive effects of sexual violence to be widespread on collegiate campuses if an epidemic existed, even if reports of the violence are not.

Despite the dubiousness of the above-mentioned studies, the Department of Education's OCR viewed them as "both deeply troubling and a call to action for the nation."[49] In taking up this call to action, OCR issued "additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence."[50] This Note argues that the steps taken by OCR in response to this perceived epidemic of sexual assault on college campuses violate the due process rights of accused students. After the Background section establishes that students facing charges in campus disciplinary proceedings do in fact have a right to due process protections, this Note then turns to the problems with OCR's guidance for Title IX compliance. In particular, it argues that accused students are not afforded sufficient procedural due process protections under this guidance, first because its requirement of a preponderance of the evidence standard in

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"reexperiencing the trauma in the form of unwanted thoughts, images, and dreams; avoidance of reminders of the trauma, such as certain situations or people; and increased arousal, such as the development of insomnia or heightened startle response." *Id.*

[45] *Id.* (citing a study finding that 16% of rape victims still meet the criteria for PTSD though their attack occurred on average 17 years earlier).

[46] *Id.* (noting that "[s]tudies of college rape victims have found that between 47% and 73% do not label their experience a rape or a victimization . . . . Instead, they give their experience a much more benign label, such as a mis-communication or bad sex, or state that they are unsure how to label their experience . . . ." (internal citations omitted)).

[47] *Id.* at 150.

[48] *Id.* at 162.

[49] ALI, *supra* note 37, at 2.

[50] *Id.*

resolving campus disciplinary disputes is too low. Next, this Note argues that OCR's policy of strongly discouraging schools from allowing accused students to cross-examine their accusers does not comport with basic fairness because cross-examination is necessary in cases where facts are disputed and resolution turns on the credibility of witnesses. Finally, this Note concludes that OCR's requirement of allowing an accuser to appeal (if the school allows an accused student to do so) borders on a "double jeopardy" violation—that is, it fails to shield the accused against multiple prosecutions for a single offense[51]—and goes too far in favoring the accuser at the expense of the accused.

II. BACKGROUND

A. A BRIEF HISTORY OF TITLE IX

At the peak of the Civil Rights Movement, the U.S. Congress passed the Civil Rights Act of 1964[52] in an attempt to end discrimination against minorities.[53] After passing the Civil Rights Act, Congress turned its attention toward higher education; the result was the Higher Education Act of 1965.[54] While this Act promoted higher education by adding vast amounts of funding through grants and loan programs, it failed "to bind the grant of federal funds in the same way as Title VI of the Civil Rights Act bound other institutions from discriminating on the basis of race, color, or national origin."[55] A few years later, Congress amended the Higher Education Act, enacting the Education Amendments of 1972.[56] Legislative history suggests that these amendments were focused on preventing sex discrimination from denying women

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[51] *See infra* Part III.C.

[52] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[53] *See* 42 U.S.C. § 2000 (2006) (forbidding discrimination in public accommodations on the basis of race, color, religion, or national origin).

[54] Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in 20 U.S.C. §§ 1001–1161).

[55] Kimberly A. Mango, Comment, *Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 366 (1991).

[56] Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688).

access to institutions of higher education and not necessarily on stopping discrimination affecting women once they matriculated.[57] In fact, Title IX, a provision of the Education Amendments,[58] "so closely mirrored both the language and spirit of the antidiscrimination provisions in the Civil Rights Act of 1964, namely in Title VI and Title VII, [that it] raises the presumption that in fact legislators were actively seeking to redress the perceived voids in the Civil Rights Act's provisions."[59] The actual language of Title IX provides, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[60] The Supreme Court has succinctly stated the purpose of Title IX to be twofold: (1) to avoid the use of federal funds to support discriminatory practices and (2) to provide effective protection against those practices to individual citizens.[61]

In pursuit of the twofold purpose of Title IX, significant strides have been made, which has led perhaps most notably to greater female inclusion in collegiate athletics.[62] While fewer than "32,000 female students participated in athletics [at the collegiate level] in 1972, almost 171,000 women played college sports during the 2005–06 season"; the percentage of Division I college athletes who are women jumped from 15% in 1971 to 44% in 2004.[63] Title IX and increased female participation in college sports has been credited with the creation of the Women's Basketball Association

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[57] *See* Mango, *supra* note 55, at 372 (explaining that an examination of legislative intent behind Title IX shows uncertainty as to what it aimed to address, but that there was an apparent determination to remedy access factors such as admission standards with little focus on discriminatory procedures within the institution or on post-access factors).

[58] 20 U.S.C. § 1681.

[59] Mango, *supra* note 55, at 373.

[60] 20 U.S.C. § 1681(a).

[61] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (explaining the purpose of Title IX).

[62] *See* Lexie Kuznick & Megan Ryan, *Changing Social Norms? Title IX and Legal Activism Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 367, 367 (2008) (noting that Title IX has become synonymous with increased opportunities for women in athletics).

[63] *Id.* at 368.

and the U.S. women's soccer team's victory in the 1999 World Cup.[64]

Similar trends exist for higher-education enrollment and hiring.[65] While women occupied less than 20% of collegiate-faculty positions before Title IX, they represented nearly 40% in 2006.[66] Likewise, the percentage of female undergraduates jumped from 40% before its passage to 60% by 2005.[67]

B. SEXUAL HARASSMENT IS BROUGHT UNDER TITLE IX

Although receiving less media attention, courts have focused on Title IX's effect on collegiate sexual-harassment policies and regulations.[68] In 1980, Title IX was the subject of a legal review by the National Advisory Council on Women's Educational Programs.[69] This Council concluded that Title IX should be interpreted to prohibit sexual harassment and urged the Department of Health, Education and Welfare's Office of Civil Rights (OCR) to implement regulations pursuant to that interpretation.[70] The next year, OCR declared that "sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under

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[64] Justin F. Paget, Comment, *Did* Gebser *Cause the Metastasization of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1257 (2008).

[65] *See* Kuznick & Ryan, *supra* note 62, at 371 (explaining that "Title IX's impact on women in higher education exposes similar [positive] trends").

[66] *Id.*

[67] *Id.*

[68] *See* Paget, *supra* note 64, at 1258 (noting that "as college athletics dominated the media's Title IX attention, sexual harassment commanded that of the courts," and while the Supreme Court has not specially addressed athlete equality, the Court has addressed sexual harassment three times in the last decade).

[69] *See* Mango, *supra* note 55, at 380 ("In 1980, the National Advisory Council on Women's Educational Programs was commissioned to conduct a legal review of Title IX.").

[70] *See id.* ("[T]he Council concluded that Title IX should in fact be read to prohibit sexual harassment. Despite the Council's urging for the Office for Civil Rights (OCR) of the Department of Health, Education and Welfare to promulgate regulations embracing this interpretation, no additional regulations were enacted at that time.").

Title IX."[71] Despite this, the Supreme Court did not recognize that sexual harassment could fall under Title IX's prohibitions on gender discrimination until 1992.[72] Five years after that opinion, OCR first published its Sexual Harassment Guidance, which alerted schools at all educational levels that Title IX requires an educational environment free from sexual harassment.[73] In doing so, OCR described two types of conduct that constitute sexual harassment: quid pro quo harassment and hostile-environment harassment.[74] Quid pro quo harassment occurs when a school employee "conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature."[75] Hostile-environment harassment refers to any sexually harassing conduct by an employee, student, or third party that is severe enough to limit the victim's ability to participate in or benefit from an educational program or that creates a hostile educational environment.[76] Revised in 2001,[77] this Guidance explains that under Title IX a school has the responsibility to "implement a sexual harassment policy, to designate a Title IX Coordinator to ensure Title IX compliance in all areas including sexual-harassment prevention, and to provide adequate grievance procedures for victims of sexual harassment."[78]

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[71] *Id.* at 381 (internal quotation marks omitted).

[72] *See* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) ("Title IX placed on the [school] the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' ").

[73] *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12034 (Mar. 13, 1997) (stating that Title IX prohibits sexual harassment of students "at every education level").

[74] *See id.* at 12038 (describing actions that rise to the level of prohibited sexual harassment).

[75] *Id.*

[76] *See id.* (describing what constitutes hostile-environment sexual harassment).

[77] *See* Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512, 5512 (Jan. 19, 2001) (issuing limited revised guidance relating to sexual harassment in schools pursuant to subsequent Supreme Court cases).

[78] Kuznick & Ryan, *supra* note 62, at 373–74 (citation omitted).

C. OCR ISSUES "DEAR COLLEAGUE" LETTER REGARDING SEXUAL VIOLENCE AND TITLE IX

On April 4, 2011, the Department of Education's Office for Civil Rights issued a "Dear Colleague" letter regarding Title IX's applicability to sexual violence on college campuses.[79] This letter was sent to every college or university receiving federal funding and instructed recipients on how to meet their legal obligations.[80] While not adding to or changing existing law, these letters instruct schools on how OCR currently interprets the law and what schools must do to stay within its bounds.[81]

The letter defined sexual violence to include "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol" or is otherwise "unable to give consent due to an intellectual or other disability."[82] This means acts such as rape, sexual assault, sexual battery, and sexual coercion are forms of sexual harassment covered by Title IX.[83] OCR reasoned that these acts, even if they occur only once, are severe enough to create a hostile environment that limits a student's ability to participate in or benefit from a school program and thus brings the acts fall within Title IX's prohibition against sexual harassment in educational programs.[84]

Some of the most important changes in OCR's 2011 letter pertain to how schools must conduct their grievance procedures in adjudicating sexual assault claims.[85] One major addition relates to the appropriate standard of proof. The 2011 letter requires that schools use a preponderance of the evidence standard to determine

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[79] ALI, *supra* note 37, at 1.

[80] *Id.* at 1 & n.1.

[81] *Id.* at 1 n.1.

[82] *Id.* at 1.

[83] *Id.* at 1–2.

[84] *See id.* at 3 & n.10 (citing ample case law supporting the proposition that an isolated instance of sexual harassment is sufficiently severe to create a hostile environment under Title IX).

[85] *See id.* at 8–14 (discussing Title IX grievance procedures in light of OCR's Revised Guidance).

the accused's guilt or innocence.[86] OCR reasoned that any higher burden of proof would be inequitable because it would require a higher standard of proof to establish Title IX violations than that required for violations of other civil rights laws.[87] A showing of preponderance of the evidence requires a school to demonstrate that "it is more likely than not that sexual harassment or violence occurred."[88] Another change relates to the appeals process. For schools allowing appeals, the letter requires this procedure to be available for *both* the accused and accuser,[89] meaning the accused could face the same accusation in disciplinary proceedings twice. Additionally, OCR "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing" because to allow the accused to question the accuser would be "traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."[90]

D. ENFORCEMENT MECHANISMS FOR TITLE IX REQUIREMENTS

The enforcement mechanism for these Title IX requirements is administrative: federal agencies that distribute education funding are directed to establish requirements to effectuate the nondiscrimination mandate and may enforce those requirements through any lawful means, including the termination of federal funding.[91] The Supreme Court has held that Title IX is also enforceable through an implied private right of action; thus, an individual can bring suit against a school alleging that it did not conform to Title IX's requirements.[92] Monetary damages are

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[86] *See id.* at 11 (setting forth the proper burden of proof applicable in grievance procedures).

[87] *Id.*

[88] *Id.*

[89] *See id.* at 12 ("If a school provides for appeal of the findings or remedy, it must do so for both parties.").

[90] *Id.*

[91] *See* 20 U.S.C. § 1682 (2006) ("Compliance with any requirement adopted pursuant to this section may be effected by . . . the termination of . . . assistance . . . .").

[92] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (holding that petitioner could maintain her Title IX action brought against two universities alleging that each discriminated against her on the basis of her sex even though there was no express statutory authorization for the action).

available in this implied private action, though not in cases where liability rests solely on vicarious liability or constructive notice.[93]

According to the Supreme Court, a school can be held liable for a Title IX violation when "it is deliberately indifferent to known acts of sexual harassment by a teacher"[94] or when it exhibits "deliberate indifference to known acts of peer sexual harassment."[95] "Deliberate indifference" means that in the particular, known circumstances of a given case the school's lack of response to the harassment was clearly unreasonable.[96] The Court noted that what constitutes a reasonable response in a primary- or secondary-education setting may not be the same as in a college setting, where the school may not have as much control over its students.[97] According to OCR guidelines, schools violate Title IX when a school official "knew of or reasonably should have known" of the harassment, when the school did not "respond promptly and effectively" to stop the harassment and prevent it from happening again, or when the accused student's conduct was "unwanted and sufficiently serious to deny or limit the harassed student's ability to participate in an educational program or benefit."[98]

Commentators have formulated a three-part test based on OCR's Guidance for evaluating the adequacy of a school's response to peer sexual harassment: "(1) whether the harassment impaired access to educational opportunities, (2) whether the school had actual or constructive notice of the harassment, and (3) whether the school took prompt and effective action to remedy the harassment and prevent its recurrence."[99] In practice, these

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[93] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288 (1998) ("Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice."); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 76 (1992) ("[A] damages remedy is available for an action brought to enforce Title IX.").

[94] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641 (1999).

[95] *Id.* at 648.

[96] *Id.*

[97] *See id.* at 649 (explaining that the standard for conforming to Title IX is sufficiently flexible to account for differences in grade school and university settings).

[98] Hogan, *supra* note 19, at 280–81.

[99] Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 102 (2010).

standards mean that schools must take sexual harassment very seriously, and even though no school has actually had its funding withdrawn for a Title IX violation,[100] the threat of this devastating penalty is likely coercive enough that schools go out of their way to comply with OCR's standards and to avoid potential litigation.

E. DUE PROCESS RIGHTS OF UNIVERSITY STUDENTS

The Supreme Court has declared that students do not "shed their constitutional rights" at the "schoolhouse gate."[101] Rather, "[t]he authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards."[102] This is so because the Fourteenth Amendment protects citizens against state action, and public schools are state actors.[103] Among the most important of these constitutional protections is the Due Process Clause of the Fourteenth Amendment, which states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[104]

Because universities cannot deprive students of "life" as a result of disciplinary proceedings, a claim for due process protections must come from having a liberty or a property interest at stake in the proceeding.[105] The Supreme Court has interpreted liberty interest broadly, holding that it refers not only to freedom from bodily restraint, but that it also "extends to the full range of conduct which the individual is free to pursue."[106] While the Court

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[100] Erin E. Buzuvis & Kristine E. Newhall, *Equity Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 439 (2012).

[101] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[102] Goss v. Lopez, 419 U.S. 565, 574 (1975).

[103] *See id.* (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)) (stating the applicability of the Fourteenth Amendment to public schools).

[104] U.S. CONST. amend. XIV.

[105] *See* Robert B. Groholski, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law*, 19 N. ILL. U. L. REV. 739, 743 (1999) (explaining the grounds on which a student can invoke due process protections in a disciplinary proceeding).

[106] *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (holding that segregation constitutes a deprivation of liberty in violation of the Due Process Clause).

held in *Wisconsin v. Constantineau* that due process protects liberty interests when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,"[107] it later clarified in *Paul v. Davis* that the protected liberty interest previously had to be guaranteed by state law.[108] This means that students wishing to invoke procedural due process protections must show that they either "previously had a right to an education protected by state law or that their legal status is in some way altered when a university seeks to impose disciplinary sanctions upon them."[109]

"Property interest" is also broadly defined and extends "well beyond actual ownership of real estate, chattels, or money"[110] to include interests people rely on in daily life that are created 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."[111] So, to invoke a procedural due process claim based on property interests, a student would need to show a basis for relying on rules or state laws to create this property interest in education.[112]

The Supreme Court has held that public education is a property interest protected by the Due Process Clause that states cannot take away from a student without adhering to minimum standards required by that clause.[113] Thus, accused students facing suspension or expulsion from a college or university "are entitled to due process because of their presumed protected interest in their education."[114] In *Goss v. Lopez*, the Supreme Court held that nine students who were suspended or expelled from high school

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[107] 400 U.S. 433, 437 (1971).

[108] *See* 424 U.S. 693, 708 (1976) (holding that due process protection of a liberty interest is invoked only when such right was "previously held under state law").

[109] Groholski, *supra* note 105, at 747.

[110] Bd. of Regents v. Roth, 408 U.S. 564, 571–72 (1972).

[111] *Id.* at 577.

[112] *See* Groholski, *supra* note 105, at 748 (explaining how a student could invoke due process rights founded on property interest).

[113] *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (holding that public education is a constitutionally protected property interest).

[114] Hogan, *supra* note 19, at 278.

without a hearing regarding the allegations against them were denied due process.[115] This was unconstitutional because the students had a property interest in their entitlement to public education.[116] The Court also recognized that the students had liberty interests at stake because their suspensions or expulsions could harm their reputations and affect their ability to pursue higher education and later career opportunities.[117]

While the Supreme Court has not explicitly held that university students have constitutionally protected property and liberty rights in their continued enrollment in public universities or colleges, lower courts have expanded the Supreme Court's secondary-education decisions to include university students.[118] Although there is no statutory right to a university education (as there was in *Goss*), the Court could still find that students have liberty interests at stake in disciplinary proceedings that could result in expulsion because an expulsion alters the legal status of a student and can make it harder to enroll at another university, thus inflicting economic pain in addition to the stigmatizing pain.[119] Further, lower federal courts have implied that university students do in fact have property and liberty interests in their continued enrollment at their universities.[120] Additionally, OCR

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[115] *See* 419 U.S. at 568–72 (summarizing the procedural history of the case).

[116] *Id.* at 574.

[117] *See id.* at 575 (describing the liberty interests at stake for students in disciplinary proceedings).

[118] *See* Hogan, *supra* note 19, at 278–79 (explaining the Supreme Court's assumption that university students have constitutionally protected property and liberty rights in their enrollment).

[119] *See* Groholski, *supra* note 105, at 754–55 (predicting that the Supreme Court, if faced with the right set of facts, would explicitly rule that university students have a protected liberty interest in their education).

[120] *See, e.g.*, Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (holding that a student at a vocational–technical training school must be afforded due process protections like the public school students in *Goss* because she had a property right in her education, especially since she paid an enrollment fee to the technical training school); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 151, 157 (5th Cir. 1961) (holding that procedural due process is required before students can be dismissed from a public university because the right to higher education is vital, allows people to reach their full potential, and is an interest of extremely great value); Crook v. Baker, 584 F. Supp. 1531, 1554 (E.D. Mich. 1984) (holding that plaintiff had property and liberty interests in his university degree which was revoked upon allegations of fraud and cheating), *vacated on other grounds by* 813 F.2d 88 (6th Cir. 1987).

itself recognizes and instructs federal funding recipients that students at public schools are guaranteed due process rights when accused of certain violations.[121]

Once a court has determined that a liberty or property interest does in fact exist so as to invoke procedural due process protections, the next step is to determine how much process is due.[122] This determination requires consideration of three factors: first, the private interest at stake in the disciplinary proceeding; second, the risk of a wrongful deprivation of the interest through the procedures used and any probable value of "additional or substitute procedural safeguards"; and third, the university's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[123] In other words, the court must balance the importance of the individual liberty or property interests at stake and "the extent to which the requested procedure may reduce the possibility of erroneous decision-making" against "the governmental interest in avoiding the increased administrative and fiscal burdens that result from increased procedural requirements."[124] At a minimum, due process requires both notice and a hearing to the accused student.[125]

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[121] *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 22 (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.").

[122] *See* Walter Saurack, Note, *Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearings*, 21 J.C. & U.L. 785, 787–89 (1995) (describing the two-step analysis set out by the Supreme Court in *Board of Regents v. Roth*, which courts use in reviewing student disciplinary hearings for procedural fairness).

[123] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the factors used in the due process analysis).

[124] Saurack, *supra* note 122, at 789.

[125] *Dixon*, 294 F.2d at 151.

The next section turns to the specifics of OCR's latest guidance and argues that its requirements favor the accuser too much and thus violate the accused student's procedural due process rights.

III. ANALYSIS

A. A PREPONDERANCE OF THE EVIDENCE STANDARD DOES NOT AFFORD SUFFICIENT PROCEDURAL DUE PROCESS PROTECTION TO STUDENTS ACCUSED OF SERIOUS OFFENSES LIKE SEXUAL ASSAULT

What is most troubling about OCR's Dear Colleague letter is that it mandates the use a preponderance of the evidence standard in campus disciplinary hearings.[126] At best, OCR's explanation for this requirement is faulty: namely, that this standard is necessary for schools' grievance procedures to be consistent with Title IX standards in other contexts, such as when OCR resolves Title IX claims against schools.[127] But this comparison makes no sense because the issues being decided when OCR evaluates a school's compliance are completely different from issues being decided in college disciplinary proceedings.[128] In college disciplinary proceedings, the issue is whether the harassment actually occurred and the accused is guilty, whereas OCR only evaluates whether a school's response to the alleged harassment was unreasonable.[129] Requiring the same standard of proof to find a student guilty of sexually assaulting a classmate as to find a school liable for an inappropriate administrative response to the assault is illogical given the different implications and ramifications of each type of situation.[130]

Whatever OCR's explanation for its new requirement, using a preponderance standard to adjudicate sexual assault claims does

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[126] *See* ALI, *supra* note 37, at 11 (explaining that the preponderance of the evidence standard is consistent with Title IX).

[127] *See id.* at 10–11 (describing OCR's grievance procedures).

[128] Hans Bader, *Falsely Accused Teachers and Students Will Be Harmed by New Education Department Policy*, WASH. EXAMINER (May 16, 2011), http://washingtonexaminer.com/article/145202#.UN4IY4njl7F.

[129] *Id.*

[130] *See id.* (arguing that it is "reasonable to apply a higher burden of proof . . . when determining the guilt of individuals, rather than the monetary liability of an institution").

not comport with the gravity of the charges against the accused.[131] At its most basic level, procedural due process requires "that the party who is subject to the potential deprivation of a life, liberty, or property interest be afforded a fair and meaningful opportunity to tell his or her side of the story before the State takes away that protected interest."[132] To determine what process is due in campus disciplinary proceedings, we return to the three factors laid out in *Mathews v. Eldridge* and evaluate each proposed procedure in light of those factors, beginning with the burden of proof.[133]

The Supreme Court has described the purpose of a standard of proof as "instruct[ing] 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."[134] The applicable standard "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[135] On one end of the spectrum is the "mere preponderance of the evidence" standard, typical in civil cases involving monetary disputes because "society has a minimal concern with the outcome" of those suits.[136] This standard allows litigants to "share the risk of error in roughly equal fashion."[137] At the other end of the spectrum is the "beyond a reasonable doubt"

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[131] *See* Letter from Will Creeley, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education, to Russlynn Ali, Assistant Sec'y of Educ. for Civil Rights (May 5, 2011), *available at* http://thefire.org/article/13142.html ("In cases involving allegations of criminal misconduct such as acts of sexual violence, the preponderance of the evidence standard fails to sufficiently protect the accused's rights and is thus inadequate and inappropriate."); *see also* Letter from Ann E. Green & Cary Nelson, Am. Ass'n of Univ. Professors, to Russlynn Ali, Assistant Sec'y of Educ. for Civil Rights (Aug. 18, 2011), *available at* http://www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf (arguing that a preponderance of the evidence standard is too low given the seriousness of accusations of sexual violence and the potential for false accusations).

[132] Elizabeth Ledgerwood Pendlay, Note, *Procedure for Pupils: What Constitutes Due Process in a University Disciplinary Hearing?*, 82 N.D. L. REV. 967, 970 (2006).

[133] *See* 424 U.S. 319, 335 (1976) (detailing the three factors to evaluate in determining how much due process to afford a defendant).

[134] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)) (internal quotation marks omitted).

[135] *Id.*

[136] *Id.*

[137] *Id.*

standard that protects criminal defendants because "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."[138] Between these two is the "clear and convincing" standard. Courts use this standard when the interests at stake are "more substantial than mere loss of money," such as in cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[139] This standard permits courts to "reduce the risk to the defendant of having his reputation tarnished erroneously."[140]

Students accused of sexual violence and charged in campus disciplinary hearings should be afforded at least the intermediate protection of a clear and convincing burden of proof. Any lesser standard is insufficient to comply with procedural due process. Determining the proper standard of proof for a given class of proceedings requires weighing the relative interests of the parties, keeping in mind "that the function of legal process is to minimize the risk of erroneous decisions."[141] Courts have often applied the clear and convincing standard when the defendants' interests at stake in a case justify increased protection against erroneous outcomes that could tarnish their reputations.[142] Surely the quasi-criminal nature of a sexual violence charge in a campus disciplinary proceeding should invoke at least that standard, if not the higher beyond a reasonable doubt standard. The reputational harm to the accused from a sexual assault charge in campus disciplinary proceedings is obvious and severe. As Joshua Vaughan's story illustrates,[143] the charge alone can seriously stigmatize those accused.[144]

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[138] *Id.*

[139] *Id.* at 424.

[140] *Id.*

[141] *See id.* at 425 (explaining that in determining the appropriate standard in a civil commitment proceeding, the Court must assess the interests of both the state and the individual being committed).

[142] *Id.* at 424.

[143] *See supra* notes 12–17 and accompanying text.

[144] *See* Vaughan v. Vt. Law Sch., No. 2:10 cv 276, 2011 WL 3421521, at *3 (D. Vt. Aug. 4, 2011) (describing the harmful effects of being accused of sexual harassment).

Under the *Eldridge* factors, the first consideration relevant to the proper standard of proof for disciplinary proceedings involving sexual assault allegations is the private interests at stake.[145] Because the penalty for those found guilty is usually expulsion, the private interests at stake are significant.[146] Accused students have significant property and liberty interests in their continued education, given the social and economic importance of a college education and the significant reputational damage that results from being labeled a sexual assaulter.[147] Expulsion remains on the permanent records of those found guilty, which may make it impossible for them to complete their education at another institution and "virtually ensures irreparable damage to reputation among a critical population, compounding the liberty deprivation."[148]

The second *Eldridge* factor requires consideration of the risk that those accused will be wrongfully deprived of their established interests.[149] Here, this means one must consider whether a preponderance of the evidence standard makes it too likely that an accused will be found guilty, given the interests at stake. A preponderance of the evidence standard requires only a "feather" more of proof on the accuser's side.[150] In a "he said, she said" case, where both parties seem equally trustworthy, this "feather" might be accomplished by, say, proof that alcohol was involved, especially if consumption of alcohol renders a female college student incapable of giving consent.[151] This standard would make the risk

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[145] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the due process analysis factors).

[146] Paul E. Rosenthal, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1273–74 (1997) (considering the private interests at stake in college disciplinary hearings).

[147] *See id.* (describing the significant property and liberty interests an accused student has in his continued education).

[148] *Id.* at 1274.

[149] *Eldridge*, 424 U.S. at 335.

[150] *In re* M.L. & Z.L., 993 A.2d 400, 407 (Vt. 2010) ("[A preponderance of the evidence] standard is satisfied '[w]hen the equilibrium of proof is destroyed, and the beam inclines toward him who has the burden, however slightly . . . . A bare preponderance is sufficient, though the scales drop but a feather's weight.'") (second alteration in original) (quoting Livanovitch v. Lavanovitch, 131 A. 799, 800 (Vt. 1926)).

[151] For an example of studies characterizing inability to give consent in this way, *see supra*

of finding the accused guilty (and thus depriving him of his established interests) intolerably high for purposes of constitutional due process. Recognizing this concept, the Court in *Addington v. Texas* held that the standard of proof governing civil commitment proceedings should be elevated from preponderance of the evidence to clear and convincing, in part because it worried the likelihood of erroneously convicting people under a preponderance of the evidence standard was too high.[152]

Finally, the third *Eldridge* factor calls for an evaluation of the fiscal and administrative burdens that the additional or substitute procedural requirement would impose on the university.[153] Courts have recognized that rising "financial costs, interfering with the college's ability to effectively discipline its students, and transforming school discipline from an educational to an adversarial event" are significant costs that result from imposing procedural requirements upon schools.[154] While elevating the standard of proof makes it more difficult to punish an accused student, *effective* punishment punishes guilty students, thereby deterring the unwanted behavior.[155] A clear and convincing standard would not interfere with schools' ability to effectively punish guilty students; rather, it would only help ensure that those punished are actually guilty. Increased financial costs are a concern because "the economic costs of fairer disciplinary procedures necessarily result in a shifting of scarce resources from the purposes to which they would otherwise be put."[156] However, it is hard to see how requiring a higher burden of proof would substantially raise the costs of disciplinary proceedings. A higher burden of proof may require the introduction of more evidence or

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notes 37–39 and accompanying text.

[152] *See* Addington v. Texas, 441 U.S. 418, 426 (1979) ("Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.").

[153] *Eldridge*, 424 U.S. at 335.

[154] Rosenthal, *supra* note 146, at 1280.

[155] *See id.* at 1281 ("To be effective deterrents, sanctions must be perceived to correspond with guilt.").

[156] William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 574 (1971).

increased deliberation by factfinders before finding the accused guilty. But it seems unlikely that these consequences would make the process significantly longer or more expensive. Moreover, raising the burden of proof will not make the proceeding more adversarial than disciplinary, because disciplinary proceedings involving sexual assault allegations are adversarial by their very nature.[157]

Based on the foregoing analysis, students accused of sexual assault in campus disciplinary proceedings are due a clear and convincing burden of proof because their interests far outweigh any costs imposed on the university by this additional protection—costs that do not interfere with the school's ability to effectively punish guilty students.

B. STUDENTS ACCUSED OF SEXUAL ASSAULT SHOULD BE ABLE TO CROSS-EXAMINE THEIR ACCUSER IN CAMPUS DISCIPLINARY PROCEEDINGS IN ACCORDANCE WITH PROCEDURAL DUE PROCESS

John Wigmore, often considered the preeminent expert on evidence,[158] famously referred to cross-examination as the "greatest legal engine ever invented for the discovery of truth" by humankind.[159] The Supreme Court has declared that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[160] By their very nature, sexual assault allegations fall within this category. Such allegations clearly turn on questions of fact, and indeed nearly always involve a "he said,

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[157] *See* Rosenthal, *supra* note 146, at 1284 (arguing that affording the accused the right to remain silent in campus disciplinary proceedings involving rape charges does not render the proceeding more adversarial because "[t]he nature of the charge already makes the hearing unavoidably adversarial").

[158] *See* Robert P. Burns, *A Wistful Retrospective on Wigmore and His Prescriptions for Illinois Evidence Law*, 100 NW. U. L. REV. 131, 132 (2006) (noting that Wigmore's "many books included his great Evidence treatise, often called the greatest legal treatise produced in the Anglo-American world").

[159] 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (1904).

[160] *See* Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (requiring cross-examination in a case involving temporary suspension of welfare payments).

she said" dispute.[161] Because resolution of sexual assault allegations depends on the credibility of witnesses testifying to disputed facts, sufficient procedural due process must include the opportunity for the accused to cross-examine the accuser.[162]

Requiring the right to cross-examination is in line with multiple lower court rulings, although the Supreme Court has yet to address it. For example, the Eleventh Circuit has held that while cross-examination was not required in an academic dismissal hearing, "disciplinary proceedings involving more serious charges may necessitate the right to confront one's accuser."[163] This is consistent with the holding in *Donohue v. Baker*, where the district court "expressly held 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."[164] Some courts have found a middle ground, such as allowing the accused to cross-examine the accuser while shielding the accuser from the accused's view to make the confrontation easier.[165] These courts have thus recognized that, because of the serious liberty and property interests at stake in sexual assault disciplinary proceedings coupled with the factual disputes that always accompany such charges, due process requires accused students to be able to confront the witnesses against them in order to help the factfinder make a determination based on truthful information.

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[161] *See supra* notes 1–11 and accompanying text.

[162] *See* Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (holding in the context of a college rape accusation disciplinary hearing that the accused should "[a]t the very least" have the right to cross-examine his accuser through the hearing panel); *see also* Winnick v. Manning, 460 F.2d 545, 550 (2d Cir. 1972) (arguing that if a case turns on matters of credibility in college disciplinary hearings, "cross-examination of witnesses might [be] essential to a fair hearing").

[163] Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987), *as construed in*, Hogan, *supra* note 19, at 292.

[164] Hogan, *supra* note 19, at 292 (discussing *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997)).

[165] *See* Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 725 (1st Cir. 1983) (holding that a campus disciplinary hearing comported with due process when the student accused of sexual misconduct was able to cross-examine a witness against him with the witness out of his view).

An evaluation of the *Eldridge* factors leads to the same conclusion and largely follows the analysis of those factors applied to the burden-of-proof question above.[166] The private interests at stake in the proceeding remain the same—accused students have significant interests in continued education and in protecting their reputation from the stigma associated with being labeled a sexual assaulter.[167] For the reasons discussed above, the second factor—whether allowing the accused to cross-examine the accuser would reduce the risk of an erroneous finding of guilt[168]—is met: Cross-examination reduces the risk of erroneous guilty outcomes because it "helps ensure that a student's accusers are unbiased, truthful, and accurate."[169] Finally, the third factor focuses on the university's interests, including any additional costs following from allowing cross-examination of accusers.[170] The financial costs of allowing cross-examination probably would be insignificant, as the time it would add to the proceeding likely would be minimal. Additionally, it would not interfere with the university's ability to effectively punish its students; instead, it would help ensure that those students being punished are in fact guilty.[171] Nor would adding cross-examination to a proceeding seem to make it more adversarial than disciplinary in nature, another consideration in this analysis.[172] Given the adversarial nature of sexual assault allegations in the first place, this is not a significant enhancement of the hearing's adversarial nature.[173] Because of the significant

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[166] *See supra* notes 131–57 and accompanying text.

[167] *See* Rosenthal, *supra* note 146, at 1273–74 (discussing the private interests at stake for students accused of sexual assault).

[168] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the second factor of the Court's due process analysis as the risk of wrongful deprivation of the liberty interest involved through the procedure used).

[169] Saurack, *supra* note 122, at 823.

[170] *See Eldridge*, 424 U.S. at 335 (describing the third factor of the Court's due process analysis as the interests of the government, including costs imposed upon it by the procedure used).

[171] *See* Rosenthal, *supra* note 146, at 1281 ("To be effective deterrents, sanctions must be perceived to correspond with guilt.").

[172] *Id.* at 1280.

[173] *Cf. id.* at 1284 (arguing that affording a student the right against self-incrimination in university disciplinary proceedings would "not render the hearing more adversarial than it otherwise would be").

interests at stake for the accused student, the minimal burden cross-examination would place on the universities, and the fact that allowing cross-examination would reduce the risk of an erroneous finding of guilt, sufficient procedural due process protections in disciplinary hearings on sexual assault charges should include the right of accused students to cross-examine the witnesses against them, including their accuser.

C. ALLOWING ACCUSERS TO APPEAL ADVERSE OUTCOMES UNDERMINES THE PROCEDURAL DUE PROCESS RIGHTS OF ACCUSED STUDENTS

Allowing an accuser to appeal the result of a campus disciplinary proceeding tilts the scale too far in favor of accusers at the expense of depriving those accused sufficient due process protections. It also resembles double jeopardy, a concept derived from the Fifth Amendment "intended to shield defendants against multiple prosecutions for a single offense."[174] The Double Jeopardy Clause however does not typically apply to noncriminal government proceedings or to disciplinary proceedings.[175] Yet the Supreme Court has found that it does apply in juvenile delinquency determinations, even if these are disciplinary in nature, because the risks of stigma and loss of liberty involved are "sufficiently similar to the risks involved in traditional criminal proceedings to warrant protection from double jeopardy."[176] It follows that the risks of stigma and loss of liberty involved in campus disciplinary hearings regarding sexual assault allegations are also sufficiently similar to risks involved in traditional criminal proceedings and thus warrant this same protection.[177] In fact, while couched as a violation of the campus disciplinary code, what accused students are actually being found guilty of—sexual

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[174] Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1186 (2004).

[175] *See* William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 422 (1993) (describing the types of adjudications that do not raise double jeopardy concerns).

[176] *Id.* at 421–22.

[177] *See supra* notes 12–17 and accompanying text.

assault—is itself a crime,[178] meaning the argument for barring double jeopardy is at least as strong here as it is in juvenile delinquency hearings where the court "adjudicates status, rather than a conviction of crime."[179]

Once again, application of the *Eldridge* factors shows that allowing an accuser to file an appeal, thereby subjecting the accused student to a second hearing on the same charges, does not comport with basic fairness and violates due process. The first factor, evaluating the interests of accused students, remains the same: they have significant interests in continued education and in protecting their reputation from erroneous harm.[180] The second factor is whether forbidding an accuser from filing an appeal would reduce the risk of an erroneous finding of guilt.[181] Commonsense dictates that those facing one adjudication have less of a chance of being found guilty erroneously than those facing accusation twice. This is especially true in light of the low burden of proof required by OCR[182] and the pressure the new guidance puts on universities to address the "epidemic" of sexual assault on their campuses by finding students guilty.[183] Finally, the costs to the university from not allowing an accuser to appeal are minimal to negative. It stands to reason that universities that do not conduct additional disciplinary proceedings in every case have their financial costs lessened.[184] One might argue that not allowing accusers to appeal interferes with a school's ability to effectively punish its students because it keeps them from

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[178] *See, e.g.*, O.C.G.A. § 16-6-22.1 (2011) (defining sexual battery as a high misdemeanor).

[179] 14 AM. JUR. *Trials* § 15 (1968).

[180] *See* Rosenthal, *supra* note 146, at 1273–74 n.184 (noting the income disparities between people with a college degree and those with a high school diploma).

[181] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (explaining that the second factor in the Court's due process analysis is whether the procedure would reduce the risk of an erroneous finding of guilt).

[182] *See supra* notes 86–88 and accompanying text.

[183] *See* Creeley, *supra* note 131, at 11 ("We worry that because of the publicity that often surrounds claims of [sexual assault] and the resulting pressure on judiciary panelists to return a guilty verdict, such appeals would often essentially be reheard *de novo*.").

[184] *See* Rosenthal, *supra* note 145, at 1280 (noting that courts have recognized that procedural requirements in university disciplinary proceedings impose financial costs on the university).

adjudicating the issue on appeal and potentially finding the student guilty the second time.[185] However, the school's interest in cracking down on the perceived sexual assault epidemic cannot come at the expense of the accused's due process rights. One opportunity to adjudge guilt is enough. When weighing the school's slight interest against the accused's significant interests, especially in not being erroneously found guilty, it is clear that the accuser should not be able to appeal an adverse outcome.[186]

IV. CONCLUSION

Bringing to justice students who, in violation of campus codes of conduct, sexually assault their peers is a necessary and worthy goal. Yet the way that OCR seeks to accomplish this goal violates the procedural due process rights of accused students. A balance must be struck between protecting victims of sexual assault and protecting students accused of assault who, if innocent, are themselves victims. Appropriate procedural due process protections during campus disciplinary hearings can strike this balance. But this cannot be accomplished until universities are allowed to use a higher burden of proof than preponderance of the evidence, students are allowed to cross-examine their accusers, and the system does not allow for appeals by accusers. Until that time, OCR's newest requirements for grievance procedures will continue to make it far too likely that those accused of sexual assault—who are disproportionately male—will not only have their reputations destroyed, like Joshua Vaughan, but worse still may be found guilty for what is really consensual sexual conduct. Adopting these proposed procedures would allow society to be confident in the justice and fairness of campus disciplinary proceedings, secure in the knowledge that an appropriate balance exists between holding true offenders accountable for their actions

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[185] *See id.* (explaining that one factor courts consider in evaluating the university's interests includes the procedure's effect on the university's ability to effectively punish its students).

[186] In reaching my conclusion about accuser appeals, I have assumed that the initial hearing afforded the same opportunity to find the accused guilty as would exist in any appeal.

and protecting those who might be falsely accused of sexual assault.

Barclay Sutton Hendrix