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## Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-Campus Sexual Assault Claims

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# UNDERSTANDING THE IMPLICATIONS OF THE 2011 DEAR COLLEAGUE LETTER: WHY COLLEGES SHOULD NOT ADJUDICATE ON-CAMPUS SEXUAL ASSAULT CLAIMS

## INTRODUCTION

Emma Sulkowicz protested Columbia University's handling of her sexual assault complaint by carrying around a mattress for her entire senior year. On May 19, 2015, she hauled it across the stage to accept her diploma.<sup>1</sup> She alleged that a fellow Columbia student raped and assaulted her in her dorm room during their sophomore year. Following what she characterized as a flawed disciplinary proceeding, the man was found not guilty and remained on campus.<sup>2</sup> Sulkowicz appealed to Columbia's dean, but the school refused to expel him.<sup>3</sup> To protest the decision and as part of her senior thesis project, Sulkowicz decided to carry an extra-long twin-size mattress around Columbia's campus as long as her alleged attacker remained enrolled as a student there.<sup>4</sup> The images of Emma Sulkowicz hauling her mattress around Columbia have become some of the most prominent symbols of sexual assault on American college campuses.<sup>5</sup>

Paul Nungesser is the man who Emma Sulkowicz accused of raping her.<sup>6</sup> Nungesser chose to stay at Columbia following the rape allegations and the disciplinary hearing.<sup>7</sup> During an interview with *Newsweek*, he recounted the loneliness and fear that came along with being

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1. Mike Vilensky, *Columbia Student Graduates While Carrying Mattress*, WALL ST. J. (May 19, 2015, 8:54 PM), <http://www.wsj.com/articles/columbia-student-graduates-while-carrying-mattress-1432052902/>.

2. *Id.*

3. Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAG.: THE CUT (Sept. 21, 2014, 9:00 PM), <http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html>.

4. *Id.*

5. Sarah Kaplan, *How a Mattress Became a Symbol for Student Activists Against Sexual Assault*, WASH. POST (Nov. 28, 2014), [https://www.washingtonpost.com/lifestyle/style/how-a-mattress-became-a-symbol-for-student-activists-against-sexual-assault/2014/11/28/d637db1c-6040-11e4-91f7-5d89b5e8c251\\_story.html](https://www.washingtonpost.com/lifestyle/style/how-a-mattress-became-a-symbol-for-student-activists-against-sexual-assault/2014/11/28/d637db1c-6040-11e4-91f7-5d89b5e8c251_story.html).

6. Max Kutner, *The Other Side of the College Sexual Assault Crisis*, NEWSWEEK (Dec. 10, 2015, 5:33 AM), <http://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html>.

7. *Id.*

“the most notorious alleged college rapist in the country.”<sup>8</sup> Nungesser maintains his innocence and, despite maintaining a low-profile while Sulkowicz and her project garnered considerable media attention, he has since given his account of the alleged incident.<sup>9</sup> He states that the two met during their freshman year and became friends and by spring 2012 their relationship had become intimate.<sup>10</sup> They had sexual intercourse twice prior to the alleged rape on August 27, 2012, a fact that Sulkowicz herself does not dispute.<sup>11</sup> However, while she alleged that she was raped and violently assaulted that night, Nungesser says their interaction was mutual, they fell asleep together, and he returned to his own room the following morning.<sup>12</sup> They continued to exchange benign, even friendly, Facebook and text messages until early 2013.<sup>13</sup>

Then on April 18, 2013, Nungesser was summoned to the Office of Gender-Based and Sexual Misconduct where he learned Sulkowicz had filed a complaint accusing him of sexual assault.<sup>14</sup> Nungesser says his remaining years at Columbia were marred by harassment when the notoriety of his case exploded following Sulkowicz’s mattress project.<sup>15</sup> In April 2015, he sued Columbia for sexual discrimination under Title IX.<sup>16</sup> Nungesser alleged that Columbia’s acts and omissions effectively destroyed his reputation and allowed the type of student-on-student harassment that Title IX prohibits.<sup>17</sup> His suit was dismissed for lack of evidence.<sup>18</sup>

Like the over 3,900 reports of forcible sex offenses that were reported on American college campuses in 2012, it is highly unlikely the general public will ever know what exactly happened between Paul

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8. *Id.*

9. *Id.*; see also Cathy Young, *Columbia Student: I Didn’t Rape Her*, DAILY BEAST (Feb. 3, 2015, 4:55 AM), <http://www.thedailybeast.com/articles/2015/02/03/columbia-student-i-didn-t-rape-her.html>.

10. Kutner, *supra* note 6.

11. *Id.*

12. Young, *supra* note 9. Sulkowicz alleges that Nungesser choked, hit, and anally raped her that night in her dorm room.

13. *Id.* This article features Facebook and text messages between Sulkowicz and Nungesser that Nungesser provided to his interviewer at the *Daily Beast*. Sulkowicz confirmed the authenticity of these messages. *Id.*

14. *Id.*

15. Kutner, *supra* note 6.

16. Tyler Kingkade, *Paul Nungesser Suit Against Columbia Over Mattress Protest is Dismissed*, HUFFINGTON POST (Mar. 12, 2016), [http://www.huffingtonpost.com/entry/paul-nungesser-law-suit-dismissed\\_us\\_56e43ae7e4b0b25c91822496](http://www.huffingtonpost.com/entry/paul-nungesser-law-suit-dismissed_us_56e43ae7e4b0b25c91822496).

17. Complaint at 1, *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353 (S.D.N.Y. 2016) (No. 15-3216).

18. Kingkade, *supra* note 16.

Nungesser and Emma Sulkowicz that night.<sup>19</sup> Despite that uncertainty, many people still assert that Columbia University did not handle the situation properly. If Nungesser did rape Sulkowicz that night, then the school allowed a rapist to freely roam its campus for more than two years and Emma Sulkowicz was forced to deal with the agony of knowing she could find herself face-to-face with her rapist on any given day.<sup>20</sup> Conversely, if Nungesser is innocent, Columbia failed to protect him and his reputation, which has since been intensely ridiculed.<sup>21</sup> This story shows that there can be a battle between truth and narrative in sexual assault cases and educational institutions are simply not equipped to handle that fight.<sup>22</sup>

The prevalence of on-campus sexual assault is one of the most pressing issues facing colleges today.<sup>23</sup> In January 2016, the Justice Department's Bureau of Justice Studies released the Campus Climate Survey Validation Study Final Technical Report.<sup>24</sup> Over 23,000 students at nine schools completed the survey. The survey revealed that the number of women that had been a victim of sexual battery or rape varied from school to school. The lowest recorded rate was 13%; the highest was 51%.<sup>25</sup> The disturbingly widespread presence of on-campus sexual assault is undoubtedly problematic and has spawned numerous debates around the country.<sup>26</sup>

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19. Nick Anderson, *Sex Offenses Statistics Show U.S. College Reports Are Rising*, WASH. POST (July 1, 2014), [https://www.washingtonpost.com/local/education/sex-offense-statistics-show-us-college-reports-are-rising/2014/07/01/982ecf32-0137-11e4-b8ff-89afd3fad6bd\\_story.html?utm\\_term=.4e4eaacb729c](https://www.washingtonpost.com/local/education/sex-offense-statistics-show-us-college-reports-are-rising/2014/07/01/982ecf32-0137-11e4-b8ff-89afd3fad6bd_story.html?utm_term=.4e4eaacb729c).

20. Emma Sulkowicz, *My Rapist is Still on Campus*, TIME (May 15, 2014), <http://time.com/99780/campus-sexual-assault-emma-sulkowicz/> (stating that Sulkowicz was afraid to leave her dorm room for fear of seeing Nungesser on campus).

21. Complaint at 1, *Nungesser*, 169 F. Supp. 3d 353 (No. 15-3216) (explaining that the assault allegations "effectively destroyed" Paul Nungesser's reputation).

22. See generally Ali Shapiro & Jed Rubinfeld, *Colleges Ill-Equipped to Investigate, Adjudicate Sexual Assaults*, NPR (Nov. 25, 2014), <http://www.npr.org/2014/11/25/366620511/colleges-ill-equipped-to-investigate-adjudicate-sexual-assaults>.

23. See, e.g., The Press Office, *Vice President Joe Biden Op-Ed: It's On Us to Stop Campus Sexual Assault*, WHITE HOUSE (Nov. 9, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/09/vice-president-joe-biden-op-ed-its-us-stop-campus-sexual-assault> (describing Vice President Biden's "It's On Us" campaign and its goal to bring awareness to sexual assault on college campuses).

24. *Understanding the Campus Climate Survey Validation Study Final Technical Report*, U.S. DEP'T JUST. (Jan. 21, 2016), <https://www.justice.gov/archives/opa/blog/understanding-campus-climate-survey-validation-study-final-technical-report>.

25. *Id.* This disparity exists because the prevalence rates for sexual assault, rape, and sexual battery varied between the nine schools, with the lowest at 4.2% and the highest at 20%, which is also a significant disparity. *Id.* The prevalence rate for such crimes is calculated by dividing the number of victims by the total population. *Id.*

26. See, e.g., *The Debate: How Should College Campuses Handle Sexual Assault?*, TIME (May 15, 2014), <http://time.com/100038/college-sexual-assault-debate/>. This site features a compilation

It has also spurred the federal government to act.<sup>27</sup> In 2011, the Department of Education's Office of Civil Rights ("OCR") issued a "Dear Colleague" letter ("DCL") to colleges and universities throughout the country to remind them of Title IX's requirements regarding the prevention of on-campus sexual assaults.<sup>28</sup> Many schools thereafter amended their procedures for handling sexual assault claims.<sup>29</sup> The DCL describes the various ways in which colleges must address sexual assault claims to comply with Title IX, which prohibits discrimination on the basis of sex in education.<sup>30</sup>

Women who are sexually assaulted deserve justice and men who are accused of sexual assault deserve to have their due process rights protected.<sup>31</sup> It seems that the DCL is unable to accomplish both. In recent years, for example, accused students have experienced more success in lawsuits against their colleges. According to some legal scholars, this may show that schools are eliminating basic procedural protections in an attempt to combat the issue of on-campus sexual assault.<sup>32</sup> Between 2013 and 2016, at least seventy-five men sued their colleges or former colleges complaining of unfair disciplinary proceedings.<sup>33</sup> Recently, accused students from Middlebury College, Brown

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of articles written for *Time* magazine regarding how colleges should handle sexual assault. For example, Yale Law professor Jed Rubenfeld argues that colleges' "overbroad definitions of sexual assault" are extremely harmful, while attorney Matthew Kaiser wrote an article about how consent rules can be unfair to male students. Jed Rubenfeld, *Overbroad Definitions of Sexual Assault are Deeply Counter-Productive*, TIME (May 15, 2014), <http://time.com/99890/campus-sexual-assault-jed-rubenfeld/>.

27. See *infra* notes 28–29.

28. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *DCL*].

29. Antonia Woodford, *Schools Revise Sexual Assault Policies*, YALE DAILY NEWS (Oct. 7, 2011), <http://yaledailynews.com/blog/2011/10/07/schools-revise-sexual-misconduct-policies/> (noting that Yale University, Princeton University, Duke University, and the University of Virginia all altered their sexual misconduct policies following the issuance of DCL).

30. *DCL*, *supra* note 28.

31. I recognize that not all accusers are female and accused assailants are male. However, I refer to them in this way throughout this Comment because it has been widely reported that the vast majority of accusers and victims are women, and nearly all accused assailants and actual perpetrators of sexual violence are men. See, e.g., C.P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report* (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

32. Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 12, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>.

33. Tony Gutierrez, *Colleges Slammed with Lawsuits from Men Accused of Sex Crimes*, CBS NEWS (Mar. 23, 2016), <http://www.cbsnews.com/news/colleges-slammed-with-lawsuits-from-men-accused-of-sex-crimes/>.

University, and the University of Southern California have found success in courts.<sup>34</sup>

There is a strong desire to end sexual assault on college campuses.<sup>35</sup> However, in order to achieve that goal, it is imperative to analyze the procedures schools utilize to deal with these claims.<sup>36</sup> These procedures have been met with controversy and, in some cases, disapproval.<sup>37</sup> Recent cases have shown that colleges are failing to provide accused assailants with due process rights.<sup>38</sup> A structural conflict of interest arises when colleges are given adjudicatory power over sexual assault claims.<sup>39</sup> In some instances, colleges dismiss claims where a sexual assault likely occurred;<sup>40</sup> in others, they push innocent students out of schools when it is unclear that an assault even happened.<sup>41</sup>

This Comment argues that colleges do not have the competency to properly adjudicate on-campus sexual assault claims and, as a result,

34. *Doe v. Middlebury Coll.*, No. 1:15-CV-192-JGM, 2015 U.S. Dist. LEXIS 124540 (D. Vt. Sept. 16, 2015); *Doe v. Brown Univ.*, 210 F. Supp. 3d 310 (D.R.I. Sept. 28, 2016); *Doe v. Univ. of S. Cal.*, No. B262917, 2016 Cal. LEXIS 6534 (Aug. 10, 2016). For example, the student at Middlebury was awarded a preliminary injunction allowing him to return to campus while the case was being adjudicated. *Middlebury Coll.*, 2015 U.S. Dist. LEXIS 124540, at \*15.

35. Irin Carmon, *What Advocates are Doing to End Sexual Assault on Campus*, NBC News (Sept. 4, 2016), <http://www.nbcnews.com/news/us-news/what-advocates-are-doing-end-sexual-assault-campus-n642156> (noting the various ways in which different groups are attempting to end sexual assault on college campuses, such as Stanford University's ban on "high-volume distilled liquor containers" for on-campus students and parties in the wake of the Brock Turner case and the Obama administration's "It's on Us" campaign).

36. See, e.g., Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond*, U.S. DEP'T EDUC. (Oct. 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>. The authors note that the purpose of writing this report is that, despite the prevalence of sexual assaults on college campuses, relatively little information has been published about "sexual assault policies, protocols, and programs," and their analysis of such topics allowed them to make recommendations to colleges in an effort to prevent sexual assaults. *Id.*

37. Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), <http://www.wsj.com/articles/SB10001424053111903596904576516232905230642>; see also Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>; Christina Hoff Sommers, *In Making Campuses Safe for Women, a Tragedy of Justice for Men*, CHRON. OF HIGHER EDUC. (June 5, 2011), <http://www.chronicle.com/article/In-Making-Campuses-Safe-for/127766/>.

38. See *Brown Univ.*, 210 F. Supp. 3d 310; *Middlebury Coll.*, 2015 U.S. Dist. LEXIS 124540; *Univ. of S. Cal.*, 2016 Cal. LEXIS 6534.

39. See *infra* notes 138–158.

40. See, e.g., Melinda Henneberger, *Why I Won't Be Cheering for Old Notre Dame*, WASH. POST (Dec. 4, 2012), [https://www.washingtonpost.com/blogs/she-the-people/wp/2012/12/04/why-i-wont-be-cheering-for-old-notre-dame/?utm\\_term=.74c474d2b0de](https://www.washingtonpost.com/blogs/she-the-people/wp/2012/12/04/why-i-wont-be-cheering-for-old-notre-dame/?utm_term=.74c474d2b0de) (alleging that the University of Notre Dame purposely ignored a sexual assault complaint regarding one of its football team members).

41. See Jake New, *Court Wins for Accused*, INSIDE HIGHER ED (Nov. 5, 2015), <https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges> (describing how students claiming innocence have been expelled from their colleges for sexual misconduct).

their processes, guided by the DCL, produce results that are often unfair to both the accuser and the accused. Further, it argues that incompetent processes will inevitably produce errors and injustices for both parties. Part II provides a brief history and overview of Title IX. It also describes the OCR's enforcement of Title IX on college campuses, both prior to and following the issuance of the DCL in April 2011. Part III analyzes colleges' adjudicatory powers and procedures regarding sexual assault claims. Further, it explains the structural conflict of interests that ultimately produce injustice and unfairness for the accuser and the alleged assailant.<sup>42</sup> Additionally, Part III introduces facts from recent successful lawsuits that illustrate procedural unfairness in college tribunals. It also explains why allowing colleges to adjudicate sexual assault claims is unfair to the accuser. Part IV presents the argument that adjudication of on-campus sexual assault claims should be left to the criminal justice system. It also explains that colleges have a role to play in sexual assault claims, but it should be limited to education, not adjudication.

## II. HISTORY OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

In the 1960s and early 1970s, the second-wave of the feminist movement reinvigorated efforts to urge the federal government for equality between the sexes.<sup>43</sup> Specifically, feminists called attention to the ongoing discrimination against women in educational employment.<sup>44</sup> As institutions of higher education grew and more women applied to colleges, many believed schools needed to hire more female faculty members.<sup>45</sup> Congress chose not to amend Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in educational programs or activities,<sup>46</sup> or Title VII, which prohibits employers from discriminating against employees on the basis of sex, race, color, or national origin.<sup>47</sup> Instead, Congress ultimately decided to draft new legislation.<sup>48</sup> On June 23, 1972, Presi-

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42. See *infra* notes 138-158.

43. *From Title IX to Riot Grrrls*, HARV. MAG., Jan.-Feb. 2008, <http://harvardmagazine.com/2008/01/from-title-ix-to-riot-gr.html>.

44. Terrence P. Collingsworth, Note, *Title IX Applies to Employment Discrimination*, 1981 DUKE L.J. 588, 589.

45. *The History, Uses, and Abuses of Title IX*, AM. ASS'N U. PROFESSORS (June 2016).

46. 42 U.S.C. § 2000d (2012).

47. 42 U.S.C. § 2000e-2 (2012).

48. SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS: CURRENT RESEARCH AND BEST PRACTICES FOR PREVENTION 50 (Michele A. Paludi et al. eds., 2015).

dent Richard Nixon signed Title IX of the Education Amendments into law.<sup>49</sup> Title IX states:

No person in the United States shall, on the ground of sex . . . be subject to discrimination . . . under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance.<sup>50</sup>

Title IX applies to all schools that accept federal funding, including both private and public institutions.<sup>51</sup> The law addresses sex-based employment discrimination in education, as well as student admissions, scholarships, and the like by requiring educational institutions to maintain policies, practices, and programs that do not discriminate between the sexes.<sup>52</sup>

Despite Title IX's simple purpose—to prohibit discrimination on the basis of sex in education—it has had a profound effect on American educational institutions. It has transformed several aspects of the educational experience, including the ways in which colleges deal with sexual assault claims.<sup>53</sup>

#### A. Enforcement Following Enactment

Following its enactment in 1972, Title IX became widely known for its effect on women's collegiate sports.<sup>54</sup> In actuality, however, Title IX is applicable to all aspects of education.<sup>55</sup> Title IX has endured a turbulent history within the court system and these cases provide an avenue to dissect the various aspects of Title IX and its relationship to sexual assault.<sup>56</sup>

49. CYNTHIA FABRIZIO PELAK, GENDER AND HIGHER EDUCATION 390 (2011).

50. 20 U.S.C. § 1681 (2012).

51. SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS, *supra* note 48, at 51. Schools can seek exemptions if they believe that abiding by Title IX would violate their religious beliefs. Currently, 232 institutions have received exemptions, most of them being lesser-known religious colleges and universities, but well-known institutions Brigham Young University and Pepperdine University have also received exemptions. Melissa Korn, *U.S. Releases List of Religious Colleges Exempt from Discrimination Laws*, WALL ST. J. (Apr. 29, 2016, 7:51 PM), <http://www.wsj.com/articles/u-s-releases-list-of-religious-colleges-exempt-from-discrimination-laws-1461969837>.

52. *Title IX: Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#who> (last visited Jan. 5, 2018).

53. *Understanding How and Why Title IX Regulates Campus Sexual Violence*, UNITED EDUCATORS, available at <https://www.ue.org/uploadedFiles/History%20of%20Title%20IX.pdf>.

54. *From Title IX to Riot Grrrls*, *supra* note 43 (noting that the years immediately following the enactment of Title IX experienced an increase in girls' participation in athletics); see also SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS, *supra* note 48, at 50 (commenting that Title IX was mis-framed as a "sports-equity rule" for decades).

55. SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS, *supra* note 48, at 50.

56. See *infra* notes 57–94.

In 1979, the Supreme Court decided *Cannon v. University of Chicago* and recognized an “implied cause of action,” a judicially inferred right to relief for injuries caused by another’s violation of a federal statute, under Title IX.<sup>57</sup> *Cannon* allowed students to sue their colleges for a variety of issues involving sex-based discrimination and gender inequality.<sup>58</sup> Slowly, the attention began to shift away from women’s sports and towards sexual assault.<sup>59</sup> In 1980, the National Advisory Council on Women’s Educational Programs reviewed Title IX and concluded that the explicit addition of sexual harassment was necessary to this anti-discrimination law.<sup>60</sup> In 1981, the OCR responded to the critique when it issued a policy memorandum that included the term “sexual harassment,” and defined it as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient [of federal funding], that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.”<sup>61</sup>

Despite this clarification, more uncertainty about Title IX ensued following the Supreme Court’s decision in *Grove City v. Bell*.<sup>62</sup> In that case, Grove City College, a private liberal arts school, refused federal and state funding in an effort to maintain its “institutional autonomy.”<sup>63</sup> However, the college enrolled many students who had received grants from a program run by the Department of Education (“DOE”).<sup>64</sup> The DOE argued that this financial assistance to those students qualified the college as the recipient of federal assistance and, thus, made it subject to the nondiscrimination requirements of Title IX.<sup>65</sup> The college refused to comply with those requirements, so the DOE attempted to terminate assistance to the student financial aid program.<sup>66</sup> In *Grove City*, the Court noted that the receipt of the federal grants did not trigger institution-wide adherence to Title IX,

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57. 441 U.S. 677, 741 (1979).

58. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (referencing several important points made in *Cannon*).

59. Frank J. Till, *A Report on the Sexual Harassment of Students*, NAT’L ADVISORY COUNCIL ON WOMEN’S EDUC. PROGRAMS 7 (Aug. 1980), <http://files.eric.ed.gov/fulltext/ED197242.pdf>. A shift seemed to begin when this Council analyzed Title IX and reported that sexual harassment should be considered a form of discrimination.

60. *Id.*

61. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996) (quoting OCR Policy Memorandum from Antonio J. Califa, Directors of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)).

62. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

63. *Id.* at 559.

64. *Id.*

65. *Id.* at 560.

66. *Id.* at 561.

but rather only the College's financial aid program could be regulated.<sup>67</sup> Thus, the Court held that enforcement of Title IX was limited only to those programs within a university or college that receive federal financial assistance.<sup>68</sup> Congress was concerned with this holding and wanted to provide clarification regarding Title IX enforcement.<sup>69</sup> In response, Congress enacted the Civil Rights Restoration Act of 1987, which addressed recent cases that narrowly applied Title IX, such as *Grove City*.<sup>70</sup> Through the Civil Rights Restoration Act, Congress clarified that Title IX was to be applied on an institution-wide basis, rather than be limited in application to specific offices within a college or university.<sup>71</sup>

### 1. 1997 Guidance

In 1992, the Supreme Court decided *Franklin v. Gwinnett County*,<sup>72</sup> in which a high school sophomore alleged she was sexually harassed and abused by a teacher and sports coach.<sup>73</sup> The student alleged the teacher asked her sexually explicit questions and that on three occasions the teacher took her into a private office and forced her to engage in coercive intercourse.<sup>74</sup> Further, she argued that the other teachers and administrators knew about the harassment, and yet they did nothing.<sup>75</sup> The student sued the school district and the Supreme Court held that students who were sexually harassed in public schools could sue for monetary damages under Title IX.<sup>76</sup>

Five years later, the OCR issued its first guidance letter ("1997 Guidance") that emphasized Title IX's role in preventing student-on-student sexual assault and harassment.<sup>77</sup> The 1997 Guidance identified several elements to consider when evaluating if a school's grievance procedures are "prompt and equitable," including "notice to students," "adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence,"

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67. *Id.* at 574.

68. *Grove City Coll.*, 465 U.S. at 573-74.

69. Bob Packwood, *Discrimination Aided*, N.Y. TIMES (Apr. 20, 1984), <http://www.nytimes.com/1984/04/20/opinion/discrimination-aided.html>.

70. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, § 2(1) (1998).

71. *Id.* § 908(2)(A).

72. *Franklin v. Gwinnett Cty.* Pub. Schs., 503 U.S. 60 (1992).

73. *Id.* at 63.

74. *Id.*

75. *Id.* at 63-64.

76. *Id.* at 75.

77. SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12,034, 12,045 (Mar. 13, 1997) available at <https://www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf> [hereinafter 1997 Guidance].

and “reasonably prompt timeframes.”<sup>78</sup> The 1997 Guidance also discussed the accused students’ due process rights and stated, “[t]he Constitution guarantees due process to students . . . who are accused of certain types of infractions.”<sup>79</sup> Further, the OCR emphasized the importance of respecting both the accuser’s and the accused’s due process rights, writing, “[i]ndeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties will lead to sound and supportable decisions.”<sup>80</sup>

## 2. 2001 Guidance

In the 1999 landmark case *Davis v. Monroe*,<sup>81</sup> the Supreme Court further emphasized that Title IX clearly applies to sexual assault and harassment between classmates where the behavior is “so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school.”<sup>82</sup> This case established a cause of action based on peer-to-peer sexual assault, which helped to provide a foundation for Title IX intervention on college campuses.<sup>83</sup> In January 2001, in the wake of the *Davis* decision, the OCR issued the *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* (“2001 Guidance”), which required that schools conduct “prompt, thorough, and impartial” investigations into all allegations of on-campus sexual assault.<sup>84</sup> The 2001 Guidance also placed an increased emphasis on the rights of the accused by including an entirely new section dedicated to describing their due process rights.<sup>85</sup> By 2008, a new version of the aforementioned 1997 Guidance and 2001 Guidance was published that did not mention the rights of the accused, except to warn them that retaliation is prohibited.<sup>86</sup>

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78. *Id.* at 12,044.

79. *Id.* at 12,045.

80. *Id.*

81. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

82. *Id.* at 631.

83. *Id.* at 633.

84. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 Guidance].

85. *Id.* at 22. It has been argued that this section was merely the result of a rearrangement of words from the 1997 Guidance and the addition of a new headline. See Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 59 (2013).

86. *Id.*

The connection between sexual assault and Title IX started to gain more attention when Harvard University, following a “spike in accusations of date rape,” decided to adopt a new set of procedures for sexual assault complaints.<sup>87</sup> One of the new controversial rules stated that the sexual assault complainants were required to produce “sufficient corroborating evidence” before the Administrative Board would pursue the accused student.<sup>88</sup> Absent this proof, Harvard University would not provide redress to the complainant or take action against the accused.<sup>89</sup> Former Dean of Harvard College Harry R. Lewis stated that the University was not properly equipped to deal with “he-said-she-said” complaints.<sup>90</sup>

The new policy received mixed reviews. Many Harvard students expressed that it would create a dangerous environment for victims of sexual assault. However, some legal scholars argued it would help to prevent false accusations.<sup>91</sup> It has since been suggested that the mandatory corroboration policy allowed Harvard to underreport on-campus sexual assaults since it refused to investigate claims lacking, what it considered, a sufficient level of evidence.<sup>92</sup> Harvard University has since changed its sexual assault policy, but its 2002 policy change drew attention to the connection between on-campus sexual assault and Title IX.<sup>93</sup>

Harvard University’s sexual assault policy change is illustrative of the confusion that surrounds the issue of sexual assault. It also provides an example of the negative effects that may arise when a college

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87. Katie Zernike, *Campus Court at Harvard Alters Policy on Evidence*, N.Y. TIMES (May 9, 2002), <http://www.nytimes.com/2002/05/09/us/campus-court-at-harvard-alters-policy-on-evidence.html>.

88. *Id.*

89. *Id.*

90. *Adjudicating Sexual-Assault Cases*, HARV. MAG., July–Aug. 2002, <http://harvardmagazine.com/2002/07/adjudicating-sexual-assa.html>.

91. Compare Sarah M. Seltzer, *Leaning Committee Signals Major Changes in Sexual Assault Policy*, HARV. CRIMSON (June 5, 2003), <http://www.thecrimson.com/article/2003/6/5/leaning-committee-signals-major-changes-in/> (stating that student activist group Coalition Against Sexual Violence urged Harvard to reconsider the new policy’s corroboration requirement), with Anne Kofol, *Lawyer Praises Harvard’s New Sexual Assault Policy Changes*, HARV. CRIMSON (Aug. 16, 2002), <http://www.thecrimson.com/article/2002/8/16/lawyer-praises-harvards-new-sexual-assault/> (describing statements made by Boston lawyer Harvey A. Silvergate who stated that his firm represented a defendant who came “frighteningly close” to being falsely convicted of sexual assault and would have been convicted had an independent investigation that uncovered exculpatory evidence that the Harvard subcommittee had ignored not been conducted by a Harvard faculty member).

92. SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS, *supra* note 48, at 52.

93. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1984 (2015).

is given adjudicatory power over such claims.<sup>94</sup> Finally, the fact that many Harvard students participated in a rally asking the University to reevaluate its policy change, proves that college adjudication of sexual assault claims is a topic about which students are deeply aware.<sup>95</sup>

### B. Enforcement After April 2011

The OCR attempted to clarify the relationship between Title IX and sexual assault on college campuses via its issuance of the DCL in April 2011.<sup>96</sup> This nineteen-page document provides substantial guidance to colleges on how to deal with sexual assault claims.<sup>97</sup> The DCL broadly defined “sexual harassment” under Title IX as ranging from “sexual violence,” which includes rape, sexual assault, sexual battery, and sexual coercion, to the creation of a hostile environment via speech.<sup>98</sup> It also reaffirmed that “sexual violence . . . interferes with students’ right to receive an education free from discrimination.”<sup>99</sup>

It also explicitly states schools are required to lower the burden of proof in sexual assault trials and instructs them to use a preponderance of the evidence standard—the lowest possible threshold—in its adjudication of on-campus sexual assault,<sup>100</sup> even though Congress had already rejected legislation that lowered the standard.<sup>101</sup> The utilization of a preponderance of the evidence standard means that the findings of fact must show that it is more likely than not that the allegations are true.<sup>102</sup>

By contrast, the 2001 Guidance never instructed the schools to set a specific standard of proof for disciplinary hearings.<sup>103</sup> The DCL states, “[I]n order for a school’s grievance procedures to be consistent with Title IX standards, the schools must use a preponderance of the

94. SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS, *supra* note 48, at 52.

95. Reina A.E. Gattuso, *A Growing Movement: Students Aim to Change Culture and Policies Surrounding Sexual Assault on Campus*, HARV. CRIMSON (Dec. 6, 2012), <http://www.thecrimson.com/article/2012/12/6/harvard-can-do-better-movement/>.

96. DCL, *supra* note 28, at 1.

97. *Id.*

98. *Id.* at 1-2.

99. *Id.* at 1.

100. *Id.* at 10-11.

101. An early version of the Campus Sexual Violence Elimination Act (Campus SaVE Act) was introduced on November 30, 2010, including a preponderance of the evidence standard, but it was struck down. H.R. 6461, 111th Leg., 2d Sess. (Ill. 2010).

102. Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use in Higher Education Campus Conduct Processes*, ASS’N FOR STUDENT CONDUCT ADMIN., <http://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>.

103. 2001 Guidance, *supra* note 84.

evidence standard.”<sup>104</sup> Further, it notes that the use of the clear and convincing evidence standard is not fair under Title IX.<sup>105</sup> It also acknowledges that some colleges and universities use different standards of proof, but asserts that those schools must change them in order to comply with Title IX, or else forfeit their federal funding.<sup>106</sup> According to the DCL, other standards are “inconsistent with the standard of proof established for violating civil laws, and are thus not equitable under Title IX.”<sup>107</sup>

As previously noted, one of the most striking aspects of the 2001 Guidance was the attention it placed on the rights of the accused students.<sup>108</sup> Its predecessor, the 1997 Guide, also emphasized the importance of respecting the procedural rights of both parties.<sup>109</sup> The 2001 Guidance included a new section entitled “Due Process of the Accused.”<sup>110</sup> While it has been argued that this was no “grand addition” to the 1997 Guidance, but rather a simple rewording,<sup>111</sup> it is still worth noting that the DCL includes no such section.<sup>112</sup> In fact, it rarely mentions the rights of the accused and directs those interested in that issue to the 2001 Guidance.<sup>113</sup> The DCL states, “Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”<sup>114</sup>

The DCL also includes steps that schools may take to protect the complainant.<sup>115</sup> It notes that schools should inform complainants of ways in which they can avoid their alleged assailant.<sup>116</sup> Institutions may, for example, facilitate changes in housing assignments and class schedules. The DCL noted, however, that schools should minimize the burden on complainants, and thus, should not “remove complain-

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104. *DCL*, *supra* note 28, at 11.

105. *Id.*

106. *Id.*

107. *Id.*

108. *2001 Guidance*, *supra* note 84.

109. *1997 Guidance*, *supra* note 77.

110. *2001 Guidance*, *supra* note 84.

111. Henrick, *supra* note 85.

112. *DCL*, *supra* note 28.

113. *Id.* at 5. Only two sentences in the nineteen-page document address the due process rights of the accused assailants. Besides those two sentences and the reference to the 2001 Guidance, the DCL does not address this issue, despite the fact that, according to the first footnote, the Department of Education determined that it is a “significant guidance document.” *Id.* at 1 n.1.

114. *Id.* at 12.

115. *Id.* at 10.

116. *Id.* at 15.

ants while allowing alleged perpetrators to remain.”<sup>117</sup> This suggests that alleged assailants may be removed from their dorms or classes while their complaint is pending. The DCL also notes that the alleged assailant should not have the opportunity to cross-examine the complainant, since that could be a very “traumatic” or “intimidating” experience and may perpetuate a hostile environment.<sup>118</sup> This is the very type of situation from which Title IX seeks to protect students.<sup>119</sup> Additionally, the DCL states that school administrators should explain to complainants that they have a right to file a criminal complaint and that the administrators shall not discourage them from reporting the incident to the police.<sup>120</sup>

Some applauded the issuance of the DCL praising the “greater clarity” that it provided for schools dealing with sexual assault claims.<sup>121</sup> They also expressed hope that it would promote “equitable result[s].”<sup>122</sup> Others, such as political scientist Peter Berkowitz of Stanford University and Yale Law professor Jed Rubenfeld, have voiced their concerns regarding its negative effects, such as the stripping away of the accused student’s presumption of innocence.<sup>123</sup> In 2014, the Boston Globe published a letter penned by twenty-eight Harvard Law professors that urged Harvard to reevaluate the changes that it had made to its sexual assault policy.<sup>124</sup> The professors argued that the procedures Harvard had adopted following the issuance of the DCL lacked “the most basic elements of fairness and due process.”<sup>125</sup> Their letter was met with criticism, including a response in the Harvard Crimson in which students commented that they were “baffled” and “disheartened” by the professors’ critique of the University’s sexual assault policy.<sup>126</sup>

In 2014, the DOE released a list of schools under investigation for possible violations of federal law related to the handling of sexual vio-

117. *DCL*, *supra* note 28, at 15-16.

118. *Id.* at 12.

119. *Id.*

120. *Id.* at 10.

121. See, e.g., *NCHERM Reaction to the April 4th, 2011 OCR Dear Colleague Title IX Guidance on Campus Assault*, NAT’L CTR. FOR HIGHER EDUC. RISK MGMT., available at <https://www.ncher.org/documents/NCHERMReactiontotheDearColleagueLetter4.6.11.pdf>.

122. *Id.*

123. Berkowitz, *supra* note 37; see also Sommers, *supra* note 37; Rubenfeld, *supra* note 37.

124. Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOST. GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZn7nU2UwuUuWMnqbM/story.html>.

125. *Id.*

126. Stephanie Davidson et al., *What Title IX Does*, HARV. CRIMSON (Oct. 24, 2014), <http://www.thecrimson.com/article/2014/10/24/where-the-professors-err/>.

lence and harassment complaints.<sup>127</sup> These investigations are prompted by either a formal complaint, such as from a student, or a compliance review.<sup>128</sup> This initial list included the names of fifty-five colleges and universities.<sup>129</sup> However, that number continued to grow and, as of June 2016, there were 246 ongoing investigations by the DOE into how 195 colleges and universities handle sexual assault reports.<sup>130</sup> Harvard Law School was found to have violated Title IX because its “policies and procedures failed to comply with Title IX’s requirements for prompt and equitable response to complaints of sexual harassment and sexual assault.”<sup>131</sup> In one case, for example, the law school took over a year to make a final determination about a sexual assault complaint.<sup>132</sup> Although Harvard Law School’s federal funding has not been withdrawn, it entered a resolution with OCR and agreed to change the ways in which it deals with sexual assault claims by abiding by the procedures set forth in the DCL.<sup>133</sup>

Nevertheless, hundreds of sexual assault victims remain students at schools where they believe that their claims are not being dealt with properly.<sup>134</sup> Further, they may feel that they have sacrificed their right to an education in their pursuit of justice.<sup>135</sup> Those feelings, in conjunction with the recent successful Title IX cases brought by accused students imply that colleges should not be allowed to adjudicate on-campus sexual assault claims. It is apparent that both parties are experiencing injustices within the context of a hyper-sensitive issue and something must be done.<sup>136</sup>

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127. Press Office, *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, DEP’T OF EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

128. Jodi S. Cohen, *Federal Authorities Investigating Sexual Violence Complaints at Several Area Colleges*, CHI. TRIBUNE (Mar. 1, 2016, 6:17 PM), <http://www.chicagotribune.com/news/local/breaking/ct-universities-sexual-violence-investigations-20160301-story.html>.

129. *Id.*

130. Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFINGTON POST (June 16, 2016), [http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment\\_us\\_575f4b0ee4b053d433061b3d](http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d).

131. Press Office, *supra* note 127.

132. *Id.*

133. *Id.*

134. Cohen, *supra* note 128 (paraphrasing a quote from University of Chicago student Olivia Ortiz).

135. *Id.*

136. *See* Henneberger, *supra* note 40; *see also* New, *supra* note 41.

### III. ANALYSIS OF COLLEGES' ADJUDICATORY POLICIES AND PROCEDURES

Students accusing other students of sexual assault, the accused students, and colleges all have separate and distinct interests in the context of on-campus sexual assault hearings. These interests have the propensity to conflict. Because colleges are able to control the adjudication process from beginning to end, due process rights and general fairness for both parties may be compromised. The implications of allowing colleges to adjudicate on-campus sexual assault claims, however, extend beyond the accused and the accusers.

#### A. *Structural Conflict of Interests*

In the college setting, there is an inherent structural conflict of interests between three parties when it comes to sexual assault cases: the accused, the victim, and the college itself. Each party's interests are dramatically different and thus incredibly difficult to balance in sexual assault adjudications.

Alleged assailants have an interest in protecting themselves from the negative consequences that result from a sexual assault adjudication.<sup>137</sup> In the past, accused students have been disciplined by their colleges in a variety of ways. Students have been banned from dormitories and other buildings on campus, and prevented from signing up for classes until the accuser has signed up for hers.<sup>138</sup> More seriously, if a student is found guilty by a college tribunal, that verdict may be depicted on his transcript, which could potentially prevent him from transferring to another school.<sup>139</sup> Further, accused students like Paul Nungesser may have to deal with the social consequences of an assault accusation, such as extreme bullying from having the term "rapist" forever attached to their names.<sup>140</sup> In the age of the internet, these harmful and potentially unwarranted stigmas may be perpetuated by the prevalence of social media.<sup>141</sup> Any effects stemming from an on-campus sexual assault accusation could be incredibly detrimental to a person's future and reputation. Thus, accused students have a strong

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137. Ashe Schow, *Yes, False Accusations Destroy Lives*, WASH. EXAMINER (Dec. 9, 2014, 12:51 PM), <http://www.washingtonexaminer.com/yes-false-accusations-destroy-lives/article/2557145>.

138. *Id.*

139. *Id.*

140. Young, *supra* note 9 (describing that Nungesser has been the target of social media threats).

141. *Id.*

interest in protecting themselves. Consequently, they have an interest in a fair trial without bias or a presumption of guilt.

Another set of interests to consider is that of the complainants. The trauma resulting from a sexual assault should not be diminished. Victims of sexual assault may find themselves so overcome by the repercussions of their unwanted sexual encounter that they may be unable to eat, complete assignments on time, attend class, or establish interest in future intimate relationships.<sup>142</sup> These effects may be exacerbated if the alleged assailant is able to remain on campus and, therefore, a victim's primary interest may be to remove the accused student from the school.<sup>143</sup> Thus, the complainant has an interest in speedy proceedings.<sup>144</sup> Further, victims seek validation from their schools so they can know and understand that what happened to them was disgraceful and that they will be supported.<sup>145</sup> Validation is particularly important when one considers the culture of "victim-blaming" that some argue has infiltrated sexual assault cases on college campuses.<sup>146</sup> When "victim-blaming" occurs, sexual assault victims are questioned about their own conduct at the time of the assault, such as about their level of intoxication or how revealing their clothes were at the time of the incident. This can ultimately make them feel "mocked or disbelieved."<sup>147</sup>

Finally, it is important to understand the ramifications of a Title IX violation and the effect it has on college administrators. If a DOE investigation shows that a school violated Title IX by mishandling a sexual assault case, the DOE can revoke the school's federal funding.<sup>148</sup> In 2015, it was reported that federal funding had surpassed

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142. Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST (Aug. 6, 2014), [https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/?utm\\_term=.5864a85e515d](https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/?utm_term=.5864a85e515d).

143. Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2303 (2015).

144. *Id.*

145. J.W. White, *What You Need to Know About Disclosure and Reporting*, ADMINISTRATOR RESEARCHER CAMPUS CLIMATE COLLABORATIVE (Oct. 24, 2015) <http://campusclimate.gsu.edu/files/2015/04/Facts-about-disclosure.pdf>.

146. See, e.g., Jake New, *Blaming the Victim*, INSIDE HIGHER ED (June 17, 2016), <https://www.insidehighered.com/news/2016/06/17/colleges-sued-students-negligence-turn-victim-blaming-defense>; Petula Dvorak, *Stop Blaming Victims for Sexual Assaults on Campus*, WASH. POST (Feb. 24, 2014), [https://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b\\_story.html?utm\\_term=.2b0868f25374](https://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b_story.html?utm_term=.2b0868f25374).

147. Beatrice Diehl, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 GEO. J. LEGAL ETHICS 503, 509 (2015).

148. *DCL*, *supra* note 28, at 16.

state funding as the main source of public funding in higher education.<sup>149</sup> For some schools, the amount of federal funding at stake is hundreds of millions of dollars. In 2011, for example, the University of Michigan received \$820 million, the University of Pennsylvania received \$707 million, and Stanford University received \$656 million from the federal government.<sup>150</sup> Although the DOE has not withdrawn federal funds from any school involved in sexual assault cases since Title IX was signed into law, the possibility nevertheless exists. In November 2016, the DOE announced that Pennsylvania State University would be fined nearly \$2.4 million for numerous violations of the Clery Act<sup>151</sup> that were mostly associated with the Jerry Sandusky scandal.<sup>152</sup> Although this fine may seem slight when compared to the revocation of the entirety of a school's federal funding, it shows universities that the DOE is willing to punish schools involved in the mishandling of assault cases. Further, administrators know that losing federal funding would be incredibly detrimental to a college or university's ability to function.<sup>153</sup> Thus, it is in their best interest to protect that funding by ensuring compliance with Title IX.<sup>154</sup>

Colleges and universities also do not want their reputations to be tarnished, and administrators have an interest in being able to manage the school's public image. In 2011, the DOE published its list of schools under investigation for possible violations of Title IX and the

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149. Kellie Woodhouse, *Impact of Pell Surge*, INSIDE HIGHER ED (June 12, 2015), <https://www.insidehighered.com/news/2015/06/12/study-us-higher-education-receives-more-federal-state-governments>.

150. *Ten Universities That Receive the Most Government Money*, HUFFINGTON POST (Apr. 29, 2013, 2:47 PM), [http://www.huffingtonpost.com/2013/04/27/universities-government-money\\_n\\_3165186.html](http://www.huffingtonpost.com/2013/04/27/universities-government-money_n_3165186.html).

151. The Clery Act is a campus safety law named after a former Lehigh student who was raped and murdered in her dorm room.

152. Nick Anderson, *Feds Seek Record \$2.4 Million Fine Against Penn State in Sandusky Scandal*, WASH. POST (Nov. 3, 2016), [https://www.washingtonpost.com/local/education/feds-seek-record-24-million-fine-against-penn-state-in-sandusky-scandal/2016/11/03/7f8e7bf8-a1cd-11e6-8832-23a007c77bb4\\_story.html?utm\\_term=.6c343de9d34b](https://www.washingtonpost.com/local/education/feds-seek-record-24-million-fine-against-penn-state-in-sandusky-scandal/2016/11/03/7f8e7bf8-a1cd-11e6-8832-23a007c77bb4_story.html?utm_term=.6c343de9d34b).

153. Joseph R. D'Angelo, *A Road Map to Recovery*, INSIDE HIGHER ED (Dec. 21, 2016), <https://www.insidehighered.com/views/2016/12/21/how-profit-institutions-can-generate-better-student-outcomes-and-long-term-success>. As noted, the DOE has never taken away federal funding from a school for violating Title IX. Recently, however, it declared 23 campuses of Marinello Schools of Beauty ineligible after the cosmetology school chain had violated Title IV. The revocation of funding forced all 53 of the cosmetology school's campuses to close. *Id.* Granted, the Marinello Schools of Beauty were not acquiring millions of dollars in donations every year like the University of Michigan, but the closings may still serve as a warning to four-year colleges and universities.

154. *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <http://knowyourix.org/why-schools-handle-sexual-violence-reports/> (last visited Jan. 8, 2018).

mishandling of sexual violence and harassment complaints.<sup>155</sup> Following the release of the list, some of the nation's most prominent institutions have seen their sexual assault policies become subject to public ridicule.<sup>156</sup> Some alumni have become so disturbed by universities' practices that they have decided to withhold donations until they are satisfied with the manner in which their former colleges and universities handle sexual assault cases.<sup>157</sup> It has been argued that universities' primary concern is making money, whether that be from federal funding or private donations.<sup>158</sup> However, the ability to make money may be impeded by a Title IX violation or a reputation for allowing sexual assailants to go unpunished. Title IX gives colleges the ability to govern the lifespan of a sexual assault complaint. Thus, they can guide the proceedings in a way that is most beneficial for them. This may result in the miscarriage of justice for one or both of the involved parties. It should be noted that colleges' interests in funding should not be construed to mean that administrators are necessarily apathetic to the harms inflicted upon their students or disinterested in finding ways to prevent future harms. It is simply that an administrator's primary goal, at many schools, seems to be to protect the institution, not the student.<sup>159</sup>

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155. Press Office, *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, DEP'T OF EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

156. See, e.g., David Folkenslik, *Acclaimed Documentary About Campus Rape Draws Critics Too*, NPR (Dec. 3, 2015), <http://www.npr.org/2015/12/03/458031996/acclaimed-documentary-about-campus-rape-draws-critics-too>. Following the release of the DOE's list, the documentary *The Hunting Ground* was released and purported to offer evidence of universities' failure to properly deal with campus sexual assault claims. *Id.* It inspired a "call to action" for some who wanted to take a closer look at schools' sexual assault policies, but the film also garnered much criticism from college administrations. *Id.* Nevertheless, it provoked a discussion on how schools like Harvard Law School and the University of Notre Dame, both of which were featured in the film, handle sexual assault complaints. *Id.*

157. See *Alumni Will Withhold Support Until Tufts Complies With Title IX and Re-Signs the VRA*, CHANGE.ORG, [https://www.change.org/p/alumni-will-withhold-support-until-tufts-complies-with-title-ix-and-resigns-the-vra?recruiter=91382940&utm\\_campaign=twitter\\_link\\_action\\_box&utm\\_medium=twitter&utm\\_source=share\\_petition](https://www.change.org/p/alumni-will-withhold-support-until-tufts-complies-with-title-ix-and-resigns-the-vra?recruiter=91382940&utm_campaign=twitter_link_action_box&utm_medium=twitter&utm_source=share_petition) (last visited Jan. 9, 2018); see also Cara Newlon, *After Campus Rape Allegations, Some Alums Deny Donations*, FORBES (June 16, 2014), <http://www.forbes.com/sites/caranewlon/2014/06/16/after-campus-rape-allegations-some-alums-deny-donations/#4d77eb2a7f0b> (noting the importance of donations for colleges by pointing out that American colleges and universities received about \$9 billion from alumni donors in 2013).

158. See generally Andrew Rossi, *How American Universities Turned into Corporations*, TIME (May 22, 2014), <http://time.com/108311/how-american-universities-are-ripping-off-your-education/>.

159. See Caroline Kitchener, *When Helping Rape Victims Hurts a College's Reputation*, ATLANTIC (Dec. 17, 2014), <https://www.theatlantic.com/education/archive/2014/12/when-helping-rape-victims-hurts-a-universitys-reputation/383820/>.

B. *Procedural Unfairness and Due Process Violations*

1. *Lack of Neutrality in College Tribunals*

According to the Sixth Amendment, the accused shall enjoy the right to a speedy and public trial by an impartial jury.<sup>160</sup> The guarantee of impartiality is essential to criminal proceedings because it helps to ensure fairness.<sup>161</sup> However, campus proceedings can be biased and, thus, inherently unfair. Tribunal members may be administrators, professors, or fellow students, all of whom may carry their own strong biases.<sup>162</sup> Particularly, administrators and faculty members have an interest in a school's reputation since their jobs may be dependent on it. This indicates a lack of neutrality. Additionally, by allowing other students who may personally know one or both of the parties to play a role in the proceedings, another risk of bias may be introduced. These potential partialities often exist despite the fact that the DCL states, "A school's investigation and hearing process cannot be equitable unless [it is] impartial."<sup>163</sup> In *Bleiler v. College of the Holy Cross*, a student claimed that the College violated its procedures by allowing two students who were Facebook friends with the female complainant to serve as members of a tribunal for his sexual assault hearing.<sup>164</sup> Further, both of the students had previously served as the complainant's resident advisors in her dormitory and, consequently, had personal relationships with her.<sup>165</sup> At Stanford University, administrators train jurors on tribunals that taking a neutral stand between the two parties in a sexual assault claim is the equivalent of siding with the accused, which not only contradicts the very definition of "neutral" but also violates the accused student's right to due process.<sup>166</sup>

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160. U.S. CONST. amend. VI. The Sixth Amendment applies only to the federal government. The right to an impartial jury was extended to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

161. James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 271 (1988–1989).

162. See, e.g., *Bill of Rights for Students Involved in Sexual Misconduct Cases*, U. NORTH GA., <https://ung.edu/dean-of-students/policies/bill-of-rights-sexual-harassment.php> (last visited Dec. 9, 2017) (stating that accused students have the right to an administrative hearing in front of two faculty members and two students).

163. *DCL*, *supra* note 28, at 12.

164. *Bleiler v. Coll. of the Holy Cross*, No. 11-11541-DJC, 2013 U.S. Dist. LEXIS 127775, at \*5–6 (D. Mass. Aug. 28, 2013).

165. *Id.*

166. Mike Armstrong & Daniel Burton, *Op-Ed: A Thumb on the Scale of Justice*, STAN. DAILY (Apr. 29, 2011), <http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/>.

An absence of neutrality on college tribunals for sexual assault complaints can also negatively affect victims. In August 2016, the University of Florida cleared a football player of responsibility for an alleged sexual assault of a female student.<sup>167</sup> The university appointed former Assistant State Attorney Jake Schickel to decide whether the leading wide receiver should be punished for the misconduct.<sup>168</sup> Schickel, an alumnus of the University of Florida and its law school, was also an annual donor to the school's football and basketball programs.<sup>169</sup> In a statement, the University of Florida's assistant vice president for media relations and public affairs, Janine Sikes, said that Schickel "had been vetted . . . for impartiality," but did not explain the process further.<sup>170</sup> Schickel's presence as the sole member of the tribunal imputes a clear conflict of interest given his status as a financial supporter of the University of Florida football and basketball teams. Schickel, as an athletic booster, may not have wanted to impose any punishments that would negatively affect the success of the teams. That kind of connection between a juror and a defendant would not be allowed in criminal court, and it could have yielded a gross injustice for the female student.<sup>171</sup> Biases and impartiality can be present in college tribunals, while juries in criminal proceedings are screened for biases that may hinder their ability to participate in a fair trial during *voir dire*.<sup>172</sup>

## 2. *Preponderance of the Evidence Standard*

The OCR's DCL explicitly requires schools to use a preponderance of the evidence standard—a "more likely than not" standard—in adjudicating campus sexual assaults.<sup>173</sup> The DCL reasons that this standard is appropriate because it is the same one used in civil proceedings.<sup>174</sup> However, a civil proceeding and an on-campus sexual assault disciplinary proceeding are dissimilar. Furthermore, this process cannot be considered legitimate if it does not fairly resolve claims, regardless of the punishment at stake.

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167. Paula Lavigne & Mark Schlabach, *Accuser to Boycott Title IX Hearing After Florida Gets Booster to Handle Case*, ESPN (Aug. 5, 2016), [http://www.espn.com/college-football/story/\\_/id/17226092/woman-accusing-florida-gators-players-sexual-assault-boycotts-title-ix-hearing](http://www.espn.com/college-football/story/_/id/17226092/woman-accusing-florida-gators-players-sexual-assault-boycotts-title-ix-hearing).

168. *Id.*

169. *Id.*

170. *Id.*

171. Gobert, *supra* note 161, at 275 (noting how the "ideal juror" in the criminal court system is someone who is not acquainted with either of the parties).

172. *Id.* at 275 n.252.

173. *DCL*, *supra* note 28, at 11.

174. *Id.* at 10.

In criminal court, allegations of a sexual assault must be proved “beyond a reasonable doubt.”<sup>175</sup> The stakes are too high for the accused student for there to exist such a disparity between these standards. The applicable standard should not depend upon whether or not the assault occurred between students of the same college. Again, the emotional and physical consequences of being sexually assaulted should never be ignored. The same can be said for victims of other crimes, but, in those cases, the criminal justice system is concerned with making sure that innocent people are not falsely convicted.<sup>176</sup> This low standard of proof seems to be a violation of the accused student’s due process rights, especially when considering the general presumption of guilt for the accused student that some argue seems to underlie the DCL.<sup>177</sup>

Simply heightening the standard of proof to the “beyond a reasonable doubt” standard in campus sexual assault proceedings may not be a viable solution to this problem. As illustrated in the case involving the University of Florida football player, colleges and universities can ignore potential biases when it is beneficial to them.<sup>178</sup> The amount of discretion that colleges are given in sexual assault proceedings is problematic. Because colleges are unable to exercise this discretion fairly, maybe the power to adjudicate these cases should be taken away. Also, these proceedings may be guided by people who, although well educated in issues involving academia, have no legal education.<sup>179</sup> The seriousness of these proceedings and, thus, the importance of properly explaining and applying the correct standard of proof, is paramount given the stakes for all parties.

### 3. Possible Inability to Cross-Examine

The 2011 DCL states, “OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other

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175. Gobert, *supra* note 161, at 277.

176. *Id.* at 277 n.142 (stating that the “fundamental principles of legality would be compromised if the jury could convict a technically innocent person”).

177. *See* Henrick, *supra* note 85, at 61.

178. Lavigne & Schlabach, *supra* note 167.

179. U.S. Bureau of Labor Statistics, *Postsecondary Education Administrators: Summary*, U.S. DEP’T LAB. (Dec. 17, 2015), <https://www.bls.gov/ooh/management/postsecondary-education-administrators.htm> (showing that the typical entry-level education is a master’s degree); *see also* Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, BOST. GLOBE (Nov. 3, 2014), <https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html> (describing a former Yale student’s disciplinary proceeding in which the chairman had “no prior experience handling dispute resolution,” yet wanted the process to operate as a form of mediation).

during the hearing.”<sup>180</sup> To qualify as harassment under Title IX, the speech must be so severe and pervasive that it creates a hostile environment in a way that interferes with the accuser’s education.<sup>181</sup> While objectivity is present in analyzing whether or not an incident may be considered harassment, there is also an element of subjectivity because different people are offended by different conduct. Thus, people have varying views on what constitutes a “hostile environment.”<sup>182</sup> Consequently, some have argued that cross-examination is crucial in order for the accused to properly defend themselves in sexual assault cases.<sup>183</sup>

In 2015, a court in California held that the University of California, San Diego acted improperly when it adjudicated a sexual assault complaint and sanctioned the accused student based on a process that violated his rights.<sup>184</sup> The court found that the University violated the student’s right to due process when it did not allow him to adequately cross-examine the alleged victim.<sup>185</sup> In the interest of protecting victims, colleges often choose to handle cross-examinations by asking the alleged assailant to submit questions.<sup>186</sup> The accused submitted thirty-two questions, but the panel decided to only ask nine of them.<sup>187</sup> Also, the tribunal relied heavily on a report created by the University’s Office for the Prevention of Harassment and Discrimination, but it did not allow the author to be available for cross-examination.<sup>188</sup> The court held that this inability to properly cross-examine was a blatant violation of the accused student’s due process rights. This case has been cited as favorable precedent for other students challenging the ways their universities have adjudicated sexual assault complaints against them.<sup>189</sup>

The OCR reasons that cross-examination should not be used because it could be “traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”<sup>190</sup> Having to be

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180. *DCL*, *supra* note 28, at 12.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Doe v. Regents of Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4294597 (Cal. Super. Ct. July 10, 2015) (order granting Petition for Writ of Mandamus).

185. *Id.* at \*2.

186. Jake New, *The Right to Confront*, *INSIDE HIGHER ED* (July 23, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/07/23/suit-against-u-california-san-diego-could-provide-framework-other-students-accused>.

187. *Doe v. Regents of Univ. of Cal. San Diego*, 2015 WL 4294597, at \*2.

188. *Id.* at \*2–3.

189. *Id.*

190. *DCL*, *supra* note 28, at 12.

interrogated by one's sexual assailant or rapist would undoubtedly be emotionally difficult. However, that reasoning also presumes that the accused student is guilty of sexual assault, and thereby able to make the situation traumatic and uncomfortable. It seems that such a policy that clearly prefers the accuser is unfair to the accused student and violates due process rights. Colleges and universities are able to implement this policy because the OCR allows them to choose whether they want to give parties the ability to cross-examine.

#### 4. Possible Denial of Right to Counsel

The DCL notes that it is for the institution to decide whether attorneys may be present at disciplinary hearings.<sup>191</sup> In *Goss v. Lopez*, the Supreme Court stated that the process owed to the accused student depends on the circumstances of each case and a balancing of the parties' interests.<sup>192</sup> Additionally, the court held that disciplinary hearings in which "longer suspensions or expulsions" are possible may require "more formal procedures."<sup>193</sup> Though vague, this holding might imply that accused assailants, who will likely be expelled if found guilty of sexual assault by a tribunal, may have the right to counsel. However, the DCL notes that schools need not permit the parties to have lawyers participate at any stage of the proceedings.<sup>194</sup> However, if the school chooses to allow one party to hire a lawyer for the proceedings, then it must allow the other party to also hire one.<sup>195</sup> Any additional restrictions on the use of lawyers, such as their ability to speak during proceedings, must be equally placed on both parties.<sup>196</sup>

Thus, a college has complete discretion in deciding whether the students will have the ability to gain access to an attorney's expertise. Given the complexities of a sexual assault proceeding, the inability to access legal advice may be damaging to a party's case. This process is intimidating, as the DCL itself admits, and both parties should be protected from any procedural schemes used by college administrators to unfairly convict or find not guilty the accused student.<sup>197</sup> Accordingly,

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191. *DCL*, *supra* note 28, at 12.

192. *Goss v. Lopez*, 419 U.S. 565, 577-84 (1975).

193. *Id.* at 584.

194. *DCL*, *supra* note 28, at 12.

195. *Id.*

196. *Id.*

197. *DCL*, *supra* note 28, at 12 (noting that allowing an alleged assailant to question a victim could escalate a hostile environment, indicating that a hostile environment may already exist, given the discomfort associated with sexual assault proceedings).

all parties to a sexual assault proceeding should be allowed to have lawyers present.

### 5. *Lack of Transparency*

Colleges often handle sexual assault complaints with a general lack of transparency, which could have a direct impact on their credibility.<sup>198</sup> If an official makes a mistake, such as overlooks an inherent bias or does not ensure the appropriate people are adequately trained, that mistake can be hidden since colleges are under no obligation to publicly disclose their processes in sexual assault hearings. A criminal conviction is accessible to the general public,<sup>199</sup> while colleges and universities are not required to disclose the names of students they expel, nor are they required to disclose the reason.<sup>200</sup>

An illustration of this lack of transparency can be found at Hanover College in Indiana, where students involved in assault-related disciplinary hearings are strictly prohibited from publicly disclosing the names of any of the participants.<sup>201</sup> However, this lack of transparency does not cease after a disciplinary hearing has ended. While a sexual assault violation can be included on a transcript, it may only be described as “misconduct” and cannot further define the acts for which the student was expelled.<sup>202</sup> Currently, colleges have no way of knowing if a student transferring to their campus has committed a sexual assault at a previous school.<sup>203</sup> Furthermore, this level of confidentiality is disheartening when one considers the prevalence of

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198. See generally Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 *YALE L.J.* 1820, 2160–61 (2016).

199. James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter?*, 14 *PUNISHMENT & SOC'Y* 3, 14–15 (Jan. 13, 2012) (describing how the rise of the internet has made it difficult to keep criminal records private).

200. *FERPA: Noting Student Misconduct on Transcripts*, AM. ASS'N OF COLLEGIATE REGISTRARS & ADMISSIONS OFFICERS (Nov. 18, 2014), <http://www.aacrao.org/resources/resources-detail-view/ferpa—noting-student-misconduct-on-transcripts>. The AACRAO states, “There is no definitive law or general practice on notation and notification; ultimately it is up to the institution to set its own policy and follow it. Typically, institutions do not place notations on their transcripts, and most sending institutions do not, as a matter of course, include disciplinary records during the transfer process.” *Id.*

201. *Hanover College Policy on Sex/Gender Harassment, Discrimination and Misconduct*, HANOVER C., <http://vault.hanover.edu/~heckler/Hanover%20College%20Policy%20&%20Procedures%20for%20Title%20IX%20Issues.pdf> (last visited Jan. 3, 2018).

202. *FERPA*, *supra* note 200.

203. Andrew Kreighbaum, *Bill Would Require Transcripts to Note Violation of Sexual Assault Policies*, *INSIDE HIGHER ED* (Dec. 9, 2016, 3:00 AM), <https://www.insidehighered.com/quick-takes/2016/12/09/bill-would-require-transcripts-note-violation-sexual-assault-policies> (according to Congresswoman Jackie Speier, who has introduced a bill that would require academic transcripts to indicate if a student committed a sexual assault at their former school).

sexual assault on college campuses.<sup>204</sup> The consequences of failing to disclose that a transfer student committed an assault at their former college thus increases the risk of sexual assault at their new institution.<sup>205</sup>

Not only are campus disciplinary processes shrouded in secrecy, but the investigations conducted by the OCR also exhibit a general lack of transparency.<sup>206</sup> This characteristic can be harmful if colleges are not aware of how their tribunals will be assessed. Further, this confusion could cause schools to become more concerned with being as “safe” as possible so as not to be found to be in violation by the OCR, rather than focusing on the administration of fairness and justice. There seems to be significant variation between investigations at different schools. For instance, when the OCR investigated the University of Santa Cruz in 1994, the investigation involved interviewing a large number of people, not only those who had served as officials on the tribunal.<sup>207</sup> Conversely, in other investigations, it seems that the OCR never attempted to speak with anyone besides the complainant and the involved school officials.<sup>208</sup> Colleges cannot possibly ask parents and students to trust that the schools will keep students safe from the ever-growing issue of sexual assault on campuses when their policies for handling these crimes are surrounded by secrecy.

#### IV. IMPACT

This Section argues that campus sexual assault complaints should be dealt with by the criminal justice system rather than colleges and uni-

204. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., [http://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf) (last visited Jan. 3, 2018) (indicating that one in every five women and one in sixteen men are sexually assaulted in college).

205. Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (July 10, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts>. In 2015, Jesse Matthew murdered University of Virginia student Hannah Graham. *Id.* It has since been disclosed that Matthew was accused of sexual assault at two of his former universities. *Id.* Both schools failed to disclose how Matthew was punished following the complaints. *Id.* Virginia has since become the first state to require colleges to note sexual assault on college transcripts. *Id.*

206. See generally Ridolfi-Starr, *supra* note 198.

207. See Mary Spicuzza, *The Missing 47: Rape Survivor Advocates Worry UCSC's Revamped Sex Offense Policy Promotes Silence Around Sexual Assault*, METROACTIVE (Nov. 12, 1998) <http://www.metroactive.com/papers/cruz/1.12.98/rapel-9845.html>; see also Noah J. Delwiche & Ivan B. Levingston, *Civil Rights Office Interviews Students for Title IX Probe*, HARV. CRIMSON (Apr. 23, 2015), <http://www.thecrimson.com/article/2015/4/23/ocr-solicits-student-input>.

208. Press Office, *Students Accused of Sexual Misconduct had Title IX Rights Violated by Wesley College, Says U.S. Department of Education*, U.S. DEP'T EDUC. (Oct. 12, 2016), <https://www.ed.gov/news/press-releases/students-accused-sexual-misconduct-had-title-ix-rights-violated-wesley-college-says-us-department-education>.

versities themselves. Additionally, it asserts that schools do have an important role to play in the prevention of sexual assault, but that role lies in education, not adjudication.

### A. Adjudication in the Court System

It is worth noting at the outset of this Section that most victims of sexual violence on college campuses do not report their sexual assaults or rapes at all.<sup>209</sup> Further, it has been reported that most victims do not want to turn to the criminal justice system out of a fear of enduring skepticism or abuse from judges, police officers, or juries.<sup>210</sup> Thus, it is imperative that the appropriate body properly adjudicates the small percentage of sexual assaults that are reported. This Comment does not argue that the system is entirely sound or consistently produces the most just results. However, the criminal justice system is the most appropriate venue for these adjudications, not colleges and universities.

Possible sexual assailants may be more likely to be deterred by the increased possibility of being arrested and standing trial versus being disciplined by a campus tribunal, where their punishment may include, at worst, expulsion or a notation on their transcript.<sup>211</sup> Of course, a sexual assailant could face both academic and criminal repercussions for their crime. However, given the fact that most on-campus sexual assaults are not reported and, if they are, it is more likely that they

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209. *Statistics about Sexual Violence*, *supra* note 204 (stating that more than 90% of victims do not report their assaults and that rape is the most under-reported crime).

210. *Why Schools Handle Sexual Violence Reports*, *supra* note 154 (noting that “[f]or many survivors, campus reporting is their only option” since the criminal justice system can be intimidating and fear-inducing); see also Eliza Gray, *Why Victims of Rape in College Don’t Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> (explaining reasons for not reporting such as fear that the police will not believe them and a lack of understanding about what constitutes rape).

211. *Henrick*, *supra* note 85, at 90 (listing colleges’ “serious” sanctions and their effects on the accused students future); see also *Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 326–27 (D.R.I. 2016) (noting that a panel at Brown University determined that a student accused of sexual assault should be suspended until his accuser graduated); see also Peter Walsh & Karen Zamora, *St. John’s Student Accused of Sexually Assaulting a Woman in Her Dorm Sues Over Suspension*, STAR TRIB. (Oct. 27, 2016, 2:15 PM), <http://www.startribune.com/st-john-s-student-accused-of-sexually-assaulting-woman-in-her-dorm-sues-over-suspension/398784011/> (describing the case of a male student who was suspended for one month after being found guilty of sexually assaulting a female student in her dorm room); see also Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence—With U-Va. a Prime Example*, WASH. POST (Dec. 15, 2014), [https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e\\_story.html?utm\\_term=.4be5f6624a37](https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html?utm_term=.4be5f6624a37) (reporting that some schools, such as the University of Virginia, have expelled no students for sexual misconduct in years).

will be reported to college administrators, the punishment that an assailant is most likely to endure is an academic sanction.<sup>212</sup>

It is imperative that the body that adjudicates on-campus sexual assault does so in a just and fair manner. The American criminal justice system has been dealing with sexual assault claims for centuries. By contrast, the DOE issued its first guidance instructing colleges and universities about how to handle sexual assault cases in accordance with Title IX just two decades ago in 1997.<sup>213</sup> The criminal justice system has created safeguards against the procedural unfairness that exists in college tribunals as explained above.

Courts were established and are designed to deal with serious crimes such as homicide, kidnapping, and arson.<sup>214</sup> Rape and sexual assault are also serious crimes, and it should not make a difference where the crime was committed. Thus, adjudication belongs in the criminal justice system, while colleges and universities should solely deal with academic violations.

Finally, courts do not have the same incentives as colleges and universities. The members of the criminal justice system do not have to worry that finding a defendant not guilty may result in the revocation of federal funding. In fact, the American criminal justice system is grounded in neutrality so that defendants can receive a fair trial.<sup>215</sup> Due process and justice should be at the forefront of sexual assault adjudications. Therefore, the criminal justice system, which was founded upon those values, should alone be dealing with these cases.

### B. *Role of Colleges in Sexual Assault Claims*

Colleges have the ability to play an impactful role in preventing sexual assault on campus and making both parties as comfortable as possible while their case is being adjudicated in criminal court. In order to prevent sexual assaults, many argue that it is critical that colleges and universities educate students on sexual assault.<sup>216</sup> Dartmouth

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212. Rubinfeld, *supra* note 37 (stating that according to a *New York Times* article “a ‘great majority’ of college students now choose to report incidents of assault to their school, not the police, because of anonymity and other perceived advantages”).

213. *1997 Guidance*, *supra* note 77.

214. *See, e.g., Man Gets 44 Years in Prison for Killing a Yale Student*, N.Y. TIMES (June 3, 2011), <http://www.nytimes.com/2011/06/04/nyregion/annie-les-killer-at-yale-raymond-clark-iii-gets-44-years.html> (describing the case of Annie Le, who was murdered on Yale University’s campus, and her murderer’s sentencing of 44 years in prison).

215. *See, e.g., Gobert*, *supra* note 161, at 275 (noting how the “ideal juror” in the criminal court system is someone who is not acquainted with either of the parties).

216. Eilene Zimmerman, *Campuses Struggle with Approaches for Preventing Sexual Assault*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/campuses-struggle->

University recently introduced a series of reforms in an effort to combat sexual violence on its campus.<sup>217</sup> One of the changes included a mandatory sexual violence prevention curriculum for four years, versus a one-time lecture during the freshmen orientation.<sup>218</sup> Topics such as “what constitutes consent” and alcohol’s effect on one’s ability to consent should certainly be covered, especially given the prevalence of alcohol-involved sexual assault.<sup>219</sup> There is very little data available on the effectiveness of such programs.<sup>220</sup> However, this new implementation will likely prove to be effective, since students need to be constantly reminded that sexual assault is a threat that is always present on college campuses.<sup>221</sup> Additionally, creating an on-campus culture that demands that men treat women with respect will go a long way in assuring that women will be safe on college campuses and hopefully decrease the prevalence of on-campus sexual assault.

Additionally, colleges and universities should institute bystander intervention training. These trainings ask participants to attend workshops to learn techniques for effective intervention.<sup>222</sup> Campus administrators should also threaten academic sanctions for those who are aware that someone is being sexually assaulted in their dorm room or fraternity house, and yet do nothing to stop it. It has been reported that young men in social fraternities are more likely to commit sexual assault than other men.<sup>223</sup> This has been attributed to “within-group attitudes” which can perpetuate a hyper-masculine culture and “crys-

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with-approaches-for-preventing-sexual-assault.html (illustrating the University of Michigan’s efforts to prevent sexual assaults by reforming their educational programs for students).

217. Holly Ramer, *Dartmouth Undertakes Reforms to Reduce Campus Sexual Assaults*, PORTLAND PRESS HERALD (Dec. 17, 2016), <http://www.pressherald.com/2016/12/17/dartmouth-undertakes-reforms-to-reduce-campus-sexual-assaults/>.

218. *Id.*

219. Antonia Abbey et al., *Alcohol and Sexual Assault*, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM (2000), <https://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm> (noting that approximately half of sexual assault cases involve alcohol consumption by either one or both parties).

220. Zimmerman, *supra* note 216.

221. See Kate B. Carey et al., *Incapacitated and Forcible Rape of College Women: Prevalence Across the First Year*, 56 J. ADOLESCENT HEALTH 678, 680 (Feb. 25, 2015), [http://i2.cdn.turner.com/cnn/2015/images/05/20/carey\\_jah\\_proof.pdf](http://i2.cdn.turner.com/cnn/2015/images/05/20/carey_jah_proof.pdf) (finding that 19% of women said that they had been a victim of attempted or completed during their first year of college). *But see* Vilensky, *supra* note 1 (noting that Emma Sulkowicz was a sophomore at the time of her alleged rape); Stacey Barchenger, *Read the Victim’s Full Statement in Vanderbilt Rape Case*, TENNESSEAN (July 15, 2016, 11:55 AM), <http://www.tennessean.com/story/news/2016/07/15/read-victims-full-statement-vanderbilt-rape-case/87132264/> (stating that the victim was 21 years old when she was raped by Vanderbilt football player Cory Batey).

222. Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 981.

223. Jessica Bennett, *The Problem with Frats Isn’t Just Rape. It’s Power*, TIME (Dec. 3, 2014), <http://time.com/3616158/fraternity-rape-uva-rolling-stone-sexual-assault/> (reporting that fraternity members are three times more likely to rape than their non-Greek counterparts).

talize elements of our culture that reinforce inequality, both gender and otherwise.”<sup>224</sup> Requiring bystanders to report may help to break down the dangerous group culture that can form in these situations.

Some have suggested that these bystander prevention programs may be able to play an important role in ending sexual assault on college campuses.<sup>225</sup> Additionally, whenever more than one student accuses the same student of sexual assault, those claims need to be taken especially seriously, since that situation may indicate the presence of a serial rapist on campus.<sup>226</sup> It is imperative that those cases be reported to the police.

## V. CONCLUSION

Sexual assaults and rapes are not just occurring in dark alleys. Rather, they are taking place among members of the military,<sup>227</sup> in the workplace,<sup>228</sup> and in homes.<sup>229</sup> These crimes are also happening on college campuses throughout the country.<sup>230</sup> As the statistics continue to alarm, steps must be taken to protect young individuals, many of whom are away from their homes for the first time. The DOE, through the DCL, has put colleges and universities into an incredibly difficult position. It has created a set of incentives that prevent schools from justly deciding sexual assault cases. Colleges have their own interests to consider as well, specifically funding and the protection of their reputations. Violations of due process rights, as well as error-ridden results are the effect of allowing schools to adjudicate these claims. Campuses must respond to the prevalence of sexual assault, but they should do so in the form of education, not adjudication.

*Kelly Rice\**

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224. *Id.*

225. See Swan, *supra* note 222, at 991–92 (2015); see also Michael Winerip, *Stepping Up to Stop Sexual Assault*, N.Y. TIMES (Feb. 7, 2014), <https://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html>.

226. Rubinfeld, *supra* note 37.

227. See generally Eric R. Carpenter, *The Military's Sexual Assault Blind Spot*, 21 WASH. & LEE J. C.R. & SOC. JUST. 383, 383–84, 415–16 (2015).

228. See generally Lawrence Allen Katz, *Sexual Harassment in the Workplace*, 29 PRAC. LAW. 29 (1983).

229. *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Dec. 1, 2017) (noting that 34% of sexual abuse cases reported to the police included perpetrators who were related to the victim).

230. See Anderson, *supra* note 19.

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