

RESTORING FAIRNESS TO CAMPUS SEX TRIBUNALS

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I. INTRODUCTION

Pressured by directives from the Obama Department of Education (DOE), colleges and universities across the country hastily revamped their processes of adjudicating sexual assault, making it easier to bring, and prove, charges of sexual misconduct on campus.¹ These changes have generated substantial concern on behalf of accused students. Commentators from both sides of the political spectrum have objected, arguing that the new college misconduct codes are dismissive of the rights of respondents.² In the past few years, respondents found liable for sexual misconduct under the new codes have sued in court, claiming violations of contract or due process. In a number of recent cases, the courts have upheld those claims.³

1. See, e.g., Juliet Eilperin, *Biden and Obama Rewrite the Rulebook on College Sexual Assaults*, WASH. POST (July 3, 2018), https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html?utm_term=.d8976f8e194c.

2. See, e.g., *The Trump Administration's Approach to Rape on Campus Is Welcome*, ECONOMIST (Sept. 14, 2017), <https://www.economist.com/news/united-states/21728966-barack-obamas-government-put-undue-pressure-colleges-secure-convictions-return>; see also KC JOHNSON & STUART TAYLOR JR., *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES* 89 (2017); LAURA KIPNIS, *UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS* 16 (2017). See generally Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016) (discussing the government's growing interest in the sexual lives of college students); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015) (discussing how accused students are subject to low standards of proof and possible hearsay); Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15 (2017) (discussing the government's exertion of pressure on universities to enforce sexual misconduct and whether this violates Due Process).

3. See, e.g., *Doe v. Univ. of S. Cal.*, No. B271834, 2018 WL 6499696, at *1–2 (Cal. Ct. App. Dec. 11, 2018) (finding that accused USC student, who had been found liable for very serious sexual misconduct and expelled as a result, had been denied a fair hearing by the university, where the adjudicator in the case had failed to personally assess the credibility of three key witnesses; the respondent had not been allowed to submit questions for the adjudicator to ask the complainant; and the adjudicator had failed to conduct a fair and thorough investigation as promised in the university's procedures); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1057–58 (Cal. Ct. App. 2018) (finding that accused Claremont McKenna student, who had been found liable and suspended for sexual misconduct, had been denied a fair hearing by the college where the student faced serious consequences if found responsible; the case turned on credibility assessments of the complainant and respondent; and the college had failed to require complainant to appear and to

Now, the Department of Education (under Secretary Betsy DeVos) has responded to those concerns by proposing new Title IX regulations that would substantially amend the Obama-era guidance in the name of fairness and due process.⁴ Subject to review and approval following the notice and comment process of the federal Administrative Procedure Act,⁵ the proposed reforms address a number of issues related to sexual misconduct on campus. Those issues include complainants' and respondents' constitutional rights in this context, definitions of sexual harassment under Title IX, the availability of remedies upon a finding of responsibility, and institutional obligations as to staffing, notice, and dissemination of relevant policies.⁶ With respect to the investigation and adjudication of sexual harassment complaints in particular, the proposed regulation would require school-“recipients” (recipients of federal aid, the institutions covered under the provisions of Title IX) to:

- Narrow the definition of student-on-student sexual harassment under Title IX to include sexual assault or “[u]nwelcoming conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s [school’s] education program or activity.”⁷ (Previous DOE guidance had defined Title IX sex harassment more broadly as “unwelcoming conduct of a sexual nature.”)⁸

answer questions from the adjudicator); *Doe v. Regents of the Univ. of Cal.*, 28 Cal. App. 5th 44, 46 (Ct. App. 2018) (finding that accused student, who had been suspended for two years after being found liable for sexual misconduct under the campus code of the University of California Santa Barbara, had been denied “even a semblance of due process” where the respondent “was denied access to critical evidence; denied the opportunity to adequately cross-examine witnesses; and denied the opportunity to present evidence in his defense”).

4. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018). On November 29, 2018, the Department of Education released its proposed Title IX regulations. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter DOE Proposed Rule].

5. 5 U.S.C. § 553 (2018).

6. DOE Proposed Rule, *supra* note 4, at 5.

7. *Id.* at 18.

8. RUSSLYNN ALI, ASSISTANT SEC’Y FOR CIVIL RIGHTS, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011) [hereinafter DEAR COLLEAGUE LETTER], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. (a significant guidance document regarding Title IX interpretation).

- Hold a live hearing to adjudicate formal complaints. At this hearing, recipients must allow the parties’ “advisor of choice” to cross-examine witnesses—including the complainant and respondent.⁹ (Obama-era DOE guidance did not require a live hearing or the opportunity for cross-examination.)¹⁰
- Structurally separate the investigative, adjudicative, and coordinating functions by forbidding schools from allowing their Title IX coordinators to act as the claim investigator or decision-maker.¹¹ (Prior guidance did not require such separation; for example, it allowed a school’s Title IX coordinator to also act as investigator and decision-maker.)¹²
- Apply the correct standard of proof—either the preponderance of the evidence standard or clear and convincing evidence standard. The new guidance forbids the use of the preponderance standard in sexual harassment cases unless the school (1) also uses that standard to adjudicate misconduct in areas other than sexual harassment but which carry the same maximum penalty, and (2) uses that same standard of evidence in cases involving complaints against employees of the recipient, including faculty.¹³ (Previous guidance required schools to use the preponderance standard.)¹⁴
- Treat both complainants and respondents “equitably.” Equitable treatment would mean that, in cases involving a formal complaint where a respondent is found liable, recipients must offer complainants remedies “designed to restore or preserve access to the recipient’s educational program or activity”; and recipients must offer respondents due process protections before imposing any disciplinary sanctions.¹⁵

9. DOE Proposed Rule, *supra* note 4, at 52.

10. *See generally* DEAR COLLEAGUE LETTER, *supra* note 8.

11. DOE Proposed Rule, *supra* note 4, at 63–64.

12. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014) [hereinafter QUESTIONS AND ANSWERS], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

13. DOE Proposed Rule, *supra* note 4, at 62.

14. DEAR COLLEAGUE LETTER, *supra* note 8, at 11.

15. DOE Proposed Rule, *supra* note 4, at 135.

- Evaluate evidence objectively, impartially, and without any bias based on a party's status as complainant or respondent.¹⁶
- Ensure that college or university personnel who investigate or adjudicate such complaints are properly trained using materials which “promote impartial investigations and adjudications of sexual harassment.”¹⁷
- Apply a presumption of non-responsibility in favor of respondents prior to the conclusion of adjudication.¹⁸
- Bear the burden of proof and of producing sufficient evidence, and ensure that those burdens do not fall upon either the complainant or the respondent.¹⁹
- Give appropriate notice of the complaint and of relevant procedures, and grant the parties equal access to relevant evidence uncovered during the recipient's investigation of the complaint.²⁰

The proposed rule strikes a familiar balance, seeking to respect allegations of sexual misconduct while also protecting the rights of the accused.²¹ But the conversation about sexual harassment on

16. *Id.* at 135–36.

17. *Id.* at 136.

18. *Id.* at 41.

19. *Id.* at 46.

20. *Id.* at 48.

21. See, e.g., Betsy DeVos, *Betsy DeVos: It's Time We Balance the Scales of Justice In Our Schools*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsy-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html?utm_term=.21adb8794303 (“Our proposed framework supports survivors while safeguarding due process, helping make Title IX protections against sex discrimination a reality for all students. Indeed, it is difficult to understand how people can object to procedures premised on the foundational concept of due process, or how anybody could have confidence in a system that lacks such protections.”); Susan Kruth, *New Proposed Title IX Regulations Feature Essential Safeguards for Free Speech and Due Process On Campus*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Nov. 16, 2018), <https://www.thefire.org/new-proposed-title-ix-regulations-feature-essential-safeguards-for-free-speech-and-due-process-on-campus/> (DOE's new rules, “if finalized, would help ensure [that schools] afford fair hearings to students accused of sexual misconduct while taking seriously all accusations of such misconduct.”); Daily News Editorial Board, *Lesson Learned: Betsy DeVos (Mostly) Gets Title IX Rules Right*, N.Y. DAILY NEWS (Nov. 19, 2018), <https://www.nydailynews.com/opinion/ny-edit-lesson-learned-on-title-ix-20181116-story.html> (“mostly, DeVos has rebalanced scales that had tipped out of whack.”).

campus takes place against a backdrop in which ideological fervor has precipitated a head-on conflict between victims' rights and procedural fairness. Amid impassioned cries to "Believe Survivors"—a standard which suggests that protecting the rights of the accused is secondary, or even harmful, to achieving just results—it can be difficult to see the very important difference between a political slogan and a fair standard of punishment.²² As a means of calling attention to the social reality of sexual abuse, the call to "Believe Survivors" has been powerful and effective. But as a method of adjudicating individual charges of sexual misconduct, it would be a disaster. Colleges and universities must now recognize this and amend their codes of conduct accordingly.

But how? What constitutes fair process in this context, and do the new DOE rules meet that standard? It can be difficult to see through the fog of political ideology on this topic. But the central issues are actually quite clear. This Article explains why. It also develops a model for fairness-based procedure in the context of college- and university-based sexual misconduct cases, and assesses DOE's proposed reforms under that model. I conclude that the reforms, though not perfect, would go a long way toward restoring fairness to the process of adjudicating sexual assault on campus.

II. BASELINE: THE LAW OF CAMPUS SEXUAL ASSAULT

Any legitimate process for adjudicating campus-based claims of sexual misconduct must persuasively answer three questions:

1. Defining Misconduct: With respect to sexual relationships at colleges and universities, which harms are punishable "misconduct"? Perhaps the easiest response is "All." But the easy answer turns out to be wrong. A fair standard must clearly define "sexual misconduct," and must also clearly delineate related terms (such as "affirmative consent" and "incapacitation") that are central to understanding it.

22. For examples of negative reaction to DOE's proposed rule, see Helen Rosenthal & Mary Haviland, *Campus Sex-Assault Victims, Betrayed: Reject Betsy DeVos' Overhaul of Title IX*, N.Y. DAILY NEWS (Nov. 18, 2018), <https://www.nydailynews.com/opinion/ny-oped-a-huge-step-back-for-campus-sex-assault-victims-20181116-story.html>; Amanda Marcotte, *Betsy DeVos Moves to Demolish Title IX, Silence Sexual Abuse Victims*, SALON (Nov. 16, 2018), <https://www.salon.com/2018/11/16/betsy-devos-moves-to-demolish-title-ix-silence-sexual-abuse-victims/>.

2. Adjudication Process: When a student has been accused of sexual misconduct by another student, what procedural protections and adjudicatory methods are necessary in order to (1) respect the victim's claim; (2) protect the rights of the accused person; and (3) guarantee the integrity of the university process, thus maximizing the chance that it will produce accurate answers on the core question of responsibility? Many of the concerns expressed about recent case outcomes proceed from perceived defects in this area.²³

3. Sanctions: Among the sanctions that are possible in the collegiate setting, what punishments are appropriate for acts of sexual misconduct? Again, responding to a number of well-known cases in which colleges have let offenders off with a slap on the wrist, it is perhaps tempting, now, to embrace the other extreme and make expulsion the default sanction for all cases of sexual misconduct. Some schools have moved that way.²⁴ Most schools, however, still decide sanctions on a case-by-case basis.²⁵ Which is the better model?

For institutions of higher education, the task of creating and enforcing fairness in this area is freighted with historical baggage. Sexual assault is a serious wrong. Colleges and universities have not always treated it that way, sometimes opting to protect unrelated institutional interests at the expense of victims' right to redress.²⁶

23. See, e.g., *infra* text accompanying notes 63, 76, 101 (discussing recent Title IX cases at Northwestern University, Occidental University, and Brandeis University, respectively).

24. See, e.g., Beth Howard, *How Colleges Are Battling Sexual Violence*, U.S. NEWS & WORLD REP. (Aug. 28, 2015, 2:58 PM), <http://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence> ("A growing number of schools are also stiffening penalties for offenders. At Duke, for example, expulsion is now the favored sanction."); Jake New, *Expulsion Presumed*, INSIDE HIGHER ED (June 27, 2014), <https://www.insidehighered.com/news/2014/06/27/should-expulsion-be-default-discipline-policy-students-accused-sexual-assault> ("Colleges facing criticism over their handling of sexual assault allegations debate whether the best policy is to automatically kick out those found guilty."); see also Howard, *supra* note 24. (discussing the policy at Duke University, which makes expulsion the "preferred" sanction in cases where an accused student has been found responsible for sexual misconduct).

25. New, *supra* note 24.

26. See, e.g., Tyler Kingkade, *JMU Sued for Punishing Sexual Assault with 'Expulsion After Graduation'*, HUFFINGTON POST (Mar. 9, 2015, 2:26 PM),

That is a problem and must be fixed. But simply reversing direction—forcing respondents, rather than complainants, to suffer the costs of hasty, reactive, overly politicized adjudications—is hardly an adequate solution. Higher education must craft a standard that treats both parties fairly and produces accurate and just results. Further, the process of investigating and adjudicating claims of sexual misconduct must not only *be* fair; it must also be *perceived* as fair—in other words, the process should be transparent, accessible, and explainable to all members of the community.

Of course colleges and universities lack the power to answer these questions in a vacuum. Although college disciplinary process is not technically “law” (that is, the rules under which campus tribunals operate are not created or enforced by legislatures and courts), formal law has decidedly influenced, and sometimes dictated, those rules. To understand the reality in which campus sexual misconduct cases now operate, we first review some basics about the legal framework that shapes and constrains it.

http://www.huffingtonpost.com/2015/03/09/jmu-sued-sexual-assault_n_6820026.html (discussing a case where a student-plaintiff filed a Title IX action after James Madison University found three male students responsible for sexually assaulting and sexually harassing her, and the school punished them with expulsion after graduation); see also Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>. Bogdanich’s article raised questions about Florida State University’s failure to investigate sexual assault allegations against its star football player Jameis Winston until after football season ended: “The athletic department had known early on that Mr. Winston had been accused of a serious crime. . . . This knowledge should have set off an inquiry by the university.” *Id.* “According to federal rules, any athletic department official who learns of possible sexual misconduct is required to pass it on to school administrators.” *Id.* “Why did the school not even attempt to investigate the matter until after the football season?” said John Clune, another lawyer for the accuser.” *Id.* Bogdanich’s article also quoted from an interview with former Florida prosecutor Adam Ruiz. *Id.* Discussing a sexual assault allegation at F.S.U. that he had prosecuted a decade before the Jameis Winston case, Mr. Ruiz told *The New York Times*: “I learned quickly what football meant in the South Clearly, it meant a lot. And with respect to this case I learned that keeping players on the field was a priority.” *Id.*

A. The Law of Campus Sexual Assault

The law exerts a significant, but complex, influence on the creation and implementation of campus sexual misconduct codes. First, as numerous lawsuits now demonstrate,²⁷ the courts often serve as the ultimate venue of appeal in cases where either party to a sexual misconduct allegation feels wronged by the on-campus process. Second, the courts, the police, and campus personnel must often follow legal rules that regulate their interaction with each other in these cases.²⁸ Third, formal law increasingly mandates particular answers to such core questions as what constitutes sexual misconduct on college campuses, how such misconduct should be investigated and adjudicated, and what sanctions should be imposed when an accused student is found responsible.²⁹ Title IX of the Civil Rights Amendment Act of 1972 is, obviously, a major source of positive law in this area, and I discuss that further below.³⁰ First, however, several other relevant legal sources should be named.

27. See, e.g., *supra* note 3 and accompanying text (discussing lawsuits filed by students protesting sanctions imposed on them by college hearing panels in sexual misconduct cases). Of course, complainants are also filing suits against universities, often on the ground that the university mishandled their allegation of sexual misconduct against another student. See, e.g., Edwin Rios & Madison Pauly, *This Explosive Lawsuit Could Change How Colleges Deal With Athletes Accused of Sexual Assault*, MOTHER JONES (Mar. 3, 2016, 11:00 AM), <http://www.motherjones.com/politics/2016/03/sexual-assault-case-against-university-tennessee-explained> (discussing a lawsuit by eight college women who claim that the University of Tennessee mishandled their sexual assault allegations against football and basketball players at the school).

28. See, e.g., Ashe Schow, *New Campus Sexual Assault Laws Go into Effect in Virginia*, WASH. EXAMINER (July 2, 2015, 1:08 PM), <http://www.washingtonexaminer.com/new-campus-sexual-assault-laws-go-into-effect-in-virginia/article/2567530> (discussing new state statutes in Virginia that compel reporting of sexual misconduct by university employees and regulate interaction between campus police and local law enforcement).

29. Perhaps responding to this proliferation of law, the American Law Institute has recently entered the fray. The A.L.I.'s campus-rape project will produce suggested guidelines for universities, legislatures, and courts charged with creating and enforcing campus sexual misconduct codes. See Sarah Brown, *How a Prominent Legal Group Could Change the Way Colleges Handle Rape*, CHRON. HIGHER EDUC. (Dec. 4, 2015), <http://chronicle.com/article/How-a-Prominent-Legal-Group/234467>.

30. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2018); see also *infra* Part II.A.3.

1. Constitutional Due Process

Due process, in the formal constitutional sense, is of clear but limited use in designing college sexual misconduct codes. Although public colleges and universities are considered government actors and must therefore comply with the commands of due process,³¹ the concept itself (as interpreted by the U.S. Supreme Court and lower courts) is famously flexible and context-dependent. Under the test outlined in the Supreme Court's go-to case *Mathews v. Eldridge*,³² the amount of process that is "due" in any particular setting "requires consideration [by courts] of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail."³³ The test captures the bedrock intuition that where a defendant's private interest is large and the risk of wrongful results is great, protective procedures are warranted unless the government can articulate an interest of overriding importance.

In the educational setting, courts have made clear that due process is relevant but does not necessarily mandate the full panoply of procedural rights accorded to criminal defendants. For example, courts have ruled that *some* process is "due" to students charged with disciplinary violations of their public school's code of conduct. In the 1975 case of *Goss v. Lopez*,³⁴ a group of high school students sued their school claiming that their suspensions violated due process. The U.S. Supreme Court's ruling in the case set a due process "floor" consisting of three fundamental requirements. At

31. Private universities are not government actors and are therefore not bound by the constitutional commands of due process; but, they are constrained by the law of contract to keep promises they have made to students (for example, promises to investigate or adjudicate disciplinary cases in a certain way) and to follow their own rules in good faith. *See, e.g.*, HARVEY A. SILVERGLATE & JOSH GEWOLB, FIRE'S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE 41–56 (William Creeley ed., 2014), <https://www.thefire.org/first-amendment-library/special-collections/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/>; *see also* DEAR COLLEAGUE LETTER, *supra* note 8 (acknowledging the constitutionally based due process obligation of public colleges and universities).

32. 424 U.S. 319 (1976).

33. *Id.* at 321.

34. 419 U.S. 565 (1975).

minimum, the Court held, a public school student facing disciplinary action of this kind must “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”³⁵ Although *Goss* itself involved high school students,³⁶ the Supreme Court’s opinion in the case took favorable notice of an earlier Fifth Circuit case, *Dixon v. Alabama State Board of Education*, involving a due process appeal by college students who had been expelled from Alabama State College without a hearing.³⁷ In *Dixon*, the Fifth Circuit held that “the State cannot condition the granting of even a privilege [such as a college education] upon the renunciation of a constitutional right to due process.”³⁸

In *Goss v. Lopez*, the longest student suspension was ten days.³⁹ Notably, the Court opined that in cases threatening more serious sanctions, due process “may require more formal procedures.”⁴⁰ Thus, the “floor” is not also a ceiling—a fact that is relevant in the context of campus sexual assault cases where the punishment for a finding of liability can include sanctions (such as expulsion and notations on transcripts and registrar’s records) that not only end a student’s education at the adjudicating college but as a practical matter, may end the student’s opportunity to get a college education at all.⁴¹

A number of recent lower-court cases have specifically addressed the due-process rights of respondents in cases of sexual misconduct under Title IX. For example, in two Sixth Circuit cases, *Doe v. University of Cincinnati*⁴² and *Doe v. Baum*,⁴³ the court ruled that in cases that centrally involve credibility judgments about the testimony of witnesses, due process requires public universities to permit the accused to cross-examine the accuser and other adverse witnesses.⁴⁴

35. *Id.* at 581.

36. *Id.* at 567.

37. 294 F.2d 150, 151–52 (5th Cir. 1961).

38. *Id.* at 156.

39. *Goss*, 419 U.S. at 584–85 (Powell, J., dissenting).

40. *Id.* at 584.

41. *See, e.g.*, SILVERGLATE & GEWOLB, *supra* note 31, at 41–56

42. *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

43. *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

44. *Id.* at 578 (“[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”).

In the spirited national conversation about this subject, the concept of “due process” has perhaps created more confusion than clarity. Attorneys and legal scholars tend to employ the term in a technical sense, referring to the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution, and to the body of Supreme Court precedent which has grown up around them.⁴⁵ But in a broader sense, the calls for due process invoke a normative standard to which (for example) the constitutional distinctions between public and private colleges and universities is irrelevant. That standard concerns the relationship between process and punishment. It’s a relationship whose fullest expression appears in the criminal law, but which is ultimately grounded in the more general concept of fairness. The core idea is simple: When institutions set out to punish individuals for an offense, they have a moral obligation (rooted in fairness) to accord the accused person the fullest possible rights and protections against the possibility of wrongful conviction.

2. Statutes Specifically Targeting Campus Sexual Misconduct

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), passed in 1990, required colleges and universities receiving federal aid to collect and publish information about crimes, including sex crimes, that occur on campus.⁴⁶ The Act has since been amended for the purpose of prompting aid-receiving higher education institutions to develop policies specifically targeting sexual assault, and to include requirements that said institutions report the incidence of stalking, domestic violence, and dating violence.⁴⁷

45. U.S. CONST. amends V, XIV; *see, e.g.*, Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15 (2017) (arguing that constitutional rules surrounding “state action” doctrine should apply to private as well as public colleges and universities); Jim Newberry, *After the Dear Colleague Letter: Developing Enhanced Due Process Protections for Title IX Sexual Assault Cases at Public Institutions* (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166561) (outlining a “vision for due process” which “generally focus[es] on the due process obligations of public institutions” under the state action doctrine, but urging private institutions to adopt the same framework).

46. 20 U.S.C. § 1092(f) (2018).

47. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (codified as amended at 20 U.S.C. § 1092 (2018)); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 20 U.S.C. § 1092 (2018)).

More recent federal and state statutes have specifically responded to the national debate about sexual assault on campus and the Obama Administration's approach to it. State legislatures and the U.S. Congress have considered or passed statutes addressing the problem.⁴⁸

3. Title IX and DOE Regulation

Most of the pressure to amend college and university sexual misconduct codes came from a third source of law: federal regulations, specifically those enforced by the DOE as part of Title IX.⁴⁹ Title IX itself simply states: "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."⁵⁰ Over the years since the statute was enacted, a series of interpretations by the DOE's Office for Civil Rights (OCR) specified that sexual harassment, including harassment which creates a "hostile environment," counts as sex discrimination under Title IX; that student-upon-student harassment is covered; and that covered institutions of higher education must create procedures for ending such harassment.⁵¹ During the Obama Administrations, OCR kicked it up a notch, pressuring colleges and universities to make their processes more complainant-friendly by launching probes into non-compliant institutions and threatening to withdraw their federal funding if they refused.⁵² By early 2017, more than 200

48. See, e.g., Heather Mongilio, *Va. Campus Sexual Assault Bills Signed Into Law*, ARL NOW (May 29, 2015, 1:15 PM), <https://www.arlnow.com/2015/05/29/va-campus-sexual-assault-bills-signed-into-law/>. California and New York have enacted "affirmative consent" statutes mandating that all institutions receiving certain state financial support enact policies which that conform. See CAL. EDUC. CODE § 67386 (West 2012); N.Y. EDUC. LAW § 6441 (McKinney 2018); see also Campus Accountability and Safety Act, S. 590, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/590/text>; Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3403/text>.

49. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018).

50. *Id.*

51. For a detailed discussion of the evolution of Title IX regulation, see Gersen & Suk, *supra* note 2, at 897–905.

52. See, e.g., Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1062–67 (2015) (describing DOE's efforts to light a fire under colleges and universities on this issue). In 2011, the DOE penned its famous Dear Colleague letter, which launched the

institutions of higher education were under investigation by OCR for alleged violations of the civil rights of students in sexual assault cases.⁵³ The Obama OCR made clear that (1) it considered sexual violence to be actionable under the Department's Title IX mandate to fight education-based gender discrimination;⁵⁴ and (2) it had a detailed and continuing interest in overseeing university processes for investigating and punishing sexual misconduct on campus.⁵⁵ During the Obama years, OCR took the view that, as the subject of civil litigation under the sexual harassment provisions of Title IX, allegations of sexual assault on campus should be adjudicated independently of the criminal process and may feature fewer procedural protections for accused persons than would be required for criminal charges.⁵⁶ In its now-famous Dear Colleague letter of

modern era of sexual misconduct regulation by laying down specific rules and guidance to colleges and universities as to its policies and procedures in this area. See generally DEAR COLLEAGUE LETTER, *supra* note 8.

53. See, e.g., Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm_term=.0ecb3b2cc79c.

54. "Title IX of the Education Amendments of 1972[, 20 U.S.C. §§ 1681–1688 (2018)], and its implementing regulations, [34 C.F.R. § 106 (2018)], prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities . . . in meeting these obligations, [the Dear Colleague letter] explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence." DEAR COLLEAGUE LETTER, *supra* note 8, at 1.

55. See generally DEAR COLLEAGUE LETTER, *supra* note 8 (requiring that beneficiaries of federal financial assistance conform to Title IX).

56. *Id.* at 10 ("Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably."); see also Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294 ("The history of Title IX illuminates a fact that is too often overlooked in conversations about campus rape today: University adjudication is neither a substitute for nor a direct parallel to the criminal justice system. After all, student-victims can report to both their universities and the police; the two systems are not mutually exclusive.

April 2011, OCR instructed the approximately 7,000 colleges and universities that accept federal aid to use the lowest possible standard of proof (preponderance of the evidence) in adjudicating complaints of sexual assault; discouraged institutions from allowing respondents or their advocates to cross-examine witnesses; allowed complainants as well as respondents to appeal not-responsible verdicts (thereby potentially subjecting respondents to the institutional equivalent of double jeopardy); and set down a time table of sixty days during which schools should, in general, adjudicate and dispose of each case.⁵⁷ In subsequent guidance, OCR made clear that schools could authorize their Title IX coordinators to investigate complaints and to determine sanctions and supportive measures upon findings of responsibility.⁵⁸

The Obama OCR also made clear that colleges and universities must have an independent process for adjudicating these cases—that it would not be acceptable, for example, for a college to simply defer all complaints of sexual assault on campus to the police and the criminal system. This federal mandate—that colleges must investigate and decide these cases themselves—essentially forced institutions of higher education to independently adjudicate sexual misconduct complaints or face the possibilities of federal investigation and loss of federal funding.⁵⁹

In response, colleges and universities overhauled their sexual misconduct codes in accordance with the 2011 letter and other OCR guidance documents that followed.⁶⁰ By 2015, many had begun to implement the new codes. The results thus far have been decidedly mixed. While some empirical evidence suggests that the number of sexual assault claims has risen on campuses nationwide⁶¹—a

Campus adjudication is a separate antidiscrimination right protecting students' access to educational opportunities at their schools, unburdened by historical and persistent gender-based disparities. (In this way, Title IX mirrors not the criminal justice system but Title VII, the federal workplace antidiscrimination law that recognizes the particular impediments to equality that may arise in an employment context and which requires employers to respond to violence reports.)”).

57. See generally DEAR COLLEAGUE LETTER, *supra* note 8.

58. QUESTIONS AND ANSWERS, *supra* note 12, at 11.

59. See DEAR COLLEAGUE LETTER, *supra* note 8, at 4 (“[T]he school’s Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.”).

60. See, e.g., QUESTIONS AND ANSWERS, *supra* note 12.

61. See, e.g., Max Kutner, *U.S. Students Filed Record 10,000 Civil Rights Complaints Last Year*, NEWSWEEK (May 4, 2016, 4:49 PM), <http://www.newsweek.com/department-education-office-civil-rights-report-455752>.

possible indication that victims now feel more comfortable bringing such claims forward—serious concerns about the accuracy, transparency, impartiality, and overall fairness of campus-based adjudications have also been expressed.⁶²

B. Some Troubling Cases

A few recent Title IX cases (a hostile environment case that did not involve a charge of sexual assault and three other cases that did charge sexual assault) offer a better sense of where things stand today.

Case 1. A feminist professor at a top university, published an article about “sexual paranoia” on campus, arguing that a recently enacted sexual misconduct code at the university had “infantilized” students and could reinforce invidious stereotypes of women.⁶³ In response to the piece, two graduate students at the university filed a Title IX claim against the professor on the ground that her article violated the university’s sex harassment policy.⁶⁴ The university’s president announced that he would consider the petition.⁶⁵ Some two weeks later, the campus Title IX administrator informed the accused professor of the action against her, adding that (1) the university had retained outside counsel who would question her about her article; (2) she (the professor-respondent) had no right to an attorney and would be limited to assistance from a university “support person” who would not be allowed to speak during the proceedings; and (3) she would not be informed of the charges against her before

62. Gersen & Suk, *supra* note 2, at 884; *see also* Jeannie Suk Gersen, *Laura Kipnis’s Endless Trial by Title IX*, NEW YORKER (Sept. 20, 2017), <https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix>. Jacob Gersen and Jeannie Suk’s more general critique of “bureaucratic sex creep”—of which the increasing regulation of sex on campus is a prime example—is also well worth reading in this context. *See generally* Gersen & Suk, *supra* note 2 (providing examples of demographics such as ethnicity being excluded from reports, which prevent the public from recognizing patterns of injustice).

63. Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), <http://chronicle.com/article/Sexual-Paranoia-Strikes/190351/>. The Kipnis case is a case of campus-based sexual harassment, but not sexual assault, under Title IX. *Id.* The procedural defaults which characterized the handling of her case by Northwestern, however, have become common to both types of cases. *See generally* LAURA KIPNIS, UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS (2017) (offering a broad discussion of the Kipnis case).

64. Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://chronicle.com/article/My-Title-IX-Inquisition/230489/>.

65. *Id.*

she was questioned about them.⁶⁶ The professor later recalled: “Apparently the idea was that they’d tell me the charges, and then, while I was collecting my wits, interrogate me about them. The term ‘kangaroo court’ came to mind.”⁶⁷ The professor received the same refusal when she asked the university’s investigators themselves for advance notice of the charges against her.⁶⁸ The investigators eventually agreed to inform the professor-respondent of the charges in advance of the interrogation but denied her request to record the session, refused to give her a written copy of the charges against her, and asked her not to speak publicly about the matter.⁶⁹ By contrast, a graduate student at the university published an attack on the professor’s article that revealed the existence of the Title IX complaints and demonstrated more knowledge about the university’s process for resolving such complaints than the university had seen fit to share with the accused professor.⁷⁰ Meanwhile, the designated university “support person,” a member of the Faculty Senate who had accompanied the accused professor to a meeting with the investigators, *himself* became the target of a Title IX investigation for speaking in the Senate about his concern that the university process he had witnessed violated academic freedom.⁷¹

The university’s Title IX investigators informed the respondent that the case would be decided under a “preponderance of the evidence” standard of proof but refused her access to the evidence

66. *Id.*

67. *Id.*

68. *Id.* The same thing happened when Professor Kipnis asked the university-hired investigators to see the charges against her before meeting with them: “They told me, cordially, that they wanted to set up a meeting during which they would inform me of the charges and pose questions.” *Id.*; see also TheFIREorg, *In Her Own Words: Laura Kipnis’ ‘Title IX Inquisition’ at Northwestern (VIDEO)*, YouTube (Apr. 6, 2016), <https://www.youtube.com/watch?v=vVGOp0IffOQ> (Professor Kipnis: “You never get the charges in writing, and I’ve heard that from other people since.”).

69. Kipnis, *supra* note 64 (“We finally agreed to schedule a Skype session in which they would inform me of the charges and I would not answer questions. . . . I said I wanted to record the session; they refused but said I could take notes. The reasons for these various interdictions were never explained. I’d plummeted into an underground world of secret tribunals and capricious, medieval rules, and I wasn’t supposed to tell anyone about it.”).

70. *Id.*; see also Lauren Leydon-Hardy, *What’s a President to Do?: Trampling Title IX and Other Scary Ideas*, HUFFINGTON POST (Apr. 5, 2015, 3:50 PM), http://www.huffingtonpost.com/lauren-leydonhardy/whats-a-president-to-do-trampling-title-ix-and-other-scary-ideas_b_7001932.html (discussing the Title IX action against Professor Kipnis and defending the complainants in that action).

71. Kipnis, *supra* note 63.

that would form the basis of their findings.⁷² Under the university's procedures for handling this type of Title IX complaint, investigators make affirmative findings as to the facts and the misconduct charge—in short, they simultaneously act as investigators and adjudicators in the case.⁷³ The professor was informed that she must wait sixty days for their report in order to know what those findings were.⁷⁴ The professor was given no opportunity to present her case at a hearing where she might learn the evidentiary basis for either of the two complaints against her.⁷⁵

Case 2. On a weekend evening early in their first semester, two college freshmen (whom I will call Jack and Jill) got drunk at separate events, then spent the night together having sex.⁷⁶ Before going to Jack's room to have sex with him, Jill texted Jack to confirm that he had a condom.⁷⁷ She then texted a friend and informed her that she, Jill, intended to have sex.⁷⁸ Upon arriving in Jack's room, Jill again asked for a condom.⁷⁹ During the night a friend stopped by Jack's room to see if Jill was alright; she said that she was.⁸⁰ The next morning both Jill and Jack had very partial memories about what had happened.⁸¹ Nonetheless, Jill filed a Title IX action against Jack for sexual assault.⁸²

College policy at the time provided that contested complaints of this kind would normally be adjudicated by a hearing panel consisting of faculty and administrators.⁸³ Instead the college hired a local employment law attorney to adjudicate the case—a decision the

72. *Id.*

73. *See id.*

74. *Id.*

75. Professor Kipnis's "trial by Title IX" did not end there. *See* Suk Gersen, *supra* note 61 (detailing the subsequent Title IX-based targeting of Professor Kipnis).

76. Richard Dorment, *Occidental Justice: The Disastrous Fallout When Drunk Sex Meets Academic Bureaucracy*, *ESQUIRE* (Mar. 25, 2015), <http://www.esquire.com/news-politics/a33751/occidental-justice-case/>.

77. *Id.*

78. *See id.* (citing the relevant texts from the college's official report on the incident).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* ("According to college policy, 'Formal resolution of a complaint . . . will occur through the use of a Conduct Conference'—which is recommended for uncontested accusations—'or a Hearing Panel . . . which typically consist of three members drawn from a pool of trained faculty and campus administrators.'").

college refused to explain.⁸⁴ By a chain of reasoning that apparently complied with the college misconduct code, the college-hired adjudicator found that (1) Jack and Jill had sex; (2) Jack could have reasonably believed that Jill had in fact consented to sex; (3) although Jill was moving under her own power and was aware of where she was at the time, she was so drunk that she was incapacitated under the college's definition of that state; (4) Jack was intoxicated too, but *his* intoxication would not affect the outcome; (5) had Jack *not* been intoxicated, he would have perceived that Jill was too drunk to *validly* consent to sex; and therefore, (6) Jack had sexually assaulted Jill.⁸⁵ Jack was expelled from the college.⁸⁶

Because the outcome of the action would appear on his transcript and in the records of the college registrar, Jack had scant chance of being admitted to any other college.⁸⁷ After his expulsion, Jack attempted to counterclaim. He argued that Jill had initiated the sexual encounter and since he, Jack, was also drunk at the time, Jill had sexually assaulted *him*.⁸⁸ Jack's attorney advised him that anything Jack said in the college proceeding could be used against him in a subsequent legal proceeding, but the college refused Jack's request to bring his attorney to meet with college officials.⁸⁹ When Jack declined to meet without his attorney, the college rejected his counterclaim.⁹⁰ Under the circumstances, it appeared that Jill had gained an un rebuttable advantage simply by filing first, suggesting that under college policy, vindication belonged to the speedy rather than to the just. The next case may support that suspicion.⁹¹

84. *Id.* ("Occidental's policy permits it to appoint an external adjudicator at its sole discretion. It declined to explain its decision, either to [Jack]'s attorney or to Esquire.")

85. *Id.*

86. *Id.*

87. *Id.* In fact, his admission to one other college was rescinded when that college discovered that he had been expelled for sexual assault. *Id.* Jack's admission to yet another college was not immediately rescinded only because he successfully petitioned a court to stay the college's order and sanctions pending the outcome of his lawsuit against the college. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See, e.g.,* Caitlin Flanagan, *Mutually Nonconsensual Sex*, ATLANTIC (June 1, 2018), <https://www.theatlantic.com/politics/archive/2018/06/title-ix-is-too-easy-to-abuse/561650/> ("[T]he functionaries of the college sex panic have an obdurate habit of determining that the victim of a blearily remembered amorous encounter is the person who decides to report it, with all ties broken by the one who reports it first.")

Case 3. “Jack’s” attempted countersuit, above, suggests that some college misconduct policies contain such vague definitions of key terms like “consent” and “incapacitation” that either party, or both parties, might be guilty of sexual assault. A more recent case makes this even more clear. Plaintiff “Jane Roe” was suspended from a state university for engaging in sexual contact with another student who was intoxicated (and therefore incapacitated and unable to consent).⁹² Plaintiff Roe filed suit in protest, averring the following facts: Jane Roe and “John Doe,” both students at the university, attended a party on September 30, 2017.⁹³ Both were drinking. After John Doe said he wanted to go home because he was drunk, the two left the party together and went to John Doe’s house, where Jane Roe fell asleep on John Doe’s bed.⁹⁴ At some point that night, John Doe climbed into bed with Jane Roe and the two had sexual contact which involved John Doe touching Jane Roe’s vagina, after which Jane Roe inquired, “Is there anything else you want to do?”⁹⁵ John Doe answered in the negative, and both went back to sleep.⁹⁶ Two days later John Doe filed a Title IX complaint alleging that Jane Roe had engaged in sexual conduct with John Doe while the latter was incapacitated and therefore unable to consent.⁹⁷ The university agreed and Jane Roe was suspended indefinitely.⁹⁸ In her lawsuit Jane Roe claimed that the school violated her constitutional rights, not only because it disciplined her in the case, but also because it failed to discipline John Doe—suggesting that, under the facts of the case, John Doe was actually the perpetrator.⁹⁹ The case demonstrates the bizarre reality that, under the terms of many schools’ sexual misconduct codes, both parties to a particular sexual encounter may be guilty of assaulting each other.¹⁰⁰

92. *See id.*

93. Robby Soave, *Male Student Accuses Female Student of Sexual Assault. She Says He Wanted Revenge*, REASON: HIT & RUN BLOG (May 11, 2018, 4:15 PM), <https://reason.com/blog/2018/05/11/cincinnati-rape-title-ix-doe-roe-sex>.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See, e.g.*, Complaint at 29, *Roe v. Univ. of Cincinnati*, No. 1-18-cv-00312-TSB (S.D. Ohio May 7, 2018); Flanagan, *supra* note 91 (“Is it possible for two people to simultaneously sexually assault each other? This is the question . . . [that] the University of Cincinnati now addresses”); Soave, *supra* note 93 (discussing the same case and opining that “Title IX creates a prisoner’s dilemma: students have to file sexual misconduct complaint to avoid becoming the accused”).

Case 4. Finally, another perplexing issue arising from the vagueness of college codes: Is there such a thing as normal sex? In their comprehensive critique of the “sex bureaucracy” created under Title IX, Jacob Gersen and Jeannie Suk discuss the case of *Doe v. Brandeis University*,¹⁰¹ in which the plaintiff challenged the university’s determination that he had committed “serious sexual transgressions” and the university’s placement of a permanent notation in to that effect in his educational record.¹⁰² The student’s alleged offenses included:

[T]ouching the clothed groin of the complainant (who would soon be his boyfriend) while the two watched a movie; occasionally waking his boyfriend with a kiss; looking at his boyfriend’s groin while showering together; and, while at his boyfriend’s father’s house, attempting to perform oral sex when his boyfriend did not want it.¹⁰³

To state the facts of these cases is to name the arguments against them. Particularly troubling are:

- The *secrecy of campus sexual misconduct proceedings*, which has the foreseeable effects of making such proceedings impervious to public critique or accountability, and of allowing inaccurate rumors (e.g., that an expelled student is a “rapist” when no allegation of rape has been made or charged) to spread unchecked.¹⁰⁴
- The *lack of a process for filtering out false or flimsy allegations* before subjecting a respondent to a full-scale investigation.¹⁰⁵
- *Inadequate notice* to accused persons of potentially career-ending sexual misconduct charges against them.¹⁰⁶
- The *refusal to set down allegations* in writing.¹⁰⁷

101. 177 F. Supp. 3d 561 (D. Mass. 2016).

102. Gersen & Suk, *supra* note 2, at 938 (citing *Brandeis Univ.*, 177 F. Supp. 3d at 571).

103. *Id.*

104. See Kipnis, *supra* note 64.

105. See, e.g., *id.* (“As I understand it, any Title IX charge that’s filed has to be investigated, which effectively empowers anyone on campus to individually decide, and expand, what Title IX covers. Anyone with a grudge, a political agenda, or a desire for attention can quite easily leverage the system.”).

106. See, e.g., *id.* (claiming that she would not receive information on the substance of the complaint until she met with investigators).

- The *refusal to allow the accused person to see the evidence against him or her* before the case is adjudicated.¹⁰⁸
- The *refusal to offer a full and fair hearing* staffed by impartial, well-trained personnel.¹⁰⁹
- The *refusal to permit well-trained advocates for the parties* and allow them, by questioning of witnesses, to reveal the strengths and weaknesses of the case before such a panel.¹¹⁰
- The *vagueness of key terms* in college conduct codes—“coercion,” “consent,” and “incapacitation”—which are often defined in language so broad that it fails to inform students and college adjudicators about the nature of sexual misconduct.¹¹¹
- The fact that some colleges and universities have *done away with the requirement of a live hearing* in sexual misconduct cases. Instead, these institutions have put their Title IX administrator in charge of the entire adjudicatory process (excluding appeals), presenting an obvious threat of bias resulting from an equally obvious conflict of interest

107. *See id.*

108. *See, e.g., id.* (claiming that she was not presented with any evidence against her).

109. Many of the new campus codes provide that investigators and adjudicators in these cases must be “trained.” But since most do not require that such personnel have actual law-enforcement or criminal adjudication experience, it is unclear what such training consists of or how rigorous it might or might not be. The outside adjudicator in the Occidental case, for example, was a local attorney who specialized in employment law. Dorment, *supra* note 76. The university refused to explain why it had chosen her to adjudicate the matter or disclose any prior relevant experience or training she may have had in adjudicating cases of sexual misconduct either in the civil or the criminal sphere. *See id.* This is not to say that she, or other adjudicators, never do have such experience. Some do. The concern is that broad university discretion on the issue keeps the public, including those accused of sexual misconduct, in the dark about who will decide the case and what their qualifications may be.

110. *See* Kipnis, *supra* note 64 (claiming that the school would not allow the accused to have a lawyer present, but would allow a “support person” from the university community, even though that person would not be allowed to speak).

111. *See, e.g.,* Dorment, *supra* note 76. “[I]n an apparent effort to show Occidental’s inconsistent application of its own sexual-assault policies, John filed a sexual-assault complaint against Jane Doe with Occidental. He claimed she did not obtain his consent prior to performing oral sex on him—as he doesn’t even recall this happening, and nobody ever asked Jane whether she received consent from John, he believes it should be subject to the same scrutiny under which he was investigated.” *Id.* Because John would not meet with Occidental’s investigator without his attorney, the college refused to consider his complaint. *Id.*

between the Title IX office's priorities and the rights of persons accused of sexual misconduct.¹¹²

- Colleges' apparent *willingness, while denying accused respondents the most basic procedural protections, to impose the harshest possible sanctions* for sexual assault in the murkiest cases: where both parties were drinking heavily, neither party remembers key facts, and it may actually be impossible to determine with anything like reasonable confidence which, if either, party to an act of sex committed assault on the other.¹¹³

- The apparent *willingness to adjudicate such cases under the lowest possible standard of proof*, again while simultaneously and substantially raising the possible sanctions upon a finding of responsibility.¹¹⁴

112. Harvard University adopted such a system in 2014, prompting a widely publicized protest from twenty-eight members of the Harvard Law faculty, who collectively wrote: "Among our many concerns [with Harvard's new sexual misconduct policy and procedures] are the following: Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation." *See Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>. The signators' concerns "include but are not limited to the following: [1] The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing. [2] The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial." *Id.*

113. *See generally* Dorment, *supra* note 76 (discussing the Occidental case).

114. *See e.g.*, *supra* text accompanying notes 76–91 (discussing Case 2); *see also* Dorment, *supra* note 76 ("In a letter rebutting John's appeal to Occidental, Jane's lawyers wrote, 'Ms. Jane Doe was raped by . . . John Doe' . . . which suggests just how empty the distinction really is between sexual assault as a breach of student conduct and rape as a criminal offense."). Additionally, according to feminist Law Professor Janet Halley of Harvard: "The idea that what we're talking about here is just a civil sanction, the equivalent of money damages, is unreal to me. When we expel or suspend a student and put that on the transcript, it's going to be very hard for that person to go to any other institution of higher education." *Id.* Further discussing Harvard's revamped procedure for adjudicating sexual misconduct cases, Professor Halley told *Esquire*: "Every legal lever has been ticked in the direction of the accuser and against the [accused] I think it's almost in bad faith to be arguing that we 'need' [the preponderance standard] because we have to get equality of the parties. It's called going too far." *Id.* (alteration in original).

- The potential for *use of Title IX investigations and disciplinary sanctions to enforce a particular set of opinions about sex and sexual activity* on campus and/or to punish faculty or students for holding or expressing unpopular views on a wide range of issues.¹¹⁵

It would be unfair to suggest that these procedural faults now infect the misconduct codes of all colleges and universities. Thus far, and in the absence of a generally accepted set of guidelines, schools have mainly been “going at it on their own,” with the result that investigation and adjudication procedures in sexual misconduct cases vary widely from institution to institution.¹¹⁶ Some systems offer relatively strong procedural protections to accused respondents; others do not. The problem is that the troubling procedures named above do not clearly *violate* current standards of fair process in the context of campus adjudications. The denial or under-emphasizing of fundamental tenets of fair process (e.g., notice to an accused person of the charges against him or her, a full opportunity to test the evidence, and an impartial adjudication by trained personnel) raises concern about the system as a whole, even if some colleges have thus far succeeded in avoiding such deficits. The process of investigating and adjudicating claims that may result in serious punishment must not only *be* fair, it must also be *perceived* to be fair. Fair process, in turn, compels the laying of a sound procedural floor, a minimum set

115. See, e.g., Kipnis, *supra* note 64 (“Title IX officers now adjudicate an increasing range of murky situations involving mutual drunkenness, conflicting stories, and relationships gone wrong. They pronounce on the thorniest of philosophical and psychological issues: What is consent? What is power? Should power differentials between romantic partners be proscribed?”); Suk Gersen, *supra* note 62.

116. See, e.g., Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, DISP. RESOL. MAG., Spring 2016, at 27, 29–30 (“[B]est practice models remain elusive. Even assuming there is a perfect alchemy in policy language, [college and university] administrators are clamoring for standards of care that serve the needs of complainants, respondents, and institutions . . .”). The American Law Institute is now conducting the “Project on Sexual and Gender-Based Misconduct on Campus,” which will address a variety of procedural issues including the investigation and adjudication of sexual misconduct and sexual assault cases. See *Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities*, AM. LAW INST., <https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/> (last visited Nov. 19, 2018).

of structural protections necessary to produce accurate adjudication and when responsibility is duly found, just punishment.

In the context of campus-based sexual misconduct complaints, what protections fit that description? To decide, we need to think more deeply about the purposes of such adjudication, the extent to which it can do justice of the kind appropriate in an educational context, and the structural limits to fair and accurate adjudication and punishment in a setting which necessarily lacks the full panoply of protections offered to an accused person in court. In Part III, I argue that the core principles governing punishment—whether in court or in a campus hearing panel—are found in criminal law.

III. RELEVANT PRINCIPLES OF CRIMINAL LAW: HARM, PARSIMONY, PROPORTIONALITY

Reformists claim that campus misconduct proceedings should not be analogized to criminal cases.¹¹⁷ Instead, they claim, these adjudications are civil, intra-institutional proceedings involving a college's interpretation of its own code of conduct.¹¹⁸ If the law applies at all, under this argument, the appropriate body of doctrine is solely on the civil side (Title IX and gender discrimination), not the law of rape.¹¹⁹

It is of course true by definition that college misconduct proceedings are not criminal prosecutions. But that fact does not answer any important questions. No one would argue that since college disciplinary procedures are not “legal” in any formal sense, such procedures need not concern themselves with fairness or accuracy. Fairness and accuracy should be important goals whenever institutional punishment is at issue. The real question, then, is what rights and procedures must such adjudications include in order to make them as fair and accurate as possible? The answer need not simply replicate the criminal process. But because they involve the potential infliction of serious punishment, college sexual misconduct adjudications should hew closely to the core principles that have produced that process.

117. See, e.g., Alexandra Brodsky, *Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault*, AM. PROSPECT (Jan. 21, 2015), <http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault>.

118. *Id.*

119. *Id.* (“School investigations don’t look like trials because they aren’t supposed to.”).

A. *Conflicting Intuitions*

Our national conversation about sexual assault on campus reflects deep ambivalence about the criminal law of sexual assault. Victim advocates argue that colleges must treat sexual assault on campus “as the violent felony that it actually is.”¹²⁰ But they simultaneously argue that campus-based adjudication of sexual assault cases is *not* a criminal matter and should therefore eject cumbersome, costly, and time-consuming procedural protections—such as an accused’s rights to an attorney, to confront witnesses, to a high standard of proof, and to a formal and impartial hearing—that are considered fundamental rights in the criminal setting.¹²¹ Jointly, these two assertions imply that (1) college sexual misconduct policies need not offer the procedural protections that would necessarily attend a criminal accusation of rape, but (2) in order to treat sexual assault as the “violent felony that it is,”¹²² they should nonetheless impose harsh penalties upon parties found responsible.

The tension between these two intuitions is easily demonstrated by reference to the different levels of procedural protection present in the civil and criminal court systems generally. “Due process” is relevant in both settings, but means very different things in each.¹²³ In contrast with the criminal process, civil defendants have fewer

120. Cathy Young, *New Campus Rape Bill Offers a Better Way*, REALCLEAR POL. (Aug. 7, 2015), https://www.realclearpolitics.com/articles/2015/08/07/new-campus-rape-bill-offers-a-better-way_127695.html (quoting remarks made by U.S. Senator Kirsten Gillibrand); see Nicole Hart, *Sen. Kirsten Gillibrand Talks Combating Campus Sexual Assaults*, NEWS10 (May 1, 2015, 8:38 AM), <https://www.news10.com/news/kristen-gillibrand-heads-to-schenectady-to-discuss-sexual-assault-on-campus/1108076359> (“[T]he senator’s message was loud and clear: sexual assault is not okay and will not be tolerated. ‘We need to define this crime for the crime that it is,’ she said. ‘Rape is a felony. It is a violent felony.’”).

121. See, e.g., *The Toughest Issue on (Any) Campus*, YALE ALUMNI MAG., July/Aug. 2015, <https://yalealumnimagazine.com/articles/4105-the-toughest-issue-on-i-any-i-campus?page=2> (quoting feminist and former federal judge Nancy Gertner: “Sexual harassment is not a *crime*. It is a civil action. And it is covered by university policy.”).

122. Young, *supra* note 120.

123. See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 14 (2006) (“The Supreme Court approaches procedural due process quite differently in its criminal and civil decisions, both in how it talks about due process and how it conceptualizes what due process requires.”).

constitutionally-rooted procedural rights.¹²⁴ These differences accord with the more general principle of proportionality—the idea that there should be a proportional relationship between the procedural rights accorded to a defendant and the potential consequences of a finding of liability. Felony convictions carry the potential for a particular kind of stigma and for prison time, punishments that as categories we think significantly more serious than the monetary compensation which typically results from a finding of civil liability. Because they often pose the threat of heavy punishment, “violent felonies” in criminal law are carefully defined, investigated by professionally-trained personnel who must operate within firmly established constitutional and statutory mandates, prosecuted and defended by professionally trained advocates, adjudicated under our most exacting standard of proof (“beyond a reasonable doubt”) in order to minimize the chance of arbitrary or otherwise unjust convictions, and punished according to a rule of sentencing proportionality that links the sanction imposed to the severity of the offense.¹²⁵ In short, *because* criminal punishment is especially harsh, justice requires that we offer defendants a correspondingly high level of procedural protection so we can be sure that convicted defendants actually did the crime and deserve the associated punishment.¹²⁶

124. See *id.* at 8 (“[T]he essential element of procedural due process, as clearly established in civil settings, is that notice and a hearing must ordinarily precede any governmental deprivation of a liberty or property interest.”); *id.* at 9–11 (describing *Mathews v. Eldridge*, 424 U.S. 319 (1976), and its three-pronged test for procedural due process in civil settings); see also *supra* text accompanying note 33 (discussing *Mathews* and its implications for disciplinary proceedings at public educational institutions).

125. See, e.g., SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIKER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 186 (9th ed. 2012) (“The requirement that punishment be proportional to the seriousness of the offense is a core principle of punishment, both as a central limit dictated by the Eighth Amendment, and a statutory statement of purpose in modern criminal codes.”); Kuckes, *supra* note 123, at 18 (reviewing constitutionally guaranteed rights of criminal defendants who go to trial and noting that “at trial, a criminal defendant receives an impressive degree of ‘process’ constitutionally required to adjudicate his guilt or innocence”); *Criminal Procedure*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/criminal_procedure (last visited Nov. 19, 2018).

126. See, e.g., *Criminal Procedure*, *supra* note 125 (“Once a trial begins, the U.S. Constitution affords further rights to criminal defendants. Trying to avoid convicting an innocent defendant at all costs, the law only permits the prosecution to overcome the defendant’s presumption of innocence if they can show the defendant’s guilt

B. Campus Sexual Misconduct Tribunals Inflict Punishment

As a threshold matter, it might be necessary to establish the proposition that college and university sexual misconduct proceedings are, in fact, “punitive” in the sense requisite to the central argument here. To those familiar with the debate on this issue, it might appear silly to argue otherwise—the intent to punish offenders found responsible for sexual assault seems abundantly clear.¹²⁷ “The idea that what we’re talking about [in campus sexual assault adjudications] is just a civil sanction, the equivalent of money damages, is unreal to me,” notes Professor Janet Halley of Harvard Law School.¹²⁸ “When we expel or suspend a student and put that on the transcript, it’s going to be very hard for that person to go to any other institution of higher education.”¹²⁹

University sexual misconduct panels are not criminal courts, are not necessarily staffed by lawyers or judges, and do not have the power to impose prison time on offenders found responsible. Nonetheless, sexual misconduct proceedings are clearly punitive—both in intent and effect. The intent (as well as the primary goal and effect) of disciplinary proceedings in college sexual assault cases is to inflict penalties on persons found responsible for sexual misconduct. Further, such penalties are potentially the most severe sanctions available in the college setting—for example, expulsion and permanent notation of the findings and sanction on the offender’s transcript.¹³⁰ Finally, such penalties are not meant to “compensate” the victim of the assault in the way that tort or contract damages are. Instead, they are designed to single out the offender for condemnation and punishment.¹³¹

beyond a reasonable doubt. This very high burden differs drastically from a civil trial’s much lower standard in which the plaintiff must only prove a claim by a preponderance of the evidence.”).

127. See, e.g., *Criminal Procedure*, *supra* note 125; see also *supra* note 3 and accompanying text.

128. Dorment, *supra* note 76.

129. *Id.*

130. *Id.*

131. See, e.g., Tovia Smith, *Push Grows for a ‘Scarlet Letter’ on Transcripts of Campus Sexual Offenders*, NPR (May 11, 2016, 4:27 PM), <http://www.npr.org/2016/05/11/477656378/push-grows-for-a-scarlet-letter-on-transcripts-of-campus-sexual-offenders> (“When it comes to punishing students for campus sexual assault, some say kicking offenders out of school isn’t enough. They want schools to put a permanent note on offenders’ transcripts explaining that they’ve

College administrators sometimes claim that campus misconduct proceedings are not constrained by concerns like the presumption of innocence or the right to counsel—core elements of the modern criminal process—because the sanctions imposed on responsible offenders are not “punishment” at all. Instead, they claim, the sanctions are a means of rehabilitating offenders and educating them in good behavior.¹³² This argument is not persuasive. To “punish” means “to impose a penalty on, for a fault, offense, or violation.”¹³³ Criminal punishment can be, and often is, justified as a means of educating or “rehabilitating” offenders. College sexual misconduct proceedings are punitive because they involve the knowing and intentional infliction, by the college and under the authority of its code, of painful consequences on the offenders found responsible for violating college policy with the deliberate purpose of expressing condemnation of the offender and the offense.¹³⁴ That

been punished for sexual misconduct, so other schools—or employers—can be warned.”).

132. *Id.* “Administrators stress that the college judicial system is . . . ‘not the same thing as a court of law.’ . . . Even their mission differs from the criminal justice system: Verdicts are educational, not punitive, opportunities. Alleged student victims may expect punishment from campus proceedings, says Jerry Price, vice chancellor for student affairs at Chapman University, in California, ‘but there is nothing in our mission about justice.’” *Id.*; see, e.g., Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> (last updated July 14, 2014, 5:40 PM) (“College administrators stress that the sanctioning in disciplinary matters reflects the mission of higher education. Proceedings aren’t meant to punish students, but rather to teach them. ‘We’d like to think that we can always educate and hold accountable the student,’ says Pamela Freeman, associate dean of students at Indiana University. IU officials defended suspending [a respondent in a case at that university] as, in effect, a teachable moment.”).

133. *Punish*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/punish> (last visited Nov. 19, 2018).

134. Consider, by analogy, the definition of legal punishment offered by H.L.A. Hart: “[T]he standard or central case of ‘punishment’ in terms of five elements: (i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offence against legal [here, college or university] rules. (iii) It must be of an actual or supposed offender for his offence. (iv) It must be intentionally administered by human beings other than the offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.” H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (2d ed. 2008). As for element (v), the analogy to authority constituted by college policy is clear. Beyond that, a persuasive argument could be made that legal authorities (including Title IX of the Education Amendments of 1972 and its interpretation by the DOE) place college sexual misconduct proceedings squarely within Hart’s element (v). See *id.*; see also Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2018); DEAR COLLEAGUE LETTER, *supra* note 8, at 8.

such actions may be also justified by the goal of rehabilitation does not distinguish them from punishment.

Again, campus sexual assault adjudications are not criminal trials, and the procedures of criminal law need not be wholly imported into such adjudications. But campus proceedings should be powerfully influenced by the same concerns about accuracy, impartiality, and fairness that animate criminal law. The two systems need not share identical procedural rules, but they do share the underlying values and principles which produce those specifics. Those fundamental principles are the Harm Principle and the related principles of Parsimony and Proportionality.¹³⁵

None of what follows is new; most of it, in fact, is so firmly instantiated into criminal law that it is usually taken as given. But that is really the point. Campus sexual misconduct codes lack a coherent set of principles upon which to ground the structure of adjudications; such principles *do* underlie the criminal process, and they should serve as a model for other forms of institutional punishment.

C. Centrality of the Harm Principle

Criminal law, of course, spells out the conditions under which defendants can be convicted and punished for harming others. But—and this is crucial to remember in the current context—criminal prohibitions do not target the infliction of all harms. Instead, from the universe of possible harms that one person might inflict on another, the law selects a subset for criminal punishment. Consider a basic example. John owns ABC Enterprises, a successful and longstanding business which produces and sells widgets. Having developed a cheaper and higher-quality widget than John's, Jane establishes XYZ Enterprises directly across the street from John's business. Jane sells her "super-widgets" at a lower price than John's, eventually driving John out of business. Clearly Jane has caused "harm" to John (John would certainly think so!), but in deference to the perceived social benefits of commercial competition, the law will generally not offer redress for that harm. Instead, the law would defend *Jane's* right to compete with John's business, even though ABC Enterprises came first. John has certainly been harmed by Jane, but that harm lacks a legal remedy (and certainly lacks a criminal remedy).

135. See *infra* Parts III.D–III.E.

This example also illustrates what might be called the “hierarchy of harm” with respect to the law. Some harms are not redressable by law, period. Some harms—usually those deemed compensable but not necessarily punishable—are redressable only by civil suit and not by the criminal law. A third set of harms—typically those which inflict what we deem to be the most serious injuries to persons or property—are redressable by criminal action, an action in which society is the plaintiff and sanctions frequently involve imprisonment or the threat thereof. Criminal sanctions, therefore, constitute a subset of legally redressable harms.

Return to the above example. Although in general the law does not give John the right to stop Jane from competing with him or his business, Jane’s right to compete is not limitless. Suppose that, instead of simply underselling John, Jane establishes XYZ Enterprises across the street from him, begins selling widgets at a *higher* price than John’s, then sends her goons over to burn down John’s store, thereby driving John out of business. In that case the law *would* offer John redress, including criminal redress, for example via a prosecution against Jane (and the goons) for arson. The important thing to notice is that the different outcome in the two situations does *not* hinge on the existence or absence of harm; John has been “harmed” in *both* scenarios. The difference hinges on the law’s decision as to which kind of harm will be legally (including criminally) protected—in other words, which party has the legal right to protection from the other. Because the law views competition as presumptively beneficial, in the former case it sides with Jane: Jane harmed John but did not violate his rights. In the latter case, however, Jane engaged in methods of competition which are deemed not socially beneficial and so the legal right shifts to John—in that case the harm Jane inflicted *did* violate John’s rights (by using arson, rather than sales of cheaper widgets, to drive John out of business), and the violation was serious enough to be a criminal wrong. Jane may harm John by selling a better product at a lower price and thereby driving him out of business, but she may *not* legally harm him by burning down his store to drive him out of business. Another way to say the same thing: I have the right to compete against you by making and selling a superior product, even if that competition harms you by winning away your customers. I do *not* have the right to intentionally destroy your property, even if my motive in doing so is exactly the same—to win your customers.

Thus, only some harms generate rights that are the subject of criminal prohibitions, and for violation of which the criminal law will punish guilty defendants. The rights which it so defends are those

which (1) society accepts as legitimate bases for state-inflicted punishment and (2) are feasibly definable, provable, and enforceable by the courts.¹³⁶ And for present purposes we need only agree that, whatever the complete list of criminally actionable “rights,” the right to be free from undeserved physical harm—which certainly includes the right not be sexually abused or assaulted—is among them. Criminal law (not exclusively, but in particular) punishes those who commit, or threaten to commit, serious physical assaults on others. It thereby defends the presumptive right of individuals not to be physically assaulted or threatened with such assault. How far such protection extends—a question which requires a closer definition of “sexual assault”—is a question we will take up later.¹³⁷

Next, it is firmly established in our judicial system that criminal punishment is justified only if the person who causes harm is blameworthy for doing so. Harm done to another in self-defense, or that results from other excusable or justifiable circumstances, is not punishable; harm done negligently—that is, without conscious purpose, knowledge, or knowledge of risk that the harm might result from the defendant’s conduct—is either not punishable at all, or punishable only if the defendant’s negligence reaches beyond that required in the civil sphere.¹³⁸ And harm done without moral fault—

136. See Stephen J. Schulhofer, *The Feminist Challenge to Criminal Law*, 143 U. PA. L. REV. 2151, 2182 (1995). Professor Schulhofer effectively captures the first of these elements in the related civil context of sexual harassment: “[I]f a supervisor tries to get sexual favors by offering a promotion (or by threatening to veto one), he is confronting the employee with alternatives (no matter whether we call them offers or threats) that his position gives him no right to impose. If the supervisor used his position to get an economic payoff from the employee, he would be guilty of extortion. If a professor threatened to withhold a good grade or a good recommendation until he got some cash from a student, again he would be guilty of extortion. The worker or student should have the same right to control her sexuality that she has to control her wages or her bank account. . . . What makes the [woman’s] consent invalid is that rules already settled in our culture deny the supervisor the *right* to require an employee to choose between her promotion and her legally protected interests. . . . For the same reason, the high school principal who allegedly obtained sex from a student by threatening to block her graduation should certainly be guilty of a crime.” *Id.* (emphasis added).

137. See *infra* Part IV.A.1.

138. See, e.g., *Rex v. Bateman*, 133 LT 730, 732 (1925) (“In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets such as ‘culpable,’ ‘criminal,’ ‘gross,’ ‘wicked,’ ‘clear,’ ‘complete.’ But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between

strict liability harms—are limited to minor offenses or those which fit into the well-defined category of “public-welfare” offenses.¹³⁹ To be criminally punishable, the person who inflicts a criminally-prohibited harm must, at the time they acted, have had some culpable knowledge or very good reason to have possessed such knowledge that the person’s conduct would cause the harm.¹⁴⁰

Finally, the law (including criminal law) punishes only those harms which are objectively *provable*. This is a reality which has particular import for sexual crimes, which often possess the twin characteristics of inflicting a large amount of harm on the victim while also offering a relatively small amount of corroborative evidence, such as testimony from third parties outside of the recollections and accounts of the parties to the sexual encounter. The law requires that the burden of proof be placed upon the complainant, that the standard of proof be sufficient to convince impartial observers that the harm happened, and that the person charged possessed the relevant culpable mental state while committing it.¹⁴¹

The principles that the law punishes only that subset of provable harms which violate certain rights, and only when a defendant deserves blame for doing so, apply in the context of personal (including sexually intimate) relationships. In the commercial sphere, the principle of open competition sets the background to business dealings, denying John recovery when Jane harms his business simply by making and selling cheaper widgets. In the arena of personal relationships, the analogous default principle is that of individual autonomy—according to which adult people are free to decide with whom they want to be in a relationship and how they want that relationship to be conducted.¹⁴² Within the fairly broad

subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.”).

139. See, e.g., Richard J. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 732 (1960) (citing Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 83 (1955)).

140. 1 FRANCES WHARTON ET AL., WHARTON’S CRIMINAL LAW § 27 (14th ed. 1978).

141. *Id.*

142. Schulhofer, *supra* note 136, at 2182. Professor Schulhofer expressed: “[W]hat if a woman does agree [to sex]? What kinds of constraints violate her autonomy? Autonomy cannot mean freedom from all constraints upon choice, but it does entail freedom from those constraints that our culture identifies as illegitimate. The scope of that freedom is marked by the rights to bodily integrity and personal

boundaries set by laws which criminalize fraud, assault, and so forth, we allow people to run their personal lives, including their sexual lives, in the way they see fit—even if they suffer harm in the process. In the course of human relationships people are (unfortunately) lied to, cheated, manipulated, insulted, and treated badly. Relationships, in short, can be harmful. Generally, however, we do not punish people criminally for harmful things they do in personal relationships unless those behaviors clearly violate another person's physical autonomy or would constitute a crime (embezzlement or fraud, for example) in an arms-length transaction. The law thus creates a strong presumption against state intervention and punishment, even in cases which indisputably result in harm.¹⁴³

Under this conception of rights, if A credibly says to B, "Have sex with me or I'll kill you," and B has sex with A because of A's threat, A has violated B's rights and has committed punishable sexual assault.¹⁴⁴ If, on the other hand, A says to B, "Have sex with me or I'll break up with you," that may not be very nice of A, but it violates no right of B's. Outside of special status relationships such as marriage or parenthood, B does not have the right to compel A to have a relationship with her, to stay in that relationship, or to acquire her consent to end it. The right lies on the other side: both A and B have the presumptive right to leave their relationship for any

independence that existing legal principles already protect. This modest conception of personal autonomy offers boundaries that are specific and, yet, far reaching." *Id.*

143. So, for example, domestic violence laws prohibit intimate partners from using force (or threats of force) to dominate each other in a relationship, but do not generally prohibit them from lying to each other, saying hurtful things, being unreasonably demanding or selfish, etc. In general, harms given and received in relationships that are not independently criminal and do not involve special status, physical injury, or threats of physical injury, are not criminally actionable. *See, e.g.*, FLA. STAT. § 741.28(2) (2018) ("Domestic Violence" means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.').

144. *See, e.g.*, MODEL PENAL CODE § 213.1(1) (AM. LAW INST., Proposed Official Draft 1962) (providing that a defendant commits "rape" when he "has sexual intercourse with a female not his wife" and "he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone"); *id.* § 213.2 (providing that a defendant commits "gross sexual imposition" when he "has sexual intercourse with a female not his wife" and "he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution").

reason or no reason at all. A can leave B because B will not have sex with A, or because A met somebody richer or prettier or smarter or blonder or taller or shorter or heavier or lighter or . . . for any reason. Although we might say that some of those reasons are fairly paltry in a moral sense (good riddance to A, if he leaves B because of them), the criminal law will not punish A for threatening to act or for acting upon them. In such a situation, A may have harmed B in the sense that B is now faced with the hard choice of either having sex with A when he or she would rather not, or doing without A entirely, which by hypothesis, B does not want to do either. However tough that may be emotionally, and whatever moral judgments we may be inclined to pass upon A, A has not committed a criminally punishable offense.

Stephen Schulhofer usefully compares two cases: (1) a highly paid fashion model who consents to sex with a casting director in order to further her acting career, and (2) “a needy mother of four who finds a partner willing to support her.”¹⁴⁵ The model’s autonomy has been violated by the director because “[t]here is an improper constraint on the woman’s freedom of choice under background rights that are already settled in our culture.”¹⁴⁶ In the “hard case” of the needy mother, on the other hand, if the man threatens to kick her out of the house unless she continues to satisfy him sexually, that threat may not be legally actionable:

Obviously, the needy mother has far less freedom of choice than the successful fashion model does. But the relevant question has to be whether the man’s threatened actions are illicit. In the model’s situation, the pressure may be slight, but it is clearly impermissible. In the mother’s case, the pressure, though severe, might not be illicit. A sexual quid pro quo is not a legitimate condition of ordinary employment, but sexual fulfillment *is*, for both men and women, an appropriate and valued goal of ongoing, intimate personal relationships. Thus, although the man’s action in imposing a sexual condition on his willingness to continue his relationship with the needy mother could be criticized as insensitive in many contexts, it nonetheless involves an exercise of *his* autonomy that society ordinarily considers legitimate and worthy of social protection. . . . [I]f existing norms do not protect her from this sort of economic pressure,

145. Schulhofer, *supra* note 136, at 2183.

146. *Id.*

then her decision to remain in the relationship, although highly constrained, is not improperly tainted, and her consent to sex would therefore be valid. . . . *The key is in the background structure of rights and privileges that determine what uses of personal power and institutional position are permissible, against either the weak or the strong, against either men or women in our society.*¹⁴⁷

Under this conception of criminal law, a fair number of morally egregious cases would not be criminally actionable. Suppose, for example, that Bill and Barb are sexually involved. Barb is unhappy and wants to end the relationship, and to prevent her from leaving, Bill credibly threatens, “If you leave me, I will kill you.” In this case Bill has clearly and believably threatened Barb with grave physical harm and has thus violated her rights in a way that constitutes criminal coercion.¹⁴⁸ But suppose, instead, that Bill threatens, “If you leave me, I will kill *myself*.” Again, most of us would make negative moral judgments about this behavior—it is manipulative, exploitive, etc. But in contrast to the prior example, the threat in this second instance should not be criminally actionable. Despite the fact that such manipulation might well cause harm to Barb (either by preventing her from leaving the relationship or if she leaves and Bill follows through with his threat, causing her to feel guilty for his demise), it is a threat of harm to one’s *self*, not another. Thus, it violates no legally cognizable rights (Bill has no legal right of protection against a threat of self-harm).

In sum, the intentional infliction of harm, by itself, is not criminally punishable. To “qualify” for punishment, the inflicted harm must violate (or credibly threaten to violate) the harmed person’s rights, including his or her right to personal physical security. Clearly, a system structured in this way will leave many harms unredressable by the law of punishment.

147. *Id.* at 2183–84 (third emphasis added).

148. *See* MODEL PENAL CODE § 213.1(1).

D. The Principle of Parsimony

Why does the law, and in particular the criminal law, operate in this parsimonious way? Why punish only harms that violate, or credibly threaten to violate, a person's physical autonomy? Why not punish all morally egregious conduct (such as a threat to eject a person from your house unless they have sex with you or a threat to commit suicide if the other person leaves the relationship) if such conduct in fact pressures a person into doing something that they would not otherwise do? Or, perhaps we should consider the mirror image of this question: why not adopt a much more expansive vision of the legally defensible rights of persons in a relationship? Shouldn't the law recognize and enforce the widow's right not to be forced into a choice between sex and a safe home, and Barb's right not to be subjected to Bill's manipulative threats to harm himself if she exercises her autonomous choice to end their relationship?

Stating the question may suggest the right answer. Criminal enforcement of morality at such a micro-level would probably be impossible and could easily become tyrannical. We are not willing to devote the resources or accept the degree of state intrusion that would be necessary in order to protect people from all the emotional harms that arise in personal relationships. In the personal arena, the law of punishment sets broad boundaries, prohibiting physical harms and the credible threat of such harms. Within those boundaries the law generally leaves it to individuals to run their own lives and defend their own autonomy.¹⁴⁹ We punish only the most serious harms, and in the area of personal relationships, we generally deem those to be actual or credibly threatened harms to the physical autonomy of the person.

149. For an interesting discussion of the traditional boundaries of criminal law in this respect and recent attempts to change them, see generally Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607 (2015) (noting that criminal law traditionally has implicitly acknowledged emotional harm but has not made such harm an element of criminal liability and arguing that recent "Criminal Infliction of Emotional Distress" statutes, which break with this tradition, are problematic).

E. Parsimony and Proportionality

This parsimonious definition of rights, in turn, is conceptually parallel to the principle of proportional punishment. According to the latter, criminal punishment must be proportional to the degree of harm inflicted by the offense, and in the context of state-imposed punishment, proportionality is the view that criminal “penalties [should] be proportionate in their severity to the gravity of the defendant’s criminal conduct.”¹⁵⁰ The proportionality maxim was famously articulated by Jeremy Bentham in his *Principles of Penal Law*.¹⁵¹ In Bentham’s utilitarian view, criminal punishment is presumptively an evil because it involves the deliberate infliction of suffering on a convicted person.¹⁵² Because punishment is an evil it should be minimized, by which Bentham meant that criminal penalties should (1) not be inflicted at all unless necessary, and (2) when necessary, should be carefully gauged by the seriousness of the criminal’s offense.¹⁵³ Of course, proportionality is also an important element in retributive theories of punishment, which hold that a person may not be punished to an extent that is greater than he or

150. Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 *CRIME & JUST.* 55, 55 (1992) (noting, also, that “[t]he principle of proportionality . . . seems to be a basic requirement of fairness”).

151. JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW* (1771), reprinted in *THE WORKS OF JEREMY BENTHAM* 367, 401 (John Bowring ed., 1843); see also Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 *DUKE L.J.* 263, 276–77 (2005) (discussing Bentham’s view of proportionality as a principle in criminal punishment).

152. BENTHAM, *supra* note 151, at 399, 401.

153. *Id.* In relevant part, Bentham articulated the rule of proportionality in terms of constraints on both the *minimum* and *maximum* punishment allowed in the criminal setting. *Id.* “Punishments may be too small or too great; and there are reasons for not making them too small, as well as for not making them too great. . . . [As to the need for minimums:] If, then, a man, having reaped the profit of a crime, and undergone the punishment, finds the former more than equivalent to the latter, he will go on offending for ever; there is nothing to restrain him. If those, also, who behold him, reckon that the balance of gain is in favor of the delinquent, the punishment will be useless for the purposes of example.” *Id.* at 399. As to the need for maximums: “The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given. . . . An error on the maximum side . . . is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. *It is on this side, therefore, that we should take the most precautions, as on this side there has been shown the greatest disposition to err.*” *Id.* at 401 (emphasis added).

she deserves, with desert measured by the seriousness of the offense he or she committed.¹⁵⁴

The three principles of Harm, Parsimony, and Proportionality are the basic building blocks of the criminal model of adjudication. Part IV of this Article applies these principles in the setting of sexual assault on campus, demonstrating their usefulness in establishing a procedural framework for the adjudication of individual cases. First, however, it will be important to clarify a key distinction between two different functions of college codes of conduct.

F. Distinguishing Aspiration from Punishment

Unlike criminal law, which mostly sketches society's moral code in a negative sense through prohibitions and punishments, college codes of conduct usually have a dual function: (1) they prohibit certain conduct and contain disciplinary procedures for code violations; and (2) they articulate affirmative ideals—of community, civility, and equal respect—that they seek to impart independently of the disciplinary code. The second, affirmative function of college codes retains a vestige of the *in loco parentis* role that colleges and universities filled for many generations.¹⁵⁵

In the realm of campus sexual misconduct codes, these two roles have sometimes become confused, to the detriment of the conversation about sexual assault on campus. In fact, it is important to clearly distinguish them and to realize that the sanctioning process that inevitably attends sexual misconduct adjudications does *not* necessarily attach to the more aspirational sections of student codes of conduct.

A major goal of college and university student conduct codes is to articulate a set of aspirations and behavioral ideals toward which members of the community are expected to strive. In contrast to criminal law's focus on prohibitions, campus codes often declare the *affirmative* norms by which the community seeks to operate—norms of mutual respect, toleration, honesty, and integrity. These norms

154. See, e.g., HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 436 (1979) (“[T]he requirement that punishment not be disproportionately great . . . is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.”).

155. See generally Theodore C. Stamatakos, *The Doctrine of In Loco Parentis, Tort Liability, and the Student-College Relationship*, 65 IND. L.J. 471 (1990) (discussing the doctrine of *in loco parentis* in a collegiate setting).

express the values necessary for an academic community to function well. They also acknowledge a traditional role of the university, the sense that part of its job is to continue the character education of young adults as well as their academic training. Thus, college conduct codes are replete with exhortatory statements:

- “[A]ll student members of the University community are expected to conduct themselves in a manner that demonstrates mutual respect for the rights and personal/academic well-being of others, preserves the integrity of the social and academic environment, and supports the mission of the University.”¹⁵⁶
- “Students at Carnegie Mellon, because they are members of an academic community dedicated to the achievement of excellence, are expected to meet the highest standards of personal, ethical and moral conduct possible. These standards require personal integrity, a commitment to honesty without compromise, as well as truth without equivocation and a willingness to place the good of the community above the good of the self It is rare that the life of a student in an academic community can be so private that it will not affect the community as a whole or that the above standards do not apply.”¹⁵⁷
- “Bruins are committed to the values of Respect, Accountability, Integrity, Service and Excellence. Bruins conduct themselves with integrity and understand that the quality of their educational experience is predicated on the quality of their academic work and service to the community. Bruins hold themselves accountable to the commitments they make and for their conduct. When faced with adversity, Bruins engage in thoughtful reflection and exhibit superior ethical decision-making skills.”¹⁵⁸

Such statements do not define specific conduct violations that will result in punishment. No college could (or would) punish every word or behavior by a student which does not “support the mission of

156. *Academic Integrity*, N.Y.U. SHANGHAI, <https://shanghai.nyu.edu/content/academic-integrity> (last visited Nov. 19, 2018).

157. *Carnegie Mellon Code*, CARNEGIE MELLON U., <https://www.cmu.edu/student-affairs/theword/code/index.html> (last visited Nov. 19, 2018).

158. *UCLA Student Conduct Code*, UCLA, <https://www.deanofstudents.ucla.edu/Individual-Student-Code> (last visited Nov. 19, 2018).

the university,”¹⁵⁹ “place the good of the community above the good of the self,”¹⁶⁰ or demonstrate “thoughtful reflection and . . . superior ethical decision-making skills.”¹⁶¹ Such exhortations are not meant to articulate standards of formal punishment, but rather a behavioral ideal toward which students should strive. They serve purposes which are mainly pedagogical and developmental rather than punitive. A university’s code of *punishment*—the rules specifying misconduct which are adjudicated by college misconduct panels—on the other hand, pertains only to a small subset of violations, violations (prominently including sexual assault) which are deemed to cause large and unjustified harm. The three principles articulated above—harm, parsimony and proportionality—mark and enforce the conceptual boundary between the realms of aspiration and permissible punishment in campus codes of conduct.

Both the aspirational and punitive roles of student conduct codes apply to their dictates about personal relationships—including sexual relationships. The statement in a college code of conduct that “[a]ll members of the University community have a right to treatment with dignity and respect and to full participation in the community”¹⁶² cannot reasonably be interpreted as a declaration that any violation of that ideal—any instance of disrespect or unfairness in personal relationships between students—will be adjudicated and punished in a disciplinary proceeding. For the same reason that society does not punish all harms via criminal law, universities should not, and cannot, punish all morally flawed behaviors which occur between students involved in personal relationships, including intimate relationships. A student who “cheats” on an intimate partner by flirting with someone else, or calls an intimate partner hurtful names during a fight, or says mean things about an intimate partner behind his or her back—all violations of respect and fair dealing which people commit in intimate relationships all the time—should not be subject to formal disciplinary proceedings and sanctions for violating his or her code of conduct.

In their critique of the “sex bureaucracy” now encircling higher education, Jacob Gersen and Jeannie Suk recount some wonderful

159. *Academic Integrity*, *supra* note 156.

160. *Carnegie Mellon Code*, *supra* note 157.

161. *UCLA Student Conduct Code*, *supra* note 158.

162. *Student Handbook: Standards of Conduct in the Harvard Community*, HARV. U., http://static.fas.harvard.edu/registrar/ugrad_handbook/current/chapter5/standards_conduct.html (last visited Aug. 25, 2018).

examples of what they call “bureaucratic sex creep” in this area.¹⁶³ They quote from a number of college and university conduct codes which purport to teach students how to have healthy romantic and sexual relationships.¹⁶⁴ In 2015, for example, Georgia Southern University instructed students: “[Sexual c]onsent is a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest, and verbal agreement.”¹⁶⁵ The 2014 Annual Security Report from American University outlines “the difference between healthy and unhealthy relationships,”¹⁶⁶ while the consent materials from the University of Wyoming urge students, “Don’t Kill the Mood,” explaining that “[a]sking for consent . . . shows your creativity and can even make the sexual interaction more intimate.”¹⁶⁷

As standards for adjudications of misconduct, such exhortations obviously make no sense. No school would seriously entertain the charge that a respondent should be disciplined for misconduct because they were insufficiently “creative” or “imaginative” in procuring consent. Such instructions are not meant to spell out grounds for a misconduct charge but rather to teach students about healthy relationships, especially healthy sexual relationships.¹⁶⁸

Those who create and who implement campus codes of sexual misconduct must recognize the distinction between the aspirational and the punitive. Just as the principles of parsimony and proportionality restrict criminal prohibitions to a subset of wrongful acts, misconduct prohibitions in campus codes reach only a relatively small set of provable, serious (and therefore punishable) harms.

163. Gersen & Suk, *supra* note 2, at 925–30.

164. *Id.*

165. *Id.* at 925–26 (quoting GA. S. UNIV., ANNUAL SECURITY REPORT 39 (2015), <http://perma.cc/8NQF-SEQY>).

166. *Id.* at 927 (quoting AM. UNIV., ANNUAL SECURITY REPORT 31 (2014), <https://perma.cc/6GWT-RJVV>).

167. *Id.* at 928 (quoting UNIV. OF WYO., WHERE IS YOUR LINE: CONSENT IS SEXY, <https://perma.cc/45FK-BQRQ>).

168. Admittedly, some college consent materials may venture too far even as aspirational guides. *See, e.g., id.* at 929 (quoting consent materials from the University of Wyoming, in which students who want to “Make Consent Fun” are offered “some more colorful suggestions for a script: Baby, you want to make a bunk bed: me on top, you on bottom? May I pleasure you with my tongue? Would you like to try an Australian kiss? It’s like a French kiss, but ‘Down Under.’ I’ve got the ship. You’ve got the harbor. Can I dock for the night?”).

G. Three Common Principles

Collectively, the harm, parsimony, and proportionality principles set a baseline standard for the criminal process. In the context of personal relationships, they instruct (1) that criminal law will not punish all harms but only certain harms (typically those which violate or credibly threaten to violate the physical security of other persons); (2) that punishment, the deliberate infliction of suffering on a convicted defendant, must be justified by legitimate purposes (e.g., desert and/or utility) and will only be inflicted for serious offenses that violate important rights as society understands them; and (3) that punishment must not exceed, in nature or degree, the just deserts of the convicted defendant as gauged, again, by the seriousness of the crime he or she committed.¹⁶⁹ To the extent that the law of punishment follows these principles, we recognize it to be just and fair. Further, the procedural rights and protections we call “due process” in the criminal context are strategies which help to ensure that these meta-goals of the process—that punishment be inflicted only for the harmful violation of rights, that it not be inflicted on the undeserving, and that it be inflicted only to the degree deserved by the guilt of the defendant—are achieved to the maximum extent possible.

What might be called the criminal law model of punishment in this context is just this: the presence of these three related principles combined with a method of balancing them which allows for charges of sexual assault to be heard, for the person charged to have a full and fair opportunity to mount a defense, and for the adjudication process to thus produce accurate, transparent, and fair results. Out of a desire to maximize accuracy and prevent unjust convictions, our balancing method has produced certain core rules and presumptions:

- The presumption of innocence, requiring the state to prove guilt according to clear standards—the more serious the charge, the higher the standard of proof;
- Statutes of limitation, requiring that criminal prosecutions for most offenses be brought within a specified time period, based on the theory that over time key evidence becomes lost or corrupted, witnesses disappear or forget, and the chance of inaccurate decision-making rises accordingly;

169. With the degree of seriousness measured by the degree of harm inflicted, or credibly threatened, to the physical autonomy of other persons.

- Advance notice to accused defendants accompanied by a full explanation of the charges against them;
- Clear definitions of criminal prohibitions, a way of giving notice to the public of what conduct would render them subject to prosecution;
- An impartial process adjudicated by trained personnel who are thoroughly familiar with the appropriate rules and standards;
- Transparency—both in terms of clarity of the rules and openness of the process to the parties and, where appropriate, to the public—so that errors can be seen and corrected as quickly as possible.

Criminal law offers one functional model of the harm, parsimony, and proportionality principles at work in a system of punishment which seeks to do justice. But the model also presents a structure and framework that can be applied to any system of punishment. Part IV of this Article applies the framework to the problem of adjudicating sexual assault on campus.

IV. THE MODEL APPLIED TO CAMPUS SEXUAL ASSAULT

The foregoing does *not* require that every system of punishment must precisely mirror criminal law or replicate its methods of balancing the three principles. Setting and context matter; and the particular procedures required may vary with differences in both. The Supreme Court dictates that due process is necessarily a flexible concept, sensitive to the particular situation in which the need for protection of rights arises. Where the three core principles are respected, and the process “due” to a defendant follows from them and keeps them in a proper balance, a system of punishment can consistently meet the demands of justice.

How should the balance be struck in cases of sexual misconduct and sexual assault on campus?

A. The Criminal Law Model in Context

Recall the model’s basic conceptual framework. Its animating principles derive from a background respect for the autonomy of the individual person.¹⁷⁰ Criminal punishment is justifiable only when an offender has inflicted serious harm that violates the rights of

170. See *supra* text accompanying note 142.

others, and only to the degree merited by the gravity of the offense.¹⁷¹ Further, rights in relationships are defined against a background assumption that, absent physical harm or the threat of such harm, people should generally be allowed to enter, conduct, and leave personal relationships in the ways, and for the reasons, that they choose.¹⁷²

This autonomy principle argues for a vigorous response to serious assaults on the person, such as sexual assault.¹⁷³ People have the right not to be physically forced into having sex or sexual contact, and not to be coerced into having sex or sexual contact by otherwise illegal means (e.g., as the price of their physical freedom, of someone else's physical freedom, of getting a good grade, a promotion, or a job, or of retaining their privacy against the threat of exposure).¹⁷⁴ Further, if A has sex with B, knowing that B is not consenting or is reckless with respect to B's consent, then A has violated B's rights whether or not A uses or threatens to use force or coercion, and A should be found responsible for sexual misconduct. Punishment is permissible only when (1) the perpetrator caused harm that violated the victim's rights; (2) the perpetrator caused such harm in a morally culpable way; and (3) that harm is provable under a clearly defined standard.¹⁷⁵

The autonomy principle also argues for the maximum possible protection against unjust conviction and punishment and a number of procedural rights proceed from that premise. Unjust punishment can seriously interfere with the autonomy of the wrongly convicted person and serves no legitimate interest of the victim. Persons

171. See *supra* text accompanying note 153.

172. See *supra* text accompanying note 142.

173. See, e.g., M.C. v. Bulgaria, App. No. 39272/98, 2003-XII Eur. Ct. H.R. (2003), in KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 186, 369, 371 (9th ed. 2012) (“The basic principle which is truly common to [the reviewed] legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it” (alteration in original)).

174. See, e.g., MODEL PENAL CODE §§ 213.1–213.2 (AM. LAW INST., Proposed Official Draft 1962) (discussing the definition of “rape” and “gross sexual imposition”).

175. See, e.g., M.C. v. Bulgaria, App. No. 39272/98, 2003-XII Eur. Ct. H.R. (2003), in KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 186, 369, 372 (9th ed. 2012) (“[T]he *actus reus* of the crime of rape in international law is constituted by . . . sexual penetration . . . where [it] occurs without . . . consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”).

charged with serious offenses—offenses which carry the potential for punishment—have the right to a fair and accurate assessment of the evidence against them. Fair and accurate assessment, in turn, requires that certain threshold rules be firmly in place.

1. Clearly Defined Offenses

First, the offenses at issue must be clearly, carefully, and transparently defined so that all members of the community understand what actions violate the sexual misconduct standard and under what conditions the standard will apply. Thus, campus misconduct codes must make valid distinctions between their aspirational and punitive dimensions—neither seeking to punish students for violating such amorphous duties as “support[ing] the mission of the university,”¹⁷⁶ nor withholding punishment that is otherwise justified on the grounds that the mission of the institution is to educate and not to punish.¹⁷⁷

Campus sexual misconduct codes must clearly define the meaning of “sexual harassment” under Title IX, and must also clearly and publicly define, *ex ante*, the elements of sexual misconduct offenses. In this connection, such terms as “affirmative consent” and “incapacitation”—core elements in most of the new campus sexual misconduct codes—should be defined so as to explicitly mark the boundary between permissible and actionable behavior. Too often they are not.

Serious concerns have been raised about the fairness and accuracy of the affirmative consent standard, which is now imposed by law on colleges and universities in California and other states.¹⁷⁸ The strength of affirmative consent standards is that they put sexual autonomy front and center. Stephen Schulhofer has described this virtue well:

176. *Academic Integrity*, *supra* note 156.

177. Lombardi, *supra* note 132.

178. *See, e.g.*, CAL. EDUC. CODE § 67386 (West 2018) (“Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.”).

‘No’ means no, obviously. But an intrusion on the person requires more than just the absence of a clear ‘no.’ A physical intrusion on the person requires actual permission. Would anyone think that a medical patient’s ambivalence, or an ambiguous ‘maybe,’ was a consent to medical treatment or surgery? Obviously, anything less than clear affirmative permission would never count as consent. . . . Why should the physical autonomy of a woman’s body not be entitled to the same respect in a sexual encounter? . . . Consent for an intimate physical intrusion into the body should mean in sexual interactions what it means in every other context—affirmative permission clearly signaled by words or conduct.¹⁷⁹

In the context of institutional punishment, however, the concerns about affirmative consent are at least equally powerful. In relevant part, for example, the California affirmative consent statute reads as follows: “Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.”¹⁸⁰ As an aspirational ideal, this statement has obvious value. But as a basis for punishment, it is deeply problematic, especially in the context of a college disciplinary proceeding that requires only a preponderance standard to prove a violation and is conducted by personnel who typically have little or no training in adjudication.¹⁸¹ The cases discussed earlier illustrate the potential injustice of the standard.¹⁸² As a practical matter, how is a person accused of sexual assault under an affirmative consent standard to prove that he or she obtained “ongoing” affirmative consent in a sexual encounter witnessed only by the two parties to the sex? What does “ongoing” mean? That each person must obtain consent at certain stages of their sexual

179. Schulhofer, *supra* note 136, at 2181. As to the details of his proposed affirmative consent standard, and its workability, Professor Schulhofer argues: “Clear proof of an unequivocal ‘no’ should not be required. . . . There are many ways to make permission clear without verbalizing the word ‘yes,’ and permission certainly need not be in writing. But permission must be an affirmative indication of actual willingness. Silence and ambivalence are not permission.” *Id.*

180. CAL. EDUC. CODE § 67386.

181. *See id.* (All California institutions of higher education, in order to receive state funds for student financial assistance, “shall adopt a policy concerning sexual assault The policy shall include . . . [a] policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.”).

182. *See supra* Part II.A.3.

encounter? If so, what stages are those? What constitutes “revocation” of consent? Certainly, a verbal “no” should be enough, but affirmative consent statutes do not require this. Does the affirmative consent statute upend the presumption of innocence that forces the party bringing the charge to prove the case against the accused? Some believe that it does—that the standard, in effect, mandates a finding of sexual assault unless the accused can prove that he or she obtained ongoing consent in whatever way that term is defined by the adjudicator.¹⁸³ Until these questions are answered, it will be at least unclear whether the standard accurately targets only parties who have violated the sexual rights of other persons or whether, instead, it has made a lot of non-actionable conduct subject to serious disciplinary action and punishment.

Similar problems attend the definition of “incapacitation,” and its relationship to “consent,” in many college codes. It is clearly appropriate for a system of punishment to prohibit sexual contact with a person who is “incapacitated” because he or she was sleeping or unconscious at the time of the contact.¹⁸⁴ The Codes often go well beyond that, however, enabling charges of sexual misconduct when one or both parties may be intoxicated but still able to walk, speak coherently, etc. and leaving it to misconduct panels in individual cases to decide, *ex post* and (again) under the lowest possible standard of proof, what “incapacitation” really means.¹⁸⁵ It is true

183. See, e.g., Alan Dershowitz, *Innocent Until Proven Guilty? Not Under 'Yes Means Yes.'*, WASH. POST (Oct. 14, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk/> (opposing college affirmative consent standard on ground of fairness to the accused; “it is better for [ten] individuals who did not obtain consent *to go free* than for even one individual who did obtain consent to be wrongfully punished. Being wrongfully punished can be catastrophic for a student.”). Here, Dershowitz also delineates the important difference between the aspiration and punitive aspects of college conduct codes: “I believe that there are two separate, often overlapping, issues with regard to consent. One involves individual behavior, an area in which affirmative consent could be a helpful standard. The second, however, concerns our legal system—where punishing alleged violations of such stringent rules without due process may tarnish our principles of fairness.” *Id.* On the first (aspirational) side, Dershowitz approves of the affirmative consent standard; on the second (legal) side, he opposes the affirmative consent standard on the grounds that punishing someone under it is unfair to the accused person. *Id.*

184. See, e.g., Liam Stack, *Outrage Over Sentencing in Rape Case at Stanford*, N.Y. TIMES, June 7, 2016, at A15 (describing facts of the case and the controversy surrounding Brock Turner’s sentence).

185. See, e.g., T. Rees Shapiro, *He Said It Was Consensual. She Said She Blacked Out. U-Va. Had to Decide: Was It Assault?*, WASH. POST (July 14, 2016),

that many codes contain a reasonableness provision under which the accused may defend against a charge of sexual assault on the grounds that he or she reasonably believed that the other person was not incapacitated. But what counts as “reasonable” or “unreasonable” behavior in these circumstances, particularly when the definitions of “consent” and “incapacitation” may be murky, is far from clear.¹⁸⁶ Adjudicators require some discretion in applying general standards to a particular set of facts. But to achieve a procedural standard which honors the principles of harm, parsimony, and proportionality, much more guidance is needed as to what the standard and its component parts mean.

2. Threshold Procedural Protections

In addition to clearly defined offenses, fairness and accuracy require the presence of procedural protections for the accused. The need for procedural rights is proportionally related to two things: (1) the seriousness of the charged offense and (2) the risk of false conviction.

Above, I discussed the relationship between a defendant’s procedural rights and the gravity of the offense.¹⁸⁷ The more serious the latter, the more potentially harsh the punishment, and therefore the more compelling the need for procedural rights that ensure the defendant has a full and fair chance to argue his or her case.

As for the risks of inaccurate adjudication, four seem most serious in the context of campus adjudication of sexual assault: (1) OCR’s mandate that colleges must use the lowest standard of proof (preponderance of the evidence) in deciding these often complicated and confusing cases; (2) the lack of rules (on many campuses) surrounding notice, and *ex ante* access to the evidence, for the person charged; (3) the adjudication of such cases by untrained faculty,

https://www.washingtonpost.com/local/education/he-said-it-was-consensual-she-was-blacked-out-u-va-had-to-decide-was-it-assault/2016/07/14/4211a758-275c-11e6-ae4a-3cdd5fe74204_story.html?hpid=hp_rhp-top-table-main_uva-335pm%3Ahomepage%2Fstory (describing a case in which the core issue was whether or not (under the university’s standard) the victim was incapacitated by alcohol at the time of the sexual encounter; “To U-Va.,” wrote author Shapiro, “it was another drunken mess with no good answers.”).

186. See, e.g., Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 AM), www.slate.com/articles/double_x/2014/12/college_rape_campus_sexual_assault (recounting the 2013 case of “John Doe” at Occidental College).

187. See *supra* text accompanying note 154.

administrators, students, or Title IX administrators, who, in some cases, are charged with the investigation and adjudication of these cases despite the potential conflict of interest between their duty to be impartial in each case and their role as enforcer of OCR's Title IX interpretations; and (4) the greatly constricted roles of representatives for the accused and complainant—for example barring them from questioning or cross-examining witnesses for the other side.

It seems clear that the risk of false findings of liability is much greater in this context than it is even in civil court, where these procedural deficits do not exist in nearly the same degree. Feminist Judge and Law Professor Nancy Gertner has expressed the point well:

What was troubling to me [about the new sexual misconduct procedures at Harvard] was not the [preponderance] standard in and of itself. It was that standard accompanied by considerably fewer protections. In civil court, civil rights cases and sexual harassment cases are all evaluated by a “fair preponderance” standard. But those proceedings take place after discovery—people have exchanged information; after lawyers; after hearings presided over by a judge. What was troubling at Harvard . . . was . . . a preponderance standard unaccompanied by any of those proceedings: no counselors for both sides, no hearing—no setting in which the accuser had to say what was going on and could be addressed by lawyers, even if not by the man accused.¹⁸⁸

The need for procedural protections in campus-based cases of sexual assault where the charged respondent faces the most serious possible institutional sanctions—expulsion and/or permanent notation of the offense and liability finding on his or her transcript—is at its highest. At a minimum, such protections must include:

- *Complete, written notice* of the charges against him or her, in advance of any investigation or adjudication.
- *Advance access to all the evidence* obtained during the investigation. Only when an accused person has a full understanding of the charges and the evidence can he or she adequately prepare a defense.

188. *The Toughest Issue on (Any) Campus*, *supra* note 121.

- The right to a *formal hearing*, adjudicated by impartial and well-trained professionals, at which the respondent and complainant may be represented by attorneys or other professionally trained persons of his or her choice.¹⁸⁹
- Acknowledgement of the need for *structural separation between investigators, adjudicators, and appellate authorities* involved in these cases. Separation of roles and powers decreases the chance that bias and partiality will determine the outcome of a case. Thus, the many college misconduct codes which now allow investigators to recommend, or presumptively determine, liability are not valid.¹⁹⁰ Nor are systems which house the investigative and adjudicative roles under the authority of the Title IX administrator. Structural separation allows for independent judgment, and independent judgment greatly assists accuracy, fairness, and the perception of fairness.
- Permission for the parties *to view the evidence well in advance, to ask questions, and to cross-examine witnesses at the required hearing*.¹⁹¹
- *A full account, in writing, of the basis for the adjudicator's decision as to liability*. Such decision must

189. Many conduct codes specify, as does OCR's April 2011 Dear Colleague letter, that adjudicators in these cases must be "trained." *See, e.g.*, DEAR COLLEAGUE LETTER, *supra* note 8, at 8. What that means, however, is often unclear—especially since the standards almost always specify that representation by an attorney is *not* required. "All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence." *Id.* Schools should be transparent on the issue of how much training they offer to those who investigate cases and adjudicate the complicated procedural and evidentiary issues which are sometimes involved.

190. *See, e.g.*, *Student Handbook: Standards of Conduct in the Harvard Community*, *supra* note 162 (stating that the Title IX Office appoints investigator who in turn makes recommendation in final report).

191. *See, e.g.*, Eugene Volokh, *28 Harvard Law Professors Condemn Harvard's New Sexual Harassment Policy and Procedures*, WASH. POST (Oct. 15, 2014), www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/15/28 (reprinting a letter by twenty-eight Harvard Law professors protesting the new sexual misconduct procedures at Harvard on the grounds that those procedures—which, among other changes, put the Title IX Coordinator in charge of the investigation and adjudication process—violate due process).

summarize the pertinent evidence, articulate the reasons for the decision, and locate those reasons within the school's sexual misconduct policy and standard of liability.

- The *right to appeal* the initial decision on any reasonable ground of evidentiary insufficiency, lack of impartiality, or failure to base the decision upon the policy or publicly available procedures.
- Finally, the *burden of proof should be raised* to clear and convincing evidence, at least in cases where a finding of liability could result in the most serious punishment—punishment that could permanently limit or destroy the respondent's opportunity to complete their education. Such a move is permissible under U.S. Supreme Court precedent and seems indicated where serious harm to a defendant's reputation or other important interests may result from a finding of liability.¹⁹² As the four cases discussed earlier in this Article illustrate, these threshold rights are not yet acknowledged requirements in college and university sexual misconduct codes. They must be, and soon.

3. Victims' Rights

People possess the right not to be sexually assaulted, and institutional authorities should protect and defend that right.¹⁹³ On campus there are many ways of honoring these important rights, including aspirational policies that clearly define what respectful behavior toward others is and educate students about it—both in sexual contexts and otherwise.¹⁹⁴ In adjudication that threatens punishment against a named offender, however, the criminal law model permits only those procedural victims' rights which (1) aid the truth-finding function of the adjudication and (2) do not

192. See *Addington v. Texas*, 441 U.S. 418, 424 (1979) (noting that the highest civil standard of "clear and convincing evidence" is available in cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant[, because t]he interests at stake in those cases 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").

193. See *supra* Part III.C.

194. Such education has become a major focus of campus student misconduct codes, and that is a positive step forward. See generally Silbaugh, *supra* note 52 (making the case that this aspirational and pedagogical role of campus codes should be acknowledged and expanded).

substantially diminish the importance or the effectiveness of the procedural rights accorded to the person who faces punishment if found responsible.¹⁹⁵ Victims do not have a “right” that the person they accuse be unjustly found liable or unfairly sanctioned. It serves no one’s interests, including the interests of victims, when cases against accused perpetrators are rushed to judgment or decided under vague, poorly defined standards or biased personnel, or when adjudicatory procedures are perceived by the community and/or general public to be biased and unfair. Only impartial and accuracy-focused adjudications, featuring carefully defined offenses, strong procedural protections for the accused, and proportional sanctions, serve the legitimate interests of victims.

4. Punishment that Fits the Offense

Offenders who are legitimately found liable for sexual assault should be sanctioned. Few would argue that a student who perpetrates a violent sexual assault on another student or has sex with an unconscious student should not be expelled from the institution. Yet confusion reigns here, and those who frame and enforce campus sexual misconduct codes must clear it up.

The confusion seems to have two sources. One is definitional, arising from sloppy analogizing to criminal law even from those who are otherwise skeptical of its ability to prosecute sexual misconduct cases. Demanding that colleges treat sexual assault as a “violent felony”¹⁹⁶ is simply incoherent; colleges do not adjudicate or punish crimes. Similarly, speaking of a campus sexual assault as “rape”¹⁹⁷ is a category error; rape is a crime and is adjudicated by criminal courts. If these statements simply urge that violent sexual assault be treated seriously and that when a person is found responsible for it by a legitimate adjudication process he or she should receive the most serious punishment that the university can impose, this could accord with the principles of the criminal law model, but only *if* the

195. Many of the rights now typically accorded to complainants in sexual misconduct cases would presumably be permitted under this standard, including, for example, complainants’ rights to equal representation at a hearing, equal access to the evidence uncovered by investigators, a full account of the decision in the case and its rationale, and to appeal an unfavorable decision.

196. Hart, *supra* note 120 (“[T]he senator’s message was loud and clear: sexual assault is not okay and will not be tolerated. ‘We need to define this crime for the crime that it is,’ she said. ‘Rape is a felony. It is a violent felony.’”).

197. See, e.g., Joe Drape & Marc Tracy, *Protests Overshadow A Championship at Yale*, N.Y. TIMES, Mar. 10, 2016, at B10.

offenses in question are properly defined and the sanctions carefully gauged to fit the offense. On both of these fronts, many campus codes are heading in the wrong direction.

Reformists argue that in the past, even when a respondent has been found guilty of sexual assault in a campus adjudication, colleges and universities have been reluctant to impose serious sanctions.¹⁹⁸ In some cases, that is correct.¹⁹⁹ But in the current, punitive environment, it has been claimed that expulsion should be the default sanction in all cases where a respondent is found to have committed sexual misconduct against another student.²⁰⁰

That cannot be right. Both in the criminal system and in college codes, sexual misconduct typically covers a wide variety of behaviors ranging from “unwanted touching,” to “unwelcome sexual contact,” to forcible intercourse.²⁰¹ For sentencing purposes, no criminal code treats a conviction for unwanted touching or unwelcome contact with the same severity as it treats rape.²⁰² To do so would grossly violate

198. See, e.g. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>. Bogdanich’s article raised questions about Florida State University’s failure to investigate sexual assault allegations against its star football player Jameis Winston until after football season ended: “The athletic department had known early on that Mr. Winston had been accused of a serious crime. . . . This knowledge should have set off an inquiry by the university.” *Id.* “According to federal rules, any athletic department official who learns of possible sexual misconduct is required to pass it on to school administrators.” *Id.* “Why did the school not even attempt to investigate the matter until after the football season?” said John Clune, another lawyer for the accuser.” *Id.* Bogdanich’s article also quoted from an interview with former Florida prosecutor Adam Ruiz. *Id.* Discussing a sexual assault allegation at F.S.U. that he had prosecuted a decade before the Jameis Winston case, Mr. Ruiz told *The New York Times*: “I learned quickly what football meant in the South Clearly, it meant a lot. And with respect to this case I learned that keeping players on the field was a priority.” *Id.*

199. See, e.g., Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 AM), https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html (finding that fewer than one-third of cases in which respondents are found responsible for sexual misconduct result in expulsion).

200. See, e.g., New, *supra* note 24.

201. See, e.g., *Student Handbook: Standards of Conduct in the Harvard Community*, *supra* note 162.

202. The Model Penal Code, for example, contains a number of sexual assault offenses graded by severity: rape, gross sexual imposition, deviate sexual intercourse (by force or imposition), corruption of minors, sexual assault, and indecent exposure. MODEL PENAL CODE § 213.0–213.5 (AM. LAW INST., Proposed Official Draft 1962).

the proportionality principle. Unwanted touching and the like may properly be deemed offenses, but they are not as serious, and therefore should not be treated as harshly, as forced intercourse. The punishment for sexual misconduct and sexual assault on campus should closely track the criminal law model in this sense: while the sanctions available to college misconduct panels are different from those available to courts, the severity of punishment should follow a similarly proportional course. That is, nonconsensual intercourse should be punished most severely—expulsion and a permanent transcript notation seem quite fair in that context. Unwelcome sexual contact that does not involve intercourse should be punished less severely and so forth. Thus, colleges and universities must (1) carefully define each degree of offense and (2) carefully gauge the sanctions available to fit the gravity of the offense. The policies and procedures must give firm, clear guidance about the range of sanctions to adjudicators (and other personnel who, under current codes, may be involved in deciding responsibility and punishment or upholding them on appeal).

B. Answering the Three Questions

This Article opened by posing three questions: (1) What harms may be prohibited by sexual misconduct codes? (2) What procedural rules and protections are required for adjudications under these codes? and (3) What sanctions are permissible when someone has been found responsible for violating the codes? Recognizing that some discretion must remain with adjudicators deciding individual cases, the criminal law model, when applied to the context of sexual assault on campus, suggests sound answers to all three questions. First, the question of prohibited harms. Student conduct codes must distinguish between those standards which are meant to be aspirational and to which students will be introduced by means of education, and those which articulate prohibitions that are punishable. Sexual misconduct codes—which contain the punishable prohibitions regarding sexual behavior—should carefully define offenses according to the rule that only harms which violate the rights of another person shall be the proper basis of a misconduct claim. Thus, the student who complains that he or she was manipulated into having sex with another student by the other's

The Code's general approach to the law of sexual assault has been widely criticized, but in this particular respect it reflects a general trend among post-1960s reformed rape statutes. *Id.*

threat to break off the relationship should not have a valid basis for bringing a charge under a properly constituted conduct code.

The principle of personal freedom and autonomy in relationships also requires that such freedom and autonomy not be threatened or taken away except for good cause, proven under a rigorous standard by fair, professional, and impartial investigators and adjudicators. Many misconduct codes contain this language,²⁰³ but few articulate what terms like “well-trained,” “fair,” and “impartial” mean or how they ensure that those values are honored in the code. Colleges and universities must be more precise and more transparent about how they plan to achieve these important goals.

Fair and accurate adjudication, in this context, requires the inclusion of procedural rights that are currently not honored by many institutions—for example, the right to advance notice of the charges, to full access to the evidence, to impartial and well-trained adjudicators, to a separation of powers between the functions of investigation, adjudication, appeal, and representation, and to a reasoned account of findings and justification of any sanction.

Finally, proportional sanctioning means that the punishment must fit the offense: colleges and universities must adopt clear and defensible sanction regimes that prohibit them from either refusing to sanction a student who has been found responsible (because, for example, he is a star athlete at the school) or sanctioning a student too harshly. For example, violent sexual assault and sexual assault on someone who is unconscious merit serious punishments like expulsion; lesser forms of sexual contact, even if unwanted, do not. Colleges and universities must make clear to the public, and to the personnel who investigate and adjudicate the cases, exactly what constitutes an offense under the code and what range of sanctions the offense could trigger if the person charged is found liable.

C. The DOE's Proposal Would Restore Fundamental Fairness

Under the standard developed here, the DOE's proposed reforms would restore fairness to the process of adjudicating sexual assault on campus. In particular, the DOE's proposed regulation would require school-recipients to offer advance written notice of the allegations and of the school's procedures as well as possible sanctions and supportive measures,²⁰⁴ to give both parties equal

203. See, e.g., DEAR COLLEAGUE LETTER, *supra* note 8.

204. DOE Proposed Rule, *supra* note 4, at 48.

access to all relevant evidence obtained during the investigation,²⁰⁵ to hold a live, formal hearing, staffed by impartial adjudicators,²⁰⁶ to permit cross-examination of witnesses, including the parties, at such hearing,²⁰⁷ to separate the Title IX coordinating function from the functions of investigating and adjudicating complaints,²⁰⁸ and to offer a written account of the basis for the final decision as to responsibility.²⁰⁹ The DOE's proposal would also define "sexual harassment" in a way that clearly connects that offense to recipients' duties under Title IX, authorizing complaints under the statute when "unwelcome conduct on the basis of sex . . . is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's [school's] education program or activity."²¹⁰ Finally, although the proposed regulation would not mandate that schools apply the clear and convincing evidence standard in sexual harassment cases, it erases the prior requirement to use the preponderance standard, and restricts the use of preponderance to cases in which the school also uses that standard to adjudicate other types of misconduct potentially carrying the same conduct or involving the school's employees, including faculty.²¹¹

The proposed regulation is not perfect. Among the early concerns expressed by commentators, at least two merit further thought. First, the proposal restricts the availability of Title IX sexual harassment process to acts which occur "in an education program or activity of the recipient."²¹² Some commentators have read this to mean that harassment which occurs off campus, for example at a fraternity party or other school-affiliated event, would not be actionable.²¹³ The DOE should amend this provision to make clear that harassment at school-sponsored or affiliated events or sites,

205. *Id.* at 48.

206. *Id.* at 41, 52.

207. *Id.* at 52.

208. *Id.* at 65.

209. *Id.*

210. *Id.* at 18.

211. *Id.*

212. *Id.*

213. *See, e.g.,* Marcotte, *supra* note 22 (Under the proposed rules, "a student who is raped by another student while off campus will have no recourse with the school."); Rosenthal, *supra* note 22 ("The proposed regulations would also limit the scope of institutional responsibility to incidents that take place 'within a recipient's education program or activity,' even if the accused is a student. This excludes many aspects of student life, including fraternities and off-campus residences.").

even if those sites are technically off campus, could be the basis for valid complaints under Title IX.

Second, the proposal allows (but does not require) school- recipients to offer an appeal, and provides that “[i]f a recipient offers an appeal, it must allow both parties to appeal.”²¹⁴ Some commentators worry that allowing complainants to appeal would subject respondents to the equivalent of double jeopardy, a risk that is prohibited in the criminal setting by the Fifth Amendment to the Constitution.²¹⁵ While college and university misconduct panels are not explicitly governed by this constitutional ban, the theory developed here—that in the name of procedural fairness, schools should follow the core principles which have generated the rules of criminal punishment—suggests that respondents, at least, should be allowed to appeal. As for the double-jeopardy analogy, the proposed regulation states: “[A]lthough a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the recipient’s [school’s] education program or activity, a complainant is not entitled to a particular sanction against the respondent.”²¹⁶ Thus far the DOE’s explanation of these provisions²¹⁷ is not entirely satisfying. It is true, as the DOE suggests,²¹⁸ that both complainants and respondents have important interests in fair and accurate adjudication of these cases. Of course the same is true in the criminal context—both complainant and defendant have important interests in the outcome. The rationale behind the rule against double jeopardy is not that complainants lack important interests, but that it is unfair to repeatedly put defendants through the stress of trial under threat of serious punishment. If double jeopardy did not exist, the state could simply appeal adverse verdicts until it got a conviction.

The same fundamental rationale exists here: Respondents in a sexual harassment proceeding should not be subjected to retrial simply because a complainant does not like the recipient’s finding or the penalty. At the same time, unlike the criminal context, “remedies provided by the recipient to the complainant . . . to restore

214. DOE Proposed Rule, *supra* note 4, at 67.

215. U.S. CONST., amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb”); *see, e.g.*, Susan Kruth, *supra* note 21 (“[T]he proposed regulations allow for complainants to appeal cases decided in favor of respondents, subjecting respondents to a situation akin to double jeopardy.”).

216. DOE Proposed Rule, *supra* note 4, at 67.

217. *Id.* at 67–69.

218. *Id.* at 69.

or preserve access” to the school’s educational activities may include actions whose purpose is unrelated to punishing the respondent. If the regulation is interpreted to mean that complainants may not appeal for the purpose of changing a finding of non-liability or of increasing the respondent’s punishment but may appeal for other purposes (more directly related to the adequacy of remedies to restore complainant’s access to education), then it might satisfy concerns about “double jeopardy.” The DOE should (1) require school-recipients to grant the right of appeal in sex harassment cases and (2) further elucidate the grounds for such appeal by respondents and complainants.

V. DOWNSIZING FAIR PROCESS

The cases discussed in this Article could not happen at every American college or university today, but neither are they isolated examples. They are not exceptions to the trend; they exemplify it. Across the country, newly minted procedures for adjudicating sexual misconduct on campus now threaten accused persons with serious punishment under the lowest possible standard of proof, refuse to give accused respondents adequate notice of the charges against them, bar advocates for the parties from speaking during adjudicatory proceedings or testing the evidence of the opposing side by questioning witnesses, ignore clear conflicts of interest, and insist on a degree of secrecy which insulates campus process from salutary public scrutiny.

Proponents of the new standards argue that because college conduct codes are not “law,” they need not be constrained by the standards which govern legal process.²¹⁹ Obviously college codes are not “legal” in a formal sense (that is, they are not created or implemented by legislatures and courts).²²⁰ But the absence of

219. See, e.g., *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <http://knowyourix.org/why-schools-handle-sexual-violence-reports> (last visited Nov. 19, 2018) (“Title IX doesn’t take sexual violence away from the criminal justice system; it just gives students *additional* rights because equality in education is so important.”).

220. Legislatures and courts are increasingly becoming part of the discussion by, for example, defining key terms like what it means to “consent” to sex. See, e.g., CAL. EDUC. CODE § 67386 (West 2018) (statute mandating that institutions of higher learning adopt affirmative consent rule when adjudicating cases of sexual assault); see also Campus Accountability and Safety Act, S. 590, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/590/text> (a proposed federal statute, sponsored primarily by Democrats, addressing the problem of sexual assault

formal legal status does not absolve colleges from their obligation to do justice for the parties whose fate they adjudicate. We do not concern ourselves with fair process only because statutes—or even constitutional doctrine—force us to do so. We concern ourselves with procedural fairness because it is a moral imperative when we consciously threaten someone with punishment. In the context of sexual misconduct, fairness means ensuring that victims' claims of harm have a full chance to be heard, and that persons accused of inflicting such harm have a full opportunity to argue their innocence, and test the case of their accuser, before an impartial adjudicator. Harvard Law School Professor Janet Halley recently captured this intuition:

Thing number one: We want to have workplaces and educational settings where sexual abuse is absent. . . . Thing number two: When we're charging somebody with a violation of norms that are morally and legally important, we need to understand that we are bringing a major accusation against them, one that can destroy their career, their peace of mind, and their reputation. And three, we need to remember that the legitimacy of the sex-harassment system will be squandered if we don't try to do both.²²¹

The duty to deliver accurate, fair, and impartial results is not exclusive to the law; it goes first to principles which justify and sustain the law. College adjudicators are not deciding "legal" cases *per se*, but in the campus setting, they *are* deciding whether or not to inflict punishment on the accused person before them. Where a finding of responsibility can visit serious punishment on an offender, colleges have a primary and infeasible obligation to deliver justice.

on campus); Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3403/text> (a proposed federal statute, sponsored primarily by Republicans, addressing the same); Grace Erard, *Virginia Legislature Passes Bills to Address Campus Sexual Assault*, CAVALIER DAILY (Mar. 3, 2015), <http://www.cavalierdaily.com/article/2015/03/virginia-legislature-passes-bills-affecting-victim-autonomy> (discussing Virginia's statutory approach to campus sexual assault); Susan Svrluga, *Do Students Get a Fair Hearing? An Effort to Change How Colleges Handle Sexual Assaults*, WASH. POST (July 29, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/07/29/do-students-get-a-fair-hearing-an-effort-to-change-how-colleges-handle-sexual-assaults/> (discussing federal legislative efforts to address the problem).

221. Dorment, *supra* note 76.

Proponents argue that because colleges are not empowered to inflict criminal-type punishments—namely, imprisonment—upon persons found responsible for sexual misconduct on campus, procedural safeguards are not as important in the campus setting as they are in the criminal one.²²² But this argument misses the point. The question is not whether punishment in one sphere is identical to punishment in the other, but rather the degree to which sanctions available to adjudicators might seriously impact the person found “guilty” *within the sphere in which those sanctions operate*.

The fact that colleges cannot deprive responsible parties of their liberty, as the criminal system often does, might justify some differences in adjudicatory process. The level of required procedural rights depends on the severity of the potential sanction. For example, if the most serious sanction available for committing sexual misconduct on campus were a \$5.00 ticket, a low level of procedural protection for accused persons might be justified. But no one thinks that this is, or should be, the case. A person who commits a sexual assault should be severely punished, and the new sexual misconduct codes reflect that belief.²²³ But many colleges and universities, while *lowering* the procedural protections available to accused students, have simultaneously *raised* the level of punishment for persons found responsible for sexual misconduct.²²⁴ This is what raises fairness concerns about the new misconduct codes.

“The idea that what we’re talking about here is just a civil sanction, the equivalent of money damages, is unreal to me,” says Professor Janet Halley.²²⁵ “When we expel or suspend a student and put that on the transcript, it’s going to be very hard for that person

222. See, e.g., Lombardi, *supra* note 132 (“Administrators stress that the college judicial system is, as IU’s Freeman, who heads the Office of Student Ethics, says, ‘not the same thing as a court of law.’ Unlike criminal courts, which enforce rape statutes, college proceedings enforce ‘conduct codes’ that list prohibited acts like ‘sexual assault’ or ‘sexual contact.’”).

223. I should note, again, that this was not always the case. See, e.g., Dorment, *supra* note 76 (recalling that “Occidental, for its part, once assigned a book report to a student found responsible for sexual assault”); see also Bogdanich, *supra* note 26 (raising questions about Florida State University’s handling of sexual assault allegation against star F.S.U. athlete Jameis Winston).

224. See, e.g., Beth Howard, *How Colleges Are Battling Sexual Violence*, U.S. NEWS & WORLD REP. (Aug. 28, 2015, 2:58 PM), <http://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence> (“A growing number of schools are also stiffening penalties for offenders. At Duke, for example, expulsion is now the favored sanction.”).

225. Dorment, *supra* note 76.

to go to any other institution of higher education.”²²⁶ In the sphere of higher education, expulsion is the most severe punishment available. Where expulsion is a possible sanction, the cost of punishing an innocent respondent is at its highest and, therefore, procedural protections of the accused should be at their most rigorous.

A third argument for dropping procedural protections in campus sexual assault cases points to the special evil of sexual assault, the harms it inflicts on victims, or both. The suggestion is that we must revamp the campus adjudication system in order to ensure that more perpetrators are reported and punished, even if fewer procedural protections raise the risk that innocent respondents will be found responsible and (unjustly) sanctioned. Here, discussion typically focuses on the clear and present danger posed by serial campus predators,²²⁷ the ubiquity of “rape culture” and its consequences,²²⁸ and the traumatic and enduring injury suffered by many victims of sexual assault.²²⁹

It is of course no justification of unjust procedures to say that many (or even most) of the people charged under them are in fact guilty of the charge. That assertion may be true, but it is also beside the point. We do not accord rights to accused persons because we think they all are innocent of the crimes with they are charged. In law we accord such rights because we deem them necessary to a fair and accurate outcome. Even in cases where the prosecution’s evidence seems overwhelming, defendants deserve a fair chance to defend themselves and to test the evidence of their accusers.²³⁰

226. *Id.*

227. *See, e.g.,* Amelia Thomson-DeVeaux, *What If Most Campus Rapes Aren’t Committed By Serial Rapists?*, FIVETHIRTYEIGHT (July 13, 2015), <https://fivethirtyeight.com/features/what-if-most-campus-rapes-arent-committed-by-serial-rapists/>.

228. *See, e.g.,* Tyler Bishop, *The Laws Targeting Campus Rape Culture*, ATLANTIC (Sept. 11, 2015), <http://www.theatlantic.com/education/archive/2015/09/the-laws-targeting-campus-rape-culture/404824/>. *See generally* *College Rape Culture*, HUFFINGTON POST, <https://www.huffingtonpost.com/topic/college-rape-culture> (last visited Nov. 19, 2018) (a collection of articles discussing college rape culture).

229. *See, e.g.,* *Sexual Assault on Campus*, NAT’L INST. JUST., <https://www.nij.gov/topics/crime/rape-sexual-violence/campus/Pages/welcome.aspx> (last visited Nov. 19, 2018) (“Sexual assault can have devastating effects that can last a lifetime.”).

230. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436, 442–44 (1966); *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (holding that the right of an indigent criminal defendant to an attorney is “fundamental and essential to a fair trial”). In order to introduce the confession of a suspect obtained during a police interrogation, the state

Again, everyone agrees that sexual assault should be punished. To the extent that colleges and universities are suppressing reports of sexual misconduct or letting perpetrators off lightly in order to further institutional interests such as maintaining a good reputation for campus safety, that behavior must be stopped.²³¹ But punishing bad guys is not the only goal here. If it were, then colleges could accomplish that goal simply by finding all accused perpetrators responsible and expelling them. Why bother with investigating at all? And why allow any sanctions less serious than expulsion? If all reports were simply accepted as true and the accused respondents immediately expelled, then the guilty parties would be punished automatically. Such a system would also greatly increase the incentive to report, since complainants who did so would know from the start that their case is won. We avoid this approach for the simple reason that it would be unfair to strike the balance between the interests of reporting and responding parties so heavily in favor of the former. We seek a different balance, one which recognizes the interests of the accused in addition to that of the victim. The law,

must demonstrate that the suspect has been warned that he or she has the right to remain silent; that anything he or she does say may be used against her in court; and that he or she has the right to an attorney. *Miranda*, 384 U.S. at 442–44. These “procedural safeguards” are necessary to “secure the [Fifth Amendment’s] privilege against self-incrimination,” *Id.* at 444, which “had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition.” *Id.* at 442–43.

231. Whether accurate or not, the perception that colleges and universities act in this way is widespread. *See, e.g.*, Brooks Barnes, *An Unblinking Look at Sexual Assaults on Campus*, N.Y. TIMES, Jan. 26, 2015, at C1 (discussing the content of, and the reaction to, the film “The Hunting Ground”); Christina Cauterucci, “Don’t Accept Rape” Campaign Uses Acceptance Letters with a Dark Twist to Fight Campus Rape Culture, SLATE (Apr. 18, 2016, 1:24 PM), http://www.slate.com/blogs/xx_factor/2016/04/18/don_t_accept_rape_campaign_uses_dark_acceptance_letters_to_fight_campus.html; Tyler Kingkade, *Two New Documentaries Will Highlight Student Activism Against Campus Sexual Assault*, HUFFINGTON POST (Jan. 21, 2015), http://www.huffingtonpost.com/2015/01/21/campus-rape-documentaries_n_6517840.html (discussing the films “The Hunting Ground” and “It Happened Here”).

especially criminal law, offers an inevitable frame of reference. Whether conducted on campus or in court, the integrity of an adjudication process requires that the system secure both parties' procedural rights. This, according to many observers, is exactly what the new campus codes fail to do. Discussing Harvard's revamped procedure for adjudicating sexual misconduct cases, Professor Halley told *Esquire* magazine:

Every legal lever has been ticked in the direction of the accuser and against the [accused] I think it's almost in bad faith to be arguing that we 'need' [the preponderance standard] because we have to get equality of the parties. It's called going too far.²³²

However flawed the above arguments are, they have thus far fueled the creation of university sexual misconduct procedures that raise the potential level of punishment for many campus sex offenses while simultaneously lowering the procedural standard for assessing responsibility. In place of a high standard of proof (for example, beyond a reasonable doubt in the criminal setting and clear and convincing evidence on the civil side), colleges, following the guidance of OCR, are using the lowest possible standard, preponderance of the evidence. Instead of allowing lawyers to participate in a process governed by strict rules of evidence, colleges and universities assign college faculty and administrators, whose legal training is negligible at best, to assist both parties. Parties who do hire attorneys as advocates usually find—again, in accordance with strictures laid down by OCR—that the attorneys are not permitted to voice objections, question witnesses, or even to ask

232. Dorment, *supra* note 76. The fact that college misconduct proceedings are “civil” rather than “criminal” does not mandate the preponderance standard. In *Addington v. Texas*, the United States Supreme Court noted that the highest civil standard of “clear and convincing evidence” is available in cases “involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant[, because t]he interests at stake in those cases 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.” 441 U.S. 418, 424 (1979). In its widely disseminated Dear Colleague letter of April 2011, OCR considered, and rejected, the clear and convincing evidence standard as applied to campus sexual misconduct proceedings under Title IX. See DEAR COLLEAGUE LETTER, *supra* note 8 (“Grievance procedures that use this higher standard [of clear and convincing evidence] are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.”).

questions during meetings with college investigators or adjudication proceedings.²³³ Instead of a full hearing run by impartial judges, many policies have transformed the adjudicatory process into a civil investigation that is supervised and controlled by a Title IX administrator whose mandate—to respond to the perceived crisis of sexual assault by taking a tougher stand toward accused perpetrators—presents an obvious conflict of interest that threatens the fairness and impartiality of these adjudications. It is no wonder that students found responsible under the new sexual misconduct procedures are suing, and often winning, in court.²³⁴

VI. CONCLUSION: INSPIRATION FROM CRIMINAL LAW

In this Article, I have argued that the foundational principles that justify criminal punishment should form the basis for the adjudication and sanctioning of students in campus sexual misconduct proceedings. While the personnel, goals, and available sanctions are importantly different in the two settings of court and campus, the two systems of punishment share core values which should greatly inform the adjudication of sexual assault under college misconduct codes.

No one suggests that college misconduct boards should employ the high standard of proof—beyond a reasonable doubt—that applies in criminal cases, and few would insist on the level of procedural protection (e.g., the right to a publicly funded attorney for indigent

233. See, e.g., Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015, 4:38 PM), <https://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/index.html> (discussing procedures at University of California San Diego, where respondents are allowed to hire lawyers but their lawyers are not permitted to speak during the proceedings); Allie Grasgreen, *Students Lawyer Up*, INSIDE HIGHER ED (Aug. 26, 2013), <https://www.insidehighered.com/news/2013/08/26/north-carolina-becomes-first-state-guarantee-students-option-lawyer-disciplinary> (noting that most universities do not allow lawyers to speak on their client's behalf at disciplinary proceedings).

234. See, e.g., Jake New, *Court Wins for Accused*, INSIDE HIGHER ED, (Nov. 15, 2015), <https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges> (“Students suspended or expelled over allegations of sexual assault rarely succeed in lawsuits against the institutions that punished them. That’s starting to change.”); Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-the-m-sexual-assault> (“Colleges lose series of rulings in suits brought by male students accused of sex assault. In stinging decisions, judges fault lack of due process.”).

defendants) that criminal defendants receive. But it is too easy to understate the degree to which a finding of responsibility for sexual assault can affect the life of a party who is found to be responsible. As colleges and universities increase the possible sanctions for sexual misconduct, including expulsion and permanent notations on the educational records of student violators, we should acknowledge that harsher penalties place a proportionately heavier burden on college policymakers to get it right.

It is crucial that colleges treat reports of sexual assault seriously, that they punish such assaults appropriately, and that they try to help survivors deal with the emotional trauma of assault, both during and after the adjudication process. But it is just as important to assure the accused person of a fair and impartial adjudicatory proceeding in which he or she has adequate opportunity to understand the process, absorb and respond to the complainant's evidence, and present his or her case to those who will decide whether or not a code violation took place. A process that is not fair, or is not perceived to be fair, to both parties cannot serve the interests of anyone, including the victims of sexual assault. In deciding their response to the new regulation proposed by the DOE, colleges and universities should not reflexively defend misconduct codes that were themselves too hastily assembled in response to controversial mandates from the government. This time, instead, they should think more carefully about what fairness means in the context of adjudicating sexual misconduct charges on campus. The principles which ground the criminal process are the best place to start.