

THE VIOLENCE AGAINST WOMEN ACT AND DOUBLE JEOPARDY IN HIGHER EDUCATION

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The reauthorization of the Violence Against Women Act (VAWA), set to expire this year, has elicited predictable partisan rancor.¹ While there is little chance of the reauthorization being enacted by Congress so close to an election, the Senate draft includes a provision that raises interesting issues for the rights of students involved in sexual assault disciplinary proceedings on campus.

The bill requires all institutions receiving federal funding to develop:

Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that—

....

(III) both the accuser and the accused shall be simultaneously informed, in writing, of—

....

(bb) the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding²

This language is ambiguous, but appears to go further than the April 4, 2011, "Dear Colleague Letter" (DCL) issued by the Department of Education's Office for Civil Rights (OCR), which interpreted Title IX to require that *if* a university provides a right to appeal in sexual assault cases, *then* it must pro-

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1. See Jonathan Weisman, *Women Figure Anew in Senate's Latest Battle*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/15/us/politics/violence-against-women-act-divides-senate.html>.

2. Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong. § 304 (as introduced in the Senate, Nov. 30, 2011).

vide an appeal for both the accuser and the accused.³ The Senate version of VAWA could arguably condition a university's receipt of federal funds on a requirement that the university *always* provide an appeal right for both accuser and accused.⁴

Setting aside the massive rise in federal micromanagement of college disciplinary proceedings,⁵ both the DCL and the proposed language in VAWA raise serious, unsettled issues of the application of double jeopardy principles in the higher education context. As noted in *Goss v. Lopez*,⁶ the leading Supreme Court case on point, students facing disciplinary action in school have substantial liberty and property interests at stake, interests that demand due process. However, the *Goss* inquiry into the adequacy of process simply requires additional, unspecified process the greater the penalty involved, and to date the Supreme Court has refused to identify a list of procedural rights in college disciplinary hearings.⁷ Without delineating what constitutes minimum process under *Goss*, permitting rehearing threatens the fundamental constitutional rights of students.

"Double jeopardy" can refer to two distinct concepts. First, double jeopardy can refer to the formal constitutional right, as enshrined in the Fifth Amendment, not to be tried more than one time for the same criminal offense. As discussed more below, this does not just implicate formal criminal trials, but may also protect defendants in quasi-criminal proceedings such as college disciplinary hearings. Second, double jeopardy can refer to the general concept that it is not fair in any proceeding, criminal or otherwise, to keep revisiting the same factual issues time and again, including the issues that would be revisited if an accuser were afforded the right to appeal an acquittal in a college disciplinary proceeding. These principles are found in the Due Process clauses of the

3. See 20 U.S.C. §§ 1681-88 (2011); see also "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary, U.S. Dep't of Ed., Office for Civil Rights, at 12 (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> ("If a school provides for appeal of the findings or remedy, it must do so for both parties.").

4. While neither the DCL nor the proposed language in VAWA are limited to appeals of matters of fact, this article will only address such appeals.

5. This micromanagement truly puts "unconstitutional conditions" doctrine under strain. See Richard Epstein, *Title IX or Bust*, DEFINING IDEAS (Feb. 7, 2012), <http://www.hoover.org/publications/defining-ideas/article/107626>.

6. 419 U.S. 565 (1975).

7. See James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2133 (1987) ("To this day . . . the Supreme Court has never specified what those more formal procedures should be or when they should be required."). For a more recent discussion, see *Furey v. Temple Univ.*, No. 09-2474, 2012 U.S. Dist. LEXIS 108874, at *57-61 (E.D. Pa. Aug. 3, 2012). See also Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653 (2001).

Fifth and Fourteenth Amendments, and sometimes find their expression in common law concepts, such as *res judicata*.⁸

FIFTH AMENDMENT PROHIBITIONS ON DOUBLE JEOPARDY

Whether the Fifth Amendment prohibition on double jeopardy in criminal trials applies in the context of public colleges rests on the general framework found in *Hudson v. United States*⁹ for assessing whether a statute is “criminal.” The first step is to determine whether a statute is intended by the legislature to be “civil” or “criminal,” and the second step asks whether the statutory scheme (even if facially “civil”) is sufficiently “punitive, either in purpose or effect,” for the purpose of attachment of double jeopardy. This statutory inquiry relies on a number of traditional factors, including:

- (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.¹⁰

To some extent, it could be argued that college disciplinary proceedings can fit each of the *Hudson* factors (although it is unlikely that these arguments would succeed, given current case law in this context). An accused student’s brief would apply *Hudson* as follows: expulsion, the most serious single punishment available in higher education, (1) is a restraint on the ability of a student to study and find a job; (2) is regarded as a punishment; (3) is usually reserved for those actions involving actual knowledge; (4) is primarily geared towards deterrence and retribution; (5) is often, as is the case in disciplinary hearings involving sexual assault, meted out for behaviors that are already criminal; (6) often has no alternative purpose—indeed, permanent expulsion, as the academic equivalent of the death penalty, can by definition have no rehabil-

8. *See, e.g., Ashe v. Swenson*, 397 U.S. 436, 444 (1969) (holding that the Double Jeopardy Clause incorporates the broader, historical common law principle of collateral estoppel); *See also* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1812 (1987) (“[T]he root, commonsense idea underlying double jeopardy is generalizable beyond criminal cases: Government should not structure the adjudication game so that it is ‘heads we win; tails let’s play against until you lose; then let’s quit (unless we want to play again).’”).

9. 522 U.S. 93 (1997). Determining whether such constitutional prohibitions apply to a similar scheme at a private university requires an antecedent showing of state action by that university, something which this article does not address.

10. *Id.* at 99-100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)) (alterations and internal quotation marks omitted).

itative function; and (7) can be excessive. While not all college disciplinary proceedings involve accusations of criminal activity, it is not uncommon for criminal activity to be at the heart of those proceedings. Moreover, even when those hearings involve violations of rules that do not implicate criminal law—for example, accusations of plagiarism—it is difficult to ignore the punitive nature of the proceedings.

As noted above, however, courts have so far declined to find a Fifth Amendment prohibition on double jeopardy in the college context. In one case, *State ex rel. Fleetwood v. Board of Education*, predating *Hudson*, a court summarily declared that a second suspension for the same underlying conduct was “civil in nature.”¹¹ In *Students for Sensible Drug Policy Foundation v. Spellings*, a more recent class action suit assessing the constitutionality of a federal statute which prevented drug offenders from receiving federal student loan monies, the Eighth Circuit applied both steps of the *Hudson* analysis to find the prohibition to be civil in nature.¹² However, the Eighth Circuit found that the fourth and fifth factors were met, and that several of the other factors were only set aside on balance (for instance, the punishment was not excessive or enough of an affirmative restraint), implying that a federal education statute might, in another context, violate double jeopardy protections.

Importantly for the court, the only potential sanction applied to a student in *Hudson* was the withdrawal of funds. In the VAWA case, by contrast, the only possible statutory sanction is the removal of federal funding from universities. While possible sanctions against students include expulsion by the university and social stigma associated with the underlying charges, it is difficult to connect these penalties to the statute itself. Thus, whether a federal statute violates the formal strictures of the Fifth Amendment prohibition on double jeopardy remains to be seen, but it is certainly closer to the line than the statute in *Fleetwood*.

DUE PROCESS PROHIBITIONS ON REPEAT PROCEEDINGS

A stronger case can be made, however, that double jeopardy in the public college disciplinary context is prohibited by the due process concerns posed by repeating a disciplinary procedure. Both public and private colleges must be concerned with fundamental fairness and accuracy in their disciplinary proceedings—principles violated when colleges hold disciplinary proceedings predicated on the same underlying conduct multiple times in an attempt to find the accused guilty rather than innocent. As civil libertarian Wendy Kaminer has

11. 252 N.E.2d 318, 321 (Ohio Ct. App. 1969) (per curiam).

12. See *Students for Sensible Drug Policy Found. v. Spellings*, 523 F.3d 896, 901-02 (8th Cir. 2008).

noted in the *Atlantic*, “you’d have to regard the protection against double jeopardy as a mere constitutional technicality to believe that schools should dispense with it. Or you’d have to assume that, as a general rule, fairness requires convictions and provides multiple opportunities to obtain them.”¹³

The constitutional guarantee of fair proceedings is secured in the Fifth and Fourteenth Amendments to the Constitution, and these due process guarantees apply not only to court proceedings, but on the public campus. Put another way: “For students facing discipline at public universities, the Constitution shapes the proceedings: Federal courts view the student’s continued enrollment as a protected property interest, immune from arbitrary state action.”¹⁴ Indeed, some jurisdictions recognize that even private universities may not act arbitrarily or capriciously in meting out discipline to students.¹⁵

The *Goss v. Lopez* inquiry, mentioned above, into the adequacy of college disciplinary process is fact-bound, echoing the procedural due process balancing test outlined in *Mathews v. Eldridge*: courts must balance the interest of the individual adversely affected by official action against the government interest involved, including the costs of the additional procedural safeguards, and against the risk of error inherent in the current process.¹⁶ Applying this analysis, circuit courts rarely delineate specific formal requirements, preferring district courts to require “more formal procedures” as the potential penalties appear greater. Put another way, *Goss* and subsequent university discipline cases hold that the more the process looks like an adversarial process or even a criminal trial (here the due process analysis echoes the double jeopardy analysis in *Hudson*), the stronger the constitutional due process protections required.¹⁷

To see why repeating an academic judicial process violates due process, therefore, it is useful to see where a repeat procedure does the most damage. One argument by some courts and advocates minimizes the individual interest prong of the *Mathews* analysis, contending that because students accused of

13. Wendy Kaminer, *What’s Wrong with the Violence Against Women Act*, ATLANTIC (Mar. 19, 2012)(arguing that while the formal prohibitions of the Fifth and Sixth Amendment are not applicable in the college disciplinary context, fundamental fairness demands similar prohibitions), <http://www.theatlantic.com/national/archive/2012/03/whats-wrong-with-the-violence-against-women-act/254678>.

14. Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 290 (1999); see also *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

15. See *Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 98-99 (La. Ct. App. 1993); *Coveney v. President & Trs. of College of Holy Cross*, 445 N.E.2d 136, 138 (Mass. 1983); *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 113 (Minn. 1977).

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

17. See, e.g., *Furey*, *supra* note 7 at 398. (“If an institution decides not to allow counsel or cross examination to avoid an adversarial hearing and the additional administrative burden and cost, it must make sure that the hearing it does provide is fair and impartial.”).

misconduct are not risking imprisonment, for example, universities can subject students to subsequent trials. These advocates contend that college disciplinary proceedings should be fluid, granting wide discretion to administrators to mete out punishment in line with pedagogical goals.

Ironically, those in favor of fluidity in college disciplinary proceedings often also contend that prohibitions on repeat proceedings are not necessary because college disciplinary proceedings are formally analogous to civil suits. Since defendants in civil trials do not risk imprisonment, and since student code penalties are civil in nature, they assert that it does not violate due process to allow retrials in these situations.¹⁸

However, while college disciplinary proceedings are not perfectly analogous to criminal trials, neither are they perfectly analogous to civil suits. Indeed, defendants in civil trials have many rights that offset the unfairness posed by the possibility of rehearing. In civil suits, there are robust rules of evidence and procedure designed to protect both parties. Parties can settle, and have discovery rights and at least some right to a jury. Finally, in civil suits, there is not usually a stigma associated with a loss in court; by contrast, a student found guilty of academic misconduct or rape is may be excluded from higher education and at a disadvantage in the job market. As noted in *Goss*:

‘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. . . . If sustained and recorded, [charges leading to suspensions of up to ten days] could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.¹⁹

In fact, these contrasts between formal civil suits and college disciplinary proceedings point towards greater need for prohibitions on repeat proceedings, given the absence of other, mitigating procedural safeguards.

For example, a student accused in state court of felony theft has the right to a lawyer, to a jury, to an appeal, to have evidence disclosed, to cross-examine

18. See, e.g., Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 13 nn.46 & 48-49, 57 (2004).

19. *Goss*, 419 U.S. at 574. Furthermore, many prospective employers and educational institutions require previous transcripts. For an example of the *Goss* stigma in action, see the case of Caleb Warner at the University of North Dakota, who was falsely accused of rape and, until the school disciplinary sanctions were overturned, prohibited from attendance at every university in the state. Justin Pope, *On Campus, Debate over Civil Rights and Rape*, BOS. GLOBE (Apr. 21, 2012), http://articles.boston.com/2012-04-21/news/31379502_1_sexual-violence-sexual-assault-assault-on-college-campuses. In addition, after false rape accusations at Duke University, “demonizing” of the innocent students continued even after their exoneration. See Peter Applebome, *After Duke Prosecution Began to Collapse, Demonizing Continued*, N.Y. TIMES, Apr. 15, 2007.

witnesses, to present witnesses, and, if certain conditions are met, possibly to have a conviction expunged. A student sued for civil fraud in state court has many of the same rights.

By contrast, if the same student is later tried in a college proceeding, it might go something like this: On day one, the student receives a letter from the dean stating that he or she is accused of theft. On day two, the student turns in a sheet of paper detailing his or her side of the story. On day three, the student receives a letter of notification that he or she has been found not guilty, based on the whole record. In such a situation, it is fundamentally unfair to allow the university to reopen the case the next year at the behest of the student's accuser and revisit the same record. Because there are fewer procedural safeguards, repeated proceedings can do much more damage to the fairness of a proceeding on campus than in the civil context.²⁰

The unfairness of retrial at the behest of the accuser does not just involve the arbitrariness of allowing repeat proceedings against the accused; rather, re-hearing has real consequences for the accuracy of the proceedings. For example, as time progresses, the memories of witnesses fade, reducing the accuracy of factual determinations. Some colleges partially mitigate this by establishing a set time period within which to bring allegations of academic or other misconduct. But even when witnesses still have strong memories, testifying about factual circumstances for a second time may be unnatural to them and sound rehearsed, ruining the credibility of even truthful witnesses. This cuts both ways: victims could also appear less credible and guilty parties could be unfairly exonerated. As a result, university counsels drafting hearing procedures would do well to limit appeals to determinations of the applicability of conduct codes (matters of "law") rather than determinations of fact. At the least, where determinations of fact are appealable, a higher burden of proof should be placed on the appellant, to comport both with an initial presumption of innocence of the accused (when appealing an acquittal) and to justify having a lower proceeding at all (when appealing an acquittal or a conviction).

Whatever the legal basis, it is clear that both Congress and the Department of Education ought to take seriously the risk that mandating that all universities receiving federal funds afford a dual appeal right in college disciplinary proceedings violates fundamental notions of fairness and legal norms prohibiting double jeopardy. College disciplinary hearings are serious matters that retain very few specific procedural safeguards for accused students, and permitting "do-overs" (let alone mandating them) does incredible damage to the fundamental rights of students.

20. Some courts might find that such a scheme also violates a due process right to notice, however. *See, e.g.,* *Waln ex rel. Waln v. Todd Cnty. Sch. Dist.*, 388 F. Supp. 2d 994, 1007 (D.S.D. 2005).