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Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus

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SEX, BOOZE, AND CLARITY: DEFINING SEXUAL ASSAULT ON A COLLEGE CAMPUS

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INTRODUCTION

Nearly one in four women[1] will become a victim of sexual assault while attending college.[2] It is estimated that over 100,000 students each year "are too intoxicated to know whether they con-

1. Throughout this Note, I will refer to the survivor and perpetrator in gender-neutral terms to reflect the fact that not all survivors of sexual assault are women and not all perpetrators are men. This includes the editing of source material to be gender-neutral except where it would be intellectually dishonest to do so, such as in survey data.

2. Kay Hartwell Hunnicutt, *Women and Violence on Campus*, *in* VIOLENCE ON CAMPUS 149, 152 (Allan M. Hoffman et al. eds., 1998).

sented to sexual intercourse"[3] and more than 70,000 students a year are "[survivors] of alcohol-related sexual assault or acquaintance rape."[4] Responding to the problem, Congress passed several pieces of legislation that required colleges to address the issue.[5] Colleges, in response to the problem and the federal legislation, developed comprehensive sexual assault policies and procedures,[6] including the addition of student disciplinary regulations proscribing sexual assault.[7]

Yet even with the addition of these policies and procedures, eighty-three percent of sexual assaults go unreported to campus officials.[8] One reason, as studies have shown, is that a substantial number of survivors do not label the incident as sexual assault, even when the experience complies with the technical definition.[9] Additionally, even with a written student disciplinary regulation proscribing sexual assault, perpetrators do not define their behavior as the commission of sexual assault,[10] and as a result, continue to believe the behavior is appropriate.[11]

The campus environment plays a significant role in creating confusion about which acts constitute sexual assault. College is an exciting and often confusing time for students.[12] This new experience

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3. William DeJong, *The Impact of Alcohol on Campus Life*, *in* RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS 101, 104 (David R. Karp & Thom Allena eds., 2004).

4. *Id.* at 104-05.

5. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 1 (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/205521.pdf [hereinafter NAT'L INST. OF JUSTICE] (noting that these laws require colleges "to notify students about crime on campus, publicize their prevention and response policies, maintain open crime logs, and ensure sexual assault victims their basic rights").

6. *See* HEATHER M. KARJANE ET AL., CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND viii (2002), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf (noting that colleges "have made substantial strides in the direction of developing explicit sexual assault policies").

7. *Id.* (noting "that most campuses . . . d[o] articulate some definition of rape and other forms of sexual assault").

8. Bonnie S. Fisher, et al., *Crime and Sexual Victimization on College and University Campuses: Ivory Towers or Dangerous Places?*, *in* RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS, *supra* note 3, at 217, 227.

9. *See* KARJANE ET AL., *supra* note 6, at vii (explaining that "even though the incident is legally a criminal offense, [survivors] do not call their victimization a 'rape'").

10. *See* MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT 79 (1997) (noting that the perpetuation of "rape myths" leads to a "very narrow definition" of sexual assault).

11. *See* THE CAMPUS COMMUNITY CONFRONTS SEXUAL ASSAULT: INSTITUTIONAL ISSUES AND CAMPUS AWARENESS 3 (Juneau Mahan Gary ed., 1994) [hereinafter CAMPUS COMMUNITY] (noting that perpetrators will not change their behaviors until "they examine and label them as aggressive and violent").

12. *See* University Counseling Center, The George Washington University, *Understanding the Transition to College*, http://gwired.gwu.edu/counsel/ResourcesforParentsFacultyStaff/ParentServices (last visited Nov. 11, 2009) (noting that "college will

is defined by coed dorms, near constant socializing that often involves alcohol, and the ability to retreat to a private room with no adult supervision.[13] The environment creates a socialization process where appropriate behavior is defined by the actions of peers, particularly when it comes to sexual behavior.[14] Given this environment, sexual assaults on campus are often committed by someone the survivor knows[15] and, in most incidents, at least one individual is under the influence of alcohol.[16]

This Note will seek to convince college officials of the need to more precisely define the behavior that constitutes sexual assault under their student disciplinary regulations. This action is necessary both as a legal and policy matter. As a legal matter, the ambiguity within the text of the regulation itself may give rise to potential legal challenges to the regulation under the void-for-vagueness doctrine. As a policy matter, a more precise definition is needed to facilitate the labeling of certain acts as sexual assault from the viewpoint of both the perpetrator and the survivor, which will encourage more survivors to report their victimization and discourage perpetrators from ever engaging in such conduct. This Note will explain the history of the void-for-vagueness doctrine, its application to student disciplinary regulations, and will propose a definition of sexual assault for use in a student disciplinary regulation proscribing such conduct.

I. VOID-FOR-VAGUENESS DOCTRINE: HISTORY AND APPLICATION TO STUDENT DISCIPLINARY REGULATIONS

The void-for-vagueness doctrine "is embodied in the due process clauses of the fifth and fourteenth amendments."[17] The doctrine is used to ensure that an individual has "fair notice" and an "adequate warning" of the fact "that sanctions are attached to [the] conduct he

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likely be a period of intellectual stimulation and growth, career exploration and development, increased autonomy, self-exploration and discovery, and social involvement").

13. *See* Fisher et al., *supra* note 8, at 225.

14. *See* KATHLEEN A. BOGLE, HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS 74 (2008) (explaining that college students' perception of appropriate sexual behavior is largely based on the "norms for their peer group" because "students define their own sexual behavior relative to others, particularly other students of the same sex").

15. *See* Connie J. Kirkland, *Program Case Study: Campus-Based Sexual Assault Services — On the Cutting Edge*, *in* RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS, *supra* note 3, at 239, 245 (noting that "[o]ne of the biggest dilemmas is reporting someone the [survivor] knows").

16. *See* Michele A. Paludi & Darlene C. DeFour, *Sexual Harassment of Students: The Hidden Campus Violence*, *in* VIOLENCE ON CAMPUS, *supra* note 2, at 187 (noting that "[m]any acts of sexual violence on college campuses involve the use of alcohol").

17. Woodis v. Westark Cmty. Coll., 160 F.3d 435, 438 (8th Cir. 1998).

contemplates."[18] The doctrine also prevents those government officials charged with enforcing a regulation or statute from doing so in an arbitrary or discriminatory manner.[19] The doctrine has been applied to criminal statutes,[20] civil regulations,[21] and though courts initially expressed reluctance, the void-for-vagueness doctrine has become one of the tools students have used to vindicate and protect their due process rights.[22]

A. The Void-for-Vagueness Doctrine

The void-for-vagueness doctrine, though in existence since common law, has taken many forms and has based its foundation on a variety of authorities. At common law, courts refused to enforce laws that were found to be "too uncertain to be applied."[23] In early Supreme Court jurisprudence, the Court invalidated unclear laws based on a separation of powers doctrine.[24] There is also Supreme Court precedent for invalidating criminal convictions because the accused "was denied his right to be informed 'of the nature and cause of the accusation' as guaranteed by the Sixth Amendment."[25] Over time, however, the void-for-vagueness doctrine cemented its foundation in the Fifth and Fourteenth Amendments' Due Process Clauses.[26] Though the void-for-vagueness doctrine was originally applied solely to criminal statutes, specifically the description of prohibited conduct,[27] the doctrine has been extended to other areas, including the level of punishment that may be imposed for a criminal conviction[28] and civil regulations.[29]

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18. Note, *Bringing the Vagueness Doctrine on Campus*, 80 YALE L.J. 1261, 1265-66 (1971).

19. *Id.* at 1266.

20. WAYNE R. LAFAVE, CRIMINAL LAW 97 (3d ed. 2000).

21. *See* Arnett v. Kennedy, 416 U.S. 134, 158 (1974) (finding that the regulations governing the process by which to dismiss a federal employee, a civil action, were not invalid for vagueness).

22. *See* Sill v. Pa. State Univ., 462 F.2d 463, 470 (3d Cir. 1972) (noting that the void-for-vagueness doctrine "extends to rules regulating the conduct of students in educational institutions chartered or supported by the state"); Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969) ("To the extent that *Esteban v. Central Missouri State College* . . . refuses to apply standards of vagueness . . . required of universities by the Fourteenth Amendment we decline to follow it.").

23. LAFAVE, *supra* note 20, at 97.

24. *Id.*

25. *Id.*

26. Connally v. Gen. Constr. Co., 269 U.S. 385, 390 (1926); LAFAVE, *supra* note 20, at 97.

27. LAFAVE, *supra* note 20, at 97.

28. *See* United States v. Evans, 333 U.S. 483, 495 (1948) (noting that the vagueness extended to the statutorily required penalties).

29. *See* Arnett v. Kennedy, 416 U.S. 134, 158 (1974) (finding that the regulations governing the process by which to dismiss a federal employee, a civil action, were not invalid for vagueness).

The accepted standard by which to evaluate a statute or regulation under the void-for-vagueness doctrine, as articulated in *Connally*, is that a statute or regulation should be declared void when the language is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." [30] The void-for-vagueness doctrine uses three general lenses through which to approach a specific regulation or statute. First, it examines whether the statute or regulation gives fair notice to individuals possibly subject to it.[31] Second, it considers whether the statute or regulation provides adequate guidance to prevent arbitrary and discriminatory enforcement.[32] Third, in cases where First Amendment protections are implicated, it questions whether the statute or regulation provides sufficient breadth to permit free expression.[33]

Under the first lens, a court must consider whether an individual was given fair notice of the standard of conduct proscribed by the statute or regulation.[34] Fair notice, however, is not simply determined by the language itself, but can be given where a well-settled meaning in the common law, court decisions, or a general societal understanding exists.[35]

Under the second lens, a court must consider whether the statute or regulation allows for arbitrary or discriminatory enforcement.[36] Courts are generally concerned about selective enforcement by the individuals, typically prosecutors, or government agencies charged with enforcing the law.[37] Courts are also concerned that a vague regulation will leave it to "the arbitrary whim" of an official to determine what "in fact constitutes" a violation based on "his own subjective opinion." [38]

Under the third lens, courts are concerned not only with statutes or regulations that trample on protected forms of speech and expression, but also with laws that have the potential for a chilling effect.[39] Courts will examine the statute or regulation to determine if the law sweeps too broadly by bringing protected speech within its grasp.[40]

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30. *Connally*, 269 U.S. at 391.
31. LAFAVE, *supra* note 20, at 98.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 98-99.
36. *Id.* at 98.
37. *Id.* at 101.
38. Crossen v. Fatsi, 309 F. Supp. 114, 117-18 (D. Conn. 1970).
39. *See* LAFAVE, *supra* note 20, at 102 (addressing the possibility that the state may get away with "more inhibitory regulation than it has a constitutional right to impose" because people would rather obey the regulations than run the risk of "erroneous constitutional judgment").
40. *Id.*

B. Judicial Intervention into Student Disciplinary Procedures

During the early years of void-for-vagueness challenges, courts were generally very reluctant to apply the doctrine to student disciplinary regulations.[41] Courts and society viewed colleges as "self-sustaining entit[ies] that w[ere] capable of regulating" themselves.[42] As such, courts were generally unlikely to intervene.[43] This reluctance was based on the view that because of "the particular nature of academic life, universities have an inherent power to discipline students and that this power may be exercised without the necessity of relying on specific rules of conduct."[44] This reluctance to intervene extended beyond the void-for-vagueness doctrine and included other constitutional due process protections because courts believed that student disciplinary procedures "should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community."[45]

C. Student Disciplinary Regulations and the First Amendment

One area of student discipline in which courts were more willing to intervene involved student disciplinary regulations that "touch[ed] upon First Amendment rights to free speech and association."[46] In *Tinker v. Des Moines*, the landmark student free speech case, the Supreme Court held that students do not "shed their constitutional rights . . . at the schoolhouse gate."[47] In *Healy v. James*, the Supreme Court noted that colleges, like secondary public education schools, are not immune from the requirements of the First Amendment.[48]

The First Amendment, as applied to the states and state institutions via the Fourteenth Amendment, requires regulations that proscribe conduct touching upon First Amendment freedoms to be

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41. *See* Will W. Travelstead, *Introduction and Historical Context*, *in* ENHANCING CAMPUS JUDICIAL SYSTEMS 3, 3 (Robert Caruso & Will W. Travelstead eds., 1987) (explaining that "[t]he prevailing doctrine . . . was one of judicial restraint").

42. *Id.*

43. *See* Marin v. Univ. of P.R., 377 F. Supp. 613, 620 (D.P.R. 1973) (three judge panel) ("It is . . . well settled that it is not the policy of the federal courts '[to] intervene in the resolution of conflicts which arise in the daily operation of school systems.'" (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).

44. *See* Marin v. Univ. of P.R., 346 F. Supp. 470, 482 (D.P.R. 1972) (denying motion to dismiss and convening three judge panel).

45. Esteban v. Cent. Mo. State Coll., 290 F. Supp. 622, 629 (W.D. Mo. 1968).

46. Edgar H. Bittle et al., *Due Process for Students*, *in* SCHOOL VIOLENCE FROM DISCIPLINE TO DUE PROCESS 99, 109 (James C. Hanks ed., 2004).

47. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

48. *See* Healy v. James, 408 U.S. 169, 180 (1972) (noting that "colleges and universities are not enclaves immune from the sweep of the First Amendment").

specific in describing the prohibited conduct.[49] First Amendment freedoms are considered "most precious"[50] and "the government may regulate in the area only with narrow specificity."[51] The recognition that students do not shed their constitutional rights, particularly their First Amendment rights, while attending school requires that student disciplinary regulations be sufficiently defined.[52] These protections are not solely limited to public secondary schools, but extend to college students as well.[53]

The recognition that students are entitled to constitutional protection was only the first question for courts to address when analyzing student disciplinary regulations. Courts were faced with the additional question of how to enforce such protections given that students do not possess the same level of First Amendment protection as adults living in a free society.[54] Courts are required to balance a student's First Amendment rights "against . . . society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[55] Courts were conflicted on whether to apply the full force of the void-for-vagueness doctrine to student disciplinary regulations or to apply some other standard of review.[56] Over time, however, courts have found that the void-for-vagueness doctrine does "extend[ ] to rules regulating the conduct of students in educational institutions chartered or supported by the state."[57]

The void-for-vagueness doctrine, as applied to student disciplinary regulations infringing on First Amendment freedoms, requires precision in the regulation's language to ensure that the regulation

49. *See* ROBERT E. PHAY, THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS 7 (1977) (noting that "courts are particularly firm in requiring specificity when First Amendment freedoms are involved").

50. NAACP v. Button, 371 U.S. 415, 433, 438 (1963).

51. *Id.* at 433.

52. *See* PAUL WECKSTEIN, SCHOOL DISCIPLINE AND STUDENT RIGHTS 37 (rev. ed. 1982) (indicating that "[i]n order to avoid violations of constitutional rights, precision in school rules affecting expression is essential").

53. *See Healy*, 408 U.S. at 180 (explaining that there is "no room for the view that . . . First Amendment protections should apply with less force on college campuses"). It is also important to note that "[p]rivate colleges and universities are not required to meet the due process requirements applied to public institutions." John Wesley Lowery & Michael Dannells, *Contemporary Practice in Student Judicial Affairs: Strengths and Weaknesses*, *in* RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS, *supra* note 3, at 16, 20.

54. *See* Bethel v. Fraser, 478 U.S. 675, 682 (1986) ("It does not follow, however, that simply because the use of a[ ] . . . form of expression may not be prohibited to adults . . . the same latitude must be permitted to children in a public school.").

55. *Id.* at 681.

56. *See, e.g.*, Undergraduate Student Ass'n v. Peltason, 367 F. Supp. 1055, 1057 (N.D. Ill. 1973) (noting the "sharp divergence as to the required degree of specificity" for student conduct regulations that implicate First Amendment rights).

57. Sill v. Pa. State Univ., 462 F.2d 463, 467 (3d Cir. 1972) (citing Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969)).

does not inhibit the exercise of protected speech and applies only to unprotected expression.[58] Courts begin an examination of a student disciplinary regulation by first "determin[ing] if the [regulation] reaches a substantial amount of constitutionally protected speech."[59] If the regulation is found to do so, courts will next consider whether the regulation's language "invites arbitrary, discriminatory and overzealous enforcement."[60] In conducting that review, courts must balance a "school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct"[61] with the need to give students an "indication of what actions or behavior would lead to discipline."[62] As noted above, however, courts will invalidate a student disciplinary regulation under the void-for-vagueness doctrine if the regulation is not sufficiently clear to ensure the protection of First Amendment freedoms.[63]

A recent area of challenges to student disciplinary regulations involves student-on-student sexual harassment. With the passage of Title IX,[64] colleges are now required to "adopt and publish grievance procedures for handling complaints of sexual harassment."[65] In addition, the Supreme Court has held that colleges can be held individually liable under Title IX.[66] These two factors led to nearly all colleges adopting a formal sexual harassment prohibition within their codes

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58. WECKSTEIN, *supra* note 52, at 37.

59. Coy *ex rel*. Coy v. Bd. of Educ., 205 F. Supp. 2d. 791, 801 (N.D. Ohio 2002) (citing Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182 (6th Cir. 1995)).

60. *Id. at* 802 (quoting Leonardson v. City of East Lansing, 896 F.2d 190, 195-96 (6th Cir. 1990)).

61. Bethel v. Fraser, 478 U.S. 675, 686 (1986).

62. *Coy*, 205 F. Supp. 2d. at 802.

63. *See* Baughman v. Freienmuth, 478 F.2d 1345, 1350 (4th Cir. 1973) (finding "obscene" is too vague); *Coy*, 205 F. Supp. 2d. at 802 (finding "inappropriate" behavior too vague); Note, *supra* note 18, at 1264-65 (noting that "a series of speaker bans [have] been held unconstitutionally vague, [and] so have rules restricting student freedom to assemble, to establish political organizations, and to determine the editorial content of campus newspapers").

64. 20 U.S.C. § 1681(a) (2006) ("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. . . .").

65. JUDITH BERMAN BRANDENBURG, CONFRONTING SEXUAL HARASSMENT 23 (1997).

66. *See* CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 7 (2005), *available at* http://www.aauw.org/research/upload/DTLFinal.pdf (noting that "[t]he Supreme Court affirmed in 1992 that sexual harassment is a form of sex discrimination under Title IX when it ruled in *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), that students could seek monetary damages for sexual harassment from educational institutions"). Title IX is not the sole avenue through which a victim of gender discrimination can pursue his or her claim; the Supreme Court recently held that 42 U.S.C. § 1983 is also available. Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 796 (2009).

of conduct.[67] These student disciplinary regulations have become a recent focus for void-for-vagueness challenges because the regulations "could include 'core' political and religious speech, such as gender politics and sexual morality."[68] These recent judicial examinations of student disciplinary regulations demonstrate that courts are now more willing than ever to invalidate student disciplinary regulations under the void-for-vagueness doctrine.

D. Student Disciplinary Regulations and General Due Process

Courts were even more reluctant to extend the void-for-vagueness doctrine to student disciplinary regulations that did not implicate First Amendment freedoms.[69] This reluctance was based on the perception that students did not face serious consequences, as a criminal defendant would, from sanctions imposed under a student disciplinary scheme.[70] This reluctance was also based on the recognition, just as in First Amendment cases, that colleges have a strong interest in protecting the educational environment.[71] Courts eventually recognized, however, that some procedural protections were needed in cases of potentially serious sanctions.[72]

1. Student Disciplinary Procedures and Judicial Intervention

As courts became increasingly active in the protection of First Amendment freedoms by invalidating student disciplinary regulations, many courts remained reluctant to intervene to enforce due process protections in cases that involved general conduct regulations absent First Amendment concerns.[73] Courts were simply unwilling to intervene even in cases of expulsion or suspension because "the process is not punitive or deterrent in the criminal law sense, but the process

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67. *See* HILL & SILVA, *supra* note 66, at 33.

68. DeJohn v. Temple Univ., 537 F.3d 301, 317 (3d Cir. 2008) (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001)).

69. *See* Esteban v. Cent. Mo. State Coll., 290 F. Supp. 622, 629 (W.D. Mo. 1969) (stating that the court will not require student proceedings to conform to criminal proceedings).

70. *See id.* at 628 (noting that student proceedings are not equal to criminal proceedings in an irrevocable expulsion case for misconduct).

71. *See id.* at 629 (finding that an educational institution can impose on its students a standard of conduct "that is relevant to a lawful mission, process or function of the educational institution").

72. *See* Goss v. Lopez, 419 U.S. 565, 573 (1975) ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.").

73. *See Esteban*, 290 F.Supp. at 629 (upholding disciplinary action where regulation did not deprive students of First Amendment rights).

is rather the determination that the student is unqualified to continue as a member of the educational community."[74] Some courts even recognized the "damaging effects" of an expulsion, but found that because the student could not be "imprisoned, fined, disenfranchised, or subjected to probationary supervision," student disciplinary proceedings could not be equated "to criminal proceedings against adults and juveniles."[75]

Dixon v. Alabama State Board of Education marked a turning point in the protection of students' due process rights.[76] In *Dixon*, the court held that public university students have a constitutional right to due process under the Fourteenth Amendment, specifically the "constitutional right to notice and hearing before their suspension or expulsion."[77] In *Goss v. Lopez*, the Supreme Court largely adopted the Fifth Circuit's rationale.[78] *Goss* represents "the seminal case on student due process" because the Supreme Court held that in cases where a student is suspended for more than ten days, "minimal due process — notice and an opportunity to be heard — [is] required."[79]

It is important to note that the Supreme Court in *Goss* found that students had two different interests that necessitated due process protection in student disciplinary proceedings.[80] First, the high school students challenging their suspensions had a property right arising from a state law that required local authorities to provide public education.[81] Second, and relevant to this Note, the students possessed a liberty interest arising under the Fourteenth Amendment because their "good name, reputation, honor, or integrity [were] at stake."[82]

2. Application of the Void-for-Vagueness Doctrine to Student Disciplinary Regulations

Given the Supreme Court's holding in *Goss*, courts began to hold that the void-for-vagueness doctrine does apply to student disciplinary

74. *Id.* at 628.

75. *Id.*

76. 294 F.2d 150 (5th Cir. 1961).

77. Lowery & Dannells, *supra* note 53, at 20.

78. *See* Goss v. Lopez, 419 U.S. 565, 576 (1975) (noting that a student's interest is not "so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary").

79. Bittle et al., *supra* note 46, at 101.

80. *See Goss*, 419 U.S. at 574 (noting a student's right to public education as a property interest and a liberty interest under the Fourteenth Amendment).

81. *Id.*; *see also* WILLIAM D. VALENTE WITH CHRISTINA M. VALENTE, LAW IN THE SCHOOLS 230 (5th ed. 2001) ("It is now settled that a student's entitlement under state law to a public education or to state-mandated educational benefits is a property interest that entitles students who face educational penalties to due process.").

82. *Goss*, 419 U.S. at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 437 (1971)); *see also* Bittle et al., *supra* note 46, at 103 ("The liberty interests protected by due process include preserving one's good name, reputation, honor, or integrity.").

regulations proscribing non-expressive conduct.[83] Schools, colleges in particular, attempted to push back against court intervention by claiming that schools have "the inherent power . . . to discipline students and that this power may be exercised without the necessity of relying on a specific rule of conduct."[84] Courts quickly pointed out, however, that the "[p]ower to punish and the rules defining the exercise of that power are not . . . identical."[85] Although courts have long recognized the unique responsibilities and challenges facing colleges,[86] courts have also held that colleges are "not immune from the [] requirements of due process."[87]

Courts have taken notice that many "outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education."[88] Based on this view and the balancing of interests the Court in *Goss* seemed to articulate,[89] courts have generally found that the void-for-vagueness doctrine, when applied to student disciplinary regulations, does "not require . . . the same rigorous standards as criminal statutes."[90]

Given the history and development of judicial intervention into student disciplinary regulations, four general parameters apply to student disciplinary regulations. First, students are entitled to due process protections in student disciplinary procedures and regulations.[91] Second, these protections include the right to be put on notice of what conduct is proscribed.[92] Third, as a matter of due process, student disciplinary regulations proscribing certain conduct are subject to the void-for-vagueness doctrine.[93] Finally, the void-for-vagueness

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83. *See* Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1344 (S.D. Tex. 1969) ("The constitutional doctrine[ ] of vagueness . . . [is] applicable, in some measure, to the standard or standards to be applied by the university in disciplining its students . . . .").

84. Soglin v. Kauffman, 418 F.2d 163, 167 (7th Cir. 1969).

85. *Id.*

86. *See Sullivan*, 307 F. Supp. at 1347 (noting the "highly discretionary functions" of school officials).

87. *Soglin*, 418 F.2d at 167.

88. Esteban v. Cent. Mo. State Coll., 290 F. Supp. 622, 630 (W.D. Mo. 1968) (citation omitted).

89. *See* Bittle et al., *supra* note 46, at 101 ("The clear rule is that '[t]he minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.' Clearly, *Goss v. Lopez* . . . suggests this flexible standard.").

90. *Soglin*, 418 F.2d at 168; *see also* LAWRENCE F. ROSSOW & JERRY R. PARKINSON, THE LAW OF STUDENT EXPULSIONS AND SUSPENSIONS 4 (2d ed. 1999) (noting that "the exact form of [student] rules seems flexible").

91. *See* Lowery & Dannells, *supra* note 53, at 20 (explaining that "the courts [have] established constitutional protections for college students").

92. *See* ROSSOW & PARKINSON, *supra* note 90, at 4 ("To exist, due process must meet the requirement of notice.").

93. *See supra* text accompanying note 57.

doctrine, given the unique responsibilities and challenges facing colleges, is applied, depending on the constitutional rights at stake, in a less rigid fashion than in other contexts.[94] These parameters have led courts to invalidate regulations proscribing "inappropriate" behavior,[95] "misconduct,"[96] behavior not "promoting [the school's] best interests,"[97] "improper or disrespectful conduct,"[98] and student dress that is not "expected"[99] under a void-for-vagueness application that is deferential to colleges.[100]

II. APPLICATION OF THE VOID-FOR-VAGUENESS DOCTRINE TO STUDENT DISCIPLINARY REGULATIONS PROSCRIBING SEXUAL ASSAULT

A recent survey[101] found that 33.2% of schools used only a generic term such as "sexual assault" or "sexual misconduct" in their student disciplinary regulations without further defining the specific acts

94. *See Soglin*, 418 F.2d at 168 (noting that the court "[does] not require university codes of conduct to satisfy the same rigorous standards as criminal statutes"); *see also* ROSSOW & PARKINSON, *supra* note 90, at 4 (explaining that "the exact form of the rules seems flexible"). *But see* PHAY, *supra* note 49, at 7 (noting that there may be less strict requirements when the First Amendment freedoms are not involved in the conduct).

95. *See* Coy *ex rel*. Cox v. Bd. of Educ., 205 F. Supp. 2d. 791, 802 (N.D. Ohio 2002) (explaining "[t]he section does not define 'inappropriate' or give any indication to students what activity might be inappropriate. On its face, the wording . . . 'invites arbitrary, discriminatory and overzealous enforcement.'") (citing Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1183 (6th Cir. 1995)).

96. *Soglin*, 418 F.2d at 168 ("The use of 'misconduct' as a standard in imposing the penalties threatened here must . . . fall for vagueness. The inadequacy of the rule is apparent on its face.").

97. Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1345-46 (S.D. Tex. 1969) ("Little can be said of a standard so grossly overbroad as 'in the best interests of the school.' It cannot be contended that it supplies objective standards by which a student may measure his behavior or by which an administrator may make a specific ruling in evaluation of behavior.") (citation omitted).

98. Marin v. Univ. of P.R., 377 F. Supp. 613, 627 (D.P.R. 1973) (three judge panel) ("The inadequacy is obvious — the purpose of a prohibitory rule is to inform those affected what is improper not merely that the 'improper' is prohibited.").

99. *See* Crossen v. Fatsi, 309 F. Supp. 114, 117-18 (D. Conn. 1970) ("The wordage of the school code in stating what is 'expected' is too vague . . . [i]t leaves to the arbitrary whim of the school principal, what in fact constitutes extreme fashion or style in the matter of personal grooming and permits his own subjective opinion . . . .").

100. *See* WECKSTEIN, *supra* note 52, at 203 (noting that *Crossen*, *Soglin*, and *Sullivan* involved regulations invalidated "without resorting to the higher standards applicable to First Amendment/chilling effect grounds (even though the students in both *Soglin* and *Sullivan* were engaged in expressive activities)"). The "higher standard" void-for-vagueness application more closely examines student disciplinary regulations and requires more specificity in order to protect First Amendment activities. *See* PHAY, *supra* note 49, at 7 (noting that "courts are particularly firm in requiring specificity when First Amendment freedoms are involved").

101. The survey consisted of 2,438 schools throughout the United States and Puerto Rico, including all ninety-eight historically black colleges and universities, all twenty-eight

that violated the regulation.[102] The survey found that even of those schools that further defined what acts constituted sexual assault, sixty-two percent included the vague term "sexual contact" in the definition of sexual assault contained in the regulation.[103] This survey shows that "there are no standard definitions of rape and sexual assault" and that "the ways in which rape and sexual assault are defined varies across institutions and states."[104] The use of various definitions illustrates the confusion regarding what acts constitute sexual assault. This confusion leads to the perpetuation of "rape myths"[105] and creates a void where students themselves set the standard of what constitutes acceptable sexual behavior.[106] These vague regulations also fail to address a major factor in sexual contact between college students: alcohol.[107] The failure to adequately define what acts violate the regulation proscribing sexual assault creates three substantial issues about which students, parents, and administrators should be concerned. First, the regulation's vagueness can give rise to legal challenges by the accused based on the void-for-vagueness doctrine. Second, the regulation's vagueness creates a vacuum in which students are able to develop their own standard of appropriate sexual behavior that condones the very acts the college wishes to prevent. Third, the regulation's vagueness creates confusion resulting in many survivors being unsure of whether or not the acts they were subject to constituted sexual assault, thus leading to significant underreporting of sexual assaults.

Native American tribal schools, and two-to-four-year private and public colleges and universities. KARJANE ET AL., *supra* note 6, at vi.

102. *Id.* at 44, 46 tbl.3.3.

103. *Id.*

104. *Id.* at viii.

105. *See* CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 38 (1993) (noting the myth of a "real rape" to be one in which "a victim is raped by a stranger who jumps out of the bushes with a weapon"); *see also* CAMPUS COMMUNITY, *supra* note 11, at 87 (indicating the common perception that "real rape" is "committed by a stranger hiding behind a bush").

106. *See* Mary Crawford & Danielle Popp, *Sexual Double Standards: A Review and Methodological Critique of Two Decades of Research*, 40 J. SEX RES. 13, 17 (2003) (noting one study that suggested age "is important when evaluating sexual standards"); *see also* BOGLE, *supra* note 14, at 72-95 (suggesting that college students' perceptions of appropriate sexual behavior is shaped by their peer group); Gwendell W. Gravitt, Jr. & Mary M. Krueger, *College Students' Perceptions of the Relationship Between Sex and Drinking*, *in* SEXUAL HARASSMENT & SEXUAL CONSENT 175, 184 (Barry M. Dank & Roberto Refinetti eds., 1998) (noting that students "learn the dynamics of the sexual uses of alcohol . . . primarily by watching, and being subject to social pressures by their peers").

107. *See* DeJong, *supra* note 3, at 104 (noting that "approximately 400,000 students each year have unprotected sex due to their use of alcohol, while more than 100,000 students are too intoxicated to know whether they consented to sexual intercourse" and that twenty percent of respondents in one survey "said they had experienced an unwanted sexual advance due to someone else's drinking").

A. Vague Terms

As discussed in Part I.D.1, absent an implication of First Amendment freedoms, courts are reluctant to apply the full strength of the void-for-vagueness doctrine to student disciplinary regulations.[108] Courts are generally willing to uphold "terms that are customarily understood, such as willful disobedience, intentional disruption . . . profanity, excessive absenteeism, and vulgarity."[109] This approach, however, presents a unique problem in defining sexual assault within a student disciplinary regulation because college students often have significantly different views of what constitutes inappropriate sexual contact, particularly given the integral role alcohol plays in the campus culture, than do administrators, parents, and adults in society.[110] Colleges failing to fully define what acts constitute sexual assault under the regulation provide an opportunity for the accused to challenge the regulation under the void-for-vagueness doctrine. The realities of campus social norms, particularly the regular use of alcohol, must also be taken into account when drafting the student disciplinary regulation.

1. Student Perception of What Constitutes Sexual Assault

More precise wording of a student disciplinary regulation prohibiting sexual assault is necessary to ensure that students fully understand what acts are prohibited. As noted above, nearly one-third of colleges in a recent survey used only a generic term such as "sexual assault" or "sexual offense" within their code of conduct without further defining specific prohibited acts.[111] Of those schools that did include specific behavior, nearly all defined sexual assault to include penile-vaginal rape (93.4%), over half included acquaintance rape (53.4%), and a little over forty percent included anal or oral penetration (45.8%) or other forms of vaginal penetration (43%).[112] The survey, however, also found that 62% of colleges that further defined sexual assault included the generic term "sexual contact"[113]

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108. *See* PHAY, *supra* note 49, at 7 (noting that "[w]hen the conduct does not involve the expression of First Amendment freedoms, however, less strict requirements may be imposed").

109. VALENTE WITH VALENTE, *supra* note 81, at 232.

110. BOGLE, *supra* note 14, at 28 (noting "that there may be generational differences in perceptions of what counts as sex"); *see also* Associated Press, *Americans Aren't Explicit When Defining Sex*, MSNBC, July 1, 2009, http://www.msnbc.msn.com/id/31685784/ns/health-sexual_health/.

111. KARJANE ET AL., *supra* note 6, at 46 tbl.3.3.

112. *Id.*

113. *See id.* (noting that sexual contact also included "unwanted touching of intimate body parts").

and 28.4% of colleges included other acts such as "voyeurism, indecent exposure, nondisclosure of HIV/STDs, and forms of homosexual behavior."[114] The failure to adequately define what acts constitute sexual assault results in administrators believing acts A, B, and C[115] are prohibited by the regulation and students believing only act A is prohibited.[116] This is particularly true where the administrators' understanding of the regulation includes acts that do not consist of actual physical contact such as voyeurism.[117] Researchers have noted the disparity in understanding what behavior constitutes sexual assault even amongst researchers themselves.[118] One critic of the prevailing view argues that the prevailing view "cast[s] a large, tightly-woven net that snares the minnows with the sharks."[119]

Colleges are justified in prohibiting sexual acts beyond forcible rape under a student disciplinary regulation proscribing sexual assault in order to "incorporate a more complete range of sexual behaviors that many [survivors] regard as major threats to their physical and psychological well-being."[120] The institutional definition, however, must be clear enough to put students on notice of exactly what acts are prohibited in order to avoid legal challenges under the void-for-vagueness doctrine.[121] Given the disparity that often exists between the college's understanding and students' understanding of what constitutes sexual assault, it is important to specifically define what acts violate the regulation.[122] Further defining sexual assault with specific acts is necessary to put students on notice of what acts constitute sexual assault.[123] If a college wishes to prohibit more than penile-vaginal rape, proscribing "sexual assault" does not put students on notice of what is prohibited, because students largely believe that

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114. *Id.*

115. *See* SCHWARTZ & DEKESEREDY, *supra* note 10, at 8 (noting that some use the term "sexual assault to depict a broader range of behaviors ranging from nonconsensual kissing to nonconsensual anal, oral, and vaginal intercourse").

116. *See* KARJANE ET AL., *supra* note 6, at vii (noting that "when weapons are absent, alcohol is present, and/or physical injury . . . is not apparent" students do not perceive the incident to be sexual assault).

117. *Id.* at 46 tbl.3.3 (indicating that 28.4% of colleges include behaviors that do not consist of actual contact between the accused and survivor, such as voyeurism, within their definition of sexual assault).

118. SCHWARTZ & DEKESEREDY, *supra* note 10, at 8-9 (noting that the prevailing view defines sexual assault to include unwanted sex play, i.e., fondling, kissing, or petting, in addition to sexual coercion, attempted rape, and rape).

119. *Id.* at 26.

120. *Id.* at 8.

121. *See* CAMPUS COMMUNITY, *supra* note 11, at 31 (noting the need to "address, in detail, issues of expected and proscribed student conduct").

122. *Id.*

123. *See id.* at 3 (noting that students "are not likely to change their behaviors, values and attitudes until they examine and label" these behaviors as sexual assault).

sexual assault only includes forcible penile-vaginal penetration by a stranger.[124] This perception, recognized by those colleges that specifically include other forms of vaginal penetration in their definition of sexual assault, does not include vaginal penetration with something other than a penis (mouth, tongue, fingers, and/or foreign objects) nor does it include anal or oral penetration.[125] The perception of "real rape" is even more troubling given the high rate of acquaintance rape on college campuses,[126] because "acquaintance sexual assaults contain few, if any, of" the perceived elements of "real rape."[127]

The problem is not that colleges wish to prohibit conduct under a student disciplinary regulation proscribing sexual assault that is broader than forcible rape; rather, the problem is that students are simply not put on notice of that expansion. The failure to provide adequate notice to students of what acts are prohibited by the regulation provides a justification under the first lens of the void-for-vagueness doctrine, discussed in Part I.A, to invalidate the student disciplinary regulation.[128] Additionally, the failure to provide a more detailed explanation of what acts are prohibited may invite arbitrary or discriminatory enforcement by campus administrators, giving further support to a challenge under the second lens of the void-for-vagueness doctrine.[129]

2. Alcohol

It is no secret that the college culture is dominated by regular and often excessive alcohol consumption.[130] This culture of heavy

124. BOHMER & PARROT, *supra* note 105, at 138.

125. *See* KARJANE ET AL., *supra* note 6, at 45 (noting that less than fifty percent of colleges include other forms of penetration in their definitions of sexual assault).

126. *See* BOHMER & PARROT, *supra* note 105, at 26 (noting that acquaintance rape is the most common type of sexual assault on college campuses); *see also* NAT'L INST. OF JUSTICE, *supra* note 5, at 2 (indicating that "between [eighty] and [ninety] percent" of sexual assaults involving college students can be labeled acquaintance rape).

127. BOHMER & PARROT, *supra* note 105, at 38; *see also* LESLIE PICKERING FRANCIS, SEXUAL HARASSMENT AS AN ETHICAL ISSUE IN ACADEMIC LIFE 69 (2001) (noting "[t]here is an extensive literature about whether acquaintance or date rape is similar to such 'real' rape"); Hunnicutt, *supra* note 2, at 153 (noting that "[d]ate rape or acquaintance rape is reported even less frequently than other forms of sexual assault because few persons identify it as a crime").

128. *See* ROSSOW & PARKINSON, *supra* note 90, at 4 (noting that a "clearly understood school rule must forewarn the student that certain behavior" is prohibited); Bittle, *supra* note 46, at 105 (noting that due process requires that "[t]he rules must be sufficiently definite to provide prior notice to students . . . that certain standards of conduct, behavior, and performance are expected"); *see also supra* notes 115-18 and accompanying text.

129. *See* SCHWARTZ & DEKESEREDY, *supra* note 10, at 157 (noting one benefit of a clear regulation is that "everyone at the university in positions of authority [is] acting in the same way, based on the same set of presumptions").

130. *See* Gravitt & Krueger, *supra* note 106, at 179 (noting that "[f]ifty-eight of the [sixty] subjects reported that consumption of alcohol in social situations is the norm on campus").

alcohol consumption impacts many areas of college administration, but is particularly relevant for student disciplinary regulations proscribing sexual assault.[131] Some studies have shown a direct causal link between alcohol and sexual aggression,[132] while others have argued that "the physiological effects of alcohol increase the likelihood that men will commit a sexually aggressive act."[133] While there is significant disagreement about the existence of a direct causal link between alcohol and sexual assault,[134] there is near universal acceptance "that alcohol . . . plays some important role."[135] The connection between alcohol and sexual behavior is not always sinister — that is, when the perpetrator uses "alcohol as a weapon to get [another individual] to engage in sexual intercourse [he or she] do[es] not want"[136] — but also involves situations where the perpetrator uses alcohol to build up their own confidence when dealing with a member of the opposite sex.[137]

Colleges face the added pressure of not appearing to condone underage or excessive drinking and thus colleges inundate students with a message that says "don't drink."[138] This unfortunately creates

131. *See id.* at 175 (noting "the tendency of young adults to combine . . . alcohol . . . with sexual behavior").

132. *See id.* at 176 (explaining the common "assumption that the mere presence of alcohol in social situations is a causal factor — a catalyst — for sexual violence and unsafe sexual behavior"); *see also* SCHWARTZ & DEKESEREDY, *supra* note 10, at 105 (noting a study that argued "alcohol was a factor for [sixty-six percent] of the date rapists").

133. SCHWARTZ & DEKESEREDY, *supra* note 10, at 105.

134. *See id.* at 105-06 (explaining the disagreements amongst researchers regarding the strength of the link between sexual assault and alcohol).

135. *Id.* at 106; *see also* BOGLE, *supra* note 14, at 167 (noting that "[t]he connection between hooking up and alcohol-centered socializing on campus is not insignificant").

136. SCHWARTZ & DEKESEREDY, *supra* note 10, at 107.

137. *See* Gravitt & Krueger, *supra* note 106, at 179 (noting a study that showed fifty-eight out of sixty students "indicated that their peers explicitly use alcohol to facilitate casual sexual encounters known as 'hooking up.'"); *see also* BOGLE, *supra* note 14, at 168 (indicating that consuming alcohol can help nervous students navigate the complex college dating scene).

138. *See* Gravitt & Krueger, *supra* note 106, at 176 (explaining that a college's message to students is often simply "don't drink"); *see also* WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 60-61 (2d ed. 1985) (noting "student alcohol abuse is increasingly recognized as a serious campus problem, and special efforts are being made to eradicate it"); TERRY W. MCCARTHY & DONALD D. GEHRING, 1999 UPDATE TO ALCOHOL ON CAMPUS: A COMPENDIUM OF THE LAW AND A GUIDE TO CAMPUS POLICY 251 (1999) (noting the passage of federal law mandating "a biennial review to determine the effectiveness of the institution's programs to reduce the use, possession and distribution of alcohol" and legislation that, though not a legal mandate, was "very intrusive and suggest[ed] that [college] presidents establish and support task forces to examine academic life and recommend changes to reduce alcohol . . . problems . . . and . . . also suggests alcohol free housing and other alcohol free environments as well as a zero tolerance policy for illegal consumption and the vigorous enforcement of campus policies").

a void in programming and education in which students are provided "with little information or skills regarding how to negotiate social and sexual situations involving alcohol."[139] This lack of information and skills leads to troubling results with students having a dangerous perception of alcohol and sexual behavior. One study of college students indicated that more than seventy-five percent of students relied "heavily on alcohol as a tool with which to manipulate social interactions to produce sexual activity."[140] This manipulation is used to "facilitate casual sexual encounters known as 'hooking up'"[141] or to manufacture an excuse to engage in sexual behavior that they normally would not.[142] A troubling consequence of this culture is the fostering of an environment that encourages women to "use alcohol in order to give themselves a 'safe' excuse to engage in sexual activity" to avoid the negative labels associated with a female being sexually active.[143] Another troubling aspect of alcohol use by students is the perception by men that "females bear the ultimate responsibility for preventing" any inappropriate sexual behavior.[144]

This is not to say that students should be given a free pass when it comes to their behavior while under the influence of alcohol. On the contrary, students need to be put on notice that alcohol cannot serve as an excuse and that students need to be more self-aware about their actions, particularly their sexual behavior, while under the influence of alcohol. The point is that college administrators must face reality.[145] Students are attempting to navigate the confusing and stressful college social scene and predominantly rely on their peers to determine the norms of sexual behavior.[146] This reliance leads to the adoption of a behavioral norm that accepts and encourages alcohol as a necessary element in the campus social scene, particularly when

139. Gravitt & Krueger, *supra* note 106, at 176.
140. *Id.* at 179.
141. *Id.*
142. *Id.* at 179-80.
143. *Id.* at 180.
144. *See* BOGLE, *supra* note 14, at 180 (noting that many students "took for granted that it is a woman's responsibility to decide 'how far' a sexual encounter will go"); Gravitt & Krueger, *supra* note 106, at 181 (noting the general feeling among the survey's participants that "girls . . . know what they want; [if] they don't want sex, they won't get hammered and put themselves in that situation," and if females are "worried about violence, they need to . . . not get plastered").
145. *See* BOGLE, *supra* note 14, at 185 (explaining that incidents of sexual assault develop "out of a larger context of how students socialize" and that "[w]ithout understanding this context, it [is] difficult to find any effective solutions").
146. *See id.* at 95 (explaining that "[i]n the campus sexual arena, students create their personal standards by drawing upon what they believe other students are doing (i.e., what is 'normal')").

it comes to sexual behavior.[147] Add in alcohol, a "hookup culture,"[148] and a college's failure to adequately define what constitutes sexual assault and one has a recipe for disaster.

B. Policy Reasons

Aside from the legal concerns, there are also serious policy concerns that weigh in favor of drafting more specific student disciplinary regulations proscribing sexual assault. The stigma that attaches to a student based upon a finding that he or she violated the sexual assault student disciplinary regulation has potentially significant negative consequences for that student.[149] Eliminating vagueness in the student disciplinary regulation will also assist survivors of sexual assault in understanding that the behavior they were subjected to was wrong and should be reported.[150] Ensuring that all acts of sexual assault are reported to the appropriate officials will not only ensure the safety of the entire college community, but will also ensure that the survivor is provided the necessary support and resources to cope with the trauma.[151]

1. Stigma

Disciplinary action against a student under a student disciplinary regulation proscribing sexual assault becomes part of that student's educational record.[152] Courts have recognized the greater consequences of student disciplinary action, specifically noting that the "potential consequences reach beyond [a student's] immediate standing at the [college]."[153] This concern is amplified in the case of sexual assault and could "have a major immediate and life-long

147. *See* Gravitt & Krueger, *supra* note 106, at 185 (noting that "not only do many college students use alcohol as an excuse for sexual behaviors that they would not engage in while sober . . . but also *that they are aware they are doing so*").

148. *See* BOGLE, *supra* note 14, at 50-71 (discussing the current state of sex, dating, and relationships on college campuses).

149. *See* Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1338 (S.D. Tex. 1969) (noting that the disciplinary action taken against a student "amounts to a blot on [his or her] scholastic records that might well haunt [him or her] for years to come").

150. *See* SCHWARTZ & DEKESEREDY, *supra* note 10, at 91 (noting that "the problem of the hidden victim is particularly strong, in that [one] must first deal with the issue of whether [one is] in fact a victim at all").

151. *See id.* at 91-92 (noting the need for survivors to seek help for "their emotional and psychological reactions to victimization").

152. *See* United States v. Miami Univ., 294 F.3d 797, 812 (6th Cir. 2002) (holding that "student disciplinary records are education records because they directly relate to a student and are kept by that student's university").

153. Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005).

impact on [the student's] personal life, education, employment, and public engagement."[154]

Given this serious concern and the ability of colleges to develop regulations proscribing all types of conduct, the definition of sexual assault should only include the most serious types of inappropriate sexual acts, specifically excluding activities that do not involve physical contact between the perpetrator and the survivor, and specifically identifying what type of contact is prohibited. A regulation that includes too broad of a range of behaviors will "cast a large, tightly-woven net that snares the minnows with the sharks."[155] Under such a broad regulation, a student who tries to peer into the sorority house showers through an open window (i.e., voyeurism) will be charged with the same violation as a student who violently beats and forcibly rapes another student. To be clear, both acts should be prohibited by the college given the "major threat[ ] to [a survivor's] physical and psychological well-being," but the behaviors should be dealt with under different regulations.[156] This will ensure that the full negative weight of a sexual assault violation is counter-balanced by the equally, if not greater, morally culpable behavior.

2. Underreporting

Study after study has shown that sexual assault is significantly underreported on college campuses.[157] Vagueness in a student disciplinary regulation proscribing sexual assault not only fails to put the perpetrator on notice of what behavior is prohibited, but also results in many survivors failing to label the experience as sexual assault.[158] Vagueness in the student disciplinary regulation is not the only reason survivors fail to report the incident,[159] but any action a college is

154. *Id.* (citation omitted).

155. SCHWARTZ & DEKESEREDY, *supra* note 10, at 26.

156. *Id.* at 8. *But see id.* at 8 (noting activists' concerns "that narrow definitions of sexual assault . . . ignore many [victim's] subjective experiences of sexual assault or create a hierarchy of sexual victimization based on seriousness").

157. *See* SCHWARTZ & DEKESEREDY, *supra* note 10, at 89 (explaining that "a very small number of women report their assaults . . . so any counts we have are extraordinarily low"); Hunnicutt, *supra* note 2, at 152 (noting one report that found "that only 33.6% of campus sexual assaults were reported to the police").

158. *See* SCHWARTZ & DEKESEREDY, *supra* note 10, at 89 (noting that one study found that "only [twenty-seven percent] of women said they had been raped, even though they *all* described a victimization experience that completely fulfilled the state law for rape"); *see also* Hunnicutt, *supra* note 2, at 153 (explaining that "acquaintance rape is reported even less frequently than other forms of sexual assault because few persons identify it as a crime").

159. *See* Hunnicutt, *supra* note 2, at 153 (indicating that survivors often fail to report the incident due to "the perceived stigma, and the belief that no purpose would be served" by the incident).

able to take to ensure that more survivors report incidents of sexual assault is a step in the right direction.

The failure to label the experience as sexual assault is in large part tied to alcohol use.[160] One particular area in which vagueness must be eliminated within any regulation proscribing sexual assault concerns the ability of a student to consent to sexual conduct. It is vitally important that any student disciplinary regulation proscribing sexual assault be explicitly clear that an intoxicated student is unable to give consent to sexual acts. This is important given the dominance of alcohol within the social culture on college campuses[161] and the resulting feeling among many survivors that it is the survivor's "fault for getting drunk, not [the perpetrator's] fault for committing" sexual assault.[162] A clear rule that indicates that an individual is unable to give consent when intoxicated, but that the perpetrator is still liable for his or her actions, will serve a strong deterrent effect on college campuses.[163]

There is, however, significant criticism of this position, arguing that it is fundamentally unfair to hold only one party liable for one's actions while intoxicated.[164] Critics of such a clear rule also point to the research that shows that alcohol is often used by both men and women "to 'get into the mood' for legitimate sexual interactions."[165] Supporters of this clear rule, however, point to the overwhelming amount of evidence that shows the significant role alcohol plays in sexual assaults on college campuses, particularly in acquaintance rape.[166] Supporters also point to the difficulty of drafting and enforcing a regulation that tries to establish a moving standard of intoxicated consent.[167] Given the strong interests at stake on a college

160. *See* DeJong, *supra* note 3, at 104 (noting that "more than 100,000 students are too intoxicated to know whether they consented to sexual intercourse").

161. *See* Gravitt & Krueger, *supra* note 106, at 179 (noting that "[f]ifty-eight of the [sixty] subjects reported that consumption of alcohol in social situations is the norm on campus").

162. SCHWARTZ & DEKESEREDY, *supra* note 10, at 90.

163. *See* JOAN MCGREGOR, IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 153 (2005) (noting the strong incentive to avoid the behavior of becoming intoxicated and having nonconsensual sex if there was a clear rule that an intoxicated individual lacks consent).

164. *See id.* at 152 (noting the "inconsistency about not holding the drunken [survivor] responsible for [one's] drunkenness and what it leads to, while the drunken [perpetrator] is held" liable for his or her behavior).

165. *Id.* at 147.

166. *See id.* (indicating that one study showed that "[seventy-five] percent of the men and [fifty-five] percent of the women reported that they had consumed drugs or alcohol prior to the [sexual assault]").

167. *See id.* at 150 (noting that "it is difficult to state in abstract terms when a person has had too much to drink . . . to consent"); *id.* at 154 (noting that making the survivor "responsible for inebriated consent is . . . horribly out of line with the law's treatment of consent in other areas").

campus, particularly with a student disciplinary regulation proscribing sexual assault, colleges should err on the side of clarity and create a bright-line rule.

III. PROPOSED STUDENT DISCIPLINARY REGULATION

Colleges must do a better job of defining which acts violate the student disciplinary regulation proscribing sexual assault. The regulation should "provide definitions sufficiently broad to capture the scope of the problem, but specific enough to describe" what acts are prohibited.[168] The regulation should be written as plainly as possible in not overly legalistic language to ensure students understand the regulation.[169] Finally, the regulation must address the realities of the campus social scene and create a bright-line rule regarding the ability to consent to sexual acts while under the influence of alcohol.

A. Avoid Legalistic Language

Providing a clearer definition of what constitutes sexual assault within a student disciplinary regulation does not necessarily mean that such a definition must become overly legalistic. Student disciplinary regulations are meant to be understood by students and should be written in a manner easily understood by students.[170] Student judicial affairs professionals are justified in their concern regarding language of a student disciplinary regulation as being too legalistic.[171] Providing a clearer definition of sexual assault, however, will not undermine the educational focus of student judicial affairs;[172] it will strengthen it by clearly indicating what conduct is prohibited.[173]

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168. BRANDENBURG, *supra* note 65, at 51.

169. *See* WECKSTEIN, *supra* note 52, at 197 (indicating that "the vocabulary and style" of the regulation is important to determine "the extent to which [the regulation] is reasonably designed to inform students of what is prohibited").

170. *Id.*

171. *See* Lowery & Dannells, *supra* note 53, at 21 (noting that many "student judicial affairs [professionals] continue to call for simpler, less legalistic" student disciplinary regulations).

172. *See id.* (noting that concern that overly legalistic student disciplinary regulations will undermine the education focus); *see also* BRETT A. SOKOLOW, THE NAT'L CTR. FOR HIGHER EDUC. RISK MGMT., 2004 WHITE PAPER: CRAFTING A CODE OF CONDUCT FOR THE 21ST CENTURY COLLEGE 4, *available at* http://www.ncherm.org/pdfs/Whitepaper%20Crafting%20a%20Code%20of%20Conduct.pdf (indicating that "[t]he more legalistic [student disciplinary regulations], the less developmental and educational they will be").

173. *See* CAMPUS COMMUNITY, *supra* note 11, at 3 (noting that students "are not likely to change their behaviors, values and attitudes until they examine and label" these behaviors as sexual assault).

B. Proposed Language

Given the aforementioned, this Note proposes that campus administrators adopt the following definition of sexual assault within their student disciplinary regulations:

> Sexual Assault — includes sexual intercourse, other sexual acts (anal or oral intercourse or penetration by objects other than the penis), and the intentional touching of another person's genitals or breasts, without the consent of the other person. An individual under the influence of alcohol is unable to consent to sexual activity.

1. Clearly Indicate Acts

This definition removes any vagueness regarding what acts actually constitute sexual assault and "incorporate[s] a more complete range of sexual behaviors that many [survivors] regard as major threats to their physical and psychological well-being."[174] Clearly identifying behaviors beyond forcible rape as sexual assault will also help eliminate myths about sexual assault.[175] The elimination of such myths will assist more survivors, particularly those of the most common form of sexual assault on college campuses,[176] in recognizing their victimization.[177] This recognition is necessary to ensure that survivors report the assault and receive the necessary support.[178]

2. Alcohol and Inability to Consent

The bright-line rule that clearly informs all students that an individual under the influence of alcohol is unable to consent will eliminate the perception that using alcohol to manipulate a social setting to produce sexual activity is appropriate.[179] Achieving the

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174. SCHWARTZ & DEKESEREDY, *supra* note 10, at 8.

175. *See supra* notes 102-05 and accompanying text.

176. *See* BOHMER & PARROT, *supra* note 105, at 26 (noting that acquaintance rape is the most common type of sexual assault on college campuses).

177. Hunnicutt, *supra* note 2, at 153 (noting that "[d]ate rape or acquaintance rape is reported even less frequently than other forms of sexual assault because few persons identify it as a crime").

178. *See* SCHWARTZ & DEKESEREDY, *supra* note 10, at 91-92 (noting the need for survivors to seek help for "their emotional and psychological reactions to victimization").

179. *See* Gravitt & Krueger, *supra* note 106, at 179 (noting that more than seventy-five percent of students relied "heavily on alcohol as a tool with which to manipulate social interactions to produce sexual activity").

recognition that this behavior is inappropriate and labeling it as such will help prevent future acts of sexual assault.[180]

CONCLUSION

Student disciplinary regulations are largely designed to "prevent exploitation . . . and harm."[181] But in order to achieve this goal, these regulations must "address, in detail, issues of expected and proscribed student conduct."[182] Unfortunately, in the area of sexual assault, most colleges are failing to adequately define what acts constitute a violation of the regulation.[183] The failure to adequately define what constitutes a violation creates both a legal and a policy problem for administrators. First, an accused student may challenge the regulation under the void-for-vagueness doctrine.[184] Second, the vagueness may actually act as a barrier to the reporting of incidents of sexual assault[185] and may also do nothing to prevent future acts of assault.[186]

Administrators have noted the difficulty of writing a policy that "is realistic, workable, and legal."[187] These concerns are at the heart of the sexual assault definition proposed by this Note. First, the definition is legal. By providing a clear definition of prohibited behavior and avoiding ambiguity, the regulation would survive a legal challenge under the void-for-vagueness doctrine. Second, the definition is workable. The proposed definition is written in clear non-legalistic language and includes a bright-line, workable, standard by which to judge consent. Finally, the proposed definition is realistic. It takes into account the heavy role alcohol plays in college social settings and includes a broader range of behaviors to eliminate the perception that only forcible rape constitutes sexual assault.

Sexual assault is one of the most serious incidents that colleges must address on their campuses.[188] Studies have shown that around

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180. *See* CAMPUS COMMUNITY, *supra* note 11, at 3 (noting that perpetrators will not change their behavior until "they examine and label [those behaviors] as aggressive and violent").

181. David A. Hoekema, CAMPUS RULES AND MORAL COMMUNITY: IN PLACE OF *IN LOCO PARENTIS* 118 (Steven M. Cahn ed., 1994) [hereinafter CAMPUS RULES] (emphasis omitted).

182. CAMPUS COMMUNITY, *supra* note 11, at 31.

183. *See supra* notes 102-04 and accompanying text.

184. *See* cases cited *supra* note 22.

185. *See supra* notes 157-58 and accompanying text.

186. *See* BOGLE, *supra* note 14, at 163 (noting that "[w]ith no firm guidelines decreeing when, where, and with whom sex is appropriate, some students can engage in lewd behavior and think it's permissible because there are no rules saying otherwise").

187. CAMPUS RULES, *supra* note 181, at 49.

188. *See* Hunnicutt, *supra* note 2, at 151 (noting that sexual assault is "acknowledged as the most common violent crime on U.S. college and university campuses").

one-quarter of college-aged women report being victims of sexual assault;[189] this number is probably lower than the actual occurrence rate.[190] While more precisely defining what actually constitutes sexual assault will not completely solve the problem and will not prevent all incidents of sexual assault, providing clear guidance to students about what constitutes sexual assault is necessary as a legal and policy matter.

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189. *Id.* at 152.

190. *See* sources cited *supra* notes 157-58.

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