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A Critical Look at How Top Colleges Are Adjudicating Sexual Assault

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ARTICLES

A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault

TAMARA RICE LAVE*

This Article examines the procedural protections afforded by the top American colleges and universities. After briefly situating these policies historically, it presents original research on the procedural protections provided by the top twenty universities, top ten liberal arts colleges, and top five historically black colleges as ranked by U.S. News and World Reports. In 2015, university administrators were contacted and asked a series of questions about the rights afforded to students, including the standard of proof, right to an adjudicatory hearing, right to confront and cross-examine witnesses, right to counsel, right to silence, and right to appeal. This Article describes the study's findings and then compares them with prior studies. It then considers whether the disciplinary proceedings constitute state action, thus making them subject to constitutional scrutiny should they

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be challenged in court. This Article concludes by briefly considering whether a student could successfully challenge these proceedings under contract law or Title IX.

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INTRODUCTION

People across the country are outraged by the way universities handle sexual assault.¹ They argue that rape has become a pervasive problem on college campuses, and schools aren't doing enough

¹ See Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault>; Kayla Webley, *Big Shame on Campus*, MARIE CLAIRE (Oct. 16, 2013), <http://www.marieclaire.com/politics/news/a8217/big-shame-on-campus/>; Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAG.: THE CUT (Sept. 21, 2014), <http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html>.

to stop it.² They rightfully point to cases like Sam Ukawuachu at Baylor University³ and Jameis Winston at Florida State University⁴ as examples of universities prioritizing football over victim safety and offender accountability. They contend that the problem stretches beyond sports teams, with victims not being taken seriously and even being dissuaded from pursuing charges in some cases.⁵ They argue that in the rare case a student is found responsible, he is not adequately punished.⁶

President Obama listened to these concerns and made addressing campus sexual assault a priority of his presidency.⁷ In 2011, the Department of Education Office for Civil Rights (OCR) issued its Dear Colleague Letter (DCL), in which it called the statistics on sexual violence “deeply troubling and a call to action for the nation.”⁸ After reminding universities that sexual violence constitutes a form of discrimination under Title IX,⁹ OCR told universities that in order to be in compliance with Title IX, they had to change disciplinary proceedings to more effectively hold rapists accountable.¹⁰ In no uncertain terms, it told universities that they had to reduce the standard of proof in disciplinary proceedings to a preponderance of the evidence, and it strongly discouraged universities from allowing the

² Webley, *supra* note 1.

³ Jessica Luther, *Silence at Baylor*, TEXAS MONTHLY (Aug. 20, 2015), <http://www.texasmonthly.com/article/silence-at-baylor/>.

⁴ Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

⁵ *See id.*

⁶ Lombardi, *supra* note 1.

⁷ Press Release, White House Office of the Press Sec’y, Memorandum Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>.

⁸ Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, to Colleague 2 (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁹ *Id.* at 1.

¹⁰ *Id.* at 1–3, 7–14.

parties to directly question one another.¹¹ OCR threatened to withhold federal funding to universities that did not adequately comply¹² and it published a list of schools under investigation that continues to grow.¹³ OCR has found a number of schools to be in violation of Title IX, including Princeton University¹⁴ and Harvard Law School.¹⁵ These schools have since reached settlements with OCR, in which they agreed to change the way they handle sexual assault so as to meet the protocol set forth in the DCL.¹⁶

Some applaud OCR's efforts,¹⁷ including at least ninety professors who signed a White Paper in support of the DCL,¹⁸ but others contend that universities have gone too far in sacrificing the rights of the accused.¹⁹ Members of the law faculty at both Harvard and

¹¹ *Id.* at 11–12.

¹² *Id.* at 16.

¹³ See *infra* notes 86–109 and accompanying text. See also Press Office, U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations, DEP'T OF EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i> [hereinafter *DOE List*].

¹⁴ Press Release, U.S. Dep't of Educ., Princeton University Found in Violation of Title IX, Reaches Agreement with U.S. Education Department to Address, Prevent Sexual Assault and Harassment of Students (Nov. 5, 2014), <http://www.ed.gov/news/press-releases/princeton-university-found-violation-title-ix-reaches-agreement-us-education-department-address-prevent-sexual-assault-and-harassment-students> [hereinafter Princeton Violation].

¹⁵ Press Release, U.S. Dep't of Educ., Harvard Law School Found in Violation of Title IX, Agrees to Remedy Sexual Harassment, including Sexual Assault of Students (Dec. 30, 2014), <http://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-including-sexual-assault-students> [hereinafter Harvard Violation].

¹⁶ See Princeton Violation, *supra* note 14; see also Harvard Violation, *supra* note 15.

¹⁷ See Lavinia M. Weizel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1642–55 (2012); Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, BYU EDUC. & L.J. 143, 149–56 (2013).

¹⁸ Katherine K. Baker, Deborah L. Blake & Nancy Chi Cantalupo, et al., *Title IX and the Preponderance of the Evidence: A White Paper*, FEMINIST LAW PROFESSORS (Aug. 4, 2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf>.

¹⁹ See William A. Jacobson, *Accused on Campus: Charges Dropped, But the Infamy Remains*, LEGAL INSURRECTION (May 16, 2015, 8:30 PM), <http://legal>

the University of Pennsylvania have publicly called for greater procedural rights.²⁰ The popular press has also started to draw attention to the experiences of men who say their universities never gave them a meaningful chance to defend themselves before finding them responsible for sexual assault and expelling them.²¹

Congress has also begun to take notice of the impact the DCL has had on college campuses.²² On January 7, 2016, Senator James Lankford, Chairman of the Subcommittee on Regulatory Affairs and Federal Management, U.S. Senate Committee on Government Affairs and Homeland Security, wrote a letter to the Acting Secretary for the Department of Education (DOE) demanding that the DOE

insurrection.com/2015/05/accused-on-campus-charges-dropped-but-the-infamy-remains/; see also Naomi R. Shatz, *Feminists, We Are Not Winning the War on Campus Sexual Assault*, HUFFINGTON POST (Oct. 29, 2014, 6:44 PM), http://www.huffingtonpost.com/naomi-shatz/feminists-we-are-not-winn_b_6071500.html. See generally Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49 (2013); Barclay Sutton Hendrix, Note, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 594 (2013); Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 80–81 (2013).

²⁰ See Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>; David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty, Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, PHILLY.COM (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf>.

²¹ See Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014, 3:31 AM), <http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them>; see also Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html; Teresa Watanabe, *More College Men Are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES (June 7, 2014, 6:15 PM), <http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html>.

²² See generally Letter from Senator James Lankford, Chairman, Subcommittee on Regulatory Affairs and Fed. Mgmt., U.S. Senate Committee on Homeland Security and Gov't Affairs, to The Hon. John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Jan. 7, 2016), <http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf>.

provide statutory authority for the DCL.²³ Although Catherine Lhamon, the Assistant Secretary for Civil Rights, provided a response,²⁴ Lankford declared it inadequate.²⁵

In addition, several courts across the country have found that current protections violate procedural due process.²⁶ For example, in July 2015, a judge ordered the University of California, San Diego to reverse the suspension of a male student because the disciplinary proceedings violated his due process rights,²⁷ and nine months later, a different judge overturned the suspension of a University of Southern California student on the grounds that he was denied a fair hearing and the substantive evidence did not support the Appeal Panel's findings.²⁸ On March 31, 2016, the Massachusetts District Court ruled in favor of a Brandeis University student who had been found responsible for "serious sexual transgressions."²⁹ The court wrote, "Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process."³⁰ The court was particularly troubled by the deprivation of the right to

²³ *Id.*

²⁴ Susan Kruth, *OCR Response to Senator's Inquiry Not All That Responsive*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Feb. 29, 2016), <https://www.thefire.org/ocr-response-to-senators-inquiry-not-all-that-responsive/>.

²⁵ Letter from Senator James Lankford, Chairman, Subcommittee on Regulatory Affairs and Fed. Mgmt., U.S. Senate Committee on Homeland Security and Gov't Affairs, to The Hon. John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Mar. 4, 2016), <http://www.lankford.senate.gov/imo/media/doc/3.4.16%20Lankford%20letter%20to%20Dept.%20of%20Education.pdf>.

²⁶ See Jake New, *Court Wins for Accused*, INSIDE HIGHER EDUC. (Nov. 5, 2015), <https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges>.

²⁷ *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at *1, 5 (Cal. Super. Ct. 2015).

²⁸ *Doe v. Univ. of S. Cal.*, 200 Cal. Rptr. 3d 851, 855 (Cal. Ct. App. 2016).

²⁹ *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at *4 (D. Mass. Mar. 31, 2016).

³⁰ *Id.* at *6.

cross-examine³¹ as well as the lack of notice about the underlying allegations.³²

There is significant interest in campus sexual assault as evidenced by a recent Google search yielding over 18.3 million results.³³ However, inadequate attention has been paid to the rights actually being afforded to students. A 1999 study by Berger and Berger looked at procedural protections in state and private universities, but it focused on cases of academic misconduct.³⁴ In 2002, Karjane, Fisher, and Cullen conducted a study, funded by the Department of Justice, into how institutions of higher education (IHEs) respond to sexual assault.³⁵ Their study was extensive, and it included a content analysis of published sexual assault policy materials from a nationally representative sample.³⁶ Although the scope of this work is extraordinary, it took place before the 2011 DCL and may not reflect current practices.

This leaves a major gap in the literature, which this Article and a recently published companion article³⁷ attempt to fill. Both provide a systematic description, based on original research, of the pro-

³¹ *Id.* at *33–35 (“While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns. . . . Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.”).

³² *Id.* at *33–34.

³³ A Google search conducted on February 24, 2017 yielded 18,300,000 results.

³⁴ Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 290–94 (1999).

³⁵ HEATHER M. KARJANE, ET AL., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* vii (Oct. 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

³⁶ *Id.* at vi.

³⁷ Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637 (2016).

cedural protections IHEs provide when a student is accused of sexual assault.³⁸ This Article focuses on the highest-ranked twenty universities, ten liberal arts colleges, and five historically black colleges as determined by U.S. News and World Reports.

This Article begins by situating university disciplinary proceedings legally and historically. It then moves to the central contribution—the study of procedural protections afforded at the top American colleges and universities. After describing research methods, this Article presents findings and compares them with prior studies. Next, it discusses whether these proceedings should be subject to constitutional scrutiny due to the coercive actions of the Department of Education. Finally, this Article considers whether students might be able to prevail on other grounds should courts determine that no state action exists.

I. LEGAL AND HISTORICAL BACKGROUND

On July 2, 1964, President Lyndon B. Johnson signed the 1964 Civil Rights Act into law.³⁹ Although much of the Act was aimed at preventing discrimination on the basis of race, color, religion, or national origin,⁴⁰ Title VII—which banned workplace discrimination—specifically included sex as a protected class.⁴¹ Congress later extended the protection against sex discrimination to the classroom with Title IX.⁴² Enacted as part of the Educational Amendments of 1972, Title IX barred sex discrimination in any education program or activity receiving federal financial assistance.⁴³ Although there were exceptions, such as for fraternities, any institution that violated Title IX could lose federal funding.⁴⁴

³⁸ *See id.*

³⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 21 (2012)).

⁴⁰ *Id.* (Title II (Injunctive Relief Against Discrimination in Places of Public Accommodation); Title III (Desegregation of Public Facilities); Title IV (Desegregation of Public Education); Title VI (Nondiscrimination in Federally Assisted Programs)).

⁴¹ *Id.* § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a) (2012)).

⁴² Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-03, 86 Stat. 235, 373-75 (1972) (codified as amended at 20 U.S.C. § 1681 (2012)).

⁴³ *Id.*

⁴⁴ *Id.*

At first, the Supreme Court interpreted Title IX narrowly, holding that it did not apply to an entire institution, but solely to the particular program receiving federal assistance.⁴⁵ Congress responded by enacting the Civil Rights Restoration Act of 1987 to clarify the “broad application of title IX.”⁴⁶ It explicitly extended Title IX to “all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance[.]”⁴⁷

In 1999, the Supreme Court held that Title IX extended to “student-on-student sexual harassment, if sufficiently severe.”⁴⁸ It then determined that a school could be held liable for monetary damages in a private lawsuit if one student sexually harasses another in the school’s program,⁴⁹ but it repudiated the standard of liability set forth in OCR’s 1997 Guidance Document as insufficiently demanding.⁵⁰ Instead, the Supreme Court held that to prevail, the complainant had to meet the conditions of notice and deliberate indifference set forth in *Gebser v. Lago Vista Independent School District*.⁵¹

⁴⁵ See *Grove City Coll. v. Bell*, 465 U.S. 555, 573–74 (1984). See also Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1108–09 (1998); Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN’S L.J. 85, 113 n.119 (1992).

⁴⁶ Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, §187, §2(1), 102 Stat. 28 (1988).

⁴⁷ *Id.* § 908(2)(A). Note that the law actually reached more broadly, to extend, for instance, to “a department, agency, special purpose district, or other instrumentality of a State or of a local government.” *Id.* § 908(1)(A).

⁴⁸ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

⁴⁹ *Id.* at 650–52. The Court had previously held in *Franklin v. Gwinnet County Public Schools*, that students had a private right to damages when their Title IX rights were violated. 503 U.S. 60, 65 (1992).

⁵⁰ *Davis*, 526 U.S. at 651; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997) [hereinafter 1997 Guidance] (setting the standard of liability at “knows or should have known”).

⁵¹ *Davis*, 526 U.S. at 647–48, 641–42; see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (holding that to recover damages the plaintiff must prove “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs” and “refuses to take action to bring the recipient into compliance.”).

These rulings extended the federal government's power to police colleges and universities.⁵² As long as a school receives federal funding, the institution is required to comply with Title IX.⁵³ Federal student loans count, which effectively makes every college and university subject to Title IX.⁵⁴ And since institutions are now liable for the harassment of one student against another, they can at least theoretically no longer afford to ignore what happens in dorm rooms and fraternities.⁵⁵ At the same time, however, the Court showed in *Gebser* that it would not hesitate to reign in the Department of Education if the justices found its interpretation of Title IX deficient.⁵⁶

Despite the high standard of proof for liability, universities face significant lawsuits.⁵⁷ United Educators (UE), which provides insurance to 1,200-member universities, recently began offering insurance to cover sexual assault payouts.⁵⁸ Between 2006 and 2010, UE paid out \$36 million; 72% of the settlements were provided to parties suing the schools for incidents of sexual assault.⁵⁹ In 2014, the University of Connecticut paid \$1.28 million to settle a suit, and the University of Colorado at Boulder settled a suit for \$825,000.⁶⁰

A. Department of Education, Office for Civil Rights

Congress explicitly left enforcement of Title IX in the hands of the departments and agencies that allocate federal funds to education programs and/or activities.⁶¹ These agencies were “authorized and directed” to effectuate the prohibition against sexual discrimination.⁶² They were supposed to do so “by issuing rules, regulations,

⁵² See generally *Gebser*, 524 U.S. at 274; *Davis*, 526 U.S. at 629.

⁵³ Civil Rights Restoration Act of 1987 § 908(1)(A).

⁵⁴ See *Title IX Legal Manual*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/title-ix#A.%C2%A0%20Federal%20Financial%20Assistance> (last updated Aug. 6, 2015).

⁵⁵ See, e.g., *Davis*, 526 U.S. at 650.

⁵⁶ *Gebser*, 524 U.S. at 280, 290–292.

⁵⁷ Gayle Nelson, *The High Cost of Sexual Assaults on College Campuses*, NONPROFIT Q. (June 23, 2015) <https://nonprofitquarterly.org/2015/06/23/the-high-cost-of-sexual-assaults-on-college-campuses/>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Large Loss Report 2015*, UNITED EDUCATORS (2015), https://www.ue.org/uploadedFiles/Large_loss_2015_Final.pdf.

⁶¹ 20 U.S.C. § 1682 (2012).

⁶² *Id.*

or orders of general applicability[.]”⁶³ Compliance with these rules could be achieved “(1) by the termination of or refusal to grant or to continue assistance under such program or activity . . . or (2) by any other means authorized by law[.]”⁶⁴ OCR has published three guides on how schools should adjudicate sexual cases.⁶⁵

1. THE 1997 OCR GUIDE

In 1997, OCR published its first official guidance in the Federal Register on how schools should investigate and resolve allegations of sexual harassment.⁶⁶ Before drafting the document, OCR met with representatives from interested parties, including students, teachers, school administrators, and researchers.⁶⁷ It also twice publicly requested comments.⁶⁸

In the 1997 guide, OCR enumerated certain factors that grievance procedures should contain in order to be in compliance with Title IX.⁶⁹ They included provisions providing for notice to students and other interested parties, such as “[a]dequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence”; “[d]esignated and reasonably prompt timeframes for the major stages of the complaint process”; notice of the outcome to the parties; and “[a]n assurance that the school will take steps to prevent reoccurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.”⁷⁰ OCR explicitly permitted schools to use a general student disciplinary procedure in responding to sexual harassment.⁷¹

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See generally 1997 Guidance, *supra* note 50; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (Jan. 2001), <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [hereinafter 2001 GUIDANCE]; Dear Colleague Letter, *supra* note 8.

⁶⁶ 1997 Guidance, *supra* note 50.

⁶⁷ *Id.* at 12035.

⁶⁸ *Id.*

⁶⁹ *Id.* at 12044.

⁷⁰ *Id.*

⁷¹ *Id.* at 12045.

The 1997 Guide also discussed the due process rights of the accused.⁷² OCR wrote: “The rights established under Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint proceeding.”⁷³ In addition to constitutional rights, OCR recognized that there could be additional rights created by state law, institutional regulations and policies, and collective bargaining.⁷⁴ OCR emphasized that respecting the procedural rights of both parties was an important part of a just outcome:

Indeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions. Schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.⁷⁵

2. THE 2001 OCR GUIDE

In 2001, OCR published a revised guide to sexual harassment under Title IX in the Federal Register principally in response to the Supreme Court’s rulings in *Gebser* and *Davis*.⁷⁶ Just like the 1997 Guide, the 2001 Guide went through notice and comment.⁷⁷ Although the Supreme Court had rejected the standard of liability advocated by OCR for liability in a private lawsuit, OCR emphasized that it still had the power to “‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,’ even in circumstances that would not give rise to a claim for money damages.”⁷⁸

The most important change to the section on adjudication of sexual harassment complaints was an *increased* emphasis on the rights

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 2001 GUIDANCE, *supra* note 65, at ii. In the 1997 Guide, OCR said that the standard of liability for monetary damages should be “knows or should have known[,]” a standard that was clearly rejected in *Gebser*. See 1997 Guidance, *supra* note 50, at 12039.

⁷⁷ 2001 GUIDANCE, *supra* note 65, at ii.

⁷⁸ *Id.*

of the accused.⁷⁹ The 2001 Guide now had a section entitled, “Due Process Rights of the Accused.”⁸⁰ In addition to being slightly reorganized, this newly appointed section told schools that “the Family Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment.”⁸¹ It concluded by saying: “Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.”⁸²

3. THE 2011 DEAR COLLEAGUE LETTER

In 2011, OCR issued what has come to be known as the Dear Colleague Letter, which OCR deemed to be a “significant guidance document.”⁸³ OCR contended that the DCL “does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”⁸⁴

Unlike the 1997 and 2001 Guide, OCR did not post a formal notice requesting feedback on the proposed changes.⁸⁵ Yet it still laid out several recommendations and requirements in the DCL,⁸⁶ and two are of particular note. First, OCR strongly discouraged schools from allowing the parties to directly question one another.⁸⁷ Second, OCR told schools that they “must use a preponderance of the evidence,”⁸⁸ and it advised that the clear and convincing standard used by some schools violated Title IX.⁸⁹

⁷⁹ *Id.* at 22; *see* 1997 Guidance, *supra* note 50, at 12045.

⁸⁰ *Id.* at 22.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Dear Colleague Letter, *supra* note 8, at 1 n.1.

⁸⁴ *Id.*

⁸⁵ *Id.* *See also* 1997 Guidance, *supra* note 50; 2001 GUIDANCE, *supra* note 65.

⁸⁶ *See generally id.* For a detailed discussion of all the changes, *see generally* Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 KAN. L. REV. 915 (2016) [hereinafter *Reject the Dear Colleague Letter*].

⁸⁷ Dear Colleague Letter, *supra* note 8, at 12.

⁸⁸ *Id.* at 11.

⁸⁹ *Id.*

OCR justified reducing the standard of proof to preponderance on the ground that it was the standard used in Title VII hearings.⁹⁰ The difficulty with this justification, however, was that OCR did not also adopt Title VII protections that would have benefited the accused.⁹¹ For instance, the Civil Rights Act of 1991 gives both parties in a Title VII case the right to a jury trial if one party requests compensatory or punitive damages.⁹² The right to trial means that both parties enjoy a panoply of other protections such as the right to counsel and the right to confront and cross-examine witnesses. Not only did OCR not mandate that these Title VII rights be provided, but it also affirmatively recommended *against* some of them.⁹³ For instance, OCR strongly discouraged schools from allowing the parties to directly question one another, and it did not suggest any alternative.⁹⁴

B. Enforcement

Although a university has never lost federal funding for violating Title IX,⁹⁵ DOE has been taking a more aggressive stance.⁹⁶ As mentioned above, OCR has found a number of schools to be in violation of Title IX, including Princeton⁹⁷ and Harvard Law School.⁹⁸ These schools have since reached settlements with OCR in which they agreed to change the way they handle sexual assault so as to meet the protocol set forth in the DCL.⁹⁹

On May 1, 2014, DOE released a list of fifty-four colleges and universities under investigation,¹⁰⁰ and that number has grown—

⁹⁰ *Id.*

⁹¹ *Id.* at 10, 12.

⁹² Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100, 1073.

⁹³ Dear Colleague Letter, *supra* note 8, at 12.

⁹⁴ *Id.*

⁹⁵ As of May 1, 2014, no university had ever lost funding for violating Title IX. See Tyler Kingkade, *55 Colleges Face Sexual Assault Investigations*, HUFFINGTON POST (last updated July 1, 2014), http://www.huffingtonpost.com/2014/05/01/college-sexual-assault_n_5247267.html.

⁹⁶ See, e.g., Princeton Violation, *supra* note 14; Harvard Violation, *supra* note 15.

⁹⁷ Princeton Violation, *supra* note 14.

⁹⁸ Harvard Violation, *supra* note 15.

⁹⁹ See Princeton Violation, *supra* note 14; Harvard Violation, *supra* note 15.

¹⁰⁰ *DOE List*, *supra* note 13.

there are currently 310 open cases, with multiple schools facing more than one investigation.¹⁰¹ There is no finding of fact required to be placed on this list; it simply requires a complaint by one person.¹⁰² Importantly, this release conflicts with the policies applicable to other federal agencies. For example, the Equal Employment Opportunity Commission (EEOC) is statutorily barred from releasing the names of those under investigation in Title VII cases,¹⁰³ and “[a]ny person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.”¹⁰⁴ Similarly, the Department of Justice has an explicit policy against releasing information on current investigations except in unusual circumstances.¹⁰⁵

Even if universities don’t take the threat of losing federal funding seriously, such public shaming is almost certainly having an effect.¹⁰⁶ Two recent articles have discussed how universities under suspicion for violating Title IX are receiving fewer applications from prospective students and fewer donations from alumni.¹⁰⁷

II. SURVEY RESEARCH

In June 2015, the highest-ranked twenty universities, the top ten liberal arts colleges, and the top five historically black colleges, as determined by the 2014 U.S. News and World Reports higher education rankings,¹⁰⁸ were contacted by email and asked a series of

¹⁰¹ See *Title IX: Tracking Sexual Assault Investigations*, THE CHRON. OF HIGHER EDUC., <http://projects.chronicle.com/titleix/> (last visited Feb. 22, 2017).

¹⁰² *DOE List*, *supra* note 13.

¹⁰³ 42 U.S.C. § 2000e-5(b) (2012).

¹⁰⁴ *Id.*

¹⁰⁵ *Frequently Asked Questions*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/usao-ri/frequently-asked-questions-0> (last updated June 23, 2015) (“Justice Department guidelines, rules of professional conduct, and rules of court, as well as considerations of fairness to defendants, require that we not make comments that could prejudice a defendant’s right to a fair trial.”).

¹⁰⁶ See, e.g., Nelson *supra* note 57; Tyler Kingkade, *Alumni Are Creating a Network to Put Pressure on Universities over Sexual Assault*, HUFFINGTON POST (May 29, 2014), http://www.huffingtonpost.com/2014/05/28/alumni-network-sexual-assault-college_n_5401194.html.

¹⁰⁷ Nelson, *supra* note 57; Kingkade, *supra* note 106.

¹⁰⁸ The author referred to the list compiled by the 2014 U.S. News and World Reports. *National University Rankings*, U.S. NEWS & WORLD REP., (Sept. 10,

questions about the procedural protections afforded to students alleged to have committed sexual assault. All were asked about protections considered fundamental to those accused of a crime by the state: the standard of proof, the right to an adjudicatory hearing, the right to confront and cross-examine witnesses, the right to counsel, the right to silence, and the right to appeal. Other than the right to appeal, all are part of the Bill of Rights, which through the incorporation clause of the Fourteenth Amendment have been deemed to apply to the states.¹⁰⁹

Although a few schools responded to the initial inquiry, many did so only after further additional emails and phone calls. Some administrators were extremely reluctant to share information. Online policies were used to fill in the gaps as much as possible, and follow-up email and/or phone calls were attempted to confirm results. During the course of writing this Article, this Author became aware that one university had changed from the traditional adjudicatory method to the investigatory model. The results were changed accordingly, but the reader should be aware that other schools may have also changed their method of adjudication since the gathering of data for this Article.

2013) <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings-national-universities/spp+25> [<https://web.archive.org/web/20140707054623/http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings-national-universities/spp+25>]; *National Liberal Arts College Rankings*, U.S. NEWS & WORLD REP., (Sept. 10, 2013) <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings-national-liberal-arts-colleges/spp+25> [<https://web.archive.org/web/20140401054309/http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings-national-liberal-arts-colleges/spp+25>]; *Historically Black College and Universities Ranking*, U.S. NEWS & WORLD REP., (Sept. 10, 2013) <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/hbcu> [<https://web.archive.org/web/20140401084614/http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/hbcu>].

¹⁰⁹ U.S. CONST. amend. XIV, § 1. (The Fourteenth Amendment of the U.S. Constitution prohibits states from depriving “any person of life, liberty, or property, without due process of law.”). In determining what that means, the Supreme Court turned to the first eight Amendments of the Constitution, otherwise known as the Bill of Rights. U.S. CONST. amends. I-X. Over time, in piecemeal fashion, the Court held that almost all of these rights were protected against state action through the Due Process Clause of the Fourteenth Amendment. *See generally* *Duncan v. Louisiana*, 391 U.S. 145 (1968).

A. Findings

The tables below show the findings of this investigation.

Table 1: Standard of Proof

Standard of proof	94% Preponderance of the evidence (34)	3% Beyond Reasonable Doubt (1)	3% Unknown (1)
Different standard for non-sex offenses?	22% Yes (8)	64% No (23)	14% Unknown (5)

As Table 1 shows, thirty-four of the institutions of higher education (94%) set the standard of proof at preponderance of the evidence, one used beyond a reasonable doubt, and one was unknown. Eight IHEs (22%) set a different standard of proof for non-sex allegations; all but one made that standard more onerous. Twenty-three IHEs (64%) used the same standard, and five (14%) were unknown.

Table 2: Right to an Adjudicatory Hearing

Adjudicatory or Investigatory	56% Adjudicatory (20)	44% Investigatory (16)	0% Unknown
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All schools used either an adjudicatory or an investigatory model for determining whether a violation occurred. The twenty schools (56%) that used the adjudicatory model conducted an initial investigation, but the determination of whether a violation occurred could only be made at an adjudicatory hearing. An adjudicatory hearing is similar to a trial in the sense that evidence is presented in one hearing in front of a fact finder with the accused present. Witnesses testify at the hearing, although schools usually allow hearsay evidence, which means that the fact finder may consider a witness interview conducted by the Title IX investigator.

Sixteen schools (44%) used an investigatory model. The investigatory model is one in which a single investigator (or sometimes two) prepares a report after having met with the parties and any witnesses. The accused student does not have the right to be present for these interviews. Sometimes that same investigator determines whether a violation occurred, and sometimes the report is turned over to a third party (or parties) who determine(s) whether a violation occurred based on the contents of the investigation report. That person may request additional information, but there will never be a live hearing in which all of the evidence is presented in one place, with the accused present.

Table 3: Schools that Provide Right to Adjudicatory Hearing

Adjudicatory Model Detail (% of 20 schools)			
Right to an Adjudicatory Hearing	70% - Yes (14)	0%	
	25% - Yes, Limited: school decides (5)	Unknown (0)	
	5% - Yes, Limited: evidence (1)		
Panel Composition	10% - 1 staff / faculty / admin / outsider (2)	20% Unknown (4)	
	40% - 3 or more faculty / staff / admin (8)		
	25% - 3 or more faculty / staff / student (5)		
	5% - 3 or more unspecified (1)		
Right to Challenge Panelist	60% - Yes (12)	0% - No	40% Unknown (8)
Panel vote	60% - majority (12)	15% Unknown (3)	
	10% - 1 decider (2)		
	15% - 3 or more deciders unanimous (3)		

For the twenty schools that used the adjudicatory model, fourteen (70%) gave the accused the absolute right to an adjudicatory hearing. That meant that if he requested a hearing to resolve guilt, he would get one. Five schools (25%) allowed for an adjudicatory hearing, but only if the school decided it was the appropriate way to determine guilt. For instance, at one school, the investigator prepared a report, to which the parties had a chance to review and respond. A separate panel then reviewed the report and made a determination of responsibility. If that panel unanimously agreed that a hearing was not necessary, then it would make its decision based only on the investigation report. If it decided a hearing was necessary, then there would be a closed hearing where both parties and witnesses were allowed to testify. One school (5%) allowed for an adjudicatory hearing but significantly limited the evidence that could be admitted. For instance, it might allow the parties to testify but prohibit any witness testimony, even if it was relevant to the determination of responsibility. Instead, the fact finder would rely on the witness statements included in the investigation report.

For those schools that used an adjudicatory model, two (10%) allowed a single person to determine responsibility. Eight schools (40%) had a panel of three or more faculty, staff, or administrators. Five (25%) had a panel of three or more, but it included students. One (5%) had a panel of three or more to determine responsibility, but the composition of that panel was unspecified. The composition of the panel for four schools (20%) was unknown.

Twelve schools (60%) used a majority vote to determine guilt. The minimum size of the adjudicatory hearing using a majority vote was three. Two schools (10%) had one person make the decision, and three schools (15%) required that the decision be unanimous. For three schools (15%), the results were unknown.

Table 4: Schools that Use Investigatory Model¹¹⁰

Investigatory Model Detail (% of 16 schools)		
Who Decides Responsibility	38% - Single Model: Investigator & Decision-Maker are the Same (6)	6% Unknown (1)
	13% - Split Model: Investigator Reports & Separate Single Individual Decides (2)	
	44% - Split Model: Investigator Reports & 2 or More Individuals Decide (7)	

All of the schools that used the investigatory model had an investigator prepare a report as to what occurred, but they differed in who determined responsibility. Six schools (38%) used the single investigator model. That meant that the person who investigated the case was also responsible for determining whether a violation had occurred. Two schools (12.5=13%) used a split model in which one person investigated and a separate person determined whether a violation had occurred. Seven schools (43.75=44%) had two or more people (all separate from the investigator) determine whether a violation had occurred.

Table 5: Right to Confront and Cross Examine¹¹¹

Right to Confront	Yes - 6% (2)
	Limited through investigator - 8% (3)
	Limited through panel - 50% (18)
	No - 30.6=31% (11)
	Unknown - 6% (2)

Only two of the schools (6%) provided the right to directly question the accuser. Three (8%) allowed the accused to submit questions to the investigator who would decide whether or not to ask those questions. Of course, the accused would not be present to hear the questions or the responses, and so this approach denies the

¹¹⁰ The numbers are rounded so they do not add up to 100%.

¹¹¹ The numbers are rounded so they do not add up to 100%.

accused the right to confront and cross-examine. Eighteen schools (50%) allowed the student to submit questions to the hearing panel, which would determine whether to ask them. Eleven schools (30.6%=31%) did not allow the accused to ask questions of his accuser in any capacity. For two schools (6%), the results were unknown.

Table 6: Additional Procedural Rights¹¹²

Procedural Right	Yes			No	Unknown
Right to Counsel	Yes, robust 3% (1)	Yes, as advisor but silent in hearing 85% (31)	Yes, but limited role 3% (1)	6% (2)	3% (1)
Right to Remain Silent	Yes, no adverse inference 56% (20)	Yes, but adverse inference may be drawn 0% (0)		3% (1)	42% (15)
Right to Appeal	Yes 100% (36)			0% (0)	0% (0)

As Table 6 shows, the vast majority of universities (91%) gave accused students the right to counsel, but it was almost always an abridged right. In thirty-one schools (85%), attorneys could be present, but only in the capacity of an advisor. They were not allowed to address the investigator or the panel in any way. One school (3%) allowed attorneys to participate, but in a limited fashion. Two schools (6%) did not allow for any right to counsel. Only one school (3%) gave students a more robust right to counsel. That meant the attorney would be allowed to participate fully in the hearing by questioning witnesses and addressing the panel directly. For one school (3%), the results were unknown.

¹¹² The numbers are rounded so they do not add up to 100%.

All but one of the known universities (55.6%=56%) gave the respondent the right to remain silent. One school (3%) did not give students the right to remain silent, and for fifteen schools (42%) the results were unknown.

Finally, all schools promised the right to appeal. Most schools limited the appeal to procedural grounds, and this Author is aware of only one school that allowed an appeal of the factual findings.

B. *Comparison with Other Studies*

University protections for students charged with misconduct have received surprisingly little attention with only two empirical studies over the past thirty years. In 1999, Carl and Vivian Berger studied the protections that state and private universities provided to students charged with academic misconduct.¹¹³ They sent letters to 222 public and private universities selected at random and received responses from 159.¹¹⁴ Berger and Berger found that 90% provided for a hearing before an impartial body (as compared with twenty, or 56% here); 90% allowed the accused to remain silent without an adverse finding of guilt (as compared with twenty, or 56% here); and over 90% gave students the right to confront and cross-examine adverse witnesses (as compared with two, or 6% that gave the right, and twenty-one, or 58% that gave a limited right here).¹¹⁵ One area in which IHEs have improved is the right to counsel. Berger and Berger found that only 58% of the state schools surveyed allowed the advisor to be an attorney (as compared with 91% that allowed lawyers in at least some situations).¹¹⁶ As with present procedures, those schools that did provide the right to counsel often prohibited direct participation.¹¹⁷

In 2002, Heather M. Karjane, Bonnie S. Fisher, and Francis T. Cullen studied how IHEs adjudicate sexual assault.¹¹⁸ They used a multi-faceted approach including a content analysis of published

¹¹³ See generally Berger & Berger, *supra* note 34.

¹¹⁴ *Id.* at 296.

¹¹⁵ *Id.* at 297–98.

¹¹⁶ *Id.* at 298.

¹¹⁷ *Id.*

¹¹⁸ See generally KARJANE, ET AL., *supra* note 35.

sexual assault policy materials, email surveys of campus administrators, and field research at eight colleges and universities.¹¹⁹ Their sample was comprised of 2,438 schools, and they received an overall response rate of 41%.¹²⁰

Karjane et al. found that only 22.4% of schools specified the burden of proof used in sexual assault cases (as compared with thirty-five, or 97% here), and of those, 81.4% used preponderance of the evidence (as compared with thirty-four, or 94% here); 3.3% used beyond a reasonable doubt as compared with one, or 3% here.¹²¹ They found that of the 203 public four-year universities that mentioned who decided if a student had violated the code of conduct, 82.3% had judicial or disciplinary members make that decision as opposed to one individual (as compared with twenty-one, or 58% now).¹²² Of those universities that described their proceedings, 68.5% mentioned cross-examination (as compared with twenty-three, or 63.8=64% now),¹²³ but it was unclear whether that included direct questioning of the complainant and/or whether the complainant had to actually respond.¹²⁴ Furthermore, of the seventy-four four-year public universities that mentioned the type of vote needed for a finding of responsibility, 94.6% used majority; 1.4% were unanimous, and the remaining 4.1% used something else.¹²⁵ The present study found that twelve, or 33%, of all schools used a majority vote to determine responsibility; three, or 8%, required consensus or unanimity, and ten, or 28%, had one person make the determination. Seven schools, 19%, used the investigatory model and had two or more individuals determine responsibility, but it was unknown what their vote had to be. Four schools or 11% (one investigatory and three adjudicatory) were completely unknown.

The above comparison shows a mixed picture of how rights afforded to accused students have changed over time. For example,

¹¹⁹ *Id.* at vi.

¹²⁰ *Id.* at vi–vii.

¹²¹ *Id.* at 122, table 6.12.

¹²² *Id.* at 121, table 6.11.

¹²³ *Id.* at 118, table 6.9. Note that this article is classifying all schools with the investigatory model as not allowing cross-examination. Suggesting questions to an investigator who will decide whether to ask, and even if he does it will be outside of the accused's presence, does not qualify as cross-examination.

¹²⁴ *Id.*

¹²⁵ *Id.* at 122, table 6.12.

some protections have been reduced because, in the past, more schools afforded students the right to a hearing. The right to counsel, in contrast, has clearly improved. Although students may not currently have a robust right to an attorney, at least most schools give students the right to have an attorney present as an advisor. Unfortunately, insufficient information exists to meaningfully analyze either the right to confront/cross-examine or the standard of proof over time. Karjane et al. found that 68.5% mentioned cross-examination, but they do not specify whether that means students at those institutions had the right to ask questions and whether the complainant had to respond.¹²⁶ If that is what their findings mean, then the right has been significantly reduced. If they meant that students were allowed to indirectly question the complainant who need not respond, then more schools now afford a limited right to cross-examine.¹²⁷ In addition, this study found that more of the IHEs used a lower standard of proof (preponderance).

III. CHALLENGING THESE PROCEEDINGS

The Fourteenth Amendment of the United States Constitution forbids the deprivation of “life, liberty, or property, without due process of law.”¹²⁸ The Court has limited the reach of the Fourteenth Amendment—and the Fifth Amendment, applicable to the federal government¹²⁹—through the “state action doctrine,”¹³⁰ holding that

¹²⁶ See KARJANE, ET AL., *supra* note 35, at 118, table 6.9.

¹²⁷ See *id.*

¹²⁸ U.S. CONST. amend. XIV, § 1.

¹²⁹ In *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (U.S. 1987), the SFAA argued that the USOC’s enforcement of its exclusive right to use the word “Olympic” was discriminatory in violation of the Fifth Amendment. *Id.* at 542. In analyzing this question, the Court wrote: “The fundamental inquiry is whether the USOC is a governmental actor to whom the prohibitions of the Constitution apply.” *Id.* The Court then applied the public function test and the state compulsion test and concluded that the actions of the USOC did not constitute state or governmental action by Congress. *Id.* at 542–547.

¹³⁰ Although the Civil Rights cases are often recognized as the “earliest state action decision,” the Court discussed the doctrine in earlier cases. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1584 (5th ed. 2005); see also *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875) (“The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal pro-

“the prohibitions of the amendment are against State laws and acts done under State authority.”¹³¹ In other words, if the conduct in question is private, “the Amendment affords no shield, no matter how unfair that conduct may be.”¹³² Importantly, the state action doctrine also applies to the federal government, and “doctrine developed in the context of suits involving conduct by state and municipal bodies and officials is directly relevant.”¹³³

Public universities are, of course, state actors; but private universities would seem not to be. Nevertheless, otherwise private conduct may fall within the ambit of the Fifth or Fourteenth Amendment if it qualifies as “state action.”¹³⁴ Any university conduct that amounts to state action is subject to the Fourteenth Amendment¹³⁵ and renders the university liable to suit under 42 U.S.C. § 1983.¹³⁶

Professor Charles Black called “the ‘state action’ problem . . . the most important problem in American law.”¹³⁷ Students hoping to challenge the disciplinary proceedings of their private university

tection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another.”); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) (“The provisions of the Fourteenth Amendment . . . have reference to State action exclusively, and not to any action of private individuals.”).

¹³¹ *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.”).

¹³² *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988); see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–50 (1974).

¹³³ *Franz v. United States*, 707 F.2d 582, 591 n.33 (1983) (“The phrase ‘state action’ is used here in its generic sense, to refer to action by any level of government, from local to national . . . At issue in the present case is action by officials of the federal government, but doctrine developed in the context of suits involving conduct by state and municipal bodies and officials is directly relevant.”).

¹³⁴ See *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982).

¹³⁵ See *id.*

¹³⁶ “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983 (2012).

¹³⁷ Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 69 (1967).

would undoubtedly agree. For the state action question is a “threshold” one; unless state action is present, the Court will not even reach the constitutionality of the challenged act or policy.¹³⁸ There is good reason to believe that if state action could be shown, plaintiffs might well prevail on the merits.¹³⁹ In a companion article, this Author argues that students facing expulsion from state universities for sexual assault are entitled to procedural due process due to the considerable liberty and property interests at stake.¹⁴⁰ That article then employs the balancing test from *Matthews v. Eldridge* to evaluate whether the proceedings (similar to those used here) comport with due process and concludes they do not.¹⁴¹ Consequently, the state action question has great practical significance.

A. *Is There State Action?*

State action doctrine is notoriously difficult.¹⁴² Even the Supreme Court has acknowledged as much, writing, “[t]his Court has never attempted the ‘impossible task’ of formulating an infallible test for determining whether the State ‘in any of its manifestations’ has become significantly involved in private discriminations.”¹⁴³ The Court explained that “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”¹⁴⁴ It should come as no surprise then that critics have called the state action doctrine incoherent,¹⁴⁵ a “conceptual disaster area,”¹⁴⁶ and a “‘doctrine’ without

¹³⁸ Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v Brooks*, 69 GEO. L.J. 745, 747 (1981).

¹³⁹ *See id.* at 746.

¹⁴⁰ *See Lave, supra* note 37, at 669.

¹⁴¹ *See id.* at 696.

¹⁴² *See State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1255 (2010); *see also* Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 561–62 (2008); Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 TOURO L. REV. 775, 775–76 (2000).

¹⁴³ *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (citation omitted).

¹⁴⁴ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

¹⁴⁵ *See* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 548–49 (1985).

¹⁴⁶ Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982).

shape or line . . . [that] has the flavor of a torchless search for a way out of a damp echoing cave.”¹⁴⁷ Part of the problem with distinguishing between private and state action is that “the state *always* acts—at least in the sense that its courts resolve the resulting dispute according to a state policy.”¹⁴⁸ As Professors Tushnet and Peller write, “[e]very exercise of ‘private’ rights in a liberal legal order depends on the potential exercise of state power to prevent other private actors from interfering with the rights holder.”¹⁴⁹

The confounding nature of the state action doctrine makes it all the more important to carefully define what is at issue here. The action in question is not the university’s determination of responsibility in a particular case. Rather, it is the university’s decision to lower procedural protections in sexual assault cases.¹⁵⁰ If *that* action could be shown to constitute “state action,” a properly pled § 1983 claim (including matters such as standing) might be brought against the university on the ground that it had violated procedural due process rights under the Constitution.¹⁵¹

In *Jackson v. Metropolitan Edison Co.*, the Court explained that it would be appropriate to attribute the actions of a private party to that of the state only when “there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”¹⁵² The question of what factors might justify a conclusion that a university’s decision to lower procedural protections should be treated as state action is complex. The fact that universities depend heavily on federal funding—funding provided on conditions—is relevant, but is not in itself sufficient to result in a finding of state action.¹⁵³ The Court has held that government regulation on its own,

¹⁴⁷ Black, *supra* note 137, at 95.

¹⁴⁸ Rowe, *supra* note 138, at 746 (emphasis added).

¹⁴⁹ Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004); *but see* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1792 (2010) (“The [state action] principle does not turn on the presence or absence of government power. It turns, instead, on whether a choice by a government actor *qua* government actor or a private actor *qua* private actor invokes the application of that power.”).

¹⁵⁰ See Lave, *supra* note 37, at 657–58.

¹⁵¹ See generally Chemerinsky, *supra* note 145, at 550–51.

¹⁵² *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1975).

¹⁵³ See generally *id.* at 352.

even ““extensive and detailed”” state regulation, is not enough to constitute state action.¹⁵⁴ Furthermore, in a series of cases, the Court has held that a monetary relationship is inadequate on its own to establish the necessary connection. For instance, in *Blum v. Yaretsky*, the Court held that dependence of nursing homes on government funding did not transform the actions of doctors and nursing home administrators into the actions of the state.¹⁵⁵ That same year in *Rendell-Baker v. Kohn*, the Court declined to find state action even though the school in question received 90% of its funding, and in one year 99%, from public funds.¹⁵⁶

How, then, might a nexus be shown sufficient to qualify a university’s decision to lower procedural protections as state action? Before proceeding, it is important to acknowledge that this Article makes no claim of providing a comprehensive account of the state action doctrine. The goal is only to give a preliminary account of how state action might be shown. With that caveat in mind, of the various tests used to determine state action, two seem most plausible.¹⁵⁷ One is the public function exception to the state action doctrine, which reflects the sense among critics of the DCL that universities’ adjudication of sexual assault claims fulfills a function, or has some effects, similar in important respects to prosecution of criminal charges.¹⁵⁸ The other is state compulsion, reflecting the charge that the decision to adopt lower procedural safeguards reflects the overwhelming pressure imposed by the threat of a funding cut-off by DOE.¹⁵⁹

¹⁵⁴ See *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (citations omitted).

¹⁵⁵ *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982).

¹⁵⁶ *Rendell-Baker*, 457 U.S. at 832.

¹⁵⁷ See *Brown*, *supra* note 142, at 564–68 (discussing the different tests the Supreme Court has used in determining state action). Although *Brown* distinguishes seven different tests (public function, state compulsion, nexus, state agency, entwinement, symbiotic relationship, and joint participation), Erwin Chemerinsky has reduced them down to three: public function, entanglement, and entwinement. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 527–28 (Aspen, 3d. ed. 2006).

¹⁵⁸ See *Brown*, *supra* note 142, at 565.

¹⁵⁹ *Id.* at 565–66. See FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *FIRE’S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE* 3, 5–7 (2003), <https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/> [hereinafter FIRE’S GUIDE].

1. PUBLIC FUNCTION

Under the public function exception to the state action doctrine, a private party must comply with the Constitution if it is performing a task that has “traditionally [been] exclusively reserved to the State.”¹⁶⁰ Although the Court has held that the management of private property can meet the public function exception,¹⁶¹ it has never held that the actions of a private school constitute state action under this exception.¹⁶²

In *Rendell-Baker v. Kohn*, the Petitioner sued for damages under 42 U.S.C. § 1983.¹⁶³ The Petitioner contended that her rights under the First and Fourteenth Amendments were violated when she was dismissed without a hearing from the private school where she was employed after she supported a student proposal that had been denied by the director of the school.¹⁶⁴ The Court agreed with the U.S. Court of Appeals for the First Circuit that the Petitioner was not entitled to pursue this claim against the respondents because they had not acted under the color of state law when they fired her.¹⁶⁵ The Court held that it was not enough for the private party to be serving a public function (here providing an education), but that this function must be one that has “traditionally [been] the exclusive prerogative of the State.”¹⁶⁶ The Court wrote that even though it was clear from Chapter 766 of the Massachusetts Acts of 1972 that the state intended to educate maladjusted high school students, this “legislative policy choice in no way makes these services the exclusive province of the State.”¹⁶⁷ As proof of this, the Court pointed out that “until recently[,] the State had not undertaken to provide education for students who could not be served by traditional public schools.”¹⁶⁸

¹⁶⁰ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

¹⁶¹ *See Evans v. Newton*, 382 U.S. 296, 302 (1966); *Marsh v. Ala.*, 326 U.S. 501, 506 (1946).

¹⁶² *See, e.g., Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191–94 (1988); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841–43 (1982).

¹⁶³ *Rendell-Baker*, 457 U.S. at 835.

¹⁶⁴ *Id.* at 835, 842.

¹⁶⁵ *Id.* at 837.

¹⁶⁶ *Id.* at 842 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Six years later, in *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, Jerry Tarkanian, the basketball coach at the University of Nevada, Las Vegas, sued the National Collegiate Athletic Association ("NCAA") under 42 U.S.C. § 1983.¹⁶⁹ He argued that his due process rights under the Fourteenth Amendment were violated when he was not afforded a fair hearing before being suspended.¹⁷⁰ The Court held that Tarkanian was not entitled to damages under § 1983 because the NCAA was not a state actor and thus was not required to comply with the Fourteenth Amendment.¹⁷¹ Although the Court acknowledged that regulating college athletics was a critical function, it held that it was not the exclusive (or even the traditional) function of the state.¹⁷²

Just as with college athletics, disciplinary proceedings are not the exclusive (or even the traditional) function of the state.¹⁷³ To the contrary, universities are entitled to decide what constitutes a violation of their code of conduct, regardless of whether it would be a crime in state or federal court.¹⁷⁴ In addition, at least regarding non-sex offenses, they have significant leeway in determining how they determine whether a violation occurred.¹⁷⁵ They certainly do not need to afford all the same protections that would be required in criminal court, such as the right to a jury trial and a standard of proof set at beyond a reasonable doubt.¹⁷⁶ Thus, it is clear that under the public function test, the involvement of the government in college disciplinary proceedings does not constitute state action.

2. STATE COMPULSION

Under the state compulsion exception to the state action doctrine, a private party must comply with the Constitution if the state has exercised such coercive power over the conduct at issue that the "choice must in law be deemed to be that of the state."¹⁷⁷

¹⁶⁹ *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 180–81 (1988).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 181–82.

¹⁷² *Id.* at 198 n.18.

¹⁷³ *See, e.g., id.*

¹⁷⁴ *See FIRE'S GUIDE*, *supra* note 159, at 3.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* at 5–6.

¹⁷⁷ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

In *Blum v. Yaretsky*, Respondents Yaretsky and Cuevas were Medicaid recipients who argued that their procedural due process rights under the Fourteenth Amendment had been violated when they were transferred from a nursing home to a lower level of care without notice or a hearing.¹⁷⁸ The Court held that there was no state action because the decision had been made by a private organization (specifically the doctors and administrators at the nursing home), and the state was only responding to that decision.¹⁷⁹ Justice Rehnquist authored the majority opinion, which set forth the test for state compulsion: “[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”¹⁸⁰

Later, in *Logan v. Bennington College*, the Second Circuit held that there was no state action when Logan was dismissed from his job as a drama professor pursuant to a sexual harassment policy that was written by the Vermont Human Rights Commission.¹⁸¹ The court noted that Bennington College had enacted the policy in an unrelated case, and although the state helped craft the policy, it was Bennington’s sole decision to find Logan responsible and then dismiss him.¹⁸²

The state compulsion exception, as applied to the Dear Colleague Letter, was recently litigated in *Doe v. Washington & Lee Univ.*¹⁸³ Doe had argued that Washington & Lee’s disciplinary proceedings constituted state action because the 2011 Dear Colleague Letter led directly to the university’s decision to discipline him.¹⁸⁴ Although the court found that it was “plausible that W & L was under pressure to convict students accused of sexual assault in order to demonstrate that the school was in compliance,” that alone was not enough to constitute state action.¹⁸⁵ Instead, the court held that Doe would have to show that “the government deprived W & L of its

¹⁷⁸ *Id.* at 993.

¹⁷⁹ *Id.* at 1005–12.

¹⁸⁰ *Id.* at 1004–05.

¹⁸¹ *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1020, 1027 (2d Cir. 1995).

¹⁸² *Id.* at 1027–28.

¹⁸³ *See generally* *Doe v. Wash. & Lee Univ.*, No. 6:14–CV–00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015).

¹⁸⁴ *Id.* at *9.

¹⁸⁵ *Id.*

autonomy to investigate and adjudicate charges [or] . . . that the government participated in the decision-making process at any stage of the proceedings.”¹⁸⁶ The court found that the state had not “drafted the disciplinary code, nor participated in determining what sentence was to be handed out under it.”¹⁸⁷ Because the state wasn’t more directly involved, the court held that there was no state action.¹⁸⁸

Washington & Lee can be distinguished from the claim discussed in this Article. The plaintiff in *Washington & Lee* alleged that the outcome of *his* particular case represented state action.¹⁸⁹ This paper, in contrast, contends that a university’s decision to lower procedural protections for *all* students charged with sexual assault is state action. Thus, this Article is focused on the proceedings in general instead of the outcome of a particular case.

Although both *Logan* and *Doe* failed to show that there was state action, a student might have more success by citing two cases decided over forty years ago.¹⁹⁰ In *Powe v. Miles*, the Second Circuit held that state regulation of educational standards at Alfred University was not enough to transform Alfred’s acts in curtailing protest and disciplining students into those of the state.¹⁹¹ Judge Friendly authored the opinion and wrote that “the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.”¹⁹² Although the actions of Alfred University did not constitute state action, Judge Friendly explained what would have: “State action would be . . . present here with respect to all the students if New York had undertaken to set policy for the control of demonstrations in all private universities”¹⁹³

In *Coleman v. Wagner College*, students sought to apply dicta from Judge Friendly’s opinion in asserting that their expulsion for demonstrating against the Vietnam War constituted state action.¹⁹⁴

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (internal citation omitted).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See id.*; *see also* *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1028–29 (2d Cir. 1995).

¹⁹¹ *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Coleman v. Wagner Coll.*, 429 F.2d 1120, 1123 (2d Cir. 1970).

They contended that by enacting § 6450, the New York legislature undertook to create policy for handling campus demonstrations and, in so doing, became involved in the regulation of the activity that caused the students to be unjustly injured.¹⁹⁵ Although the Second Circuit found that § 6450 “was devoid of meaningful content” in terms of providing specific guidance on how universities should handle campus demonstrations, the court still found that it could constitute state action.¹⁹⁶

We are, however, cognizant of the possibility that the statute may have been intended, or may be applied, to mean more than it purports to say. More specifically, section 6450 may be intended or applied as a command to the colleges of the state to adopt a new, more severe attitude toward campus disruption and to impose harsh sanctions on unruly students. The Governor’s Memorandum approving section 6450 referred to an ‘intolerable situation on the Cornell University Campus’ and spoke of ‘the urgent need for *adequate* plans for student-university relations.’ Several other bills pending in the New York legislature while section 6450 was under consideration suggest that the statute was enacted in an atmosphere of hostility toward unruly student demonstrators and of resolve to make disruption costly for the participants. If these considerations have merit and section 6450 was intended to coerce colleges to adopt disciplinary codes embodying a ‘hard-line’ attitude toward student protesters, it would appear that New York has indeed ‘undertaken to set policy for the control of demonstrations in all private universities’ and should be held responsible for the implementation of this policy.¹⁹⁷

¹⁹⁵ *Id.* at 1123.

¹⁹⁶ *Id.* at 1124.

¹⁹⁷ *Id.* at 1124–25 (emphasis added) (citations omitted).

The Second Circuit then remanded the case for a determination of whether there was state action.¹⁹⁸ In so doing, it alerted the District Court to some factors it deemed “of particular importance.”¹⁹⁹ “Most significant” were the actions of the state officials:²⁰⁰

If these officials were to regard their function as more than a ministerial task, and, as an illustration, believed themselves empowered to prevent regulations from being filed because of substantive ‘inadequacies,’ or exercised any other influence upon the content of regulations filed pursuant to Section 6450, they would provide strong indicia of state action.²⁰¹

The Second Circuit also directed the District Court to look into the attitude of the campus administrators that drafted regulations pursuant to § 6450.²⁰² Although the court said it would “ordinarily be loath” to find that state action could arise from the mistaken beliefs of a private individual, “[a] reasonable and widespread belief among college administrators . . . that section 6450 required them to adopt a particular stance toward campus demonstrators would seem to justify a conclusion that the state intended for them to pursue that course of action. And this intent, if present, would provide a basis for a finding of state action.”²⁰³ The Second Circuit then suggested one way of discerning the attitude of college administrators towards § 6450:

The universal adoption of noticeably more stringent standards governing student disruption following the statute’s enactment or an attempt by administrators to attribute the imposition of harsh penalties to the command of the state would give support to the contention that the statute constitutes significant state intervention in the area of campus discipline.²⁰⁴

¹⁹⁸ *Id.* at 1125.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

Applying the reasoning from *Powe* and *Coleman*, students have a strong case that disciplinary proceedings implemented in response to the Dear Colleague Letter constitute state action. The Department of Education told universities that they had to make certain enumerated changes to their disciplinary proceedings, including lowering the standard of proof to preponderance of the evidence, or risk losing federal funding.²⁰⁵ Since then, the DOE has actively policed universities to make sure they are doing what they are supposed to, published a list of schools under investigation, and found that at least two schools were in violation.²⁰⁶ In addition, after the DCL, there is evidence that there was a universal adoption of more stringent standards—with schools lowering their standards of proof and changing their disciplinary processes in ways that make it easier to find someone responsible of sexual assault.²⁰⁷ To make this case fully, a student would have to do an empirical study akin to this one, but that was focused more on whether universities made changes to their policies in response to the DCL.

Although *Powe* and *Coleman* are still good law, a court might be unwilling to follow Judge Friendly's more expansive notion of state action on the ground that it has been foreclosed by the Supreme Court's decision in *Blum v. Yaretsky*.²⁰⁸ Even so, there is still a way that a student could succeed. As *Doe v. Washington & Lee* indicates, the Court's decision in *Blum* would make it difficult for a student to challenge a *particular* finding of fault, but a student might be more successful if he challenged the university disciplinary proceedings at a more general level.²⁰⁹

The argument would look like this: OCR has exercised the kind of coercive power over university disciplinary proceedings to turn the private actions of private colleges and universities into those of the state. As detailed above, OCR specifically told schools to change their policies, and threatened schools with termination of federal

²⁰⁵ See Dear Colleague Letter, *supra* note 8.

²⁰⁶ See *id.*; *DOE List*, *supra* note 13; Princeton Violation, *supra* note 14; Harvard Violation, *supra* note 15.

²⁰⁷ See generally FIRE'S GUIDE, *supra* note 158.

²⁰⁸ See *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

²⁰⁹ See *Doe v. Wash. & Lee Univ.*, No. 6:14–CV–00052, 2015 WL 4647996, at *9 (W.D. Va. Aug. 5, 2015).

funds if they did not comply.²¹⁰ OCR further tightened the screws by publishing a list of schools under investigation even though there was no finding of fact required to make the list.²¹¹ The DOE did this even though such a list would violate Title VII and DOJ policy.²¹² This Article contends that the combination of threatening to withdraw federal funds unless universities took specific actions and then publishing a list of those under investigation for not having done so was sufficiently coercive to constitute state action.

3. STANDING

A court would not hear the constitutional claim unless the plaintiff had standing.²¹³ Like state action doctrine, the law of standing is complex and not always predictable, but the Supreme Court has recognized three constitutional standing requirements.²¹⁴ First, the plaintiff must allege a personal injury—one that is imminent and actual, rather than hypothetical or speculative.²¹⁵ The injury must

²¹⁰ See Dear Colleague Letter, *supra* note 8.

²¹¹ See *DOE List*, *supra* note 13.

²¹² See Letter from Senator James Lankford, *supra* note 25, at 1–3.

²¹³ See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013).

²¹⁴ See *id.* at 1147.

²¹⁵ See *id.* (“To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’ ‘Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.’ Thus, we have repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.”) (citations omitted). See also *Lujan v. Def’s of Wildlife*, 504 U.S. 555, 560 (1992) (“Over the years, our cases have established that . . . the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent, not conjectural or hypothetical.’”) (internal citations and quotations omitted); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, distinct and palpable, and not abstract or conjectural or hypothetical[.]”) (internal citations omitted); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–102 (1983) (“It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate ‘a personal stake in the outcome’ in order to ‘assure

also be “fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”²¹⁶

The Supreme Court has long made clear that “injury” under the standing doctrine is defined capaciously.²¹⁷ The term is “not confined to those who [can] show ‘economic harm[.]’”²¹⁸ The Court has recognized harm to “aesthetic and recreational values”²¹⁹ as well as “‘conservational’” values²²⁰ and “First Amendment values.”²²¹ The Court has also held that a person has suffered an injury-in-fact when he has been “prevented from . . . competing on an equal footing”²²² or if he is a member of a disfavored group that is “stigmatiz[ed] . . . as ‘innately inferior.’”²²³ Finally, in 2016 the Court explicitly recognized that an “intangible injury” could establish standing as long as it is also “concrete.”²²⁴

that concrete adverseness which sharpens the presentation of issues’ necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural or hypothetical.’”) (internal citations omitted).

²¹⁶ *Allen*, 468 U.S. at 751.

²¹⁷ *See* *United States v. Students Challenging Reg. Agency Procedures*, 412 U.S. 669, 686 (1973).

²¹⁸ *Id.*

²¹⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000).

²²⁰ *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (citing *Scenic Hudson Preservation Conference v. FCC*, 354 F.2d 608, 616 (2d Cir. 1965)).

²²¹ *Id.*

²²² *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667 (1993).

²²³ *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (citation omitted).

²²⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Rachel Bayefsky has written that “intangible injury” should also include psychological injury. *See generally* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOKLYN L. REV. 1555, 1557–58 (2016). Although Bayefsky acknowledges the refusal of at least some members of the Court to give standing to “psychic injury,” she points out that the Court *already* implicitly recognizes the role psychological injury plays in establishing injury in fact. *Id.* at 1579, n.109. Bayefsky writes, “the harmful nature of these intangible injuries seems to stem at least partially from their psychological effects on plaintiffs.” *Id.* at 1558.

In a case against a university, the asserted violation—a matter of the merits—would be the university’s lowered procedural protections below the minimum required by the Constitution. The capaciousness of “injury” under the standing doctrine means that a student might claim to be injured by this violation in either or both of two ways. The first is the most obvious. A student could claim that he has suffered practical and stigmatic injuries from the imposition of a penalty such as suspension or expulsion (or the imminent possibility of such a penalty if a hearing was scheduled or under way). The second is subtler. A student could claim that he has suffered the inhibiting effect—whether on forming relationships or expressing views—from the prospect of being subjected to a hearing with procedural protections that fall below the constitutional minimum.

Although the first type of injury seems preferable because it is more concrete, it might be in tension with the underlying claim on the merits. That is, framing the claim as a challenge to the university’s decision to lower the procedural protections in all sexual assault cases—as opposed to the university’s decision regarding guilt in a particular case—while helpful in dealing with state action issues, might create difficulties for the second and third components of standing where the alleged injury is expulsion or suspension. A court that vigorously applied the “causation” component of the standing doctrine might conclude that the simple act of lowering the procedural protections did not necessarily cause the expulsion or suspension. Would a plaintiff have to demonstrate that with stronger procedural protections he would not have been found liable? That might be very difficult to prove. But some of the Court’s standing cases might suggest such a requirement.²²⁵ In other cases involving

²²⁵ See *Allen v. Wright*, 468 U.S. 737, 759 (1984) (“The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents’ communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.”); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–102 (1983); *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 42–43 (1976) (“It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners ‘encouragement’ or instead result from decisions made by the hospitals without regard to the tax implications.”); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (“[I]f appellant were granted the requested relief, it would result only

challenges to universities' use of affirmative action, however, the Court has not applied such a demanding test.²²⁶ These later cases suggest that a plaintiff might establish causation by framing the injury not as the outcome—*i.e.*, expulsion or suspension—but as being subjected to unlawful procedures. The injury, in other words, would be the use of procedures that violate due process to determine whether the plaintiff would be permitted to continue his education. Thus framed, the injury would be directly caused by the constitutional violation being alleged and would be fully redressed by a ruling that the procedures were unconstitutional.

As for the second type of injury, a student who has not been sanctioned might nevertheless still have a claim. He might, for example, allege that although his university allows him to engage in consensual romantic and sexual relationships,²²⁷ he is so afraid of being unable to fully and fairly defend himself should he be wrongfully accused of sexual assault that he is avoiding romantic relationships.²²⁸ Making matters worse, the standards of affirmative defense and coercion are so vague that he isn't even sure what constitutes sexual assault. As a result, he is avoiding sex altogether. Since a 2013 Facebook study found that 28% of people married someone they met in college,²²⁹ the student worries that the disciplinary proceeding is undermining his best chance of finding a spouse.

in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.”)

²²⁶ See *Gratz v. Bollinger*, 539 U.S. 244, 260–69 (2003); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–311 (1978); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 662–68 (1993).

²²⁷ A student at a school that explicitly banned students from engaging in sexual or romantic relationships would not be able to make this argument.

²²⁸ To be clear, this Article is not arguing that the chilling effect of a private university's disciplinary proceedings is the same as the state outlawing certain kinds of intimate conduct.

²²⁹ Sofus Attila Macskassy, *From Classmates to Soulmates*, FACEBOOK (Oct. 7, 2013 11:41 AM), <https://www.facebook.com/notes/facebook-data-science/from-classmates-to-soulmates/10151779448773859/>.

The student could also allege that the unfair proceedings have made him reluctant to have even platonic friendships, which is relevant for students matriculating at schools where sex and dating are forbidden.²³⁰ His ability to learn and to succeed academically has also been impaired because he refuses to do group projects with only one other student unless witnesses are present. Indeed, his fear of biased and unfair proceedings has made him reluctant to do laboratory work where he would be working in a confined space with another student, and he worries that not doing so will derail his lifelong dream of becoming a doctor. Overall, the student's fear of being falsely accused and unable to adequately defend himself has caused deep unhappiness and undermined his sense of community and connection to his classmates. It has also negatively impacted his education and future success.

An injury to the plaintiff's ability to form relationships, whether romantic or platonic, would seem to comport with the Court's generally expansive conception of injuries. If "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society,"²³¹ certainly the same is true of emotional and intellectual well-being. In *Lawrence v. Texas*, the Court discussed the significance of sexual intimacy, calling it the "most private human conduct"²³² and saying that it "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."²³³ More recently, in *Obergefell v. Hodges*, the Court explicitly recognized the value of "expression, intimacy, and spirituality" in holding that same sex couples had the right to marry.²³⁴

The Court has also "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities

²³⁰ This Article is not contending that a private school does not have the right to demand that its students refrain from engaging in sexual or romantic conduct.

²³¹ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

²³² *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

²³³ *Id.* at 574.

²³⁴ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599 (2015).

occupy a special niche in our constitutional tradition.”²³⁵ If a disciplinary policy is chilling student speech, isn’t that interfering with the “robust exchange of ideas,” which is of “paramount importance in the fulfillment of [the university’s] mission”?²³⁶ Indeed, isn’t such a policy causing harm not just to the student who is afraid to participate, but also to the university as a whole?

There might be some uncertainty, however, about the success of claims by students whose asserted injury was inhibition of relationships or expression. On the one hand, and ironically, the causation issues discussed above might be easier to handle in such cases than in cases where the student claimed an expulsion or suspension or some other sanction as the injury. The plaintiff would assert that what was inhibiting him from forming relationships was his fear of being subjected to a process with standards that had been lowered through state action in violation of the Fourteenth Amendment. The causation would appear quite direct.

On the other hand, at least in *Clapper*, the Court seemed wary of injuries that it viewed as self-inflicted or manufactured for the purposes of creating standing.²³⁷ There, plaintiffs alleged that the federal government was engaging in illegal surveillance of some of their conversations, and that as a result, the plaintiffs had been forced to “take costly and burdensome measures to protect the confidentiality of their communications.”²³⁸ The Court responded that plaintiffs could not “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”²³⁹ *Clapper* may not be representative of the broad thrust of the Court’s standing doctrine, as Justice Breyer suggested in his dissenting opinion,²⁴⁰ but it does raise the prospect that a court might conclude that a student who said he was refraining from certain activities was simply manufacturing standing.

²³⁵ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

²³⁶ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978).

²³⁷ *Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138, 1150–51 (2013).

²³⁸ *Id.* at 1151.

²³⁹ *Id.*

²⁴⁰ *Id.* at 1161 (Breyer, J., dissenting) (“More important, the Court’s holdings in standing cases show that standing exists here. The Court has often *found* standing where the occurrence of the relevant injury was far *less* certain than here.”).

If a student is able to establish standing, and if he is able to convince the court that there is state action and that the school's disciplinary proceedings violate procedural due process, then he would be able to sue for damages under § 1983.²⁴¹ More importantly, he would also be able to request a preliminary injunction that would bar the university from using its current disciplinary proceedings until a court ruled that they adequately protected the procedural due process rights of accused students.²⁴²

B. *Alternative Argument if State Action Cannot Be Established*

Without the Fourteenth Amendment limiting what is permissible, it will be harder to challenge these disciplinary proceedings in court. Yet, students still have three major avenues of attack. The first two are essentially contractual; students can argue that their contractual rights with the university have been explicitly breached, and that the proceedings violate their implicit right to "fundamental"²⁴³ or "basic fairness."²⁴⁴ They can also argue that their right to gender equality under Title IX entitles them to better procedures. Each will be briefly discussed below.

1. CONTRACT

The student/college relationship is "essentially contractual in nature,"²⁴⁵ which means that students can sue for breach of contract if the university is not meeting its procedural obligations. Contract disputes are governed by state as opposed to constitutional law. In determining the terms of the contract, courts can look at statements from student manuals,²⁴⁶ registration materials,²⁴⁷ brochures, and

²⁴¹ See generally, *Rendell-Baker v. Kohn*, 457 U.S. 830, 845–51 (1982).

²⁴² See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983).

²⁴³ *PSI Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991) (private school "students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides The only caveat applied to this principle is that the disciplinary procedures established by the institution must be fundamentally fair.") (internal citations omitted).

²⁴⁴ *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 380 (Mass. 2000) (quoting *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983)).

²⁴⁵ *Mangla v. Brown Uni.*, 135 F.3d 80, 83 (1st Cir. 1998). See also *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972).

²⁴⁶ *Magnla*, 135 F.3d at 83.

²⁴⁷ *Id.*

other advertisements.²⁴⁸ To determine whether there has been a breach, courts must consider what is a “reasonable expectation” of interpretation for the contractual terms.²⁴⁹ In other words, courts must ask, “what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.”²⁵⁰

Recently, students have achieved some success challenging their punishment on contractual grounds. In *Doe v. Brandeis University*, the U.S. District Court for the District of Massachusetts conducted a detailed analysis of Doe’s breach of contract claim and found that Doe had alleged sufficient evidence to survive a dismissal for insufficiency of the evidence.²⁵¹ The grounds included that Brandeis allegedly failed to provide Doe with a copy of the Special Examiner’s Report and that it failed to maintain confidentiality of his educational record.²⁵² Several months later, in *Doe v. Brown University*, the U.S. District Court for the District of Rhode Island found that Brown had breached Doe’s contractual rights by using the wrong definition of consent.²⁵³ Although the alleged incident had taken place in 2014, Brown used a definition of consent from the revised 2015–2016 Title IX policy, which included “manipulation” as a ground for lack of consent.²⁵⁴ The court held that Doe had proved by a preponderance of the evidence that Brown breached its contract with Doe by the manner in which it conducted his disciplinary hearing, and thus he was entitled to a new hearing.²⁵⁵

²⁴⁸ *Gluckenberger v. Boston Univ.*, 957 F. Supp. 306, 317 (D. Mass. 1997).

²⁴⁹ *Magnla*, 135 F.3d at 83.

²⁵⁰ *Id.* (quoting *Giles v. Howard Univ.*, 428 F. Supp. 603, 605 (D.D.C. 1977)).

²⁵¹ *See Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

²⁵² *Id.* at 598–99. The court also considered Brandeis’ failure to provide Doe with basic fairness, as part of the breach of contract, even though it specifically stated that “Brandeis’s obligation to provide basic fairness in its proceedings is separate from and in addition to its contractual obligation to follow the rules it set forth in the Handbook.” *Id.* at 601.

²⁵³ *See Doe v. Brown Univ.*, No. 16-017 S, 2016 U.S. Dist. LEXIS 132824, at *59–71 (D. R.I. Sept. 28, 2016).

²⁵⁴ *See id.* at *59.

²⁵⁵ *See id.* at *102, *4.

2. BASIC FAIRNESS

Although private schools need not comply with the Constitution, they do not have a free pass to trample students' procedural rights.²⁵⁶ The Supreme Court has never directly ruled on what constitutes fairness in private disciplinary proceedings, but lower courts have set a low bar.²⁵⁷ If the school is complying with its own rules and procedures, courts are likely to find the proceedings fair.²⁵⁸ Some courts will only intervene when the proceedings are "arbitrary and capricious."²⁵⁹ Other courts explicitly require the proceedings to comply with "fundamental" fairness.²⁶⁰ In other words, they don't just look to see whether the university provided students with the procedural safeguards it specifically contracted to, but they "examine the hearing to ensure that it was conducted with basic fairness."²⁶¹ Despite these hurdles, students have seen some success in challenging these procedures.²⁶²

In *Doe v. Brandeis University*, Doe sued Brandeis University for various causes of action related to him being found guilty of sexual misconduct under the university's procedures for such cases.²⁶³ Brandeis filed a motion to dismiss, and the United States District Court for the District of Massachusetts was asked to consider whether Doe had filed sufficient information to proceed.²⁶⁴ The

²⁵⁶ See *Ahlum v. Adm'rs of Tulane Educ. Fund.*, 617 So. 2d 96, 98 (La. Ct. App. 1993).

²⁵⁷ See *id.* at 99 ("The disciplinary decisions of a private school may be reviewed for arbitrary and capricious action.") (citations omitted).

²⁵⁸ See *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990). See also Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 664 (2001).

²⁵⁹ See *Ahlum*, 617 So. 2d at 98–99.

²⁶⁰ See *PSI Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991) (Private school "students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides . . . The only caveat applied to this principle is that the disciplinary procedures established by the institution must be fundamentally fair.") (internal citations omitted).

²⁶¹ *Schaer v. Brandeis Univ.*, 432 Mass. 474, 481 (Mass. 2000) (quoting *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983)).

²⁶² See, e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016).

²⁶³ *Id.* at 567.

²⁶⁴ *Id.* at 569–70.

court began its analysis by acknowledging that the Sixth Amendment does not bind Brandeis, but even so, its “authority to discipline its students is not entirely without limits.”²⁶⁵ The court wrote that Brandeis had to afford its students “basic fairness” or what the court called, “some minimum level of fair play.”²⁶⁶ The court went on: “Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral factfinder, not predisposed to reach a particular conclusion.”²⁶⁷ Importantly, the court noted that Brandeis had an obligation to provide basic fairness in its proceedings which was “separate from and in addition to its contractual obligation” to abide by the rules enumerated in the university handbook.²⁶⁸

The court then provided a detailed account of all of Brandeis’ procedural failings.²⁶⁹ It noted that Doe had not been given a “full account” of what he had allegedly done wrong;²⁷⁰ was not allowed to have a lawyer to assist him in either an active or a passive capacity;²⁷¹ was not given the right to confront his accuser, which some found particularly troubling because “the entire investigation . . . turned on the credibility of the accuser and the accused” and “[u]nder the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding”;²⁷² was not given the right to cross-examine the witnesses who the Special Examiner questioned and relied on in some degree in her report;²⁷³ and was denied the right to an effective appeal because he could not challenge the decision because it was “not supported by the evidence or that it was otherwise unfair, unwise, or simply wrong.”²⁷⁴

The court also was troubled by the fact that Brandeis used a single investigator process, similar to that of six of the schools studied here, in which one person investigates the case and determines

²⁶⁵ *Id.* at 572.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 573.

²⁶⁸ *Id.* at 601.

²⁶⁹ *Id.* at 602–08.

²⁷⁰ *Id.* at 603–04.

²⁷¹ *Id.* at 604.

²⁷² *Id.* at 604–05.

²⁷³ *Id.* at 605.

²⁷⁴ *Id.* at 607.

guilt.²⁷⁵ The court wrote: “The dangers of combining in a single individual the power to investigate, prosecute, and convict with little effective power of review are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions.”²⁷⁶

Finally, the court was concerned by the fact that Brandeis used a lower standard of proof in sexual assault hearings than any other kind of violation, which it found particularly problematic in light of the elimination of other basic procedural rights of the accused:

The standard of proof in sexual misconduct cases at Brandeis is proof by a “preponderance of the evidence.” For virtually all other forms of alleged misconduct at Brandeis, the more demanding standard of proof by “clear and convincing evidence” is employed. The selection of a lower standard (presumably, at the insistence of the United States Department of Education) is not problematic, standing alone; that standard is commonly used in civil proceedings, even to decide matters of great importance. Here, however, the lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused.²⁷⁷

For all these reasons, the court held that Doe had raised sufficient information to survive a motion to dismiss.²⁷⁸

²⁷⁵ *Id.* at 606.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 607.

²⁷⁸ *Id.* at 611, 617–18.

3. TITLE IX

Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”²⁷⁹ Although Title IX was aimed at protecting the rights of women, the language is gender neutral, and male students are starting to use it to challenge student disciplinary proceedings.²⁸⁰

In *Yusuf*, the Second Circuit set forth a framework for determining whether a school’s disciplinary proceeding violates a student’s rights under Title IX.²⁸¹ *Yusuf* distinguished between two different theories of liability under Title IX: “erroneous outcome” and “selective enforcement.”²⁸² As the court in *Yusuf* explained, a student filing a challenge under an “erroneous outcome” theory must meet two requirements:

Plaintiffs who claim that an erroneous outcome was reached must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding A plaintiff must thus also allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.²⁸³

The selective enforcement claim, on the other hand, asserts that “regardless of the student’s guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student’s gender.”²⁸⁴

Recently, courts have indicated receptivity to attacking disciplinary proceedings on Title IX grounds.²⁸⁵ In 2014, John Doe sued

²⁷⁹ 20 U.S.C. § 1681(a) (2012).

²⁸⁰ See generally Jeannie Suk Gersen, *College Students Go to Court over Sexual Assault*, NEW YORKER (Aug. 5, 2016), <http://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault>.

²⁸¹ *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714–15 (2d Cir. 1994).

²⁸² *Id.* at 715.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Gersen, *supra* note 280.

Washington & Lee for five causes of action stemming from his expulsion for non-consensual sexual intercourse.²⁸⁶ Washington & Lee moved to dismiss, but the United States District Court for the Western District of Virginia, Lynchburg Division, denied that motion in part, finding that Doe had pled sufficient factual allegations to support a Title IX claim.²⁸⁷ The court wrote:

Plaintiff's allegations, taken as true, suggest that W & L's disciplinary procedures, at least when it comes to charges of sexual misconduct, amount to 'a practice of railroading accused students' Given these allegations, as well as Plaintiff's charge that W & L was under pressure from the government to convict male students of sexual assault, a reasonable fact finder could plausibly determine that Plaintiff was wrongly found responsible for sexual misconduct and that this erroneous finding was motivated by gender bias.²⁸⁸

In July 2016, the Second Circuit Court of Appeals also held that sufficient evidence had been presented to go forward on a gender bias claim.²⁸⁹ John Doe sued Columbia University for violating Title IX by practicing gender bias against him after the university investigated and suspended him for sexual assault.²⁹⁰ The District Court originally dismissed the case for making an insufficient claim, but the Second Circuit reversed and remanded on the ground that there was enough evidence to show gender bias.²⁹¹

A few months earlier, in February, a Senior United States Judge partially denied a motion to dismiss in *Cornell*.²⁹² The court held that "[g]iven the totality of the circumstances . . . Plaintiff plausibly

²⁸⁶ Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *1 (W.D. Va. Aug. 5, 2015).

²⁸⁷ *Id.*

²⁸⁸ *Id.* at *10 (internal citations omitted).

²⁸⁹ Doe v. Columbia Univ., 831 F.3d 46, 48 (2d. Cir. 2016).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Prasad v. Cornell Univ., Civ. No. 5:15-cv- 322, 2016 WL 3212079, at *1 (N.D.N.Y. Feb. 24, 2016).

establishe[d] a causal connection between gender bias and the outcome of the disciplinary proceeding.”²⁹³ The court thus denied Cornell’s motion to dismiss on Title IX grounds.²⁹⁴

CONCLUSION

As this Article has shown, the top American colleges and universities do not give students what would be considered fundamental rights in the criminal context. Because universities are rightfully being pressured to take rape more seriously, it is especially important that accused students are treated fairly. Although accused students do not face prison time, they do face expulsion, which can forever derail their chance of success.²⁹⁵ With stakes this high, universities should have a fair procedure that, at a minimum, requires a robust right to counsel, an adjudicatory hearing with direct questioning, the right to evidence, and a standard of proof set at clear and convincing evidence.²⁹⁶ Anything less poses the risk that innocent men and women will be found responsible for offenses they did not commit.

Challenging these laws will not be easy. In general, students at private schools are afforded fewer procedural protections than those at public universities.²⁹⁷ Ironically, the Department of Education’s heavy handedness in forcing universities to comply with the Dear Colleague Letter is what may enable students to successfully challenge these procedures as depriving them of procedural due process.²⁹⁸ Indeed, this Article has argued that because of the coercive actions of the DOE, private schools have become state actors, which means that students there are entitled to the same constitutional rights as students at a public university.

Even if state action claims fail, students have successfully challenged campus disciplinary proceedings on other grounds. They

²⁹³ *Id.* at *17.

²⁹⁴ *Id.*

²⁹⁵ *See generally* Doe v. Wash. & Lee Univ., No. 6:14–CV–00052, 2015 WL 4647996, at *9 (W.D. Va. Aug. 5, 2015).

²⁹⁶ *See generally* Lave, *supra* note 37.

²⁹⁷ *See, e.g.*, Ahlum v. Adm’rs of Tulane Educ. Fund, 617 So. 2d 96, 98–99 (La. Ct. App. 1993); Cloud v. Trs. of Boston Univ., 720 F.2d 721, 725 (1st Cir. 1983).

²⁹⁸ *See* Dear Colleague Letter, *supra* note 8.

have shown that universities are violating their contractual obligations, and they have argued convincingly that disciplinary proceedings violate their right to “basic fairness” and equal treatment under Title IX.

The advent of a new administration often provides the opportunity for reconsideration of existing policies, particularly where they have come under criticism by courts. The issuance of new regulations or guidance through proper administrative procedures that take appropriate account of the issues of fundamental procedural fairness outlined in this Article (and developed more fully in its companion piece, *Ready, Fire, Aim*)²⁹⁹ would be a welcome development.

There are worrying signs, however, that the Trump administration may change course in harmful ways.³⁰⁰ This Author has argued here and elsewhere that ensuring basic procedural fairness to the accused is fully compatible with—indeed, supportive of—treating the issue of campus sexual assault as a serious problem urgently in need of redress.³⁰¹ Federal action pressing universities to enforce the guarantees of Title IX is entirely appropriate, so long as basic procedural rights inherent in the Constitution and in notions of fundamental fairness are respected. The Republican Party platform, on the other hand, seems to characterize the very idea of federal regulation of the way colleges and universities respond to campus sexual assault as a “distortion” of Title IX and harmful federal “micromanagement.”³⁰² Moreover, there is some support among Trump advisors for closing OCR down and transferring its functions to the Justice Department—actions that advocates for victims of campus sexual assault fear would undercut efforts to effectively address the issue.³⁰³

²⁹⁹ Lave, *supra* note 37.

³⁰⁰ See Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED (Nov. 10, 2016), <https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault>.

³⁰¹ See generally Lave, *supra* note 37; *Reject the Dear Colleague Letter*, *supra* note 86.

³⁰² See New, *supra* note 300 (“It criticized the Obama administration’s policies, saying the White House’s ‘distortion of Title IX to micromanage the way colleges and universities deal with allegations of abuse contravenes our country’s legal traditions and must be halted.’”).

³⁰³ See *id.*

That being said, the views on campus sexual assault adjudication of Betsy DeVos, President Trump's newly sworn-in Secretary of Education, are not well known.³⁰⁴ Senator Bob Casey (D-Penn.) asked DeVos whether she would commit to keeping the DCL in place, but she refused to do so, saying it was "premature."³⁰⁵ She also balked at promising Senator Patty Murray (D-Wa.) that she would allow OCR to continue its work investigating and enforcing rules against campus sexual assault.³⁰⁶ It is this Author's hope that DeVos will use her power to address the DCL's flaws without jettisoning federal efforts to press for an end to the serious problem of campus sexual assault. Unless and until then, it will be up to the courts to ensure that accused students receive the fair treatment that is being denied to them by their colleges and universities.

³⁰⁴ See Andrew Kreighbaum, *Trump's Choice for Education Secretary*, INSIDE HIGHER ED (Nov. 28, 2016), <https://www.insidehighered.com/news/2016/11/28/betsy-devos-trumps-choice-education-secretary-has-unclear-higher-ed-priorities>.

³⁰⁵ See Senator Bob Casey, *DeVos says it's "Premature" to Commit to Enforcing Campus Sexual Assault Protections*, YOUTUBE (Jan. 17, 2017), <https://www.youtube.com/watch?v=c6yrrppa-Oc> (Senator Bob Casey (D-Penn.) questioning Betsy DeVos); see also Tyler Kingkade, *Trump's Education Secretary Nominee Won't Commit to Keeping Campus Rape Rules*, BUZZFEED NEWS (Jan. 17, 2017, 7:58 PM), https://www.buzzfeed.com/tylerkingkade/betsy-devos-title-ix?utm_term=.eybK6gz1b#.ueKpE2ILJ.

³⁰⁶ See Kingkade, *Trump's Education Secretary Nominee*, *supra* note 305.