AN ERRONEOUS SHIFT IN PERSPECTIVE: HOW CROSS-EXAMINATIONS FORSAKE CONSTITUTIONAL JURISPRUDENCE AND THE PURPOSE OF TITLE IX*

Comment

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* Effective August 14, 2020, Secretary Betsy Devos and the Department of Education officially passed the new regulation seeking to implement live hearings and cross-examinations as part of the sexual misconduct proceeding in public universities. *See* Grievance Process for Formal Complaints of Sexual Harassment, 34 C.F.R. § 106.45(b)(6)(i) (2020); *see also Secretary Devos Takes Historic Action to Strengthen Title IX Protections for All Students*, U.S. DEP'T OF EDUC. (May 6, 2020), https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students. The regulation now requires postsecondary institutions to provide a live hearing in sexual misconduct proceedings and must allow each of the parties' advisors to ask, through cross-examination, questions that challenge credibility of the witnesses and the parties themselves. Although the regulation states that questions about the complainant's sexual history are irrelevant to cross-examination proceedings, they are relevant if they are offered to prove that the complainant consented to the alleged sexual misconduct. This new development in the law does not change this Comment's analysis or policy arguments; however, it does breathe life into the consequences this Comment warned against.

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I. INTRODUCTION

The victim sat on a cold wooden chair as they were forced to recount humiliating and dehumanizing moments that they would rather forget. As they sat there listening and answering questions to the best of their ability, the victim was making eye-contact with the person that changed their life forever. By the end of this ordeal, the victim has recounted every second of the day that someone sexually assaulted them. Opposing counsel artistically phrased questions with the intent to diminish the victim's credibility and to bolster their client's, and in doing so, swiftly attempted to place the fault on the victim.[1]

1. *See* Marisa Iati, *Her Name Is Chanel Miller, Not 'Unconscious Intoxicated Woman' in Stanford Assault Case*, WASH. POST (Sept. 5, 2019, 1:42 PM), https://www.washingtonpost.com/nation/2019/09/05/her-name-is-chanel-miller-not-unconscious-intoxicated-woman-stanford-assault-case/. This Comment was inspired by the true story of Chanel Miller, who Brock Turner, a former swimmer at Stanford University, raped while unconscious. *Id*. According to Chanel, she "let her guard down . . . and drank liquor too fast." *Id*. She only remembers waking up in a hospital bed to doctors telling her that she had been sexually harassed. *Id*. Chanel went on to write a memoir describing her experience through the criminal justice system that many consider as a letter to other victims that encourages them to stand up to their abusers. *See also* Marina Koren, *Telling the Story of the Stanford Rape Case*, ATLANTIC (June 6, 2016), https://www.theatlantic.com/news/archive/2016/06/stanford-sexual-assault-letters/485837/. Brock Turner faced a fourteen-year sentence, but only served three months due to "good behavior." *Id.* At trial, Turner's counsel portrayed him as a "white, blond-haired, blue-eyed student . . . [and] as a talented athlete with a bright future ahead of him." *Id.* Moreover, the news stories that covered the case referred to Turner as an "All-American swimmer" and Miller as an "unconscious intoxicated woman." *Id.* At sentencing, the judge, who has since been recalled, decided to sentence Turner to only six months and stated that "a harsher sentence would have a 'severe impact' on Turner." *See also* Elle Hunt, *'20 Minutes of Action': Father Defends Stanford Student Son Convicted of Sexual Assault*, GUARDIAN (June 5, 2016, 11:19 PM), https://www.theguardian.com/us-news/2016/jun/06/father-stanford-university-student-brock-turner-sexual-assault-statement. Turner's father stated at trial that his son should not go to prison for "[twenty] minutes of action." *Id.* This depicts how our criminal justice system and society in general treats victims of rape and sexual violence.

Now imagine that this process of direct questioning is done without the legal guarantees and safeguards the criminal justice system has developed for sexual harassment and rape victims. Opposing counsel will likely still be just as adversarial, but the "judges" in this case are underqualified individuals whose professional careers focus on running a university and not a complex judicial system. This is a real and imminent possibility in universities across the country that would affect the lives of thousands of young college students. In that scenario, the school will require the complainant to sit through a direct cross-examination if the university decides to suspend or expel the student. This is the experience many sexual harassment victims, which Title IX purports to protect, will be forced to grow accustomed to if we lose sight of the original reasons Title IX was implemented in the first place: the physical and psychological impact of sexual violence on victims and the context in which these issues arise—educational institutions.

According to a recent compilation of studies, sexual violence is the most common crime on college campuses.[2] About 11% of all graduate and undergraduate students experience rape or sexual assault during the course of their education at any particular institution.[3] Moreover, 9% of graduate students who are victims of sexual violence are women and 2% are men.[4] Moreover, about 23% of female and 5.4% of male undergraduate students at some point during their education suffer rape or sexual assault.[5] What is even more concerning, and at the root of the issues deeply explored in this Comment, is the rate at which victims of sexual violence report to law enforcement.[6] Only about 20% of female student victims between the ages of eighteen and twenty-four report sexual violence to law enforcement.[7] The prevalence of sexual violence on college campuses has led many colleges and universities across the country to enhance and expand the role campus law enforcement plays in addressing and responding to sexual violence.[8]

Although universities and colleges across the country have increased their sensitivity towards sexual harassment on their campuses, some have questioned whether the university procedures are adequately protecting the due process rights of an accused student.[9] More precisely, the Department of Education's New Guidance Letter and the Sixth Circuit Court of Appeals have begun to push the idea that live and adversarial cross-examinations are required to provide the accused student a fair hearing.[10]

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2. Rape, Abuse & Incest Nat'l Network, *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Dec. 14, 2020).

3. *Id.*

4. *Id.*

5. *Id.*

6. *See id.*

7. *Id.*

8. *See id.*

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

10. *Id.*; *see generally* U.S. DEP'T OF EDUC. OFF. FOR CIV. RIGHTS, *Q & A on Campus Sexual*

This Comment is unique in that it analyzes the recent circuit split over whether cross-examinations are required under the Due Process Clause in public university disciplinary proceedings. Moreover, this Comment uses statistics in a detailed manner pertaining to the impact of cross-examination on the victims themselves, including attrition rates, reasons for not reporting sexual harassment to authorities, and the prevalence of sexual harassment in public universities.

In Part II, this Comment reviews in detail the roots of Title IX and the executive guidelines that represent opposite sides of the procedural due process pendulum—one advocating for an increased sensitivity and awareness towards sexual harassment victims, and the other shifting focus towards the accused student's due process rights.[11] In Part III, this Comment lays out the due process jurisprudence imperative in understanding what process is due in public universities.[12] Part IV provides a detailed explanation of the cases involved in the recent circuit split on the question of what process is due in public university hearings.[13]

In Part V, this Comment argues that due process, as explained in two landmark Supreme Court cases, does not require cross-examinations in the context of public university hearings.[14] In addition, Part VI argues that if the Supreme Court decides to grant certiorari, it should follow the holding and reasoning of the First Circuit Court as opposed to the Sixth's.[15] Finally, Part VII provides two public policy arguments focused on the negative effects of cross-examinations on the victims and the universities forced to implement this procedure.[16] To conclude, Part VIII of this Comment attempts to provide a guideline that maintains the required sensitivity sexual harassment victims deserve, provides the accused student a fair hearing, and continues to provide schools with the necessary flexibility and deference they need to effectively carry out their educational goals.[17]

Misconduct, DEP'T OF EDUC. (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

11. *See infra* Part II (discussing the history and scope of Title IX and the opposing views of its enactment process).

12. *See infra* Part III (reviewing the history of due process jurisprudence in higher education institutions).

13. *See infra* Part IV (analyzing case law in recent circuit splits regarding this issue).

14. *See infra* Part V (analyzing due process jurisprudence as it relates to landmark Supreme Court cases).

15. *See infra* Part VI (recommending action to the Supreme Court in regard to resolving this issue).

16. *See infra* Part VII (analyzing policy arguments that support the view of eliminating cross-examinations for victims).

17. *See infra* Part VIII (providing guidelines that benefit every person involved in these proceedings).

II. HISTORY AND SCOPE OF TITLE IX: AN ESSENTIAL OVERVIEW

In an attempt to avoid using federal funds to support discriminatory practices, Congress enacted Title IX as part of the Education Amendments of 1972 to prevent sexual discrimination in educational institutions that receive federal funds.[18] The provision of Title IX that prevents discriminatory practices states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[19] Therefore, any educational institution that receives federal funds must abide by Title IX.[20]

Although the provisions under Title IX do not expressly provide guidance as to how public universities must abide by and implement its requirements, the Department of Education is tasked with setting out compliance requirements.[21] The Department of Education has stated that sexual harassment is a form of sexual discrimination that schools must actively attempt to prevent.[22] The Supreme Court has held that "the regulatory scheme [and the common law] surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to . . . discriminatory acts."[23] Although the statute does not expressly provide victims of sexual discrimination with a private right of action, the Supreme Court has interpreted the statute's legislative purpose and history to mean that Congress intended to provide victims of sexual harassment with the right to sue the university for money damages.[24]

In implementing their sexual misconduct hearings, universities follow guidance that the Department of Education issues.[25] In this context, the Department of Education has provided lists of requirements public universities must follow when responding to and dealing with sexual violence claims.[26] For the purpose of this Comment, the discussion focuses on two

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18. Cannon v. Univ. of Chi., 441 U.S. 677, 680–81, 704 (1979).

19. 20 U.S.C. § 1681(a).

20. *See Dear Colleague Letter*, DEP'T OF EDUC., at 1, (Apr. 4, 2011) [hereinafter *Dear Colleague Letter*] https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html ("Title IX . . . prohibit[s] discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance.").

21. *See id.*; *see also* U.S. DEP'T OF EDUC., *supra* note 10, at 1 ("The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence.").

22. *Dear Colleague Letter*, *supra* note 20, at 1–2 (defining what constitutes sexual harassment and sexual violence).

23. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 643 (1999).

24. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 689–709 (1979).

25. *See Dear Colleague Letter*, *supra* note 20, at 4–5 (explaining that inquiry depends on the nature of the allegations); U.S. DEP'T OF EDUC., *supra* note 10, at 2 (listing interim measures used prior to investigation of a sexual misconduct allegation).

26. *See generally* U.S. DEP'T OF EDUC., *supra* note 10 (explaining the various requirements public universities must follow in a sexual misconduct investigation).

competing approaches—one that was implemented under the Obama administration and the other currently in the works under the Trump administration.[27]

A. Dear Colleague: Guidance Under the Obama Era

In 2011, the Department of Education and the Office of Civil Rights (OCR) released the *2011 Dear Colleague Letter* (DCL) in an attempt to address the rampant problem of sexual violence in educational institutions.[28] "[T]he letter encouraged schools to publish their discrimination policies, adopt and publish grievance procedures," provide training to their employees to effectively respond to sexual harassment incidents, to appoint Title IX coordinators, and adopt the "preponderance of the evidence standard" in their sexual misconduct proceedings.[29] The letter also required the school to immediately take action to cure a hostile environment if the "school knows or reasonably should know about student-on-student harassment that creates a hostile environment."[30]

The DCL defines sexual harassment as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol . . . [and] . . . unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[31] The DCL also defines a "hostile environment" as one that "is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."[32] Therefore, when a student sexually harasses or attempts to harass another student, the school must cure the hostile environment by taking immediate action to eliminate the current and future sexual harassment, and address its effects if the school knows of, or reasonably should know, about the sexual harassment.[33] Most importantly, the DCL strongly advises against implementing cross-examinations in school sexual misconduct proceedings.[34]

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27. *See supra* note 25 and accompanying text (showing the two competing approaches).

28. *Dear Colleague Letter*, supra note 20, at 2 ("The statistics on sexual violence are both deeply troubling and a call to action for the nation.").

29. *Id.*; Doe v. Colum. Coll. Chi., 933 F.3d 849, 855 (7th Cir. 2019).

30. *See Dear Colleague Letter*, *supra* note 20, at 3–4 (finding that "a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe"); *see also* Jennings v. Univ. of N.C., 444 F.3d 255, 268 (4th Cir. 2006) (showing the rules for demonstrating if a plaintiff was subjected to a hostile education environment).

31. *Dear Colleague Letter*, *supra* note 20, at 1–3.

32. *Id.* at 3.

33. *Id.* at 4.

34. *Id.* at 12 ("OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing.").

B. A Shift in Perspective and the Swift Retraction of the 2011 DCL

However, on September 22, 2017, the Department of Education under Betsy DeVos issued a new guidance and rescinded the 2011 DCL.[35] The "New Interim Q&A," specifically addressed what procedures schools must implement and follow when adjudicating sexual misconduct cases.[36]

This new guidance echoes recent federal cases that deal with the rights of the accused and place a stronger focus on fairness and due process.[37] For example, the new interim guidance explains that school proceedings can use either the preponderance of the evidence standard or the clear and convincing standard.[38] Unlike the *2011 Dear Colleague Letter*, the new interim guidance opens the door for cross-examination when it suggests that cross-examinations could be a procedure used during the school's sexual misconduct proceedings.[39]

III. DUE PROCESS JURISPRUDENCE AND HIGHER EDUCATION

The Fifth Amendment of the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[40] Private individuals who wish to bring suit against a public entity for violation of their due process rights must do so through a 42 U.S.C. § 1983 claim.[41] A plaintiff bringing a § 1983 claim must show that there was a violation of a right secured by the Constitution and laws of the United States, and that a person acting under the color of state law committed the deprivation.[42] Therefore, public universities and their administrators can be liable for damages for deprivations of a student's constitutional rights.[43]

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35. *See generally* U.S. DEP'T OF EDUC., *supra* note 10.

36. *Id.* at 5.

37. *See id.* at 5 n.19 (relying on Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 607 (D. Mass. 2016)).

38. *Id.*

39. *Id.* at 5 ("Any process made available to one party in the adjudication procedure should be made equally available to the other party []for example, . . . the right to cross-examine parties and witnesses . . . .").

40. U.S. CONST. amend. V.

41. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."); Lynch v. Household Fin. Corp., 405 U.S. 538, 545 (1972).

42. *See* West v. Atkins, 487 U.S. 42, 48 (1988); *see also* Duke v. N. Tex. State Univ., 469 F.2d 829, 837 (5th Cir. 1972) (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)) (stating that the Fourteenth Amendment protects against state universities). *But see* Goss v. Lopez, 419 U.S. 565, 569 (1975) (deciding a case where the plaintiff brought an action against the school board and various administrators for violation of their due process rights after being suspended for ten days without a hearing).

43. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 65 (2001) (refusing to extend an implied private action for damages against private entities who are not acting under the color of state law).

In the context of due process, the Court first determines whether there is a property interest that triggers the protections of the Fifth Amendment as applied to the states through the Fourteenth Amendment.[44] After determining that there is a property interest at stake, the next inquiry is to determine what process is due.[45] However, this inquiry is no easy task because the vagueness of the Due Process Clause makes it difficult to apply without the flexibility that the specific situation demands—much less attempting to apply a single approach to due process jurisprudence in every context.[46]

In *Mathews v. Eldridge*, the Court explained that in determining what process is due, one must balance the governmental and private interests that are affected.[47] In determining whether a recipient of Social Security benefit payments was entitled to an evidentiary hearing prior to the termination of those benefits,[48] the Court listed the following factors as part of the balancing analysis:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[49]

These factors, according to the Court in *Mathews*, should be applied in light of the context at issue and should not be affected by the rare exceptions.[50] In other words, there may be rare cases where the processes used may erroneously deprive a particular party, but that does not necessarily indicate that the processes used are inherently unfair as applied to the generality of cases.[51]

In *Mathews*, the plaintiff claimed that the state deprived him of adequate due process because he was not given an evidentiary hearing prior to a temporary deprivation of benefit payments while the State made a decision on his eligibility.[52] In *Goldberg v. Kelly*, the Court established the right to an evidentiary hearing prior to the termination of welfare benefits.[53] This case, according to the Court, was the only case where the "hearing closely

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44. *Goss*, 419 U.S. at 576.
45. *Id.* (citing Morissey v. Brewer, 408 U.S. 471, 481 (1972)).
46. Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976).
47. *Id.* at 335.
48. *Id.* at 323.
49. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).
50. *Id.* at 344–45.
51. *See id.* (showing how the Court will not make determinations based on any single case, but rather, will view the procedures used in light of the entire context in which they are implemented).
52. *See id.* at 325 (relying on *Goldberg*, 397 U.S. 254, dealing with the process that is due before a temporary deprivation of payments to a welfare recipient).
53. *Goldberg*, 397 U.S. at 266–71.

approximating a judicial trial is necessary."[54] In applying the factors above, the Court ultimately held that processes by which the Secretary makes the decision to discontinue disability benefits afforded the plaintiff adequate due process without an evidentiary hearing.[55]

Applying the first factor, the Court held that unlike a welfare recipient, who will likely not find other forms of income while the State makes a decision, a disability recipient's interest in continuously receiving payments through the pending resolution is wholly unrelated to financial need.[56] A disabled worker's private interest at issue, which is different than a welfare recipient, is also less than a welfare recipient because the disabled worker would have access to private resources and would likely qualify for governmental assistance programs if they fall below the subsistence level.[57]

Second, unlike welfare cases, the decision to terminate disability benefits does not encompass a wide variety of relevant information.[58] In disability cases, the decision to discontinue disability benefits generally relies on "routine, standard, and unbiased medical reports by physician specialists."[59] The Court recognized that sharply focused, credible, and easily documented medical reports do away with the issue of witness credibility and veracity present in most welfare cases.[60] This ultimately makes the potential risk of deprivation for a disabled worker far lower than the welfare recipient, and further diminishes the value of an evidentiary hearing that is often critical in welfare cases.[61]

In assessing the value of evidentiary proceedings, the Court rejected the argument that written submissions lacked the "flexibility of oral presentations" and were therefore an inadequate substitute for oral presentations.[62] The Court reasoned that the questionnaires are sufficiently detailed and adequately identify the relevant information to make a decision —the decisions to end entitlement are mostly based on medical conclusions that are supported by sources such as X-rays and laboratory tests.[63] Moreover, the recipient of disability benefits will receive notice of the tentative assessment, the reasons behind the decision, and the evidence the state agency considers to be most relevant.[64] Thereafter, the recipient is allowed an opportunity to provide more evidence, which allows the recipient to "mold" his story because it "enabl[es] him to challenge directly the accuracy

54. *Mathews*, 424 U.S. at 333.
55. *Id.* at 349.
56. *Id.* at 340–41.
57. *Id.* at 341–42.
58. *Id.* at 344.
59. *Id.* at 322.
60. *Id.*
61. *Id.* at 344–45.
62. *Id.* at 345.
63. *Id.*
64. *Id.* at 346.

of information . . . [and] the correctness of the agency's tentative conclusions."[65]

The Court found the final factor, which considers the administrative burden and societal costs associated with the additional safeguards, as weighing in favor of the decision to not provide evidentiary hearings prior to the termination of disability benefits.[66] The state would bear the costs of an increased number of hearings and additional benefits that ineligible recipients would receive pending the state agency's decision.[67] The Court reasoned that although "cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard," the government has an interest in preserving fiscal and administrative resources for the public in general.[68] The Court held that the judicial model of an evidentiary hearing is "neither a required, nor even the most effective, method of decision[-]making in all circumstances."[69] Therefore, all the Constitution requires before someone is deprived of a private interest is that "the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'"[70] The Court largely deferred to the "good-faith" judgments of elected officials to administer fair procedures for recipients.[71]

IV. AN IMMINENT CLASH OF UNCERTAINTY: THE CIRCUIT SPLIT

Courts have historically refrained from intervening in the decision-making processes of public education.[72] Recently, however, federal district courts have heard an increasing number of cases in which accused students of sexual harassment are claiming that their universities violated their due process rights in sexual misconduct proceedings.[73] As a 2016 decision explained, the context around this new wave of litigation is rooted in the pressures that the *2011 Dear Colleague Letter* imposed on schools with

65. *Id.*
66. *Id.* at 347–49.
67. *Id.* at 347–48.
68. *Id.* at 348.
69. *Id.*
70. *Id.* at 349 (quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970)).
71. *Id.*
72. Goss v. Lopez, 419 U.S. 565, 578 (1975) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
73. *See generally* Doe v. N. Mich. Univ., 393 F. Supp. 3d 683 (W.D. Mich. 2019) (student bringing claim for violation of his due process rights); Norris v. Univ. of Colo., Boulder, 362 F. Supp. 3d 1001 (D. Colo. 2019) (student alleging violations of his due process rights); Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-CV-1549-B, 2019 WL 536376 (N.D. Tex. Feb. 11, 2019) (medical student brought claim against school for violations of his due process rights); Powell v. Mont. State Univ., No. CV 17-15-BU-SEH, 2018 WL 6728061 (D. Mont. Dec. 18, 2018) (student bringing claim against school for violations of his due process rights); Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016) (former student bringing claim against university for violation of his due process rights); Doe v. Brown Univ., 166 F. Supp. 3d 177 (D. R.I. 2016) (male student brought suit for violation of due process).

the purpose of encouraging victims to come forward and report sexual harassment.[74]

The two main cases in the circuit split are *Doe v. Baum* and *Haidak v. University of Massachusetts-Amherst*.[75] This subsection compares the holdings and reasoning in both cases and provides a detailed explanation of each schools' policy. Although in both cases the accused student also claimed that the school violated Title IX,[76] this Comment will only cover the courts' decision pertaining to due process.

A. Doe v. Baum*: An Example of Bad Facts Creating Bad Law*

In *Doe v. Baum*, the Sixth Circuit reiterated its previous holding in *Doe v. University of Cincinnati*, and held that when the university's decision relies on the credibility of the parties, the school must provide the accused student an opportunity to cross-examine the accuser and witnesses directly through a representative.[77] In *Baum*, the University of Michigan commenced an investigation when a female student, Roe, filed a sexual misconduct complaint with the university claiming that Doe, a male student, had sex with her while she was too drunk to consent.[78] For purposes of clarity, this Comment will change the male student's name to Baum and will maintain the female student's name as Roe.

Both parties agree that they had been drinking at a fraternity party, and that they were making out before going into Baum's room.[79] However, two stories emerged as to whether Roe had been too intoxicated to consent, and whether she had consented at all.[80]According to Baum, Roe did not appear to be drunk and consented to the sexual encounter when he asked Roe if she wanted to have sex.[81] On the other hand, Roe claimed that she was drunk, unaware of her surroundings at the time of the sexual encounter, and had expressly told Baum she did not want to have sex.[82] While she was in a "hazy state of black out," Roe claimed that Baum undressed her and had intercourse with her.[83]

The school's investigation was three months in length and consisted of twenty-three separate interviews with individual witnesses.[84] After

74. *Brandeis Univ.*, 177 F. Supp. 3d at 572.

75. *Compare* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1st Cir. 2019) (holding male student was not entitled to cross-examine the complainant), *with* Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) (holding that the male student was entitled to cross-examine the complainant).

76. *Haidak*, 933 F.3d at 65; *Baum*, 903 F.3d at 580.

77. *Baum*, 903 F.3d at 581.

78. *Id.* at 579.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

interviewing all the witnesses, the investigator was unable to say that Roe's level of incapacitation was at such a level to be noticeable to Baum, and recommended that the administrator rule in favor of Baum.[85] Roe appealed the case to the Appeals Board where the case was reversed because "Roe's description of the events was 'more credible' than [Baum's], and Roe's witnesses were more persuasive."[86] This ultimately led to Baum withdrawing from the university due to the possibility of expulsion.[87] Baum filed a suit claiming that the university's disciplinary proceedings violated his due process rights and Title IX because he was denied the opportunity to cross-examine Roe and the adverse witnesses, and claimed that the school violated Title IX because it discriminated against him based on gender.[88]

The court held that in certain circumstances due process requires cross-examinations where there are competing narratives "because it is 'the greatest legal engine ever invented' for uncovering the truth."[89] Therefore, according to the court, because Baum did not have an opportunity to cross-examine Roe and the witnesses, the risk of erroneous deprivation of Baum's property interest was significant.[90] The court reasoned that Baum's interest in not being labeled a sex offender was substantial compared to the university's burden because the school had already implemented cross-examinations in other disciplinary proceedings.[91] According to the court, being labeled as a sex offender could have an immediate and lasting impact on Baum because he may be forced to withdraw from the school, change his living arrangements, his relationships may suffer, and he may find it difficult to obtain future educational and employment opportunities.[92]

Furthermore, the court rejected the argument that the accused student's written statements, identifying inconsistencies in the complainant's statements, was not an adequate substitute for direct and *live* cross-examinations.[93] The court considered the "back-and-forth" nature of the adversarial system as essential because it "probe[s] the witness's story to test her memory, intelligence, or potential ulterior motives."[94] Although the court in *Baum* held that an accused student does not have the right to personally cross-examine the victim or the witnesses, they held that the student's agent could be the one to question the opposing parties directly.[95] According to the court, an indirect cross-examination through an agent would

85. *Id.* at 580.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 581.
90. *Id.* at 582.
91. *Id.*
92. *See id.*
93. *Id.* at 582–83.
94. *Id.* at 582.
95. *Id.* at 583.

prevent the potential emotional trauma the victim may encounter if forced to be directly cross-examined by their alleged harasser.[96]

The court also rejected the idea that cross-examinations are required only where the university's decision relied *entirely* on the credibility of the parties.[97] In other words, if the school relies on other evidence—such as videos, photos, or other witnesses[98]—cross-examinations may still be required as long as the school relies on the credibility of the students to some degree that it influences their decision.[99] The court recognized the accused student's admission to the harassment as an exception to requiring cross-examinations.[100] Moreover, according to the court, a written transcript of a deposition in a civil (or criminal) case is insufficient to substitute cross-examinations because it lacks the ability to assess the witness's demeanor.[101]

B. The First Circuit: Rejecting Baum*'s Categorical Approach*

The University of Massachusetts at Amherst expelled James Haidak (Haidak) amid accusations of sexual harassment against a female student (Gibney).[102] Soon after expulsion, Haidak filed a claim against the school and several of its officials seeking compensatory damages, declaratory relief, and an injunction that would prevent the school from enforcing his expulsion.[103] Haidak claimed that the university proceeding violated his rights to due process and that the school violated Title IX.[104] Specifically, Haidak argued that the hearing was constitutionally deficient because the hearing panel excluded some of the evidence he believed corroborated his story, and he was not allowed to cross-examine Gibney.[105]

According to the facts presented at the hearing, Haidak and Gibney were involved in a "tumultuous romantic relationship" while they were studying abroad.[106] The parties agreed that after they had arrived from a night out, the students got into a physical confrontation, but there was a question as to who hit whom first.[107] Gibney claimed that Haidak placed his hands around

96. *Id.* (citing Maryland v. Craig, 497 U.S. 836, 857 (1990)).
97. *Id.*
98. *Id.* (distinguishing *Baum*, 903 F.3d at 583 with Plummer v. Univ. of Hous., 860 F.3d 767, 775–76 (5th Cir. 2017), which held that cross-examinations were unnecessary because the university relied on videos and photos instead of solely relying on the accuser's statement).
99. *Id.* at 583–84.
100. *Id.* at 584.
101. *Id.* at 585.
102. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 60 (1st Cir. 2019).
103. *Id.*
104. *Id.* at 65.
105. *Id.* at 66.
106. *Id.* at 61.
107. *Id.*

Gibney's neck, pushed her to the bed, and punched himself with her fists.[108] On the other hand, Haidak claims that he was only attempting to restrain Gibney to prevent her from hitting him and kicking him in the groin.[109]

After Gibney's mother called the university to report that Haidak had physically abused her daughter, the school issued Haidak a Notice of Charge for violations of the Physical Assault and Endangering Behavior to Persons or Property provision of the Code of Student Conduct.[110] The Notice also included a no-contact order that prevented Haidak from contacting Gibney.[111] Thereafter, Haidak met with the Associate Dean of Students to deny the allegations and provide his version of the incident.[112]

Notwithstanding the no-contact order, the two students immediately resumed contact upon which the school imposed on Haidak a second Notice of Charge for harassment and failure to comply with the direction of university officials.[113] However, Gibney failed to disclose to her mother and the school that she had largely welcomed contact with Haidak.[114] On June 3, 2013, Gibney and her mother met with the Associate Dean of Students to discuss the continued communications between the students and provide evidence including the call log and text message history between the two students.[115] On June 17th, the Dean of Students issued Haidak a third Notice of Charge for the same violations and instituted, without previously notifying Haidak, a suspension, because the school believed that he was a direct and imminent threat to the safety of the university's community.[116]

On July 8th, Haidak sent the Dean an email describing his side of the story and explained that although he had violated the no-contact order, the communication with Gibney was mutual.[117] He received no response for about a month, remained suspended, and when the school responded it was only to notify him that the suspension remained in place pending a hearing that was not scheduled yet.[118] Haidak remained suspended through the end of the school year and decided to withdraw from the school after seeing that the school took no action through the summer.[119] During the summer, Gibney sought a state court restraining order against Haidak, but was denied because

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108. *Id.*
109. *Id.*
110. *Id*. at 62.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* The evidence the mother provided the Dean included 311 calls and 1,749 text messages between April 24th and June 1st, which violated both no-contact orders the Dean issued Haidak. *Id.*
116. *Id.*
117. *Id.* at 63.
118. *Id.*
119. *Id.* (indicating that through the summer, Haidak and Gibney continued their relationship).

the court considered Gibney's testimony admitting to welcoming the interaction with Haidak.[120]

It was not until late November of 2013 that the school finally provided a hearing for Haidak.[121] The Hearing Board declined Haidak's request to introduce evidence (such as the transcript of the state court hearing where Gibney admitted to have voluntarily engaged in contact with Haidak and the pictures of previous bite marks Gibney left on him), denied Haidak's request to have his mother testify about Gibney's prior violent behavior, and struck twenty of the thirty-six questions Haidak submitted.[122] Most importantly, the Hearing Board denied Haidak an opportunity to cross-examine Gibney.[123]

The Hearing Board ultimately found that Haidak was responsible for assault and failure to comply with the school's no-contact orders.[124] The Hearing Board explained that Haidak was responsible for assault because "his behavior was disproportionate to the actions attributed to Gibney," and relied on the evidence Gibney introduced at the hearing, which included pictures.[125] Although the Hearing Board did not find Haidak responsible for harassment due to evidence that the interactions were mutual, it found Haidak responsible for failing to comply with both directives.[126] Haidak ultimately brought an action against the university and the officials involved, claiming that the proceedings violated his due process rights and that the school violated Title IX.[127]

In *Haidak*, the court applied the *Mathews* factors and recognized that students have a "paramount" interest in finishing their degree, "avoiding unfair or mistaken exclusion from the educational environment," and avoiding the negative stigma that follows from being suspended from school.[128] On the other hand, universities have an interest in protecting the school's community from those who threaten "the basic values of the school" and balancing resources between the need for providing fair hearings and the need to promote their primary purpose of education.[129] Sticking true to the commands outlined in *Mathews*, the court expressly limited their question presented to whether Haidak had an opportunity to answer, explain, and defend.[130]

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120. *Id.* at 64. Gibney testified that she voluntarily had consensual sex with Haidak through the summer and that she had previously struck and bit Haidak during their relationship. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 64.

126. *Id.*

127. *Id.* at 65.

128. *Id.* at 66 (quoting Gorman v. Univ. of R.I., 837 F.2d 7, 14 (1st Cir. 1988)).

129. *Id.* at 66 (citing Goss v. Lopez, 419 U.S. 565, 580 (1975)).

130. *Id.* at 67.

Moreover, the court went out of their way to deny the idea that university proceedings should mirror common law trials.[131] Nonetheless, the court thought that some of the rules of trial could be helpful in guiding their analysis.[132] With this in mind, the court found that the school did not violate Haidak's due process rights during the expulsion hearing in deciding not to include the trial court transcripts where Gibney admitted to consenting communication with Haidak because, like a federal district court, the school was well within its discretion in excluding the transcript.[133] Following the same reasoning, the court found that the school was within its discretion in not allowing Haidak to present evidence of Gibney's previous propensity for violence—referring to the photograph of a bite mark on Haidak and to Haidak's request to have his mother testify about Gibney's behavior.[134] The court explained that like a criminal trial, the school did not have to admit evidence of Gibney's character to prove that on a specific occasion she was violent.[135]

Haidak further claimed that he was denied due process because he was not allowed to cross-examine Gibney.[136] However, the court held that the right to unlimited cross-examinations was never required in school proceedings and explained that applying the inquisitorial system, as opposed to the adversarial system, could also bring about a fair hearing.[137] According to the court, allowing the accused student to cross-examine the witnesses would likely not increase the fairness of the hearing or decrease the risk of erroneous deprivation.[138] The court expressed concern that cross-examinations, led either by the student or the student's representative, would turn the hearings into a debate that could "lead to displays of acrimony or worse."[139]

The court further considered the holding in *Doe v. Baum* and held that the categorical rule requiring cross-examinations in credibility determinations is unnecessary in the context of university proceedings.[140] The court did not bend to the idea that an inquisitorial approach "[was] so fundamentally flawed" that cross-examinations were necessary to provide a fair hearing.[141] Moreover, according to the court, implementing trial-like procedures in school disciplinary proceedings will overwhelm schools and

131. *Id.* at 64.
132. *Id.*
133. *Id.* at 67.
134. *Id.*
135. *Id.* at 64.
136. *Id.* at 68.
137. *Id.*
138. *Id.* at 69.
139. *Id.*
140. *Id.*
141. *Id.*

would "cost more than it would save in educational effectiveness."[142] The court feared that allowing cross-examinations would lead to students insisting on the participation of counsel in cross-examinations and would, at that point, be a trial without a jury.[143]

Nevertheless, when a school is the one conducting the questioning, it must do so reasonably.[144] Although some of Haidak's proposed questions were excluded, the school's questioning was adequate because it required Gibney to provide a detailed account of her story and clarify ambiguities, inquired into her level of intoxication, and alternated between questioning Haidak and Gibney.[145] This onerous process was capable of extracting the truth in that Gibney voluntarily consented and even welcomed communication with Haidak after the school imposed the first no-contact order on Haidak.[146] Moreover, after finding this mutual nature of their communication, the school absolved Haidak of the harassment charge and found that Haidak was not responsible for the endangering behavior charge.[147] According to the court, this shows that the school's inquisitorial approach was appropriate because it was capable of exposing weaknesses in the charges.[148]

Nevertheless, the court found that the school violated Haidak's due process rights because it did not provide an expulsion hearing before suspending Haidak for five months.[149] The school did not have to provide Haidak with notice and a hearing before suspending him if he posed a "continuing danger to persons or property or an ongoing threat of disrupting the academic process."[150] However, the school waited about two weeks after learning that Haidak and Gibney had been in contact before deciding to suspend Haidak and offered no evidence showing that it was impossible "to provide some type of process" before doing so.[151] Moreover, the court thought that suspending Haidak for five months was too long of a period of time when the school could have begun the hearing.[152]

To summarize, in *Haidak*, the court declined to adopt the categorical rule that cross-examinations are required when there is a reliance on the credibility of the students.[153] Moreover, it found that the inquisitorial process was adequate enough to provide a fair hearing to Haidak.[154] Finally,

142. *Id.* (quoting Goss v. Lopez, 419 U.S. 565, 583 (1975)).
143. *Id.* at 69–70.
144. *Id.* at 70.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 71.
149. *Id.*
150. *Id.* (quoting Goss v. Lopez, 419 U.S. 565, 582–83 (1975)).
151. *Id.* at 72.
152. *Id.*
153. *Id.* at 68.
154. *Id.*

notwithstanding the way the school carried out the proceeding, it violated Haidak's due process rights because the school did not provide Haidak with adequate notice and a hearing before suspending him for five months, and did not show that he posed an immediate threat that would excuse the failure in doing so.[155]

V. THE CONSTITUTIONAL ARGUMENT AGAINST REQUIRING CROSS-EXAMINATIONS

Although adversarial cross-examinations in sexual harassment cases are a form of getting to the truth, due process does not require them. In determining what process is due in any particular setting, educational institutions must consider the effects on private interests, whether the school can decrease probable risk of erroneous deprivation by substituting or implementing additional safeguards, and the school's interest, including the function involved and the fiscal and administrative burdens the proposed procedures will entail.[156] Applying those factors to sexual misconduct proceedings, in light of a similar context, will show that cross-examinations are unnecessary to provide a fair hearing.

A. The Private Interest at Stake Is Insufficient

The first factor the Court considered is if the administrative process affected the petitioners' private interests and afforded them adequate due process.[157] In *Goss*, the Court held that the high school students had a strong interest to avoid unfair or mistaken exclusion from the educational process and the unfortunate consequences that come with the exclusion.[158] However, the students had that interest because an Ohio statute expressly created a compulsory attendance system and required local authorities to provide free education to all residents between the ages of five and twenty-one.[159] Apparently, the source that created the property interest is relevant in analyzing the private interest at stake.[160] Like a high school student, a university student has an interest in completing their education, avoiding an erroneous deprivation of that education, and preventing the negative stigma that may come as a result of suspension or expulsion.[161] In contrast, however,

155. *Id.* at 71–73.

156. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

157. *Id.* at 335.

158. Goss v. Lopez, 419 U.S. 565, 579 (1975).

159. *Id.* at 573–74.

160. *Id.* at 569 (holding that the Constitution does not create the property interest, but rather independent sources such as statutes do); *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that the state cannot revoke recipients' benefits when the recipient has a statutory right to receive them without a proper proceeding).

161. *Goss*, 419 U.S. at 569; Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 66 (1st Cir. 2019).

a public university student's interest is not rooted in any state statutory provision, much less a state constitution.[162]

Unlike the vast majority of K–12 students in the United States who are entitled to an education through state law, students who wish to attend a public university must first apply and hope that they meet the requirements set out by the institution.[163] Therefore, a public university student only has the property interest in higher education because they have chosen to apply and have been admitted, not because the state has guaranteed their admission.[164]

In addition, states do not compel people to attend universities like they require K–12 students.[165] It is only at the moment that the university accepts the student that the public university makes the decision to provide, through contractual obligation, higher education to the student.[166] Unlike a public university student, whose property interest in higher education derives from their choice to attend and the school's determination that they are qualified, a K–12 student's right to an education is not only one that all states have chosen to grant for free, but one that many states now regard as a constitutional right.[167]

Although it is true that higher education also provides professional opportunities to the students who seek it, the essential role K–12 has historically played in our unique American society makes it difficult to consider higher education as being equally important. For example, the purpose of public education is to provide children with the essential skills needed to perform the most basic public responsibilities.[168] According to Chief Justice Earl Warren's opinion in the historic *Brown v. Board of*

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162. Dalton Mott, *The Due Process Clause and Students: The Road to a Single Approach of Determining Property Interests in Education*, 65 U. KAN. L. REV. 651, 651–55 (2017) (explaining that courts have not decided whether university students have a property interest).

163. *See, e.g.*, TEX. EDUC. CODE ANN. § 4.001(a) ("The mission of the public education system of this state is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation."). *But see Admission for First Year Students*, TEX. TECH UNIV., http://www.depts.ttu.edu/admissions/apply/status/first_freshmen/ (last visited Dec. 14, 2020).

164. *See College Costs: FAQs*, BIG FUTURE, https://bigfuture.collegeboard.org/pay-for-college/college-costs/college-costs-faqs (last visited Dec. 14, 2020).

165. *See* Farran Powell & Emma Kerr, *24 States that Offer Tuition-Free College Programs*, U.S. NEWS (Aug. 29, 2019), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2018-02-01/these-states-offer-tuition-free-college-programs (explaining that even in states that promise to provide free college to its citizens, there are still certain eligibility requirements such as a minimum GPA or socio-economic status).

166. *See* TEX. TECH UNIV., *Deposit and Contract Terms*, https://www.depts.ttu.edu/housing/contracts/deposit.php (last visited Dec. 14, 2020) (noting that Texas Tech University requires students who apply to pay a $75 non-refundable application fee, and if admitted, pay a $400 initial deposit before applying for housing).

167. *See, e.g.*, Joel R. by Salazar v. Bd. of Educ. of Mannheim Sch. Dist. 83 Cook Cnty., 686 N.E.2d 650, 654 (Ill. App. Ct. 1997) (explaining that the Illinois constitution obligates the State to provide public educational institutions and services).

168. Brown v. Bd. of Educ, 347 U.S. 483, 493 (1954).

Education decision, public education "is the . . . foundation of good citizenship," awakens children to cultural values, prepares them for later professional training, and helps children adjust normally to their environment.[169] In fact, society could almost certainly expect a child who is denied the opportunity to have an education to fail to succeed in life and become part of our society in general.[170] One would hope that by the time children graduate from high school, they have already acquired the basic tools they need to succeed and become productive members of society.

The commitment to make K–12 education a constitutional right is further emphasized by the active role many states play in ensuring that K–12 education is effective—many have established rules and regulations designating minimum adequate facility standards and attendance requirements.[171] Moreover, unlike a public university student, a public school student can only be suspended or expelled for a limited amount of time.[172] If expelled, most states provide K–12 students alternative schools in order to help the student complete their academic requirements the state sets out.[173]

Perhaps another difference that supports the conclusion that a K–12 student's private interest is greater than that of a public university student is the overall concern many states have in ensuring an equitable and equal education for all children.[174] This serves the purpose of providing all students, regardless of their socio-economic status, with the opportunity to attend school and learn the essential skills Chief Justice Earl Warren argued our society needs to grow.[175] In contrast, however, those students who are accepted and have the means to pay, either out of pocket or through scholarships and federal aid, are the only ones who can pursue higher education.[176]

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169. *Id.*

170. *Id.*

171. *See, e.g.*, Hull v. Albrecht, 960 F.2d 634, 637 (Ariz. 1998) (explaining that once a state establishes minimum adequate facility standards and provides funding to ensure every district is able to remain above the standard, the district itself may not fall below those standards); Afr. Am. Legal Def. Fund, Inc. v. N.Y. State Dep't of Educ., 8 F. Supp. 2d 330, 337 (S.D.N.Y. 1998) (holding that because the state has an interest in making sure students attend school, it could base the amount of funds each school district receives on attendance rates).

172. *School Expulsion: What is the Process? What Can You Do?*, CTLAWHELP (May 2019), https://ctlawhelp.org/en/school-expulsions-child-expelled.

173. *See* EDUC. COMM'N OF THE STATES, *School Discipline: Are There Alternative Schooling Options Available for Students who are Suspended or Expelled?* (Aug. 2018), http://ecs.force.com/mbdata/MBQuest2RTanw?rep=SD1805#targetText=Each%20school%20district%20must%20have,classwork%20during%20period%20of%20suspension.&targetText=Yes.,The%20State%20Board&targetText=Students%20suspended%20in%2Dschool%20for,provided%20with%20an%20instructional%20program.

174. *See* Leandro v. State, 488 S.E.2d 249, 353 (N.C. 1997) (holding that because the North Carolina constitution has a duty to provide every child access to a sound basic education it also has the duty to provide supplemental funding with the purpose of giving additional funds to poor districts).

175. *Brown*, 347 U.S. at 493.

176. *See* Jeffrey T. Denning, *College on the Cheap: Consequences of Community College Tuition Reductions*, 9 AM. ECON. J.: ECON. POL'Y 155, 155–56 (2017). Community colleges, which are substantially cheaper than four-year universities, are generally more accessible for students of historically

While K–12 education is focused on ensuring the students within their districts receive the same quality of education and rely almost completely on state funding, higher education institutions are historically an industry that is incentivized to make profit.[177] This supports the inference that while in one context the property interest is rooted in what we value as a society and what we believe is essential to the prosperity of our country as a whole, the other is largely rooted in the student's ability or inability to pay for tuition.

The first factor in the *Mathews* analysis should clearly suggest that a K–12 student has a higher property interest than a public university student.[178] As a society, we have dictated what we value. Some of those values have become so important and so rooted in our nation's history that we, as a people, have passed laws and included provisions in our Constitution in order to protect them.[179] It should be safe to assume that if our state constitutions have promised all its citizens education up to the twelfth grade and, in most cases, have required our people to reach a certain level of academic achievement, we believe that property interest to be of greater value than a property interest that is acquired through a contract between a student and a university.

Although the number and time periods of suspensions in K–12 education may have persuaded the Court in *Goss* to decline holding that cross-examinations are required under the Due Process Clause, the rate at which sexual violence crimes occur on college campuses across the country is also alarming.[180] However, the schools often determined what punishment was appropriate given the students' acts. The question in *Goss*, however, was not whether the ten-day suspensions were inappropriate, but rather whether the procedure in determining whether to suspend the students complied with due process.[181] Instead of dwelling on the length of time the students were deprived, the Court focused on the actual deprivation itself—that of education.[182] Therefore, the focus for this analysis should not be on the length of time, but rather on the interest to get an education.

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lower educational attainment. *Id*. However, they may become more attractive as the prices of four-year universities increase.

177. John Aubrey Douglass, *The Rise of the For-Profit Sector in US Higher Education and the Brazilian Effect*, 47 EUR. J. EDUC. 242, 243 (2012); Zack Friedman, *Student Loan Debts Statistics in 2019: A $1.5 Trillion Crisis*, FORBES (Feb. 25, 2019), https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/#438b58a6133f (showing that student loan debt is at an all-time high across all demographics).

178. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

179. U.S. CONST. amends. I–XXVII.

180. Goss v. Lopez, 419 U.S. 565, 584 (1975); Rape, Abuse & Incest Nat'l Network, *supra* note 2 ("11.2% of all students experience rape or sexual assault through physical force, violence, or incapacitation (among all graduate and undergraduate students).").

181. *Goss*, 419 U.S. at 567.

182. *Id.*

B. Mathews*'s Principles Already Mitigate the Risk of Erroneous Exclusion*

The second factor the Supreme Court considered in determining what process is due is the risk of erroneous deprivation using the procedures at issue and whether additional or substitute procedural safeguards would provide additional value to the inquiry.[183] In *Mathews*, the Court explained that when analyzing the risk of erroneous deprivation, the assessment should be based on "the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."[184] In other words, one must analyze the application of school disciplinary proceedings as they are applied in the general context of higher education and not on a case-by-case basis.[185]

Goss recognized that although the risk of erroneous suspension will inevitably exist in school disciplinary proceedings because the controlling facts are often disputed, the attempt to mitigate that risk is appropriate as long as the processes used are "done without prohibitive cost or interference with the educational process."[186]

In *Goss*, the Court criticized the schools for their failure to provide the students with fair notice and a hearing before suspending them.[187] Similarly, public universities that deprive their students of these basic procedural protections would also prevent them from presenting more evidence, arguments in favor of their cases, and challenges to the correctness of the universities' decisions.[188] However, the Court expressed great concern with the prospect of "elaborate hearing requirements in every suspension case" in K–12 education.[189] Public universities and colleges are just as complex as public primary and secondary school systems, and therefore, require the same level of thought and reservation before designating procedural safeguards as constitutional requirements.

Regardless of whether students are in a public primary or secondary school or college, those who are suspended without notice of the charges against them are at a higher risk of erroneous deprivation because "[f]airness can rarely be obtained by secret," and the opportunity to be heard is the best instrument for arriving at the truth.[190] In *Goss*, the Court explained that the minimum procedural requirements were a protection "against unfair or

183. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

184. *Id.* at 344.

185. *Id.* at 344–45 (explaining that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions").

186. *Goss*, 419 U.S. at 580.

187. *Id.*

188. *See Mathews*, 424 U.S. at 340–41.

189. *Goss*, 419 U.S. at 580.

190. *Id.* (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)).

mistaken findings of misconduct and arbitrary exclusion from school."[191] Accordingly, a university would avoid constitutional violations if they adequately, and in a timely manner, provided accused students with notice of the accusations against them, the relevant evidence the school relied on in deciding to begin the inquiry, and an opportunity to meet and present relevant evidence.[192]

Assuming that university officials conducting the inquiries are unbiased, written questionnaires and statements in university proceedings should provide accused students with an expansive opportunity to mold their defenses and arguments against the accusations.[193] When considering the general issue in context, as *Mathews* requires, the risk of erroneously suspending or expelling an accused student from a university is sufficiently mitigated if the school abides by what the Constitution requires.[194]

Although decisions in this context may be entirely based on medical reports, credibility and veracity alone cannot dictate what process is due.[195] There may be cases where a complainant's credibility may be questioned due to a number of different factors, including lack of evidence or university officials' biases, but "due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, [and] not the rare exceptions."[196] Unbiased panels and investigators can mitigate the issue of witness credibility and veracity by allowing students to present relevant evidence in their favor and see the evidence against them, and by remaining unbiased through the process and maintaining adequate communication with all parties involved.

C. The Interest in Educational Effectiveness Outweighs the Need for Cross-Examinations

The final factor the Court in *Mathews* considered in determining what process was due is the government's interest, which included the costs and administrative burdens the additional safeguards would impose.[197] In determining when judicial-type procedures should be imposed to guarantee a fair process, we must once again consider the context in which these procedures will take place.[198] In *Goss*, the Court found that "truncated trial-type procedures might well overwhelm administrative facilities in many

191. *Id.* at 581.
192. *See Mathews*, 424 U.S. at 346.
193. *Id.*
194. *See id.* at 348–49.
195. *See id.* at 344 ("[T]here may be 'professional disagreement with the medical conclusions' [but] the 'specter of questionable credibility and veracity is not present.'") (quoting Richardson v. Perales, 402 U.S. 389, 405 (1971)).
196. *Id.*
197. *Id.* at 335.
198. *See id.* at 348–49.

places and, by diverting resources, cost more than it would save in educational effectiveness."[199] The "educational effectiveness" the Court was referring to was the school's ability to protect the safety of other students, the school's property, and the academic process in general.[200] In considering the university's interest in educational effectiveness, cross-examinations are unnecessary in university proceedings because they restrict the school's ability to ensure other students' safety, divert fiscal and administrative resources that affect the students' learning environment, and cross-examinations application is ultimately legally unobtainable.

1. Cross-Examinations Undermine the Need for Exigency

Understanding the complexity of public school systems, the Court in *Goss* recognized that schools may need to suspend a student without notice or a hearing if that student poses a danger to other students or to the school's property.[201] Therefore, the logical inference from the Court's holding is that the school's interest in ensuring the safety of its students outweighs a student's right to notice and a hearing.[202]

In the context of a university sexual misconduct case, it is impossible to ignore the inherent danger other students, including the complainant, face due to the severity of the complaint at issue. Like in *Goss*, universities should be able to change a student's schedule, living arrangements, and if the danger is imminent, suspend the student for a brief period of time to ensure the safety of its campus community.[203]

The argument against cross-examinations should not be construed as completely ignoring the general principle requiring universities to provide an accused student adequate notice and an opportunity to be heard.[204] Instead, the argument should be understood as an expansion of what the Court has already held in the context of *Goss*—universities should be able to make difficult determinations in the name of their interests, but they must provide adequate notice and hearings whenever possible.[205]

The problems with cross-examinations may be less apparent in cases in which the complaint is not violent in nature, such as situations where a student is accused of cheating on a test, but cross-examinations can become very problematic in sexual violence cases—when a student's safety may be in imminent danger. Because an effective notice and a hearing is sufficient to protect against erroneous action by allowing students to give their version of

199. Goss v. Lopez, 419 U.S. 565, 583 (1975).
200. *See id.* at 582–83.
201. *Id.* at 582.
202. *See id.*
203. *See id.* at 582–83.
204. *See id.* at 581–82.
205. *See id.*

events, cross-examinations are an ineffective measure that could potentially have dangerous consequences.[206]

2. Complex Trial-Like Procedures Are Simply Too Expensive

Although financial cost alone should not control whether due process requires cross-examinations in university proceedings, the school's interest in preserving fiscal and administrative resources is an essential factor in making that decision.[207] At some point, the fiscal costs may outweigh whatever benefit to the fairness of cross-examinations exists.[208] Although the Court in *Goss* did not discuss the fiscal costs a school could potentially endure as a result of cross-examinations, it held that the right to cross-examine an accuser, the right to counsel, and the right to call witnesses are unnecessary for short-term suspensions.[209]

Similarly, universities and colleges also have an interest in promoting educational effectiveness and preparing students for their respective careers.[210] Accordingly, universities hire professors and administrators based on their abilities to further the institution's goals.[211] Requiring university staff, who are not trained in the art of correctly and fairly implementing complex trial-like systems, would require universities to invest unimaginable amounts of resources into training or hiring people to adequately implement these procedures according to the law.

Administrators, whose job descriptions are designed primarily with the ultimate goal of providing students with an education, will now also have to train in implementing the rules of evidence and procedure that are necessary to protect the accused and the complainant's due process rights. This will not only have immediate detrimental effects on university budgets, but it will potentially make working for a university less lucrative or even unappealing. Therefore, schools will not only incur indeterminate costs, but they will also likely lose an opportunity to hire talented academics who would have taken

206. *See* Mathews v. Eldridge, 424 U.S. 319, 346 (1976).

207. *See id.* at 348.

208. *See id.*

209. *Goss*, 419 U.S. at 583.

210. *See, e.g.*, TEX. TECH UNIV., OFF. OF THE DEAN OF STUDENTS, CODE OF CONDUCT (2019–2020), http://www.depts.ttu.edu/dos/docs/PartISecA.pdf ("The Office of Student Conduct is committed to an educational and developmental process that balances the interests of individual students with interests of the University community."); TEX. TECH UNIV., *About TTU*, https://www.ttu.edu/about/ (last visited Dec. 14, 2020) ("Committed to teaching and the advancement of knowledge, Texas Tech University, . . . provides the highest standards of excellence in higher education, fosters intellectual and personal development, and stimulates meaningful research and service to humankind."); *see also* HARV. UNIV., *About Harvard*, https://www.harvard.edu/about-harvard (last visited Dec. 14, 2020) ("Harvard University is devoted to excellence in teaching, learning, and research, and to developing leaders in many disciplines who make a difference globally.").

211. *See* OFF. OF THE PROVOST, COLUM. UNIV., *Guide to Best Practices in Faculty Search and Hiring*, at 4, (2016) (stating that the university cannot be the school for scholars without focusing on hiring qualified faculty).

the job but were deterred by additional demands the position will now ask of them.

In addition to fiscal costs that universities will undertake in implementing cross-examinations in their proceedings, they will also divert another important resource away from their educational goals: time.[212] The way faculty spend their time, according to some studies, has major implications on the administrative staff and students.[213] The more time professors spend teaching, which is already about sixty hours per week, the more successful their students will likely be.[214]

Moreover, proponents of making cross-examinations a right in university sexual misconduct proceedings fail to consider an administrative burden that is perhaps the most important legal hurdle for universities: unlike criminal and civil courts, universities do not have the subpoena power to require witnesses to appear.[215] Because university proceedings are not civil or criminal trials, they are asked to do impermissible tasks that would inevitably completely halt university processes, making the prospect of any decisions on sexual misconduct investigations almost impossible.[216]

VI. THE COURT SHOULD ADOPT THE HOLDING IN *HAIDAK*

The Court should adopt the holding in *Haidak* because it focuses on the requirements under due process instead of focusing on whether the credibility of the parties is at issue.[217] This provides a framework that is consistent with how due process jurisprudence has developed, undoes the restrictive assumption that an adversarial model is the only option, and respects the historical deference courts have afforded educational institutions.[218] Moreover, *Haidak* does not fall victim to the flawed conclusion that the victim's interest could be protected if the student's agent conducted direct cross-examination, as opposed to the students themselves.[219] The holding in

212. Colleen Flaherty, *So Much to Do, So Little Time*, INSIDE HIGHER ED. (Apr. 9, 2014), https://www.insidehighered.com/news/2014/04/09/research-shows-professors-work-long-hours-and-spend-much-day-meetings. According to some scholars, professors spend most of their time teaching. *Id*. Due to the increasingly competitive environment of higher education, professors feel compelled to place more time into teaching, research, and efforts to receive grant money. *Id*.

213. *Id.*

214. *Id.* John Ziker, chair of the anthropology department at Boise State University, stated that on average 30% of faculty time is spent on activities that are not traditionally considered part of an academic including: meetings with students and staff, email, and other administrative duties. *Id*.

215. *See* FED. R. CIV. P. 45 ("Every subpoena must: (i) state the court from which it issued; (ii) state the title of the action and its civil-action number; (iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises . . . .").

216. *See id.*

217. Haidak v. Univ. Mass.-Amherst, 933 F.3d 56, 66 (1st Cir. 2019).

218. *Id.* at 65–66.

219. *See id.* at 69.

Haidak is not only the most constitutionally sound option but also is the one that guarantees fairness to all parties involved.

A. Defending the Inquisitorial Model

Both the First and Sixth Circuits dealt with a situation where the credibility of the parties was at issue.[220] Unlike in *Haidak*, however, the court in *Baum* emphasized that where the credibility of the students was at issue, the school must provide the accused student an opportunity to cross-examine the accuser.[221] Instead of automatically assuming that cross-examinations are necessary where there is a question of credibility of the parties, the court in *Haidak* dissimilarly also considered the possibility of having a fair hearing with an inquisitorial system and even expressed concerns with the consequences of having an adversarial system.[222] The court in *Haidak* explained:

> As a general rule, we disagree, primarily because we doubt that student-conducted cross-examination would so increase the probative value of hearings and decrease the "risk of erroneous deprivation" that it is constitutionally required in this setting. In the hands of a relative tyro, cross-examination can devolve into more of a debate. And when the questioner and witness are the accused and the accuser, schools may reasonably fear that student-conducted cross-examination will lead to displays of acrimony or worse.
>
> This is not to say that a university can fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account. Rather, we are simply not convinced that the person doing the confronting must be the accused student or that student's representative.[223]

The belief that only an adversarial system can ultimately discover the truth is rooted in the obsession with legal contestation and litigant activism that derives from American exceptionalism.[224] In the adversarial system, it is the disputing parties that control the legal arguments, claims, and evidence gathering.[225] In contrast, the inquisitorial system allows the judge to control

220. *See id.* at 61–62 (explaining that the incidents that led to the altercation happened while both students were in their room, alone and abroad); *see also* Doe v. Baum, 903 F.3d 575, 579 (6th Cir. 2018) (explaining that the incidents that led to the sexual harassment happened in a room where nobody else but the accused and accuser were present).

221. *Baum*, 903 F.3d at 581.

222. *Haidak*, 933 F.3d at 68.

223. *Id.* at 69.

224. Herbert M. Kritzer, *American Adversarialism*, 38 LAW & SOC'Y REV. 349, 349–50 (2004).

225. *Id.* at 350.

the case and limits counsel to "suggesting additional questions for the judge to ask witnesses."[226]

According to some scholars, however, the adversarial system is not as effective in reaching justice as most people may think.[227] For instance, there is an alarming number of wrongful convictions in our criminal justice system, which is perhaps the system that is most commonly associated with the adversarial confrontation.[228] Ignoring the positive and negative attributes of both systems is just as unreasonable as assuming that only an adversarial instrument, such as direct cross-examinations, could lead to the truth.[229] While some may champion the adversarial nature of cross-examinations in intentionally confrontational environments, others may perceive it as traumatic in situations where being adversarial could transform a hearing into an unnecessary, and potentially traumatic, debate.[230]

The court in *Baum* found it rather concerning that the university procedures were far removed from the "tried and true" procedure in our civil and criminal justice systems.[231] According to the court, even a written deposition containing the victim's statements is insufficient to provide a fair hearing to an accused student.[232] This conclusion, however, consequently points to the principal purpose of cross-examinations—that of testing the victim and assessing their physical expressions while under the pressure of opposing counsel.[233] At this point, the value of cross-examinations can be questioned: Are they effective because they truly find inconsistencies in the victim's story or because their confrontational nature pressures victims into confusing their own stories?[234] Although both the inquisitorial and adversarial systems have their detriments, concluding that cross-examinations are required to find the truth presumes that the inquisitorial system can never be sufficient, in any context.

In *Baum*, the court wrongly assumed that the psychological issues of the victim are solved if cross-examinations are directly conducted by the

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226. Franklin Stier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice*, 76 JUDICATURE 109, 109 (1992).

227. *See generally* Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C.J. INT'L & COM. REG. 319 (2011).

228. *See* KELLY WALSH ET AL., ESTIMATING THE PREVALENCE OF WRONGFUL CONVICTIONS 4 (Sept. 2017) https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf.

229. *See* Kritzer, *supra* note 224, at 349–50; Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) (emphasizing that cross-examinations are the greatest legal engine ever invented for uncovering the truth).

230. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019).

231. *Baum*, 903 F.3d at 585.

232. *Id.*

233. *Id.* at 582–83.

234. 2 TIMOTHY TIPPINS, NEW YORK MATRIMONIAL LAW AND PRACTICE § 18.30 (2019). Cross-examinations serve the purposes of "securing admissions from the witness which will corroborate or support the practitioner's position" and "impeaching the credibility of the witness or his or her testimony where it has an adverse impact upon the practitioner's case . . . ." *Id.* The former is seen as a "constructive cross-examination" and the latter as "destructive in nature." *Id.*

student's agent as opposed to the student themselves.[235] This presumes that a victim's continued suffering is contingent upon a victim seeing their perpetrator in person; however, studies show that other factors negatively impact a victim's mental well-being during cross-examination.[236] Perhaps the most impactful factor is the secondary victimization of the victim attributed to being forced to recollect traumatic events in vivid detail.[237]

The holding in *Baum* assumes that the suffering a victim of sexual violence endures is limited to what the victim can see, and it forgets a fundamental reality of who we are as humans and our ability to remember. Although it was important to mention the court's flawed perception of the impact of cross-examination on victims in this Section, this Comment will cover this topic in greater depth in a later Section.[238] Nevertheless, although the holding in *Baum* attempts to recognize the victim's point of view, the court's attempt to reconcile the interests of both the victim and the accused student ends with an overly simplistic conclusion that only the abuser controls the victim's experience.[239]

B. *Pre-Conceived Stereotypes Shouldn't Dictate Fairness*

The court in *Baum* follows a flawed "he said/she said" mentality.[240] Before the adoption of evidentiary rules designed to protect victims of sexual assault and violence, the criminal justice system required complainants to corroborate their allegations with witnesses or evidence.[241] As a whole, our system was inherently skeptical of any sexual harassment claim and naturally adopted the presumption that most complainants were lying.[242] These burdensome requirements ultimately excluded many victims from our criminal justice system.[243] Unfortunately, the same skeptical mentality that silenced many for decades is now also making its way into the halls of our universities.

The rule requiring cross-examinations when the parties' credibility is at issue is rooted in the presumption that, in most cases, the complainant is

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235. *Baum*, 903 F.3d. at 583.

236. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 314–15 (2002) (stating that victims of sexual violence experience secondary victimization during and after criminal proceedings).

237. *See id.* at 314.

238. *See infra* Part VII.A–B (discussing the impact cross-examination can have on victims).

239. *See Baum*, 903 F.3d at 583.

240. *See id.* (clarifying that cross-examinations are not only necessary in cases dealing exclusively with a "he said/she said" situation); *see also* Allison Leotta, *I Was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth*, TIME (Oct. 3, 2018), https://time.com/5413814/he-said-she-said-kavanaugh-ford-mitchell/.

241. Leotta, *supra* note 240.

242. *Id.*

243. *Id.*

lying.[244] Without citing to any studies or statistics, the Sixth Circuit imposed a categorical rule because it believed that the risk of erroneous deprivation increased when the universities relied on testimonial evidence.[245] Therefore the court's concern was not focused on the requirements of due process but rather guided by the belief that most students accused of sexual misconduct were innocent and would be wrongfully sanctioned.[246] The court's subconscious beliefs, however, could not be further from the truth because studies suggest that only about 2%–8% of rape and sexual assault allegations are false.[247] The decision in *Baum* could be seen as a microcosm of how society views sexual harassment. Dr. Kimberly A. Lonsway suggests society's tendency to largely "overestimate[ ] the percentage of sexual assault reports that are false" could be explained on nothing more than preconceived societal stereotypes.[248]

These stereotypes affect the way ordinary people approach sexual harassment claims and naturally question the victim's credibility. Some inaccurate stereotypes that ordinary people rely on to determine the credibility of a sexual assault claim include: the victim and the suspect are strangers; there was a weapon involved in the assault; the victim suffered a physical injury; the victim will show mental anguish; the victim did not exercise bad judgment (i.e. was not drinking) at the time of the assault; or the suspect is considered deranged or is not likable.[249] Moreover, most people assume that authorities will always find physical evidence in sexual assault cases, the victim is always willing to participate in the investigative process, the victim's story is consistent through the entire process, and every detail in the victim's story is true.[250]

However, as with many things in our society, our perception is often thwarted by reality. Contrary to popular belief, the rate at which victims report sexual assault and sexual violence is at an alarmingly low rate.[251] From the sexual assault cases victims do report, the perpetrators and victims often know each other.[252] Moreover, a victim's account of the events may not

244. *See Baum*, 903 F.3d at 582 (holding that the accused student was at an increased risk of erroneous deprivation when denied the opportunity to cross-examine the complainant because the school relied on the parties' credibility).

245. *Id.* at 582–83.

246. *See id.*

247. Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, NAT'L SEXUAL VIOLENCE RES. CTR. (2009), https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf.

248. *Id.* at 4–6.

249. *Id.*; *see* Rape, Abuse & Incest Nat'l Network, *Perpetrators of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/perpetrators-sexual-violence (last visited Dec. 14, 2020). According to a compilation of studies conducted by the Department of Justice, eight out of every ten rapes are committed by someone the victim knew, such as an acquaintance, spouse, boyfriend, or girlfriend. *Id.*

250. Lonsway et al., *supra* note 247.

251. *Id.* (finding that an evidence-based estimate suggests that only about 2%–8% of allegations are false).

252. *Id.*

always be completely accurate, and the victim may change details in their stories or even recant.[253]

In addition, victims often do not behave according to the norms society has adopted to determine the credibility of a victim—sometimes victims are not "hysterical" when interviewed or in trial.[254] Finally, and perhaps the most troubling reality, is that perpetrators do not always fit what society believes to be a stereotypical "rapist."[255] This presumption leads ordinary people to assume, without knowing all the facts, that the victim is most likely lying if, for example, the student accused of rape is a swimmer at one of our country's top institutions.[256]

C. Haidak*'s Flexibility Provides Breathing Room*

The approach in *Baum* is unworkable because it imposes a categorical rule on inherently complex situations because it would require direct cross-examinations in every case where credibility of the parties is at issue—even if the school relies on other evidence.[257] In distinguishing its prior decision in *Doe v. University of Cincinnati* from a Fifth Circuit decision, the court in *Baum* made its position clear: the only circumstances where cross-examinations are unnecessary is when a university does not rely on testimonial evidence at all.[258] This conclusion creates the possibility that even in cases where other evidence strongly corroborates the complainant's story, the accused student is still entitled to an opportunity to cross-examine the complainant if the school also considered the complainant's statements—regardless of the weight it placed on the testimonial evidence.[259]

In contrast, however, the court in *Haidak* also held that the university infringed on the accused student's due process rights but only because the school did not provide Haidak with a hearing, not because they denied him

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253. *Id.*

254. *Id.*

255. *Id.*

256. Koren, *supra* note 1. The judge in the Brock Turner case expressed concerns that a prison sentence would have a "severe impact" and adverse collateral consequences on Turner's future. *Id.* Although we do not know the internal reasons the judge made such remarks, it is an example of how society views sexual harassment claims. This is concerning because in every public university sexual harassment accusation, it is likely that the accused student has a blank record and is viewed in high regard by society in general.

257. Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018).

258. *See id.* at 583–84 (agreeing with the notion that cross-examinations are not required in cases "whe[re] the university's decision did not rely on any testimonial evidence at all"); *see also* Doe v. Univ. of Cincinnati, 872 F.3d 393, 401 (6th Cir. 2017) (holding that cross-examinations are required because the university's Title IX office relied on the credibility of the parties). *But see* Plummer v. Univ. of Hous., 860 F.3d 767, 775–76 (5th Cir. 2017) (holding that cross-examinations were not required because the university completely relied on video and photo evidence to make the decision).

259. *Baum*, 903 F.3d at 584 (clarifying that its *Doe v. Univ. of Cincinnati* decision "does not stand for the proposition that cross-examination is required only if the university's decision depends solely on the accuser's statement").

the right to cross-examine the complainant.[260] In *Haidak*, the university suspended Haidak for five months but did not provide him with a hearing.[261] The court reasoned that a hearing was required because there was no evidence suggesting that it was infeasible to provide Haidak with a hearing before imposing the lengthy suspension.[262] Nonetheless, the court rejected Haidak's claim, which was based on *Baum*'s categorical rule, that he was entitled to an opportunity to cross-examine Gibney if the credibility of the parties was at issue.[263]

In declining to follow *Baum*'s categorical rule, the court explained that a non-adversarial model could provide a fair hearing when considering the context in which the case took place.[264] If designed reasonably, an inquisitorial process could highlight weaknesses in the charges against the accused student and eventually lead to the truth.[265] Therefore, this holding essentially discards the idea that the risk of erroneous deprivation does not increase simply because there is an inquisitorial model at issue. The holding in *Haidak* also provides adequate due process to accused students because it follows the only requirements the Court has ever expressly recognized—absent exigency, an accused student is entitled to adequate notice and an opportunity to be heard.[266] In addition to providing adequate due process, the holding in *Haidak* is sufficiently flexible to also protect the complainant from increased trauma they could experience in an adversarial system.[267]

As for the universities making these decisions, *Haidak* affords them the historical deference that courts have given schools in determining what procedures best fit their interests.[268] Absent any failure to provide the minimum procedural requirements outlined in *Mathews* and *Goss*, the universities will have the freedom to implement those procedures that best fit

260. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 72 (1st Cir. 2019).

261. *Id.*

262. *Id.*

263. *Id*. at 73.

264. *Id.* at 68.

265. *Id.* at 71 (explaining that the school's probe "exposed weaknesses in the charges against Haidak. [Because] [t]he Board decided that Haidak was not responsible for [e]ndangering [b]ehavior, the most serious charge he faced . . . .").

266. Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Goss v. Lopez, 419 U.S. 565, 579 (1975).

267. *See Haidak*, 933 F.3d at 69–70 ("If we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete."). *But see* Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018) (opening the door to participation of counsel by allowing the accused student to pick an agent of his choice to conduct the cross-examination).

268. *See Goss*, 419 U.S. at 578 ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities.") (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)); *see also* Plummer v. Univ. of Hous., 860 F.3d 767, 773 (5th Cir. 2017) (explaining the idea that "[c]ourts should refrain from second-guessing the disciplinary decisions made by school administrators [,]" that universities should not be treated like a court of law, and that courts should focus on whether the process was fundamentally fair).

their fiscal and administrative abilities.[269] Requiring schools to abide by a restrictive categorical rule contradicts a very clear principle the Court established in *Mathews*: due process must be applied according to what the specific situation demands.[270]

Due to the complexity of the system of higher education, it is critical for universities to have the flexibility to operate as they see fit because confining them into rigid requirements will be too expensive and unduly burdensome. As stated previously, the court's role in these cases should be limited to determining whether universities are abiding by the requirements of due process, not dictating what those processes should look like.[271]

VII. THE PUBLIC POLICY ARGUMENT AGAINST CROSS-EXAMINATIONS

Forcing cross-examinations is contradictory to the purposes of Title IX, which are to "take immediate and appropriate steps to investigate . . . and take prompt and effective steps reasonably calculated to end any harassment [and] eliminate a hostile environment."[272] Implementing cross-examinations in university proceedings will likely subject victims to increased mental anguish and will have a direct effect on their already low propensity to report sexual harassment to officials. Therefore, cross-examinations will force universities to ignore the original purposes of Title IX, will lack procedural protections victims are entitled to in the criminal justice system, will lead to an increase in unreported cases, and will dangerously expose universities to potential liability.

A. The Attack Against Victims and Their Well-Being

Victims report only about 230 out of every 1,000 sexual assaults.[273] According to some studies, most victims do not report sexual assaults to law enforcement because they are skeptical of the criminal justice system and fear that their situation, which many perceive as being very private, will become public. [274] The phenomenon of "secondary victimization" provides valuable

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269. *Mathews*, 424 U.S. at 333; *Goss*, 419 U.S. at 579.

270. *Mathews*, 424 U.S. at 334.

271. *See Plummer*, 860 F.3d at 773 (citing Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 635 (6th Cir. 2005)).

272. Jared P. Cole & Christine J. Back, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, CONG. RESCH. SERV., at 26, (Apr. 12, 2019), https://fas.org/sgp/crs/misc/R45685.pdf (explaining how Title IX applies to institutions who receive federal funding).

273. Rape, Abuse & Incest Nat'l Network, *supra* note 2, *The Criminal Justice System: Statistics* (noting that most sexual assaults go unreported).

274. *See* Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW & HUM. BEHAV. 607, 611 (1996).

insight into the victim's mind and validates the perception many victims have about the criminal justice system.[275]

Secondary victimization of victims of sexual harassment occurs when the "negative social or societal reaction in consequence of the primary victimization . . . is experienced as further violation of legitimate rights or entitlements by the victim." [276] In a 2001 study, 52% of rape victims viewed the criminal justice system as harmful.[277] Not only are victims less inclined to report sexual harassment and violence to law enforcement due to their concerns of being exposed, but they do not trust the criminal justice system's ability to bring justice, they fear the possibility that the offender will retaliate, and they prefer to report to another official.[278]

On top of the already traumatic psychological consequences that come with being a victim of sexual violence, criminal proceedings themselves "could negatively influence . . . the victim's self-esteem, faith in the future, trust in the legal system, and faith in a just world."[279] In many respects, defense lawyers put the victims on trial as a way to cast doubt on their credibility due to the outdated notion that it is the victim's word against the defendant's.[280] According to multiple studies conducted between the late '90s and early 2000s, further interaction with the suspect is "especially stressful" because victims perceive contact with the suspect as continued "interpersonal conflict with the perpetrator."[281] Facing the perpetrators in court, recalling traumatic events, and being forced to sit through long periods of cross-examinations that question their credibility, comes with substantial mental health issues.[282]

In trial, victims face defense counsel who use the adversarial system to aggressively question the victim and, although not always expressly, they implicitly attempt to blame the victim for what occurred.[283] Proponents of cross-examinations in university proceedings assume, or rather ignore, the issues victims face in the criminal justice system. The biggest difference, and perhaps the most consequential to students in every university receiving Title

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275. Orth, *supra* note 236, at 314 (describing secondary victimization as a cause of criminal justice proceedings).

276. *Id.* at 314.

277. *Id.* (citing Campbell, Wasco, Ahrens, Self & Barnes, *Preventing the 'Second Rape': Rape Survivors' Experiences with Community Service Providers*, J. INTERPERSONAL VIOLENCE 16: 1239–59).

278. Rape, Abuse & Incest Nat'l Network, *Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Dec. 14, 2020).

279. Orth, *supra* note 236, at 314 (listing effects of secondary victimization).

280. Leotta, *supra* note 240 ("[T]he legend of 'he said, she said' originated centuries ago. Under old English law, rape prosecutions could not be brought unless every material element of the victim's story was corroborated by another witness or evidence.").

281. Orth, *supra* note 236, at 316.

282. Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victim's Mental Health*, 23 J. OF TRAUMATIC STRESS 182, 184 (2010).

283. *Id.*

IX funding, between a criminal trial and a hearing at a university, is that victims can be sure that they will not be forced to confront their aggressor.[284]

Title IX requires schools to provide students with an education free of sexual discrimination including sexual harassment.[285] Although a type of sanction that schools may implement is a suspension or expulsion, it is not the only type of sanctions.[286] In fact, victims are not always seeking to pursue administrative sanctions on the accused student, but rather, they are mostly seeking a change in schedule, living arrangements, or an attempt to disclose how the perpetrator made them feel.[287] Victims may choose the school proceeding for a variety of reasons, so the option to stay anonymous is important for the complainant.[288]

B. Victims Left Out to Dry Without Critical Protections

According to Kimberly Simón, the Title IX administrator for Texas Tech University, out of all the sexual harassment claims she receives from students, less than 15% of them actually reach a hearing which, in most of those cases, complainants choose another remedy.[289] The criminal justice system is a slow process, and absent temporary restraining orders, cannot change the student's schedule, change their living arrangements, or provide other temporary and quick remedies to prevent future injury.[290] This is why having both options open to the victims, as they were originally intended, is critical.

Some of the most popular and important procedural protections victims enjoy in the criminal justice system are rape shield laws.[291] Congress passed rape shield laws with the purpose of preventing evidence of the victim's sexual conduct into trial.[292] It is nearly impossible to assume that, without the aid of additional expensive training, administrators implementing cross-examinations would be prepared to determine whether counsel's question violated the victim's right to maintain their sexual privacy out of the hearing.[293] To deny victims these protections to any degree would admit that

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284. *See* Cole, *supra* note 272, at 36 (explaining that cross-examination has not been seen as necessary in the civil due process context).

285. 20 U.S.C. § 1681(a).

286. Interview with Kimberly Simón, Title IX Adm'r, Tex. Tech Univ., in Lubbock, Tex. (Sept. 2019).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. FED. R. EVID. 412.

292. *Id.* (explaining that "evidence offered to prove that a victim engaged in other sexual behavior . . . [or] . . . evidence offered to prove a victim's sexual predisposition" is inadmissible in a civil or criminal trial).

293. *See generally* Goss v. Lopez, 419 U.S. 565 (1975).

a victim's right to keep their sexual history private through those protections is of less concern than the accused's right to cross-examine.[294]

Due to the cost and administrative challenges schools will face in implementing, not only cross-examinations, but all the procedural protections that come with a trial, this proposition would almost be unrealistic. Schools vary in resources, and to impose these requirements would create massive economic disparities among higher education institutions. Title IX officers are constantly placed in difficult circumstances where they are asked to protect the accused student's right to due process, but lack the resources to do so.[295] If cross-examinations are required, we will likely see even more of an increase in the high turnover rate schools are currently experiencing in their Title IX office positions.[296]

Even assuming that cross-examinations could be implemented fairly, schools will inevitably need more funding in order to properly implement these procedures. This proposition, however, seems bleak due to the Department of Education's recent decision to decrease funding towards public education in general.[297] Moreover, over the last decade, states have decreased funding for public universities by about $9 billion.[298] The current trend states and the federal government are following makes the prospect of increased funding for the implementation of these procedures highly unlikely. Unfortunately, without the proper funding, schools will implement ineffective procedures that will be more detrimental to all parties involved—including the accused students themselves.

C. Cross-Examinations Will Expose Universities and Administrators to Liability

Section 1983 provides private individuals a cause of action for violations of their civil rights against any person acting under the color of state law.[299] In limited circumstances, however, the Court has exempted certain public officials by entitling them to some sort of immunity from

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294. FED. R. EVID. 412 (explaining that "evidence offered to prove that a victim engaged in other sexual behavior . . . [or] . . . evidence offered to prove a victim's sexual predisposition" is inadmissible in a civil or criminal trial).

295. Sarah Brown, *Life Inside the Title IX Pressure Cooker*, CHRON. OF HIGHER EDUC. (Sept. 2019), https://www.chronicle.com/interactives/20190905-titleix-pressure-cooker.

296. *Id.*

297. Valerie Strauss, Danielle Douglas-Gabriel & Moriah Belingit, *Devos Seeks Cuts from Education Department to Support School Choice*, WASH. POST (Feb. 13, 2018, 11:14 AM), https://www.washingtonpost.com/news/education/wp/2018/02/12/devos-seeks-massive-cuts-from-education-department-to-support-school-choice/.

298. Jon Marcus, *Most Americans Don't Realize State Funding for Higher Ed Fell by Billions*, PBS (Feb. 26, 2019, 12:20 PM), https://www.pbs.org/newshour/education/most-americans-dont-realize-state-funding-for-higher-ed-fell-by-billions.

299. *See* 42 U.S.C. §1983; *see also* Gomez v. Toledo, 446 U.S. 635, 638 (1980).

suit.[300] In civil and criminal trials, judges—and those performing judicial or quasi-judicial functions—enjoy total immunity from personal liability and therefore, have the freedom to make decisions based on their best judgment and knowledge of the law.[301]

However, university officials do not enjoy this same protection. Therefore, when confronted with making certain determinations as to whether to let certain evidence in, school administrators and officials will err on the side of allowing most of the evidence for fear of making a mistake and being liable.[302] This approach would inevitably lead to a system controlled by fear of retribution and not by what is fair according to the good-faith judgment of university officials.[303]

The potential risk of liability will prevent administrators from adequately filtering any evidence at all, therefore subjecting victims to the confrontational and adversarial techniques inherent in cross-examinations. At this point, the accused student could essentially bring any evidence they desire, even if obtained through undesirable means, in order to paint the witness in any light that is unfavorable to their story.[304] The ability to determine how parties are to conduct cross-examinations could eventually lead to a complete overhaul of Title IX. Unless public officials and our courts are prepared to re-draft Title IX or do away with it, they should only consider cross-examinations after understanding the dangerous consequences educational institutions will endure.

Another troubling concern about cross-examinations has to do with a school's lack of subpoena power.[305] Without the power to summon the witnesses, schools will likely stop pursuing many sexual harassment claims because of the schools' inability to require them to appear. Therefore, in cases where witnesses refuse to take the stand, victims will not be able to pursue sanctions against the alleged perpetrator because the case will be dismissed. These are just examples (that this Comment will discuss in greater length) of how implementing cross-examinations would require the schools and courts to recognize additional powers and procedures for schools.

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300. *Gomez*, 446 U.S. at 638.

301. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 268–69 (1993) (quoting Butz v. Economou, 438 U.S. 478, 511–17 (1978) (holding that officials who perform functions essentially similar to those of judges or prosecutors are "quasi-judicial" agency officials and are entitled to absolute immunity)).

302. Goss v. Lopez, 419 U.S. 565, 573 (1975).

303. *See id.* at 579–80 (holding that school administrators, although acting in utmost good faith, may sometimes commit error, but does not excuse implementing procedures that are overly prohibitive costs or disruptive to the educational process).

304. *See generally* FED. R. EVID. 608(b); Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 67 (1st Cir. 2019) (explaining that "even in a full-blown federal trial, 'extrinsic evidence is not admissible . . . to attack or support the witness's character for truthfulness'").

305. *See* FED. R. CIV. P. 4.

VIII. A DIFFICULT BUT AN IMPORTANT ANSWER FOR EVERYBODY: PROVIDING FAIRNESS, SENSITIVITY, AND FLEXIBILITY

It is difficult to ascertain what process universities should use in sexual harassment cases because these incidents are often very different. However, it should be clear that due process does not require direct cross-examinations when taking into account the context, degree of potential deprivation, and the public policy reasons arguing against cross-examinations. With this in mind, it is possible to create a workable framework that is consistent with the due process requirements, sensitive to victims, and flexible for the universities.

Legislators, elected officials, and university administrators must first accept the notion that an inquisitorial process is capable of providing a fair hearing to any student accused of sexual harassment.[306] With that said, universities must also give the accused student an opportunity to review all the information they have regarding the particular accusations against them—including the victim's story and statements—in order to adequately prepare their defense.[307] Without access to at least all relevant information, one cannot expect the process to be sufficiently transparent.

Denying cross-examinations does not mean that the accused student would not be able to bring attention to inconsistencies in the complainant's story. Universities can do this by allowing the student to submit questions to the investigators they believe would help corroborate their story or clarify any questions they may have.[308] With this in mind, to protect the victim from inflammatory and adversarial questions, the accused student would be required to submit explanations as to why they believe those questions are relevant to their case or helpful in weeding out the truth. In order to protect the school from future Title IX violations against the victim, schools should have the option to immediately suspend students "whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process."[309] In cases requiring exigency, however, universities must provide the student with a hearing in a reasonable amount of time.[310]

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306. *See Haidak*, 933 F.3d at 68; Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J.L. & PUB. POL'Y 175, 177–82 (2003).

307. *See Haidak*, 933 F.3d at 69–70.

308. *Id.* at 70 (holding that by alternating questioning between both parties, the hearing board was able to extract the complainant's admission about the nature of their relationship).

309. *Id.* at 72 (citing Goss v. Lopez, 419 U.S. 565, 582–83); *see also* Gilbert v. Homar, 520 U.S. 924, 930 (1997).

310. *Haidak*, 933 F.3d at 69–70 (explaining that when there is no real "exigency" to suspend a student, especially for a lengthy period of time (five months in Haidak's case), the school must provide more than an informal interview with an administrative body of the college).

IX. CONCLUSION

Although our criminal justice system serves an incredibly important role in our society, its adversarial processes have no place in public university sexual misconduct proceedings. Due process jurisprudence has historically manifested that in determining what process is due, we must take into account the context of the particular situation at issue.[311] Without this flexibility, implementing a process that works in one context to every situation could lead to costly procedures that could be more detrimental than beneficial. This is especially true in the context of public universities, whose goals are to educate, and not to serve as a mimicry of a court room whose administrators lack the training and education to implement these procedures.[312]

The Supreme Court should resolve the case by following the decision in *Haidak* because it provides the most accurate depiction of what due process has historically required—that of adequate notice and an opportunity to be heard. Moreover, *Haidak* serves as an example of when an inquisitorial system, if implemented correctly, could provide a path towards the truth and protect the interest of both the accuser and the accused. Cross-examinations are perhaps necessary in a criminal trial due to the interest at stake, however, a university student's interest in continuing their education is much lower.

Finally, the impact of cross-examinations on the victim's mental health could lead to secondary victimization, dissuade even more victims from speaking out, and potentially expose schools and their administrators to increased liability.[313] University officials are likely not prepared to undertake the responsibility in implementing truncated procedures and act as "judges." Moreover, if schools are forced to implement cross-examinations, the Department of Education must provide funding to train university officials in how to implement procedures that are fair and sensitive to the interests of all parties.

This Comment is not written with the purpose of diminishing the rights of an accused student. In fact, there is no question that anybody accused of an act should have notice and an opportunity to be heard. However, a realistic approach must always determine what procedures are most adequate in any given situation. This approach, while imperfect, will likely allow society to maintain focus on the interest and values Title IX was purported to defend.

311. *See* Goldberg, *supra* note 53.
312. *See* Brown, *supra* note 295.
313. *See* Orth, *supra* note 236; *Goss*, 419 U.S. at 579–80.