AN "F" IN DUE PROCESS: HOW COLLEGES FAIL WHEN HANDLING SEXUAL ASSAULT

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CONTENTS

INTRODUCTION

In 2012, Joshua Strange was found "responsible" for "sexual assault and/or sexual harassment" by an Auburn University disciplinary tribunal.[1] Joshua's ex-girlfriend had accused him of sexual assault.[2] His punishment was a life-sentence of expulsion.[3] If he ever sets foot on Auburn University property again, he will be arrested for trespassing.[4] The day after Joshua's banishment was made official by the University president, an Alabama grand jury returned a "no bill" on criminal charges for the same alleged conduct, having found insufficient evidence to support a finding of probable cause that the alleged misconduct ever occurred.[5]

This brief summary does not fully describe the inadequacy of Joshua's sexual assault hearing and resulting punishment. Quite divorced

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1. James Taranto, *An Education in College Justice*, WALL ST. J. (Dec. 6, 2013), http://www.wsj.com/articles/SB10001424052702303615304579157900127017212.

2. Nick Anderson, *Men Punished in Sexual Misconduct Cases on Colleges Campuses Are Fighting Back*, WASH. POST (Aug. 20, 2014), http://www.washingtonpost.com/local/education/men-punished-in-sexual-misconduct-cases-on-colleges-campuses-are-fighting-back/2014/08/20/96bb3c6a-1d72-11e4-ae54-0cfe1f974f8a_story.html.

3. Taranto, *supra* note 1.

4. *Id.*

5. *Id.*; Anderson, *supra* note 2.

from the formality or professionalism of a courtroom, the proceeding had witnesses and a jury, but no judge or lawyers.[6] Actually, there *were* lawyers present—both Joshua and his accuser had counsel present—but the only legally-trained individuals in the room were not allowed to speak before the tribunal.[7] The presiding "judge" was a librarian, and the remainder of the committee was made up of a staffer from the College of Liberal Arts, two students, and a professor from the Agriculture College—none of whom had any legal training.[8]

The first witness for the alleged victim[9] admitted that she did not know the details of the alleged events because she had never asked about them, but nevertheless claimed that Joshua was a potential threat.[10] The second witness—another university staff member to whom the alleged victim had complained—essentially testified that the victim should be believed because she had cried and been upset when telling her story.[11] On this evidence, the tribunal found him guilty and expelled him, although a grand jury later determined there was not even probable cause to believe the assault occurred—a much lower standard than the preponderance standard used by the tribunal.[12]

The story of Joshua Strange was made public in an exposé by an author for the *Wall Street Journal*, and is only one example of what can occur at such a proceeding. Different schools maintain different procedures, and it would be disingenuous to say that all such proceedings

6. Taranto, *supra* note 1.

7. *Id.* The presence of an attorney may in some cases provide a benefit via a later judicial review. In New York, for example, university adjudications may be reversible in a hearing under N.Y. C.P.L.R. Article 78. *See, e.g.*, Stapor v. Wagner Coll., 997 N.Y.S.2d 101, 101 (Sup. Ct. 2014). However, the court will not reweigh the evidence before the tribunal, but only overturns the decisions if it appears arbitrary and capricious. *Id.* at 109. This does little to cure the inherent problems in fact-finding during campus adjudications.

8. Taranto, *supra* note 1.

9. When discussing a sensitive topic such as sexual assault, the use of terminology can be problematic. If one uses the terminology "attacker" and "victim," the connotation is that the "attacker" is guilty. While this note strives to discuss the issues tactfully, because burden falls on the prosecution or the wronged party, the accused is presumed innocent. For that reason, this note will use the terminology "accuser" or "alleged victim" and "accused" or "alleged attacker," but this does not demarcate any position by the author on the validity of any alleged victim's claims.

10. Taranto, *supra* note 1.

11. *Id.* Specifically, the witness testified to the certain behaviors typical of sexual assault victims which the alleged victim had exhibited when talking to the witness about her complaint. *Id.* The testimony consisted of three statements: (1) victims frequently cry, (2) "there's often a lot of emotion inserted into the story," and (3) that "their storytelling is sometimes disjointed, sometimes not." *Id.* The first two are really the same statement, and suggest that an alleged victim's tears equate to the guilt of the accused. The third is a tautology: storytelling is either disjointed or it is not.

12. *Id.*

are per se unfair to the accused. Nevertheless, stories like that of Mr. Strange are the result of two major problems with campus sexual assault proceedings that are prevalent across the country. First, the hearings are often conducted by amateurs with no legal training and (in some cases) no college degree. Their procedures and rules fail to rise to the level of the protections provided by an actual court.[13] In short, campus authorities are not equipped, nor are they capable, of effectively investigating and punishing accusations of sexual assault.[14]

Second, campuses are now required all across the country to use the preponderance of the evidence standard of proof, which results in a finding of guilty if the evidence establishes that the events more likely than not occurred.[15] While colleges once made up for the weaknesses in their proceedings by requiring clear and convincing evidence or evidence beyond a reasonable doubt,[16] in 2011, a document known as a "Dear Colleague" Letter ("DCL") mandated the preponderance standard as a condition of compliance with Title IX of the Education Amendments of 1972 ("Title IX").[17]

This Note will argue that the DCL, and similar measures taken by state governments, violate the due process rights of students who are accused of sexual assault. Part I will discuss the history of sexual assault laws and the political atmosphere in which the DCL and similar measures were developed and implemented. Part II-A will discuss which standards of review due process requires for various circumstances. Part II-B will analyze the possible candidates for a proper standard of proof in campus sexual assault. Part II-C will conclude that the clear and convincing standard is needed to adequately protect the rights of accused students, despite the compelling reasons to make proceedings which assist actual

13. A recent order by a court in California, for example, overturned a campus determination of sexual assault because the accused could not confront his accuser with cross-examination. Minute Order, Doe v. Regents of the Univ. of Cal. San Diego, No. 37-2015-10549-CU-WM-CTL (Cal. App. Dep't Super. Ct. July 10, 2015).

14. In at least one recent case, a court overturned an expulsion based on a sexual assault allegation because the campus adjudicator was not able to correctly apply even the preponderance standard. Mock v. Univ. of Tenn. at Chattanooga, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015) (memorandum and order); *see also* Robby Soave, *Judge Stops USC from Expelling Football Player Who Failed to Prove He Wasn't a Rapist*, REASON (Aug. 13, 2015), http://reason.com/blog/2015/08/13/judge-stops-usc-from-expelling-football.

15. Anderson, *supra* note 2.

16. Stanford University, for example, used a beyond a reasonable doubt standard prior to the Dear Colleague Letter. Katie Jo Baumgardner, Note, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1822 (2014).

17. *Id*. at 1824.

victims in effectively seeking justice.

I. BACKGROUND

To properly frame this discussion, it is necessary to delve into the history of rape and sexual harassment prosecutions as they have developed in response to social initiatives.[18]

A. The History of Reforms in Rape Prosecution

Rape laws in the United States have historically made it difficult for victims to seek justice.[19] As recently as the 1970s, it was extremely difficult to prosecute even the guilty for rape, due to peculiarities of the law and entrenched juror skepticism.[20] In the 1960s, Harry Kalven and Hans Zeisel performed a landmark study of jurors which contained significant revelations.[21] The study revealed that juries were judgmental toward the victim's character, often attributing fault to the provocative conduct of the victim.[22] Juries looked for ways in which the woman could have contributed to the crime.[23] Jurors were more likely to acquit for rape than for any other charge.[24] In almost half of the instances which the Kalven and Zeisel study surveyed, the judge would not have been as lenient as the jury.[25]

Juror skepticism has often been traced to certain particularized suspicions on the part of the jurors, which indicate underlying sexist attitudes about rape victims.[26] Male jurors in particular tend to be suspicious of rape accusations, perhaps because they identify with a male defendant and fear that an allegation may be falsely levelled at them.[27]

In the 1970s, the feminist movement began tackling the problems

18. These social initiatives continue to inform modern remedies, especially on college campuses.

19. Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 983 (2008).

20. *Id*.

21. *See generally* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

22. *Id.* at 249–50.

23. *Id.*

24. *Id.* at 249–57.

25. *Id.* at 253–54.

26. Klein, *supra* note 19, at 983–84 ("The alleged victim may just be vindictive because the guy she dated never called back to see her again; women may subconsciously desire to be raped, fantasize about it and then believe that their fantasy actually occurred; a long-term boyfriend decided to end the relationship and the rejected woman wished to retaliate; the complaining witness was just after money and believed that the threat of bringing a rape charge . . . would lead to a cash settlement.").

27. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 370 (Ballantine Books 1993) (1975).

with rape law, spearheading what would become the rape reform movement.[28] With the dual laudable goals of encouraging more rape victims to come forward and increasing convictions of rapists, the movement set forth to revise laws and remove statutory obstacles to conviction which were unique to the crime of rape.[29]

First, the movement challenged statutory corroboration requirements in criminal rape laws. Corroboration requirements have been attributed to a 1736 treatise by Sir Matthew Hale (then the Chief Justice of the Court of King's Bench in England) which expounded, "[a rape accusation is] easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[30] Famous evidentiary scholar John Henry Wigmore wrote, "[n]o judge should ever let a sex-offense charge go to the jury, unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician," because women's "psychic complexes are . . . distorted by inherent defects" and they are prone to "contriving false charges of sexual offenses by men."[31] In 1962, the official draft for the Model Penal Code included a statement that "uncorroborated testimony of the alleged victim" should never result in a conviction for sexual offenses.[32] The philosophy had long been deeply entrenched in the mindset of lawmakers.

Such corroboration was usually satisfied by medical evidence of a victim's injuries, self-defense wounds on the defendant's body, or testimony of third party witnesses.[33] Naturally, this would have required in most cases that a victim have the presence of mind to seek immediate medical attention to preserve the evidence. Over time, rape laws were revised to remove corroboration requirements.[34] The courts also began to object to the requirement.[35] By 2001, all states had rejected such general corroboration requirements.[36]

28. Klein, *supra* note 19, at 984.

29. *Id.* at 985.

30. *Id.* (quoting SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (P.R. Glazebrook ed., Professional Books Limited 1971) (1736)).

31. *Id.* at 986 (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 736–37 (James H. Chadbourn rev. ed., 1970)).

32. MODEL PENAL CODE § 213.6(5) (AM. LAW INST., Proposed Official Draft 1962).

33. Klein, *supra* note 19, at 986.

34. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 374 (7th ed. 2001); *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.020 (West 2015) ("[I]t shall not be necessary that the testimony of the alleged victim be corroborated.").

35. *See, e.g.*, United States v. Wiley, 492 F.2d 547, 552 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

36. Klein, *supra* note 19, at 986. Texas, however, still requires corroboration if the

Laws were also revised to remove requirements for "utmost" or "reasonable" resistance by the victim.[37] These requirements, also based on widespread skepticism of victim veracity, presumed that a woman would fight to the death were she being sexually assaulted. As a result, state supreme courts often said things like this:

> Turning to the testimony of prosecutrix, we find it limited to the general statement, often repeated, that she tried as hard as she could to get away. Except for one demand, when first seized, to "let me go," *and inarticulate screams*, she mentions no verbal protests. . . . [W]e cannot conceive it possible that one whose mind and exertions had . . . been set on resistance, could or would in narrative mention nothing but escape or withdrawal. A woman's means of protection are not limited to that, but *she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles.*[38]

In 1975, the state of Michigan enacted what would become a model for rape reform legislation in many states, eliminating the requirement for physical resistance.[39] Typical state rape statutes now define forcible compulsion to include implied or express threat of force.[40]

More recently, evidentiary "Rape Shield" laws also developed to protect alleged victims from being questioned about their sexual past—questions which can poison the opinions of a jury against the alleged victim on a personal level. In the same year that Michigan removed the resistance requirement, it also passed the first significant rape shield provision: "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . ."[41] Other states have adopted similarly-styled provisions, and in 1978, Congress added rape shield rules to the Federal Rules of Evidence.[42]

But the movement's goals were not just legal, they were political. It was said that there was a "cherished male assumption that female persons tend to lie" about rape.[43] The movement sought to "improve male

victim did not inform any third party of the alleged offense within a year of its occurrence. TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 2005).

37. KADISH & SCHULHOFER, *supra* note 34, at 329.

38. Brown v. State, 106 N.W. 536, 538 (Wis. 1906) (reversing a conviction for rape of a fourteen year old girl because screams and attempts to escape were insufficient as a matter of law to uphold the conviction, without other evidence of "utmost resistance") (emphasis added).

39. MICH. COMP. LAWS ANN. § 750.520i (West 2004).

40. Klein, *supra* note 19, at 989.

41. MICH. COMP. LAWS ANN. § 750.520j(1) (West 1975).

42. *See* FED. R. EVID. 412.

43. BROWNMILLER, *supra* note 27, at 369.

behavior, not merely by curbing forcible rape, but also by eliminating aggressive seduction" and "to abolish the traditional sexual roles."[44] In order to counteract the myth that women always lie about rape, the movement propagated a counter-myth: that women *never* lie about rape.[45]

The "always believe the victim" movement is based on the idea that "[w]henever the account of the victim is not believed, this tends to place responsibility for the sexual encounter on the victim and sends the message that the woman is the cause of her own injury."[46] The result of this reasoning is a discourse in which "anyone who says that 'women often lie about sex' is automatically viewed . . . as simultaneously denying and denigrating the truthfulness of those who are not lying, who are really victims."[47]

The current atmosphere regarding rape is charged with anger and frustration, in part *because* of the "always believe the victim" rhetoric. On occasion, women *do* lie about rape. There are many well-publicized examples, not the least of which was the false accusation in 1931 of nine black teenagers by two white women in Scottsboro, Alabama.[48] In 1987, Tawana Brawley, backed by Al Sharpton, falsely accused a group of white men in Dutchess County, New York, of kidnapping and raping her, and both she and Sharpton were found liable for defamation.[49] In 2006, a stripper falsely accused members of Duke University's lacrosse team of rape.[50] The lead prosecutor in that case, Mike Nifong, was later held in contempt and disbarred for pursuing the rape charges.[51]

44. David Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 478 (2000).

45. *See generally* Patricia Sharpe & Frances E. Mascia-Lees, *"Always Believe the Victim," "Innocent Until Proven Guilty," "There Is No Truth": The Competing Claims of Feminism, Humanism, and Postmodernism in Interpreting Charges of Harassment in the Academy*, 66 ANTHROPOLOGICAL Q. 87 (1993).

46. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 227 (1999).

47. Edward Greer, *Awaiting Cassandra: The Trojan Mare of Legal Dominance Feminism (Part I)*, 21 WOMEN'S RTS. L. REP. 95, 112 n.113 (2000).

48. In somewhat happier news, the Alabama legislature finally pardoned the convictions of the nine boys in 2013—eighty two years after their conviction. James Nye, *Alabama FINALLY Pardons the 'Scottsboro Boys' . . . 82-Years After They Were Falsely Convicted of Raping Two White Women*, DAILY MAIL (Apr. 4, 2013), http://www.dailymail.co.uk/news/article-2304279/Alabama-FINALLY-pardons-Scottsboro-Boys—82-years-falsely-convicted-raping-white-women.html.

49. Mark Memmott, *15 Years Later, Tawana Brawley has Paid 1 Percent of Penalty*, NPR (Aug. 5, 2013), http://www.npr.org/blogs/thetwo-way/2013/08/05/209194252/15-years-later-tawana-brawley-has-paid-1-percent-of-penalty.

50. Aaron Beard, *Prosecutors Drop Charges in Duke Case*, WASH. POST (Apr. 12, 2007, 7:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/04/11/AR2007041101392.html.

51. Aaron Beard, *Judge Finds Duke Prosecutor in Contempt*, WASH. POST (Sept. 1, 2007, 2:03 AM), http://www.washingtonpost.com/wp-dyn/content/article/2007/08/31/

More recently, Marc J. Randazza (a first amendment attorney from Las Vegas) wrote about the 2014 scandal at the University of Virginia (UVA).[52] Rolling Stone had published a highly-detailed article outlining the accuser's allegations that she had been raped at a UVA fraternity, but questions quickly began to accumulate about her story. Apparently, Rolling Stone had not checked their facts, and eventually the fraternity was investigated by police and cleared of any wrongdoing.[53] Randazza wrote his article before the police found "no basis to believe that an incident occurred at the fraternity,"[54] but his point was a good one: "after [Rolling Stone's] lazy journalism, the next girl who reports a rape might find it to be that much more difficult to get to justice."[55]

This atmosphere creates a vicious cycle: one side claims that women never lie, then one woman lies and it is highly publicized, and the other side uses the opportunity to discredit the "women never lie" camp, and the public is left even more skeptical of rape accusations.[56] And these politics then go on to inform our legal policies, which also compound cyclically: first, juror skepticism prevents victims from pursuing legal remedies and they report fewer assaults; second, policymakers respond by making easier avenues for reporting and vindication (which is exactly what the "Dear Colleague" Letter does); third, these easier avenues create one or two highly publicized abuses of the system, making potential jurors *even more* skeptical when they are eventually called to sit for a criminal rape trial. It is impossible to make laws in a vacuum, but this atmosphere doesn't seem to be much better.

AR2007083100512.html; Lara Setrakian & Chris Francescani, *Former Duke Prosecutor Nifong Disbarred*, ABC NEWS (June 16, 2007), http://abcnews.go.com/TheLaw/story?id=3285862&page=1.

52. Marc Randazza, *Should We Always Believe the Victim?*, CNN (Dec. 7, 2014, 3:37 PM), http://www.cnn.com/2014/12/05/opinion/randazza-uva-rape-allegations/.

53. Margaret Hartman, *Everything We Know About the UVA Rape Case [Updated]*, N.Y. MAG. (Jan. 13, 2015, 5:02 AM), http://nymag.com/daily/intelligencer/2014/12/everything-we-know-uva-rape-case.html.

54. *Id.*

55. Randazza, *supra* note 52.

56. A great deal of the problem is due to selection bias. That is, the only rape cases that are publicized are the ones that are shocking enough to get publicity. False accusations are often shocking by their very nature, and so are greatly publicized. This makes false accusations seem more common than they actually are. Professor Alan Dershowitz has said that FBI crime statistics show 8.4% of rape reports are "unfounded." It is doubtful that all the "unfounded" allegations were necessarily "false accusations." Undoubtedly, a portion of them were merely unprovable. But even if the 8.4% of rape allegations are outright lies, the vast majority of such allegations are accurate (and do not make it into the news). Greer, *supra* note 47.

B. Sexual Harassment, "Sexual Assault," and the War of Statistics

Concurrent to the reformation of rape laws and the development of the political movements discussed above, the law of sexual harassment also developed. Title IX, created in 1972, is perhaps most well-known for its application to scholastic athletics.[57] It declares that "no 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."[58] Although the statute does not explicitly reference athletics, its most common usage has been to afford girls and women equal opportunities to compete in interscholastic and intercollegiate athletics.[59] Decades after the passage of the statute, in the case *Gebser v. Lago Vista Independent School District*, the United States Supreme Court said explicitly that "sexual harassment can constitute discrimination on the basis of sex under Title IX."[60] By this application, Title IX also "requires schools and colleges to protect students from sexual misconduct, sexual harassment, and sexual violence, and to take seriously all reports of sexual harassment."[61]

Procedurally, the Department of Education (DOE) is authorized to issue rules and regulations for the purpose of carrying out Title IX's nondiscrimination mandate, and the DOE delegates enforcement of Title IX compliance to the Office of Civil Rights (OCR).[62] The OCR may only enforce Title IX at colleges which receive federal funding, but that statement is misleading, because "federal funding" includes federal financial aid, and out of all the public and private university and colleges in the country, only three do not accept federal funding assistance.[63] The OCR has not published rules or regulations, but rather issues "guidance" and "Dear Colleague" letters which inform campus administrators how to remain in compliance with Title IX.[64] Failure to comply can result in withdrawal of federal funding.[65] The OCR may also refer cases to the

57. *See, e.g.*, 149 CONG. REC. E609 (daily ed. Mar. 27, 2003) (statement of Hon. Eni F. H. Faleomavaega).

58. 20 U.S.C. § 1681(a) (2012).

59. *See* Christine I. Hepler, Symposium, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 442 (2013).

60. 524 U.S. 274, 283 (1998).

61. Baumgardner, *supra* note 16, at 1815.

62. *Id.*

63. *Id.* at 1814. The three colleges are Hillsdale College in Michigan, Grove City College in Pennsylvania, and Patrick Henry College in Virginia. *Id.* at n.3.

64. *Id.* at 1815.

65. 20 U.S.C. § 1682 (1972).

Department of Justice (DOJ) for litigation.[66] For these reasons, the OCR has a stake in the ongoing debates surrounding sexual assault on college campuses.

The problem of college sexual assault has seen increased government attention in recent years, mostly in the form of federally-funded research studies. In 2000, three researchers published *The Sexual Victimization of College Women* for the National Institute of Justice (a branch of the DOJ).[67] Based on a survey of 4,446 women who were attending a two or four year college or university during the fall semester of 1996, the study found that "about 1 in 36 college women (2.8 percent) experience[d] a completed rape or attempted rape in an academic year."[68] The authors then made the following extrapolation:

> The figures measure victimization for slightly more than half a year (6.91 months). *Projecting results beyond this reference period is problematic for a number of reasons*, such as assuming that the risk of victimization is the same during the summer months and remains stable over a person's time in college. However, if the 2.8 percent victimization figure is calculated for a 1-year period, the data suggest that nearly 5 percent . . . of college women are victimized in any given calendar year. Over the course of a college career—which now lasts an average of 5 years—the percentage of completed or attempted rape victimization among women in higher educational institutions might climb to between one-fifth and one-quarter.[69]

The authors' footnote for that statement then states that these "projections are suggestive" and that "[t]o assess accurately the victimization risk for women throughout a college career, longitudinal research following a cohort of female students across time is needed."[70]

Despite the authors' reminder that the one-fifth projection is not accurate and that it is based on a number of "problematic" assumptions, the findings of that study are nevertheless inappropriately used. The most common claim is that one-in-five women on college campuses in the United States has been sexually assaulted or raped (or worse, the statement is abbreviated to say that one-in-five college aged women has

66. RUSSLYNN ALI, OFFICE FOR CIVIL RTS., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 16 (2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

67. *See* BONNIE S. FISHER ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

68. *Id.* at 3, 10.

69. *Id.* at 10 (emphasis added).

70. *Id.* at 37 n.18.

been raped).[71] The statistic was seemingly supported by a study by the Centers for Disease Control (CDC) which stated baldly that "[i]n the United States, an estimated 19.3% of women . . . have been raped during their lifetimes."[72] Critics, however, questioned the CDC study's methodology, noting the huge disparity between the CDC's estimate of rapes and sexual assaults in 2011 (2 million and 6.7 million, respectively) and that of the *National Crime Victimization Survey* for the same year (238,000 rapes and sexual assaults).[73] The most glaring flaw with the CDC's study, say the critics, is its handling of "incapacitated rape"—that is, sexual acts performed when a party was unable to consent due to severe intoxication.[74] The CDC's survey asked respondents about sexual acts that happened when they were "drunk, high, drugged, or passed out and unable to consent."[75] This may imply to respondents that "unable to consent" is only one of the variables and that they should report situations in which they were "drunk, high, drugged, or passed out," but may not have been "unable to consent."[76] In other words, women may have reported instances when they were intoxicated, but their consent was still validly and legally given as sexual assault.

The National Institute of Justice (NIJ) funded a more recent study of campus sexual assault in 2007, called the *Campus Sexual Assault (CSA) Study*.[77] The CSA study made reference to the 2000 study, but did not repeat the words of caution when it said that the 2000 study "estimated that between 20% and 25% of women will experience a completed and/or attempted rape during their college career."[78] The findings included a statement that, of the 5,446 undergraduate women respondents, 19% reported an attempted or completed sexual assault.[79] This statistic was

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

72. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 MORBIDITY & MORALITY WEEKLY REP. SURVEILLANCE SUMMARIES, Sept. 5, 2014, at 1–8, http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e.

73. Cathy Young, *The CDC's Rape Numbers are Misleading*, TIME (Sept. 17, 2014), http://www.time.com/3393442/cdc-rape-numbers/.

74. *Id.*

75. *Id.*

76. *Id.*

77. CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

78. *Id.* at 2-1.

79. *Id.* at 5-3.

then pushed very strongly by politicians seeking government action in this area.[80] President Obama, for example, said, "[i]t is estimated that 1 in 5 women on college campuses has been sexually assaulted during their time there."[81] The problem is that the CSA study does not actually say that.[82]

The CSA study was localized to the seniors at only two U.S. colleges, and statements such as that of the President extrapolate the findings to "the universe of college experience."[83] The NIJ itself cautioned against using the research so broadly on its website, saying, "[r]egardless of which studies are most accurate, the often-quoted statistic that one in four American college women will be raped during her college years is not supported by the scientific evidence."[84] When approached with questions regarding the White House's cavalier use of the "one-in-five" language, a spokesman pointed to two surveys, one being the often-misinterpreted 2000 study.[85]

Perhaps the most condemning criticism of the "one-in-five" language comes from two of the CSA study's authors:

> First and foremost, the 1-in-5 statistic is *not* a nationally representative estimate of the prevalence of sexual assault, and we have never presented it as being representative of anything other than the population of senior undergraduate women at the two universities where data were collected—two large public universities, one in the South and one in the Midwest.
>
> Second, the 1-in-5 statistic includes victims of both rape and other forms of sexual assault, such as forced kissing or unwanted groping of sexual body parts . . . .[86]

In other words, the statistics cited in many discussions of college sexual assault are often misused, misunderstood, or manipulated to push a political agenda.[87]

80. *See* Glenn Kessler, *One in Five Women in College Sexually Assaulted: An Update on this Statistic*, WASH. POST (Dec. 17, 2014), http://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/.

81. *Id.*

82. Which is not to say that it is not true, only that it is not supported by the available evidence, and therefore it is not appropriate to make that claim.

83. Kessler, *supra* note 80.

84. *Id.* This Note tries to consistently refer to the statistic as one-in-five, but it has interchangeably been used as one-in-four based on the "20–25%" numbers in the 2000 study.

85. *Id.*

86. Krebs & Lindquist, *supra* note 71.

87. An additional problem is created by the use of terminology. In some instances, "sexual assault" is used as a catch-all category to include the plethora of unwanted sexual contact, from forcible rape to an unwanted drunken kiss. In other instances, however "sexual

Into this morass waded the DOE, and in 2011 the OCR issued a "Dear Colleague" letter, which changed the landscape of college sexual assault, and particularly, how colleges are to deal with it. Citing the 2007 CSA study, the letter begins by repeating the erroneous generalization that "about 1 in 5 women are victims of completed or attempted sexual assault while in college."[88] It then directs that "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard [for allegations of sexual harassment or violence]. . . . Grievance procedures that use [a higher standard of proof] are . . . not equitable under Title IX."[89]

Following the issuance of this DCL, colleges scrambled to enact policies and procedures to comply with the new guidelines and avoid losing access to federal funds.[90] Prior to the DCL, many colleges had used a clear and convincing or beyond a reasonable doubt standard, and in changing to the less-demanding preponderance standard, officials at some universities expressed concern that the change would result in "more convictions—of both guilty and innocent individuals."[91]

These concerns were highlighted at Stanford University, where the university "switched from requiring proof 'beyond a reasonable doubt' to the 'more likely than not' standard *in the middle of a student's sexual misconduct case*."[92] The student was found guilty and suspended under the new standard, despite statements by at least one juror that they would have found the student not guilty under the prior, more demanding standard.[93] Although many university administrators objected to the change as arguably unlawful (Princeton University's general counsel argued at the time that there was no legal authority for the OCR's

assault" is used interchangeably with "rape," with an eye on victim sensitivity. This confusion can lead individuals to conflate the first, proper use of the term "sexual assault" with "rape," and undoubtedly contributes to the misleading statement that "one in five college-aged women has been raped."

88. ALI, *supra* note 66, at 2.

89. *Id.* at 11.

90. Baumgardner, *supra* note 16, at 1815.

91. *Id.* at 1823 (quoting Greg Lukianoff, *Feds to Students: You Can't Say That*, WALL ST. J. (May 16, 2013, 7:15 PM), http://www.wsj.com/articles/SB10001424127887323582904578485041304763554.). According to a survey by the Foundation for Individual Rights in Education (FIRE), the more highly ranked a university, the more likely it used a higher standard than preponderance to protect the rights of accused students. *Standard of Evidence Survey: Colleges and Universities Respond to OCR's New Mandate*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Oct. 28, 2011), http://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/ [hereinafter FIRE Survey].

92. FIRE Survey, *supra* note 91.

93. Baumgardner, *supra* note 16, at 1824; FIRE Survey, *supra* note 91.

demand),[94] in order for a university to have the directive overturned, they would need to refuse compliance to invite litigation.[95] But as FIRE has noted, "[t]his scenario is unlikely, however, because the loss of federal funding is such a huge threat to universities that they are unlikely to choose to stand up for principle . . . ."[96] At least for now, the preponderance standard rules on college campuses.

The preponderance standard has been solidified on college campuses in the years following the DCL, in part due to the action of the states. In 2014, for example, California passed Education Code section 67386, which mimicked the DCL in that any college receiving California state funding must use a preponderance standard or risk losing state funding.[97] New York has also enacted similar legislation.[98] As this note argues below, however, this standard is insufficient and the DCL (and similar subsequent state legislation) violates due process.

II. THE CANDIDATES FOR STANDARD OF PROOF

The discussion of standards of proof for university adjudications for allegations of sexual assault really boils down to two distinct questions. First, what standards of proof are appropriate (and which are inappropriate)? This first question may also be stated as "what standards of proof satisfy due process?" Second, out of the appropriate standards, which standard *best* ensures a reliable outcome for such adjudications while still preventing easy abuse?

This section will first lay out the various standards of proof in the abstract, with an eye for the purposes and typical uses of each.[99] Next, it will discuss whether the university adjudications are criminal or civil by

94. Jason Jung, *University Undergoing Title IX Investigation*, DAILY PRINCETONIAN (Apr. 19, 2011), http://www.dailyprincetonian.com/2011/04/19/28314/.

95. FIRE Survey, *supra* note 91.

96. *Id.*

97. CAL. EDUC. CODE § 67386(a)(3) (West 2015). This law made headlines for another subdivision, (a)(1)–(2), which require "affirmative consent" standards. *Id.* The preponderance standard was less newsworthy, likely because it was redundant in light of the DCL. However, if the OCR were to change its interpretation in the future, this statute would remain in force for colleges in California.

98. Although the recently-enacted New York law does not explicitly refer to the preponderance standard, it requires that colleges in New York "utilize applicable state and federal law, regulations, and guidance in writing the policies required pursuant to this article," which would necessarily require adherence to the Title IX preponderance requirement and the "guidance" of the DCL. Act of July 7, 2015, ch. 76, 2015 N.Y. Sess. Laws § 6440(7) (McKinney) (to be codified at N.Y. EDUC. LAW § 6440(7)). If an institution does not file a certificate of compliance under this section, that institution "shall be ineligible to receive state aid or assistance." *Id.* § 6440(3).

99. *See infra* Section II.A.

examining how courts categorize criminal and civil matters.[100] Then, it will apply the standards in light of the type of adjudication and determine that (at the minimum) a clear and convincing standard is necessary to satisfy due process, it is the most likely standard to prevent abuse, and it will ensure reliable punishment of wrongdoers.[101]

A. Standards of Proof

Suppose Perry Plaintiff comes to you with a story. He tells you that he was walking down the sidewalk, minding his own business, and David Defendant ran up to him and promptly slapped him across the face. You ask David about this, and David denies it ever occurred. How do you know what the truth is without having witnessed the event yourself? If you are a court, you would place the burden on the person who came to you for your help to provide enough evidence to satisfy a predetermined standard of proof.[102] The decision of which standard applies depends on the type of court you are and what kind of issue you are deciding.

The preponderance of the evidence standard is used for factual propositions in civil trials.[103] The trier of fact must "believe that the existence of a fact is more probable than its nonexistence before [it] may find in favor of the party who has the burden to persuade the [trier of fact] of the fact's existence."[104] This nearly-even probability burden is appropriate in civil cases because, in the words of Justice Harlan, "[i]n a civil suit . . . it [is] no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor."[105] Because "[c]ivil trials are designed to resolve disputes in an amicable fashion among parties who are indistinguishable before the law[,]" the preponderance of the evidence standard is appropriate.[106]

Criminal trials, on the other hand, "pit an individual against the virtually inexorable power of the state," and therefore "the concept of certainty assumes much greater importance in criminal than in civil

100. *See infra* Section II.B.

101. *See infra* Section II.C.

102. *See* Gary Lawson, *Legal Theory: Proving the Law*, 86 NW. UNIV. L. REV. 859, 870 (1992) ("In criminal cases, relevant factual propositions generally must be established by the prosecution 'beyond a reasonable doubt'; in civil cases, the asserting party generally must establish them by a 'preponderance of the evidence' . . . .").

103. *Id*.

104. *In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring).

105. *Id*. at 371.

106. Symposium, *Probability and Inference in the Law of Evidence: I. Theories of Inference and Adjudication: A Reconceptualization of Civil Trials*, 66 BOS. UNIV. L. REV. 401, 437 (1986).

trials."[107] Unlike in a civil case, "the social disutility of convicting an innocent man [is not] equivalent to the disutility of acquitting someone who is guilty."[108] In the words of Justice Brennan:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.[109]

The beyond a reasonable doubt standard is used as a tool to enforce the Due Process Clause of the Fourteenth Amendment[110] and has been used in criminal cases for centuries.[111] The Supreme Court said in *In re Winship*, a leading case in standards of review, that this standard "is a prime instrument for reducing the risk of convictions resting on factual error" because of "the possibility that [the defendant] may lose his liberty upon conviction and . . . the *certainty* that he would be stigmatized by the conviction."[112]

The stakes are very high for a criminal defendant. Because of these high stakes, "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt[,]" and it is critical that every individual has confidence that he or she will not be punished without evidence convincing a trier of fact "with utmost certainty."[113]

Other standards do exist. The most lenient standards of proof, for example, are used when reviewing police actions: temporary police stops are reviewed under a reasonable suspicion standard, with the burden being on the government.[114] This is not met by a mere "hunch."[115] A

107. *Id*.

108. *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring).

109. Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

110. Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOY. L. REV. 217, 228 (2007).

111. *Id.*; *see also In re Winship*, 397 U.S. at 362–63 ("Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."). It should be noted that despite the Court's presumption of the clarity of its prior decisions, the beyond a reasonable doubt standard was not a settled constitutional requirement in criminal cases before *Winship* was decided. Chauvin, *supra* note 110.

112. *In re Winship*, 397 U.S. at 363 (emphasis added).

113. *Id*. at 364.

114. *See* Terry v. Ohio, 392 U.S. 1, 4 (1968).

115. *Id*. at 27.

suspicion is "reasonable" when it is based on "specific and articulable facts" and such inferences which an officer is entitled to make by virtue of his experience in law enforcement.[116] An actual arrest must instead generally meet, on judicial review, a standard of probable cause.[117] This standard is met when the evidence is sufficient to "warrant a man of reasonable caution in the belief that" a crime is being committed.[118] Probable cause is also the standard at a grand jury.[119] These, as well as other, more obscure standards, are not used at trial for actual findings of fact.[120]

There is another standard, though, which rests between preponderance of the evidence and beyond a reasonable doubt and is sometimes appropriate for findings of fact at trial. The clear and convincing evidence standard usually applies when the stakes of the finding are somewhat more than that of a civil suit but somewhat less than a criminal conviction.[121] A typical application of the clear and convincing standard is a civil case involving "quasi-criminal" wrongdoing by the defendant, such as fraud.[122] In such cases, "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money, and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[123]

The standard is also applied in circumstances to "protect particularly important individual interests in various civil cases," because due process is implicated.[124] These cases of "particularly important interest" include deportation,[125] denaturalization,[126] civil commitment,[127] findings of

116. *Id.* at 21, 27.

117. The discussion of probable cause in police investigations is complex, nuanced, multi-faceted, and not relevant for this discussion.

118. Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

119. For an analysis of the justifications, powers, and weaknesses of the grand jury system, see Ric Simmons, *Re-Examining the Grand Jury: Is There Room For Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1 (2002).

120. Essentially, any finding of reasonable suspicion or probable cause is merely a gateway to the later trial, where the trier of fact reviews under a different standard.

121. *See*, *e.g.*, Addington v. Texas, 441 U.S. 418, 425 (1979).

122. *Id.* at 424.

123. *Id.*

124. *Id.*

125. Woodby v. INS, 385 U.S. 276, 285–86 (1966).

126. Chaunt v. United States, 364 U.S. 350, 353 (1960) (quoting Schneiderman v. United States, 320 U.S. 118, 125 (1943)).

127. *Addington*, 441 U.S. at 431–32 (collecting state statutes).

actual malice in libel suits by public plaintiffs,[128] termination of parental rights,[129] and in deciding whether to grant an incompetent person's alleged wish to terminate medical treatment.[130] If the interests at stake are more substantial than mere loss of money and the conduct rises to at least "quasi-criminal," then there is a strong argument that due process can only be satisfied by, at the minimum, the clear and convincing standard.

B. Criminal or Civil?

The discussion of standards of proof is only relevant in the context of university sexual assault adjudications after an additional question: is the penalty handed down a criminal one or a civil one? This question matters because preponderance of the evidence would be inappropriate to convict someone of a crime and apply a criminal punishment. Answering this question depends on the specific conduct being alleged. Allegations of forcible rape clearly implicate criminal statutory offenses beyond the scope of the administrative proceedings on college campuses. Forcible rape—intercourse without consent by means of physical force—was a crime at common law, and is the ground floor for modern statutory constructions of rape found in all fifty states.[131] However, the research that has been performed suggests that a majority of campus sexual assaults involve victim intoxication.[132]

The problem posed by intoxicated non-consent is that criminal offenses do not always draw the "unable to consent" line in the same place as the drafters of campus policies. For example, New York State requires the level of intoxication to rise to physical incapacitation before the victim is legally unable to consent.[133] Recent changes to the policies of the State University of New York (SUNY), however, require

128. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)).

129. Santosky v. Kramer, 455 U.S. 745, 769 (1982).

130. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280 (1990).

131. Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1090–95 (2007).

132. KREBS ET AL., *supra* note 77, at 5-16 (2007). The study found that, of the respondents who reported being sexually assaulted, 80.5% admitted to consuming alcohol, and 70.9% admitted being drunk. *Id.* The study also found that 14.6% of victims had consumed drugs, either intentionally or without consent, although the study did not clarify to what degree this 14.6% overlapped with alcohol usage. *Id.*

133. New York's criminal sex offenses do not, in fact, explicitly mention alcohol or other intoxication at all. Inability to consent based on intoxication is derived from Penal Law section 130.05, which reads in part: "A person is deemed incapable of consent when he or she is . . . (c) mentally incapacitated; or (d) physically helpless." N.Y. PENAL LAW § 130.05 (Consol. Supp. 2000).

"affirmative consent" in order for intoxicated consent to be valid.[134] This is a much higher standard than that of the criminal law. As of July 2015, this standard now applies to private colleges in New York State as well.[135] Affirmative consent is a no means no; silence means no; only yes means yes formulation of consent.[136] The "yes means yes" approach has become much more prevalent in recent years, and its momentum appears to be gaining.[137]

In states with criminal laws similar to New York's, university policies often define the offense more broadly than the criminal offense, and so a victim may be legally capable of consenting but still unable to consent for the purposes of the campus sexual assault policy. Taking New York State and SUNY as an example, if a complainant is intoxicated but can nonetheless walk, talk, and otherwise function, he or she is capable of consent according to New York State Penal Law. But any individual engaging in sex with that person could still be adjudicated responsible by SUNY and penalized in accordance with the affirmative consent rule. If the state criminal law is like that of California, which does not require total incapacitation to find intoxicated incapacity to consent, then this discrepancy is less significant in that state.[138] Nevertheless, the affirmative consent standard being instituted statewide in both California and New York universities is a much lower hurdle.[139] The fact that the standards of proof have been lowered concurrently with the heightening

134. *See* Memorandum from Nancy L. Zimpher, Chancellor, State Univ. of N.Y., to the Bd. of Trs., State Univ. of N.Y. (Oct. 2, 2014), http://www.suny.edu/media/suny/content-assets/documents/boardoftrustees/memos/Sexual-Assault-Response-Prevention-REVISED.pdf; *see also Governor Cuomo Announces First-Ever Statewide, Uniform Policy to Combat Sexual Assault on New York College Campuses*, SUNY NEWS (Oct. 2, 2014), http://www.suny.edu/suny-news/press-releases/october-2014/10-2-14-gov-sex-assault-policy/governor-cuomo-announces-first-statewide-uniform-policy-to-combat-sexual-assault.html.

135. *Governor Cuomo Signs "Enough is Enough" Legislation to Combat Sexual Assault on College and University Campuses*, N.Y. STATE (July 7, 2015), https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university.

136. Quinn Cummings, *The Most Game-Changing Part of the 'Affirmative Consent' Law*, TIME (Oct. 1, 2014), http://time.com/3453656/affirmative-consent-law-silence/.

137. *See id.*

138. CAL. PENAL CODE § 261 (West 2014). On the other hand, perhaps it is just as much a problem in California. California law *does* allow a defense of "reasonable mistake as to consent," Act of Sept. 28, 2014, ch. 748, 2014 Cal. Stat. 4920, which is incompatible with the newly promulgated standards.

139. It is worth noting that the "affirmative consent" movement has developed concurrently with the push to use a lower standard of proof, and for the same reasons. The practical effect of an affirmative consent rule is that it becomes easier for a victim to see her alleged attacker punished, because she no longer needs to prove that she said no; it becomes much more difficult for the alleged attacker to claim that he mistakenly perceived consent.

of standards for proper consent only serves to compound the procedural problems and the potential for abuse. If someone were to falsely accuse another student of sexual assault, not only would that person's burden be lower as to the elements they needed to prove, but the requirements of those elements themselves would be lower.

This creates situations in which the university is investigating and penalizing conduct which does not rise to the level of the criminal offense that could follow from nearly identical conduct. In cases such as these, that are arguably the majority of sexual assaults which occur on college campuses today, students are accused, tried, and penalized based on policies which do not allege criminal conduct.[140]

It is only problematic that universities designate non-criminal conduct as "sexual assault" if they are penalizing that non-criminal conduct with a criminal punishment. It would be acceptable if a college punished a criminal act with a civil penalty, because the elements of civil claims often overlap with criminal offenses, and criminal conduct can often give rise to both criminal and civil penalties.[141] A rape victim may pursue a sexual battery suit in addition to the rape charges.[142] The American legal system is not a stranger to this duality. Put simply, if universities are applying merely civil penalties, then there is no problem with a campus policy that penalizes both criminal sexual conduct and a broader range of acts which would not meet the criminal elements necessary to prosecute. If the punishment is criminal, however, then not only is it inappropriate to punish non-criminal conduct, it is also inappropriate to use the civil preponderance of the evidence standard of proof.

The difference seems simple: in civil suits, the result is usually monetary damages or injunctive relief, while criminal charges often result in imprisonment, probation, or a stigmatizing criminal record. But the distinction is not so easily made. While money predominately changes

140. This is not surprising, nor is it problematic per se. Universities are of course free to define whatever conduct they like as a violation of their campus codes of conduct. There is nothing inherently wrong with a university creating campus policies that are more restrictive than the law. Many campus conduct policies, especially at private universities, forbid conduct which is perfectly legal under state and federal laws. For example, many private universities restrict speech beyond what would be allowed by a state actor under the First Amendment. For an analysis of university speech restriction, see generally Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145 (2010).

141. The case of O.J. Simpson is the most immediately recognizable example.

142. *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 58 (2006) ("[T]he number of civil cases being litigated by sexual assault victims has increased dramatically, perhaps exponentially . . . .").

hands at the conclusion of a civil case, the mere fact that a defendant is ordered to pay does not mean the case was a civil one. Criminal offenses often include fines,[143] criminals are sometimes required to make restitution to their victims,[144] and criminal defendants often face significant pecuniary loss from crime-related forfeitures.[145] Ambiguous penalties such as civil forfeiture (which is nominally civil but straddles the line where it results from an allegation of criminal conduct) further muddy the waters.[146]

Whether a particular penalty is civil or criminal is a matter of statutory interpretation.[147] The Supreme Court uses a two-step inquiry when determining whether a statutory penalty is criminal or civil for the purposes of the Double Jeopardy Clause and the Fifth Amendment.[148] Under the Double Jeopardy Clause, a defendant may not be punished a second time criminally.[149] The Fifth Amendment's self-incrimination clause only applies in criminal cases.[150] Of course, the Court must define what it means to be "punished criminally." First, the Court has traditionally asked whether the legislature that created the law either expressly or impliedly indicated a preference for one designation or the other.[151] However, the label itself is not determinative, and even a penalty explicitly intended as civil may in fact be criminal if the penalty is "so

143. Recall that the Eighth Amendment, full of protections for criminal defendants, expressly forbids excessive fines. U.S. CONST. amend. VIII. In order for a civil penalty to come under this clause, it must be sufficiently punitive. *See* United States v. Ursery, 518 U.S. 267, 278 (1996) (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984)).

144. *See* Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 94 (2014).

145. *See* David J. Fried, *Criminal Law: Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 420 (1988).

146. Civil forfeiture, which has seen significant media attention recently, is technically civil but is only triggered on suspicion of criminal activity. *See* Boyd v. United States, 116 U.S. 616, 634 (1886) ("[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."). *Boyd* and its progeny seem to classify these types of forfeitures as quasi-criminal. *See, e.g.*, *id.*

147. *See, e.g.*, United States v. Ward, 448 U.S. 242, 244, 248 (1980) (interpreting whether the Federal Water Pollution Control Act created a civil or criminal penalty for the purposes of the Fifth Amendment's privilege against self-incrimination). The *Ward* test was briefly modified by United States v. Halper, 490 U.S. 435, 447–48 (1989), but *Halper* has since been overruled by Hudson v. United States, 522 U.S. 93, 101–02 (1997), which reaffirmed the *Ward* test.

148. *Ward*, 448 U.S. at 248.

149. Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

150. *Ward*, 448 U.S. at 248.

151. *Id.* (citing One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 236–37 (1972)).

punitive either in purpose or effect as to negate that intention."[152] Deportation is an example of a penalty which, while civil, the Supreme Court has treated differently than other civil penalties, because it is "severe" and "intimately related to the criminal process."[153]

In making the second determination, the Court has found the seven factors from *Kennedy v. Mendoza-Martinez* instructive:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[154]

None of these factors is determinative alone, because they "may often point in differing directions."[155]

There may also be substantial overlap between the purposes of civil (remedial) and criminal (retributive or deterrent) penalties. All civil penalties are to some degree deterrents.[156] That does not render all civil penalties criminal in fact.[157] However, based on the *Kennedy* factors, a civil sanction may be so punitive that it transforms what was originally intended to be civil into a criminal punishment.[158] Importantly, the *Kennedy* factors, while worthwhile in this analysis, do not constitute an exhaustive list.[159] Rather, the factors illustrate the idea that the degree to which a penalty is punitive rather than remedial affects whether it is civil or criminal.

There are also some quasi-criminal penalties which, while technically civil, are scrutinized more closely because they implicate

152. *Id.* at 248–49 (citing Flemming v. Nestor, 363 U.S. 603, 617–21 (1960)).

153. Padilla v. Kentucky, 559 U.S. 356, 365 (2010). For another example, civil commitment, see Addington v. Texas, 441 U.S. 418, 433 (1979) ("[T]he proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.").

154. Hudson v. United States, 522 U.S. 93, 99–100 (1997) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)) (internal quotation marks and punctuation omitted).

155. *Kennedy*, 372 U.S. at 169.

156. *Hudson*, 522 U.S. at 102 (citing Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777, n.14 (1994)).

157. *Id.*

158. United States v. Ward, 448 U.S. 242, 249 (1980) (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

159. *Id.* at 250.

important interests. Civil commitment proceedings, for example, cannot use the civil preponderance of the evidence standard and still comport with due process, because civil commitment, while not criminal imprisonment, does encroach on the substantial interest of the individual's freedom.[160] The Supreme Court has held that a stigmatizing effect can render an otherwise civil penalty "quasi-criminal" and require closer scrutiny.[161]

C. Applying the Standards to Campus Sexual Assault Procedures

The actual punishment rendered after a college investigates and prosecutes an allegation of sexual assault varies from case to case and from school to school. It is a given, though, that expulsion is on the table as a direct penalty. Additionally, there are significant collateral consequences, sometimes even from the mere accusation itself. When such allegations are leveled at a faculty member, even a false accusation can ruin the faculty member's career.[162]

When leveled at students, the cost can be severe reputational damages. Yale quarterback Patrick Witt was informally accused of sexual assault by his ex-girlfriend in 2012, via a university procedure allowing informal complaints that were supposedly confidential and did not trigger a fact-finding process.[163] At the time, he was a Rhodes Scholarship finalist, had a job offer from a prestigious firm, and hoped to be drafted by the NFL.[164] No investigation was ever conducted, and he was unable to offer any defense.[165] The supposedly confidential allegation was leaked to the media, his job offer was revoked, and Rhodes withdrew him

160. *See* Addington v. Texas, 441 U.S. 418, 425, 427–28 (1979).

161. *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). Although in this case the parties stipulated that the ordinance in question was "quasi-criminal," the Court nevertheless implied that because the "prohibitory and stigmatizing effect" was clear, it would have found the ordinance to be "quasi-criminal" without the stipulation. *Id.* Various courts have since interpreted *Hoffman* to hold that an ordinance or law may become "quasi-criminal" because of these effects. *See* Delgado v. Souders, 46 P.3d 729, 747 (Or. 2002); State v. Kramsvogel, 369 N.W.2d 145, 159 (Wis. 1985).

162. FIRE Survey, *supra* note 91 (quoting Letter from Ann E. Green, Chair, Am. Ass'n Univ. Professors, & Cary Nelson, President, Am. Ass'n of Univ. Professors, to Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Aug. 18, 2011), https://www.thefire.org/pdfs/be5df1a71d0eae6b7b840a2ecdb01bb9.pdf).

163. Darren Boyle, *'Yale Policy Ruined My Life': Star Quarterback's NFL Hopes Dashed, Job Offer Withdrawn and Rhodes Scholarship Chance Evaporated Thanks to Ex-Girlfriend's 'Informal' Sexual Harassment Claim*, DAILY MAIL ONLINE (Nov. 6, 2014, 4:07 AM), http://www.dailymail.co.uk/news/article-2823220/Yale-s-sexual-harassment-policy-ruined-life-Star-quarterback-denied-ability-clear-ex-girlfriend-lodged-informal-complaint.html.

164. *Id.*

165. *Id.*

from contention.[166] While this example does not implicate the same problems as cases in which a hearing is conducted, it is illustrative of the severity of collateral consequences stemming from this type of allegation. This reputational damage may be even greater in the result of a campus "conviction."[167] This potential to ruin lives rides on top of an independently significant financial loss—the student's already paid tuition.

Based merely on the possible punishments, the clear and convincing evidence standard is arguably the minimum requirement of due process. As the Supreme Court has said, the reason why clear and convincing evidence is often required in fraud cases is that "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money" and that in order to "reduce the risk to the defendant of having his reputation tarnished erroneously" it is sometimes necessary to place on the plaintiff a burden of proof more stringent than what is typical for other civil cases.[168]

Students accused of sexual assault are at an even greater risk of having their reputations "tarnished erroneously" than if someone were falsely found liable for fraud. Shouldn't such students be just as protected by a higher standard? The bald truth is that college campuses are, generally speaking, ill-equipped to investigate such serious accusations. "Civil trials are governed by longstanding procedural rules that carefully balance access to judicial remedies with protections against frivolous claims and ensure that relevant evidence is heard and evaluated, that an accurate verdict is reached, and that decisions are impartial and final."[169] College investigations, on the other hand, are without such protections.[170]

At Harvard University, for example, "investigation, prosecution, fact-finding, and appellate review [are housed] in one office, and . . . that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial."[171] Students are rarely allowed the

166. *Id.*

167. In 2014, a Brown University student was forced to withdraw after being suspended for a year for what his attorneys called "unsupported allegations of strangulation and violent rape." Anderson, *supra* note 2. He was never charged with a crime, but was identified by the student newspaper and his reputation may have been "forever tarnished." *Id.*

168. Addington v. Texas, 441 U.S. 418, 424 (1979).

169. FIRE Survey, *supra* note 91.

170. It is certainly concerning that the investigating university is an interested party. Its reputation as an institution is determined in part by how they handle sexual assault cases. Even if the particular adjudicator in a case is impartial, the system may not be. This concern suggests another reason for raising the standard to protect falsely accused students.

171. Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-

assistance of an attorney, and even if an attorney is allowed to be present, the attorney may not speak for the accused student.[172] Accused students have no right to see the evidence against them, and some procedures make it difficult or impossible for students to confront their accusers or present a defense.[173] The hearings do not follow the same rules of evidence as criminal courts would, and are often presided over by individuals with improper or insufficient training.[174] As Charles B. Wayne, an attorney involved in a lawsuit challenging a university's procedure, has said, "the assumption that a 19-year-old can defend himself without counsel against rape charges is absurd."[175]

The problems are compounded by the fact that, in such cases, there is often no physical evidence, and only two witnesses: the accuser and the accused. The proceeding then comes down to one question: who of the two is more believable? This question is put to individuals with no legal background and without the filtering functions that judges and rules of evidence serve when juries are faced with a similar question. And the question may never be put to a jury: colleges are not required to report these allegations to local authorities at all.[176]

Because of the magnitude of reputational damages, and the otherwise scant protections for students accused of sexual assault, the clear and convincing standard is necessary to protect the due process rights of accused students. Furthermore, the DCL itself (and similar state legislation) violates due process by requiring colleges to violate the due process rights of their students.[177] While sexual assault on college campuses is abhorrent and a solution is necessary, such a solution should not come at the cost of the rights and reputations of those who are accused

sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

172. *See* Taranto, *supra* note 1.

173. *See* Bartholet et al., *supra* note 171.

174. *See* Taranto, *supra* note 1; *see also* Anderson, *supra* note 2.

175. Anderson, *supra* note 2.

176. This may be changing. Some legislators, such as Eileen Filler-Corn of the Virginia General Assembly, have proposed legislation recently which would require reporting such allegations to local commonwealth attorneys. Ella Shoup & Sara Rourke, *Proposed Bill to Require Campus Police to Report Sexual Assault to Commonwealth Attorney*, CAVALIER DAILY (Jan. 16, 2015, 1:34 AM), http://www.cavalierdaily.com/article/2015/01/proposed-bill-to-require-campus-police-to-report-sexual-assault-to-commonwealth-attorney. That bill in particular has received bipartisan support. *Id.*

177. Although case law on the subject is scant, at least one court has rejected this reasoning in the context of private universities, ruling that the DCL is insufficient by itself to turn such institutions into state actors subject to due process requirements. Doe v. Wash. & Lee Univ., No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, at *22–26 (W.D. Va. Aug. 5, 2015). This issue has not yet been litigated in New York, where state law exists explicitly applying to private colleges.

before their guilt has been fairly determined. Unfortunately, as long as universities are frightened by Title IX, it is uncertain whether anyone with standing to challenge the DCL will ever choose that path over the current path of compliance.

CONCLUSION

Because of a combination between the inherent difficulty in effectively handling rape claims, and the gross inadequacy of procedural protections in college misconduct investigations, a preponderance standard does not adequately protect due process rights of the accused. Although the punishment is not criminal in nature, the stakes are much higher for accused students than mere financial loss, and because of the extreme reputation damage that can be caused merely by an allegation of sexual assault, a clear and convincing standard (at least) is necessary to safeguard the rights of accused students. This is a type of quasi-criminal proceeding, similar to fraud. Furthermore, because the government has imposed this preponderance requirement on schools via the 2011 DCL, and states have legislated to do the same, both have violated due process. In the already muddy waters of the sexual assault discourse, there must be adequate safeguards against possible abuse of a system which is already so easy to abuse. Only the clear and convincing standard can adequately safeguard the rights of the accused.