

FOREWORD TO THE *MISSOULA BOOK ESSAYS*

As our parting gift to readers of this journal, we offer two reviews of Jon Krakauer's book, *Missoula: Rape and the Justice System in a College Town*. We have asked the authors of both reviews to address both Krakauer's book and, in more detail than is customary in a book-review, the hotly contested policy issues that the book raises at several points. One of those contested policy issue is this: What rules should govern the disciplinary hearings that colleges and universities conduct when the complainant says of the respondent that he (in the vast majority of cases) had sexually assaulted her (again, in the vast majority of cases) on the day (or days) and at the time (or times) in question? Five years and a few months before this issue of our journal goes to press, the Office for Civil Rights in the federal Department of Education issued a Guidance that addresses just this question. That Guidance concluded, controversially, (and among other things) that the standard of proof that should be in play at hearings of that sort is the mere preponderance standard, and not a more demanding clear and convincing evidence standard.

One of the authors featured here, Wendy Murphy, vigorously defends the OCR's imposition of that standard, under the aegis of Title IX, on every American college and university that is a recipient of federal funds. The authors of the other review featured here, Joseph Storch and Andrea Stagg, also find the mere preponderance standard of proof to be an appropriate one for sexual-assault based hearings. They do, however, note that some critics of the OCR Guidance "find fault with this standard due to the potential for innocent accused individuals to be punished," and they give the reader some sense of why those critics think as they do. In the recent past, several courts, state and federal, have sided with the critics of the OCR Guidance and have asserted that, either as a matter of federal or state constitutional law (in the case of public institutions) or as a matter of contract law (in the case of private institutions) accused students should enjoy significantly more procedural protection against factual error in sexual-assault based disciplinary proceedings than that Guidance envisaged for them. Those courts have said that when the disciplinary proceeding in question could result in a student's suspension or dismissal from the college or university that he or she had been attending, and when it could mark that student for life as either a rapist or something akin, morally and

societally, to a rapist, those potential consequences require substantial procedural protection against erroneous findings of responsibility for sexual assault.

As lawyers are wont to say, the jury is still out on the set of questions that the OCR Guidance of 2011 has raised. It may be that the argument that Professor Murphy and others have made in favor of the mere preponderance standard is better, legally and morally, than any argument that their adversaries have made for the clear and convincing evidence standard, and so on for the other procedural issues addressed by that Guidance (and its successors). Professor Murphy does, after all, have the OCR interpretation of Title IX on her side, while there are only a modest set of recent judicial decisions—most of them from trial courts—in support of the other side in this debate. We trust that, in this instance, as in most, you, our readers, should have the opportunity to read Professor Murphy's case for the propriety of the use of a mere preponderance standard in collegiate disciplinary hearings in which sexual assault is alleged, and, having read it, to make up your own mind as to the strength of her case. So, fasten your (mental) seat belts, and read on.

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William Hoye