

# A Rising Tide: Learning About Fair Disciplinary Process from Title IX

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## Introduction

In the fall of 2016, the Department of Education's Office for Civil Rights (OCR) announced that Wesley College had violated Title IX of the 1972 Education Amendments when it mistreated a student accused of sexual assault.<sup>1</sup> According to the OCR, four male students at the Delaware college were accused of livestreaming a fellow student having sex, without her consent. One of those students never received information from the school about the accusation or the available evidence. He was invited to attend an informal educational meeting only to discover the "chat" was in fact a disciplinary hearing.

Casual observers may have been surprised to hear the Education Department stood up for an alleged assailant. A popular public narrative suggests that advocates for victims' rights and for accused students are locked in an intractable conflict, with the Obama presidency favoring the former and the Trump presidency sure to switch teams. The story is wrong—and that matters for all students.

The decades-old movement to end campus gender violence achieved unprecedented attention and power during the course of Barack Obama's presidency. Student organizers, many of whom publicly identify as survivors, used a combination of legal complaints, public protest, and powerful narratives to pressure their schools—often successfully—to change their approach to

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1. *Letter to Robert E. Clark II, President of Wesley College from Beth Gellman-Beer*, U.S. DEP'T OF EDUC. (Oct. 12, 2016) [hereinafter *Letter to Robert E. Clark II*], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/o3152329-a.pdf>.

sexual violence reports.<sup>2</sup> The Obama OCR, under the leadership of Russlynn Ali and then Catherine Lhamon, issued new guidance clarifying schools' responsibilities to address gender violence<sup>3</sup> and commenced a rigorous enforcement campaign.<sup>4</sup> Decades after an appellate court first held that the sex discrimination law Title IX requires schools to address allegations of sexual harassment,<sup>5</sup> many colleges undertook serious reform efforts, recognizing the legal and reputational threat of their own noncompliance with civil rights law for the first time.

Many of these changes included new disciplinary procedures informed by OCR's key 2011 guidance, commonly known as the "Dear Colleague Letter."<sup>6</sup> While far from satisfied, many survivors and their allies reported significant improvements as a result.<sup>7</sup> Yet a counternarrative emerged from some law professors, reporters, libertarians critical of the administrative state, and those skeptical of the existence of campus rape<sup>8</sup>: that schools, in their attempts to conform to the Department of Education's nonbinding recommendations, were now violating the rights of students accused of gender violence.<sup>9</sup> Where

2. See, e.g., Libby Sander, *Quiet No Longer, Rape Survivors Put Pressure on Colleges*, CHRON. HIGHER EDUC. (Aug. 12, 2013), <http://www.chronicle.com/article/Quiet-No-Longer-Rape/141049> (describing a range of student survivors' strategies).
3. U.S. DEP'T OF EDUC., *QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE* (Apr. 29, 2014) [hereinafter *QUESTIONS AND ANSWERS ON TITLE IX*], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.
4. See, e.g., Robin Wilson, *2014 Influence List: Enforcer*, CHRON. HIGHER EDUC. (Dec. 15, 2014), <http://www.chronicle.com/article/enforcer-catherine-e-lhamon/150837> (describing Assistant Secretary for Civil Rights' Catherine Lhamon's efforts to strengthen OCR's Title IX enforcement).
5. *Alexander v. Yale Univ.*, 631 F.2d 178, 181-83 (2d Cir. 1980).
6. U.S. DEP'T OF EDUC., *DEAR COLLEAGUE LETTER* (Apr. 4, 2011) [hereinafter *DEAR COLLEAGUE LETTER*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.
7. See, e.g., *Letter from the National Women's Law Center et al. to Education Secretary John King*, NAT'L WOMEN'S L. CTR. (July 13, 2016), <https://nwl.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/> ("These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.").
8. The Foundation for Individual Rights in Education (FIRE), an influential critic of OCR's Title IX enforcement, has criticized the agency's guidance for alleged violations of the Administrative Procedures Act. Ari Cohn, *Did the Office for Civil Rights' April 4 'Dear Colleague' Letter Violate the Law?* FOUND. INDIVIDUAL RTS. EDUC. (Sept. 12, 2011), <https://www.thefire.org/did-the-office-for-civil-rights-april-4-dear-colleague-letter-violate-the-law/> ("It is our conclusion that in issuing this mandate, OCR failed to comply with the required APA procedures, and has robbed the public of its opportunity and duty to participate in the rulemaking process."). FIRE claims the illegal guidance is premised on a "highly inflated notion of an 'epidemic' of campus rape." Cathy Young, *The Politics of Campus Sexual Assault. Why is the Federal Government Pushing to Reduce the Due Process Rights of College Students?*, REASON.COM (Nov. 17, 2011), <http://reason.com/archives/2011/11/17/the-politics-of-campus-sexual-assault>.
9. See, e.g., Joseph Cohn, et al., *Open Letter to OCR from FIRE Coalition*, FOUND. INDIVIDUAL RTS.

schools had once disregarded the rights of victims, they argue, now they were disregarding the rights of the accused<sup>10</sup>—with a disproportionate impact, some say, on black men.<sup>11</sup> The pushback has found powerful advocates, including vocal Harvard Law professors<sup>12</sup> and Senator John McCain.<sup>13</sup> Lawsuits from students suspended or expelled for gender violence—including some who challenge the legality of the Dear Colleague Letter—continue to pile up in courts.<sup>14</sup> While the Trump administration has, at the time of this writing, yet to reveal its Title IX agenda, the Republican National Convention’s platform and Education Secretary Betsy DeVos’s hearing suggest the new OCR may be heavily influenced by the backlash.

At the same time that survivors, accused students, and their allies have argued about sexual violence on college campuses, civil rights advocates elsewhere kick-started a campaign to challenge disciplinary practices in K-12 schools that push kids, and particularly kids of color, out of the classroom. Data published by OCR showed staggering rates of exclusion for black children as young as preschoolers and significant racial gaps, with black girls five and a half times more likely than their white female classmates to be suspended.<sup>15</sup> Much of the

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EDUC. (May 7, 2012), <https://www.thefire.org/open-letter-to-ocr-from-fire-coalition/>; Isaac Arnsdorf, *ACE, FIRE on Campus Sexual Assault*, POLITICO (Feb. 25, 2016, 2:00 PM EST), <http://www.politico.com/tipsheets/politico-influence/2016/02/ace-fire-on-campus-sexual-assault-212896/>; Elizabeth Bartholet et al., *Op-Ed: Rethink Harvard’s Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqjBM/story.html>.

10. See, e.g., David G. Savage & Timothy M. Phelps, *How a Little-Known Education Office Has Forced Far-Reaching Changes to Campus Sex Assault Investigations*, L.A. TIMES (Aug. 17, 2015, 3:00 AM) (quoting Janet Halley saying “I’m afraid that’s what we are doing, we are over-correcting . . . The procedures that are being adopted are taking us back to pre-Magna Carta, pre-due-process procedures.”).
11. See, e.g., Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (Feb. 18, 2015).
12. Bartholet et al., *supra* note 9.
13. *Senator John McCain Sends Letters to DOJ and EPA on Obama Administration Settlement Abuse*, JOHN MCCAIN (June 26, 2013), <http://www.mccain.senate.gov/public/index.cfm/2013/6/post-818fd6fo-boog-24oc-b963-7b7bb47fo3fb>.
14. See, e.g., *Neal v. Colo. State Univ.-Pueblo*, No. 16-CV-873-RM-CBS, 2017 WL 633045 (D. Colo. Feb. 16, 2017); *Doe v. Lynn Univ., Inc.*, No. 9:16-CV-80850, 2017 WL 237631 (S.D. Fla. Jan. 19, 2017); *Ritter v. Oklahoma City Univ.*, No. CIV-16-0438-HE, 2016 WL 3982554 (W.D. Okla. July 22, 2016); *Doe I v. Cummins*, 662 F. App’x 437 (6th Cir. 2016); *Doe v. Columbia Univ.*, No. 15-1536, 2016 WL 4056034 (2d. Cir. July, 2016); *Doe v. Brown Univ.*, No. CV 16-017 S, 2016 WL 5409241 (D.R.I. Sept. 28, 2016); *Doe v. Univ. S. Cal.*, 200 Cal. Rptr. 3d 851 (Ct. App. Cal. 2016); *Doe v. Univ. of Cincinnati*, No. 1:15-cv-600, 2015 WL 5729328 (S.D. Ohio. Sept. 30, 2015).
15. U.S. Dept. of Educ., Civil Rights Data Collection Data Snapshot: School Discipline, OFFICE FOR CIVIL RIGHTS (March 2014), <http://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>.

push for better discipline practices has focused on the need for educators to better respond to students' trauma—including sexual trauma at school.<sup>16</sup>

In this broader fight for fairer school discipline, efforts to address sexual harassment and efforts to protect accused students' time in class are understood to be part of the same project to increase educational access. Yet in the narrower college rape context, many advocates and most popular accounts tell a tale of warring interests. Schools can either prevent and respond to gender violence or protect accused students' rights; these aims are imagined to be entirely mutually exclusive.<sup>17</sup> Many Title IX opponents deploy a rhetoric of "overcorrection" and a pendulum swinging too far, as though a single axis of justice exists on which every gain for one side is a loss for the other.<sup>18</sup> And, while this article will resist false equivalencies between political factions, some victims' advocates have resisted calls to protect accused students' rights as attempts to return to an earlier age of impunity on campus. When then-nominee for secretary of education Betsy DeVos noted, in her hearing, that her department must consider the effect of Title IX guidance on both victims and alleged perpetrators<sup>19</sup>—which it undoubtedly must—some took this as evidence of her hostility to sexual harassment protections.<sup>20</sup> This narrative of warring interests ignores the unifying principle that motivates both those who labor to end sexual abuses and those who work in good faith to ensure adequate protections for students engaged in disciplinary hearings: the need to combat

16. See, e.g., NATIONAL WOMEN'S LAW CENTER AND NAACP LEGAL DEFENSE & EDUCATIONAL FUND, UNLOCKING OPPORTUNITY FOR AFRICAN AMERICAN GIRLS: A CALL TO ACTION FOR EDUCATIONAL EQUITY (2014), [http://www.nwlc.org/sites/default/files/pdfs/unlocking\\_opportunity\\_for\\_african\\_american\\_girls\\_final.pdf](http://www.nwlc.org/sites/default/files/pdfs/unlocking_opportunity_for_african_american_girls_final.pdf).
17. See, e.g., Zoë Heller, *Rape on Campus*, N.Y. REV. OF BOOKS (Feb. 5, 2015), <http://www.nybooks.com/articles/2015/02/05/rape-campus> (describing a clash between due-process advocates and rape victim advocates).
18. See, e.g., Savage & Phelps, *supra* note 10; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 8, 2014), [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); Robby Soave, *As the Campus Rape Narrative Unravels, Will Due Process Strike Back in 2015?*, REASON (Dec. 30, 2014), <http://reason.com/archives/2014/12/30/campus-rape-narrative-and-due-process> (quoting Justin Dillon, counsel for students accused of rape, saying "The Department of Education has made clear that it doesn't really care about due process, which means colleges won't either—until they start having to pay out large damage awards to wrongly convicted students . . . . The more that happens, the more likely you are to see the pendulum start swinging back to a sensible middle.").
19. FULL COMMITTEE HEARING, NOMINATION OF BETSY DEVOS TO SERVE AS SECRETARY OF EDUCATION (Jan. 17, 2017), <http://www.help.senate.gov/hearings/nomination-of-betsy-devos-to-serve-as-secretary-of-education>.
20. To be sure, this hostility is real, given DeVos's general rejection of a federal role in enforcing civil rights. There is more than enough evidence apart from her reasonable concern for the effect of Title IX guidance on students accused of sexual violence. See, e.g., Lauren Camera, *DeVos: I'd be Fine Ditching the Education Department*, U.S. NEWS & WORLD REP. (Feb. 17, 2017, 3:27 PM), <https://www.usnews.com/news/articles/2017-02-17/betsy-devos-id-be-fine-if-we-could-ditch-the-education-department>.

unjust deprivations of the right to learn, whether the threat is unaddressed gender violence or, less frequently, false accusations.

The caveat of “good faith” is necessary because, as this article will detail, some of the loudest voices decrying the treatment of students accused of gender violence appear deeply unconcerned with victims’ educations, having rooted their campaign in misogyny and misinformation about sexual assault. Not all have done so, though, and the disingenuous posturing of some advocates is no reason to doubt that schools do, in fact, treat some alleged sexual assailants unfairly. After all, no one knows better than student survivors that schools have long mishandled disciplinary complaints. Without a doubt, the allegations made by some accused students in their lawsuits against schools are, if true, deeply disturbing. Further, while there are no available data reflecting rates of disciplinary action for different racial and ethnic groups on college campuses, and while some who have speculated about racially disparate impacts of new campus rape policies have overlooked women of color who are subject to high rates of sexual victimization and reified stereotypes of “deviant” black masculinity,<sup>21</sup> racially biased sanctions would be unsurprising given both K-12 data and America’s long history of knee-jerk, overly punitive responses to black men accused of raping white women.

This article takes as a given, then, that concerns about colleges’ treatment of student gender violence victims and their alleged assailants are both valid without making a claim of equivalency. The intervention attempted here is to demonstrate the necessity of reconceptualizing the relationship between the two interests as deeply interconnected rather than as merely locked in incurable conflict, to diagnose the roots of the “warring factions” narrative, and to describe what is lost for all students due to this misguided approach. While Trump, the self-professed “pussy grabber,” gives us little reason for optimism, young people will unquestionably be better-served by an administration that does not believe its task is to choose to stand either with rape victims or with accused men.

In Part I, I explore the overlooked common ground between efforts to address gender violence on college campuses and to protect the rights of accused students in disciplinary procedures. The two opposing camps, as they are styled, share ethical and political values, a strategic interest in the actual and perceived fairness of school proceedings, and benefit under new laws and regulations regarding campus gender violence. In Part II, I consider the foundation of the exaggerated conflict: rape exceptionalism, bolstered by the dominance of criminal law in the public’s conception of gender violence.

21. Antuan M. Johnson, Note, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J.L. & MOD. CRIT. RACE PERSP. 57, 63-73 (2017); Kamilah Willingham, *To the Harvard 19: Do Better* (Mar. 14, 2016), <https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2#.tgcony5uo> (“[Y]ou’ve speculated without evidence that Black men are disproportionately accused of sexual assault in schools, while turning a blind eye to well-established research on the disproportionate rate at which *women* of color are subjected to sexual assault. If you are concerned with the intersection of race and sexual assault, why not start there?”).

Part III considers the cost to students of the vilification of Title IX outside the context of the larger project of student discipline. The article concludes with some brief thoughts on a better way forward for advocates and students.

### 1. Overlooked common ground

Designing any system of antagonistic adjudication requires careful balancing of the parties' interests. Student disciplinary procedures are no exception. It would be Pollyannaish, then, to reject the public narrative of intractable conflict for one of perfect harmony, pretending the interests of survivors and accused students are entirely reconcilable. To put it simply: Many survivors want their assailants sanctioned, and presumably all accused students want not to be sanctioned. Yet despite this obvious tension, advocates for both parties share common values, strategic ends, and benefits under the new legal regime.

#### A. Shared values

The narrative of warring interests ignores the unifying principle that motivates both those who labor to end sexual abuses and those who work to ensure adequate protections for students engaged in disciplinary hearings: the need to combat unjust deprivations of the right to learn, whether the threat is unaddressed gender violence or, less frequently, false accusations. The robust debate around campus discipline for sexual harassment reflects a widespread, deeply held recognition of the ethical importance of education, an essential good for individual flourishing and an equalizing force for the nation. The Supreme Court has refused to recognize a fundamental right to education.<sup>22</sup> Instead, U.S. anti-discrimination law best reflects our strong national commitment to preserving educational opportunities for the most vulnerable among us, for those who are likeliest to suffer identity-based inequity, harassment, and violence. Title IX provides federal rights for students and underscores the importance of education. Gender, of course, is not the sole axis of discrimination prohibited in education. Like Title IX, Title VI of the Civil Rights Act of 1964<sup>23</sup> (dealing with discrimination based on ethnicity or national origin) and both Title II of the Americans with Disabilities Act<sup>24</sup> and Section 504 of the Rehabilitation Act of 1973<sup>25</sup> (together dealing with discrimination based on disability) require schools to ensure that all students, regardless of identity, have equal opportunities to learn and thrive, free from the imposition of identity-based limitations.<sup>26</sup> These anti-discrimination laws are based on a recognition that the deprivation of education not only limits an individual's intellectual and professional life but also blocks an essential

22. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

23. 42 U.S.C. § 2000d *et seq.* (2016).

24. 20 U.S.C. § 1681 *et seq.* (2016).

25. 29 U.S.C. § 794 (2016).

26. *See* DEAR COLLEAGUE LETTER, *supra* note 6.

gateway to participation in public life—one historically limited for women, people of color, and people with disabilities.<sup>27</sup> Thus, Title IX guarantees protections to student survivors of gender violence because such violence creates an unconscionable sex-based obstacle to the pursuit of an education.

These education anti-discrimination laws, because they place such weight on a students' opportunity to learn, are significant far beyond the domain of discrimination, underscoring the great loss a suspension or expulsion imposes on a student. Of course, students do not, by operation of federal civil rights law, have the legal right to attend a given school. Yet anti-discrimination laws that recognize the importance of education make clear that suspensions and expulsions—whatever the motivation—are weighty burdens that threaten not only career prospects<sup>28</sup> but also access to the inherently valuable chance to learn. Additionally, while discipline is often necessary to promote equality, for instance, when a student threatens the civil rights of others, it can also be used to thwart social progress. Tellingly, the student parties to the two most influential discipline cases, *Goss v. Lopez* and the Fifth Circuit's *Dixon v. Alabama State Board of Education*,<sup>29</sup> were sanctioned for protesting racial injustice in the American South. Flimsy protections create room for discrimination that has devastating consequences for marginalized students.

No one should be surprised, then, that anti-rape and fair-process advocates share core commitments—and are often the same people. In April 2015, six student anti-violence organizations signed on to an open letter written by Know Your IX (which, in full disclosure, I co-founded and previously co-directed) about the importance of procedural fairness in campus adjudication of sexual harassment.<sup>30</sup> “[A]s students whose educational opportunities have been imperiled and limited by violence,” the groups explained, “we understand too well the harm of unjust deprivations of the right to learn.”<sup>31</sup>

### *B. Shared strategic ends*

Apart from common ethical commitments, both advocates for accused students and advocates for student victims of gender violence benefit strategically from fair, equitable procedures. Attorneys who represent students on both side of accusations can attest to their frustrations when schools violate the rights of the opposing party, leading to internal appeals and subsequent litigation that extends the painful process for their clients. Students are left in limbo for months or even years, waiting to hear whether they can return

27. See, e.g., 118 CONG. REC. 5806-07 (1972).

28. Warren A. Seavey, Comment, *Dismissal of Students: “Due Process,”* 70 HARV. L. REV. 1406, 1407 (1957).

29. *Goss v. Lopez*, 419 U.S. 565 (1975); *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150 (5th Cir. 1961).

30. Know Your IX et al., *Letter to University Presidents on Fair Process*, KNOWYOURIX.ORG (Apr. 15, 2015), <https://www.knowyourix.org/letter-university-presidents-fair-process/>.

31. *Id.*

to campus—either because they fear the return of their rapists or because they have been suspended. A student who truthfully accuses another may nonetheless be forced to share a campus with her abuser if the school violates a procedural right and, to settle litigation, allows the wrongdoer to reenroll. No one wins when processes are unfair.

Further, alleged victims and accused students complain of many of the same procedural pitfalls, like biased boards, insufficient transparency, untrained staff, and poor guidance.<sup>32</sup> Of course, one party may be pleased by bias in its favor and discourage any correction. Yet, on the whole, parties on both sides of the table seek similar, if not identical, structural reform.

Zooming out to the larger political landscape, the long-term realization of accused and victimized students' interests depends on the perceived legitimacy of disciplinary procedures for gender violence. Accused students' advocates speak openly of how colleges' widespread failure to protect the rights of victimized students created political pressure to deprioritize fairness to accused students. In one lawsuit against Columbia University, a male student suspended for sexual assault claimed that the school rushed through flimsy procedures to find him responsible, despite insufficient evidence, because of negative press detailing the schools' mistreatment of survivors.<sup>33</sup> Regardless of whether the plaintiff is correct in his diagnosis, the story makes sense: if the public does not trust schools to take appropriate measures in response to students' gender violence complaints, these same colleges may feel pressure to prove critics wrong, even when a particular case does not warrant a finding of responsibility or a severe sanction.<sup>34</sup>

Right now, the stakes are particularly high for student survivors and the groups mobilized on their behalf. Suits from sanctioned students continue to pile up<sup>35</sup> and campus disciplinary boards are widely derided as inept “kangaroo courts.”<sup>36</sup> In many critics' misguided judgment, the obvious solution to school

32. Compare the 2011 Title IX complaint against Yale University, of which I was a part, Christina Huffington, *Yale Students File Title IX Complaint Against University*, YALE HERALD (Mar. 31, 2011, 10:19 PM), <http://yaleherald.com/homepage-lead-image/cover-stories/breaking-news-yale-students-file-title-ix-suit-against-school/>, with a recent suit by a student expelled by Yale, *Complaint and Jury Demand, Montague v. Yale Univ.*, No. 3:16-cv-00885 (D. Conn. June 9, 2016), <http://www.chronicle.com/items/biz/pdf/Montague%20Complaint.pdf>, and compare Columbia survivors' administrative complaint against the school with a lawsuit brought by a suspended student, *Doe v. Columbia Univ.*, 831 F.3d 46 (2d. Cir. 2016).

33. *Doe v. Columbia Univ.*, 831 F.3d 46 (2d. Cir. 2016).

34. None of this is to say, as some critics have, that this pressure is sufficient to overcome millennia-old biases against survivors and women.

35. *E.g.*, *Doe*, 831 F.3d at 46; *Doe v. Brown University*, 166 F. Supp. 3d 177 (D.R.I. Feb. 22, 2016); *Xiaolu Peter Yu v. Vassar Coll.*, 97 F. Supp. 3d 448 (S.D.N.Y. Mar. 31, 2015). *See also* Matt Rocheleau, *College Students Fight Sexual Assault Accusations*, BOS. GLOBE, June 27, 2014 <http://www.bostonglobe.com/metro/2014/06/26/students-accused-campus-sexual-assaults-fighting-back/HhierdwFHB3035w6oZXOJJ/story.html>.

36. *E.g.*, *On Campus, a Debate Over Civil Rights and Rape*, USA TODAY (Apr. 21, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-04-21/title-ix-campus-sexual-violence/54456812/1>



disciplinary failures is to cede all authority to the police. Bills to require “mandatory referrals” to law enforcement have been introduced in Congress<sup>37</sup> and states<sup>38</sup> including Georgia,<sup>39</sup> Rhode Island,<sup>40</sup> Tennessee,<sup>41</sup> Delaware,<sup>42</sup> Virginia,<sup>43</sup> and Maryland.<sup>44</sup> Gender violence survivors and advocates insist that these laws would decrease reporting to colleges, preclude support for victims, and frustrate colleges’ efforts to create an environment in which they can fulfill their ultimate mission: to teach.<sup>45</sup> Legislators, deluged by stories of inadequate school processes, have thus far been hesitant to hear these warnings.<sup>46</sup>

Fair disciplinary procedures, then, will promote not only just outcomes but also the public faith necessary to empower administrators to ensure productive educational environments. The robust literature on procedural justice has

“But when Warner returned to school, an administrator pulled him from class. He’d been accused of rape, and he would have to face charges in the campus disciplinary system . . . . What followed, as Warner and his mother describe it, was a ‘kangaroo court’ campus trial . . . .”). Some victims, too, characterize school disciplinary hearings this way. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 624 (2009).

37. Safe Campus Act of 2015, H.R. 3403, 114 Cong. § 2(a) (2015) (amending Title I of the Higher Education Act of 1965) (unenacted).
38. See generally ANDREW MORSE, BRIAN A. SPONSLER & MARY FULTON, STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY 5 (Dec. 15, 2015), [https://www.naspa.org/images/uploads/main/ECS\\_NASPA\\_BRIEF\\_DOWNLOAD3.pdf](https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf) (reporting eleven state proposals).
39. H.B. 51, 154th Gen. Assemb., Reg. Sess. (Ga. 2017).
40. H.B. 5034, 2015 Gen. Assemb., Reg. Sess. (R.I. 2015).
41. S.B. 2019, 109th Gen. Assemb., Reg. Sess. § 5(a) (Tenn. 2016), <http://www.capitol.tn.gov/Bills/109/Bill/SB2019.pdf>.
42. H. Substitute 1 for H.B. 1, 148th Gen. Assemb. (Del. 2016) (enacted but not effective until June 30, 2017), <https://legis.delaware.gov/BillDetail?legislationId=24165>.
43. VA. CODE ANN. § 23.1-806 (2016).
44. H.B. 749, S.B. 817, S.B. 578, 2015 Gen. Assemb., Reg. Sess. (Md. 2015).
45. For critiques of mandatory referral bills, see Alexandra Brodsky, *Against Taking Rape “Seriously”: The Case Against Mandatory Referral Laws for Campus Gender Violence*, HARV. C.R.-C.L. L. REV. (forthcoming); Tyler Kingkade, *28 Groups that Work with Rape Victims Think the Safe Campus Act is Terrible*, HUFFINGTON POST (Sept. 13, 2015, 1:00 PM), [http://www.huffingtonpost.com/entry/rape-victims-safe-campusact\\_us\\_55f300cce4b063ecbfa4150b](http://www.huffingtonpost.com/entry/rape-victims-safe-campusact_us_55f300cce4b063ecbfa4150b); Andrew Morse, *An Open Letter on Campus Sexual Assault to Elected Leaders in all 50 States*, NASPA (Feb. 19, 2015), <https://www.naspa.org/rpi/posts/open-letter-on-campus-sexual-assault>; *Resisting State-Level Mandatory Police Referral Efforts*, KNOW YOUR IX, <http://knowyourix.org/mandatory-referral> (last visited May 23, 2017); Jill Filipovic, *Making it Harder to Punish Campus Rapists Won’t Help Stop Campus Rape*, WASH. POST (Aug. 10, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/10/making-it-harder-to-punish-campus-rapists-wont-help-stop-campus-rape/>; Dana Bolger & Alexandra Brodsky, *Victim’s Choice, Not Police Involvement, Should Be Lawmakers’ Priority*, MSNBC (Feb. 12, 2015, 6:49 AM), <http://www.msnbc.com/msnbc/campus-rape-victims-choice-should-be-lawmakers-priority>.
46. Brodsky, *supra* note 45 (tracking introduction of mandatory referral bills and legislators’ responses to critics).

demonstrated the importance of fair process to participants' acceptance of decision-makers' authority and decisions—both in formal legal disputes and informal resolutions<sup>47</sup>—regardless of whether the outcome is favorable to their interests.<sup>48</sup> Just as fair criminal procedures encourage people to “buy in” to legal systems and “adhere to agreements and follow rules over time,”<sup>49</sup> ethical and equitable campus disciplinary procedures will likely improve student participants' trust in hearing boards and acceptance of their decisions. Over time, fair procedures should lead to greater community faith in campus discipline, allowing colleges to take the steps necessary to build safe and just campuses. All students, victims and respondents alike, will then benefit from meaningful protections for the opposing party.

### C. Shared benefit under new legal regime

Many critics have painted recent survivor-protective efforts by the Department of Education, tasked with enforcing Title IX, as an attack on accused students' rights. Other writers have helpfully demonstrated that Title IX's requirements do not conflict with procedural requirements.<sup>50</sup> Yet Title IX guidance and the Campus SaVE Act<sup>51</sup> are not merely compatible with due process but provide more robust procedural protections for *both* parties than does the Constitution—or any other federal law or regulation.

The Constitution provides very few protections to accused students. As a general matter, students at private schools have no procedural due-process rights; the fairness of their schools' disciplinary processes is a matter of contract, and disciplinarians need only conform to their written policies.<sup>52</sup> Public school students fair better, but not by much. In its most famous student due-process case, *Goss v. Lopez*, the Court held that a public school respondent facing a suspension has a protected property interest in her continued education but, procedurally, is owed only “some kind of notice and afforded some kind of

47. See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1 (2011) (demonstrating the importance of procedural justice in alternative dispute resolution).
48. *Id.* at 4.
49. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003).
50. E.g., Nancy Chi Cantalupo, “Decriminalizing” Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 512 (2012); 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 (2009).
51. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89 (2013) (codified at 20 U.S.C. § 1092(f) (2016)).
52. *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961) (following “the well-settled rule that the relations between a student and a private university are a matter of contract”). Some courts, however, have reviewed private universities decisions for arbitrariness and capriciousness. Cantalupo, *supra* note 50, at 514.

hearing.”<sup>53</sup> While *Goss* suggested schools might need to provide more formal procedures when serious sanctions are on the line, subsequent Courts have largely avoided further instructions to this effect.<sup>54</sup>

Title IX and the recently amended Jeanne Clery Act,<sup>55</sup> the two primary laws shaping colleges and universities’ responses to gender violence, present a more robust vision of fair process on campus than does the Constitution. Increased requirements for notice, access to the record, guidance, and appellate review are particularly robust.

### Notice

In December 2014, *Slate* writer Emily Yoffe introduced readers to an unlikely protagonist: Drew Sterrett, a former University of Michigan student expelled for rape. According to Sterrett, who insists he was wrongly accused, administrators first questioned him about a sexual encounter before he knew he had been accused of assault.<sup>56</sup> Without proper notice, he was unable to consult a lawyer or appreciate the repercussions of his answers. Whether or not the story is true, Yoffe’s account highlights the importance of notice to campus discipline.<sup>57</sup> Thankfully, though the Constitution requires few procedural protections for accused students at state schools, and none at all at private colleges, it does require notice.<sup>58</sup> Yet what constitutes sufficient notice is unclear: *Goss* requires only “some kind of notice.”<sup>59</sup> The 1975 *Goss* Court held that, in student discipline, “[t]here need be no delay between the time ‘notice’ is given and the time of the hearing.”<sup>60</sup> Some lower courts, however, have required such an interval. The District of New Hampshire, for example, required that a public school student facing a suspension longer than five days be provided “sufficient time to prepare a defense or reply” between notice and a hearing.<sup>61</sup> In *Jenkins*, the

53. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (emphasis added).

54. James M. Picozzi, *University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96 YALE L.J. 2132, 2133-34 (1987) (“While the Supreme Court equivocated, the lack of a national procedural standard spawned litigation... the lower federal courts did not equivocate... they found public university students *do* hold property and liberty interests... Yet, without a ruling *by* the Supreme Court specifying how much process a student was due, the district courts applied *Goss* unevenly.”).

55. Violence Against Women Reauthorization Act of 2013, 127 Stat. 89 (2013) (codified at 20 U.S.C. § 1092(f) (2016)).

56. Yoffe, *supra* note 18.

57. Although Sterrett’s story is compelling, it is important to note that no court has yet made a factual finding about whether his account is true. I would also be remiss to cite to the story without noting that I dispute Yoffe’s characterization of national response to campus gender-based violence as an “overcorrection,” which feeds the narrative of incompatible feminist and due-process interests. See Yoffe, *supra* note 18.

58. *Goss*, 419 U.S. at 740 (“student be given oral or written notice of the charges against him....”).

59. *Id.* at 579.

60. *Id.* at 582.

61. *Vail v. Bd. of Ed. of Portsmouth Sch. Dist.*, 354 F. Supp. 592, 603 (D.N.H.), *vacated and*

Fifth Circuit did not specify a minimum delay between notice and a hearing, but noted that the two weeks between a student's notice of charges and the hearing was sufficient.<sup>62</sup>

OCR, though, requires that notice to both students should go beyond the bare constitutional minimum and include timely communication of the accusation. The Obama OCR's resolution of the Wesley case indicates it believed more than a week was necessary<sup>63</sup>—far longer than that required by *Goss*. Further, a timeliness requirement follows from OCR's separate requirement that “the parties must have an equal opportunity to present relevant witnesses and other evidence [and t]he complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.”<sup>64</sup> Without timely notice, a respondent would be at a severe disadvantage in preparation, as the alleged victim would know of the charges well before his or her opposing party.

It is worth noting that OCR's explicit requirement that schools provide immediate services to reporting victims, such as moving one of the parties out of a shared dorm, does not contradict or undermine its implicit requirement that schools delay a hearing to provide both parties adequate time to prepare. Instead, these two requirements work hand in hand: Universities must provide accused students with enough time to comprehend the accusations brought against them, and must protect the alleged victim during this period through necessary accommodations. *Goss* noted that a hearing should precede a student's suspension whenever possible, but “[s]tudents whose presence poses a continuing danger to persons or property...may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable....”<sup>65</sup> Similarly, the OCR instructs: “Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation. The school should take these steps promptly once it has notice of a sexual violence allegation....”<sup>66</sup>

Despite some critics' protests that any action before a hearing is a violation of due process, prehearing temporary safety measures are well-established outside the campus setting. For example, temporary restraining orders are issued before both parties have the opportunity to be heard. Further, a hearing is not the only form of process. The Obama OCR required at least an interview with the accused student before an interim suspension. In the Wesley case, OCR found the college had violated Title IX because the college “impos[ed]

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*remanded*, 502 F.2d 1159 (1st Cir. 1973).

62. *Jenkins v. Louisiana State Bd. of Ed.*, 506 F.2d 992, 1000-01 (5th Cir. 1975).

63. *Letter to Robert E. Clark II*, *supra* note 1.

64. DEAR COLLEAGUE LETTER, *supra* note 6, at 11.

65. *Goss*, 419 U.S. at 582-83.

66. QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 3, at 3.

an interim suspension upon each student...[without]...giv[ing the students] the opportunity to show why the suspension should not be implemented... [none] were afforded [the] opportunity.”<sup>67</sup>

#### Access to the Record

OCR explicitly requires that both parties be granted “access to any information that will be used at the hearing.”<sup>68</sup> Lhamon’s OCR made good on its commitment to such transparency: In its resolution with Wesley, the agency devoted considerable space to failure to provide an incident report and investigative findings to accused students.<sup>69</sup> Given the gap between OCR’s commitment and *Goss*’s requirement of only “some kind of notice,”<sup>70</sup> students accused of a different form of misconduct at either a public or private school would likely have no such recourse absent a school’s contractual promise to provide the full record.

Yoffe’s account of procedural messes at the University of Michigan highlights the importance of such access. Yoffe writes:

On Nov. 9, 2012, Sterrett was given a one-page document titled “Summary of Witness Testimony and Review of Other Evidence.” It consisted primarily of summaries of statements from anonymous witnesses. For example, it stated: “Two witnesses stated the Complainant reported to them that she tried to push the Respondent off her.” ([The victim] didn’t know who these two witnesses were. She confirmed in her deposition that in her original statement to [the administrator], she never said that she had tried to push Sterrett off her.) It also stated: “[A] witness reported that the Respondent told them that he engaged in penetration with the Complainant and ‘she was saying ‘no,’ and that it was just—it was ‘just like a second,’ and then he stopped, and then the Complainant left.” (In her deposition, [the victim] acknowledged this was not how their sexual encounter transpired, although she maintained that at some point she said “no.”)<sup>71</sup>

Deprived of reasonable access to the records on which the decision-makers relied, neither the complainant nor the respondent was able to address apparent inconsistencies. Without the witnesses’ full testimony, and without knowledge of their identities, neither Sterrett nor the alleged victim could explain why these accounts deviated from *both* parties’ version of the events: Sterrett could not explain why the witnesses may have maliciously misrepresented him, and the opposing party could not explain why these

67. Letter to Robert E. Clark II, *supra* note 1, at 20.

68. DEAR COLLEAGUE LETTER, *supra* note 6, at 11.

69. Letter to Robert E. Clark II, *supra* note 1.

70. See, e.g., *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005) (“Absent from *Goss* . . . was any requirement for the presentation of evidence against the accused [or] a transcript of the proceedings . . .”).

71. Yoffe, *supra* note 18.

classmates, presumably friends, might have misunderstood details of her nonetheless truthful complaint.

The University of Michigan's sexual misconduct policy explains:

In most cases, the Investigator will prepare a written report at the conclusion of an investigation. Before the report is finalized, the participating Complainant and Respondent will be given the opportunity to review their own statement and, to the extent appropriate to honor due process and privacy considerations, the participating Complainant and Respondent may also be provided with a summary of other information collected during the investigation.<sup>72</sup>

Summaries are an appealing tool to provide the parties with a general understanding of the evidence available without revealing potentially sensitive information that might endanger the participants. Yet they do not provide the parties with an opportunity to engage fully with the available evidence by pointing out inconsistencies or supplying contrary evidence. Some details, peripheral to the alleged misconduct, might be excluded from a summary, but their refutation may speak to the veracity of the account and trustworthiness of a witness. This nitpicking process may be distasteful, particularly when directed at an alleged victim: Trauma is known to result in inconsistent narratives,<sup>73</sup> and there is little grace in “catching” a victim who first claimed an assault occurred at 7:00 p.m., then later testified it was at 7:30 p.m. But a board adequately trained in the nature of the harms they are tasked with reviewing should be able to parse which inconsistencies are meaningful and which are not. And, of course, full access to records may also help complainants just as much as they help respondents. OCR guidance, then, provides victims and students accused of gender violence important rights unavailable to their peers.

### Appellate Review

In 1985, the Fifth Circuit held that “[a]lthough schools may wish to provide appellate mechanisms to cure procedural errors that can creep into initial suspension proceedings, they are not required to do so by the Constitution. Due process need only be provided once.”<sup>74</sup> Since then, courts have generally agreed that students at public schools generally do not have a right to appeal “a school’s decision that was reached through constitutional procedures”<sup>75</sup>

72. *University of Michigan Policy & Procedures on Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence, Investigations Findings and Outcome Notification*, UNIV. OF MICH., <http://studentsexualmisconductpolicy.umich.edu/investigation-findings-and-outcome-notification> (last visited May 26, 2017).

73. Amanda Taub, *The Lesson of Rolling Stone and UVA: Protecting Victims Means Checking Their Stories*, VOX.COM (Dec. 5, 2014, 5:20 PM), <http://www.vox.com/2014/12/5/7341973/trauma-rape-allegation-uva>.

74. *Brewer by Dreyfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985).

75. *Flaim*, 418 F.3d at 636. The court in *Flaim* notes, though, that many schools “do wisely and justly provide for such appeals to all who are charged in a college or university setting.” *Id.*

(students at private colleges, of course, have a right to appeal only if promised by the school, as a matter of contract). However, OCR suggests that schools go beyond the constitutional basement and create an internal appeals process<sup>76</sup> to review both the finding of responsibility and severity of the sanction, if any.<sup>77</sup> Like all procedural rights, the opportunity should be equally available to both complainants and respondents.<sup>78</sup>

### Broadening the Tent

The above-mentioned reforms promote fair process at public schools beyond the bare constitutional requirements. Yet the change is more dramatic at private schools, where the Constitution provides no protection to accused students. Title IX and Campus SaVE, thus, extend for the first time in federal law a basic fair-process mandate to all private universities that receive any federal assistance, not just those public schools subject to constitutional due-process requirements.<sup>79</sup>

### Mutual Reinforcement of Rights

Perhaps most importantly, campus gender violence laws' requirement of equitable procedural rights makes robust protections for both sides an inevitable consequence of protecting victims. Title IX and the Campus Sexual Assault Victims' Bill of Rights<sup>80</sup> require that peer complainants and respondents be provided the same procedural rights.<sup>81</sup> Thus the OCR, tasked

76. DEAR COLLEAGUE LETTER, *supra* note 6.

77. QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 3, at 44. The Campus SaVE Act requires that schools provide notice of any appeals procedure, but does not require that those procedures exist. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89 (2013) (codified at 20 U.S.C. § 1092(f) (2016)).

78. QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 3, at 44.

79. Education Amendments of 1972, Pub. L. No. 92318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. §§ 1681-1688 (2017)); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89 (2013) (codified as amended at 20 U.S.C. § 1092(f) (2016)).

80. "The accuser and the accused are entitled to the same opportunities to have others present during any institutional disciplinary proceeding." 20 U.S.C. § 1092(f)(8)(B)(iv)(II) (2017).

81. DEAR COLLEAGUE LETTER, *supra* note 6, at 11 ("Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing."). The Department of Education responded to comments to the associated proposed regulations to offer an appeals process for gender violence disciplinary claims, but concluded it lacked the authority to do so. Supplementary Information to Final Regulation 34 C.F.R. Part 668, 79 Fed. Reg. 62775 (Oct. 20, 2014) (responding to public comments to "Definition of 'Prompt, Fair, and Impartial'"). See also Foundation for Individual Rights in Education, *FIRE Letter to Office for Civil Rights Assistant Secretary for Civil Rights Russlynn Ali* (May 5, 2011) [hereinafter *FIRE Letter*], <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/> ("FIRE welcomes OCR's specific and explicit emphasis on the necessity of equal treatment for both the complainant and the accused student

with enforcing Title IX and clarifying schools' responsibilities through regular guidance, provides more robust rights to one party each time a college provides more robust rights to the other, whether at OCR's behest or on its own initiative. Protections for student survivors and accused students, then, are not in intractable conflict but mutually reinforcing. For example, as some schools have permitted victims' lawyers to participate actively in disciplinary hearings, they have been required by Title IX guidance to provide the same support for accused students.<sup>82</sup> Rather than seeing Title IX as a threat to students' procedural rights, then, advocates should see the law as a model for equitable, sensible disciplinary processes.

### Exceptions to the Rising Tide?

While the tide is rising, some students at a small handful of elite universities<sup>83</sup> that provided particularly robust protections for accused students will not benefit as do their peers across the country as their schools now are forced to adopt more equitable standards.

Most controversially, a distinct minority of schools previously required clear and convincing evidence to find responsibility for gender violence—often for gender violence cases alone.<sup>84</sup> In its 2011 Dear Colleague Letter, OCR clarified

with regard to many aspects of the hearing process, including but not limited to access to information to be used in the hearing, access to counsel and participation of counsel, the ability to review the other party's statements, access to pre-hearing meetings, and equal opportunities to present witnesses and evidence.”).

82. The 2011 Dear Colleague Letter provides that “[w]hile OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties.” DEAR COLLEAGUE LETTER, *supra* note 6, at 12. Similarly, the 2014 Q&A explains: “If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.” QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 3, at 26. For an example of such a program, see SWARTHMORE COLLEGE SEXUAL HARASSMENT/ASSAULT RESOURCES & EDUCATION, PROCEDURES FOR RESOLUTION OF COMPLAINTS AGAINST STUDENTS, <http://www.swarthmore.edu/share/procedures-resolution-complaints-against-students> (“The complainant and respondent have the option to be assisted by an adviser of their choice...If the adviser is an attorney or other retained person, the adviser must be retained at the initiative and expense of the complainant/respondent.”).
83. Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 147-48 (2017) (noting that elite schools were most likely to use an evidentiary standard higher than the preponderance of the evidence before the Dear Colleague Letter).
84. For example, Cornell, Stanford, University of Virginia, Yale, Harvard and Princeton all had higher standards of proof than preponderance but all changed to the OCR level post-2011, with Princeton the last in September 2014. Jake New, *Burden of Proof in the Balance*, INSIDE HIGHER ED (Dec. 16, 2016). See also *Title IX & the Preponderance of the Evidence: A White Paper* (Aug. 7, 2016) [hereinafter *Title IX White Paper*], <https://assets.documentcloud.org/documents/3006873/Title-IX-Preponderance-White-Paper-Signed-8-7-16.pdf> (“The only OCR investigations we have found documenting schools applying a higher standard have



that the appropriate standard is preponderance of the evidence,<sup>85</sup> the standard it had previously required investigated colleges to adopt to avoid findings of noncompliance with Title IX.<sup>86</sup> Certainly an accused student who would have been found not responsible under his or her school's old clear and convincing standard but was instead found responsible under a new preponderance standard does not benefit from the new regime. Yet such students are hard to come by, and not merely because of the difficulty of proving the counterfactual. A number of studies demonstrate that the vast majority of schools used the preponderance standard for all disciplinary proceedings, gender-based or not, *before the Dear Colleague Letter*.<sup>87</sup>

Similarly, some schools previously allowed students accused of gender violence to directly cross-examine their alleged victims, a practice discouraged by OCR to avoid unnecessarily retraumatizing survivors.<sup>88</sup> Courts have occasionally provided public school students accused of serious disciplinary infractions with the right to challenge witnesses's accounts in some manner but no absolute right to *direct*, in-person cross-examination. *Goss* left the question open, refusing to require confrontation and cross-examination for short-term suspensions but leaving open the possibility that administrators might permit

been in cases involving sexual harassment.”).

85. DEAR COLLEAGUE LETTER, *supra* note 6, at 11 (“in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard....”).
86. Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, Office for Civil Rights, U.S. Dep’t of Educ., to Ms. Jane E. Genster, Vice President and General Counsel, Georgetown Univ. (Oct. 16, 2003), <https://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf> (“federal courts, and therefore OCR, use a preponderance of the evidence standard in resolving allegations of discrimination under all of our statutes, including Title IX.”); Letter from Gary D. Jackson, Reg’l Civil Rights Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Jane Jervis, President, The Evergreen State Coll. at 8 (Apr. 4, 1995), <https://www.ncherm.org/documents/193-EvergreenStateCollege10922064.pdf> (“The evidentiary standard of proof applied to Title IX actions is that of a ‘preponderance of the evidence’”).
87. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1986-88 (2016) [hereinafter Anderson, *Campus Sexual*]; *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate Appendix*, FOUND. INDIVIDUAL RTS. EDUC. (Oct. 28, 2013), [https://www.thefire.org/fire\\_speech-codes/student-code-of-conduct-05-06-14/8d799c33bcca596e58e0c2998e6b2ce4-pdf/](https://www.thefire.org/fire_speech-codes/student-code-of-conduct-05-06-14/8d799c33bcca596e58e0c2998e6b2ce4-pdf/); Angela F. Amar, et al., *Administrators’ Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 VIOLENCE & VICTIMS 579, 584-85 (2014); 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, 1000 (2004) [hereinafter Anderson, *The Legacy*]; Heather M. Karjane et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond*, 122 tbl.6.12 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>; *Title IX White Paper*, *supra* note 84, at 7-8 (summarizing studies of standard of proof used in student discipline).
88. DEAR COLLEAGUE LETTER, *supra* note 6, at 12 (“OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”).

more extensive procedures for students facing very serious sanctions.<sup>89</sup> Many lower courts, including the Second,<sup>90</sup> Fifth,<sup>91</sup> Sixth,<sup>92</sup> and Eleventh Circuits,<sup>93</sup> have found no right to direct cross-examination, often basing their opinions on the “cost and administrative burden”<sup>94</sup> of such procedures. Some district and state courts, though, have affirmed a limited right, most coherently rooted in *Goss*<sup>95</sup> or state laws.<sup>96</sup>

Despite its inconsistencies, the case law reminds us that the right to confront and cross-examine does not need to be affirmed or denied in absolute terms. In *Gorman v. Univ. of Rhode Island*, the First Circuit considered the complaint of a student who had been allowed some cross-examination but was denied the ability to “cross-examin[e] any participant in the actions concerning possible bias.”<sup>97</sup> The court rejected the student’s claim because “the right to *unlimited* cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.”<sup>98</sup> Some right to confrontation, then,

89. *Goss*, 419 U.S. 565, 583-84.

90. *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972).

91. *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961).

92. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925 (6th Cir. 1988).

93. *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987).

94. *Whiteside v. Kay*, 446 F. Supp. 716, 720 (W.D. La. 1978).

95. *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005); *Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (“*Goss* clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses.”).

96. *Warren Cnty. Bd. of Educ. v. Wilkinson By & Through Wilkinson*, 500 So. 2d 455, 460 (Miss. 1986); *John A. v. San Bernardino City Unified Sch. Dist.*, 654 P.2d 242, 246 (Cal. 1982). For further discussion of conflicting lower court precedent on the right to cross-examination, see Hogan, *supra* note 50, at 291-93; Larry Bartlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process Is Now Due*, 1993 B.Y.U. EDUC. & L.J. 1, 41-47 (1993).

97. *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988).

98. *Id.* at 16 (emphasis added). See also *Jones v. State Bd. of Ed.*, 279 F. Supp. 190, 197 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969) (“By its nature, a charge of misconduct, as opposed to 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. This is not to imply that a full-dressed judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college’s educational atmosphere and impracticable to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. . . . If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that

may be allowed without permitting *full* confrontation, including direct cross-examination of alleged victims by respondents. For example, the Sixth Circuit determined that a public school veterinary student's due process rights were not violated when his school allowed him to submit questions for witnesses through a hearing panel but not pose them directly.<sup>99</sup> Similarly, in *Donahue v. Baker*, the Northern District of New York reconciled varied holdings and interests when it allowed a student accused of sexual assault "to direct questions to his accuser through the panel."<sup>100</sup>

The procedures discussed in *Donahue* closely mirror OCR's suggested course of action for sexual misconduct cases, which has been adopted by schools including Harvard Law.<sup>101</sup> OCR instructs that, "when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time."<sup>102</sup> But, despite its commitment to combating a hostile hearing environment, OCR has also recognized the value of cross-examination—and the possibility to preserve this function without harming victims. Universities can and should experiment with different options, but one outlined by the OCR strikes a delicate balance. The 2014 guidance includes the following recommendation:

A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.<sup>103</sup>

In striking a balance between victimized students' and accused students' rights, OCR and the Clery Act appear to have raised the basement for procedural rights for all accused students while lowering the ceiling for such protections only at a few schools. The floor may still be too low, but it is rising.

## II. The roots of the "warring factions" myth

Given Title IX's benefits for accused students, why is the civil rights law characterized by so many as a full-throated attack on procedural fairness? One reason is that discussions of campus disciplinary procedures for gender violence typically have been marked by "rape exceptionalism," a belief that claims of rape and other forms of gender violence should be treated differently—that is, with greater skepticism and procedural protections—than other charged

the requirements of due process of law will have been fulfilled.").

99. *Nash*, 812 F.2d at 663-64.

100. *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997).

101. HLS Sexual Harassment Resources and Procedure for Students, Harvard Law School 3.4.1 (Dec. 2014), <https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>.

102. QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 3, at 30.

103. *Id.* at 31.

student disciplinary violations.<sup>104</sup> The recent spate of national attention to campus gender violence triggered concerns for student due processes in a way that national attention to plagiarism, for example, never has.<sup>105</sup> Public and academic debates about how best to investigate and deliberate about campus gender violence reports have approached these questions as entirely novel “quasi-criminal” challenges, puzzling why schools are tasked with the project of punishment at all, rather than part of a large and old project of student discipline. As a result, critics bemoan the failure of campus “rape trials”<sup>106</sup> to live up to the standards of actual criminal rape trials—thus styling Title IX’s protections for victims as fundamentally at odds with expected protections for the accused—rather than recognizing the ways the new sexual harassment legal regime serves as a rising tide for student disciplinary rights writ large.

Both courts and school disciplinary policies have internalized messages from sources as diverse as the Bible and the Model Penal Code that rape is a unique crime that requires a unique approach, not only because of the depth of the harm but because—so the story goes, despite evidence to the contrary<sup>107</sup>—women falsely report rape at uniquely high rates.<sup>108</sup> The trope of the woman who “cries rape,” whether out of jealousy or spite or shame, is as insidious as it is unfounded.<sup>109</sup> So, too, is the assumption that gender violence accusations are inherently and uniquely ambiguous, the truth of the matter ultimately unknowable,<sup>110</sup> as though courts were not regularly asked to resolve competing claims by opposing parties based on testimony and credibility.

104. See, e.g., Anderson, *The Legacy*, *supra* note 87, at 1000.

105. Contrast Harvard Law professors’ recent criticism of gender violence policies with their silence in the face of mass suspensions of undergraduates for plagiarism in 2012. For further discussion of the unique attention paid to processes surrounding complaints of sexual harassment, in contrast to other forms of harassment, see Katharine K. Baker, *Campus Misconduct, Sexual Harm and Appropriate Process: The Essential Sexuality of it All*, 66 J. LEGAL EDUC. 777 (2017); Anderson, *Campus Sexual*, *supra* note 87, at 1985 (“[T]he Harvard Law professors’ objections to the limited process rights of those accused of misconduct are nonunique; that is, they could be lodged against the same kinds of procedures associated with allegations of campus cheating, hazing, nonsexual assault, arson, or discrimination on the basis of race.”).

106. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>.

107. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1026 (1991).

108. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1140 (1986) (“[N]o woman is entirely above suspicion: ‘Objectivity’ demands that the jury be reminded to view the testimony of every victim or complaining witness with the ‘special care’ uniquely required in rape cases.”).

109. See, e.g., Torrey, *supra* note 107, at 1025 (cataloging the rape myths that underlie contemporary criminal law).

110. See, e.g., Barclay Sutton Hendrix, *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, 615-16 (2013) (claiming rape accusations “nearly always involve a ‘he said, she said’ dispute.”); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 66 (2013) (“[T]he evidence of what happened in a typical sexual assault case is usually murky and prone to an increased risk of erroneous conviction.”).

In response to the “special” challenges of gender violence claims, courts and schools have placed additional procedural obstacles in the way of alleged rape victims that, say, an alleged arson victim simply does not face. For example, Harvard previously required rape victims to report the harm within an unusually short time frame and provide corroborating evidence, neither of which was obligatory for students complaining of other also-criminal violations of student conduct codes.<sup>111</sup> Today, many critics demand higher burdens of evidence for alleged gender-violence victims than for victims of other forms of student misconduct<sup>112</sup> and advocate for additional procedural protections for students accused of sexual assault,<sup>113</sup> all because of the supposedly greater challenges of gender-violence accusations. Notably absent from the focus of their concern are any students accused of “nonsexual” assault or other serious student disciplinary charges for conduct that is also criminal, including underage drinking, drug sales, and physical violence not based on gender.<sup>114</sup>

Rape exceptionalism finds a powerful bedrock in the dominance of criminal law in conversations about gender violence. Courts have been clear that schools need not and indeed should not attempt to recreate the procedural protections of a criminal trial,<sup>115</sup> and plenty of student conduct violations, sexual and nonsexual alike, are also punishable under criminal law. Yet critics and legislators treat sexual assault alone as *essentially and exclusively criminal*. The most frequently asked question of the recent national debate about campus gender violence is why schools have any role in addressing gender violence—which, to the public imagination, is a crime and a crime alone, not a civil rights

111. For a thorough account of the dangers of rape exceptionalism in criminal courts and school disciplinary proceedings, including Harvard’s, see Anderson, *The Legacy*, *supra* note 87.
112. See, e.g., Editorial Board of the Stanford Review, *Dear Betsy: Restore Justice to Title IX*, STAN. REV. (Feb. 7, 2017), <https://stanfordreview.org/dear-betsy-restore-justice-to-title-ix-c7c72df7616c#.uht6fikcu>; Hendrix, *supra* note 110, at 612-15; Henrick, *supra* note 110; *New Federal Regulations Limit Due Process, Free Speech Rights on Campus*, FOUND. INDIVIDUAL RTS. EDUC (May 5, 2011), <https://www.thefire.org/fire-new-federal-regulations-limit-due-process-free-speech-rights-on-campus/> (“Students accused of serious crimes like rape should not be tried under the same standard of proof used for a parking ticket.”). It is worth noting that civil courts do, in fact, use the same standard of evidence for rape and automobile violations.
113. Hendrix, *supra* note 110, at 615-18 (2013) (advocating for the right to cross-examine for students accused of gender violence because, among other reasons, rape accusations “nearly always involve a ‘he said, she said’ dispute.”).
114. *Id.*; Bartholet, *supra* note 9.
115. *E.g.*, Goss, 419 U.S. at 583 (“To impose in each such case even truncated trial-type procedures well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.”); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (holding that accused students’ rights in a disciplinary hearing “are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial”); *Brewer by Dreyfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985) (urging parties not to “confuse[] two quite distinct processes: school disciplinary actions and criminal sentencing proceedings”).

violation, tort, or honor code infraction.<sup>116</sup> The legal and practical answer is simple: Title IX requires schools to respond to gender violence as a form of sex discrimination, and schools also have a special interest in ensuring a safe community in which students can learn. Yet a frequent refrain from critics and legislators with varying political allegiances is that rape is simply too “serious” an offense for any response other than criminal prosecution.<sup>117</sup>

Seriousness rhetoric may appear to be rooted in concern for victims and the grave harms they have experienced. Yet, paradoxically, it easily forms a basis for policies directly counter to those students’ interests.<sup>118</sup> The most obvious of these is mandatory referral laws, the proposed requirements that schools turn over all reports of gender violence to the police. These bills have gained significant political momentum despite the fact that victims overwhelmingly say that, faced with the prospect of their schools forwarding their reports to law enforcement, they simply would not report to anyone at all.<sup>119</sup> In the face of clear, repeated objections by survivors and their advocates, proponents have returned repeatedly to the easy, misleading refrain of seriousness: that

116. See, e.g., Alexandra Brodsky & Elizabeth Deutsch, *The Promise of Title IX: Sexual Violence and the Law*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/title-ix-activism-sexual-violence-law> (placing school responses to gender violence in context of other civil remedies).

117. See, e.g., Tyler Kingkade, *Bernie Sanders Comments on Campus Rape, and Totally Drops the Ball*, HUFFINGTON POST (Jan. 12, 2016, 3:59 pm), [http://www.huffingtonpost.com/entry/bernie-sanders-campus-rape\\_us\\_5695431ee4bo86bc1cd5616e](http://www.huffingtonpost.com/entry/bernie-sanders-campus-rape_us_5695431ee4bo86bc1cd5616e) (quoting then-presidential candidate Bernie Sanders saying, “Rape and assault is rape and assault. Whether it takes places on campus or on a dark street. And if a student rapes a fellow student, that has got to be understood as a very serious crime. It has got to get outside of the school and have a police investigation. And it has got to take place. Too many schools are seeing this as ‘well, it’s a student issue, let’s deal with it.’ I disagree with that. It is a crime and it has to be treated as a serious crime. And you are seeing now the real horror of many women who have been assaulted or raped, sitting in a classroom alongside somebody who raped them. Rape is a very, very serious crime and it has to be prosecuted.”); Ashe Schow, *Congressman’s Office Has Perfect Response to Anti-Due Process Advocates*, WASH. EXAMINER (Nov. 3, 2015, 4:49 pm), <http://www.washingtonexaminer.com/congressmans-office-has-perfect-response-to-anti-due-process-advocates/article/2575571>; Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html> (“[I]nternal records, along with interviews with students, sexual-assault experts and college officials, depict a school ill prepared to evaluate an allegation so serious that, if proved in a court of law, would be a felony, with a likely prison sentence. As the case illustrates, school disciplinary panels are a world unto themselves, operating in secret with scant accountability and limited protections for the accuser or the accused.”); Rubinfeld, *supra* note 106; *Letter from Scott Berkovitz & Rebecca O’Connor to the White House Task Force to Protect Students from Sexual Assault*, RAPE, ABUSE & INCEST NAT’L NETWORK (Feb. 28, 2014), at 9, <https://www.rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf> (asking the White House to “deemphasize” student disciplinary procedures for gender violence and promote criminal prosecution). See also generally Brodsky, *supra* note 45 (tracking “seriousness” rhetoric in attempts to require schools to refer rape reports to the police).

118. Brodsky, *supra* note 45.

119. Know Your IX, *Ask Survivors Survey Results*, <http://knowyourix.org/ask-survivors/>; Brodsky, *supra* note 45.

the harm is simply too bad for a school intervention, even if the harmed desire that remedy.<sup>120</sup>

Similarly, the criminal-law-focused rape exceptionalism that underlies seriousness rhetoric also leads to challenges to schools' internal disciplinary policies by providing an intuitively appealing, if legally and ethically unpersuasive, basis on which to demand that student hearings look like criminal trials. Consider the Foundation for Individual Rights in Education's (FIRE's) 2011 objection to the preponderance standard in a letter to then-Assistant Secretary for Civil Rights Russlynn Ali:

Insisting that the preponderance of the evidence standard be used in hearing sexual violence claims turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard.<sup>121</sup>

Even putting aside the substantive debate about the appropriateness of the preponderance standard, FIRE's rhetorical move is remarkable. The organization uses the depth of the wrongdoing against victims against those same victims, singling sexual assault allegations out for special scrutiny and procedural hurdles as though the additional obstacles flowed naturally from a seemingly benevolent, arguably feminist,<sup>122</sup> first principle: that rape is particularly bad.

FIRE replicates this same sleight of hand in its dubious reading of *Addington v. Texas*, to which it cites repeatedly in its 2011 letter to the Department of Education advocating for clear and convincing evidence as the appropriate standard in sexual harassment disciplinary hearings.<sup>123</sup> In *Addington*, the Supreme Court held that at least a "clear and convincing" standard was necessary

120. See, e.g., Dana Bolger, *Paternalistic Delaware Women Lawmakers Fight Campus Rape Survivors on Bill*, FEMINISTING.COM (Oct. 8, 2015), <http://feministing.com/2015/10/08/paternalistic-delaware-women-lawmakers-fight-campus-rape-survivors-on-bill/> ("Often proponents of mandatory police referral bills like that in Delaware are blatantly sexist: they believe women as a class lie and, accordingly, that rape reports should go to juries, not schools . . . . The concerns animating the Delaware women lawmakers' bill seem of a different flavor. Something far more insidious, a paternalism that whispers, *I know better than you what you need. I know better than you what justice is or should be. I know better than you what will make students safe.*" (emphasis in original)).

121. FIRE Letter, *supra* note 81.

122. For feminist criticisms of exceptionalizing rape as a uniquely devastating harm, see, e.g., Charlotte Shane, *Live Through This*, THE NEW INQUIRY (July 26, 2012), <http://thenewinquiry.com/essays/live-through-this/> ("It is unforgivable to publicly question the mythologizing of rape's status as the ruination of all women who go through it."); Jenny Diski, *Diary: Rape-Rape*, 31 LONDON REV. BOOKS 52 (Nov. 5, 2009), <http://www.lrb.co.uk/v31/n21/jenny-diski/diary> ("I didn't think that it was the most terrible thing that had ever happened to me. It was a very unpleasant experience, it hurt and I was trapped. But I had no sense that I was especially violated by the rape itself, not more than I would have been by any attack on my person and freedom. In 1961 it didn't go without saying that to be penetrated against one's will was a kind of spiritual murder.").

123. FIRE Letter, *supra* note 81.

for civil commitment of a patient to state mental hospital, reversing Texas's highest court.<sup>124</sup> The holding fell neatly in step with twentieth-century case law on procedural due process in noncriminal proceedings. That line of cases makes clear that the “fundamental tenet” of due process is not that the worse the accusation, the higher the evidentiary burden, as FIRE claims. Instead, procedural protections and standards of evidence must adjust to account for the gravity of the legal action's repercussions, not the gravity of the harm that led to the legal action.<sup>125</sup> In addition to civil commitment, other noncriminal proceedings in which “clear and convincing” or its close variants are necessary to protect significant liberty interests include deportation proceedings,<sup>126</sup> denaturalization proceedings,<sup>127</sup> and parental rights termination proceedings.<sup>128</sup>

The *Addington* holding does not help opponents of the preponderance in student discipline. However grave a deprivation suspension or expulsion may be, removal from school does not rival forcible imprisonment, even if the imprisonment is technically not punitive.<sup>129</sup> Nor does this line of cases support FIRE's argument that the reputational harm of a finding of responsibility for rape necessitates a higher burden of proof.<sup>130</sup> O.J. Simpson was found liable for Nicole Brown's death in civil court based on the preponderance of the evidence; a higher standard was not necessary even though the alleged conduct was also, without a doubt, one of “society's vilest crimes,” with a finding of liability sure to create a reputational injury.<sup>131</sup>

In truth, FIRE's strategy depends not on legal reasoning but on the reader's intuition toward rape exceptionalism. Repeatedly, the letter cites to *Addington* dicta, noting that in state courts that the standard may be employed “in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing

124. *Addington v. Texas*, 441 U.S. 418, 432-33 (1979).

125. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). *See also, infra* text accompanying notes 89-91.

126. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 284-86 (1966).

127. *Schneiderman v. United States*, 320 U.S. 118, 123 (1943).

128. *Santosky II v. Kramer*, 455 U.S. 745, 769-70 (1982).

129. Motion of *Amici Curiae* Equal Rights Advocates et al., *Neal v. Colorado State Univ.-Pueblo*, No. 1:16-CV-00873-RM-CBS, Ex. A at 21 (D. Colo. 2016), <https://nwlc.org/wp-content/uploads/2016/07/Neal-v-CSU-Amicus-Brief.pdf>.

130. *FIRE Letter*, *supra* note 81 (“In the educational context, the Supreme Court has further held that when ‘a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,’ due process requires ‘precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.’ The Court made these observations about due process protections at the elementary and secondary school level, finding at least minimal requirements of due process necessary because disciplinary action ‘could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.’ Given the increased likelihood of much further-reaching negative consequences for a college student found guilty of sexual harassment or sexual violence in a campus judicial proceeding, greater protections are required, not lesser.” (internal citations omitted)).

131. *Simpson, et al. v. Brown*, CA 4, No. G021264.



by the defendant.”<sup>132</sup> The *Addington* language is less than clear: The Court itself provides no citations for its assertions, and the history of heightened standards for fraud is murky.<sup>133</sup> What is clear, though, is that—despite the Court’s misleading singling out of “quasi-criminal *wrongdoing*”<sup>134</sup>—what makes a proceeding “quasi-criminal” is not the nature of the wrongdoing but the potential outcomes: Clear and convincing evidence of intent is usually necessary for *punitive* damages for fraud, not for a mere finding of responsibility.<sup>135</sup>

Yet FIRE elides the actual content of the “quasi-criminal” label in its attack on the preponderance standard. The letter reads, in part:

In determining compliance, OCR is engaged in a matter of administrative review; at stake is federal funding, not an individual’s continued matriculation, reputation, and employment prospects. As such, OCR’s own use of a lower standard of evidence may be justified. In contrast, when determining whether a student has in fact committed sexual harassment or sexual violence against another student, the college or university judicial body conducting the proceeding is engaged in precisely the “quasi-criminal” adjudication for which the Supreme Court has deemed the “clear and convincing” standard to be appropriate. The stakes for the accused are extremely high; the permanent, severely negative consequences of a guilty finding will follow the student for the rest of his or her life. As a result, a campus judicial hearing charged with deciding between guilt or innocence much more closely resembles a criminal proceeding than OCR’s determinations of institutional compliance.<sup>136</sup>

Taking as true that a student’s finding of responsibility by a student disciplinary board is more personally devastating than a school’s finding of noncompliance by the federal government—despite what some university administrators might protest—the legal conclusion FIRE seeks to draw from this distinction is dispelled by a quick look at the state of civil actions today. If a young person is sued in court under tort law for gender violence, the plaintiff will bear the burden to prove by the preponderance of the evidence that the tort occurred (just as, remember, Nicole Brown’s estate did). If that same plaintiff sues a school for failure to fulfill its Title IX responsibilities, the same standard must be met. The fact that one charge may carry greater reputational damage very obviously does not transform it into a “quasi-criminal” proceeding in the eyes of the law, as the term is used in *Addington* and elsewhere.

132. *FIRE Letter*, *supra* note 81 (citing *Addington*, 441 U.S. at 424-25).

133. In a 2000 article, John Rosenthal and Robert Alter argue that the higher burden for fraud is a historical accident, a result of competition between common-law courts of law and of equity. John Terrence A. Rosenthal & Robert T. Alter, *Clear and Convincing To Whom? The False Claims Act and its Burden Of Proof Standard: Why the Government Needs a Big Stick*, 74 NOTRE DAME L. REV. 1409, 1432-45 (2000).

134. *Addington*, 441 U.S. at 424 (emphasis added).

135. Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 88 (1993); Lee R. Russ, Annotation, *Standard of proof as to Conduct Underlying Punitive Damage Awards—Modern Status*, 58 A.L.R.4th 878 (1987).

136. *FIRE Letter*, *supra* note 81 (citing *Addington*, 441 U.S. at 424) (citations omitted).

Despite its flimsiness, FIRE's legal argument is politically effective because the "quasi-criminal" label appeals to readers' rape-exceptionalist instincts, disconnected from the term's technical meaning. Whatever "quasi-criminal" means in *Addington*, the idea that a student disciplinary hearing to determine a finding of responsibility (which is all that will be found, not guilt or innocence, as the FIRE letter claims) for sexual assault is "quasi-criminal" is intuitively clear to anyone who believes that sexual assault *itself* is inherently, essentially, criminal. FIRE's reliance on the "quasi-criminal" mislabel, then, does the same work as Jed Rubenfeld's description of these same hearings as "rape trials."<sup>137</sup> Both terms harness rape exceptionalism to project criminal stakes onto school disciplinary proceedings and then demand criminal-like protections.

If the point of reference is actual rape trials, then, rather than disciplinary hearings for nonsexual offenses, it is little surprise that critics see recent Title IX guidance and the Campus SaVE amendments to VAWA as attacks on fair process rather than enhancements. But the student discipline case law fits within a larger transubstantive body of procedural due process law that recognizes that "fair" does not necessarily mean "criminal." Civil trials, as discussed above, deviate widely from the stricter requirements of their criminal counterparts. Perhaps more relevantly, administrative law makes clear that the determinations of resource-strapped agencies must be fair but "need not take the form of a judicial or quasi-judicial trial" to do so.<sup>138</sup> Flexible, context-dependent procedures are dictated by the instruction of the Court in *Mathews v. Eldridge* that any determination of "what process is due"<sup>139</sup> requires a careful weighing of disparate interests, including consideration of the adjudicating institution's limited resources, the private parties' stakes, and the public interest. Government agencies and colleges alike, then, must ensure healthy protections in their decision-making, but also must avoid overly burdensome procedures that interfere with the entity's central purpose. All who develop campus disciplinary policies must constantly struggle to achieve a careful balance between the parties' competing interests and the core institutional interest in promoting education.

### III. What students lose

Increased procedural burdens resulting from myopic focus on sexual misconduct discipline pose an obvious harm to victims. Unique scrutiny also leads to more-drawn-out campus procedures and further litigation, leaving victims in limbo. But survivors are not the only ones to benefit from a more expansive conversation that puts the Title IX debate in the larger context of student discipline. Expanding the conversation to other disciplinary harms will also—and this should excite due-process defenders—create space to extend protections to students accused of nonsexual harms. Title IX can be a tide

137. Rubenfeld, *supra* note 106.

138. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

139. *Mathews*, 424 U.S. at 333.

that lifts all boats if schools create transsubstantive disciplinary rules that expand OCR's protections for students accused of sexual assault to students accused of all harms, from robbing a roommate, to dealing drugs in the dorm, to punching a teammate in the face.<sup>140</sup>

In part, the promise of Title IX is simply one of policy. Remember: Other accused students currently have *fewer procedural rights under federal law* than the classmate accused of rape. What if all students facing disciplinary action were guaranteed the same fair processes? Viewing the situation as an opportunity rather than a crisis, advocates can seize upon current Title IX debates as a forum to develop shared procedural policies much needed in the shadow of weak constitutional protections.

The power of Title IX for fair process is also expressive. What if educators and advocates approached *all* threats to *all* students' access to education with Title IX's commitment to learning as central to dignity and public citizenship? One powerful step toward that end would be to use the significant national attention paid to the contentious public Title IX debate to discuss the needs of students accused of nonsexual harms, not only in higher education but also K-12 schools, where data make clear young people of color are excluded from their classrooms at inexcusable rates.<sup>141</sup> Media coverage of these known obstacles to educational opportunity and racial equality is scarce compared to the ill-informed circus of debate on Title IX. What if we could do better? I think we can.

### **Conclusion: A better way forward**

To put it bluntly, the past five years of debate around campus sexual assault have been marked by a wrongheaded and counterproductive battle over supposedly irreconcilable differences. At this time of grave threats to civil rights, it is particularly important that we change how we talk about violence and procedural fairness in schools. Without a doubt, we are tasked with difficult, highly technical questions, to which law provides only a rough outline of an answer. But we will better serve students if our conversations consistently remember their context: the broader struggle for civil rights in schools. Doing so will make legible values shared by all those who seek to defend young people's opportunities to learn. Context will also be crucial to resist the dangerous effects of rape exceptionalism, reminding victims' advocates of their commitments to fair process in other disputes, providing well-meaning advocates for the accused with guidance, and depriving the disingenuous of the spoils of their misleading campaigns.

140. None of this is to say that schools cannot recognize special sensitivities, acknowledging, for example, the difference between a student accused of stealing a textbook cross-examining the accuser and a student accused of rape cross-examining the alleged victim, and designing policies accordingly. Indeed, criminal procedure does so.

141. U.S. Dept. of Ed., Civil Rights Data Collection Data Snapshot: School Discipline, OFFICE FOR CIVIL RIGHTS (March 2014), <http://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>.

One practical way to put those commitments into action is to focus our institutional design energies on transsubstantive disciplinary procedures that handle all student misconduct, including but not limited to gender violence.<sup>142</sup> Doing so would ensure that all students—on either side of the table, no matter the issue—are treated fairly without assigning special obstacles to sexual assault victims. Reform efforts would benefit all students. Fewer would be unjustly deprived of the opportunity to learn. And on that goal, all advocates and educators can agree.

142. The VAWA amendments to the Clery Act require that disciplinary hearings “be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.” 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(bb) (2017). The OCR requires that “[a]ll persons involved in implementing a recipient’s grievance procedures (e.g., Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient’s grievance procedures.” DEAR COLLEAGUE LETTER, *supra* note 6, at 12. To reconcile the need for specialized training with the advantages of a centralized disciplinary board, schools could create a single committee staffed by a group of professors and administrators who are assigned to cases based on their training.