CAMPUS SEX COURTS: BEYOND A REASONABLE DOUBT

John Davis

ABSTRACT

Many experts mistakenly believe that proving culpability beyond a reasonable doubt is only necessary in criminal-court trials. However, the United States Supreme Court has ruled otherwise (as have many courts in many jurisdictions). There is no other determination made in our culture that has more grave social consequences on a person than an accusation of sexual misconduct. These severe consequences, impairment of liberty and property, as well as a lifelong stigma as a sex offender, compel high standards of due process, according to Supreme Court rulings, in making such a determination against accused persons. This article comments on the Department of Education's proposed rulemaking on campus adjudications of Title IX proceedings, especially those pertaining to sexual misconduct or sexual harassment.

Keywords: males, men, sexual harassment, sexual misconduct, title ix

INTRODUCTION

The legal concept of *beyond a reasonable doubt* is a source of misconceptions among the public and among many judges and lawyers. Finding someone is guilty of committing a wrong beyond a reasonable doubt means that we are certain the person actually did something wrong and with a state of mind that a reasonable person would consider evil.

The legal requirement that someone be found guilty beyond a reasonable doubt arises from thousands of years of laws in civilization that prohibit the government (or anyone else) from harming a person unless we are certain that there is a justifiable reason to harm him or her. Before the government punishes a person, we require a judgment, arising from *due process of law*, and before we allow someone other than the government to punish someone (known as *extra-judicial punishment*) we require certainty that the person deserves the punishment.

The United States Supreme Court describes "beyond a reasonable doubt" as follows:

> *[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.*
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> *Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty." Victor v. Nebraska, 511 U.S. 1, 27, 114 S.Ct. 1239, 1253 (1994) (Justice Ginsberg concurring).*

There are many misunderstandings regarding the burden of proving something "beyond a reasonable doubt." These misunderstandings occur not only in the public, but also among lawyers and judges. Many experts mistakenly believe that it is only necessary to prove things "beyond a reasonable doubt" in criminal courts, during a trial of a crime. However, the United States Supreme Court has ruled otherwise (as have many courts in many jurisdictions).

What the U.S. Supreme Court has ruled is that anytime an official or a quasi-official institution seeks to punish someone, and that punishment requires the adjudication or quasi-

judicial determination of some conduct that will impair the liberty or property interest of an individual, then that quasi-official institution must apply a higher standard of proof than a mere preponderance of evidence in the determination of the accused's culpability. The U.S. Supreme Court has ruled in various cases that if anyone is determining that an individual committed a crime and if that determination imposes serious social consequences on the accused, then the determiner must employ criminal due process protections to make certain that it does not make a mistake in its determination. This is especially true when institutions are making determinations that would ordinarily only be made by the government (in its criminal courts).

There is no other determination made in our culture that has more social consequences on an accused person than an accusation of sexual misconduct. In the context of campus sex tribunals, a determination that an accused committed a criminal act of sexual assault, with permanent notations on his records and resulting expulsion or suspension from the school, leaves a student in a position in which his reputation is severely impaired for life. It also severely impairs his ability to get into other schools and may prohibit him from going to any school as no school wants to risk the attendance, on campus, of someone who is determined to be a sex offender. The notation of sexual offender on his school transcripts also severely impairs his ability to find employment in his educational field, and it may lead to a lifetime of social ostracism.

These severe consequences, impairment of liberty and property, as well as a lifelong stigma as a sex offender, compel high standards of due process, according to Supreme Court rulings, in making such a determination against an accused. What the Supreme Court has ruled is that school officials cannot adjudicate culpability in disciplinary proceedings that involve a sex crime with the same level of due process that must be applied in determining culpability in disciplinary matters such as a food fight. School officials must impose higher standards of due process on determinations of criminal sex conduct than they use in adjudicating campus food fight (or minor) offenses. School officials determining criminal sexual conduct of a student must apply an evidentiary standard of "beyond a reasonable doubt" in order to be certain of the determination before imposing such severe consequences (by way of stigma) on a student.

The Court has made this the law in a many of its rulings.

Below is the public comment I drafted for the U. S. Department of Education on the subject with complete citations to U. S. Supreme Court rulings.

REFERENCE

Victor v. Nebraska, 511 U.S. 1, 27, 114 U. S. 1239, 1253 (1994)

January 23, 2019

Hon. Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Room 6E310
Washington, DC 20202

Public Comment

Re: 83 Fed. Reg. 61,462 (November 29, 2018)
Notice of Proposed Rulemaking
ID: ED-2018-OCR-0064-0001

Portal Dispatch: 1k3-97uk-uy5y

Dear Secretary Devos:

The Perses Institute is a global NGO that fosters gender balance and equality in institutions worldwide.

The author of this submission is a former federal and state prosecutor with 35 years of trial experience, and, former appointments as a public official in state and federal positions. His legal education includes a Juris Doctor (J.D.) from the University of Seattle School of Law, and, a post-doctoral Legis Magister (LL.M.) from New York University School of Law.

We respectfully submit comment on the agency's proposed rulemaking on Campus adjudications of Title IX proceedings, especially those pertaining to sexual misconduct or sexual harassment.

EXECUTIVE ABSTRACT

In response to the Secretary's directed question No. 6, we assert that Supreme Court cases expressly hold that one standard of evidence in any civil proceedings is neither appropriate, nor in compliance with constitutional due process requirements.

We also assert, that given the punitive nature of campus adjudications of sexual misconduct, the certainty of extra-judicial punishment against an accused, the serious impairment of an accused's liberty and property interests, and, the ready availability of other civil and criminal remedies to address campus safety, Supreme Court cases compel a standard of evidence of "beyond a reasonable doubt" in campus adjudications of sexual misconduct.

This comment addresses the Department's Directed Question No. 6:[1]

> *6. Standard of Evidence. In § 106.45(b)(4)(i), we are proposing that the determination regarding responsibility be reached by applying either a preponderance of the evidence standard or the clear and convincing standard, and that the preponderance standard be used only if it is also used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. We seek comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and*
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> *(2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.*

COMMENT ANALYSIS:

We believe that it is neither desirable, nor constitutional, to require a uniform standard of evidence for all Title IX cases. We believe that current case law on due process requires the regulations to impose a higher standard of evidence ("clear and convincing" or "beyond a reasonable doubt") in cases that involve accusations of sexual conduct against an individual.

[1] Whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard? https://www.federalregister.gov/d/2018-25314/p-212

The proposed regulation allows a college or university to adopt one standard of evidence, including the lowest standard of evidence ("preponderance of evidence") in all disciplinary proceedings. Existing Supreme Court opinions, however, hold that there is no single standard of evidence that fulfills the requirements of due process. In *Goss v. Lopez*,[2] the Supreme Court instructs us that:

> *"[T]he interpretation and application of the Due Process Clause are intensely practical matters and ... 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' " Goss, 419 U.S. at 578, 95 S.Ct. 729 (alteration omitted) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)).*

The *Goss* opinion answers the first part of the agency's directed question. There is no single standard of evidence that will satisfy due process requirements in all civil proceedings, including civil proceedings that adjudicate student misconduct and student sexual misconduct.

Goss was the first U.S. Supreme Court opinion to directly address the issue of due process in the context of school disciplinary proceedings. Among other seminal holdings, the Court expressly held that a student has both a property interest in school disciplinary proceedings (in the form of the right to attend school), and a liberty interest in school disciplinary proceedings since disciplinary proceedings, and records of them, impair the student's reputation (and therefore his future liberty within our society of laws).

> *The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied. Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); Board of Regents v. Roth, supra, 408 U.S. at 573, 92 S.Ct. at 2707. Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).*

A few years after the *Goss* decision, the Supreme Court explained that some civil proceedings require heavier burdens of proof, to ensure the integrity of fact finding, than civil cases involving mere lawsuits for money (or, by implication, campus adjudications of cafeteria

[2] 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

food fights).

WHAT STANDARD IS MOST APPROPRIATE?

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Court court decided that civil cases, when they involve a liberty interest, require a standard of "beyond a reasonable doubt," to ensure the integrity of the proceedings.

> *... adopting a "standard of proof is more than an empty semantic exercise." Tippett v. Maryland, 436 F.2d 1153, 1166 (CA4 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. dismissed sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972). In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." 436 F.2d, at 1166.*

Id. at 425. The Court went on to discuss the nature of a civil commitment proceeding. It reasoned that since a commitment to an institution was a severe infringement on liberty, then, a normal civil standard of "preponderance of the evidence" did not satisfy due process of law. The court discussed, in *dicta*, that ordinarily, such a deprivation of liberty required a standard of "beyond a reasonable doubt."

The Court continued, however, to reason that in the case of civil commitment to an institution, since the purpose of the proceeding was to provide treatment and assistance to the defendant, and, because such a proceeding was non-punitive in nature, then, the standard of evidence required for due process could be lowered to "clear and convincing" evidence, rather than a standard of "beyond a reasonable doubt."

In reaching this conclusion, the Court discussed its holding in its prominent 1970 case: "*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The *Winship* case is relevant to Title IX proceedings for a number of reasons. First, the case involved proceedings against young persons subject to being stigmatized, and, subject to extra-judicial punishment from a finding of culpability. Second, the proceeding involved quasi-criminal adjudication that would stigmatize the defendant, with a label of criminal or quasi-criminal misconduct, upon a finding of culpability. Third, the case involved possible deprivation of a liberty interest. Fourth, the case in *Winship* was a punitive proceeding. Fifth, the proceedings in *Winship* (juvenile delinquency proceedings) were designated by the state as

"civil" proceedings (even though they adjudicated criminal misconduct). In the *Winship* case, because of these factors, the Court had held that there must be a standard of evidence of "beyond a reasonable doubt" in those proceedings, in order to provide due process of law (even though the proceedings were designated as "civil proceedings").

If we apply the analysis from the *Winship*, *Goss* and *Addington* cases to the Department's current question, then, we believe the Supreme Court's trilogy compels an evidentiary standard of "beyond a reasonable doubt" in university proceedings adjudicating sexual misconduct issues.

The adjudication of sexual misconduct is highly likely to impair an accused's property interests and liberty interests. Sexual misconduct is a very emotional issue in our culture. Sexual misconduct accusations, alone, often produce violence,[3] calumny and scorn against an accused. Attaching a label of sexual misconduct to a student or employee heavily increases the probability that he/she will be subject to extra-judicial punishment for the remainder of their lives. This impairs their freedom to interact socially, economically and professionally for a long period of time after any adjudication. It also deeply affects the accused's property interests in their reputation. Impairment of an accused's reputation severely limits their freedom within our culture and within the education system. *See generally*, James M. Piccozi, Note, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get , 96 YALE L.J. 2132, 2138 (1987) ("[t]he most significant alteration of an expelled student's status, though, is his inability to re-enroll at another university. A subsequent university to which a student may apply always knows of the reasons for his prior dismissal. If he leaves without having earned his degree, the student must make an affirmative showing to any subsequent university to which he applies that he left the original university in good standing"). *Marshall v. Ind. Univ.*, 170 F.Supp.3d 1201 (S.D. Ind., 2016).

The Court has recognized that proceedings, which impair an accused's reputation, are proceedings which severely impair both his liberty, and property interests, to an extent much

[3] The Senate has recently passed a Bill making it a federal felony to "cause" [incite] "lynching" in the form of any injury that results to someone based on their gender [lynching is a *de facto* gendered crime, with 99% of lynchings having been perpetrated against men]. *See*, **S.3178 - 115th Congress (2017-2018): Justice for Victims of Lynching Act of 2018**.

greater than simple civil proceedings in which payment of money is the sole relief. The entire purpose of campus adjudications in sexual misconduct cases is to punish the accused and harm his reputation. They have no other purpose. Arguably, the campus authorities have a safety interest in adjudicating sexual misconduct. Nevertheless, this safety interest does not obviate the need to provide adequate due process protections. To quote a distinguished federal jurist, Justice Edith H. Jones, of the Fifth Circuit Court of Appeals (in a dissenting opinion):

> *What drives my concern is the close association between the charges leveled against them and actual criminal charges. Sexual assault is not plagiarism, cheating, or vandalism of university property. Its ramifications are more long lasting and stigmatizing in today's society. The University wants to have it both ways, degrading the integrity of its fact-finding procedures, while congratulating itself for vigorously attacking campus sexual misconduct. Over-prosecution is nothing to boast about. Plummer v. Univ. of Hous., 860 F.3d 767 (5th Cir., 2017).*

Justice Jones was objecting to a university implementing a standard of preponderance of evidence in a campus adjudication in which the University was adjudicating quasi-criminal misconduct against the5 accused persons (both a man and a woman). She stated that an accused was not automatically entitled to the same due process protections in such a proceeding as a criminal proceeding, but was nevertheless entitled to more due process protections than an accused in a simple civil lawsuit in which money was the only consequence of a finding of culpability.

When government action, such as finding culpability for an accusation of misconduct, that is as serious as sexual misconduct, occurs, then the Courts must examine the extra-judicial punishment that may be imposed on the accused in order to determine the proper level of due process required.

A distinguished federal jurist, Hon. Richard Matsch (Oklahoma City bombing trial judge) has recently held that misuse of sexual misconduct stigmas, such as using a finding of culpability for sexual misconduct to impair someone's property and liberty interests, is punitive in nature and unconstitutional state action unless it directly results from due process of law afforded to the accused. *Millard v. Rankin*, 265 F.Supp.3d 1211 (D. Col. 2017) (citing the "intent-effect" analysis in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). "The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our

history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a non-punitive purpose; or [5] is excessive with respect to this purpose.").

All of these five factors apply to a campus adjudication of sexual misconduct. Notwithstanding the pretense of adjudicating campus sexual misconduct for "safety" reasons, the sole purpose of a campus adjudication of sexual misconduct is to punish the accused. Any person, including the campus administration and police, has more than adequate recourse to the civil or criminal justice system to protect people on campus from sexual offenders. Any person can readily report sexual misconduct to the local police, campus police, state police or other local law enforcement in order to receive the exact same level of protection afforded to any other person in the U.S. In addition, any accuser has immediate, open and low-cost or free access to civil restraining orders in virtually every state, from local courts, to address safety issues. Campus adjudications of sexual misconduct, for safety reasons, are unnecessary.

We assert that the adjudication of sexual misconduct, as compelled by Title IX and the regulations and cases construing it, renders those adjudications as government action. When the government compels a private party, with coercive action (such as threatening to withdraw Billions of dollars in federal funding), to perform a specified activity, then, state action results from the private party's compliance. *Blum v. Yaretsky*, 457 U.S.991, 1004 (1982).[4]

As government/state action, these adjudications require constitutional scrutiny, and, the application of due process requirements that fulfill the constitutional mandates of federal cases on due process. We therefore assert that the Agency is required in its regulations to impose a regulatory standard of evidence, in sexual misconduct proceedings, of "beyond a reasonable doubt."

Arguably, the *Winship* trilogy of cases on the standard of evidence, in quasi-criminal civil

[4] State action also results from the actions of a private party when the private party is conducting activity that is exclusively and traditionally reserved to the state (such as the adjudication of sexual misconduct). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 42 L.Ed.2d 477, 482, 95 S.Ct. 449, 456 (1974). ("[S]tate action [is] present in the exercise by a private entity of powers traditionally exclusively reserved to the State.")

proceedings, is older law from the Supreme Court. Nevertheless, they have never been overruled or attenuated. They are still "The Law" standing in the United States.

More than one recent trial court has entertained the issue that the adjudication of sexual misconduct is a "quasi-criminal" proceeding, and, even though conducted under the storefront of a "civil proceeding" is subject to a higher standard of proof than preponderance of the evidence. These cases, however, have dismissed the claim on other grounds (qualified immunity for example) and avoided the constitutional issues.[5]

The implementation of low standards of evidence, in Title IX proceedings, was originally compelled (arguably as state action) by Vice President Joseph Biden in 2011 in what is commonly known as "*The Dear Colleague Letter*."[6]

Since the *Dear Colleague Letter*, however, federal courts have taken a closer look at the nature of college tribunals adjudicating sexual misconduct, and, have found that those tribunals are imposing extra-judicial punishment on accused students, as well as impairing important liberty and property interests of an accused. Since the tribunals are affecting the accused's students' liberty and property interests, by imposing extra-judicial punishment, federal courts are considering imposing appropriate due process standards on those tribunals in the form of requiring a higher standard of proof than "a preponderance of evidence."

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[5] S*ee e.g.*, *Marshall v. Ind. Univ*., 170 F.Supp.3d 1203 (S.D. Ind., 2016). (Plaintiff raised the issue of the university employing a standard of "preponderance of the evidence" in the quasi criminal adjudication of sexual misconduct. The trial court dismissed the claim on the basis of qualified immunity of the defendants, but, noting in dicta: "Although Marshall's argument that more process was potentially warranted in his case is compelling, particularly with regard to the seemingly deficient evidentiary standard applied by the Defendants at the hearing, his arguments do not find support under either Indiana or Seventh Circuit law." *Marshall v. Ind. Univ*., 170 F.Supp.3d 1201,1208 (S.D. Ind., 2016)). Notably, the trial court did not examine the binding Supreme Court law enunciated in the *Winship*, *Goss*, *Addington* trilogy.

[6] OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011) at 11. Hereafter: "*Dear Colleague Letter*." "[I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence. *Id*. 7

SUMMARY AND CONCLUSIONS:

The "Dear Colleague Letter" was promulgated without regulatory compliance, and, has no force of law. The *Winship* trilogy, however, on the issue of the burden of proof in quasi criminal civil cases, mandates imposing a higher standard in college administrators adjudicating sexual misconduct than the standards administrators use to adjudicate "cafeteria food fights." Those cases compel the proposed regulations to impose a higher standard of evidence in campus tribunals that seek to banish, shame and punish students accused of sexual misconduct. We submit that current case law compels the Department's proposed regulation to read similar to the following:

> *Determination regarding responsibility. (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the clear and convincing evidence standard to any allegation that charges an accused with sexual misconduct, although the recipient may employ the preponderance of the evidence standard on allegations that do not express or imply that the accused has committed sexual misconduct. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.*

Respectfully Submitted,
/s/
Perses Institute
John Davis
Chief Counsel

JEP/bh
cc: Various

AUTHOR PROFILE

John Davis is a retired public official and international lawyer who writes on current gender issues. He was educated at Case Western Reserve University (BA), Seattle University School of Law (JD), and New York University School of Law (LL.M post-doctoral). John is fluent in seven languages (including ancient Latin and Greek). He has held positions such as Assistant Attorney General, United States Speaker, and Assistant District Attorney, Chief Wing JAG, U. S. Air Force Auxiliary, and Supreme Court Law Clerk. The author of eight books, John currently edits *Gender Studies for Men*, which publishes "balanced discussions of contemporary gender issues" on medium.com.

Contact details: facebook3337@gmail.com