DEAR COLLEAGUE: DUE PROCESS IS NOT UNDER ATTACK AT COLLEGES AND UNIVERSITIES, AS SHOWN THROUGH A COMPARATIVE ANALYSIS OF COLLEGE DISCIPLINARY COMMITTEES AND AMERICAN JURIES

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INTRODUCTION

It was 2004 and Laura Dunn was a freshman at the University of Madison-Wisconsin. In April of that year, Dunn was socializing with friends and had become so intoxicated that two of her male teammates offered to walk her safely to another party. Instead, they took her to a nearby apartment and, one-by-one, raped her as she fell in and out of consciousness.[1] It took Dunn over a year to report the assault to university officials and police.[2] University officials then took nine months "to contemplate [and] reject filing disciplinary charges"[3] against the men "due to a lack of 'clear and convincing' evidence,"[4] which was attributed "partially because Dunn reported her assault 15 months after it occurred."[5]

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[1] Denise Restauri, *This Law Grad Gets Justice For Survivors Of Campus Sexual Violence*, FORBES (Sept. 1, 2016, 9:22 AM), https://www.forbes.com/sites/deniserestauri/2016/09/01/this-law-grad-gets-justice-for-survivors-of-campus-sexual-violence/#4327cbe77d39 [https://perma.cc/2RPN-RDQG].

[2] Tyler Kingkade, *The Woman Students Call When They've Been Raped On Campus*, BUZZFEED NEWS (Feb. 9, 2017, 12:14 PM), https://www.buzzfeed.com/tylerkingkade/laura-dunns-campus-rape-fight?utm_term=.dd59A84ZV#.dc0x2kzXL [https://perma.cc/GGK7-HDV2].

[3] Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUB. INTEGRITY (last updated Mar. 26, 2015, 4:42 PM), https://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0 [https://perma.cc/HV6G-8G39] ("The university said a police investigation and the alleged victim's objections to one of her investigating officers accounted for the delay.").

[4] Taylor Harvey, *Victim into Advocate: One Sexual Assault Survivor's Fight for Justice*, MADISON (Apr. 11, 2013), https://madison.com/daily-cardinal/news/campus/victim-into-advocate-one-sexual-assault-survivor-s-fight-for/article_fddc55ea-a277-11e2-8f72-001a4bcf887a.html [https://perma.cc/F9EH-LBAJ].

[5] *Id.*

Dunn filed a complaint with the Department of Education's Office for Civil Rights (OCR) under Title IX,[6] alleging a violation of her right to an education free from sex-based discrimination.[7] In 2008, OCR ruled in favor of the university,[8] finding that its actions were appropriate and in accordance with "established law, due-process guidelines, and victim-support standards."[9]

But Dunn contends that "the ways the university handled her report would have violated [those same] principles . . . had her assault occurred after April 4, 2011."[10] On that date, Vice President Joe Biden Jr. announced a set of "broad new federal guidelines for how colleges should handle students' reports of assault" in a twenty-page letter released by OCR.[11] The Dear Colleague Letter,[12] as it has come to be known, codified in detail how colleges and universities should investigate sexual misconduct promptly and fairly in order to be in compliance with the federal gender-equity law, Title IX.[13] While it was intended to provide both educational institutions and "members of the public with information about their rights,"[14] its prominence as a "significant guidance document"[15] raised skepticism over university officials' capabilities to properly and fairly adjudicate sexual violence.[16]

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[6] 20 U.S.C. § 1681 (1986). As part of the Education Amendments Act of 1972, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

[7] Kingkade, *supra* note 2.

[8] Letter from Dawn R. Matthias, Team Leader, U.S. Dep't of Educ., Office for Civil Rights, to Laura Dunn (Aug. 6, 2008), http://web.archive.org/web/20101204021006/www.publicintegrity.org/investigations/campus_assault/assets/pdf/Laura_Dunn_OCR_finding.pdf [https://perma.cc/8DCW-SURE].

[9] Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (Feb. 8, 2017), https://www.chronicle.com/article/How-a-20-Page-Letter-Changed/239141 [https://perma.cc/W3K2-9SJA].

[10] *Id.*

[11] *Id.*

[12] "Dear Colleague" Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/3YAZ-T24Z] [hereinafter Dear Colleague Letter].

[13] *Id.* at 1 ("Title IX and its implementing regulations . . . 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.").

[14] *Id.* at 1 n.1.

[15] *Id.*

[16] *See* FIRE's Guide to Due Process and Campus Justice, FOUND. FOR INDIVIDUAL RTS. IN EDUC., 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/ [https://perma.cc/XS3K-MCUP] (last visited Oct. 15, 2018) [hereinafter FIRE's Guide to Due Process].

Such skeptics allege that conducting sexual misconduct hearings according to the Dear Colleague Letter guidelines results in a violation of the accused's constitutional right to due process under the Fifth and Fourteenth Amendments.[17] In light of the recent explosion of critical comparison between university disciplinary hearings and criminal trials for the same or similar conduct, this Note stands in defense of the university disciplinary process by offering a comparative analysis of university disciplinary hearings and American juries when it comes to examining, deliberating, and reaching an outcome on sex-based misconduct.

This research and comparative analysis will show that universities are more efficient at safeguarding principles of fundamental fairness for all parties than jury trials are for the same kind of offense. This will be highlighted by drawing a comparison between the components of sexual misconduct disciplinary hearings and jury trials for sex-based crimes. Ultimately, this will quell critics' fears that an accused's due process rights are infringed when universities adjudicate claims of sexual misconduct, and will show that the process is, on a micro-level, more efficient and reliable for both the victim and accused than is currently the reality for both parties in criminal jury trials.

Part I of this Note discusses the evolution of due process rights in university disciplinary hearings and gives a general overview of universities' obligations to students as mandated by OCR. Part II focuses on the due process–related criticism of the Dear Colleague Letter that led to its formal recission in 2016. This Note will explore this criticism by delving into its main arguments, including the belief that college administrators are ill-equipped to adjudicate sexual misconduct. Because this Note seeks to refute this argument, Parts III, IV, and V compare the university disciplinary process to American juries rendering verdicts in trials for sex-based crimes. Specifically, Part III compares the training methods for juries and college conduct professionals. Part IV explores the effect of exposure for jurors and university disciplinary professionals to show perspective on conduct and subsequent remedial outcomes. Finally, Part V discusses the impact of being called for jury service as an extracurricular civic duty versus the career-aspiring choice to become a college conduct professional.

This Note concludes that there is greater expertise and efficiency in university disciplinary hearings than in criminal jury trials thereby rebutting the criticism of such hearings as a violation of students' due process rights.

I. EVOLUTION OF DUE PROCESS RIGHTS IN UNIVERSITY DISCIPLINARY HEARINGS

Until recently, due process rights for students at American institutions of higher education were largely nonexistent, and punishment for student misconduct was left

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[17] U.S. CONST. amends. V, XIV. *See* discussion *infra* Section IV.D (discussing life, liberty, and property interest rights provided by the Fifth Amendment and made applicable to states through the Fourteenth Amendment).

at the whim of college administrators *in loco parentis*.[18] In the watershed case of *Gott v. Berea College*,[19] the Court of Appeals of Kentucky held that:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.[20]

With this understanding, institutions of higher education were armed with a license to promulgate rules, and "students were seldom successful in challenging them in the courts."[21] This doctrine began to deteriorate in the 1960s, when *in loco parentis* was juxtaposed with a changing cultural attitude regarding adulthood.[22] As college campuses became a hotbed for political, social, and economic protests, it was only fitting that the institutions themselves saw their own doctrinal paradigm in the cultural movement's crosshairs.[23]

A. The Death of In Loco Parentis *and Birth of Due Process in University Disciplinary Proceedings*

In loco parentis "inevitably yielded to expanded concepts of individual liberties for college students"[24] when the Fifth Circuit Court of Appeals sounded its death knell in *Dixon v. Alabama*.[25] In that case, the court set forth the groundwork for due process rights for students enrolled in public colleges and universities.[26] In *Dixon*, six students orchestrated a sit-in as part of the Civil Rights movement at an off-campus

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[18] Literally meaning "in the absence of a parent," *in loco parentis* refers to the relationship between university administrators and students, wherein "[c]ollege authorities stood in the place of parents to the students entrusted to their care." Brian Jackson, *The Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1136 (1991).

[19] 161 S.W. 204 (Ky. 1913).

[20] *Id.* at 206.

[21] Britton White, *Student Rights: From* In Loco Parentis *to* Sine Parentibus *and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education*, 2007 BYU EDUC. & L.J. 321, 325 (2007).

[22] *See id.* (discussing how protests against the Vietnam War coincided with sociopolitical changes, such as lowering the age of eligibility to vote).

[23] *See id.* at 325–26.

[24] *Id.* at 326.

[25] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[26] *See* Lisa L. Swem, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 359 n.3 (1987) ("Because *Dixon* introduced constitutional safeguards into the area of student discipline, the United States Supreme Court acknowledged the case as a 'landmark decision.'") (quoting Goss v. Lopez, 419 U.S. 565, 577 n.8 (1975)).

restaurant.[27] Although the administrators at Alabama State College did not say so explicitly,[28] the students were expelled presumably as a result of their participation in the protest.[29] The students brought suit against the Alabama Board of Education alleging a violation of due process under the Fourteenth Amendment.[30]

The court found that due process requires "notice and some opportunity for a hearing before the students at a tax-supported college could be expelled for misconduct."[31] It reasoned that, although there was no statute requiring such, the college should have given notice and an opportunity for a hearing because it was in its usual practice.[32] "[N]otice," the court wrote, "should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education."[33] Thus, the court reversed the college's decision to expel the students because they were not given notice of the college's intention to bring disciplinary proceedings against them, nor an opportunity to be heard at a judicial hearing on the matter, actions the court held to be—at a minimum—required to comport with procedural due process under the Fourteenth Amendment.[34]

However, "the vagueness of procedural due process concepts stated in *Dixon* engendered confusion among the lower courts as to the application of these selected constitutional principles,"[35] and courts in the late 1960s began to shift back and forth between giving deference to university disciplinary decisions and expressing concern for due process rights for students.[36] Finally, the Eighth Circuit weighed in with its ruling in *Esteban v. Central Missouri State College*,[37] clarifying the role of the

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[27] *See Dixon*, 294 F.2d at 152–54.

[28] *Id.* at 151–52 ("The notice of expulsion . . . mailed to each of the plaintiffs assigned no specific ground for expulsion, but referred in general terms to 'this problem of Alabama State College.'"). Alabama State College is now Alabama State University. *See 149 Years of Leadership*, ALA. ST. UNIV., http://www.alasu.edu/about-asu/history--tradition/149-years-of-leadership/index.aspx [https://perma.cc/H9KW-6HES] (last visited Oct. 15, 2018).

[29] *See Dixon*, 294 F.2d at 152–54.

[30] *Id.* at 151 n.1.

[31] *Id.* at 151.

[32] *Id.* at 155.

[33] *Id.* at 158.

[34] *See id.* at 158–59. The Fifth Circuit's ruling in *Dixon* was followed by other successful challenges brought by students against institutions for violations of due process, including sanctions imposed. *See, e.g.*, Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969) ("[E]xpulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of 'misconduct' without reference to any preexisting rule which supplies an adequate guide.").

[35] Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829, 835 (1997).

[36] *Id.* at 836.

[37] 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

judiciary in recognizing substantive and procedural due process in university disciplinary hearings.[38] The Eighth Circuit acknowledged that "procedural due process must be afforded" in accordance with the principles set forth in *Dixon*.[39] Further, the court stressed that "school regulations are not to be measured by the standards which prevail for . . . criminal procedure; and that courts should interfere only where there is a clear case of constitutional infringement."[40]

The Supreme Court in *Goss v. Lopez*[41] expanded on this sentiment, noting that any increased judicial intervention in academic affairs that "formaliz[es] the suspension process and escalat[es] its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."[42] Despite this, the Court extended the *Dixon* due process requirements to outcomes involving short suspensions, confined to public high school students, and "ventured that 'more formal procedures' may be required for longer suspensions or dismissals."[43] Still, the accused 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."[44] At a minimum, universities must engage in an "informal give-and-take" with a student before imposing a penalty; allowing this "will provide a meaningful hedge against erroneous action."[45]

Due process protection, as a general matter, continued to evolve in *Mathews v. Eldrige*,[46] which set forth a three-part balancing test to see what particular protections are required in a given situation.[47] The Court held that comporting with procedural due process requires weighing the private interest that will be affected by action taken; the risk of error and the value of additional protection; and what additional burdens would entail for governmental interest.[48] This test is applied when weighing student interests with the state's interests. Thus, procedural due process at colleges and universities seems largely born out of case law.

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[38] *See id.* at 1089. Although not a central focus of this Note, the courts have formally recognized substantive due process in college conduct proceedings. *See id.* ("We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline . . . that it may expect that its students adhere to generally accepted standards of conduct . . . .").

[39] *Id.*

[40] *Id.* at 1090.

[41] 419 U.S. 565 (1975).

[42] *Id.* at 583.

[43] Swem, *supra* note 26, at 360 (citing *Goss*, 419 U.S. at 584).

[44] *Goss*, 419 U.S. at 581.

[45] *Id.* at 583, 584.

[46] 424 U.S. 319 (1976).

[47] *Id.* at 334–35.

[48] *Id.* at 335.

B. Due Process as Related to University Obligations Under Title IX

This type of court-only influence over procedural due process formally changed in 1997 when the United States Department of Education, Office of Civil Rights (OCR) published "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."[49] Then, in 2001, OCR published a revised guidance to focus "on a school's fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding."[50]

This remained the standard guidance until OCR passed the 2011 Dear Colleague Letter, laying out federal expectations for due process in college Title IX–related cases.[51] The purpose of the Dear Colleague Letter was to provide guidance to public schools and universities on adjudicating sexual misconduct and to clarify due process in regard to the administrators' responsibilities.[52] Among its requirements was the use of the preponderance of evidence as the standard of proof for Title IX cases.[53] The Dear Colleague Letter reasoned that this was consistent with the Supreme Court and OCR's evidentiary standard for civil and civil rights lawsuits.[54] Using higher standards of proof, such as the "clear and convincing" standard that requires more than a preponderance but less than "beyond a reasonable doubt," was deemed not equitable because they are "inconsistent with the standard of proof established for violations of the civil rights laws . . . ."[55] Additionally, it provided that the typical time frame for investigating, adjudicating, and issuing an outcome to a Title IX complaint was sixty days,[56] which would effectively place universities

[49] 62 Fed. Reg. 12034 (Mar. 13, 1997).

[50] *See* U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties (Jan. 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/TMZ9-6T7A] [hereinafter 2001 Guidance].

[51] Dear Colleague Letter, *supra* note 12. *See also* 20 U.S.C. § 1681 (1986).

[52] *See* Dear Colleague Letter, *supra* note 12, at 1–2.

[53] *Id.* at 10–11.

[54] *Id.* ("The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII . . . . Like Title IX, Title VII prohibits discrimination on the basis of sex. OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.").

[55] *Id.* at 11.

[56] *See id.* at 12. Although investigations taking longer than sixty days may not be deemed reasonably prompt, "[w]hether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment." *Id. See also* U.S. Dep't of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 31 (Apr. 29, 2014), https://safesupportivelearning.ed.gov/re

in OCR's crosshairs for investigative practices dragging on for months or even years, as was formerly a common occurrence.[57]

Such bold oversight and direction came as a surprise to colleges and universities, which scrambled to ensure compliance with the Dear Colleague Letter's extensive directives.[58] However, such surprise should elicit little sympathy; the Dear Colleague Letter's roots stretched back over decades of Supreme Court decisions and subsequent actions by OCR to frame Title IX as a law providing for equal opportunity, not just in college sports but as protection against gender-based violence.[59] For instance, in 1995, OCR found that Evergreen College violated Title IX when it failed to "'promptly and equitably' resolve a student's complaint" and "by using a higher standard of proof than it should have" to determine the accused's responsibility.[60] That OCR explicitly echoed what it later codified in the Dear Colleague Letter effectively gave colleges sixteen years' notice as to what obligations they had when investigating and adjudicating cases of sexual misconduct.[61]

In 2003, OCR again reiterated its recommended standard of evidence (preponderance of the evidence) when it investigated the mishandling of a rape complaint at Georgetown University.[62] While OCR was by no means hiding or even implicity stating these standards, "[b]y 2010 many colleges and universities lacked clear grievance procedures to resolve students' complaints . . . [they] took months to investigate students' reports" and continued to use "a higher standard of evidence for sexual harassment and assault."[63] "Despite very clear case law that sexual harassment and sexual assault were on a continuum and should be treated the same

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sources/questions-and-answers-title-ix-and-sexual-violence [https://perma.cc /FEW9-BHSJ] (follow "http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix .pdf" hyperlink) [hereinafter Q&A] ("Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.").

[57] *See* Wilson, *supra* note 9; *see also* Letter from Alice B. Wender, Reg. Office Dir., U.S. Dep't of Educ., Office for Civil Rights, to Teresa Sullivan, President of the University of Virginia 12 (Sept. 21, 2015) (concluding UVA did not schedule a Title IX hearing for five months); Jones, *supra* note 3.

[58] Margo Vanover Porter, *Title IX Coordinators Learning to Cope With 'Dear Colleague' Letter*, EDURISK (Mar. 2014), https://www.edurisksolutions.org/Templates/template-article .aspx?id=2147483767&pageid=136 [https://perma.cc/WFN3-5EF2].

[59] *See* Wilson, *supra* note 9.

[60] *Id.*

[61] *See id.* The Dear Colleague Letter's production in 2011 came sixteen years after OCR ruled in the Evergreen College case in 1995; thus, colleges were on notice during those sixteen years as to what OCR expected of them when it came to equitable procedures and the appropriate standard of proof.

[62] *Id. See also* Letter from Sheralyn Goldbecker, Team Leader, U.S. Dep't of Educ., Office for Civil Rights, to Dr. John DeGioia 3 (May 5, 2004), https://www.ncherm.org/doc uments/199-GeorgetownUniversity--11032017.pdf [https://perma.cc/6RC8-3HUM].

[63] Wilson, *supra* note 9.

under Title IX, higher education didn't really understand this until the [Dear Colleague Letter]."[64]

Administrators struggled with "untangling the web of related legal obligations" arising from the Dear Colleague Letter's directives and how it intersected with other legislative obligations.[65] In 2014, the Department of Education produced the Questions and Answers on Title IX and Sexual Violence (Q&A) to "clarify the legal requirements and guidance articulated in the Dear Colleague Letter and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects."[66]

An important component of the Q&A document is the requirement that "[a]ll persons involved in implementing a recipient's grievance procedures . . . must have training or experience in handling complaints of sexual harassment and sexual violence . . . ."[67] In defending this component of the Dear Colleague Letter, advocates recommend that OCR go a step further and include training specifically on evaluating cases based on a preponderance of the evidence standard, how to determine credibility, and the effects of trauma.[68]

II. CRITICISM OF THE DEAR COLLEAGUE LETTER

Despite the Dear Colleague Letter's approval among women's rights and victim's advocacy groups, it was met with considerable criticism by a vast array of others, ranging from so-called men's rights groups to Ivy League law school faculty.[69] The criticism of the Dear Colleague Letter for purposes of this Note will focus primarily on complaints related to due process for the accused, namely concerns with the Dear Colleague Letter's requisite evidentiary standard, its guarantee that the accuser has the right to appeal, and its discouragement of cross-examination.[70] Because these are

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[64] *Id.*

[65] Porter, *supra* note 58.

[66] Q&A, *supra* note 56, at 2.

[67] Dear Colleague Letter, *supra* note 12, at 12. *See also* Q&A, *supra* note 56, at 40.

[68] *See, e.g.,* Sarah Edwards, *The Case in Favor of OCR's Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL'Y 121, 140–41 (2015).

[69] *See, e.g.,* David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty: Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, PHILLY.COM (Feb. 18, 2015), http://media.philly.com/documents/OpenLetter.pdf [https://perma.cc/A9ZT-RLF5]. *See generally* Bethy Squires, *Survivors of Campus Rape Plead with DeVos to Protect Their Rights*, BROADLY (July 14, 2017, 1:31 PM), https://broadly.vice.com/en_us/article/vbmpjm/survivors-of-campus-rape-plead-with-devos-to-keep-protecting-their-rights [https://perma.cc/6UYV-JWS9] (discussing a July 13, 2017, meeting of Secretary of Education Betsy DeVos with rape survivors and those groups, including men's rights organizations, who felt the sexual assault investigations on campus were biased against the accused).

[70] It should be noted, however, that this is not an exhaustive list of criticisms voiced by

among critics' most prominent concerns with the Dear Colleague Letter, this Note will consider them the basic foundational arguments to disprove, showing instead that universities that adjudicate college conduct hearings in accordance with the principles set forth in the Dear Colleague Letter effectuate a robust defense of protections for students' due process rights.

A. The Preponderance of Evidence Standard Is Inappropriate

Primarily, the Dear Colleague Letter's requirement that sexual misconduct cases be adjudicated in accordance with the preponderance of evidence standard of proof gives critics cause for concern because its rationale does not conform to the reality of what college conduct hearings are,[71] and is "simply too low for what is at stake for the accused student."[72] As mentioned previously,[73] the Dear Colleague Letter requires this evidentiary standard because this is used in all civil and civil rights cases; however, critics charge that defendants in civil trials "have their hearings conducted by experienced and impartial judges" who are familiar with how to weigh evidence accordingly.[74] Indeed, the implicit skepticism of administrator expertise forms much of the criticism surrounding the use of the preponderance standard.[75]

Additionally, critics opine that the Dear Colleague Letter lowered the evidentiary standard that colleges had been using traditionally, and consequently reneged on the 2001 Guidance by stripping colleges of any flexibility in how to weigh the evidence.[76] The 2001 Guidance acknowledged that "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements,

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opponents to the Dear Colleague Letter. *See, e.g.*, Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49 (2013).

[71] *See, e.g.*, Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 80–81 (2013). *See Standard of Evidence Survey: Colleges and Universities Respond to OCR's New Mandate*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Oct. 28, 2011), https://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/#_ftnref8 [https://perma.cc/465N-DE6H] (contrasting civil trials with college conduct hearings).

[72] Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915, 957 (2016) ("Although a student will not go to jail . . . the student's life will almost certainly still be gravely affected.").

[73] *See supra* Section I.B.

[74] *See* FIRE's Guide to Due Process, *supra* note 16 ("[T]he use of this low burden of proof in federal civil cases is counterbalanced by the many procedural safeguards provided . . . safeguards that aren't present in campus cases.").

[75] *See, e.g.*, *id.* ("[F]airly determining whether an accused student is guilty of sexual assault requires skills beyond the university's competence—the ability to gather and analyze forensic evidence, for example.").

[76] *Id.*

and past experience."[77] In explicitly ruling out other standards of proof to be used in sexual misconduct hearings, the Dear Colleague Letter revoked a college's discretion to ensure due process safeguards proportionate to the gravity of the charged offense.[78]

B. Accuser's Automatic Right to Appeal Violates Due Process

Critics also point out concerns with the Dear Colleague Letter's expectation that colleges provide a reporting party with the right to appeal if the same right is afforded to the responding party.[79] This, critics argue, would require the accused to invest additional time, energy, and money to defend themselves for a second or subsequent time, causing them to relive the stress and trauma of the initial hearing.[80] In a criminal law context, the responding party may face a situation akin to "double jeopardy," whereby he or she faces the same charges for the same offense despite proper adjudication and subsequent acquittal.[81]

This recommendation further exacerbates the problems associated with the evidentiary standard by allowing the reporting party a second bite at an apple seen already as the too-low-hanging fruit.[82] Also, it could give the hearing administrators the proverbial second chance at bat, where they may feel compelled to reverse the original findings out of pressure to return a desired but unfounded verdict.[83] This can be connected to the stigma associated with the offense, which may create an aura of suspicion around the responding party and make it difficult for him or her to receive an impartial hearing.[84] Finally, the varying appellate procedures at different universities means that the uniform rule that guarantees the reporting party's right to appeal may take on different heads, depending on whether a college's appellate procedures include single appeals officers or full appellate committees.[85] Such variability weighs against the responding party because the process associated with these appeals is not uniform among all colleges and universities.[86]

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[77] 2001 Guidance, *supra* note 50, at 20.

[78] FIRE's Guide to Due Process, *supra* note 16.

[79] *See* Dear Colleague Letter, *supra* note 12, at 12 ("OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties.").

[80] *See* Lave, *supra* note 72, at 937–38; FIRE's Guide to Due Process, *supra* note 16.

[81] KC Johnson & Stuart Taylor, *The Path to Obama's 'Dear Colleague' Letter*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.1b2b5e653e79 [https://perma.cc/6RQ6-8XXU] ("The letter required universities to allow accusers to appeal not-guilty findings, a form of double jeopardy.").

[82] *See* FIRE's Guide to Due Process, *supra* note 16.

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

C. Discouraging Cross-Examination Violates Due Process

"The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings."[87] The Dear Colleague Letter regards cross-examination in college sexual misconduct hearings as problematic, noting that its use may be traumatic or intimidating for the reporting party "thereby possibly escalating or perpetuating a hostile environment."[88] As a result, it "strongly discourages" colleges from allowing parties to cross-examine or personally question one another.[89] However, critics lament this limitation because of the power of cross-examination to elicit evidence related to witness credibility, a factor overwhelmingly at issue in sexual misconduct cases.[90] Cross-examination holds considerable importance in the litigation sphere and has even been regarded as the "greatest legal engine ever invented for the discovery of truth."[91] Although not required as a protected right to due process in college conduct hearings,[92] some courts have held that it may be necessary in the event of a "he said, she said" situation.[93]

It should be noted, however, that the Dear Colleague Letter only "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing."[94] The 2014 Q&A document clarifies that:

> A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.[95]

Critics argue, however, that this fails to serve as an adequate substitute for the inherently effective method and use of cross-examination, which elicits information

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[87] Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972).

[88] Dear Colleague Letter, *supra* note 12, at 12.

[89] *Id.*

[90] *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005) ("If [a] case . . . resolve[s] itself into a problem of credibility, cross-examination of witnesses might . . . be[ ] essential to a fair hearing." (quoting *Winnick*, 460 F.2d at 550)).

[91] *See* California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE, EVIDENCE, § 1367 (J. Chadbourn rev. ed. 1974)).

[92] *See* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[93] *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 401–02, 406–07 (6th Cir. 2017) (finding that the responding party was entitled to cross-examination when credibility of the parties was the main issue and the reporting party did not participate in the hearing). *See also* Winnick v. Manning, 460 F.2d 545, 549–50 (2d Cir. 1972).

[94] Dear Colleague Letter, *supra* note 12, at 12.

[95] Q&A, *supra* note 56, at 31.

from witnesses in a setting without allowing them the opportunity to sculpt responses or cater them to a less-than-authentic purpose.[96] Proponents of cross-examination in sexual misconduct hearings argue that it can be controlled or limited in various ways, such as physically separating the parties and banning irrelevant questions pertaining to sexual history, but the current guidance falls short of affording the responding party the opportunity to extract effective cross-examination.[97] At a minimum, proponents suggest that the third party to whom the cross-examination questions are submitted must "not be allowed to reject certain questions out of hand without clearly stated and objectively reasonable grounds for doing so."[98]

D. The 2017 Rescindment of the Dear Colleague Letter

On September 22, 2017, the Department of Education announced that it was rescinding both the 2011 Dear Colleague Letter and 2014 Q&A documents, citing concerns with due process and a lack of public comment during their implementation.[99] The rescindment lamented that the documents, though well-intentioned, "led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints."[100] The Department plans to implement a replacement policy after an opportunity for public comment, an aspect it noted as missing from the Dear Colleague Letter and Q&A document, and notes that it will no longer rely on these withdrawn documents during its enforcement of Title IX.[101]

As support for its position, the letter discusses various substantive issues with the Dear Colleague Letter that result in violations of due process and fundamental fairness.[102] Prominent among these concerns was that the Dear Colleague Letter "required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard."[103]

Implicit in this document is the skepticism with which committees reach their decision and upon what evidence it was based. Yet, when making its decision, committees are entitled to considerable latitude, so long as it is not "arbitrary and capricious."[104]

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[96] *See* FIRE's Guide to Due Process, *supra* note 16.

[97] *See* Rudovsky et al., *supra* note 69, at 4.

[98] FIRE's Guide to Due Process, *supra* note 16.

[99] *See* Letter from Candice Jackson, Acting Ass't Sec'y of Civil Rights, U.S. Dep't of Educ., Office of Civil Rights (Sep. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/D7T8-7LU9].

[100] *Id.* at 1–2.

[101] *See id.* at 2.

[102] *See id.* at 1–2.

[103] *Id.* at 1.

[104] Pursuant to the Administrative Procedure Act, an appellate court must, when reviewing a government agency's informal resolution of a question of fact, "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of

In *Regents of University of Michigan v. Ewing*,[105] the Supreme Court "set a rigid standard to determine arbitrary and capricious behavior."[106] The Court rendered the decision valid "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[107]

III. TRAINING AND EDUCATION FOR ADJUDICATING SEX-BASED CRIMES

Analyzing the differences between juries in trials for sex-based crimes and college sexual misconduct hearings requires a closer look at who each respective trier of fact is, how they are trained to evaluate the facts, and how they reach their conclusion based on those facts. This Part will argue that pervasive bias and failure to control for such bias due to lack of education and training makes the American jury more prone to inequitable outcomes than the college sexual misconduct hearing committee. In contrast, the legacy of the Dear Colleague Letter resulted in a cultural norm among higher education institutions that disciplinary hearing professionals be trained on how to understand the nature of the incidents that come before them, as well as on the investigative process.[108] Organizations that promote comprehensive training offer a vast array of sensitivity, substance abuse, and evidentiary training modules for colleges and universities, creating a cultural expectation in the profession that conduct professionals operate according to best practices.[109] This Part will conclude with a case study from Lewis & Clark College, which will show a practical and ideal training system that would effectuate the goals of Title IX adjudication and enforcement without threatening due process rights.

A. Pervasive Rape Myths Among American Juries Threaten an Equitable Outcome

The Sixth Amendment to the United States Constitution provides for the right to be tried by "an impartial jury of the state and district wherein the crime shall have been committed."[110] Although not explicitly required, it is commonly understood that

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discretion, or otherwise not in accordance with law . . . ." Administrative Procedure Act § 10(e)(B)(1), 5 U.S.C. § 706 (1976).

[105] 106 S. Ct. 507 (1985).

[106] Swem, *supra* note 26, at 362.

[107] *Ewing*, 106 S. Ct. at 513.

[108] *See* Dear Colleague Letter, *supra* note 12, at 4, 6, 7–8, 12.

[109] *See, e.g.*, Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* (2014), http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf [https://perma.cc/R2SU-HQC8] (last visited Oct. 15, 2018); Association of Title IX Administrators, *Training & Certification from ATIXA*, https://atixa.org/events/training-and-certification/ [https://perma.cc/LQ8M-SU6H] (last visited Oct. 15, 2018).

[110] U.S. CONST. amend. VI.

this relates to a trial by ordinary citizens from one's community, or in simple terms, one's peers.[111] This coveted aspect of the American legal system carries with it the assumption that one's peers ought not be triers of fact, but should be because they too live in the same community with the same expectations of behavior.[112] However, this can also spell out difficulties for both defendants and victims alike if the crime alleged to have been committed is particularly nuanced and culturally stigmatized, such as sexual assault.

Numerous studies analyze juror behavior, including how jurors decide cases, analyze evidence, and regard the facts in light of their understanding of the law.[113] In adult sexual assault cases, jurors tend to consider sexual assault in terms of a victim's assumption of the risk, rather than viewing it in light of the nonconsensual sexual battery that it is.[114] Personal perception of who the victim is, as well as her character and lifestyle, are weighed as a significant factor for jurors deciding sexual assault cases.[115] This mentality leads jurors away from the behavior of the accused and toward the behavior of the accuser, placing the culpability of the act not on the actor but on the acted.[116]

Although such beliefs are pervasive in society as a cultural principle, they become increasingly worrisome when they enter the deliberation room. In one study, thirty-two percent of jurors believed that a woman's resistance was a critical factor in determining a rapist's culpability, and fifty-nine percent of jurors believed that a woman should do everything she could to repel her attacker.[117] These beliefs

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[111] *See* James J. Gobert, *Criminal Law: In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 277–78 (1988).

[112] *See* Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 867 (1976) (describing peers as "those who have enough in common with the accused, or who have enough sympathy for the accused, to be able to give a realistic evaluation of his story").

[113] *See* National Judicial Education Program, Jury Selection and Decision Making in Adult Victim Sexual Assault Cases (2011), http://www.legalmomentum.org/jury-selection-and-decision-making-adult-victim-sexual-assault-cases [https://perma.cc/JN8C-PDY6] [hereinafter Judicial Education Program].

[114] *See* LYNDA L. HOLMSTROM & ANN W. BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 169 (1983) (citing HENRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 254 (1966)).

[115] *See* Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming*, 17 AGGRESSION AND VIOLENT BEHAVIOR 443, 444 (2012) (internal citations omitted) ("There are a number of variables which have been found to influence the degree to which blame is allocated to the victim of a crime, including perceiver's beliefs, victim characteristics and situational aspects. Attribution of blame by observers of rape cases is therefore subject to an infinite number of fluctuating variables which are likely to influence every situation in a unique and unpredictable manner.").

[116] *See id.* at 444–45.

[117] *See* Judicial Education Program, *supra* note 113, at 6 (citing GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989)).

persist despite the fact that laws in many states do not require a woman to resist the perpetrator.[118] Thus, the power of societal myths regarding sexual assault naturally finds its way to the jury deliberation room, propagating a dangerous cycle of victim-blaming behavior. In one study, researchers found that "the more participants endorsed rape myths, the less credible . . . and more blameworthy . . . they found the [victim]."[119]

To combat this, courts use voir dire to weed out any surface-level bias pertaining to sexual assault.[120] Juror identity plays a large role in how lawyers and judges discern this bias.[121] For example, research has found that stronger personal beliefs in guilt were associated with "higher levels of education," "positive attitudes toward rape victims in general," "higher perceptions of [victim] credibility," and "low empathy with the defendant."[122] These factors suggest that socioeconomic status may be determinative in the likelihood of ascertaining these personal beliefs, but it is not out of the realm of possibility to train jurors how to view evidence in a similar light despite the absence of educational and environmental opportunities to develop these tendencies. Indeed, "[i]f jurors were to receive the level of training and awareness-raising necessary to challenge the deep-rooted and highly persuasive myths about rape, the jury system would be more effective in dealing with sex crimes."[123]

Additionally, any below-surface-level bias that is not detected and dispelled prior to selection is meant to be remedied by jury instructions, which seek to control for harmful sex-based bias prior to the actual decision-making.[124] Such instructions can be tailored to the offense, and may include advisement on circumstances unique to the trial that give cause for concern, such as the jury's treatment of prior sexual behavior.[125] Despite the best efforts of judges and counsel in crafting instructions to

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[118] *See Rape and Resistance*, BALTIMORE SUN (Feb. 13, 2017, 2:13 PM), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-rape-20170213-story.html [https://perma.cc/NT5F-RDRG] ("For decades, states have been updating the definition of 'rape' to move away from its patriarchal past, which emphasized whether a victim demonstrated physical resistance.").

[119] Regina A. Schuller & Patricia A. Hastings, *Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions*, 26 PSYCHOL. WOMEN Q. 252, 257 (2002).

[120] *See* Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases: Part I: Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES 1, 2 (July 2010), http://www.aequitasresource.org/educatingjuriesinsexualassaultcasespart1.pdf [https://perma.cc/25HF-HBXG].

[121] *See* Natalie Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, 344 TRENDS & ISSUES IN CRIME & CRIM. JUST. 1, 4–5 (2007).

[122] *Id.* at 4.

[123] Julie Bindel, *Juries Have No Place at Rape Trials—Victims Deserve Unprejudiced Justice*, GUARDIAN (Aug. 12, 2016, 4:00 AM), https://www.theguardian.com/commentisfree/2016/aug/12/juries-no-place-rape-trials-victims-deserve-unprejudiced-justice-judge [https://perma.cc/YHY7-Q8JM].

[124] *See* J. Alexander Tanford, *The Law and Psychology of Jury Instructions,* 69 NEB. L. REV. 71, 85 (1990) (discussing a study finding that "giving a cautionary instruction concerning rape victims significantly affected jurors' decisions").

[125] *See id.* at 76–78 (discussing the two main varieties of admonitions—complete disregard

limit the use of certain evidence in this regard or guide deliberations based on applicable law, researchers found that "the proposed safeguard of providing jurors with limiting instructions may be ineffective in curbing the pernicious impact of [the victim's] prior history evidence."[126] Thus, instructions directing jurors to shelve their biases do not adequately counter the danger of jurors continuing to follow their presumptions about victim behavior.[127]

Additionally, jurors' opinions regarding the use of alcohol in sexual assault cases is problematic when determining credibility, and often manifests itself in detrimental ways to the victim while excusing the behavior of the accused.[128] During a study of jurors faced with sexual assault cases involving excessive intoxication, researchers found that jurors often used intoxication to blame victims and absolve perpetrators.[129] Additionally, victims who were sober at the time of the rape were perceived as more credible, leading to a greater conviction rate in those cases than in cases where the victim was intoxicated.[130] Therefore, juries are heavily influenced by alcohol use during sexual assaults,[131] often leading them to delineate from their duty to judge the actions of the accused according to the applicable statute.

Finally, jurors are less likely to grasp the burden of proof as an objective, legal matter, and are not adequately trained on how to weigh evidence when reaching a verdict.[132] "Even in real criminal prosecutions, jurors find it difficult, if not impossible, to acquit a defendant they believe to be guilty, even if proof wasn't beyond a reasonable doubt. The human desire for fairness compels us to go with the odds, even if the technical burden is otherwise."[133] While jury instructions and closing

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of information and instructions limiting the use of evidence—which prevent jurors from misusing potentially harmful information, such as past criminal behavior).

[126] Schuller & Hastings, *supra* note 119, at 259.

[127] *See* Tanford*, supra* note 124, at 86 ("Admonishing jurors often provokes the opposite of the intended effect.").

[128] *See generally* Emily Finch & Vanessa E. Munro, *Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study*, 45 BRIT. J. CRIMINOLOGY 25 (2005) (detailing a study focused on the intersection between jurors' attributions of blame and responsibility and common conceptions concerning alcohol and drugs).

[129] *See id.* at 35–36 ("[T]here was a surprising level of condemnation for victims of rape who were intoxicated, even in situations in which their drinks had been interfered with without their knowledge . . . . These views were accompanied by a general inclination to ascribe responsibility for intercourse to the intoxicated victim unless there was clear evidence of wrongdoing on behalf of the defendant.").

[130] *See* Ashley A. Wenger & Brian H. Bornstein, *The Effects of Victim's Substance Use and Relationship Closeness on Mock Jurors' Judgments in an Acquaintance Rape Case*, 54 SEX ROLES 547, 547 (2006).

[131] *See id.* at 552.

[132] *See* Scott H. Greenfield, *Will Raising the Burden of Proof Fix Title IX?*, SIMPLE JUSTICE (Aug. 2, 2017), https://blog.simplejustice.us/2017/08/02/will-raising-the-burden-of-proof-fix-title-ix/ [https://perma.cc/S5UY-Y5XK] ("People don't really 'get' how standards function.").

[133] *Id.*

arguments are intended to clarify the burden of proof required for conviction, jurors with little or no background in evaluating evidence are left to deliberate without any check to their emotional predispositions.[134] Ultimately, research has given some justification to the concern that "defendants face the prospect of an unfair trial simply by virtue of being unlucky in the characteristics of the jurors drawn from the jury pool on the day of the trial."[135]

B. Required Training for University Hearing Professionals Results in Fair Deliberations and Equitable Outcomes[136]

In contrast, college sexual misconduct hearing professionals ("hearing professionals") receive training to combat unfair prejudices and are often educated on alcohol use during sexual assault cases.[137] This training is comprehensive and includes sensitivity toward victims, evaluating the preponderance of the evidence standard, and determining consent.[138] There are a number of organizations that assist colleges with training their employees to be compliant with Title IX and cognizant of their obligations under the college's own policies and procedures.[139] These organizations are run by former or current hearing officers as well as legal professionals.[140] Under this umbrella, every college has the opportunity to connect with and receive guidance from professionals in the same community, allowing them to exchange ideas for best practices.

The identity of hearing officers is inherently different than that of the average American jury. Professional hearing officers at colleges typically have an advanced degree, either at the Master's or Juris Doctor level.[141] At a minimum, professional

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[134] *See id.*

[135] Jee-Yeon K. Lehmann & Jeremy Blair Smith, A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences 5 (June 27, 2013) (working paper) (retrieved from http://www.uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf [https://perma.cc/HR5S-2N6B]).

[136] *See* Dear Colleague Letter, *supra* note 12 ("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 . . . .").

[137] *See, e.g.*, Association of Student Conduct Administrators, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 28(2014), http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf [https://perma.cc/HK8R-M742].

[138] *Id.*

[139] *See, e.g.*, *id.*; Association of Title IX Administrators, *Training & Certification from ATIXA,* https://atixa.org/events/training-and-certification/ [https://perma.cc/VU6K-L4Q7] (providing several levels of certification to include Title IX Coordinator Certification Training).

[140] *See generally* Association of Title IX Administrators, https://atixa.org/ [https://perma.cc/E3JG-8RBQ]; NASPA, https://www.naspa.org/ [https://perma.cc/T75C-J787].

[141] U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK

hearing officers have gone to college and possess the requisite knowledge to be on the hearing committee, either through formal education or experience.[142] Some colleges offer sensitivity training, although more can be done to ensure that all actors in the reporting process, from initial reporters to hearing officers, receive training on how to respond adequately to those who formally file complaints.[143] However, in providing sensitivity training for those who adjudicate sexual misconduct cases, colleges "must ensure that their sensitivity toward the complainant does not infringe on the respondent's right to a fair and impartial investigation, which is often the crux of subsequent claims brought by respondents."[144]

Training on alcohol use in sexual misconduct cases also shows how hearing professionals understand consent. Unlike jurors' predispositions to discount a victim's allegations based on the victim's level of intoxication, hearing professionals are trained to focus on the issue of consent in light of the effects of intoxication.[145] In fact, hearing professionals are likely taught that the "[u]se of alcohol or other drugs will never function as a defense for any behavior that violates [sexual misconduct] policy."[146]

In evaluating consent, hearing officers are likely taught that a violation of policy may occur when one party engages in sexual activity "with someone who one should know to be—or based on the circumstances should reasonably have known to be—mentally or physically incapacitated" by alcohol or drug use.[147] While this may be substantially similar to jury instructions in the same subject matter, hearing officers are trained on this prior to being confronted with the facts and circumstances.[148] Therefore, this training and education only serves to benefit all parties in a college sexual misconduct hearing.

HANDBOOK, POSTSECONDARY EDUCATION ADMINISTRATORS, https://www.bls.gov/ooh/management/postsecondary-education-administrators.htm [https://perma.cc/26P3-YEQ5] (last modified Apr. 13, 2018).

[142] *Id.*

[143] *See* Heather M. Karjane et al., Campus Sexual Assault: How America's Institutions of Higher Education Respond ix (Oct. 2002) (unpublished manuscript), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf [https://perma.cc/36WU-L79H] (explaining, via a range of statistics, that those who are most likely to hear about an assault first are often the ones overlooked in colleges' training programs).

[144] Ariel Sullivan, *Illegal Procedure? Title IX and Sexual Assault*, NEW ENG. J. OF HIGHER EDUC. (Jan. 16, 2015), http://www.nebhe.org/thejournal/illegal-procedure-title-ix-and-sexual-assault/ [https://perma.cc/3JFU-LUX5].

[145] *See* Karjane et al., *supra* note 143, at 73 (describing training at Lewis & Clark College which includes the issue of consent relating to alcohol and drug use.).

[146] Brett A. Sokolow et al., *ATIXA Gender-Based and Sexual Misconduct Model Policy* 1, 12 (2015), https://www.atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Model-Policy-041715.pdf [https://perma.cc/W37V-2F59].

[147] *Id.* at 11.

[148] *See generally id.* (providing a set of policies intended to clearly define community expectations).

The investigative model used by colleges when approaching sexual misconduct claims protects due process at every stage of the proceeding because it sets forth a realm of guidance for hearing officers when it comes to weighing the use of drugs or alcohol in these cases.[149] The investigative model teaches hearing officers that:

> The use of alcohol and/or drugs by either party will not diminish the responding party's responsibility. On the other hand, alcohol and/or drug use is likely to affect the reporting party's memory and, therefore, may affect the resolution of the reported misconduct. A reporting party must either remember the alleged incident or have sufficient circumstantial evidence, physical evidence and/or witnesses to prove that policy was violated. If the reporting party does not remember the circumstances of the alleged incident, it may not be possible to impose sanctions on the responding party without further corroborating information.[150]

C. Use of the Preponderance of the Evidence Standard Is Appropriate

As mentioned previously in this Note, critics who oppose the required use of the preponderance of the evidence standard often decry it as the "lowest" standard of proof, lamenting that it is not appropriate for such grave cases of misconduct with severe, long-lasting consequences.[151] This implicit skepticism of administrator expertise forms much of the criticism surrounding the use of the preponderance standard, believing it to be abstract, loosely applied, and, frankly, "easy" to convict.[152]

Hearing officers are more prone to have an empirical understanding of the standard of proof required because they have used it traditionally in *all* student disciplinary cases, not just those related to sexual misconduct, which allows them to have a wider perspective on what a preponderance of the evidence calls for and how to weigh the facts in each case accordingly.[153]

Despite what the 2017 rescindment letter and critics of the Dear Colleague Letter allege, over eighty percent of schools were using the preponderance standard

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[149] *See id.* at 22–23 (answering the most commonly asked questions concerning a university's sexual misconduct procedures, including a section on drugs and alcohol).

[150] *Id.* at 22.

[151] *See supra* Section II.A.

[152] *See supra* notes 74–81 and accompanying text.

[153] *Cf.* Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, ASSOC. FOR STUD. CONDUCT ADMIN., https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf [https://perma.cc/7XTA-7DEP] (discussing that because the preponderance of the evidence standard is applied in *all* student conduct violations, hearing officers are well-versed in applying it).

before required to do so.[154] In addition, research shows that the preponderance of the evidence standard is not really so different in practice than the clear and convincing standard.[155] Those that argue for the higher standard of proof—clear and convincing—for sexual misconduct cases must first understand that hearing officers may not end up seeing the slightly different nuances between the preponderance and clear and convincing standards, which are both less than beyond a reasonable doubt.[156] When it comes to applying these standards of proof, the rationale for the committee's findings may end up with the same justification.[157]

Moreover, raising the standard to clear and convincing is inherently inequitable because the balance starts more in favor of acquittal rather than beginning the inquiry fifty-fifty.[158] Thus, the preponderance of the evidence standard is most appropriate for disciplinary hearings because it is well-understood and applied in a more even-handed way than a higher standard.

D. A Practical and Effective Training Program Safeguards Due Process While Ensuring Victim Protection

To demonstrate how a college can implement a practical training system, a research team conducted a case study of Lewis & Clark College in order to study how institutions of higher education respond to the issue of sexual assault.[159] The study evaluated the College's investigative model, training and education protocol, and hearing procedures to evaluate how the College confronts sexual misconduct.[160]

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[154] *See* Karjane et al., *supra* note 143, at 122; Jake New, *College Leaders Discuss Future of Title IX, Sexual Assault Prevention Efforts*, INSIDE HIGHER ED (Jan. 26, 2017, 3:00 PM), https://www.insidehighered.com/news/2017/01/26/college-leaders-discuss-future-title-ix-sexual-assault-prevention-efforts [https://perma.cc/J2ZK-8UHN] ("The majority of colleges were already using the standard prior to the Dear Colleague letter.").

[155] Brett A. Sokolow, ATIXA *Guide to Choosing Between Preponderance of the Evidence v. Clear and Convincing Evidence* 3 (2017), https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf [https://perma.cc/Y8BS-TS3P].

[156] *See generally* Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 1 BYU EDUC. & L.J. 143, 150 (2013) (describing the clear and convincing standard as "the most difficult to define," and discussing how courts themselves vary in their interpretations of the standard).

[157] *See* Sokolow, *supra* note 155, at 3 (reasoning that the "vast majority of decisions would actually remain the same if the standard changed, both because of the amount of evidence available in many cases (many decisions are already based on evidence that exceeds [preponderance of the evidence]) and because many college decision-makers are administering reasonable findings regardless of the standard of proof elaborated by policy").

[158] *See* Chmielewski, *supra* note 156, at 155 ("Use of the preponderance standard for civil rights violations indicates the intention . . . to assess alleged discriminatory conduct under a standard that does not privilege the defendant's word over the complainant's word.").

[159] *See* Karjane et al., *supra* note 143, at 71.

[160] *See id.* at 74–77.

A summary of this case study will show that this comprehensive program can be replicated at universities across the United States, leading to safer campuses and fairer disciplinary processes.

At the time the study was conducted in 2001, Lewis & Clark College was a small liberal arts college in Portland, Oregon, with a small graduate school and law school.[161] Nearly two-thirds of students live on campus, and the College has a two-year on-campus residency requirement.[162] The college's residence life staff receive training on how to discuss sexual assault with students and respond appropriately to incidents if and when they are reported.[163] According to the study, "[a] variety of programs are offered each year focusing on prevention and more generally on respect and tolerance."[164]

After complaints are reported, sexual misconduct complaints are "heard in designated adjudication boards with staff who have been trained to hear and respond to these cases with sensitivity."[165] The College created a Sexual Assault Response Network made up of student life and mental health professionals, all of whom "receive comprehensive training on issues relating to sexual assault, including definitions of sexual assault and consent, the role alcohol may play in sexual assaults, and characteristics of Rape Trauma Syndrome. Faculty and staff receive training on the policy and on how to refer students who disclose assaults . . . ."[166]

The College's adjudication procedures include a formal review of the investigation by a "specially appointed Sexual Misconduct Review Board, composed solely of administrators and staff members who have little student contact,"[167] and who receive "comprehensive training, including sensitivity to sexual assault victims; characteristics of Rape Trauma Syndrome; myths and facts about sexual assault; sensitivity to race, sexual orientation, and sex of individuals; and appropriate standards of proof."[168] Both the responding and reporting parties may object to the membership of the Board if the coordinator is convinced that impartiality may be at issue.[169]

When a case moves to adjudication, the Board convenes a private meeting, which is audio-recorded.[170] If the victim is unable to present his or her case, a college administrator may present the case on his or her behalf and call relevant witnesses.[171] The accused then has the opportunity to present his or her case too.[172]

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161 *Id.* at 71.
162 *Id.*
163 *Id.* at 72.
164 *Id.*
165 *Id.*
166 *Id.* at 73.
167 *Id.* at 75.
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*

Hearing officers may ask questions throughout the hearing, and the audio recording may be played back for the hearing committee.[173] In terms of cross-examination, neither party may directly question each other during the hearing, but can submit questions to the Board for clarification.[174] Following the hearing and after receiving notice of the Board's findings, both the reporting and responding party may appeal the outcome only based on evidence of "bias of [the] adjudicator(s), new evidence, procedural irregularity, and/or inappropriate sanction(s)."[175]

It is important to note that this case study was conducted a decade before the Dear Colleague Letter was released, showing that not all colleges were prone to be caught off guard by the Department of Education's groundbreaking directives.[176] Most importantly, this case study shows that colleges are capable of establishing and operating an organized and effective disciplinary process that is run by and in conformity with best practices to protect the rights of both the reporting and responding parties.

IV. EXPOSURE TO CASES AND EXPERIENCE AS IMPACTING FINAL OUTCOME

Jurors often experience emotional trauma as a result of their role as triers of fact in cases involving criminal violence, sexual trauma, and other particularly brutal acts.[177] It follows that exposure to crimes of a violent nature is a significant obstacle for decision-makers when reaching an outcome formed by rational, evidence-based reasoning.[178] Exposure to evidence in certain kinds of forms can have a spurious impact on how jurors perceive crime in general, which can impact their ability to make fair, impartial decisions.[179] Trials laden with various forms of evidence expose jurors to the carnal nature of these crimes and can cause jurors to lower the standard of proof, resulting in an inadvertent, predisposed alignment with the prosecution.[180]

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[173] *Id.* ("The hearing board members are allowed to ask questions at any point during the hearing and may recall any witnesses to clarify or challenge statements made during the hearing.").

[174] *Id.*

[175] *Id.* at 76.

[176] *See supra* Section I.B.

[177] *See* Andrew G. Ferguson, *The Trauma of Jury Duty*, ATLANTIC (May 17, 2015), https://www.theatlantic.com/politics/archive/2015/05/the-trauma-of-jury-duty/393479/ [https://perma.cc/9ZRL-FDCU] ("Jurors internalize both the difficulty of deciding another's fate, as well as the emotional toll of bearing witness to tragic events.").

[178] *See* Saul M. Kassin & David A. Garfield, *Blood and Guts: General and Trial-Specific Effects of Videotaped Crime Scenes on Mock Jurors*, 21 J. APPLIED SOC. PSYCHOL. 1459 (1991) (finding that exposure to the crime scene impacted the jurors' biases and the standard of proof they applied to the final outcome).

[179] *See id.* at 1468–69.

[180] *See id.* at 1468.

A. Problems Related to Exposure or Experience with Sex-Based Crimes

While the psychology is unique as to each respective juror's mental health, one factor that contributes to juror trauma is the lack of exposure to these types of crimes and behaviors. Because jurors are rarely exposed to the brutality of sex-based crimes, they are more likely to base their decisions on their emotional response to the evidence presented.[181] Added to this is the impact on decision-making from a juror's personal understanding of sexual assault and harassment,[182] where, for example, "stronger personal beliefs in guilt [are] significantly associated with . . . personal knowledge of sexual assault victims."[183]

As mentioned before in this Note,[184] jurors bring to the deliberation room popular, socially constructed prejudices pertaining to sex-based crimes, where the "[a]cceptance of traditional gender role norms for men and women influences tolerance of rape," ultimately leading to a greater acceptance of rape myths in general.[185] Indeed, "rape mythology persists, and studies reveal that rape myths insidiously infect the minds of jurors, judges, and others who deal with rape and its victims."[186] These types of prejudices are often ascertained through personal experience.[187] More specifically, beliefs as to guilt or innocence can be associated with personal knowledge of the circumstances surrounding these crimes, whether that knowledge pertains to commission of the crime, being or knowing a victim, or having previously played a part in the adjudication process.[188]

B. Voir Dire as an Impractical Solution to Exposure-Related Problems

Because jurors are so significantly influenced by their exposure (or lack of exposure) to sex-based crimes, courts look to voir dire to "identify and remove prospective jurors who are unable to serve fairly and impartially."[189] There are

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[181] *See* Taylor, *supra* note 121, at 6.

[182] *See id.* at 2.

[183] *Id.* at 4.

[184] *See supra* Section III.A.

[185] Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 SEX ROLES 385, 387 (2005) (discussing the impact of the level of relationship between the victim and perpetrator of the rape experience by others).

[186] State v. Robinson, 431 N.W.2d 165, 172 n.7 (Wis. 1988) (quoting Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 404 (1985)).

[187] *See* Mary A. Gowan & Raymond A. Zimmerman, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 J. APPLIED SOC. PSYCHOL., 596 (1996) (examining the influence of gender on sexual harassment cases, with results indicating that gender and prior experience with sexual harassment affect the outcomes in such cases).

[188] *See* Taylor, *supra* note 121, at 4.

[189] GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT'L CTR. FOR

various goals of voir dire in cases involving sex-based crimes that could serve to cure the defects posed by the aforementioned exposure-related problems; namely, to combat rape myth acceptance, to prepare the jury for difficult and graphic terminology and evidence, and "to use a jurors' life experiences to educate other jurors . . . ."[190] However, "[t]raditional voir dire questions regarding jurors' abilities to follow the law, assess witness credibility, understand the burden of proof, and other common areas of inquiry might not sufficiently address potential jurors' emotional reactions to sexual assault cases."[191] Notwithstanding this difficulty, voir dire generally serves as an effective method to weed out potential juror bias and control for jurors' differing experiences with sex crimes.

However, voir dire in practice may not overcome these obstacles because it is not conducted uniformly in all courts, leading to a diverse array of outcomes depending on the jurisdiction.[192] For example, the mechanics of how voir dire is conducted, such as who does the questioning, are different depending on jurisdiction.[193] In jurisdictions where the attorney, rather than the judge, conducts voir dire, juror responses "are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers."[194]

Voir dire as a multi-purpose aspect of pretrial proceedings is not uniform either.[195] Many courts are pushing back against an all-encompassing, multi-purpose use of voir dire.[196] While much of the onus to identify, cure, or dismiss highly prejudicial juror bias through voir dire is on the prosecution, "[a]n increasing number of jurisdictions are curtailing the ability of prosecutors . . . to conduct meaningful voir dire of jurors in the name of 'judicial economy.'"[197]

Indeed, voir dire in some jurisdictions is conducted by judges, who argue that "attorneys waste too much time and unduly invade jurors' privacy by asking questions that are only tangentially related to the issues likely to arise at trial."[198] Such inconsistencies among courts and within courts casts doubt on the use of voir dire as an effective method to ensure, consistently, that each and every trial for sex-based crimes is free from or minimally impacted by pervasive and harmful myths about sexual assault and harassment.

ST. CTS., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27 (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx [https://perma.cc/NDQ7-UCZK].

[190] Mallios & Meisner, *supra* note 120, at 2.

[191] *Id.*

[192] *See* MIZE, HANNAFORD-AGOR & WATERS, *supra* note 189, at 27.

[193] *See id.*

[194] *Id.* at 28 (citing Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire*, 11 L. & HUMAN BEHAV. 131 (1987)).

[195] *See* Mallios & Meisner, *supra* note 120, at 2.

[196] *See id.*

[197] *Id.*

[198] MIZE, HANNAFORD-AGOR & WATERS, *supra* note 189, at 28.

C. Bias on Student Conduct Panels Is Better Controlled and Removed

The problems with juror impartiality due to lack of exposure to sex-based crimes are largely nonexistent with student conduct committees because the committee is composed of members who have prior experience adjudicating these types of cases. While hearing bias is still a concern for students, it can be controlled in this setting more than in the courtroom because the college can handpick who serves, rather than having to narrow down their selection from a large, randomized pool. Exactly who the college decides to appoint to be on these hearings varies among institutions.[199] "Some designate specific employees to the task, while others appoint outside lawyers and judges to serve."[200] Although they choose their committee members from a narrower pool than courts, "[c]olleges have considerable flexibility when appointing hearing officers to decide the cases."[201]

However, colleges must adhere to minimal procedural standards with regards to ensuring an unbiased hearing panel. Courts have recognized that "an impartial and independent adjudicator 'is a fundamental ingredient of procedural due process.'"[202] At the same time, hearing officers are "entitled to a presumption of honesty and integrity, absent a showing of actual bias."[203] This was tested in *Gomes v. University of Maine System*.[204] In that case, the plaintiffs alleged that the chairwoman of the conduct committee was biased due to her involvement with rape response and victim advocate programs, and that plaintiffs were denied the right to voir dire members of the Hearing Committee.[205]

With regards to the bias alleged due to the chairwoman's involvement with sexual assault victim advocacy, the court noted the difference between one's capacity to adjudicate sexual assault claims based on this activity and one who is able to render a neutral decision.[206] The court found that the plaintiffs did not show a "genuine issue of material fact as to the Hearing Committee's or [the chairwoman]'s impartiality,"[207] and the evidence showed that the committeewoman's chairmanship was one capable of rendering an otherwise neutral decision.[208]

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[199] *See* Jake New, *Victims, Advocates Worry About Bias in Campus Hearings*, INSIDE HIGHER ED (Aug. 18, 2017, 3:00 AM), https://www.insidehighered.com/news/2016/08/18/victims-advocates-worry-about-bias-campus-hearings [https://perma.cc/ZM5V-VRPY].

[200] *Id.*

[201] *Id.*

[202] Gorman v. Univ. of R.I., 837 F.2d 7, 15 (1st Cir. 1988) (quoting the trial court, Gorman v. Univ. of R.I., 646 F. Supp. 799, 810 (D.R.I. 1986)).

[203] Hill v. Bd. of Trs. of Mich. State Univ., 182 F. Supp. 2d 621, 628 (W.D. Mich. 2001).

[204] 365 F. Supp. 2d 6 (D. Me. 2005).

[205] *Id.* at 29.

[206] *Id.* at 31–32.

[207] *Id.* at 31.

[208] *Id.* at 32.

Regarding the claim that the students were denied the right to voir dire, the court noted that, although not required, some colleges may allow students to conduct voir dire or to challenge any individual committee member's appointment "for cause."[209] Either allowance is consistent with due process so long as it conforms to the college's policy.[210] In weighing the difference between allowing students to conduct voir dire or to challenge the committee's members "for cause," the *Gomes* court stated that:

> Allowing challenges for cause, but not voir dire, reduces the risk the committee hearing will be transformed into a full blown trial. On the other hand, if the parties are aware of reasons that would disqualify a committee member, they are allowed to bring them forward. Striking this balance, the University has not violated the due process clause.[211]

The remedies available to students to conduct voir dire or make a "for cause" challenge to certain members of their conduct hearing committee allow for an enhanced participation in the selection process, even more than a defendant's control over members of the jury during voir dire. As mentioned before, conduct committee members who are trained on how to view evidence, understand and minimize gender biases, and approach the issues with sensitivity are less likely to harbor substantially prejudicial beliefs toward one party in favor of the other.[212] With the added security of handpicking members to serve on the committee and allowing students to challenge membership "for cause," conduct committees are substantially more likely to be fair and impartial to all parties in sexual misconduct cases than juries are to all parties in criminal trials.

D. Outcomes: Broad Range of Jury Punishment Versus Limited College Sanctions

As mentioned previously, critics of the Dear Colleague Letter lamented the required use of the "preponderance of the evidence" standard of proof, arguing that the stakes are too high for the accused to be subjected to our nation's "lowest legal standard."[213] This invokes the idea that the standard of proof has a negative relation to the outcome of the case, where the university has less to prove while the accused has much to lose. Understanding the idea that due process is intrinsically tied to punishment is helpful when analyzing how the university conduct process' limited

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[209] *Id.*
[210] *See id.*
[211] *Id.*
[212] *See supra* Section III.D (discussing the case study of Lewis & Clark College).
[213] *See supra* Section II.A.

range of outcomes pales in comparison to the wide array of options given to the American jury in criminal cases for sexual offenses.

The United States Constitution requires that the government must follow certain procedures before it can deprive individuals of their "life, liberty, or property."[214] Due process is understood in two parts: substantive and procedural, where the former "concerns whether the government has an adequate reason for taking away a person's life, liberty or property," and the latter "concerns whether the government has followed adequate procedures in taking away a person's life, liberty or property."[215] Because this Note is concerned with procedural due process, it is important to discuss punishment as a component of both the criminal process and the college disciplinary hearing.

The broad range of punitive punishment in criminal law stands in contrast to a limited scope of college conduct sanctions, an aspect that significantly distinguishes these processes from one another. While only a handful of states permit juries to sentence convicted criminals,[216] the college conduct hearing committee nearly always decides both the findings and outcomes in sexual misconduct cases.[217]

Even before jurors are selected to serve, they "must be committed to an unbiased consideration of the entire punishment range."[218] This is practically challenging because the wide range of punishment for certain crimes can span in some cases from probation to death.[219] This overwhelmingly vast array of potential punishments can create an additional layer of bias, such as when jurors fail to consider statutory minimum sentences for crimes they find personally reprehensible.[220] The Texas Court of

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214 U.S. CONST. amends. V, XIV. Although what is meant by "life" interests may be self-evident, "liberty" and "property" interests are less clear. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564 (1972) (finding that a professor was not deprived of a property right when he was not rehired after one academic year); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (holding the deprivation of liberty in a system where a police officer can designate an individual as a public drunk).

215 Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 871 (2000).

216 *See* Melissa Carrington, *Applying Apprendi to Jury Sentencing: Why State Felony Jury Sentencing Threatens the Right to a Jury Trial*, 2011 U. ILL. L. REV. 1359, 1360 (2011) (acknowledging jury sentencing systems in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia).

217 *See* Ronald B. Standler, *Legal Right to Have an Attorney at College Disciplinary Hearings in the USA* 6 (Apr. 9, 2011), http://www.rbs2.com/eatty.pdf [https://perma.cc/C3SM-97QV] ("Disciplinary decisions that result in suspension or expulsion of the student are made after fact-finding by jurors at a hearing on campus. Modern (i.e., since about 1970) practice is that disciplinary hearings on campuses use a jury that includes at least several students (and sometimes also several professors.")).

218 John Floyd & Billy Sinclair, *Defending Against Juror Bias in Sex Crimes*, HG.ORG, https://www.hg.org/article.asp?id=21208 [https://perma.cc/JBS9-PEFS] (last visited Oct. 15, 2018).

219 *See id.*

220 *See id.* (discussing how jurors who are confronted with the possibility of sentencing

Appeals weighed in on this issue in *Williams v. State*[221] and *Jordan v. State*,[222] finding as a matter of law that a juror is biased if he or she refuses to consider a certain punishment.[223] These cases show that it is neither realistic nor practical to ask juries to disassociate the alleged criminal conduct from the potential punishment; after all, who knows how many jurors, unlike the ones in *Williams* and *Jordan*, remain silent about their reservations during voir dire and after selection. Is it realistic to rely on jurors to be forthcoming about such deeply entrenched beliefs about crime and punishment?

Thankfully, the university disciplinary process does not pretend to put administrators in such a position. "Of the schools with a disciplinary process, the most common sanctions employed by a school [for sexual misconduct] are expulsion (84.3 percent), suspension (77.3 percent), probation (63.1 percent), censure (56.3 percent), restitution (47.8 percent), and loss of privileges (35.7 percent)."[224] However, it goes without saying that expulsion has a significant effect on a student's reputation, and many individuals who have been accused are pursuing legal action to clear their names.[225] While suspension or expulsion is a "grevious loss"[226] for the accused student, "the [Supreme] Court has rejected the notion that the importance of the benefit (here a college degree) determines whether it is property for the purposes of the Fourteenth Amendment."[227] Still, critics of university disciplinary committees maintain that "[o]nce the state has chosen to grant students a property right by admitting them to a public institution of higher education, it cannot revoke this right arbitrarily or unfairly."[228]

Although a jury's decision often results in whether an individual is labeled a sex offender for life, a university disciplinary committee has no such equivalent. Critics argue that a notation on a student's academic transcript amounts to such registry, but the facts do not support this idea.[229] In a survey conducted by The American

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a child rapist to a minimum term of probation often will not consider that as a punishment because it is already too lenient in their eyes).

[221] 773 S.W.2d 525, 536 (Tex. Crim. App. 1988) (holding that a juror who "cannot consider the minimum five year sentence as a possible punishment for the lesser included offense of murder in a capital murder prosecution" is biased as a matter of law).

[222] 635 S.W.2d 522, 523 (Tex. Crim. App. 1982) (holding that the defendant can bring a challenge for cause against a juror who could not consider probation in a capital murder case).

[223] *Id.* at 523; *Williams*, 773 S.W.2d at 536.

[224] Karjane et al., *supra* note 143, at xii.

[225] *See* T. Rees Shapiro, *Expelled For Sex Assault, Young Men Are Filing More Lawsuits to Clear Their Names*, WASH. POST (Apr. 28, 2017), https://www.washingtonpost.com/local/education/expelled-for-sex-assault-young-men-are-filing-more-lawsuits-to-clear-their-names/2017/04/27/c2cfb1d2-0d89-11e7-9b0d-d27c98455440_story.html [https://perma.cc/2L9Y-S8S4].

[226] Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

[227] Tamara Rice Lave, *READY, FIRE, AIM: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 664 (2016).

[228] FIRE's Guide to Due Process, *supra* note 16.

[229] *See* Tyler Kingkade, *Colleges Take A Step Towards Including Sexual Assault Punishments on Transcripts*, HUFFINGTON POST (Feb. 24, 2016, 4:50 PM), https://www.huffington

Association of Collegiate Registrars and Admissions Officers, "[n]inety-five percent of respondents said their school excludes minor disciplinary violations from academic transcripts and eighty-five percent said they do not include a student's 'ineligibility to re-enroll due to major disciplinary violations.'"[230] Without this, students found responsible can transfer to other schools without preclusion.[231] Although there is no statutory requirement to denote this on a transcript,[232] failing to share behavioral histories of students seeking to transfer to other campuses gives cause for concern.[233] As a result, some states have begun to include such information in response to higher education professionals groups and victim's rights advocates.[234] As devastating, embarrassing, and frustrating as it may be, expulsion from a university for sexual misconduct pales in comparison to the long-term impact of being found guilty by a jury for the same conduct.

V. JURY SERVICE VERSUS CONDUCT PROFESSIONALS' CAREER

Impartiality and fairness as required for due process can be threatened by whether decision-makers are voluntarily or obligatorily involved in the process. This Part will conduct a comparison between jury service as a civil duty and student conduct adjudication as a career choice, showing that the accused stands a better

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post.com/entry/college-sexual-assault-transcripts_us_56cdf7ffe4b041136f19256a [https://perma.cc/XAW9-GGY5].

[230] *Id.*

[231] *See* Tyler Kingkade, *Lawmakers Consider How to Address Sexual Assault Offenders Transferring Colleges*, HUFFINGTON POST (Dec. 10, 2014, 3:42 PM), https://www.huffingtonpost.com/2014/12/10/sexual-assault-transferring_n_6297176.html [https://perma.cc/RM8N-J6S7].

[232] *But see* Tyler Kingkade, *New York Poised To Become Second State Requiring Sexual Assault Offenses On Transcripts*, HUFFINGTON POST (June 18, 2015, 12:01 PM), https://www.huffingtonpost.com/2015/06/18/new-york-sexual-assault-transcripts_n_7606196.html [https://perma.cc/L3YM-42KP]; Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (July 10, 2015, 3:00 AM), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts [https://perma.cc/EYZ9-EKWG].

[233] ASSOCIATION OF STUDENT CONDUCT ADMINISTRATORS, STUDENT CONDUCT ADMINISTRATION & TRANSCRIPT NOTATION: ISSUES AND PRACTICES, http://www.theasca.org/files/Best%20Practices/Transcript%20Notation%20-%20Final%20Report.pdf [https://perma.cc/8M7T-7LKT].

[234] *See* Tyler Kingkade, *Students Punished For Sexual Assault Should Have Transcripts Marked, Title IX Group Says*, HUFFINGTON POST (Sept. 24, 2015, 4:17 PM), https://www.huffingtonpost.com/entry/sexual-assault-transcripts-atixa_us_560420d0e4b0fde8b0d18d42 [https://perma.cc/R3J6-K7KL] ("ATIXA, or the Association of Title IX Administrators, called on all colleges to make it a policy to include clear notations on transcripts if a student is dismissed for sexual violence."); Kingkade, *supra* note 231 ("Peg Langhammer, executive director of the Rhode Island sexual assault trauma center Day One, said Congress should put something in a bill related to students who want to transfer after being found guilty of sexual misconduct.").

chance of receiving an impartial outcome from those who are not "burdened" by their role as trier of fact.

A. Jury Duty as a Financial Obligation

Citizens who are eligible to be a juror are called to serve "one of the most important civic duties [an individual] can perform."[235] However, jury duty often carries negative connotations, being generally regarded as boring, time-consuming, and an underpaid obligation.[236] Then again, there are those who find jury service empowering, being able to influence an outcome while learning more about the communities in which they live, the problems faced in society, and how best to remedy them.[237] Yet, "citizens who are not at all eager to be on juries, just as those who are overly eager to be on juries, may not be the best people to have deciding your case."[238]

Although not always contested or dreaded, jury service often imposes a burdensome restraint on the average American citizen, leading to employment hardships as well as significant and lasting mental health problems as a result of their service.[239] However, jurors are permitted to be excused if service would result in hardship and even qualify for exemption.[240] It should be noted that exemption is not the same as disqualification: the latter prohibits "individuals who do not meet the [statutory] qualification criteria . . . from serving," and the former "provides individuals with a statutory right to decline to serve if summonsed."[241] While statutes may differ as to what kind of hardship qualifies, nearly all jurisdictions recognize financial hardship as an excuse not to serve on jury duty.[242]

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[235] *Jury Service*, UNITED STATES COURTS, http://www.uscourts.gov/services-forms/jury-service [https://perma.cc/WG7P-Q5RD] (last accessed Feb. 17, 2018).

[236] *See* Kevin Drum, *Why We All Hate Jury Duty*, MOTHER JONES (Feb. 27, 2012, 3:59 PM), http://www.motherjones.com/kevin-drum/2012/02/why-we-all-hate-jury-duty/ [https://perma.cc/6FCK-B5WR].

[237] *See* Sabrina Ali, *Why Do Some People Love Jury Duty?*, QUORA: SLATE (May 21, 2016, 7:06 AM), http://www.slate.com/blogs/quora/2016/05/21/why_do_some_people_love_jury_duty.html [https://perma.cc/7JLF-LLKU].

[238] David M. Sams, Tess M.S. Neal & Stanley L. Brodsky, *Avoiding Jury Duty: Psychological and Legal Perspectives*, 25 THE JURY EXPERT 1, 1 (2013), http://www.thejuryexpert.com/wp-content/uploads/JuryExpert_1301_AvoidingJuryDuty.pdf [https://perma.cc/G855-K6BK].

[239] *See generally* Anne Reed, *Juror Stress: The Hidden Influence of the Jury Experience*, 21 THE JURY EXPERT 70 (2009), http://www.thejuryexpert.com/2009/05/juror-stress-the-hidden-influence-of-the-jury-experience [https://perma.cc/U8LG-AUDK] (discussing the multiple sources of juror stress and the effects of juror stress).

[240] National Center for State Courts, *Jury Managers' Toolbox: Best Practices for Excusal Policies* (2009), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/Toolbox/Best%20Practices%20for%20Excusal%20Policies.ashx [https://perma.cc/7A8D-28VB].

[241] *Id.*

[242] *Id.*

Employment complaints, as part of hardship dismissals, account for a large number of dismissed jurors, with more than half of summoned jurors in some courts being excused for financial hardship as a result of missing work for jury service.[243] Of the jurors that remain, there is the risk that their personal financial concerns will taint the verdict.[244] At the same time, "[p]eople on the margins of society tend to be more sympathetic with victims bringing suit, and excluding them on hardship grounds can disadvantage plaintiffs."[245] Thus, financial hardship imposes a significant hurdle for both parties, where verdicts can be affected by jurors who are overly mindful of their own financial situations.

B. Psychological Stress of Jury Duty

While financial stress before trial even begins is influential on a prospective juror's potential decision-making, the stress of the trial itself plays a significant role in how jurors decide their verdict. The effects of juror stress as a result of exposure to graphic images and crimes are well-documented.[246] The long-term impact of this experience is substantial; in some cases, jurors have reported avoiding certain locations or triggers that remind them of their jury service.[247] One study found that twenty-nine percent of jurors reported specifically avoiding doing things that would remind them of their time on the jury.[248]

The confines of jury duty and its imposed lifestyle restrictions lead to further mental stress. Jurors are told not to speak about the case outside of the trial with anyone, even other jurors.[249] This type of isolation can be difficult for people to cope

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[243] *See* Carol J. Williams, *Weighed Down by Recession Woes, Jurors Are Becoming Disgruntled*, L.A. TIMES (Feb. 15, 2010), http://articles.latimes.com/2010/feb/15/local/la-me-reluctant-jurors15-2010feb15 [https://perma.cc/RK4R-RQ3X] ("Money woes inflicted by the recession have spurred more hardship claims, especially by those called for long cases, say jury consultants and courtroom administrators.").

[244] *See id.* ("[I]t's also risky . . . to force people into jury service that will cut deeply into their paychecks.")

[245] *Id.*

[246] *See* Reed, *supra* note 239; Stanley M. Kaplan & Carolyn Winget, *The Occupational Hazards of Jury Duty*, 20 BULL AM. ACAD. PSYCH. L. 325 (1992), http://jaapl.org/content/jaapl/20/3/325.full.pdf [https://perma.cc/6BUZ-SUDU] (discussing the psychological and physical effects on jurors in four criminal trials).

[247] *See* Noelle Robertson, Graham Davies & Alice Nettleingham, *Vicarious Traumatisation as a Consequence of Jury Service*, 48 HOW. J. CRIM. JUST. 1, 2 (2009) ("Symptoms shown . . . include excessive arousal and irritability, behaviors to avoid reminders of traumatic material, emotional numbing, and impaired memory for the original events . . . .").

[248] Ruth Lee Johnson, *The Hidden Horrors of Jury Duty: Jurors Suffer Long After Trial Has Ended*, PSYCHOL. TODAY (Mar. 16, 2015), https://www.psychologytoday.com/blog/so-sue-me/201503/the-hidden-horrors-jury-duty [https://perma.cc/N3H6-2D72].

[249] *See* Robertson, Davies, & Nettleingham, *supra* note 247, at 3 ("We were given clear instructions not to talk to anyone. I wanted desperately to talk to anybody, but I couldn't, not even my husband.").

with what they are experiencing.[250] Additionally, jurors often perceive their role as having an overwhelming responsibility to make the right decision, recognizing "that they have the duty to drastically change the outcome of the life of one or more human beings. They fear making the wrong decision, and living with the guilt."[251]

C. Juror Stress as It Impacts Impartiality and the Ultimate Outcome

For those jurors who have not wholly made their decision, despite others having done so, the risk of conforming to the majority's opinion increases when the aforementioned financial hardship is a concern, or simply out of social peer pressure. Research has shown that minority jurors, or so-called "holdouts," conform to the majority not "based on *informational influence* (i.e., because they are actually persuaded), but because of *normative influence* (i.e., because of social pressure)."[252]

Juries may also rush a judgment based on perceived time pressure to wrap up a long trial.[253] While there are no limits on deliberation time, jurors may feel pressure to reach a quick decision "because of [an] upcoming holiday . . . or finish before the weekend."[254] Research shows that "decisions made under time pressure are not as sound as those made under less pressure due to factors such as greater reliance on heuristic reasoning."[255]

When jurors find it difficult to reach their decision, a judge may offer an instruction to send a deadlocked jury back to the deliberation room.[256] However, this may make jurors feel coerced into changing their votes, and even lead those in the majority to exert more pressure on jurors in the minority. Many jurors perceive the judge to be the superior authority,[257] so they often cave to what they believe the judge wants or expects. Thus, although a judge's recommendation that a deadlocked jury continue to deliberate may be in the immediate best interests of both parties—in that the defendant may hold out hope that the jury will end in deadlock and the

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[250] Johnson, *supra* note 248 ("For the length of the trial, they're having to just internalize everything that they're hearing and they're seeing." (quoting Sonia Chopra, Consultant for the National Jury Project)).

[251] *Id.*

[252] Monica K. Miller & Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts*?, MONITOR ON PSYCHOL. 18 (2008), http://www.apa.org/monitor/2008/03/jn.aspx [https://perma.cc/6EAS-FNXC].

[253] *See id.*

[254] *Id.*

[255] *Id.*

[256] *Id.* ("The U.S. Supreme Court has approved instructions ordering a deadlocked jury to continue deliberations, often referred to as a 'dynamite charge.'").

[257] *See* David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 246 (1981) ("The judge obviously has the highest status of anyone in the courtroom. He is physically separated from and elevated above everyone else, and is addressed by jurors and attorneys alike as 'your honor.'").

prosecution will hope that the holdouts will acquiesce to the majority—the effect of a judge's order to do so may produce an outcome void of informative reasoning.

In contrast to the consensus that jury duty is a cumbersome obligation, student conduct professionals are hired to do student conduct case work and voluntarily choose to do so as part of an aspirational career. Their full-time work focuses on the student conduct process, ensuring that it serves an inherently educational purpose as well as one which benefits the college community.

D. Post-Verdict Rationales

Due process in criminal proceedings does not require that the defendant know the factors taken into account by jurors when deliberating their outcome.[258] In fact, the Federal Rules of Evidence prohibit "jurors from testifying as to what occurred during deliberations, subject to certain exceptions that do not explicitly encompass the presence of a biased or prejudiced juror."[259] The idea of keeping deliberations strictly private to the jurors participating in them is to protect the integrity of the decision-making process and insulate the triers of fact from any retaliation or criticism for their reasoning after rendering the verdict.[260] However, "[t]here is nothing to prevent the jurors from discussing the case with others after the verdict. In fact, many jurors have voluntarily revealed details of their deliberations, and some have even conducted postverdict interviews and written books."[261]

Although many colleges may choose to accept the same rationale for why deliberations are kept secretive, due process in university disciplinary proceedings also does not require a written rationale explaining the decision-makers' findings and how they came about their decision.[262] Hearing professionals are restricted even more than jurors when it comes to post-trial disclosure of information related to the case.[263] The Family Educational Rights and Privacy Act (FERPA) prohibits the improper disclosure of "personally identifiable information" derived from education records, which includes

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[258] The Constitutional requirement is stated in the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." U.S. CONST. amend. VI. *See also* FED. R. EVID. 606(b) advisory committee's notes on 1974 enactment.

[259] Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 262 (2012). *See also* FED. R. EVID. 606(b).

[260] *See* FED. R. EVID. 606(b) advisory committee's notes on 1974 enactment.

[261] Wolin, *supra* note 259, at 294–95.

[262] In *Flaim v. Med. C. of Ohio*, the Sixth Circuit held that "[a]n accused individual is generally not entitled to a statement of reasons for a decision against them, at least where the reasons for the decision are obvious." 418 F.3d 629, 636 (6th Cir. 2005).

[263] Although jurors may lawfully speak about the proceedings after the verdict is announced, legislation restricts education professionals from disclosing information. *See* Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g)(b)(1), (g)(b)(2)(A) (2017) [hereinafter FERPA].

student conduct records.[264] In this regard, students who are found responsible for violations of college policy are protected from public disclosure by members of the committee which rendered the decision, although there are exceptions.[265]

In light of this, "[m]any colleges and universities provide for written findings of fact or a written explanation of the reasoning behind the disciplinary panel's hearing, despite the state of the law."[266] However, a written statement of decision, if given, must show facts sufficient to support the committee's finding.[267] Thus, the accused can learn how the committee reached its conclusion, which can streamline the process of appeal by helping the student understand what factors were considered in the decision and how they were weighed. Additionally, a written rationale in the student's file can be helpful to the student should he or she decide to transfer, apply for graduate school, or face an employment background check. As exemplified in the Lewis & Clark case study, effective training and procedural measures can be put in place to ensure that the process remains transparent, and most of all, fair.[268]

CONCLUSION

Although she has taken a positive outlook, Laura Dunn maintains that "the ways the university handled her report would have violated the principles set down in the Dear Colleague Letter," particularly with regard to the nine months it took for the university to resolve her case as well as its use of a higher standard of proof to evaluate her claims.[269] But at what cost?

For some, it is an unacceptably high one: "one person denied due process is one too many."[270] As critics of the Dear Colleague Letter found their rallying cry vindicated at the highest level of government, the crux of their argument remains. However, if universities operating under the Dear Colleague guidance would be sidestepping constitutional rights enjoyed by and displayed at criminal courts for the same offense, then a close examination of those courts ought to reveal an exquisite alternative: one

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[264] *See* FERPA, 20 U.S.C. § 1232(g).

[265] *See* 20 U.S.C. § 1232(g) (discussing exceptions allowing schools, sua sponte, to disclose student records under certain circumstances).

[266] FIRE's Guide to Due Process, *supra* note 16.

[267] For example, the Court of Appeals of Florida in *Hardison v. Florida A&M University* reversed a disciplinary panel's finding on the basis of the written findings, finding that the facts reported in the written decision were insufficient to meet the applicable definition of assault and battery. Hardison v. Fla. Agric. & Mech. Univ., 706 So. 2d 111, 112 (Fla. Dist. Ct. App. 1998).

[268] *See supra* Section III.D.

[269] Wilson, *supra* note 9.

[270] Sophie Tatum, *Devos Announces Review of Obama-Era Sexual Assault Guidance*, CNN (Sept. 7, 2017, 10:02 PM), https://www.cnn.com/2017/09/07/politics/betsy-devos-education-department-title-ix/index.html [https://perma.cc/76M7-D25A] (quoting Betsy DeVos speaking at George Mason University).

that is ripe with procedural fairness, void of harmful bias, and consistent both in theory and practice.

The reality is that a closer glance at American jury trials for sex-based crimes may not provide satisfaction. American juries are often plagued by harmful stereotypes about sex, culture, race, and gender.[271] The jury system itself is replete with risk: jurors are reluctant to serve,[272] are affected in psychologically harmful ways,[273] and are confronted with such a broad range of punishment that results in extreme outcomes based on personal preference.[274] In contrast, through sensitivity training and programming, university disciplinary hearings are capable of being regulated to diminish bias, support equitable solutions for all parties, and provide expertise on how to view and weigh evidence properly.[275]

Universities, under Title IX, have an obligation to provide a safe environment free from gender-based discrimination, and in accordance with this purpose, Title IX must provide an equal opportunity to education for *all*.[276] In comparing university disciplinary hearings with American juries within the context of due process as required by case law and formal OCR guidance, it becomes clearer that due process is not under attack at colleges and universities.

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[271] *See supra* Section III.A.
[272] *See supra* Section V.A.
[273] *See supra* Section V.B.
[274] *See supra* Section V.B.
[275] *See supra* Section III.B.
[276] *See* 20 U.S.C. § 1681 (1986).