

NO CLASH OF CONSTITUTIONAL VALUES: RESPECTING FREEDOM AND EQUALITY IN PUBLIC UNIVERSITY SEXUAL ASSAULT CASES

*William E. Thro**

We hold these truths to be self-evident, that all . . . are created equal, that they are endowed by their Creator with certain unalienable Rights¹

INTRODUCTION

Although some may doubt whether the Declaration is a constitutional document,² the words that invented America define our core constitutional values of equality and freedom.³ In Lincoln’s words, our nation was “conceived in Liberty, and dedicated to the proposition

* General Counsel, University of Kentucky; former Solicitor General of Virginia; previously Associate Professor of Constitutional Studies, Christopher Newport University; past President of the Education Law Association (2013). B.A., 1986, Hanover College; M.A., 1988, University of Melbourne; J.D., 1990, University of Virginia. Mr. Thro, a recipient of Stetson University’s Kaplin Award for Excellence in Higher Education Law & Policy Scholarship, focuses his scholarship on constitutional issues in educational contexts. This piece is written in his personal and academic capacities and does not necessarily reflect the views of the University of Kentucky. Mr. Thro thanks Martha Alexander, Elizabeth Busch, Charles Russo, and Paul Salamanca for their insights and conversations, which shaped his thinking on these issues. He also thanks Linda Speakman for her editorial assistance.

¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

² As Professor Strang explained:

Scholars across the ideological spectrum have argued for a unique role for the Declaration of Independence in constitutional interpretation. These scholars’ arguments fall into two general categories: (1) the Declaration is the “interpretive key” to the Constitution’s text’s meaning; and (2) the Declaration is itself part of the Constitution.

Lee J. Strang, *Originalism’s Subject Matter: Why the Declaration of Independence is Not Part of the Constitution*, 89 S. CAL. L. REV. (forthcoming April 2016) (footnotes omitted).

³ As Justice Thomas, joined by Justice Scalia, explained:

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

. . . .

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State.

Obergefell v. Hodges, 135 S. Ct. 2584, 2639–40 (2015) (Thomas & Scalia, JJ., dissenting).

that all . . . are created equal.”⁴ The Constitution itself implicitly reflects those values.

Yet, there is always a degree of tension between equality and freedom. For example, equality prohibits discrimination against homosexuals⁵ and requires same-sex marriage,⁶ but freedom prohibits the prescription of political orthodoxy⁷ and requires respect for those who disagree on religious grounds.⁸ Similarly, in the context of student sexual assault on a public university campus, equality requires the institution to remedy the sex discrimination against the victim/survivor⁹ by disciplining the perpetrator; freedom requires extensive due process protections before the alleged perpetrator can be disciplined.¹⁰

Unfortunately, when confronted with sexual assaults on campus, public institutions frequently have ignored equality.¹¹ Following the

⁴ Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in JARED PEATMAN, *THE LONG SHADOW OF LINCOLN'S GETTYSBURG ADDRESS* xvii, xvii (2013) (Bliss Copy).

⁵ *Romer v. Evans*, 517 U.S. 620, 634–36 (1996); see also *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution . . . neither knows nor tolerates classes among citizens.”).

⁶ *Obergefell*, 135 S. Ct. at 2604–05. To be sure, substantive due process rather than equality formed the basis for the Court’s opinion, but the value of equality seemed to inform the substantive due process analysis.

⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁸ *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (stating that the Free Exercise Clause “requires government respect for, and noninterference with, the religious beliefs and practices of our Nation’s people”).

⁹ Some may think it is not appropriate to refer to the complaining witness as the victim/survivor until such time as there has been a formal finding of a sexual assault. See, e.g., *State v. Devey*, 138 P.3d 90, 95–96 (Utah Ct. App. 2006) (holding that referring to a complainant as a victim during the trial may constitute reversible error in some cases). While this is technically true, the reality is that virtually every complaining witness sincerely believes he/she is a victim of sexual assault. Regardless of the veracity of that belief, these individuals need support and counseling. Accordingly, this Article refers to all complaining witnesses as victims/survivors.

¹⁰ Since the landmark decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), it has been clear the Constitution requires due process before a public university expels a student or imposes a lengthy disciplinary suspension. E.g., *Goss v. Lopez*, 419 U.S. 565, 576–78 n.8 (1975); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–35 (6th Cir. 2005). It is not enough that the university believes the student committed sexual assault; these allegations must be proven in a proceeding that comports with due process.

¹¹ See Janet Napolitano, “Only Yes Means Yes”: An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL’Y REV. 387, 387 (2014) (stating that increased awareness of sexual assault on campuses highlights the need for public institutions to significantly improve their procedures for responding to this problem); Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 214–17 (2011) (reviewing instances in which schools have failed to appropriately respond to allegations of sexual assault).

decline of the *in loco parentis* doctrine, universities have tolerated a student-life culture that emphasizes heavy drinking and casual sex.¹² Such an environment does not prevent sexual assault and, indeed, indirectly encourages it.¹³ When students have come forward with allegations of sexual assault, campus officials often failed to: (1) provide adequate psychological counseling; (2) grant accommodations, such as changes in class schedule or housing; or (3) prevent retaliation by the alleged perpetrator's supporters.¹⁴ If a victim/survivor wished to pursue justice against an alleged attacker, the university often simply referred them to the criminal justice system, where police and prosecutors would not pursue ambiguous cases.¹⁵ If the school initiated student disciplinary proceedings, it was often a horrific experience for the victim/survivor.¹⁶ Sadly, at some institutions, the alleged perpetrator's status as an athlete or the child of a wealthy donor apparently influenced the decision to pursue discipline or the sanction involved.¹⁷

Given the inadequate responses of institutions to the problems of sexual assault, advocates and policy makers justifiably demand universities do more. Quite simply, public schools have a moral and *constitutional* obligation to change the culture so that sexual assault is less common, support victims/survivors, and facilitate victims'/survivors' pursuit of justice.¹⁸ Trustees, administrators, and faculty members must do more. Yet, while there is a broad consensus that equality requires more,¹⁹ some might believe public institutions must choose between equality and freedom. They may believe that pursuing justice for victims/survivors requires abandonment or a significant diminishment of

¹² See Oren R. Griffin, *A View of Campus Safety Law in Higher Education and the Merits of Enterprise Risk Management*, 61 WAYNE L. REV. 379, 383 (2016) (noting how students are generally treated as adult consumers and are "free to engage in various activities at their own discretion").

¹³ CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-5-2-8 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (noting that substance abuse and prior consensual sexual activity are major risk factors for sexual assault).

¹⁴ See Cantalupo, *supra* note 11, at 214–16 (describing instances in which university officials failed to provide appropriate support, protection, or accommodations for sexual assault victims, or failed to act at all).

¹⁵ See Nancy Chi Cantalupo, "Decriminalizing" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 487–88 n.28 (2012) (noting that many institutions' sexual assault reporting guidelines emphasize contacting police).

¹⁶ Cantalupo, *supra* note 11, at 214–16.

¹⁷ DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW 123 (2015).

¹⁸ See discussion *infra* Part II.

¹⁹ See Cantalupo, *supra* note 15, at 517–18 (discussing the need for institutions to develop procedures that go beyond simply punishing offenders).

due process protections,²⁰ or that protecting the rights of accused students means further trauma for victims/survivors²¹ or, worse, allowing rapists to go free.²²

This is a false choice. There is no clash of constitutional values.²³ The Constitution does not require public institutions to choose between equality and freedom.²⁴ To the contrary, the Constitution *requires* a public university to honor both principles. Indeed, preferring equality over freedom or freedom over equality is a constitutional violation.²⁵ The purpose of this Article is to demonstrate how a public institution *must* respect both equality and freedom in the context of a student sexual assault case.

In undertaking this purpose, this Article conspicuously avoids a direct discussion of the United States Department of Education's Office for Civil Rights' ("OCR") recent guidance on Title IX sexual assault cases.²⁶ The Article takes this course of action for several reasons. First,

²⁰ See Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 366 (2015) (discussing how required procedures for sexual assault investigations and increased pressure on institutions to punish offenders increases the risk of unfair tribunals).

²¹ See Complaint at 4–10, *Doe v. Univ. of Ky.*, No. 5:15-cv-00296-JMH (E.D. Ky. filed Oct. 1, 2015), ECF No. 1 (alleging that a university violated Title IX when it allowed the accused three appeals and four hearings, causing a "sexually hostile environment" for the victim/survivor).

²² See Annie Kerrick, *Justice Is More Than Jail: Civil Legal Needs of Sexual Assault Victims*, THE ADVOCATE, Jan. 2014, at 38, 38 (noting the difficulty of prosecuting sexual assault under the criminal legal standard, resulting in low conviction rates).

²³ As a practical matter, the American Association of University Professors has reached the same conclusion. See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX 2–3 (2016), <http://www.aaup.org/file/TitleIX-Report.pdf> (draft report) (arguing that it is possible to combat sexual assault and sexual harassment without compromising freedom of speech and academic freedom).

²⁴ For an earlier articulation of this theme, see William E. Thro, *The Heart of the Constitutional Enterprise: Affirming Equality and Freedom in Public Education*, 2011 BYU EDUC. & L.J. 571, 572 (2011).

²⁵ Compare *United States v. Morrison*, 529 U.S. 598, 620 (2000) (stating that gender discrimination by public institutions violates the Equal Protection Clause unless the discrimination substantially serves an important government interest), with *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (stating that school disciplinary procedures must comport with the Due Process Clause).

²⁶ Any university that receives federal funds for any purpose is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012), and its implementing regulations, 34 C.F.R. § 106 (2015), which prohibit discrimination on the basis of sex in educational programs or activities operated by recipients of federal financial assistance. On April 4, 2011, the OCR issued a Dear Colleague Letter to set out its view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. 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>. That Dear Colleague Letter "explains that the requirements of Title IX pertaining to

for public institutions, the prohibitions and requirements of the Constitution trump any obligations under Title IX.²⁷ A public institution's first obligation is to the Constitution, not Title IX or the collegial epistles of the Assistant Secretary of Education for Civil Rights.²⁸ Second, although there is Supreme Court dicta stating Title IX is both broader and narrower than the Equal Protection Clause,²⁹ the better statutory interpretation is that Title IX, like Title VI, is coextensive with the Equal Protection Clause.³⁰ In other words, for the college that is a constitutional actor, the constitutional obligations and the statutory obligations are the same. Put another way, if Congress were to repeal Title IX, public institutions would still have the same obligations. Third, while the OCR may attempt to enforce its Dear Colleague Letters,³¹ the private right of action to enforce Title IX does not extend to regulations or guidance that go beyond the statutory mandate.³² Indeed, under the Supreme Court's precedent, a private

sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence." *Id.* at 1.

On April 24, 2014, additional guidance was issued by the OCR entitled "Questions and Answers on Title IX." Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014) [hereinafter OCR Questions and Answers], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. Proposed regulations pursuant to the Violence Against Women Act were issued June 20, 2014, and final regulations were issued on October 20, 2014. Violence Against Women Act, 79 Fed. Reg. 62,753 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (stating that the Constitution trumps any laws to the contrary).

²⁸ "Title IX likely does not give OCR the authority to dictate the nature of university disciplinary proceedings. No cases suggest that an investigation of an allegation of sexual assault on campus must adhere to anything like the guidelines OCR is imposing on colleges." BERNSTEIN, *supra* note 17, at 129.

²⁹ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009).

³⁰ Title IX is modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (2012), and the "two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). Indeed, Title VI and Title IX are to be interpreted in the same manner. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–96 (1979). Because Title VI is coextensive with the Equal Protection Clause, *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), Title IX must also be coextensive with the Equal Protection Clause. Thus, any Title IX claim is also a constitutional claim for violation of the Equal Protection Clause.

³¹ "[E]ven if OCR had followed proper procedures, the content of the letter likely violates the Due Process Clause of the Constitution by requiring universities to deprive their students of ordinary due process considerations when putting an important right, their right to pursue and finish their college education, in jeopardy." BERNSTEIN, *supra* note 17, at 129–30.

³² See *Alexander v. Sandoval*, 532 U.S. 275, 285–86 (2001) (holding that a failure to comply with regulations that exceed the scope of Title VI is not actionable).

plaintiff can recover under the deliberate indifference standard of *Davis v. Monroe County Board of Education*³³ and *Gebser v. Lago Vista Independent School District*,³⁴ but cannot recover for conduct contrary to the latest pronouncements from the Washington bureaucracy.³⁵ Fourth, although the courts have universally held that public universities waive sovereign immunity for Title IX damages claims based on the statute by accepting federal funds,³⁶ that waiver does not apply to any new conditions imposed by the OCR.³⁷ Fifth, as senior OCR advocates conceded in congressional testimony, the guidance of the Dear Colleague Letters is not binding on any institution, regardless of whether it is public or private.³⁸

This Article has three parts. Part I briefly discusses the nature of constitutional values. All constitutional provisions restrict the sovereign discretion of government. Sometimes these restrictions prohibit the government from acting; sometimes these restrictions require the government to act. Part II explores the constitutional value of equality and its meaning in the context of public university sexual assault cases. In brief, the constitutional value of equality requires public universities to take certain actions. Part III extensively examines the constitutional value of freedom in the context of public university sexual assault cases. Quite simply, given the stakes for a student accused of sexual assault, extensive due process protections are required. Specifically, there must be a strict separation of roles, a fair hearing, and meaningful appellate review.

³³ 526 U.S. 629, 633 (1999).

³⁴ 524 U.S. at 277.

³⁵ As Professor Bernstein stated:

The Supreme Court itself has stated in the context of Title IX that at least when university officials are sued for allegedly not properly intervening in student-on-student harassment “courts should refrain from second guessing the disciplinary decisions made by school administrators.” School officials “must merely respond to known peer harassment in a manner that is not clearly unreasonable.”

BERNSTEIN, *supra* note 17, at 129 (quoting *Davis*, 526 U.S. at 648–49).

³⁶ David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 234 (2005); *see also, e.g.*, *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 555 (7th Cir. 2001); *Pederson v. La. State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999).

³⁷ *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602, 2606 (2012) (stating that legitimate uses of the spending power require voluntary acceptance of terms accompanying federal grants and recipients cannot be surprised with post-acceptance conditions).

³⁸ Joseph Cohn, *Second Department of Education Official in Eight Days Tells Congress Guidance Is Not Binding*, THE TORCH (Oct. 2, 2015), <https://www.thefire.org/second-department-of-education-official-in-eight-days-tells-congress-guidance-is-not-binding/>.

I. NATURE OF CONSTITUTIONAL VALUES

Advocating the ratification of the Constitution, Madison observed, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”³⁹ Madison’s words recognize the fallibility of human nature, but more significantly, describe the nature of a written constitution. A written constitution establishes the parameters of the government, but also limits the government.⁴⁰ In effect, all constitutional provisions are limitations on the government’s sovereignty—its discretion to pursue a particular end by a particular means.⁴¹ Thus, without a constitution, the government possesses nearly unbridled freedom to pursue its desired means and ends. A constitution limits this unbridled government discretion.

These limitations on sovereign discretion take two forms—prohibitions and requirements. The national Constitution illustrates the point. Many constitutional clauses expressly prohibit certain actions; other provisions require—at least implicitly—government to act in a particular way.⁴² Some clauses contain both a prohibition and a requirement for affirmative governmental action. For example, the Free Exercise Clause prohibits government from punishing particular beliefs,⁴³ but also mandates a religious exemption from otherwise

³⁹ THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

⁴⁰ *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

⁴¹ For example, state constitutions generally require the legislature to establish a public school system of a particular quality. William E. Thro, *Judicial Humility: The Enduring Legacy of Rose v. Council for Better Education*, 98 KY. L.J. 717, 725–26 (2010). In the absence of such a state constitutional provision, state legislatures would have absolute discretion whether to pursue the end of a public school system and to choose the means of achieving that end. See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 358–59 (2011) (arguing that state legislatures, by default, have all power not given to the federal government and are thus constrained, not enabled, by specific grants of power in state constitutions).

⁴² Compare U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”), with U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”); U.S. CONST. amend. XX, § 2 (requiring Congress to meet at least once per year).

⁴³ As the Supreme Court explained:

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” The free exercise of

applicable laws in some circumstances.⁴⁴ Similarly, the Equal Protection Clause not only requires heightened scrutiny for discrimination based on immutable characteristics,⁴⁵ but also requires the government to act affirmatively to eliminate the present-day effects of past discrimination by the government.⁴⁶

While Americans are familiar with the idea of constitutional provisions as prohibitions, they are less familiar with the notion of constitutional provisions that impose requirements on government to act in a particular way.⁴⁷ Yet, the requirements are just as essential to our constitutional order as the prohibitions. In order to fully realize our constitutional values, it is not enough that government be restrained; it is essential that government be commanded to act.

Having explained how constitutional provisions limit a public institution's sovereign discretion by imposing both prohibitions and requirements, this Article now turns to a specific discussion of both equality and freedom in the context of public university sexual assault cases.

II. EQUALITY

Like all constitutional values, equality limits the discretion of a public institution. In some instances, that limitation is a prohibition—institutions cannot confer or deny a benefit simply because of a student's

religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 876–77 (1990) (citations omitted).

⁴⁴ Compare *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (holding that the ministerial exception makes federal discrimination statutes inapplicable to the employment decisions of religious organizations concerning their ministerial employees), with *Smith*, 494 U.S. at 877–78 (stating that religious conduct is not exempt from generally applicable laws).

⁴⁵ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (stating that race-based distinctions are subject to strict scrutiny).

⁴⁶ *Freeman v. Pitts*, 503 U.S. 467, 485 (1992).

⁴⁷ Compare Abner S. Greene, *What Is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1241–42 (2013) (arguing that the Constitution creates certain duties for public officials), with Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1008–10 (2011) (discussing how the Constitution restricts the various branches of federal and state government).

race, sex, or other immutable characteristic.⁴⁸ In other contexts, that limitation is a requirement—institutions must ensure all students are free from assault, harassment, and other forms of discrimination.⁴⁹ In the context of sexual assault involving students, it is not enough for the institution to prohibit sexual assault or discipline the perpetrators; institutions are required to take measures to prevent sexual assault and lessen its impact on individual students.⁵⁰ Specifically, public universities must (1) change the culture, (2) support victims/survivors, and (3) facilitate victims'/survivors' pursuit of justice.⁵¹

A. Change the Culture

The constitutional value of equality requires institutions to change the culture. Universities must prevent sexual assaults. It is not enough to say that students believe a campus is safe;⁵² the institution must do everything in its power to eliminate sexual assault. This affirmative obligation to change the culture takes several forms.

First, public universities must fully understand their campus climate and the extent of the campus sexual assault program. Quite simply, policymakers must understand the extent of the problem before creating a solution. Although there have been a variety of surveys utilizing different methodologies,⁵³ the University of Kentucky's Campus

⁴⁸ *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (race); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (sex); *Bernal v. Fainter*, 467 U.S. 216, 219–20 (1984) (alienage).

⁴⁹ *See* Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1, 14–16 (1996) (discussing the obligation of institutions to take affirmative steps so that both sexes feel welcome).

⁵⁰ Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 52 (2013); Rosenfeld, *supra* note 20, at 369.

⁵¹ As explained *infra* notes 67–72 and accompanying text, the Constitution requires public institutions to facilitate victims'/survivors' pursuit of justice, but it does not require certain policy choices prescribed by the OCR guidance.

⁵² *See, e.g.*, Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 565 (2014) (explaining that Jeanne Clery and her parents believed that Lehigh University was a safe campus prior to her being raped and murdered in her residence hall).

⁵³ *See* DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT iii–iv, 56, 71–72 (2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report_on_the_AAU_Campus_Climate_Survey_on_Sexual_Assault_and_Sexual_Misconduct.pdf (summarizing survey methodologies and rates of sexual assault at institutions within the American Association of Universities).

Attitude Toward Safety (“CATS”) survey, which was mandatory for all students, arguably represents the best and most comprehensive model.⁵⁴

Second, public schools must educate their communities about what is and is not acceptable. Individuals must understand that sexual contact of any type requires consent.⁵⁵ Because alcohol impairs judgment and inhibitions, everyone must recognize the necessity of proceeding cautiously when one or both participants in a sexual encounter have been drinking.⁵⁶ While a public institution cannot diminish an adult’s right to engage in consensual sexual activity,⁵⁷ the institution, in the exercise of its power of government speech, can certainly discourage the casual hookup climate that pervades many campuses.⁵⁸

Third, public universities must implement programs to reduce sexual assaults.⁵⁹ Increased police presence at campus events is an obvious start, but law enforcement has only limited effectiveness. Law enforcement must be supplemented with bystander intervention programs, such as Green Dot, whereby individual students take steps to prevent incidents where both parties are intoxicated or one individual appears to be taking advantage of another.⁶⁰ Additionally, institutions

⁵⁴ UNIV. OF KY., CAMPUS ATTITUDES TOWARD SAFETY PRESIDENT’S REPORT: 2015 (2015).

⁵⁵ Rosenfeld, *supra* note 20, at 363–64.

⁵⁶ Dunn, *supra* note 52, at 575.

⁵⁷ Lawrence v. Texas, 539 U.S. 558, 578 (2003).

⁵⁸ Under the government speech doctrine, a public entity may advance its own views and criticize opposing views as long as it does not punish those other views. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245–46 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

⁵⁹ Indeed, changing the campus culture regarding sexual assault should be part of the university’s enterprise risk management efforts. For a discussion of how enterprise risk management can enhance campus safety, see Griffin, *supra* note 12, at 395–401.

⁶⁰ The University of Kentucky, which has been a national leader in the development of the Green Dot program, describes the program as follows:

The Green Dot strategy is a comprehensive approach to the primary prevention of violence that capitalizes on the power of peer and cultural influence across all levels of the socio-ecological model. Informed by social change theory, the model targets all community members as potential agents of social change. It seeks to engage them, through awareness, education and skills-practice, in proactive behaviors that establish intolerance of violence as the norm, as well as reactive interventions in high-risk situations—resulting in the ultimate reduction of violence. Specifically, the program proposes to target socially influential individuals from across community subgroups. The goal is for these groups to engage in a basic education program that will equip them to integrate moments of prevention within existing relationships and daily activities. By doing so, new norms will be introduced and those within their sphere of influence will be significantly influenced to move from passive agreement that violence is wrong, to active intervention.

Violence Intervention and Prevention Center, U. KY., http://www.uky.edu/StudentAffairs/VIPCenter/learn_greendot.php (last visited Feb. 27, 2016).

should make sure campus pathways are well-lit and secure; further, institutions should ensure that taxis or public transportation are readily available.⁶¹

Fourth, public universities must require all faculty members and every staff member who regularly interacts with students to report any incident of sexual misconduct.⁶² Indeed, given the faculty role in shared governance and the degree of regular close interaction with individual students, faculty members have a special obligation to assist the institution in changing the culture of sexual assault.⁶³

B. Provide Greater Support for Victims/Survivors

When these tragic events occur, the constitutional value of equality requires public institutions to support victims/survivors.⁶⁴ Reporting is going to be painful, but a university can make it as painless as possible. Specifically, a public school must make abundant resources available to the survivors—whether it is relocation of residence, schedule adjustments, medical assistance, or psychological counseling.⁶⁵ Of course, the institution must ensure the alleged perpetrator or the alleged perpetrator's friends and allies do not retaliate against the victim/survivor.⁶⁶

⁶¹ See Michael C. Griffaton, *Foreward is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE WESTERN RES. L. REV. 525, 588–89 (1993) (noting that an institution can be penalized for failing to adequately light campus pathways, secure building doors, or provide appropriate campus escort services).

⁶² See Griffin, *supra* note 12, at 404–05 (discussing the need for faculty to report incidents of sexual violence).

⁶³ See *id.* at 403–05 (discussing the unique role faculty can play in promoting campus safety).

⁶⁴ As part of its constitutional obligations under the Equal Protection Clause, a public institution should encourage victims/survivors to report the acts against them to the police and should support the student after the report. However, the OCR guidance takes a different view. As Professor Bernstein explained:

A logical solution, if federal intervention is indeed necessary, would be for OCR to mandate that universities encourage students who complain of sexual assault to report the assault immediately to the police, and that universities develop procedures to cooperate with police investigations. Concerns about victims' well-being when prosecutors decline to pursue a case could also be adjudicated in a real court, as a student could seek a civil protective order against her alleged assailant. OCR could have mandated or encouraged universities to cooperate with those civil proceedings, which in some cases might warrant excluding an alleged assailant from campus.

BERNSTEIN, *supra* note 17, at 124–25.

⁶⁵ Dear Colleague Letter, *supra* note 26, at 15–16.

⁶⁶ *Id.* at 16.

C. Facilitate Victims'/Survivors' Pursuit of Justice

The constitutional value of equality requires institutions to facilitate the survivor's pursuit of justice.⁶⁷ Under both the Equal Protection Clause and Title IX, once a public institution learns of a sexual assault, it must respond in a manner that is not clearly unreasonable.⁶⁸ At a minimum, this means that the institution must establish some sort of mechanism, independent of the criminal justice system, which allows the university to determine whether alleged perpetrators⁶⁹ are guilty of sexual assault and, if so, to punish them.⁷⁰ While the university satisfies its constitutional and Title IX obligations simply by establishing such a system,⁷¹ the OCR's guidance requires public institutions to do more.⁷² In particular, the OCR requires all institutions to use a lower standard of proof and to reduce the stress on victims/survivors.⁷³ Both of these are discussed below.

1. Use a Lower Standard of Proof

In the criminal justice system, a conviction for sexual assault requires the prosecution to prove every element of the offense beyond a

⁶⁷ Unfortunately, universities have failed in this respect. As Professor Bernstein explained:

[C]ampus disciplinary proceedings have often mishandled complaints of sexual assaults, usually erring on the side of the alleged perpetrator. In some cases, university officials have conspired to get an accused person off the hook, perhaps because he was a star athlete, or the child of a well-connected alumnus, or because the university wanted to avoid bad publicity by denying that an assault took place. More often, though, the problem is that the campus disciplinary rules were established to deal with relatively minor campus offenses such as cheating on exams, underage drinking, and the like, and the system is not competent to address serious violent crime.

BERNSTEIN, *supra* note 17, at 123–24.

⁶⁸ See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644–47 (1999) (holding that deliberate indifference to “known acts of student-on-student sexual harassment” may create liability for recipients of federal funding).

⁶⁹ Although the focus of this Article is sexual assaults allegedly committed by students, a university has the same obligations with respect to sexual assaults allegedly committed by faculty or staff. Indeed, an institution may wish to use the same system to establish guilt and punishment regardless of the status of the alleged perpetrator.

⁷⁰ Henrick, *supra* note 50, at 52.

⁷¹ The Constitution merely requires a reasonable system. See *supra* note 68 and accompanying text. Title IX and its implementing regulations do not require more. See *supra* note 30 and accompanying text.

⁷² See Dear Colleague Letter, *supra* note 26, at 1–19 (describing extensive procedural requirements for institutional responses to sexual assaults); OCR Questions and Answers, *supra* note 26, at 1–3 (providing additional procedural guidance for institutional responses to sexual assaults).

⁷³ Dear Colleague Letter, *supra* note 26, at 11, 16–17.

reasonable doubt (99% certainty).⁷⁴ In circumstances where there is a degree of ambiguity or significant delays in reporting, it will be difficult for prosecutors to meet this high burden of proof.⁷⁵ Consequently, many sexual assaults are never prosecuted or result in acquittals or hung juries.⁷⁶ Such outcomes, while required by due process, do not appear to result in justice for the victim/survivor. The rapist still goes free.

However, if a student disciplinary system uses a lesser standard, such as clear and convincing evidence (75%), or, as the OCR guidance mandates, a mere preponderance of the evidence (50.01%),⁷⁷ then the likelihood that a perpetrator will be found guilty presumably increases dramatically. Although some have argued that the use of a preponderance of the evidence standard violates due process,⁷⁸ this is not necessarily so.⁷⁹ An institution can utilize preponderance of the evidence and still satisfy due process by providing for: (1) strict separation of the investigatory, prosecutorial, adjudication, and appellate functions; (2) a fair hearing with adequate procedural safeguards, including participation of counsel, full disclosure of evidence, a presumption of innocence with the institution assuming the burden of proof, and some form of cross-examination; and (3) meaningful appellate review.⁸⁰

⁷⁴ *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (stating that the Constitution requires application of the reasonable doubt standard for all criminal convictions).

⁷⁵ Kerrick, *supra* note 22, at 38.

⁷⁶ *See id.* (noting that only about two percent of sexual assaults result in conviction and incarceration).

⁷⁷ Dear Colleague Letter, *supra* note 26, at 11.

⁷⁸ Henrick, *supra* note 50, at 62.

⁷⁹ Although the preponderance of the evidence standard would be utilized in any constitutional claim against a university official or a Title IX case against a public university, *see, e.g.*, *Lore v. City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012) (noting that a plaintiff alleging a claim under 42 U.S.C. § 1983 must prove each element of the claim by a preponderance of the evidence); *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363–65 (6th Cir. 2005) (stating that the standard of proof under 42 U.S.C. § 1983 and Title IX is a preponderance of the evidence), there are important distinctions between a suit against a university official or the university itself and a student disciplinary proceeding. Most significantly, the student disciplinary proceeding might not involve the extensive due process protections provided by civil courts. Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 19–25 (2003).

⁸⁰ *See, e.g.*, Comment, *The Due Process Implications of Ohio's Punitive Damages Law—A Change Must be Made*, 19 DAYTON L. REV. 1207, 1230 (1994) (“[T]he Due Process Clause does not require ‘clear and convincing evidence,’ especially when a ‘preponderance of the evidence’ standard is supported by the procedural and substantive protections of adequate guidance and appellate review.”); Note, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1641 (2012) (“At least two federal courts . . . have found that procedural due process requires a standard no lower than preponderance of the evidence . . .”).

Indeed, the civil courts use a preponderance of the evidence standard to adjudicate claims under the federal civil rights statutes.⁸¹

If an institution does utilize a lower standard of proof, then the threshold for actually initiating the prosecution is also lowered. Although criminal convictions require proof beyond a reasonable doubt (99%), a prosecution can be initiated merely by showing probable cause (50.01%).⁸² If a student disciplinary conviction requires only a preponderance of the evidence (50.01%), then a prosecution can be initiated by something less than a preponderance of evidence; perhaps the appropriate standard is reasonable suspicion.⁸³

2. Minimize the Stress of the Disciplinary Proceeding

Regardless of the standard of proof used, a disciplinary proceeding is going to be an extraordinarily stressful and traumatic event for the victim/survivor.⁸⁴ At a minimum, the victim/survivor will have to recount the events of a sexual encounter that, at least in the victim's/survivor's view, was nonconsensual. In other words, it was rape. To the extent a public institution can minimize the stress of the ordeal, it should do so.⁸⁵

One measure to minimize the stress is to screen the victim/survivor from the alleged perpetrator during the hearing.⁸⁶ Although courts allow

⁸¹ See *Walker v. England*, 590 F. Supp. 2d 113, 136 (D.D.C. 2008) (holding that the burden of proof in a Title VII case is a preponderance of the evidence). Of course, litigation in civil courts has full discovery, FED. R. CIV. P. 1, 26, subpoena power, FED. R. CIV. P. 1, 45, active participation by counsel, Bach, *supra* note 79, at 23–24, cross-examination by the lawyers rather than by the hearing officer, *id.* at 20, and formal rules of evidence, FED. R. EVID 101, 1101(b). To the extent the 50.01% preponderance standard makes incorrect outcomes more likely, all of the other factors make incorrect outcomes less likely.

⁸² *Kaley v. United States*, 134 S. Ct. 1090, 1097 (2014); see also *Costello v. United States*, 350 U.S. 359, 363 (1956) (“An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” (footnote omitted)).

⁸³ See *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (“[R]easonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence . . .”).

⁸⁴ See Karen Oehme et al., *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 337, 347 (2015) (stating that it is typical for victims of sexual assault to experience posttraumatic stress, anxiety, depression, sleeping and eating disorders, and other negative emotional consequences). Individuals struggling with posttraumatic stress experience distress when recounting the event that caused the symptoms. *Symptoms of PTSD, ANXIETY & DEPRESSION ASS’N OF AM.*, <http://www.adaa.org/understanding-anxiety/posttraumatic-stress-disorder-ptsd/symptoms> (last updated Aug. 2015).

⁸⁵ While such measures are wise policy, they are not constitutionally required.

⁸⁶ As the OCR explained:

If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety

such measures in the criminal context in only the most extraordinary circumstances,⁸⁷ there is no due process violation if such measures are utilized in the student disciplinary context.⁸⁸

III. FREEDOM

Like equality, freedom limits the discretion of a university. It prohibits a state university from punishing students for freedom of expression or engaging in unreasonable searches and seizures. In other contexts, it requires certain procedural safeguards.

Unlike the legal traditions of other cultures, the Anglo-American-Australasian legal tradition has required procedural due process before government deprives an individual of life, liberty, or property.⁸⁹ Due process prevents arbitrary governmental action, but it is ultimately a search for truth—did the individual actually do the action for which he is accused?⁹⁰ All doubts are resolved in favor of the individual.⁹¹ The focus

of a hearing, it must do so equally for both parties. *At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means.* Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

OCR Questions and Answers, *supra* note 26, at 30 (emphasis added).

⁸⁷ See *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (“[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”).

⁸⁸ See *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 724–25 (1st Cir. 1983) (allowing partitions in a private university disciplinary proceeding); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 29 (D. Me. 2005) (“There is no due process violation from the partition and location of the Complainant during her testimony.”).

⁸⁹ Compare Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT’L L. & ECON. 1, 6 (1997) (describing the lack of due process in the Ukraine), and Haibo He, *The Dawn of the Due Process Principle in China*, 22 COLUM. J. ASIAN L. 57, 93 (2008) (stating that China does not have a tradition of due process), with Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1211–12 (2005) (describing the distinctive Anglo-American tradition of due process), and Belinda Wells & Michael Burnett, *When Cultures Collide: An Australian Citizen’s Power to Demand the Death Penalty Under Islamic Law*, 22 SYDNEY L. REV. 5, 19 (2000) (describing the application of due process in South Australia and its roots in English history).

⁹⁰ See David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 473 (1992) (“[T]he search for truth is the reason the Constitution protects the right to confrontation, the right to compulsory process and the right to put on a defense.”).

⁹¹ Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 658–59 (1998).

is on preventing false convictions.⁹² As Blackstone noted, it is better for ten guilty men to go free than for an innocent man to be imprisoned.⁹³

To be sure, a student disciplinary hearing is not a criminal trial. Yet, since the landmark decision in *Dixon v. Alabama State Board of Education*,⁹⁴ it has been clear the Constitution requires due process before a public university expels a student or imposes a lengthy disciplinary suspension.⁹⁵ It is not enough that the university believes the student committed sexual assault; the university must prove these allegations in a proceeding that comports with due process.⁹⁶

While the exact contours of due process depend upon the context, the stakes are enormously high when a student is accused of sexual assault.⁹⁷ A student who is expelled for sexual assault will find it difficult to enroll at another institution.⁹⁸ Indeed, in some states, the

⁹² To the extent the OCR epistles encourage institutions to ignore due process, the OCR epistles seem to promote an attitude of avoiding false acquittals rather than false convictions: it is better that an innocent student be expelled than to allow a rapist to escape punishment.

⁹³ See 2 WILLIAM BLACKSTONE, COMMENTARIES *358 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

⁹⁴ 294 F.2d 150, 158–59 (5th Cir. 1961) (holding that due process requires notice and an opportunity to be heard before a student is expelled from a public college for misconduct).

⁹⁵ *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–37 (6th Cir. 2005) (collecting cases and analyzing the amount of process due in student disciplinary cases).

⁹⁶ Unfortunately, institutions often fail in this regard. As Professor Bernstein observed:

[M]ost campus tribunals ban attorneys for the parties (even in an advisory capacity), rules of procedure and evidence are typically ad hoc, and no one can consult precedents because records of previous disputes are sealed due to privacy considerations. Campus “courts” therefore have an inherently kangarooish nature. Even trained police officers and prosecutors too often mishandle sexual assault cases, so it’s not surprising that the amateurs running the show at universities tend to have a poor record.

BERNSTEIN, *supra* note 17, at 124.

⁹⁷ As the Supreme Court explained:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

⁹⁸ Robert B. Groholski, Comment, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process Law*, 19 N. ILL. U. L. REV. 739, 754–55 (1999); James M. Picozzi, Note, *University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96 YALE L.J. 2132, 2138 (1987); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 683 (2001).

student's transcript will carry a scarlet letter notation that the student was expelled for sexual assault.⁹⁹ Given the potential liability for admitting a known sex offender, it will be difficult for students to transfer to other institutions.¹⁰⁰ In the Southeastern Conference, an athlete who is disciplined for sexual assault is ineligible to play at any other conference school.¹⁰¹ Since no athletic program wants to be known for utilizing sex offenders, it is only a matter of time before other conferences or the NCAA itself adopts a similar rule.

Given the enormous stakes for accused students, due process in the sexual assault context requires (1) a strict separation of investigative, prosecutorial, adjudication, and appellate roles; (2) a hearing with adequate procedural safeguards; and (3) meaningful appellate review.

A. *Strict Separation of Roles*

The nature of humanity is clear. In theological terms, "all have sinned and fall short of the glory of God."¹⁰² In contemporary psychological terms, everyone—yes, everyone—has unconscious biases that color their attitudes and reactions to others.¹⁰³ Quite simply, individual humans are flawed and cannot be trusted to pursue interests other than their own or reach conclusions free of bias.¹⁰⁴

Our constitutional system recognizes the propensity of humans to pursue their own interests rather than the interests of society as a whole.¹⁰⁵ Sovereignty is divided between the states and the national

⁹⁹ VA. CODE ANN. § 23-9.2:18 (LexisNexis, LEXIS through 2015 Reg. Sess.); Tyler Kingkade, *New York Poised to Become Second State Requiring Sexual Assault Offenses on Transcripts*, HUFFINGTON POST (June 18, 2015, 12:01 PM), http://www.huffingtonpost.com/2015/06/18/new-york-sexual-assault-transcripts_n_7606196.html.

¹⁰⁰ See Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 617, 634–35 (2003) (explaining the liability that universities are exposed to because of student sexual harassment and suggesting that this may make them more cautious regarding which students they accept).

¹⁰¹ SOUTHEASTERN CONFERENCE RULES 4.1.19.

¹⁰² *Romans* 3:23 (English Standard Version).

¹⁰³ See HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES 3–4 (2014) (arguing that all humans are fraught with bias).

¹⁰⁴ *Id.* at 4; *Romans* 3:9–18 (English Standard Version).

¹⁰⁵ See MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 14–15, 20 (2013) (explaining the early influence of reformed thought, which embraced the belief that man has a depraved nature); Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295 (Michael W. McConnell et al. eds., 2001) (describing the Calvinist view of the total depravity of man and stating that men cannot be trusted); William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 J.C. & U.L. 491, 491–92, 504 (2006) (arguing that if a nation assumes humanity's corruption, it will create a distrustful constitution).

government;¹⁰⁶ each sovereign divides its power among the legislative, executive, and judicial branches.¹⁰⁷ Power is diluted rather than concentrated. Similarly, our criminal justice system acknowledges the possibility that individuals may abuse their power; it disperses authority among multiple individuals and contains structural safeguards to prevent abuse of power.¹⁰⁸ A prosecutor must obtain a grand jury indictment or preliminary hearing finding of probable cause.¹⁰⁹ A single juror can prevent a finding of guilt.¹¹⁰ A guilty verdict, but not an acquittal, is subject to appellate review.¹¹¹ The authority to imprison an individual is never concentrated in an individual.¹¹² While neither our constitutional system nor our criminal justice system operates perfectly, avoiding concentrations of power and authority makes it more likely that society, rather than a faction,¹¹³ will prevail and only the guilty will go to jail.

The same principles must apply when a public university confronts an allegation of sexual assault. The individuals who investigate the allegation must not be involved in the decision to prosecute, the determination of guilt, or the appellate review. The individuals who determine whether to initiate disciplinary proceedings or whether to negotiate some sort of “plea bargain” must not be involved in the investigation or the adjudication of guilt. The individuals who determine whether the student is, in fact, responsible for sexual assault must not be involved with the investigative phase, the decision to charge, or the appellate review. The appellate panel must have no involvement in the investigation, prosecution, or hearing.¹¹⁴

¹⁰⁶ THE FEDERALIST NO. 46, at 242–43 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹⁰⁷ THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹⁰⁸ See, e.g., Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L., POL’Y & ETHICS J. 725, 758 (2006) (describing the separate roles given to the judge and the jury); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 656 (1976) (discussing different procedural safeguards in our criminal justice system).

¹⁰⁹ *Thirty-Ninth Annual Review of Criminal Procedure: 2010*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 223, 239, 247 (2010).

¹¹⁰ *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding that there is a constitutional right to a unanimous jury if the jury only has six members).

¹¹¹ U.S. CONST. amend. V, § 1.

¹¹² See Ross, *supra* note 108, at 758–59 (noting that the judge and jury have different functions so that one entity does not have all the power).

¹¹³ THE FEDERALIST NO. 10, at 45–48 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹¹⁴ In other words, the entire process should be like the classic television show *Law & Order*. The “detectives” should investigate the crime, the “district attorneys” should

B. Hearing with Adequate Procedural Safeguards

While the strict separation of roles is essential, the centerpiece of due process will be the hearing.¹¹⁵ Although the “Due Process Clause is implicated by higher education disciplinary decisions[,] . . . [t]he amount of process due will vary according to the facts of each case.”¹¹⁶ Notice and an opportunity to be heard are “the most basic requirements of due process,” but student disciplinary hearings “are not criminal trials, and therefore need not take on many of those formalities.”¹¹⁷ At the hearing “the accused has a right to be present for all significant portions of the hearing,” but “hearings need not be open to the public.”¹¹⁸ “[N]either rules of evidence nor rules of civil or criminal procedure need be applied.”¹¹⁹ In fact, “witnesses need not be placed under oath.”¹²⁰ An accused individual generally has the right to make a statement and present evidence and to call exculpatory witnesses.¹²¹ As long as a public university meets the constitutional standards, it need not follow its own internal procedures and rules in order to satisfy its constitutional obligations.¹²²

prosecute, the “juries” should decide guilt, and the “supreme court” should review every aspect of the trial.

¹¹⁵ In its epistles, the OCR has suggested that hearings are unnecessary and it is possible to handle sexual assault cases with a single person serving as detective, prosecutor, judge, and jury. OCR Questions and Answers, *supra* note 26, at 25. With all due respect to the OCR, the Constitution does not permit the “single investigator” model for public institutions. *C.f.* Defendants’ Brief in Opposition to Plaintiff’s Motion for Emergency Temporary Restraining Order/Preliminary Injunction at 4–5, *Doe v. Pa. State Univ.*, No. 4:15-cv-2072 (M.D. Pa. filed Dec. 11, 2015), ECF No. 38 (explaining Penn State University’s use of the single investigator model); Order at 1–4, *Doe v. Pa. State Univ.*, No. 4:15-CV-02072 (M.D. Pa. Oct. 28, 2015), ECF No. 12 (granting a temporary restraining order to prevent a student’s expulsion based on the single investigator model). A public institution must provide a hearing.

¹¹⁶ *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–34 (6th Cir. 2005) (citations omitted).

¹¹⁷ *Id.* at 635.

¹¹⁸ *Id.* (citing *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983)).

¹¹⁹ *Id.*; *see also* *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) (holding that a student disciplinary hearing is not required to follow the formal rules of evidence); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (same).

¹²⁰ *Id.*

¹²¹ *Id.* at 636.

¹²² *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990) (noting that violations of federal due process are to be measured by federal standards, not by a state’s standard); *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) (“[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest.”); *Bates v. Sponberg*, 547 F.2d 325, 329–30 (6th Cir. 1976) (“It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency’s disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state

Nevertheless, in a situation in which a finding of guilt has significant adverse consequences for the accused students, the hearing must include certain procedural safeguards.¹²³ Specifically, in the sexual assault context, due process requires (1) access to counsel; (2) access to all inculpatory and exculpatory evidence; (3) the burden of proof be placed on the university; and (4) some form of cross-examination. Each of these attributes is discussed below.

1. Attorneys

While a public university is not required to provide an attorney for a student accused of sexual assault,¹²⁴ the institution cannot prohibit the student from seeking legal counsel,¹²⁵ nor can the university prohibit an attorney from being present at the hearing and offering advice as a *passive* participant.¹²⁶ However, due process does not necessarily require the *active* participation of attorneys in the hearing.¹²⁷

institutions.”); *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972) (holding that a university’s violation of its own procedures did not amount to a violation of federal due process).

¹²³ Of course, the hearing should take place before one or more impartial individuals. If a university uses multiple persons as the finders of fact (the jury), then the institution should consider using a legally trained individual as the presiding officer (the trial judge). If the institution uses a presiding officer, then the presiding officer should rule on evidentiary issues and ensure the hearing flows smoothly.

¹²⁴ *Lassiter v. Dep’t of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”).

¹²⁵ *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that “at most the student has a right to get the advice of a lawyer”); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); see *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate).

¹²⁶ *C.f. Osteen*, 13 F.3d at 225 (holding that when the student may also face criminal charges, “it is at least arguable that the due process clause entitles him to consult a lawyer, who might for example advise him to plead the Fifth Amendment”); *Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978) (holding that when criminal charges are also pending, a student must be allowed to have an attorney present during the disciplinary hearings to provide advice, but the attorney does not have to actively participate in the student’s defense).

¹²⁷ *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) (“Ordinarily, colleges and universities need not allow active representation by legal counsel or some other sort of campus advocate.”); see also *Osteen*, 13 F.3d at 225 (noting that during a disciplinary hearing, “the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal”); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (holding a student received due process even though a practicing attorney did not conduct

In most instances, being able to seek legal counsel prior to the hearing and having the lawyer present at the hearing will suffice.¹²⁸ Legal cases rarely turn on a devastating cross-examination at trial or a brilliant answer in appellate oral argument;¹²⁹ legal cases generally turn on comprehensive preparation for trial and lucid persuasive briefing on appeal.¹³⁰ A lawyer can thoroughly prepare his client for a student disciplinary hearing and can script opening and closing statements as well as direct examination. Moreover, cross-examination often can be anticipated and counsel can provide on-the-spot advice.

To be sure, there may be instances where due process requires the active participation of attorneys.¹³¹ For example, if the accused student cannot present a defense without engaging in self-incrimination for subsequent criminal proceedings, the attorney must be allowed to actively participate.¹³² Similarly, if the accused student is incapable of participating in a particular aspect of trial, the lawyer must be allowed to take over.¹³³

2. Evidence

As explained above, due process is designed to ensure the correct result. In order to ensure the correct result, the accused student must have access to all inculpatory and exculpatory evidence.¹³⁴ There should be no surprises at the hearing.

his defense because two student-lawyers consulted extensively with the student's attorney throughout the proceedings).

¹²⁸ See *supra* notes 124–27 and accompanying text.

¹²⁹ Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139, 139–41 (2003) (observing that while oral argument may change a judge's mind, statistically it only occurs in a small percentage of cases); Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67, 69 (2001) (noting that "over 80 percent of the time jurors reach their ultimate verdict during or after the opening statements").

¹³⁰ 3-72 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 72.01 (Matthew Bender 2015); Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 648–49 (2006).

¹³¹ *Flaim*, 418 F.3d at 636 (noting that due process may require allowing a student to have counsel if the procedures are extremely complex or if the school has counsel).

¹³² See *id.* (noting that students have the right to counsel when facing criminal charges for the same incident).

¹³³ See *id.* (noting that an accused student has the right to "make a statement and present evidence," and that counsel may be required to achieve these ends when the proceedings are complex or the charges are serious).

¹³⁴ See Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1210–11 (2000) (stating that criminal procedural rules require the government to produce all material and exculpatory evidence upon request). Schools should apply the same rules to disciplinary proceedings.

While this proposition may seem obvious, it presents special problems in the context of the victim's previous sexual history. "Over the last few decades, almost all American courts have limited the extent to which accused rapists can bring in the sexual past of an alleged victim. This ensures that rape trials are not in effect also putting the victim on trial."¹³⁵ If public universities follow the same approach as the applicable state law, then there is no due process problem. However, to the extent universities impose restrictions that go beyond the federal rules of evidence¹³⁶ or applicable state law,¹³⁷ there is a due process problem.¹³⁸

3. Burden of Proof

Due process requires a presumption of innocence.¹³⁹ The accused student need not make any statement or put on any evidence. Rather, the public university has the responsibility of proving, by the preponderance of the evidence or some higher standard, the student's guilt.¹⁴⁰

¹³⁵ BERNSTEIN, *supra* note 17, at 125.

¹³⁶ FED. R. EVID. 412.

¹³⁷ See Pamela J. Fisher, *State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law*, 76 IOWA L. REV. 835, 835 n.1 (collecting rape shield laws from most states).

¹³⁸ The OCR guidance forbids the consideration of the victim's/survivor's sexual history with anyone other than the accused student. OCR Questions and Answers, *supra* note 26, at 31. However, as Professor Bernstein observed:

[N]o jurisdiction has adopted a blanket rule excluding *all* sexual history evidence not involving the accused. Such evidence is occasionally highly relevant, and a blanket rule would deprive the defendant in such cases of a valid defense.

Imagine, for example, that a video circulates around a college campus showing a man and a woman engaging in what most people would consider a degrading sex act for the woman. The woman then files a complaint with the university, claiming she was sexually assaulted. During the investigation, the woman claims she would never voluntarily consent to such a degrading act. The accused, however, locates four men willing to testify that they engaged in the exact same act with the accuser, and it was fully consensual. One of them even has his own video of the interaction. Under the OCR guidelines, the student accused of sexual assault would not be allowed to present that evidence.

BERNSTEIN, *supra* note 17, at 125–26.

¹³⁹ This proposition is obvious to anyone familiar with our nation's legal tradition, but the OCR guidance "implies that the school should not start the proceedings with a presumption of innocence, or even a stance of neutrality. Rather, university officials should assume that any complaint is valid and the accused is guilty as charged." *Id.* at 126.

¹⁴⁰ See Barton L. Ingraham, *The Right to Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 562–63 (1996) (noting that although the prosecution in a criminal case has the burden to prove all the elements of the crime charged, the defendant in a criminal case has no burden of proof).

Moreover, this burden of proof is on the public institution, not the victim/survivor. Although some insist victims/survivors have “procedural equality,”¹⁴¹ the governmental actor cannot transfer its responsibilities to a private individual.¹⁴² The matter is not *Victim/Survivor v. Alleged Perpetrator*; the matter is *Public University v. Alleged Perpetrator*. It is the public university that has the constitutional and legal obligation to remedy known incidents of sex discrimination, including sexual assault.¹⁴³ It is the alleged perpetrator who violated the university’s rules.

The burden of proof must remain with the public university even when the state¹⁴⁴ or the university¹⁴⁵ has adopted an “affirmative consent” standard.¹⁴⁶ Although affirmative consent policies seem to require the alleged perpetrator to put on evidence that the victim/survivor actually did consent,¹⁴⁷ requiring the alleged perpetrator

¹⁴¹ Nancy Chi Cantalupo, *Address: The Civil Rights Approach to Campus Sexual Violence*, 28 REGENT U. L. REV. 185, 193 (2016).

¹⁴² Transferring the burden of proof to the victim/survivor has the practical effect of requiring the victim/survivor to make opening and closing statements, question witnesses, and cross-examine the alleged perpetrator. Imposing such a burden on a victim/survivor contradicts the notion that universities should minimize the stress and burdens on the victim/survivor. Indeed, in many contexts, it seems cruel to the victim/survivor.

¹⁴³ See *supra* Part II.

¹⁴⁴ E.g., CAL. EDUC. CODE § 67386 (West, Westlaw through 2015 Reg. Sess. & ch. 1, 2015–2016 2d Exec. Sess.) (requiring universities to adopt an affirmative consent policy); N.Y. EDUC. LAW § 6441 (McKinney, Westlaw through L.2015, ch. 1–589) (same).

¹⁴⁵ E.g., *Sexual Violence: Consent*, OHIO ST. U. OFF. STUDENT LIFE, <http://studentconduct.osu.edu/page.asp?id=42> (last visited Feb. 1, 2016) (defining affirmative consent standard); *Investigation Process*, U. KAN. STUDENT AFF., <https://studentaffairs.ku.edu/investigation-process> (last visited Feb. 1, 2016) (same); *Offenses*, MIAMI U. POL’Y LIBR., <http://blogs.miamioh.edu/miamipolicies/?p=2122> (last visited Feb. 1, 2016) (same).

¹⁴⁶ See Letter from Susan Kruth, Senior Program Officer, Legal and Pub. Advocacy, Found. for Individual Rights in Educ., to Catherine Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights (Nov. 24, 2015) [hereinafter FIRE Letter], <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-catherine-lhamon-november-24-2015/> (arguing that the affirmative consent standard impermissibly places the burden of proof on the accused).

¹⁴⁷ As Professor Lave explained:

When I was a public defender, I used to always remind jurors that because the [burden of proof] was on the prosecutor, I could literally say nothing, and still, if the D.A. didn’t prove the case beyond a reasonable doubt, they would have to acquit. But with affirmative consent, the accused *must* put on evidence. If the university proves by a preponderance of the evidence that a sex act happened, the student has violated the university code of conduct *unless he can convince the fact finder that the complainant consented*.

Tamara Rice Lave, *Affirmative Consent and Switching the Burden of Proof*, PRAWFSBLAWG (Sept. 3, 2015, 11:33 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/09/affirmative-consent-and-switching-the-burden-of-proof.html>.

to put on evidence of affirmative consent violates due process.¹⁴⁸ Indeed, in the criminal context, “[t]he State is foreclosed from shifting the burden of proof to the defendant . . . ‘when an affirmative defense . . . negate[s] an element of the crime.’”¹⁴⁹

4. Cross-Examination

In general, “the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.”¹⁵⁰ Indeed, the OCR’s guidance strongly discourages cross-examination.¹⁵¹ Yet, “[s]ome circumstances may require the opportunity

¹⁴⁸ See Memorandum and Order at 10–11, *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015) (holding that requiring a student accused of sexual assault to prove that the complainant consented violates due process).

¹⁴⁹ *Smith v. United States*, 133 S. Ct. 714, 719 (2013) (quoting *Martin v. Ohio*, 480 U.S. 227, 237 (1987) (Powell, J., dissenting)); see also FIRE Letter, *supra* note 146 (discussing cases in which courts have held that the burden of proof must not be placed on the defendant).

¹⁵⁰ *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988); see also *Crook v. Baker*, 813 F.2d 88, 98–99 (6th Cir. 1987) (holding that there was no deprivation of due process despite the accused’s inability to examine and cross-examine witnesses at a disciplinary hearing); *Nash v. Auburn Univ.*, 812 F.2d 655, 663–64 (11th Cir. 1987) (holding that students were not denied due process when they were required to direct their cross-examination questions to the chancellor, rather than the witness); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”).

¹⁵¹ The 2011 Dear Colleague Letter provided:

OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.

Dear Colleague Letter, *supra* note 26, at 12. The OCR’s subsequent April 29, 2014 guidance further provided:

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. *At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means.* Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school’s Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

F-6. May every witness at the hearing, including the parties, be cross-examined?

to cross-examine witnesses, though this right might exist only in the most serious of cases.”¹⁵² Given the seriousness of the allegations and the potential repercussions for the accused, due process should require *some form* of cross-examination in public university sexual assault cases.

However, the cross-examination does not have to take the form of leading questions asked in a hostile or bullying manner. As the Supreme Court explained, “[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”¹⁵³ Despite the portrayal of cross-examination in film and television, it is possible to test the believability and truth of testimony without reducing the witness to tears or eliciting a dramatic confession. Although trial attorneys strive to perfect the technique of leading questions, the veracity and accuracy of a witness’s testimony can be questioned and refuted without leading questions.¹⁵⁴ Instead, cross-examination can take place through the hearing officer or by requiring advocates to ask more open-ended questions.¹⁵⁵

C. Meaningful Appellate Review

“Courts have consistently held that there is no right to an appeal from an academic disciplinary hearing that satisfies due process,”¹⁵⁶ but

Answer: OCR does not require that a school allow cross-examination of the witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, *to allow parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third parties screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.*

OCR Questions and Answers, *supra* note 26, at 30–31 (emphasis added).

¹⁵² *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005); *see also* *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (holding that the right to cross-examine in school disciplinary hearings may be allowed if the case rests on the credibility of the testimony); *Lipsett v. Univ. of P.R.*, 637 F. Supp. 789, 813 (D.P.R. 1986) (holding that the right to cross-examine is not absolute and depends on circumstances), *rev’d on other grounds*, 864 F.2d 881, 915 (1st Cir. 1988).

¹⁵³ *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

¹⁵⁴ While the inability to ask leading questions lessens the advocate’s control of the witness, an advocate can elicit the same information without leading.

¹⁵⁵ One possibility is to allow the accused student to submit questions to the hearing officer and then to allow the hearing officer to ask the questions. As long as the hearing officer does not change the substance of the question, the hearing officer may rephrase the question.

¹⁵⁶ *Flaim*, 418 F.3d at 642; *see also* *Smith ex rel. Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997) (“Due process does not require review by a school board.”); *Winnick v.*

granting an appeal allows the university to correct “any such error that might have occurred, even in proceedings satisfying due process.”¹⁵⁷ As the Supreme Court observed, “[t]he risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.”¹⁵⁸ In the context of a sexual assault disciplinary proceeding, the consequences of an erroneous conviction are severe,¹⁵⁹ especially given the comparatively small cost to appeal. Thus, even though no court has explicitly ruled that an appeal is required, the Constitution would seem to require an appeal.¹⁶⁰

Such an appeal must be meaningful and not a mere rubber stamp.¹⁶¹ Like any enterprise run by human beings, “[d]isciplinary hearings, of course, are not flawless.”¹⁶² This is particularly true when the standard of proof is preponderance of the evidence rather than clear and convincing evidence or beyond a reasonable doubt.¹⁶³ The appellate tribunal must carefully examine whether the accused had access to all the evidence, enjoyed the presumption of innocence, and was able to meaningfully cross-examine witnesses in some form. While the tribunal

Manning, 460 F.2d 545, 549 n.5 (2d Cir. 1972) (“Winnick had no constitutional right to review or appeal after the disciplinary hearing which satisfied the essential requirements of due process.”); *Foo v. Trs. of Ind. Univ.*, 88 F. Supp. 2d 937, 952 (S.D. Ind. 1999) (holding that if the proceeding satisfies due process requirements, an appeal is not necessary).

¹⁵⁷ *Flaim*, 418 F.3d at 642.

¹⁵⁸ *Goss v. Lopez*, 419 U.S. 565, 580 (1975).

¹⁵⁹ *See, e.g.*, VA. CODE ANN. § 23-9.2:18 (LexisNexis, LEXIS through 2015 Reg. Sess.) (requiring that a notation be placed on a student’s transcript if the student is suspended or expelled for sexual assault); SOUTHEASTERN CONFERENCE RULES 4.1.19. (forbidding student athletes who are disciplined for sexual assault to play at other conference schools).

¹⁶⁰ As a practical matter, it is difficult for a public university to argue an appeal is unnecessary. Federal trial judges, who face appellate review of every decision, will likely be extremely skeptical of such an argument and not inclined to defer to the public university.

¹⁶¹ The OCR guidance also allows the victim/survivor to appeal if the hearing results in a finding of innocence. *See* Dear Colleague Letter, *supra* note 26, at 12 (“If a school provides for appeal of the findings or remedy, it must do so for both parties.”). While allowing the victim/survivor or the university to appeal a finding of innocence is counter to the norms of our criminal justice system, such a practice, on its face, does not violate due process. Of course, there may be circumstances where a reversal of a finding of innocence violates due process.

¹⁶² *Flaim*, 418 F.3d at 642.

¹⁶³ As Justice Harlan explained:

If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In re Winship, 397 U.S. 357, 371 (1970) (Harlan, J., concurring).

should review findings of fact for clear error, the appellate review for all legal conclusions should be de novo.¹⁶⁴

Should the appellate tribunal conclude that there is a reversible error, then the finding of responsibility must be vacated.¹⁶⁵ If the public institution believes it can obtain a conviction in a second hearing,¹⁶⁶ then the institution should pursue a second hearing.¹⁶⁷

CONCLUSION

Humanity is inherently sinful, and public university administrators are inherently human. Sometimes their sins are sins of omission—they ignore a culture that promotes sexual assault, provide no support for victims/survivors, and are ambivalent to victims'/survivors' pursuit of justice. Sometimes their sins are sins of commission—they expel alleged perpetrators in proceedings that are biased, procedurally inadequate, and never subject to independent scrutiny. Whether the sins are omission or commission, the actions are still sins.

The Constitution prevents sin by limiting the sovereign discretion of government officials, including public university administrators. The constitutional value of equality *requires* school officials to change the culture, support victims/survivors, and facilitate victims'/survivors' pursuit of justice. The constitutional value of freedom *prohibits* institutional actors from expelling a student without due process. In the sexual assault context, due process means: (1) strict separation of the investigative, prosecutorial, adjudicative, and appellate functions; (2) a hearing with adequate procedural safeguards including access to counsel, access to all inculpatory and exculpatory evidence, placing the burden of proof on the university, and allowing some form of cross-examination; and (3) meaningful appellate review.

Although there is tension between equality and freedom, there is no clash of constitutional values. University administrators are not forced to choose between sins of omission and sins of commission. Indeed, the

¹⁶⁴ This is the standard utilized by federal appellate courts. *See, e.g.*, *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1359 (Fed. Cir. 2007) (holding that legal conclusions are reviewed de novo); *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005) (same).

¹⁶⁵ Failure to vacate the decision violates due process. *See Chapman v. California*, 386 U.S. 18, 44 (1967) (Stewart, J., concurring) (noting that “[r]eversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained”).

¹⁶⁶ At a second hearing, the fact finders should be a different group of people than those who participated in the first hearing.

¹⁶⁷ Given the institution’s obligations under the Equal Protection Clause and Title IX, the institution may well have an obligation to conduct a second trial. *See Cohen, supra* note 36, at 255–56 (arguing that Title IX “require[s] institutions to take affirmative steps in certain situations”); *supra* Part II.

Constitution requires public officials to respect both equality and freedom. Constitutional actors must avoid both sins of omission and sins of commission. They must strive to live up to the founding propositions of the American nation—that all are created and endowed by their Creator with certain freedoms.