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# DEFENDING THE PREPONDERANCE OF THE EVIDENCE STANDARD IN COLLEGE ADJUDICATIONS OF SEXUAL ASSAULT

## I. INTRODUCTION

In April of 2011, the Department of Education's Office for Civil Rights ("OCR") released new guidelines clarifying schools' responsibilities under Title IX of the Education Amendments of 1972.<sup>1</sup> While Title IX is perhaps best known as the statute guaranteeing equal opportunities to women collegiate athletes,<sup>2</sup> the implementing regulations require educational institutions to develop "prompt and equitable" procedures for responding to complaints of sex discrimination,<sup>3</sup> including acts of sexual harassment and sexual violence.<sup>4</sup> Specifically, the Dear Colleague Letter outlined preventive

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1. OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter DEAR COLLEAGUE LETTER].

2. 34 C.F.R. § 106.41(a) (2012) ("No person shall, on the basis of sex, be excluded from participation in . . . or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds]."); *id.* § 106.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."). Although Title IX has become synonymous with collegiate athletics, the statute's drafters and supporters were concerned primarily with the admission of women to educational institutions and the employment of women in academia. See SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 1, 3 (2007) (quoting Representative Patsy Mink, a key supporter of the legislation, noting that Title IX's supporters "had no idea that its most visible impact would be in athletics." Mink explained, "I had been paying attention to the academic issue. I had been excluded from medical school because I was female.") (citing BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS 144 (2003)). See also Bernice R. Sandler, "Too Strong for a Woman" *The Five Words that Created Title IX*, 6 ABOUT WOMEN ON CAMPUS 1 (1997), reprinted in WARE *supra*, at 35-37.

3. 34 C.F.R. § 106.8(b) (2012) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part."); Office for Civil Rights, Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 4, 19-21 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter Sexual Harassment Guidance].

4. OCR uses the general term "sexual harassment" to refer to acts of sexual violence, such as sexual assault and rape, as well as to refer to *quid pro quo* and hostile environment harassment. See Dear Colleague Letter, *supra* note 1, at 1-2. In *Davis v. Monroe County Board of Education*, the Supreme Court acknowledged that harassing conduct that falls within the purview of Title IX may also be criminal in nature. 526 U.S. 629, 634, 653 (1999) (noting that harassing student had pleaded guilty to sexual battery, a type of "criminal sexual

and remedial measures that schools are required to take in order to ensure that their procedures are prompt and equitable.<sup>5</sup> The new guidance document was introduced by Vice President Biden, who spoke at the University of New Hampshire to explain and justify the Obama administration's decision to strengthen enforcement of Title IX after a period of relative inaction.<sup>6</sup>

One of the most significant provisions of the Dear Colleague Letter is OCR's clear instruction that schools use the preponderance of the evidence standard when adjudicating cases of student-perpetrated sexual harassment, sexual assault, or rape.<sup>7</sup> The document states, "[I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard . . . . Grievance procedures that use [a] higher standard are inconsistent with the standard of proof established for violations of the civil rights laws and are thus not equitable under Title IX."<sup>8</sup> While this instruction did not represent a change in policy within OCR—the office had already on several occasions instructed particular institutions to apply a preponderance of the evidence standard<sup>9</sup>—the Dear Colleague Letter

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misconduct"). This Comment focuses primarily on sexual assault and rape and uses those terms, rather than the broad term "sexual harassment," to avoid any confusion about the type of conduct being addressed.

5. Dear Colleague Letter, *supra* note 1, at 8.

6. See U.S. Dep't of Educ., Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence, Ed.gov (Apr. 4, 2011), <http://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad>. The Obama administration has taken a far more proactive role in educational civil rights enforcement than the Bush administration. See, e.g., Nadra Kareem Nittle, *Department of Education Steps Up Probes of Civil Rights Complaints*, Root (Sept. 27, 2011), <http://www.theroot.com/buzz/increased-probe-school-civil-rights-complaints> (comparing the thirty compliance reviews initiated by OCR during Obama's first two-and-a-half years in office with the twenty-two compliance reviews initiated during George W. Bush's entire eight-year presidency).

7. Dear Colleague Letter, *supra* note 1, at 10–11. This instruction clarifies the meaning of a Department of Education regulation requiring schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" pertaining to sex discrimination. 34 C.F.R. § 106.8(b) (2012). A prior guidance document also provided instruction regarding the "prompt and equitable" requirement, although it did not direct schools to use a particular evidentiary standard in their disciplinary proceedings. Sexual Harassment Guidance, *supra* note 3, at 4, 19–21.

8. Dear Colleague Letter, *supra* note 1, at 11.

9. Letter from Ass'n of Title IX Adm'rs et al. to Russlyn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ. 2, 2 n.6 (Feb. 7, 2012), *available at* <http://www.atixa.org/documents/Organizational%20Signon%20for%20DCL%20re%20Sexual%20Violence%202012%20FIN>

is the first OCR guidance document to announce this standard as generally applicable.<sup>10</sup>

Much of the media attention directed at the Dear Colleague Letter has focused on the preponderance of the evidence standard, specifically as applied to college and university disciplinary proceedings. While some legal scholars and nonprofit groups expressed support for OCR's position,<sup>11</sup> the response from the popular press was largely critical. For example, *Wall Street Journal* commentator Peter Berkowitz equated the preponderance of the evidence standard with a "presumption of male guilt" and accused the Obama administration of "abandon[ing] any pretense of due process" in school adjudications.<sup>12</sup> Another commentator argued that college disciplinary boards "lack the training and resources to investigate and adjudicate felonies," implying that they should not

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AL%20Sign%20on.pdf" (citing communications between OCR regional offices and educational institutions during the 1990s and 2000s).

10. OCR's most recent guidance document prior to the April 2011 Dear Colleague Letter is the Revised Sexual Harassment Guidance of 2001. Sexual Harassment Guidance, *supra* note 3. This document discusses the requirement that schools develop "prompt and equitable grievance procedures," *id.* at 19, but does not specify the evidentiary standard schools are to use. OCR characterizes the April 2011 Dear Colleague Letter as a "significant guidance document" that "does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations." Dear Colleague Letter, *supra* note 1, at 1.

11. *See, e.g.*, Letter from Ass'n of Title IX Adm'rs et al. to Russlyn Ali, *supra* note 9 (signed by fifty-seven institutions and individuals).

12. Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, Wall Sr. J. (Aug. 20, 2011), <http://online.wsj.com/article/SB10001424053111903596904576516232905230642.html>. *See also* Wendy Kaminer, *The SaVE Act: Trading Liberty on Campus for Security*, Atlantic (Apr. 25, 2011), <http://www.theatlantic.com/national/archive/2011/04/the-save-act-trading-liberty-for-security-on-campus/237833/> (criticizing the use of the preponderance of the evidence standard in the proposed Campus Sexual Violence Elimination ("SaVE") Act). The SaVE Act was introduced in the 111th and 112th Congresses in the winter of 2010 and spring of 2011, respectively. *See* H.R. 1616, 112th Cong. (2011); S. 834, 112th Cong. (2011); S. 4039, 111th Cong. (2010); H.R. 6461, 111th Cong. (2010). Each of the aforementioned bills included a requirement that school proceedings use a preponderance of the evidence standard in sexual assault proceedings. In his remarks supporting House Bill 6461, Representative Thomas Perriello (D-VA) stated that the preponderance standard would "guarantee the accused significant due process while not making it more difficult than necessary for institutions to effectively respond to threats to campus safety." 156 Cong. Rec. E2055 (2010). Various provisions of the SaVE Act were included in The Violence Against Women Reauthorization Act of 2012 ("VAWA"), but the preponderance of the evidence standard was not among them. *See* S. 1925, 112th Cong. § 304 (2011). The SaVE Act provisions were removed altogether in the House bill. *See* H.R. 4970, 112th Cong. § 304 (2012) (removing the text from this section of the Senate bill and instead authorizing the creation of a National Center for Public Campus Safety).

attempt to discipline students for sexual assault in any situation.<sup>13</sup> Still a third noted that “[s]ometimes, women lie about rape” and have compelling motivations to do so.<sup>14</sup> Driven by concerns about free speech and erroneous disciplinary outcomes, these critics view the preponderance standard as an attack on civil liberty directed specifically at men.<sup>15</sup>

As this Comment will demonstrate, these reactions fundamentally misrepresent the legal context of the Dear Colleague Letter and school adjudications. By drawing parallels between school disciplinary procedures and the criminal justice system, opponents of the preponderance of the evidence standard ignore the relationship between such adjudications and Title IX—a federal *civil rights* statute. The Supreme Court has recognized that student-perpetrated sexual harassment, including sexual assault or rape,<sup>16</sup> may prohibit students from participating in or benefitting from educational programs on the basis of sex.<sup>17</sup> If campus sexual assault<sup>18</sup>—and

13. Christina Hoff Sommers, *In Making Campuses Safe for Women, a Travesty of Justice for Men*, Chron. of Higher Educ. (June 5, 2011), <http://chronicle.com/article/In-Making-Campuses-Safe-for/127766/>.

14. Anna Rittgers, *Sometimes, Women Lie About Rape*, Wash. Post (Sept. 7, 2011), <http://www.washingtontimes.com/news/2011/sep/7/sometimes-women-lie-about-rape/?page=all>. But see Wendy Murphy, *Campus “Safety” Bill Endangers Rape Prosecutions*, Forbes (May 17, 2012), <http://www.forbes.com/sites/womensenews/2012/05/17/campus-safety-bill-endangers-rape-prosecutions/> (expressing support for preponderance standard).

15. See Berkowitz, *supra* note 12. See also Wendy Kaminer, *Sexual Harassment and the Loneliness of the Civil Libertarian Feminist*, Atlantic (Apr. 6, 2011), <http://www.theatlantic.com/national/archive/2011/04/sexual-harassment-and-the-loneliness-of-the-civil-libertarian-feminist/236887/> (expressing concern that attempts to curtail sexual harassment on campus impinge upon free speech). The American Association of University Professors expressed more nuanced and narrower concerns regarding the preponderance of the evidence standard, worrying that it might erode academic freedom in cases where students accuse professors of sexual harassment. Letter from Ann E. Green, Chair, Comm. on Women in the Academic Profession, Am. Ass’n of Univ. Professors, to Russlyn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, Dep’t of Educ. (Aug. 18, 2011), *available at* <http://thefire.org/public/pdfs/bc5df1a71d0eac6b7b840a2ecd01bb9.pdf?direct>. Notably, however, neither this letter nor an earlier one raised concerns about the application of the preponderance of the evidence standard to *students* accused of sexual assault or rape. See Letter from Gregory F. Schultz, Assoc. Sec’y and Dir., Dep’t of Academic Freedom, Tenure, and Governance, Am. Ass’n of Univ. Professors, to Russlyn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, Dep’t of Educ. (June 27, 2011), *available at* <http://www.nacua.org/documents/AAUPLetterToOCRReSexualViolenceEvidence.pdf>.

16. See sources cited *supra* note 4.

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

18. I use the term “campus” loosely here and throughout this Comment to indicate a college or university community and physical space associated with it. I do not mean to imply that colleges have no responsibility to investigate and respond to sexual assaults that occur in

university responses to it—are to be understood within the appropriate legal framework, they must be viewed as civil rights issues.

While it is beyond the scope of this Comment to address in detail the federal administrative structure that enforces Title IX, a short explanation may be helpful. The Department of Education is the primary agency responsible for enforcing Title IX in educational institutions of all levels (primary through postsecondary).<sup>19</sup> The Department issues rules and regulations, including guidance documents such as the April 2011 “Dear Colleague” letter, and is authorized to ensure compliance by terminating funding to offending educational programs or by “any other means authorized by law.”<sup>20</sup> The majority of Department of Education investigations pursuant to Title IX are initiated by complainants, but the agency also initiates some compliance reviews on its own.<sup>21</sup> When OCR determines that an institution is not in compliance, it typically settles the matter with a resolution agreement that does not punish the institution but rather requires it to become compliant.<sup>22</sup> In addition to pursuing administrative remedies, individuals may pursue a private right of action against institutions for violations of Title IX.<sup>23</sup>

students’ privately leased apartments, for example.

19. Additionally, more than twenty government agencies oversee some sort of educational or training programs and thus must also enforce Title IX within the context of those programs. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000).

20. 20 U.S.C. § 1682 (2006). Before terminating funding, the agency must conduct a hearing. *Id.* The Department of Education has not terminated federal funding for any college or university for violations of Title IX, despite its authority to do so. Ware, *supra* note 2, at 13.

21. *Title IX and Sex Discrimination*, Office for Civil Rights, Dep’t of Educ., [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last visited Apr. 12, 2012).

22. See, e.g., Letter from Catherine D. Criswell, Director, U.S. Dep’t of Educ., Office for Civil Rights, Cleveland Office to Gloria A. Hage, General Counsel, E. Mich. Univ. (Nov. 22, 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002-a.pdf> (requiring university, *inter alia*, to revise its grievance procedures and train staff); Letter from Debbie Osgood, Director, U.S. Dep’t of Educ., Office for Civil Rights, Chicago Office to The Reverend John I. Jenkins, President, Notre Dame University (Ill.) (June 30, 2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-a.pdf> (requiring the university, *inter alia*, to revise its policies and procedures and use the preponderance of the evidence standard in adjudications).

23. See *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999) (reversing summary judgment for defendant school district). In order to find an educational institution liable for discrimination in violation of Title IX in a case of “student-on-student sexual harassment,” *id.* at 639, the Supreme Court has required that the defendant act with “deliberate indifference” to known acts” by a harasser who “is under the school’s disciplinary authority,” *id.* at 647.

This Comment focuses exclusively on colleges and universities as the educational settings most relevant to the problem of campus sexual assault. It argues that Title IX gives universities the right and duty to respond effectively to incidents of sexual assault within their communities. Requiring universities to use the preponderance of the evidence standard in adjudications of student-perpetrated sexual assault is a key part of an *effective* response, in large part because it encourages victims of assault to report the incident. This Comment thus aims to contextualize and defend the use of the preponderance of the evidence standard in school adjudications for sexual assault.

The analysis begins by exploring the use of the preponderance standard in civil cases and particularly in civil rights cases. Part I situates Title IX and the preponderance standard squarely within the realm of civil rights law. Additionally, Part I demonstrates that Title IX is not the only legal context in which sexual assault is understood as civil rights matter.

Part II counters the view that the preponderance standard is especially problematic in cases of sexual assault. It argues that criticism of this standard can be attributed in part to common miscomprehensions of the factual circumstances surrounding campus sexual assaults. This Part addresses evidence that the typical campus sexual assault is not a mistake or a misunderstanding, but an intentional act of predation. Accordingly, it argues that the rights of students accused of sexual assault, while undeniably important, should not prevail over the rights of alleged and potential victims, whose educational opportunities are likely to be diminished following an assault. Thus, Part II calls for equal consideration of the rights of complainants and respondents—an equilibrium reflected in the preponderance standard, which does not give one student's word greater weight than another's.

Finally, Part III assesses the unique context of a university community, noting that universities have discretion over the standards of conduct to which they hold their members. Part III concludes the analysis by demonstrating that colleges and universities are not only able—and obligated—to respond to incidents of sexual assault, but are also well equipped to do so.

The orientation of this Comment is thus both descriptive and normative. It demonstrates that the preponderance of the evidence standard is, legally speaking, the correct standard to apply in college adjudications of sexual assault. Further, it argues that universities should commit to using this standard not merely for fear of legal

sanctions should they fail to comply, but because universities are uniquely positioned to address sexual violence within their communities in a way that the criminal justice system is not.

## II. THE STANDARD OF PROOF IN CIVIL AND CIVIL RIGHTS ADJUDICATION

Critics of the Dear Colleague Letter have emphasized the alleged criminal conduct of an accused student to argue that educational institutions should use a heightened evidentiary standard when adjudicating cases of rape or sexual assault.<sup>24</sup> They reason that because rape is considered a serious crime, an alleged rapist must be found “guilty” beyond a reasonable doubt, regardless of where his adjudication takes place.<sup>25</sup> However, this argument misconstrues the way that burdens of proof are allocated within the legal system. Because Title IX requires colleges to address sexual assault as a civil rights matter, OCR is legally justified—indeed, is following legal precedent—in requiring schools to use a civil standard.

### A. TITLE IX AS A CIVIL RIGHTS STATUTE

In order to understand what standard of proof is required by a certain type of legal proceeding, we must look to how our legal system categorizes that proceeding. The standard of evidence used depends on the nature of the proceedings—criminal or civil—and the specific causes of action; it does *not* depend on the alleged conduct of the defendant. Because many acts are both potential crimes and potential torts, the same act may be subject to two different standards of evidence in two separate proceedings.<sup>26</sup> Rape and sexual assault are no exception to this pattern; in fact, a rising number of civil suits for rape and sexual assault have been filed over the past few decades.<sup>27</sup> Whether a particular harm is dealt with through the

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24. See sources cited *supra* notes 12–15.

25. *Id.*

26. O.J. Simpson’s two trials—one for murder, in which he was acquitted, and another for wrongful death, in which he was found liable for one of two deaths—is a particularly well-known example. See *Oppression and Malice: The O.J. Simpson Civil Trial* (PBS television broadcast Feb. 5, 1997), available at [http://www.pbs.org/newshour/bb/law/jan-june97/simpson\\_2-5.html](http://www.pbs.org/newshour/bb/law/jan-june97/simpson_2-5.html) (discussing the differing burdens of proof in two trials). See also generally Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 Duke L.J. 1557 (2008) (addressing civil litigation for sexual assault and the interaction of the civil and criminal legal regimes).

27. Lininger, *supra* note 26, at 1568–73.



criminal justice system, civil justice system, or both depends, in part, on the nature of the harm itself, but also on the choices of the individual who has suffered the alleged harm and the discretion of prosecutors.<sup>28</sup>

The United States legal system uses three different standards of proof to determine a defendant's responsibility for criminal acts or his or her liability for civil injuries. The highest standard of proof, which requires fact finders to believe "beyond a reasonable doubt" that a defendant has engaged in the conduct at issue, is used only in criminal cases where the defendant faces the prosecutorial power of the government.<sup>29</sup> For nearly all civil cases, the significantly lower "preponderance of the evidence" standard is used, whereby a defendant will be held liable if fact finders believe that the defendant has more likely than not engaged in the conduct giving rise to liability.<sup>30</sup> The third, middle standard, known as the "clear and convincing" standard, is perhaps the most difficult to define. Courts have varied in their interpretations of this standard, stating, for example, that it requires the plaintiff's version of events to be "highly probably true," or that it necessitates evidence that "enables the fact finders to come to a clear conviction, without hesitation."<sup>31</sup>

When a student at an educational institution rapes or sexually assaults another, the incident may be understood in three different ways: as a crime, a tort, and/or a civil rights violation. The alleged victim may choose to seek criminal charges or initiate a civil tort suit against the perpetrator; the alleged victim may also seek both or neither of those options. In addition, the alleged victim may opt to file a grievance with the university, requiring it to respond to the incident once it is aware of what has occurred and to initiate disciplinary proceedings against the alleged perpetrator if the alleged victim wishes it.<sup>32</sup>

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28. See *Preliminary Proceedings*, 33 Geo. L.J. Ann. Rev. Crim. Proc. 193, 193 n.650 (2004).

29. Cf. 21B Charles Alan Wright et al., *Federal Practice and Procedure* §§ 5122, 5122 n.93 (2d ed. 2012) (noting that attempts to extend the beyond a reasonable doubt standard to non-criminal actions have not been successful).

30. 32A C.J.S. *Evidence* § 1627 n.7 (2012) (noting that "the few exceptions to the preponderance standard in civil cases are very limited and include only those cases involving fraud or possible loss of individual liberty, citizenship, or parental rights.").

31. 21B Wright et al., *supra* note 29, at nn.94, 96, 97 (citing *Har v. Boreiko*, 986 A.2d 1072, 1080 (Conn. App. Ct. 2010); *Cobb v. Leyendecker*, 200 S.W.3d 924, 926 (Ark. Ct. App. 2005)).

32. Dear Colleague Letter, *supra* note 1, at 4, 8-9. In order for a school to be liable for

Because Title IX is a civil rights statute—modeled after Title VI, which prohibits discrimination within educational programs on the basis of race, color, and national origin<sup>33</sup>—sexual assaults occurring within the context of educational institutions must be understood as an act implicating discrimination “on the basis of sex.”<sup>34</sup> Title IX is concerned not only with prohibiting patterns of discrimination within schools, but also with ensuring the ability of individuals to pursue an education regardless of their sex. In the words of Justice Stevens, “Title IX . . . sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.”<sup>35</sup>

In administering Title IX, the Department of Education and OCR pursue both of the objectives identified by Justice Stevens. Thus, Title IX, as understood by its key enforcement agency, does not merely require that schools refrain from engaging in affirmative discriminatory actions. It also requires schools to respond to discriminatory acts as potential violations of a student’s civil rights—as acts that may cause a victim to “be excluded from participation in, [or] denied the benefits of . . . [an] education program or activity.”<sup>36</sup>

Civil rights causes of action have consistently been adjudicated using the preponderance standard.<sup>37</sup> The most familiar example is Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. In 1989, the Supreme Court confirmed that the standard of proof typically applied to civil disputes is also applicable

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damages, actual (rather than constructive) notice is required. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640–42, 647 (1999).

33. 42 U.S.C. § 2000D (2006).

34. 20 U.S.C. § 1681 (2006).

35. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (citing and comparing 110 Cong. Rec. 1540, 7062 (1964) (pertaining to Title VII of the Civil Rights Act of 1964), with 118 Cong. Rec. 5806–07 (1972) (pertaining to Title IX)).

36. See 20 U.S.C. § 1681 (2006); Dear Colleague Letter, *supra* note 1, at 11; Sexual Harassment Guidance, *supra* note 3, at 5–7, 9–13. See also *id.* at 12 (“If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.”) (citing 34 C.F.R. § 106.31(b) (2012)).

37. See, e.g., *Bazemore v. Friday*, 478 U.S. 38, 400 (1986).

to Title VII cases:

Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual.<sup>38</sup>

This standard is also used in litigation of Title VI,<sup>39</sup> the statute upon which Title IX was expressly modeled.<sup>40</sup> Federal courts have consistently applied the preponderance standard to Title IX cases brought against educational institutions. For example, the Sixth Circuit stated that a school district may be liable for the sexual abuse of a student if the “[p]laintiff demonstrates by a preponderance of the evidence each of the [necessary] elements,”<sup>41</sup> and the First Circuit applied the same standard to a case involving equality of athletic opportunities.<sup>42</sup> Moreover, OCR uses the preponderance of the evidence standard when investigating and resolving complaints

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38. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (all concurring justices in a plurality opinion agreeing that the preponderance standard applies) (citing “termination of parental rights,” involuntary commitment,” “deportation,” and “denaturalization” as examples of such “unusual coercive action” by the government) (citations omitted), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 § 107, as recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

39. See *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); 42 U.S.C. § 20001D (2006). As the Supreme Court has pointed out, Title VI served as a model for Title IX; the language of the two statutes is identical except for the protected classes named and the addition of the word “education” in Title IX. See *Cannon*, 441 U.S. at 694–98, 694–95 n.16. Other civil rights statutes, including Sections 1981, 1983, and 1985, also use the preponderance standard. See, e.g., *Lynch v. Belden & Co.*, 882 F.2d 262, 267, 269 (7th Cir. 1989) (Section 1981 claim).

40. *Cannon*, 441 U.S. at 694–98, 694–95 n.16.

41. *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 364 (6th Cir. 2005); see also *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (plaintiff “has the burden of proving by a preponderance of the evidence that a school official with the power to take action to correct the discrimination had actual notice of the discrimination”).

42. *Cohen v. Brown Univ.*, 991 F.2d 888, 902 (1st Cir. 1993). Title IX is not analogous to Title VII of the Civil Rights Act in all respects; for example, in *Cohen*, the First Circuit declined to apply Title VII’s burden-shifting rules to a Title IX claim. *Id.* See also *Cohen v. Brown Univ.*, 101 F.3d 155, 176–77 (1st Cir. 1996). Also, in *Gelber v. Lago Vista Independent School District*, the Supreme Court declined to apply Title VII’s constructive notice standard to cases of teacher-student sexual harassment, noting that the “contractual nature” of Title IX requires that schools have actual notice of harassment before they face the risk of suspension or termination of federal funding, 524 U.S. 274, 287–88 (1998).

against institutions and conducting administrative hearings.<sup>43</sup>

In requiring schools to investigate and respond to cases of sexual harassment or sexual violence within their communities,<sup>44</sup> OCR assigns to schools some of the responsibility for enforcing Title IX. In other words, through OCR's administration of Title IX, schools are tasked with providing "individual citizens effective protection against [discriminatory] practices."<sup>45</sup> Accordingly, schools are expected to use adjudicatory procedures consistent with those employed at the agency level.<sup>46</sup> This consistency is meaningful for two reasons. First, it positions schools as partners of OCR in the enforcement of Title IX and not merely as entities controlled by OCR. Second, it clarifies the purpose of school adjudications for cases of rape or sexual assault. OCR calls upon schools to adjudicate these cases not in order to assess the criminality of an alleged act, but to consider whether one student's actions have had a discriminatory effect upon another student that may impede the latter's access to educational opportunities. In other words, it calls upon schools to respond to sexual harassment and sexual assault as potential violations of a student's civil rights.

### *B. Beyond Title IX: Rape and Sexual Assault as Civil Rights Violations*

Despite the legal context of Title IX as a civil rights law and despite the role that educational institutions play in helping to enforce Title IX, many critics of the Dear Colleague Letter assert that sexual assault seems different somehow from other discriminatory acts. However, Title IX is not the only legal context in which rape and sexual assault have been understood as civil rights violations and adjudicated using the preponderance of the evidence standard. Most notably, the Violence Against Women Act of 1994 ("VAWA") took this approach in creating a civil rights cause of action for "crimes of

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43. Dear Colleague Letter, *supra* note 1, at 11, 11 nn.27-28.

44. 34 C.F.R. § 106.8(b) (2012); Sexual Harassment Guidance, *supra* note 3, at 19-21.

45. *Cannon*, 441 U.S. at 704; *see also Gebser*, 524 U.S. at 286 (quoting from *Cannon*). Justice Stevens' reference to individual "protection" in his *Cannon* opinion seems to refer to a private remedy. I merely borrow his words here to argue that OCR has placed on schools much of the responsibility for enforcing Title IX as a means of ensuring the prevention of discriminatory conduct, rather than requiring them only to respond to discrimination or harassment after the fact.

46. Dear Colleague Letter, *supra* note 1, at 11, 11 nn.27-28.

violence motivated by gender.”<sup>47</sup> VAWA also explicitly referred to preponderance of the evidence as the applicable standard.<sup>48</sup>

VAWA’s civil rights remedy aimed to reframe the legal context in which gender-based violence is understood. Congress sought to provide victims of gender-based violence an alternate means of redress,<sup>49</sup> noting that various features of criminal law, such as prosecutorial discretion and the high standard of proof, make successful prosecution of rape cases particularly difficult.<sup>50</sup>

VAWA’s remedy faintly resembles school adjudications by aiming to remedy discriminatory conduct. Thus, it is concerned primarily with the effects of such conduct on the victim, rather than with the conduct of the allegedly discriminatory actor. Title IX and school adjudications of sexual assault differ from the VAWA civil rights remedy in that the former were not intended as alternatives to criminal law and are not typically understood as such.<sup>51</sup>

When the Supreme Court struck down VAWA’s civil rights remedy in 2000, it did not question the propriety of applying a civil rights remedy to rape, sexual assault, or domestic violence, but held that the *federal* government could not enforce such a measure under the Commerce Clause or section five of the Fourteenth Amendment.<sup>52</sup> Strong state support for a civil rights approach to gender violence was evidenced, however, by a joint amicus brief submitted by thirty-six state attorneys general asking the Court to uphold VAWA’s cause of action.<sup>53</sup> Today, a few jurisdictions provide a statutory civil rights remedy, in addition to a tort remedy for rape

47. 42 U.S.C. § 13981 (2006), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

48. *Id.* § 13981(c)(1) (indicating that, to prevail under the civil rights cause of action, a plaintiff must be able to demonstrate by the preponderance of the evidence that the harm suffered was “motivated by gender”); S. Rep. No. 102-197, at 50 (1991) (discussing the preponderance of the evidence standard as the typical standard used for civil rights cases).

49. S. Rep. No. 102-197, at 47-48 (referring to “an alternative Federal forum”).

50. *Id.* at 46-47.

51. *See id.* at 43 (“[W]e need [a civil rights remedy] because no existing antibias [sic] crime laws fully protect against gender-based assaults. But we also need [a civil rights remedy] because existing State remedies have proven insufficient to protect women against some of the most persistent and serious of crimes. . . . Estimates show that a rape survivor may have as little as a 5-percent chance of having her rapist convicted.”).

52. *Morrison*, 529 U.S. at 617, 626-27.

53. Brief for the State of Arizona et al. as Amici Curiae in Support of Petitioners’ Brief on the Merits at 2-3, United States v. Morrison, 529 U.S. 598 (Nos. 99-5, 99-29), 1999 WL 1032809. *See also* Lininger, *supra* note 26, at 1568-73 (2008).

or sexual assault.<sup>54</sup>

Use of the preponderance standard for civil rights violations indicates the intention among various lawmakers to assess alleged discriminatory conduct under a standard that does not privilege the defendant's word over the complainant's word.<sup>55</sup> In civil rights litigation, lawmakers choose not to employ a more heightened standard,<sup>56</sup> even though state courts occasionally use the higher clear and convincing standard when civil cases involve "quasi-criminal" conduct such as fraud or when liability may damage a defendant's reputation.<sup>57</sup> Although discriminating against an individual on the basis of race, gender, or national origin is not criminal or quasi-criminal conduct, it may nevertheless seriously affect one's reputation. Yet by writing the preponderance of the evidence standard into VAWA's private right of action and Title VII, Congress struck an appropriate balance between claimants and those individuals who have been haled into court due to their allegedly discriminatory actions.<sup>58</sup> Federal courts and the Department of Education have done the same with Title IX.

OCR's instruction to universities to use the preponderance of the evidence standard when adjudicating cases of sexual assault is neither unprecedented nor illogical. The Supreme Court has recognized that sexual harassment, which includes rape and sexual assault, presents a civil rights issue under Title IX when such conduct is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."<sup>59</sup> OCR has not

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54. Clare Bushey, *Why Don't More Women Sue Their Rapists?*, Slate (May 26, 2010), [http://www.slate.com/articles/double\\_x/doublex/2010/05/why\\_dont\\_more\\_women\\_sue\\_their\\_rapists.html](http://www.slate.com/articles/double_x/doublex/2010/05/why_dont_more_women_sue_their_rapists.html) (noting that Illinois, California, and New York City have civil rights causes of action similar to VAWA's).

55. See H.R. Rep. No. 88-914 (1963) (requiring the Equal Employment Opportunity Commission to prove "discrimination by a preponderance of the evidence"); S. Rep. No. 102-197, at 51 (1991) ("It is a basic legal rule that civil cases . . . do not require the kind of proof 'beyond a reasonable doubt' demanded in criminal cases. Literally thousands of civil rights cases have proceeded under the traditional civil 'preponderance' standard; [VAWA's civil-rights remedy] simply follows suit.").

56. See sources cited *supra* notes 37-43.

57. 16 C.J.S. *Constitutional Law* § 1776 (2012).

58. 42 U.S.C. § 13981(e)(1) (2006), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000); S. Rep. No. 102-197, at 54 (1991).

59. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (citing the standard for a private damages action against a school board arising out of student-on-student sexual harassment).

“abandon[ed] any pretense of due process,” as one critic declared.<sup>60</sup> Rather, it has followed well-established procedural precedent that requires the use of this standard for civil rights claims.

### III. COLLEGE RAPE AND SEXUAL ASSAULT: EXAMINING ASSUMPTIONS

Much of the criticism of the preponderance of the evidence standard is motivated by a fear that this standard will make innocent young men more likely to be *false*ly found responsible for rape.<sup>61</sup> This is a fear worth taking seriously. But the assumptions upon which this fear is grounded must be seriously examined, rather than immediately accepted as truth. Rape and sexual assault regularly occur on and around college campuses. The vast majority of incidents are never reported, and few perpetrators are ever disciplined. Furthermore—and perhaps more significantly—research shows that rape is often not an accident or a romantic misadventure, but rather an intentional act of predation. The realities of rape on campus should prompt a reframing of the problem to focus not only on the rights of the accused, but also on the needs of victims for meaningful recognition and remedies.

#### *A. The Prevalence of Rape and Sexual Assault in College Communities*

A study recently conducted by the National Institute of Justice (“NIJ”) and funded by the U.S. Department of Justice found that one in four or one in five female college students is a victim of rape, sexual assault, or attempted rape or sexual assault during her time in college.<sup>62</sup> The NIJ acknowledges that other studies have arrived at

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60. Berkowitz, *supra* note 12.

61. See *id.*; Rittgers, *supra* note 14; Harvey Silverglate, *Yes Means Yes—Except on Campus*, Wall. St. J. (July 15, 2011), <http://online.wsj.com/article/SB10001424052702303678704576440014119968294.html>.

62. Christopher P. Krebs et al., Nat’l Inst. of Justice, *The Campus Sexual Assault (CSA) Study 5-3* (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. This study of 5,466 women enrolled at one of two large public universities screened for what it termed “incapacitated sexual assault” in addition to “physically forced sexual assault.” *Id.* at vii, ix. Incapacitated sexual assault encompasses “any unwanted sexual contact occurring when a victim is unable to provide consent or stop what is happening because she is passed out, drugged, drunk, incapacitated, or asleep.” *Id.* at 1-5. This study found “very low” rates of sexual assault self-reported among the 1,375 college men it surveyed. *Id.* at vii. While this Comment, and the sources it cites, focus primary on sexual assault occurring to college women, it does not disclose the possibility that Title IX requires universities to respond similarly to

lower victimization rates<sup>63</sup> and explains that discrepancies seem to be largely due to variations in the definition of rape and sexual assault employed, the wording of survey questions, and the context in which questions are asked and answered.<sup>64</sup> Despite the methodological variations in survey design, there is ample support for the one-in-five statistic, which has been reproduced or approximated in other studies.<sup>65</sup>

The vast majority of sexual assaults in a university community are never reported to campus authorities or police, as demonstrated by glaring discrepancies between the one-in-five estimation—and even much more conservative estimates—and the number of incidents that schools report. Although universities are required under the Clery Act to report all sexual offenses occurring on campus or on university-affiliated property, the Clery Act does not require the reporting of off-campus sexual offenses, such as assaults that occur in a student's private apartment.<sup>66</sup> Furthermore, universities have

sexual assault occurring to male students.

63. See Nat'l Inst. of Justice, *Measuring Frequency*, Sexual Assault on Campus (Oct. 1, 2008), <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/measuring.htm>.

64. See *id.* A 2004 report sponsored by the National Institute of Justice ("NIJ") compared two surveys, both of which surveyed approximately 4,440 college women. Bonnie S. Fisher, *Measuring Rape Against Women: The Significance of Survey Questions* (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/199705.pdf>. One of the surveys asked "behaviorally specific" screening questions, defined as questions that "do[] not ask simply if a respondent had been raped [or assaulted] but rather describ[e] an incident in graphic language that covers the elements of a criminal offense." *Id.* at 1-4-8. The other survey did not use graphically worded screening questions, but instead asked, for example, "whether a respondent 'has been forced or coerced to engage in unwanted sexual activity.'" *Id.* The survey using behaviorally specific questions resulted in nearly ten times more women reporting that they had been subjected to completed rape than the other survey. *Id.* at 1-4-10.

65. Bonnie S. Fisher et al., Nat'l Inst. of Justice, *The Sexual Victimization of College Women 10* (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (finding that 2.8% of female college student respondents had experienced completed or attempted rape during the then-current academic year (a period of about seven months). This percentage may reach 20% or higher as students typically spend four to five years, or forty-eight to sixty months, in college). See also Melissa J. Himelein, *Risk Factors for Sexual Victimization in Dating: A Longitudinal Study of College Women*, 19 *Psych. of Women Q.* 31, 36-37, 40 (1995) (noting that 8% of a sample of college women had experienced unwanted sexual conduct, 13% "sexual coercion" or attempted rape, and 8% completed rape over a thirty-two-month period since entering college); Bonnie S. Fisher et al., *Crime in the Ivory Tower: The Level and Sources of Student Victimization*, 36 *Criminology* 617, 682-84, 691 (1998) (finding that 3% of a sample of college students consisting of 56% women and 44% men reported being the victims of sexual assault, attempted rape, or rape since the beginning of the then-current school year); Krebs et al., *supra* note 62, at 2-1 to 2-2 (summarizing other studies).

66. Kristen Lombardi & Kristin Jones, *Campus Sexual Assault Statistics Don't Add Up*, Center for Public Integrity (Dec. 2, 2009),



strong incentives to keep the number of incidents they report as low as possible, and many scholars and investigators have found pervasive underreporting and miscategorizing of statistics.<sup>67</sup> The Department of Education's database of Clery statistics shows that, in 2008, four-year institutions reported just under 3,000 incidents of "forcible sexual offenses."<sup>68</sup> During that same year, there were 6,878,000 female undergraduate students enrolled in four-year institutions, according to the U.S. Census Bureau.<sup>69</sup> Given that the statistics do not account for assaults in off-campus student housing, it equates to about one in 2500. One study found that 95% of college sexual assault victims do not report the incident to police,<sup>70</sup> and another found that less than 1% of college-student victims initiate a grievance procedure within their university.<sup>71</sup>

College students who have been raped or sexually assaulted stay silent in overwhelming numbers. As a result, their perpetrators are free to commit the same acts on another victim—perhaps several victims.<sup>72</sup> Yet opponents of the Dear Colleague Letter and other legal measures designed to address college sexual assault are more concerned by the prospect that a man might be wrongly accused than by the reality that most sexual assaults pass without recognition or remedy. As one commentator notes, "[s]ometimes, women lie about rape. . . . The motivations for a woman to make a false rape

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<http://www.publicintegrity.org/2009/12/02/9045/campus-sexual-assault-statistics-don-t-add>.

67. See, e.g., *id.*; Kathy Ahn, *The Pendulum Swings Backwards: The Clery Act Must Be Amended to Address University Policies that Discourage Rape Reporting*, 31 WOMEN'S RTS. L. REP. 514, 531–33 (2009) (addressing perverse incentives and accidental, as well as intentional misreporting of statistics).

68. Office of Postsecondary Educ., Dep't of Educ., *The Campus Safety and Security Data Analysis Cutting Tool*, Security, <http://ope.ed.gov/security/index.aspx> (last visited Dec. 21, 2012). This number was reached by selecting for private, public, and for-profit four-year institutions and then adding the data for incidents occurring in on-campus, non-campus, and public property locations. Incidents occurring on-campus in student housing are included within the larger on-campus category. The Clery statistics also include "non-forcible" sexual offenses. Although this category is intended to encompass only statutory rape or incest, *id.*, some schools mistakenly categorize date rape as "non-forcible." See Lombardi & Jones, *supra* note 66. The number of non-forcible sexual offenses reported in 2008 was forty-two. *Id.*

69. U.S. Census Bureau, *Table 278: Higher Education—Institutions and Enrollment 1980 to 2009*, Statistical Abstract of the United States, available at <http://www.census.gov/compendia/statab/2012/tables/12s0278.pdf>.

70. Fisher et al., *supra* note 65, at 23.

71. Krebs et al., *supra* note 62, at 5-26.

72. See David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002) (noting that more than half of the 120 men who admitted to committing rape had repeated the offense at least once).

allegation are legion: guilt, regret, even revenge.”<sup>73</sup>

It would seem logical that if women purportedly have compelling reasons to report false rapes, they should have even more compelling reasons to report real ones. Instead, victims cite many compelling reasons *not* to report. Often, the perpetrator is a friend or acquaintance, and the victim may feel personal or social pressure to avoid labeling him a “rapist” or exposing him to conviction or disciplinary procedures within the school.<sup>74</sup> Victims may also feel a sense of shame or embarrassment, and they often do not want their family or acquaintances to know about the incident.<sup>75</sup> They frequently cite their lack of proof that the incident really occurred and their resulting fear that any report they make would not be believed.<sup>76</sup> Some victims do not want to disclose that drug or alcohol use was involved in the assault; they may fear that disciplinary action will be taken against them or their friends.<sup>77</sup> Furthermore, victims believe that reporting the incident may expose them to further victimization: one survey showed that nearly 25% of victims of completed (not attempted) rape believed that police would treat them with hostility, and another found that 13% of victims of attempted or completed rape or sexual assault feared reprisal from their attacker.<sup>78</sup> Sadly, these fears are not unfounded. Victims who have reported assaults often state that their friends treated them with disbelief or animosity and that college or law enforcement officials responded with indifference or even attempted to discourage them from pursuing a case.<sup>79</sup>

Moreover, many victims seem to misapprehend the legal definition of rape, at least as it applies to their personal experiences. In the 2000 NIJ study, slightly over half of the women who had an experience that meets the legal definition of rape answered “no” when asked, “Do you consider this incident to be a rape?”<sup>80</sup>

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73. Rittgers, *supra* note 14.

74. Fisher et al., *supra* note 65, at 17–19.

75. *Id.* at 23.

76. *Id.*

77. Krebs et al., *supra* note 62, at 5–24.

78. Fisher et al., *supra* note 65, at 26; Krebs et al., *supra* note 57, at 5–24.

79. Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault*, Center For Public Integrity (Dec. 2, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1822/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1822/).

80. Fisher et al., *supra* note 65, at 15 (sample asked in neutral, non-legal language about acts that meet the definition of rape). *See also* Jacqueline Chevalier Minow & Christopher J.

Similarly, in another sample, 64% of victims of attempted or completed sexual assault or rape who did not report their incidents noted that one of their reasons for not reporting was a sense that the incident was “not serious enough to report.”<sup>81</sup> While some critics claim that these responses invalidate the surveys by calling into question how they define rape,<sup>82</sup> this response ignores the complexities of human behavior. Individuals respond to sexual assault in varied ways, some seemingly counterintuitive. The respondents may have wished to avoid thinking of themselves as *victims*, may have been hesitant to call the perpetrator—often a friend, (ex-)boyfriend, or acquaintance—a *rapist*, or may have believed that “real” rape is committed by strangers or involves additional acts of violence or extreme force.<sup>83</sup> Regardless of how one interprets this finding, it supports the general conclusion that far more college women have experienced some form of sexual victimization than have reported it.

### *B. Rape as an Act of Intentional Predation*

Opposition to OCR’s heightened enforcement approach demonstrates a misapprehension of rape and sexual assault within university communities. Concerned with the “ambiguity that often attends sexual encounters” between young people, Peter Berkowitz opined that “where erotic desire is involved, intentions can be obscure, passions conflicting, the heart murky and the soul divided.”<sup>84</sup> Berkowitz and others have also noted that romantic encounters among college students frequently involve alcohol.<sup>85</sup>

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Einolf, *Sorority Participation and Sexual Assault Risk*, 15 *Violence Against Women* 835, 842 (2009) (“the majority (50.9%) of [surveyed] victims of actions that met the legal definition of rape did not consider the act to be rape, 20.5% did consider themselves to have been raped, and 28.7% stated they were unsure whether they had been raped.”).

81. Krebs et al., *supra* note 62, at 5-24 (sample asked in neutral language; this number was derived from the numbers of total sexual assaults classified as “forced” and “incapacitated”).

82. *CE* Sommers, *supra* note 13 (questioning the validity of a study that used descriptive, behaviorally specific language rather than directly asking respondents if they had been raped).

83. Fisher et al., *supra* note 65, at 15.

84. Berkowitz, *supra* note 12.

85. *Id.*; Sommers, *supra* note 13. See also Cathy Young, *The Politics of Campus Sexual Assault*, Found. for Individual Rights in Educ. (Nov. 6, 2011), <http://thefire.org/article/13828.html> (“Unfortunately, much of the feminist ‘war on rape’ has conflated sexual assault with muddled, often alcohol-fueled, sexual encounters that involve miscommunication, perhaps bad behavior, but no criminal coercion.”).

Although these commentators stop short of claiming that women get drunk, have consensual sex, then cry “Rape!” in the morning, the message they send is clear: college rape is frequently a misunderstanding, and when a woman misinterprets a sexual encounter, she puts a young man’s reputation on the line.<sup>86</sup>

Recent research by David Lisak and Paul M. Miller paints a very different picture of the typical college sexual assault—not as a mistake or a misunderstanding, but as an intentional act of predation. In a frequently cited study of 1,882 college men, 120 men, or 6.4%, revealed that they had engaged in acts that meet the legal definition of rape or attempted rape.<sup>87</sup> None of them had been prosecuted.<sup>88</sup> Of these 120 men, 76 had raped or attempted to rape at least twice, and eleven men, or almost ten percent of the subset of self-identified rapists, had raped or attempted to rape at least nine times.<sup>89</sup>

The repeat offenders also commonly used alcohol in a strategic manner to incapacitate their chosen victims or render them unable to resist.<sup>90</sup> Lisak explains that such offenders “look for potential victims that are already somewhat vulnerable” and encourage these women to drink alcohol until they experience memory blackouts or are completely unconscious, falling entirely within the rapist’s control.<sup>91</sup> His research demonstrates that, while some college rapes may be unintended, many are carefully planned. Furthermore, when the first-time perpetrator escapes conviction or other disciplinary action, more likely than not he will try again.<sup>92</sup>

86. Berkowitz, *supra* note 12.

87. Lisak & Miller, *supra* note 72, at 73, 78–79. *See also* Antonia Abbey & Pam McAuslan, *A Longitudinal Examination of Male College Students’ Perpetration of Sexual Assault*, 72 J. Consulting & Clinical Psych. 747, 751 (2004) (finding that 8.6% of participants in a survey of 197 male college students had committed rape or attempted rape since the age of 14).

88. Lisak & Miller, *supra* note 72, at 73.

89. *Id.* at 78–79.

90. *Id.* at 79; “Non-Stranger” Rapes (CBS News television broadcast Nov. 9, 2009), available at <http://www.cbsnews.com/video/watch/?id=5592427n> (interviewing David Lisak on his research).

91. *See* “Non-Stranger” Rapes, *supra* note 90; David Lisak, Understanding the Predatory Nature of Sexual Violence, <http://www.middlebury.edu/media/view/240951/original/PredatoryNature.pdf> (last visited Dec. 27, 2012).

92. Lisak & Miller, *supra* note 72, at 78–79.

In light of the above data, it is imperative to reconsider the current assumptions about how college rape happens and who perpetrates it. If Lisak's data is representative, more than half of student rapists are not well-meaning men who have made a one-time mistake.<sup>93</sup> It is these men, the intentional repeat offenders, who must be kept in mind when considering how universities should handle sexual assault. When a woman has experienced a regrettable but consensual sexual encounter as the result of a few glasses of wine or unclear communication, the existing data (and common sense) tell us that she is not very likely to report the incident.<sup>94</sup> But when victims of habitual rapists are held to an evidentiary standard that favors the offender's word over the victim's—which is precisely what the “clear and convincing” and “reasonable doubt” standards intend to do—the rapist will often receive no punishment and enjoy opportunities for further predation.<sup>95</sup> Victimized students, who know that it will be extremely difficult to make their case, are therefore reluctant to come forward, and the offender continues to pose a threat to the college community. If and when he assaults again, he interferes with yet another woman's educational opportunities.<sup>96</sup>

Given the frequency of sexual assault in college communities, the barriers to reporting that many victims face, and evidence that the vast majority of college rapes are likely committed by repeat offenders,<sup>97</sup> the discussion must be reoriented to focus not only on the needs of those who might be falsely accused. Adopting the preponderance of the evidence standard in all school adjudications for rape and sexual assault would likely encourage victims to come forward, and it would enable colleges to take disciplinary action against students they find *more likely than not* to have committed acts of sexual acts of violence against other members of the community.

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93. *Id.*

94. *See supra* notes 65–66, 74–78.

95. *See* Nancy Chi Cantaloupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 619 (2009) (theorizing that a “cycle” ensues when victims of rape do not report and perpetrators are not caught, permitting additional acts of sexual violence to occur).

96. *See* Part III.B *infra* (discussing the effects of sexual assault on a victim's ability to pursue educational opportunities).

97. *See* Lisak & Miller, *supra* note 72, at 78 (repeat rapists, who made up over half of the sample of all rapists, averaged 5.8 rapes each).

## IV. THE CONTEXT OF EDUCATIONAL COMMUNITIES

Colleges and universities present a special kind of community. Unlike public primary and secondary schools, institutions of higher learning are not presumptively open to anyone who lives within the geographical area they serve. Selective universities carefully screen candidates for admission to craft an ideal incoming class, distinguishing applicants on the basis of academic credentials, as well as other personal qualities. At less selective institutions—even those with open admission policies—applicants must still meet minimum preparatory requirements to be accepted into the community, and they must abide by certain guidelines to remain within it.<sup>98</sup>

Whether private or public, colleges and universities typically have broad discretion to determine whom they wish to admit into their communities, what kind of conduct they expect from their community members, and how to respond if community members fail to abide by their standards of conduct. Thus, college disciplinary proceedings cannot be neatly compared to civil or criminal proceedings. Title IX gives colleges the authority and the duty to craft flexible solutions in response to harmful discriminatory conduct occurring within their communities. Moreover, colleges are better equipped than the criminal or civil justice systems to do so.

*A. Due Process and College Adjudications*

The notion of due process has a particular—and particularly narrow—meaning within the context of college adjudications. This meaning depends, in part, on whether the institution is public or private. Because public universities may be considered state actors, they must abide by the Fourteenth Amendment's prohibition against depriving an individual of property without due process of law.<sup>99</sup> However, due process within the context of university disciplinary proceedings does not have the same meaning as due process within civil or criminal courts.<sup>100</sup> Even state universities can use their own discretion in determining how to structure disciplinary

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98. For example, in addition to requiring students to follow a code of conduct, institutions may also require that students maintain a minimum GPA or take a minimum number of credits within a specified period of time.

99. See E.H. Schopler, Annotation, Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution, 58 A.L.R.2d 903 (orig. pub. 1958).

100. *Id.* at 972.

proceedings.<sup>101</sup>

Courts have generally been reluctant to overturn expulsions or other disciplinary actions or to find disciplinary procedures inadequate,<sup>102</sup> so long as universities provide the minimum procedural safeguards required by the Fourteenth Amendment, the relevant state constitution, and any state statutes that might apply. For example, in *Dixon v. Alabama Board of Education*, state college students were expelled after participating in political demonstrations. The Fifth Circuit held that the Due Process Clause of the Fourteenth Amendment “requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.”<sup>103</sup>

In contrast to state universities, private universities have almost total control over their disciplinary procedures and generally do not have to meet minimum procedural requirements.<sup>104</sup> Even if they receive some public funding or are licensed by the state, private universities are not considered state actors and are not bound by the Fourteenth Amendment (although states may regulate private educational institutions in other ways).<sup>105</sup> The relationship between a private university and its students is contractual in nature.<sup>106</sup> Therefore, if a university promises that it will provide certain procedural safeguards to a student before taking disciplinary action

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101. *Id.* at 972-73.

102. *Id.*

103. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961). “For the guidance of the parties,” the court expressed its view that due process would require that the accused students be provided with the following: notice of the specific charges against them, names of witnesses, oral or written reports of the witnesses’ testimony, an opportunity to present their defense and witness testimony, and an opportunity to review the record if the entire hearing did not occur in their presence. *Id.* at 158–59. However, the court declined to hold that due process required these protections in all cases involving disciplinary action by a state university, noting that “the nature of the hearing should vary depending on the circumstances of the particular case.” *Id.* at 158.

104. Harvey A. Silverglate & Josh Gewolb, FIRE’s Guide to Due Process and Fair Procedure on Campus 36, <http://thefire.org/public/pdfs/due-process.pdf?direct> (school’s choice of disciplinary action cannot be “arbitrary and capricious”).

105. *See, e.g., Centre Coll. v. Trzop*, 127 S.W.3d 562, 667–68 (Ky. 2003); *see also* Schopler, *supra* note 99; Silverglate & Gewolb, *supra* note 104, at 7, 35.

106. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 378–79 (Mass. 2000) (dismissal for failure to state a claim for breach of contract against university following plaintiff student’s suspension for sexual assault and creating a hostile environment); Silverglate & Gewolb, *supra* note 104, at 35; *see also* *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984) (student’s contract with private university required hearing before expulsion for cheating).

against him or her, it is contractually bound to do so.<sup>107</sup>

The Dear Colleague Letter's instruction that colleges use the preponderance of the evidence standard for adjudications of sexual assault imposes some federal control over an area where colleges have generally relied on their own discretion. However, OCR's critics seem concerned not with federal influence as such, but with the due process rights of accused students, which the critics claim are diminished under OCR's new approach.<sup>108</sup> And, ironically, the Dear Colleague Letter may actually require *more* process than some private universities typically provide, as it instructs universities to provide complainants and respondents the same opportunities to submit statements and present witnesses and evidence during disciplinary proceedings.<sup>109</sup> The case, *Schaer v. Brandeis University*, illustrates this point. In *Schaer*, Massachusetts' highest court upheld the suspension of a student for sexual assault, even though the student had not been interviewed or asked to submit any evidence as part of the hearing or investigation.<sup>110</sup> By the standards of the Dear Colleague Letter, this process would not have been considered equitable.<sup>111</sup>

Furthermore, the evidentiary standard used in a proceeding is not the only indicator of its fairness. Overall, to argue that adoption of the preponderance of the evidence standard suddenly makes college adjudications less fair than they used to be or takes away procedural protections that accused students formerly had is to ignore the fact that colleges have traditionally enjoyed wide discretion in determining how to handle disciplinary matters.

### *B. Sexual Assault and the Civil Right to Equal Educational Opportunity*

Title IX imposes on colleges and universities the responsibility of insuring that no student is denied the benefits of education on the basis of his or her sex.<sup>112</sup> The Supreme Court has recognized that "sexual harassment" is "discrimination" within the context of Title IX," and that student-perpetrated sexual misconduct may be "so

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107. Silverglate & Gewolb, *supra* note 104, at 35.

108. See, e.g., Berkowitz, *supra* note 12.

109. Dear Colleague Letter, *supra* note 1, at 11–12.

110. *Schaer*, 735 N.E.2d at 378–79.

111. Dear Colleague Letter, *supra* note 1, at 11–12.

112. 20 U.S.C. § 1681 (2006).



severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>113</sup>

This connection between sexual assault and educational opportunity is not merely a legal construct. The notion that sexual harassment, including sexual assault, can obstruct a student’s access to educational opportunities is well established in research on the effects of rape and sexual assault. In general, sexual assault and rape victims are far more likely than non-victims to experience depression and post-traumatic stress disorder.<sup>114</sup> These effects are not limited to women who have experienced violent, stranger-perpetrated rapes. In a study of 2,000 college women, respondents who had experienced drug- or alcohol-facilitated rape were about three times as likely as non-victim women to experience post-traumatic stress disorder and about four times as likely to suffer a major depressive episode.<sup>115</sup> Research has also shown that victims of drug- or alcohol-facilitated rape are particularly likely to abuse alcohol or other substances and to blame themselves for the incident.<sup>116</sup>

The psychological effects of sexual assault and rape can make a victim unable to take advantage of educational opportunities.<sup>117</sup> Frequently, victims experience a drop in their grades, as they may find that depression, anxiety, or insomnia interfere with their ability to attend class or focus on their coursework.<sup>118</sup> Those women who

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

114. Jean Kilpatrick, *The Mental Health Impact of Rape*, National Violence Against Women Prevention Research Center (2000), available at <http://www.musc.edu/vawprevention/research/mentalimpact.shtml>.

115. Heidi M. Zinzow et al., *The Role of Rape Tactics in Risk for Posttraumatic Stress Disorder and Major Depression: Results from a National Sample of College Women*, 27 *Depression & Anxiety* 708, 711–12 (2010). The study defined drug- or alcohol-facilitated rape as “rape that occurs after a perpetrator deliberately gives the victim drugs without the victim’s permission or tries to get her drunk.” *Id.* at 709. The study also assessed victims of incapacitated rape, which is defined as “rape that is perpetrated after a victim voluntarily uses drugs or alcohol, but is too intoxicated to be aware of or control her environment.” *Id.* Respondents who reported experiencing this second form of rape were about twice as likely to experience post-traumatic stress disorder and a major depressive episode. *Id.* at 712.

116. *Id.* at 709, 715.

117. While the psychological effects of sexual assault on victims are well known, it is less clear how incidents of sexual assault affect a broader educational community. Further research is necessary to explore what effect, if any, such incidents have on students who are not themselves victims, especially if the student body is aware that there are perpetrators within the community and that they are generally not held accountable for their actions.

118. Victim Rights Law Ctr., *Education*, Resources for Victims (2012), <http://www.victimrights.org/resources-victims/arcas-expertise/education>.

seek medical and psychological care may find that appointments interfere with their class schedules, and those who file criminal charges are likely to have little control over when they are called to meet with prosecutors or attend proceedings.<sup>119</sup> Additionally, some research demonstrates that female students who have been raped or sexually assaulted cope by dropping out of school, primarily because they do not want to encounter the alleged perpetrator who is still on campus or because they feel betrayed by a lack of support from the administration.<sup>120</sup> When victims interrupt or end their education to avoid further harassment, they experience the ultimate deprivation of their rights to equal educational opportunities under Title IX.

### *C. Benefits of the University Disciplinary System*

Title IX obligates schools to respond to incidents of sexual assault within their communities. This responsibility is not new: a regulation operating since 1975 requires educational institutions to provide “prompt and equitable resolution of student and employee complaints” of sex discrimination.<sup>121</sup> OCR interpreted this regulation in a 2001 guidance document as compelling schools to offer “accessible, effective, and fairly applied grievance procedures.”<sup>122</sup> Yet some critics of the Dear Colleague Letter claim that schools are fundamentally unable to adjudicate cases of sexual assault and should therefore abdicate their responsibilities to the criminal justice system.<sup>123</sup>

There is an alternative viewpoint: schools are not only responsible for, and capable of, adjudicating cases of sexual assault within their communities, but they are also, in many ways, better able to do so than the criminal courts. The inability of the criminal

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119. This observation is based mainly on personal knowledge of victims’ experiences gained from participation in the Title IX clinical course at Harvard Law School.

120. See Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, Center for Public Integrity (Feb. 24, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1945/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1945/) (report based on interviews with “50 experts familiar with the campus disciplinary process, . . . 33 female students who have reported being sexually assaulted by other students[,] . . . a survey of 152 crisis services programs and clinics on or near college campuses; and an examination of 10 years of complaints filed against institutions with the U.S. Education Department under Title IX and the Clery Act.”).

121. Sexual Harassment Guidance, *supra* note 3, at 36 n.98.

122. *Id.* at 14.

123. See Sommers, *supra* note 13.

justice system to prosecute cases of rape and sexual assault is well documented, not only by legal scholars and victims' advocates, but also by legislators—VAWA was motivated largely by a consensus that the criminal courts are systemically ill-equipped to address gender-based violence.<sup>124</sup> In comparison to courts, universities can address the problem of sexual assault in flexible and responsive ways. That universities cannot make the legal system more equitable for all victims of sexual assault does not mean that they should give up the opportunity to do so in their own communities.

In the Dear Colleague Letter, OCR alludes to two main reasons for requiring schools to adjudicate known cases of sexual assault. First, “schools should take proactive measures to prevent sexual harassment and violence,” which includes responding to known incidents of assault, in order to protect their communities as a whole.<sup>125</sup> This rationale is particularly compelling in light of David Lisak’s research, which showed that over half of the admitting offenders in Lisak’s sample had raped or assaulted women on more than one occasion.<sup>126</sup> Second, following an incident, schools must “take steps to protect the complainant[s]” so that they are able to continue participating in educational opportunities.<sup>127</sup> While Title IX does not require schools to make victims whole,<sup>128</sup> school adjudications may also help to compensate victims for their harms, in part simply by recognizing that the harm has indeed *occurred*. That victims may be more easily compensated by school adjudications than by criminal proceedings is an additional, policy-oriented argument in favor of such adjudications and the preponderance standard.

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124. See Part I.B. *supra*.

125. Dear Colleague Letter, *supra* note 1, at 14.

126. See *supra* notes 87–92 and accompanying text.

127. Dear Colleague Letter, *supra* note 1, at 15.

128. Cf. *id.* at 15–19 (addressing remedies and enforcement). Victims may, however, pursue a private claim against an educational institution. See text accompanying *supra* note 1.

One considerable roadblock to prosecuting rapes and sexual assaults in the courts is the high degree of discretion vested in prosecutors. In criminal cases, complaining witnesses do not typically make the final determination of whether to file charges.<sup>129</sup> That decision is left to the prosecutor, who will base his or her decision on not only the strength of the case but also on external factors, including financial resources and political considerations.<sup>130</sup> Prosecutors often decline to attempt to prosecute acquaintance rapes or “date” rapes because they do not believe they are likely to win the case.<sup>131</sup> As one prosecutor explained, “when the victim and perpetrator know each other . . . [it is] extremely hard to convince a jury beyond a reasonable doubt that the sexual assault was without consent.”<sup>132</sup> Furthermore, even if a prosecutor *does* decide to file charges, the complaining witness will nevertheless be “subject to legal hurdles other victims never face,” such as inquiries into her psychological health and the promptness of her complaint.<sup>133</sup>

Of course, sexual assault victims can turn to the civil courts for remedies and recognition of the harms they have suffered. While a few jurisdictions have private civil-rights causes of action for sexual assault, all states recognize it as a tort.<sup>134</sup> However, civil causes of action also present a variety of difficulties, and filing a tort claim is not a viable option for many victims. First, tort suits entail considerable expense, and the victim must be able and willing to pay for representation.<sup>135</sup> The costs of initiating a legal action are

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129. *Preliminary Proceedings*, 33 Geo. L.J. Ann. Rev. Crim. Proc. 193, 193 n.650 (2004) (citing, *inter alia*, *Leeke v. Timmerman*, 454 U.S. 83, 86 (1981) (“private individuals cannot ask court to compel prosecutor to initiate a particular prosecution”).

130. *See, e.g.*, A.G. Sulzberger, *Facing Cuts, a City Repeals its Domestic Violence Law*, N.Y. Times (Oct. 11, 2011), <http://www.nytimes.com/2011/10/12/us/topeka-moves-to-decriminalize-domestic-violence.html>; Greg Wilson, *Cash-Strapped Topeka May Stop Prosecuting Domestic Violence*, NBC Chicago (Oct. 13, 2011), <http://www.nbcchicago.com/news/weird/Cash-Strapped-Topeka-Stops-Prosecuting-Domestic-Violence-131468933.html> (recounting district attorney’s office’s decision to stop prosecuting misdemeanor domestic violence cases due to budgetary difficulties).

131. S. Rep. No. 102-197, at 51 (1991).

132. *Id. See also* Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 Just. Q. 651, 658 (2001) (summarizing other studies showing that prosecutors are unlikely to pursue a case if chances of conviction are not high).

133. S. Rep. No. 102-197, at 50.

134. Lininger, *supra* note 26, at 1557.

135. *Id.* at 1578; Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. Rev. 55, 77

prohibitive for many college students. Even those whose families have the means to pay may be reluctant to ask for monetary support, thereby disclosing the incident to their loved ones.<sup>136</sup> While some lawyers would be willing to accept clients on a contingency basis, they are presumably in the same position as prosecutors: they want strong cases and, given the unpredictability of juries, might be unwilling to take the risk of representing a victim of date rape if they are not reasonably sure that they will be paid.

Rape victims may also be deterred by the stigma of seeking monetary damages for sexual assault. Plaintiffs who seek monetary recovery against their alleged attackers often find their motives questioned, both inside and outside the courtroom. In the context of a civil suit, they must counter the arguments that they are not “real” victims and are only seeking monetary gain.<sup>137</sup> If they participate in criminal proceedings parallel to or following their civil proceedings, they can expect the defense attorney to impeach them regarding their civil claims—a highly prejudicial practice, especially in a context where credibility is paramount.<sup>138</sup> In some instances, prosecutors have dropped criminal charges after concluding that parallel civil proceedings created too many complexities or stacked the deck against the victim.<sup>139</sup> Because rape victims face such challenges in the criminal and civil systems, most victims are effectively denied the opportunity for recognition or redress. Thus, often, the educational community provides the last meaningful chance to recognize a victim’s injury, censure an offender’s conduct, and communicate disapproval of sexual assault in general, with the possible result of deterring similar future conduct.

To be sure, school-administered adjudications do not remove all the barriers victims face in the context of the criminal and civil court systems. The school investigation and adjudication process still may be frustrating, it may still entail a considerable cost in terms of time and energy if not money, and it may leave complainants vulnerable to attacks on their credibility and motives. Still, in most cases, an

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(2006).

136. Cf. Lininger, *supra* note 26, at 1557 (noting that complaining witnesses in criminal actions may often keep their identities confidential, but plaintiffs in civil actions may not).

137. *Id.* at 1561–62.

138. *Id.* at 1589–95.

139. *Id.* at 1584, 1584 n.137 (citing as a particularly well-known example Kobe’s Bryant’s criminal case for rape, which the prosecutor dropped after the alleged victim filed suit in civil court).

institutional adjudication will be more manageable for the victim than the criminal justice process and more responsive to her particular circumstances, as well as those of the accused. For example, a university is better able than the courts to offer a victim individualized accommodations pending the results of an institutional investigation in order to help her remain at school and continue her studies, even in the aftermath of a traumatic experience. While a victim of sexual assault can in some jurisdictions obtain a no-contact order or civil protection order from the courts,<sup>140</sup> many victims may be reluctant to initiate such formal processes or may feel that such legal protections are unnecessary. In contrast, a university can accommodate a victim in informal, extralegal ways, for example, by adjusting the victim's or perpetrator's on-campus housing arrangements or class schedules so that the victim no longer lives down the hall from the perpetrator or sees him regularly in class. The Dear Colleague Letter instructs schools to notify complainants of these options.<sup>141</sup> Additionally, an institution's adjudicatory process can be far more responsive to the cycle of the academic year than formal legal processes; for example, an institution may permit students to leave campus (rather than stay for legal proceedings) during periods of academic recess or work to ensure that a reported incident is investigated and adjudicated within the semester or year that it occurred so that the students involved experience as little disruption to their education as possible.<sup>142</sup>

The preponderance of the evidence standard empowers university administrators to respond appropriately when they believe that a member of their academic community has more likely than not

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140. The availability of civil protection orders varies among states and, in some cases, depends on the relationship between the victim and the perpetrator. Some civil protection laws require that the victim and perpetrator be family members or live in the same household. See Hayley Jodoin, Note, *Closing the Loophole in Massachusetts Protection Order Legislation to Provide Greater Security for Victims of Sexual Assault: Has Massachusetts General Laws Chapter 258c Closed It Enough?*, 17 Suffolk J. Trial & App. Advoc. 102, 116 (2012) (noting the unavailability of protective orders to many sexual assault victims and describing changes to the Massachusetts law enabling victims to obtain protective orders when they are not married to, living with, or related to their attackers). For information about the civil protection laws available in each state, see *Restraining Orders*, WomensLaw.org (June 12, 2012), [http://womenslaw.org/laws\\_state\\_type.php?statelaw\\_name=Restraining%20Orders&state\\_codc=GE](http://womenslaw.org/laws_state_type.php?statelaw_name=Restraining%20Orders&state_codc=GE).

141. Dear Colleague Letter, *supra* note 1, at 15–16.

142. The Dear Colleague Letter instructs schools to complete investigations within sixty days of the date of complaint under “typical” circumstances. *Id.* at 12–13.

sexually assaulted another member of the community. In contrast, heightened evidentiary standards have functioned to tie the hands of administrators in situations where they *believed* a student's complaint but lacked the type of evidence necessary to find the alleged perpetrator responsible under a clear and convincing or beyond a reasonable doubt standard.<sup>143</sup> Given that most sexual assaults on college campuses occur between students who know each other and may be socially or romantically involved, many complainants would not be able to satisfy the criminal evidentiary standard.<sup>144</sup> However, as this Comment has shown, school disciplinary panels are not criminal courts. Title IX does not require them to adjudicate crimes, but it requires them to put a stop to hostile environments on campus and ensure that students are not barred from taking advantage of educational opportunities on the basis of their sex.

When a school does find an alleged perpetrator responsible for violating its code of conduct, it can respond with more flexible and nuanced penalties and remedies than the criminal law is capable of providing. These types of penalties work to the benefit of both complainants and respondents. For example, studies of college women who have been sexually assaulted indicate that many of these women hesitate to call the incident a crime or do not wish to label the perpetrator a "rapist" or a "criminal."<sup>145</sup> This response indicates that some victims refrain from reporting their assaults to law enforcement, in part because they believe that the perpetrators—often former friends, dates, or members of their social group<sup>146</sup>—risk being penalized more harshly than the victims find warranted. Regardless of whether one disagrees with these women's assessment of their assailants' culpability, schools offer a solution to underreporting within the criminal justice system by providing victims a middle ground between seeking criminal charges and doing nothing at all. Students who are found responsible may be expelled or suspended, perhaps in combination with an order to undergo counseling or, if they remain at school, they may be denied certain privileges, such as on-campus housing or membership in a sports

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143. See Letter from Ass'n of Title IX Adm'rs et al. to Russlyn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ., *supra* note 9, at 2–3.

144. See *supra* notes 69, 125–27.

145. See Fisher et al., *supra* note 65, at 17–19.

146. See *id.*

team or fraternity.<sup>147</sup> These penalties are meaningful and communicate clear disapproval of the perpetrator's conduct without subjecting the perpetrator to a prison sentence and a criminal record.

To be clear, it is not the job of educational institutions to make up for flaws in the criminal justice system. This Comment does not argue that school adjudications are an apt substitute to criminal proceedings; rather, it argues that because schools are administratively capable of adjudicating sexual assault cases—and are legally required to do so under Title IX—they offer a meaningful supplement to the criminal justice system. This argument aligns with other efforts to recognize legal remedies for sexual assault victims outside of criminal courts, such as civil rights remedies similar provided under VAWA and tort causes of action.<sup>148</sup> When taken seriously and administered fairly, school adjudications send a message about the values of the academic community and give victimized students a voice. They may help eliminate threats to the community by encouraging victims to come forward and identify offenders, who may be less likely to reoffend after being disciplined. Finally, college adjudications may provide a victim the opportunity to receive the remedy she most needs, and that Title IX requires: to ensure that she can complete her education safely and productively.<sup>149</sup>

## V. CONCLUSION

When the preponderance of the evidence standard is properly understood within the context of Title IX as a civil rights statute, and when circumstances surrounding college sexual assaults are thoroughly examined, the Dear Colleague Letter's mandate appears neither radical nor unwarranted. Colleges have traditionally exercised great discretion over standards of conduct and disciplinary procedures within their communities. Although the Dear Colleague Letter places some limits on this discretion, it does not require that adjudications for sexual assault be unfairly biased against the accused

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147. Neither the 2011 Dear Colleague Letter nor the 2001 guidance document tells schools how to discipline students found responsible for sexual harassment or assault. *See* DEAR COLLEAGUE LETTER, *supra* note 1; SEXUAL HARASSMENT GUIDANCE, *supra* note 3. Thus, while schools are responsible for intervening to eliminate a sexually hostile environment, they are not required to expel or even suspend students found to have raped or sexually assaulted a peer.

148. *See supra* notes 47–50, 129 and accompanying text.

149. *See* FISHER ET AL., *supra* note 65, at 17–19.



party. Applying a preponderance of the evidence standard not only respects legal precedent in the area of civil rights law, it also encourages victims to come forward and gives schools permission to take flexible yet effective action against members of their community who pose a threat to the school's educational mission and the well-being of its students.

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\* Amy Chmielewski is a 2013 J.D. Candidate, Harvard Law School. This Comment began as a final paper for Diane Rosenfeld's Title IX seminar, offered at Harvard Law School in the fall of 2012. Thank you to Ms. Rosenfeld and to my fellow students in the Title IX seminar and clinical course for their helpful feedback and engaging discussions.