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When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students

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When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students

Abstract

As a part of the Educational Amendments of 1972, Title IX was created to address sex discrimination in sports programs receiving federal funding. However, its scope has ballooned tremendously over the years to include a variety of conduct occurring on college campuses. Currently, Title IX is the primary legislation governing sexual assault and harassment allegations stemming from universities.

This Note explores the use of Title IX in universities and addresses the concerns that arise when a civil rights law becomes the primary mechanism for adjudicating allegations of criminal conduct. Specifically, this Note addresses the due process concerns that arise when accused students face allegations of sexual assault without the procedural protections traditionally afforded by the criminal justice system, such as a heightened standard of proof, impartial adjudicators, and the right to cross-examination. Ultimately, this Note offers solutions and suggestions for improving the adjudication systems on campuses in order to protect the rights of both victims and accused students.

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I. INTRODUCTION

Situation One: John and Jane meet at a party on campus. The two converse, go back to John's apartment, and have sex. Jane later reports the encounter as nonconsensual to her Title IX coordinator. With no other witnesses, the university is forced to rely on only the accounts of the two participants. The single investigator handling the case reviews the written evidence and decides with 51% confidence that John assaulted Jane. John is expelled from school.

Situation Two: John and Jane meet at a party on campus. The two converse, go back to John's apartment, and have sex. Jane later reports the encounter as nonconsensual to her Title IX coordinator. With no other witnesses, the university is forced to rely on only the accounts of the two participants. The single investigator handling the case reviews the written evidence and decides with 51% confidence that John did not assault Jane. John receives no punishment.

Sexual violence towards women on college campuses is often regarded as an epidemic.¹ According to the Rape, Abuse & Incest National Network, 23.1% of female undergraduate students and 8.8% of female graduate students have been raped or sexually assaulted during their time in school.² Universities have historically failed to protect victims of sexual violence; a nine-month investigation in 2010 conducted by the Center for Public Integrity revealed that campus adjudications were often confusing, “shrouded in secrecy,” and marked by lengthy delays.³ Additionally, more than half of the incidents went

1. *Campus Sexual Violence: Statistics*, RAPE ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Oct. 2, 2019). For the purpose of this Note, survivors of sexual assault will be described as women; however, men also experience sexual assault and can also be victims of sexual violence. *Id.* There has been a 205% increase in reports of sexual assault on university campuses—“from 2,200 in 2001 to 6,700 in 2014.” Lizzie Crocker, *There's Been a Huge Increase in Campus Sex Assaults. Why?*, DAILY BEAST (May 16, 2017, 7:30 PM), <https://www.thedailybeast.com/theres-been-a-huge-increase-in-campus-sex-assaults-why>. It is unclear whether the surge is due to an increased number of assaults or an increased willingness of victims to report their experiences. *Id.* However, the figures are still likely to underestimate the prevalence of sexual assault on university campuses. *Id.*

2. *Campus Sexual Violence: Statistics*, *supra* note 1; see also Hannah Thomas-Peter, *Is There a Sexual Assault Epidemic at US Universities?*, SKY NEWS (July 20, 2018, 17:38 UK), <https://news.sky.com/story/is-there-a-sexual-assault-epidemic-at-us-universities-11442907>. Campus culture and student attitudes towards sexual assault contribute to the issue, perpetuating the idea that women somehow make themselves easy targets by what they wear or how much they drink. *Id.*

3. *How College Campuses Handle Sexual Assaults*, NAT'L PUB. RADIO (Dec. 3, 2009, 2:06 PM),

unpunished or resulted in merely a reprimand, even for the assailants who were deemed responsible—the equivalent of guilty.⁴ As the issue gained publicity, universities were denounced for their inaction, ultimately prompting both the federal government and individual campuses to revamp their procedures in handling sexual violence.⁵ In 2011, the Obama administration issued the Dear Colleague Letter (which has since been rescinded by the Trump administration), offering guidance to educational institutions receiving federal funding on how to structure their sexual misconduct policies.⁶ The Dear Colleague Letter, together with increasing awareness of sexual assault through mediums such as the #MeToo movement, inspired universities to create policies that were considerably more protective of sexual violence survivors.⁷

<https://www.npr.org/templates/story/story.php?storyId=121057891>; see also Tim Goral, *Sexual Assaults on Campus: Journalist Talks About “Frustrating Search for Justice”*, U. BUS. (Mar. 19, 2014), <https://www.universitybusiness.com/sexual-assaults-on-campus-journalist-talks-about-frustrating-search-for-justice>.

4. Goral, *supra* note 3; see also Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence*, 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=.064f72691b3e. As of 2014, the University of Virginia had not expelled a student for sexual misconduct in over ten years, despite dismissing many students for academic misconduct such as cheating. *Id.* Nationally in 2014, only 12% of the 478 sanctions for sexual assault on university campuses were expulsions, meaning that the other 88% of guilty perpetrators received some other form of discipline (or none at all). *Id.*

5. Juliet Eilperin, *Biden and Obama Rewrite the Rulebook on College Sexual Assaults*, WASH. POST (July 3, 2016), https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rule-book-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html?utm_term=.e48f55679643. The Obama administration’s response was motivated in part by survivors who publicly denounced their universities’ unresponsiveness to their sexual assault allegations. *Id.* Additionally, President Obama and Vice President Biden were individually passionate about sexual violence issues on college campuses. *Id.*

6. See *infra* notes 40–43 and accompanying text; see also S. Daniel Carter, *In Defense of the Title IX Dear Colleague Letter*, HUFFINGTON POST (Sept. 16, 2017, 10:45 PM), https://www.huffingtonpost.com/entry/in-defense-of-the-title-ix-dear-colleague-letter_us_59bddb9ae4b06b71800c3a2f. A 2009 and 2010 investigation by the Center for Public Integrity found that that perpetrators of sexual assault on university campuses often had no repercussions despite being found guilty. *Id.* Even cases of repeat offenders “rarely le[d] to tough punishments like expulsion.” *Sexual Assault on Campus*, CTR. FOR PUB. INTEGRITY, <https://publicintegrity.org/topics/education/sexual-assault-on-campus/> (last visited Mar. 26, 2015). It was against this backdrop that the Obama Administration issued the Dear Colleague Letter, which both reiterated existing Title IX requirements and created new recommendations to assist in the adjudication process. See Carter, *supra*.

7. Beth Howard, *How Colleges Handle Sexual Assault in the #MeToo Era*, U.S. NEWS (Oct. 1, 2018, 9:00 AM), <https://www.usnews.com/education/best-colleges/articles/2018-10-01/how-colleges-handle-sexual-assault-in-the-metoo-era>. The #MeToo movement against sexual harassment and assault unites survivors and brings awareness to the prevalence of sexual crime. *Id.* Against this

However, universities are now facing harsh criticism for “overcorrection,” as many of the newly reformed policies fail to institute procedural protections and consequently disregard the rights of accused students.⁸ The issues plaguing current university procedures are wide in scope, including topics ranging from whether the parties are entitled to attorneys to what standard of proof is appropriate in proceedings that are often adjudicated by university officials, who lack the appropriate experience and training to handle sexual assault claims.⁹ Because so many of the new procedures lack safeguards for the alleged perpetrators, many campuses have faced litigation initiated by students alleging that their due process rights were violated by inadequate investigations, insufficient hearings, and hasty decisions by unqualified adjudicators.¹⁰ University tribunals, tasked with striking the delicate balance between the rights of the victims and the rights of the accused, have struggled to decide such claims with the limited resources, contradictory protocol, and vague guidelines presently available.¹¹ Although the motivation behind these changes was noble—preventing sexual misconduct on campuses and strengthening existing policies to better protect victims who have historically been disregarded—“many of the remedies that have been pushed on campus in recent years are unjust to men, infantilize women, and ultimately undermine the legitimacy of the fight against sexual violence.”¹² Some of the

backdrop, universities have implemented several sexual assault prevention programs, such as mandatory training for incoming students on the intricacies of consent and how to be an active bystander. *Id.* Campuses are also offering specific support groups, counseling, and health services for survivors of sexual assault. *Id.* The prevention programs were encouraged by the Obama administration, which passed a public-awareness campaign called “It’s On Us” to encourage active intervention before sexual assault occurs. See Eilperin, *supra* note 5 (describing the effect of the Dear Colleague Letter on universities’ policies).

8. Gregg Bernstein, *An Overcorrection on Campus Sexual Assault Policies?*, BALTIMORE SUN (Feb. 15, 2015, 6:00 AM), <https://www.baltimoresun.com/news/opinion/oped/bs-ed-bernstein-0215-20150214-story.html>; see also Thomas-Peter, *supra* note 2 (noting that because of the structure of current university policies, “be[ing] accused of some sort of sexual misconduct virtually assures that you will be found responsible”).

9. See Bernstein, *supra* note 8 (noting several of the issues with university proceedings).

10. See *infra* Part III.B.

11. See Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/>.

12. See *id.*; see also Stephanie Saul, ‘Victim Feminism’ and Sexual Assault on Campus, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/education/edlife/christina-hoff-sommers-sexual-assault-feminism.html> [<https://nyti.ms/2iYP3BQ>]. Christina Hoff Sommers, a scholar at the American Enterprise Institute, argues that the Obama administration’s sexual assault policies view women as fragile and weak, a phenomenon she refers to as “victim feminism.” *Id.* She believes that

policy changes have gone as far as perpetuating “bureaucratic regulation of sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others,” which has been regarded as “counterproductive to the goal of actually addressing the harms of rape, sexual assault, and sexual harassment.”¹³

This Note examines the methods that college campuses currently utilize to adjudicate sexual misconduct claims and emphasizes the need for policy improvement in order to protect the rights of both victims and accused students.¹⁴ Part II of this Note provides an overview of the history of Title IX adjudication, including how current sexual assault claims are handled on university campuses, and the convoluted definitions that underlie the policies.¹⁵ Part III discusses the procedural due process concerns prompted by current procedures and subsequent litigation, including a recent Sixth Circuit case that decided in favor of the accused student; it also examines affirmative consent laws and the alleged shift of the burden of proof that they engender.¹⁶ Part IV offers proposals to improve current university policies to protect the due process rights of all parties, including increasing the standard of proof, utilizing independent adjudicators, defining consent consistently and universally across campuses, and encouraging cooperation between Title IX officials and law enforcement.¹⁷ Part V concludes that the implementation of mechanisms such as a higher standard of proof will more effectively protect the rights of university students.¹⁸

the current attitude towards female sexual assault on campus has “collapsed the distinction between regretted sex and rape.” *Id.*

13. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 882 (2016). By requiring that schools report incidents that are not considered prosecutable criminal conduct, the federal bureaucracy is able to “expand its regulatory reach.” *Id.* at 893.

14. *See infra* Parts III, IV.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part V.

II. THE EVOLUTION OF SEXUAL MISCONDUCT ADJUDICATION

Sexual misconduct allegations are notoriously difficult to adjudicate.¹⁹ While sexual misconduct was initially very narrowly defined and limited to specific situations involving physical force, its definition has expanded throughout the years, although the current definitions vary greatly.²⁰ Because sexual misconduct on university campuses now falls under the umbrella of Title IX regulation, the result has been adjudicatory proceedings that allegedly fail to protect the constitutional rights of the involved students.²¹

A. Unclear Definitions

At its crux, the controversy surrounding sexual assault on university campuses centers on the reality that the concept itself is ill-defined, convoluted, and inconsistent.²² The meaning of the word “rape” has evolved over the years;²³ in 2011, for the first time in eighty years, the Federal Bureau of Investigation updated its definition to “[p]enetration, no matter how slight, of

19. See Alexandra Topping & Caelainn Barr, *Rape Conviction Crisis: The Systemic Failures That Deny Justice for Victims*, GUARDIAN (Oct. 6, 2018), <https://www.theguardian.com/membership/2018/oct/06/conviction-crisis-rape-uk-cps> (describing the failures of the criminal justice system in adjudicating sexual assault claims); see also *What to Expect from the Criminal Justice System*, RAPE ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/articles/what-expect-criminal-justice-system> (last visited Oct. 2, 2019) (noting the issues with sexual assault cases, such as the prosecutor’s ability to decline to press charges). Because the final decision on whether to press charges is ultimately up to the prosecutor, many sexual assault claims go unprosecuted. *Id.* These cases are especially difficult due to the lack of physical evidence and inability of the survivor to identify the perpetrator. *Id.* Consequently, per every one thousand rape cases, only seven will result in a felony conviction. *Id.*

20. Korin Miller, *What Is Sexual Assault (and What Isn’t)*, ACCORDING TO THE LAW, SELF (Nov. 3, 2017), <https://www.self.com/story/sexual-assault-definition>. “[T]he legal definition [of sexual assault] varies depending on which state [the individual is] in, and can even be different depending on where [the individual was] when the assault happened.” *Id.* For example, the definition of sexual assault in California is different on university campuses than within the criminal justice system; consequently, the standard used may vary depending on the forum that the allegation is reported to. *Id.*

21. See *infra* Part III.A.

22. See Miller, *supra* note 20 (describing the variance of sexual assault definitions among states).

23. Estelle B. Freedman, *Women’s Long Battle to Define Rape*, WASH. POST (Aug. 24, 2012), https://www.washingtonpost.com/opinions/womens-long-battle-to-definerape/2012/08/24/aa960280-ed34-11e1-a80b-9f898562d010_story.html. Rape was initially defined as “the carnal knowledge of a woman when achieved by force by a man other than her husband.” *Id.* Because a woman’s person and property were under her husband’s authority, legally, a husband could not rape his wife. *Id.* Over the years, the definition evolved to include rape that was not achieved by physical force and rape that was committed by a perpetrator known to the victim. *Id.* The definition of rape is still at issue today.

the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”²⁴ The term “sexual assault” has faced a similar evolution; it is currently defined by the U.S. Department of Justice as “any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.”²⁵ Although the federal definitions of these offenses have been updated, the concepts of sexual assault, sexual harassment,²⁶ and consent are still ill-defined on university campuses, which largely retain discretion in defining and prescribing sexual misconduct policies.²⁷

What constitutes “consent” in sexual assault is a pivotal issue in state—and consequently, campus—policy.²⁸ States differ immensely on how consent is defined in the context of sexual crimes, and over half of the states fail to “explicitly define consent in their statutes at all.”²⁹ In some states, consent

Id.

24. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2013, RAPE ADDENDUM 1 (2014), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/rape-addendum/rape_addendum_final.pdf [<https://perma.cc/7YLK-98CG>].

25. Office on Violence Against Women, *What Is Sexual Assault?*, U.S. DEP’T OF JUST., <https://www.justice.gov/ovw/sexual-assault> (last visited Oct. 3, 2019).

26. The definition of what actions constitute sexual harassment is particularly contentious in light of the proposed changes to the Obama-era guidelines. Editorial Board, *Needed Update to Campus Sexual-Harassment Policy Goes Too Far*, SEATTLE TIMES (Dec. 2, 2018, 12:01 PM), <https://www.seattletimes.com/opinion/editorials/needed-update-to-campus-sexual-harassment-policy-goes-too-far/>. The proposal narrows sexual harassment to behavior that is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education,” a definition that victims’ rights advocates say would “leave some students subjected to ongoing harassment that doesn’t meet the actionable threshold.” *Id.* (quoting another source).

27. See Miller, *supra* note 20; see also Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html> [<https://nyti.ms/2wq9EDb>] (noting that under the proposed changes to Title IX enforcement and regulation, universities would have discretion in whether to use the preponderance of the evidence standard or the higher clear and convincing evidence standard).

28. Kimberly Lawson, *Half of the Country Doesn’t Have a Legal Definition of Consent*, VICE (June 11, 2018, 3:30 PM), https://vice.com/en_us/article/bj3p35/state-definition-of-consent-legislation (noting that the idea of consent is “the critical thing most people look [at] to understand the nature of a sexual encounter,” but the United States lacks “even . . . a consensus definition”).

29. *Id.* Consent is defined a variety of ways by different people. *Id.*

One person’s idea of consent is that no one is screaming or crying, Erin Murphy, a professor at New York University School of Law, told the *Associated Press* in December [of 2017]. [She continued,] “[a]nother person’s idea of consent is someone saying, ‘Yes, I want to do this.’ And in between, of course, is an enormous spectrum of behavior, both verbal and nonverbal, that people engage in to communicate desire or lack of desire.”

is narrowly defined; California, for example, codifies consent as an “affirmative, conscious, and voluntary agreement to engage in sexual activity.”³⁰ In contrast, other states offer vast definitions of what actions can constitute consent, such as Alabama’s interpretation, where consent is merely the “acquiescence or compliance [with the proposition of another]”³¹ and Louisiana’s approach, which defines consent by simply listing circumstances in which it is not able to be given.³² Because the definitions of consent are varied at best and completely contradictory at worst, universities have struggled with creating policies to encapsulate sexual violence offenses, create consistent punishment, and ensure that adequate procedure is in place to protect all parties involved.³³

Id.; see also *infra* note 31 and accompanying text (noting that Wyoming does not define consent by statute at all).

30. CAL. EDUC. CODE § 67386(a)(1) (West 2016). In section 67386, California codified the requirement that consent be verbal and ongoing throughout the entire sexual act. Aaron Mendelson, *California Passes ‘Yes-Means-Yes’ Campus Sexual Assault Bill*, REUTERS (Aug. 29, 2014, 2:25 AM), <https://www.reuters.com/article/us-usa-california-sexcrimes/california-passes-yes-means-yes-campus-sexual-assault-bill-idUSKBN0GT0U920140829>. The bill “mark[ed] the first time a U.S. state require[d] such language to be a central tenet of school sexual assault policies.” *Id.* “In contrast to California, however, Ohio does not define consent in its laws There, a woman can be drugged and sexually assaulted legally by her husband, as long he does not use force and they’re not technically separated.” Lawson, *supra* note 28.

31. *Consent Laws: Arkansas & Alabama & Wyoming*, RAPE ABUSE & INCEST NAT’L NETWORK, <https://apps.rainn.org/policy/compare.cfm> (follow hyperlink; select Arkansas, Alabama, and Wyoming in the “Select Up to Three States or Territories” field; select “Consent Laws” in the “Select up to Two Topics” field; then Submit). For example, Arkansas law states that there is a lack of consent if sexual contact is engaged in “forcible compulsion or with a person who is incapable of consent because he or she is physically helpless, mentally defective or mentally incapacitated.” ARK. CODE. §§ 5-14-103, 5-14-125 (2019). Other aspects of consent also vary by state, such as the age that individuals must be to consent, whether intoxication affects the ability to consent, and whether the difference in age between the victim and the actor affects the victim’s ability to consent. See *Consent Laws, supra*.

32. *Consent Laws: Kentucky & Louisiana & California*, RAPE ABUSE & INCEST NAT’L NETWORK, <https://apps.rainn.org/policy/compare.cfm> (follow hyperlink; select Kentucky, Louisiana, and California in the “Select Up to Three States or Territories” field; select “Consent Laws” in the “Select up to Two Topics” field; then Submit). Louisiana consent laws are exceptionally vague, limiting sex crimes to situations in which the victim resisted or could not resist because of intoxication or disability. *Id.* Contrary to affirmative consent laws in states like California, consent in states like Louisiana can be interpreted from silence. *Id.*

33. See Howard, *supra* note 7; see also Lawson, *supra* note 28 (noting that the lack of a consensus definition of consent across society makes it difficult, if not impossible, to create laws that accurately communicate what constitutes sexual violence).

B. History of Title IX Adjudication of Sexual Assault Claims

Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded education programs.³⁴ The text itself simply states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁵ At its inception, Title IX was created to address and correct inequalities in education faced by women, specifically in athletic programs.³⁶ However, court decisions in the 1980s and ’90s made it clear that Title IX also encompassed other forms of sex discrimination occurring on campuses, including sexual assault and sexual harassment.³⁷ Although Title IX’s early claims predominantly focused on discrimination in athletics, its scope has largely shifted to focus equally on sexual violence claims.³⁸ For example, “[i]n 2009, the number of Title IX complaints based on athletics was 1,264. By way of contrast, in the same year, the number of racial harassment/sexual violence complaints was nearly identical at 1,137.”³⁹

In 2011, President Barack Obama formally implicated Title IX in universities’ sexual misconduct policies through the Dear Colleague Letter, which provided explicit guidelines for how federally funded schools were to handle

34. 20 U.S.C. §§ 1681 *et seq.* (2018).

35. 20 U.S.C. § 1681(a) (2018).

36. *Title IX Enacted*, HIST. CHANNEL, <https://www.history.com/this-day-in-history/title-ix-enacted> (last updated July 28, 2019). Before Title IX, the National Collegiate Athletic Association (NCAA) provided no athletic scholarships for women, held no championship games for women’s sports, and failed to supply the same amount of supplies and facilities to women’s teams as to men’s. *Id.* Title IX was enacted in order to “enforce equal access and quality,” although the amount of money allocated to women’s athletic programs did not need to be equal to men’s. *Id.*

37. Kristy McCray, *How Does Title IX Affect Sexual Assault Prevention in College Sports? A Critical Review of the Dear Colleague Letter of 2011*, SPORT AM. HIST. (Aug. 14, 2017), <https://ussporthistory.com/2017/08/14/how-does-title-ix-affect-sexual-assault-prevention-in-college-sports-a-critical-review-of-the-dear-colleague-letter-of-2011>. The Office for Civil Rights “issued its first clarification on how Title IX applies to sexual harassment in 1997, and in 1999[,] federal courts recognized the discriminatory effects of sexual harassment in *Davis v. Monroe County Board of Education*, and rape (i.e., sexual assault) in *Soper v. Hoben*.” *Id.*; see also *Alexander v. Yale Univ.*, 631 F.2d 178, 181 (2d Cir. 1980) (identifying sexual harassment as a form of sex discrimination under Title IX).

38. Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 84, 90 (2013). Title IX is still very much relevant, not only in athletic claims (as women “still haven’t reached parity with their male counterparts in major elements”), but also for claims of sexual harassment and assault. *Id.* at 90.

39. *Id.*

sexual assault claims.⁴⁰ The letter explained the rising incidence of sexual violence on school campuses and “provide[d] guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination . . . and adopt and publish grievance procedures.”⁴¹ In describing grievance procedures, the letter specifically barred the use of mediation in sexual assault claims, although it allowed the use of informal mechanisms for some other types of sexual harassment complaints.⁴² Moreover, although the Office for Civil Rights (“OCR”), a sector of the U.S. Department of Education, is formally tasked with ensuring university compliance with Title IX, the Dear Colleague Letter also required each school receiving funding to appoint a Title IX Coordinator to handle claims on its campus.⁴³ Schools that failed to oblige with the guidelines faced a potential withdrawal of federal funding.⁴⁴

The Dear Colleague Letter was met with mixed reviews, especially from scholars, law enforcement, and university personnel.⁴⁵ Proponents of the Dear Colleague Letter, including the National Women’s Law Center, asserted that it

urged institutions to better investigate and adjudicate cases of campus sexual assault. It explained how the department interprets Title IX of

40. Russlyn Ali, U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter on Sexual Violence to Title IX Coordinators (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

41. *Dear Colleague Letter: Sexual Violence Background, Summary and Fast Facts*, U.S. DEP’T OF EDUC., OFFICE FOR C.R. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-fact-sheet-201104.html>. For example, the Dear Colleague Letter provided a list of obligations that each school had under Title IX, which included taking immediate action once it knew or should have known of possible sexual violence, taking steps to protect the complainant, providing a grievance procedure (using the preponderance of the evidence standard) for students to file complaints of sex discrimination, and notifying both parties of the outcome of the complaint. *Id.*

42. Dear Colleague Letter, *supra* note 40. Some scholars argue that mediation is not even appropriate for sexual harassment cases—let alone sexual assault cases—which require “a mechanism that involves fact-finding and decision making.” See Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27, 28 (1993). Mediation in sexual misconduct cases “risks trivializing the seriousness” of the claims and perpetuating an imbalance of power between males and females. *Id.*

43. Diane Heckman, *On the Eve of Title IX’s 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 547 (1997); see also Dear Colleague Letter, *supra* note 40.

44. Dear Colleague Letter, *supra* note 40; see also Yoffe, *supra* note 11 (describing the loss of federal funding as “an action that would be devastating to most schools”).

45. See *infra* notes 46–47 and accompanying text.

the Education Amendments of 1972, and . . . it has been the guiding document for colleges hoping to avoid a federal civil rights investigation into how they handle complaints of sexual violence.⁴⁶

Meanwhile, critics of the Dear Colleague Letter argued that under the purported authority of Title IX—which merely bans discrimination based on sex—“the government ha[d] concocted a right to micromanage schools’ disciplinary procedures” by creating binding law under the guise of guidelines.⁴⁷ Additionally, university officials maintained that the new investigative practices that accompanied the Dear Colleague Letter, including a public list kept by the OCR of the schools at which it was investigating Title IX violations, were unfairly biased and sought to find the schools guilty rather than fairly determine whether a violation had occurred.⁴⁸ The Trump administration rescinded the Dear Colleague Letter in 2017 and provided new proposals that purport to offer clearer guidance to universities as to the requirements for their adjudication processes.

The proposed policy changes would drastically impact the current mechanisms of adjudication.⁴⁹ Unlike the Dear Colleague Letter, which was passed without a comment period by the public and was officially designated as non-binding guidance for universities, the administration’s new rules would be legally binding, even without a congressional act.⁵⁰ The proposed rules would

46. Jake New, ‘Unwarranted Criticism’ of Sexual Assault Guidance, INSIDE HIGHER ED (July 15, 2016), <https://www.insidehighered.com/news/2016/07/15/85-organizations-defend-education-departments-title-ix-enforcement-efforts>.

47. George F. Will, *Due Process Is Still Being Kicked Off Campus*, WASH. POST (May 13, 2016), https://www.washingtonpost.com/opinions/due-process-is-still-being-kicked-off-campus/2016/05/13/cbf3ee6e-1860-11e69e162e5a123aac62_story.html?utm_term=.04b5a9e92a11 [<http://wapo.st/1TLR75r>]. Although the Dear Colleague Letter was released as a set of guidelines for universities, its critics “argue that the department’s Office for Civil Rights treats the guidance as far more than a series of recommendations” by using it to track which schools are violating Title IX, and threatening the loss of federal funds to institutions that fail to comply. Jake New, *Colleges Frustrated by Lack of Clarification on Title IX Guidance*, INSIDE HIGHER ED (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>. Critics argue that this treatment is apparent in Title IX investigations, where the OCR relies on the recommendations as mandates to determine whether schools are treating sexual assault allegations appropriately. *Id.*

48. Yoffe, *supra* note 11.

49. See Green, *supra* note 27.

50. See *id.* The Dear Colleague Letter, although it was technically mere guidance for universities, had “the teeth of binding regulations,” as the administration threatened to pull federal funding from institutions that did not comply with the letter’s suggestions. See New, *supra* note 47.

“narrow the definition of sexual harassment, holding schools accountable only for formal complaints filed through proper authorities and for conduct said to have occurred on their campuses. They would also establish a higher legal standard to determine whether schools improperly addressed complaints.”⁵¹ Additionally, the rules would allow both parties to have access to all of the evidence discovered during the investigation, to “request evidence from each other[,] and to cross-examine each other.”⁵² Moreover, the rules would require mediation, which the Obama administration considered inappropriate in sexual misconduct cases, and allow universities to determine on an individual basis whether to have an appeals process.⁵³ Because the proposals are still subject to a public comment period and have not been finalized, it is unclear what will ultimately be codified in the formal publication.⁵⁴

C. *How Sexual Assault Proceedings Are Currently Handled on Campuses*

After the withdrawal of the guidelines instituted by the Dear Colleague Letter, universities’ policies regarding the investigation and adjudication of sexual violence claims have been varied.⁵⁵ All schools have policies in place

51. See Green, *supra* note 27. DeVos is facing major backlash on the proposal that universities would only be responsible for investigating sexual assault alleged to have occurred on campus because “only 14% of all college students . . . live on campus . . . [while] 70% of all sexual assaults happen in the victim’s home or living quarters.” Amy Carleton, *Instead of Protecting Victims, Title IX Changes Would Favor Institutions and Perpetrators*, WBUR (Sept. 12, 2018), <https://www.wbur.org/cognoscenti/2018/09/12/campus-sexual-harassment-amy-carleton>. This provision would remove a majority of sexual assault claims from university jurisdiction, which arguably would result in less active university participation in ensuring campus safety. *Id.*

52. See Green, *supra* note 27.

53. See *id.*; see also Irvine, *supra* note 42 (arguing that grievance mediation in sexual harassment cases is inappropriate, likening the power structure of these types of cases to domestic violence or criminal assault). Women may not be aware of the power imbalance that exists in sexual harassment scenarios; however, mediation will never produce a fair resolution because women do not have equal bargaining power in the discussion. *Id.* at 39. Some sexual assault survivors echo this sentiment, arguing that mediation is only appropriate in settings where two parties share blame, not in sexual violence cases where one party is at fault. Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME (Oct. 2, 2017), <http://time.com/4957837/campus-sexual-assault-mediation/>. Additionally, mediation fosters compromise and rarely results in punishment, which is unsuitable for sexual violence situations. *Id.*

54. See Green, *supra* note 27.

55. Claire Hansen, *New Title IX Guidance Gives Schools Choice in Sexual Misconduct Cases*, U.S. NEWS (Sept. 26, 2017, 10:58 AM), <https://www.usnews.com/news/education-news/articles/2017-09-26/new-title-ix-guidance-gives-schools-choice-in-sexual-misconduct-cases>.

to address such claims; however, the substance of each differs widely.⁵⁶ Disciplinary hearings, present at most schools, are “often made up of teachers and students, some with little training, acting as prosecutor, judge[,] and jury.”⁵⁷ Others have been described as informal proceedings, even as limited as “conversations with deans in separate meetings between the accusing student and the accused student.”⁵⁸ Many schools lack even informal proceedings; commonly, university “investigators look into a case and make a decision without ever holding a hearing.”⁵⁹ Problematically, universities lack the resources to examine meaningful evidence even if there are hearings, as they “can’t subpoena witnesses to compel relevant testimony or put people under oath; they rarely have access to forensic evidence or processes for discovery.”⁶⁰

Additionally, the standard of evidence used during the hearing—if there is one—is discretionary.⁶¹ Universities can decide whether to use the “preponderance of evidence” standard included in the Dear Colleague Letter guidelines or to use the higher “clear and convincing” evidence standard.⁶² Moreover, while the Dear Colleague Letter required all reports of sexual violence to be recorded and addressed, it did not prescribe a consistent standard for how the investigations should be run.⁶³ Although the guidelines established by the Dear Colleague Letter faced substantial criticism, such as

56. *Id.* Schools now have substantial deference in addressing cases of sexual misconduct on campus, including the ability to choose which standard of proof to apply and whether to offer an appeals process to one party or both. *Id.*

57. Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015), <https://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/index.html>.

58. *How College Campuses Handle Sexual Assaults*, *supra* note 3.

59. Douglas Belkin, *Colleges, Buffeted by Courts and Washington, Navigate Sexual Assault*, WALL ST. J. (Sept. 22, 2018, 7:00 AM), <https://www.wsj.com/articles/colleges-buffed-by-courts-washington-navigate-sexual-assault-1537614000>.

60. Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html> [<https://nyti.ms/2kok6ba>]. Advocates of the lower preponderance standard emphasize that because Title IX hearings are administrative rather than criminal proceedings, the standard of proof currently required follows an established legal principle. *Id.* The rationale behind the lower civil standard was that Title IX employs the same preponderance standard that is used in civil sexual harassment claims. *Id.* However, Nancy Gertner, a Harvard law professor, pointed out that civil trials that employ the lower standard of proof still have substantial discovery proceedings. *Id.* She noted that Title IX hearings on campus are “the worst of both worlds, the lowest standard of proof coupled with the least protective procedures.” *Id.*

61. Green, *supra* note 27.

62. *Id.*

63. *Id.*

“lack[ing] appropriate procedural protections and . . . undermin[ing] confidence in the reliability of the outcomes of investigations of sexual harassment allegations,”⁶⁴ without any guidance at all besides rumors of proposed new rules, universities must now blindly attempt to adjudicate claims of severe crimes that far surpass typical academic misconduct.⁶⁵

III. TENSION BETWEEN UNIVERSITIES AND STUDENTS ON WHAT PROCESS IS DUE

Tasked with the adjudication of sexual misconduct allegations, universities have struggled to effectively handle claims against the backdrop of limited resources and convoluted regulations.⁶⁶ Consequently, the inconsistent handling of sexual violence claims by universities has sparked controversy from all parties involved, with victims arguing that universities do not do enough to address their claims, and accused students lamenting the loss of their constitutional rights in campus adjudication procedures.⁶⁷

A. *An Overview of the Alleged Deprivation on Campus*

Many accused students contend that university proceedings impinge on their due process rights, as an adjudication before unqualified teachers, administrators, and students does not provide the procedural safeguards guaranteed by the Constitution.⁶⁸ Their contention also concerns the standard of proof employed on campuses, with opponents arguing that the “preponderance of the evidence” standard is inappropriate in the adjudication of claims that hold weightier consequences than the typical civil cases where the standard is employed.⁶⁹ Critics assert that used in this context, the preponderance

64. *Id.*

65. Ganim & Black, *supra* note 57.

66. *See supra* Part II.A.

67. *See* cases cited *infra* note 89; Abby Jackson, *American Colleges Have a Massive Rape Problem, and There's No Clear Solution in Sight*, BUS. INSIDER (Apr. 2, 2018, 1:22 PM), <https://www.businessinsider.com/colleges-rape-problem-title-iv-2018-4> (noting that universities not only fail to adequately conduct sexual assault hearings, but also fail to punish convicted assailants appropriately).

68. *See* cases cited *infra* note 89.

69. Adam Johnson, *Opinion, Against the Preponderance of Evidence Standard*, STAN. DAILY (May 21, 2012), <https://www.stanforddaily.com/2012/05/21/op-ed-against-the-preponderance-of-evidence-standard/>. In contrast, an argument in favor of the preponderance of the evidence standard focuses on the unique allocation of power in sexual assault cases. *See* Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and*

of evidence standard violates “one of the core tenets of our judicial system: the presumption of innocence,” maintaining that the dire consequences of sexual assault claims warrant a higher standard of proof.⁷⁰ Because the regulations guiding university adjudication of sexual violence claims are murky and inconsistent, a mounting number of students have filed suit against their universities, arguing that the current proceedings failed to afford them a fair investigation.⁷¹

The Fifth and Fourteenth Amendments forbid federal and state governmental action that deprives a person of “life, liberty, or property, without due process of law.”⁷² However, the specific procedural protections that due process affords to students who are accused of sexual assault on university campuses are widely unclear and largely contextual.⁷³ Many courts have attempted to clarify the necessary procedures through years of cases.⁷⁴ In *Goss v. Lopez*, the Court examined student due process rights and decided that students accused of misconduct were entitled to notice and an informal hearing in order to “provide a meaningful hedge against erroneous action.”⁷⁵ In

Victim Protection, 62 DUKE L.J. 487, 517 (2012). Specifically, “[a] preponderance standard . . . acknowledges that the institution has competing obligations to the victim and to the accused. As between these interests, setting the scale either below or above the midline of certainty skews the balance too far in the favor of the advantaged party.” *Id.* Additionally, because sexual assault claims are generally based solely on testimony from the two parties and lack other corroborating evidence, proponents of the lower standard argue that victims would not be able to meet a higher standard of proof despite potentially having meritorious claims. *Id.* Because campus tribunals do not implicate the same liberty interests as criminal proceedings and therefore do not require as stringent of protections, the preponderance standard of proof allows the two parties to share in the error rate rather than putting a higher burden of proof on the victim. *Id.* at 518.

70. Johnson, *supra* note 69.

71. Jake New, *Suits From the Accused*, INSIDE HIGHER ED (May 1, 2015), <https://www.insidehighered.com/news/2015/05/01/students-accused-sexual-assault-struggle-win-gender-bias-lawsuits> (“[S]ome men are forcing colleges to back down with lawsuits that focus more on due process and violations of colleges’ own rules than they do on gender bias.”).

72. U.S. CONST. amends. V, XIV.

73. HARVEY A. SILVERGLATE & JOSH GEWOLD, FIRE’S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE (William Creeley ed., 2014), <https://www.thefire.org/research/publications/fire-guides/fires-guide-to-due-process-and-campus-justice/> (click “Download Guide”). FIRE (the Foundation for Individual Rights in Education) is dedicated to protecting the constitutional rights of individuals on campus, especially First Amendment and due process rights. *Mission*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/about-us/mission/> (last visited Oct. 3, 2019).

74. SILVERGLATE & GEWOLD, *supra* note 73, at 31.

75. *Goss v. Lopez*, 419 U.S. 565, 583 (1975). In *Goss*, the Court examined the necessary procedural due process protection for a ten-day suspension. *Id.* The Court concluded a hearing must be conducted for a suspension; more stringent punishments, such as expulsion, would require a higher level of procedural due process. *Id.* at 583–84.

Mathews v. Eldridge, the Court once again established the right to be heard “at a meaningful time and in a meaningful manner,”⁷⁶ and held that the specific process due in a given administrative situation should be determined by

consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁷⁷

In cases involving sexual misconduct on university campuses, courts have recognized the competing interests of the university, the complaining student, and the accused student.⁷⁸ To clarify what process is due to accused students, individual courts have identified a variety of processes that must be provided to them, including the right to cross-examine all witnesses,⁷⁹ the right to see all the evidence against them,⁸⁰ and the right to present relevant evidence in their defense.⁸¹ However, because various circuits have ruled differently and the Supreme Court has not yet spoken directly on the issue, there is not yet a consistent national standard outlining what specific due process rights are owed to accused students.⁸²

Indeed, there have been university challenges to the new methods for handling sexual violence claims on campus.⁸³ Oklahoma Wesleyan, an evangelical Christian university, filed a suit against the Department of Education in 2016, alleging that the Obama-era interpretation of Title IX imposed a “one-

76. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

77. *Id.* at 335.

78. *See Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1066 (2018), *review denied* (Nov. 20, 2018) (first quoting *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221, 240 (2016); then quoting *Doe v. Regents of Univ. of Cal.*, 5 Cal. App. 5th 1055, 1078 (2016)).

79. *Doe v. Baum*, 903 F.3d 575, 581–85 (6th Cir. 2018).

80. *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 57 (2018).

81. *Id.* at 60–61.

82. Hansen, *supra* note 55.

83. *See* Press Release, Okla. Wesleyan Univ., Oklahoma Wesleyan Files Suit Challenging Department of Education (Aug. 15, 2016), <http://www.okwu.edu/blog/2016/08/oklahoma-wesleyan-files-suit-challenging-department-education/>.

size-fits-all mandate which essentially require[d] colleges to negate the constitutional rights of [their] students.”⁸⁴ The university claimed that although it supported Title IX as written in 1972, the interpretation by the Department of Education in 2011 pushed a social agenda inconsistent with the original reading of Title IX, and forced universities to deprive their students of fairness and due process.⁸⁵ Oklahoma Wesleyan ultimately dropped the suit in early 2018 when the Trump administration rescinded the Dear Colleague Letter, calling the dismissal “a significant victory for the university and the rule of law.”⁸⁶ Nonetheless, despite the resistance from Oklahoma Wesleyan and other schools that have demanded due process rights for their students, procedures by many universities allegedly continue to deprive accused students of constitutional guarantees.⁸⁷

B. Recent Litigation Facing Universities Regarding Due Process Violations

Courts have seen an influx of litigation from accused students who allege their due process rights were infringed upon due to the lack of consistent regulation and guidance regarding sexual assault adjudication on university campuses.⁸⁸ The allegations have included failing to allow the accused student to provide an expert witness, failing to provide the accused student with the evidence against him, and failing to allow him to face his accuser.⁸⁹ The common thread in the recent litigation has concerned the lack of fair procedure

84. *Id.*

85. *Id.*

86. See Press Release, Okla. Wesleyan Univ., OKWU Agrees to Dismissal of Federal Lawsuit Against Office for Civil Rights (Feb. 21, 2018), <https://www.okwu.edu/blog/2018/02/okwu-agrees-dismissal-federal-lawsuit-office-civil-rights/>.

87. See Press Release, Found. for Individual Rights in Educ., As Changes to Title IX Enforcement Loom, America’s Top Universities Overwhelmingly Fail to Guarantee Fair Hearings for Students (Dec. 18, 2018), <https://www.thefire.org/report-as-changes-to-title-ix-enforcement-loom-americas-top-universities-overwhelmingly-fail-to-guarantee-fair-hearings-for-students/>. A study conducted by FIRE revealed that of the top 53 universities in the United States, “47 receive a D or F grade, meaning that they guarantee no more than 4 of the 10 elements rated.” *Id.* The elements included a clearly stated presumption of innocence, the right to impartial fact-finders, the ability to question witnesses, and the right to a meaningful hearing process. *Spotlight on Due Process 2018*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/spotlight/due-process-reports/due-process-report-2018/> (last visited Oct. 3, 2019).

88. See cases cited *infra* note 90.

89. See *Doe v. Baum*, 903 F.3d 575, 581–85 (6th Cir. 2018) (determining that the University of Michigan violated student’s due process by failing to allow him to cross examine accuser/adverse

afforded to accused students.⁹⁰

In a recent notable holding described as “an unparalleled decision and a win for those who feel due process has been shunned in campus investigations of sexual assault,”⁹¹ a Sixth Circuit judge determined that the due process rights of an accused student were violated when he was denied the opportunity to have a hearing or to cross-examine his accuser.⁹² In that case, entitled *Doe v. Baum*, John Doe and Jane Roe, both students at the University of Michigan, met at a fraternity party and had sex; two days later, Roe filed a complaint, alleging that she was too intoxicated to consent.⁹³ John Doe and Jane Roe told two very different stories about the night in question; John Doe alleged that Roe did not appear intoxicated and had expressly consented to the sexual encounter, while Roe alleged that Doe had sex with her while she “laid there in a hazy state of black out.”⁹⁴

After weighing the two stories as well as the testimony of twenty-three witnesses, the university investigator ultimately determined that the school should rule in Doe’s favor and close the case.⁹⁵ However, when Roe appealed, the university reversed the holding without hearing any new witnesses or considering any new evidence, deciding that Roe and her witnesses were more credible than Doe and his.⁹⁶ Doe, faced with expulsion, withdrew from the university and filed suit in federal court, alleging, in part, that the school’s failure to give him a hearing and allow him to cross-examine the witnesses

witnesses); *Doe v. Miami Univ.*, 882 F.3d 579, 601–04 (6th Cir. 2018) (plaintiff alleging that the decision-maker was not unbiased and did not provide the accused student with all of the evidence against him); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 396 (6th Cir. 2017) (affirming the district court’s preliminary injunction by finding that Doe would likely prevail on his claim that the denial of his right to face his accuser violated his due process right to a fair hearing); *Doe v. Ohio State Univ.*, 311 F. Supp. 3d 881, 896 (S.D. Ohio 2018) (determining it was “plausible that O[hio] S[tate] U[niversity] violated Doe’s right to due process by failing to permit Doe’s expert to testify and present his report”); *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961, 979 (S.D. Ohio 2018) (finding that Gischel had a plausible due process claim because, in part, he was not able to conduct meaningful cross-examinations crucial to his defense).

90. See New, *supra* note 71.

91. Jeremy Bauer-Wolf, *An ‘Unprecedented’ Direction for Title IX*, INSIDE HIGHER ED (Sept. 10, 2018), <https://www.insidehighered.com/news/2018/09/10/appeals-court-ruling-opens-door-boosted-due-process-rights>.

92. *Baum*, 903 F.3d at 581–85.

93. *Id.* at 578–79.

94. *Id.* at 579.

95. *Id.* at 579–80.

96. *Id.* at 580.

violated his procedural due process rights.⁹⁷

The district court dismissed Doe's claim, but on appeal, the Sixth Circuit reversed the decision, stating that Doe had asserted a plausible claim for relief under the Due Process Clause.⁹⁸ The judge noted that cross-examination was even more crucial in university cases, as the "university's fact-finding procedures are [far removed] from the tried and true methods invoked by courts."⁹⁹ Calling cross-examination "the greatest legal engine ever invented" for credibility determinations, the judge asserted that universities must provide accused students with an opportunity for cross-examination in order to satisfy due process.¹⁰⁰ When weighing the interests of Doe against the interests of the school, the judge determined that Doe had substantial interests at stake—being regarded as a sex offender, withdrawing from classes, being forced to move out of his university housing, and having trouble obtaining employment later in life.¹⁰¹ In contrast, the administrative burden of "providing Doe a hearing with the opportunity for cross-examination would have cost the university very little."¹⁰² Ultimately, the judge determined that in cases that depend entirely on credibility, such as university sexual assault adjudications, due process mandates the right to a hearing and an opportunity for cross-examination.¹⁰³

However, other circuits have responded differently to the allegations of due process violations.¹⁰⁴ In *Plummer v. University of Houston*, the Fifth Circuit determined that the University of Houston had provided sufficient due process rights to two expelled students after they were allowed to cross-examine witnesses via written questions, testify, and present their own witnesses.¹⁰⁵ In that case, two students were implicated in sexual misconduct—one by directly assaulting another student, and the other by encouraging and facilitating the assault, which was captured on videotape.¹⁰⁶ After a hearing

97. *Id.*

98. *Id.* at 585.

99. *Id.*

100. *Id.* at 581.

101. *Id.* at 582.

102. *Id.*

103. *Id.* at 581.

104. See *Plummer v. Univ. of Hous.*, 860 F.3d 767, 772 (5th Cir. 2017), *as revised* (June 26, 2017).

105. *Id.*

106. *Id.* at 771.

during which the victim was not present, the two accused students were ultimately expelled.¹⁰⁷ Despite the students' allegations that they were denied the ability to confront their accuser, the Fifth Circuit utilized the *Mathews* factors to determine that the students had "multiple, meaningful opportunities to challenge the University's allegations, evidence, and findings," and therefore, the university's policies afforded sufficient due process protections.¹⁰⁸

Cases such as *Baum* and *Plummer* evidence the crux of the current dispute about whether university adjudication affords sufficient due process rights to the accused.¹⁰⁹ Though some circuits have determined that due process requires a hearing and cross-examination, other circuits have responded differently, and the Supreme Court has not spoken on the issue.¹¹⁰ With the current muddy state of the laws surrounding university proceedings, litigation on the topic is likely to continue to rise.¹¹¹

C. The Practical Problem of Affirmative Consent

The issue of what constitutes consent has continued to be "hotly debated."¹¹² In sexual assault cases, the notion of "no means no" was the accepted standard until relatively recently.¹¹³ However, the concept of affirmative consent—a verbal, ongoing, and voluntary agreement—has been on the

107. *Id.* at 772.

108. *Id.* at 773–75. The *Mathews* factors—"(a) the student's interests that will be affected; (b) the risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the burden that additional procedures would entail"—are often used by courts in determining whether sufficient due process is afforded in school settings. *Id.* at 773 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

109. *Doe v. Baum*, 903 F.3d 575, 575 (6th Cir. 2018); Michael McKeon, *Cross-Examination in Title IX Disciplinary Hearings Deemed Constitutional Right in Doe v. Baum*, JD SUPRA (Sept. 13, 2018), <https://www.jdsupra.com/legalnews/cross-examination-in-title-ix-33391/>.

110. McKeon, *supra* note 109.

111. Ganim & Black, *supra* note 57. Alison Kiss, who runs the Clery Center for Security on Campus, says that historically, accusers, not the accused, dubbed the litigation process unfair because of the commonness of interference from outside influences. *Id.* However, now "[e]ven advocates of the process, like Kiss, say many universities aren't handling this the right way." *Id.* Kiss believes that because "[s]chools were so eager to reverse years of mistreatment of victims . . . some put procedures into place that led to an unfair process." *Id.* As recently as December 2018, a California appellate court ruled that the accused student was denied a fair hearing when the university failed to assess the credibility of critical witnesses and request crucial evidence for the student's defense. *Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212, 1238 (2018).

112. *See* Lawson, *supra* note 28.

113. Katie Mettler, *'No Means No' to 'Yes Means Yes': How Our Language Around Sexual Consent*

rise in university policies.¹¹⁴ Critics of affirmative consent laws have argued that they shift the burden of proof to the accused to prove that he received consent, rather than relying on the prosecutor to prove that he did not.¹¹⁵ For example, when one of the authors of California's Senate Bill 967, Bonnie Lowenthal, was asked how innocent people could prove they received verbal consent, she replied, "Your guess is as good as mine."¹¹⁶ Critics also note that there is a profound disconnect between the "policy's bureaucratic requirements for sexual interaction and human sexuality as a lived and various experience."¹¹⁷ Although meant to protect victims (commonly, women) from situations in which they feel powerless to expressly refuse, affirmative consent laws in effect impose a duty on the accused student to prove he obtained consent, which violates the fundamental presumption of innocence that is integral to the justice system.¹¹⁸

Has Changed, WASH. POST (Feb. 15, 2018), <https://www.washingtonpost.com/news/soloish/wp/2018/02/15/no-means-no-to-yes-means-yes-how-our-language-around-sexual-consent-has-changed/> [http://wapo.st/2o1P3kf?tid].

114. See Mendelson, *supra* note 30; Mettler, *supra* note 113. The concept of affirmative consent was first adopted by Antioch College in Ohio in the early 1990s. Tara Culp-Ressler, *The First College to Use Affirmative Consent Was a Laughingstock*, THINK PROGRESS (Oct. 30, 2014, 6:41 PM), <https://thinkprogress.org/the-first-college-to-use-affirmative-consent-was-a-laughingstock-now-the-tide-is-turning-a912c34401d9/>. When adopted, the standard was considered so ridiculous and mechanical that it was mocked on national platforms such as *Saturday Night Live*. *Id.* The concept did not take hold in other places until two decades later, when states like California and New York began to integrate an affirmative consent standard into their sexual assault policies. *Id.*

115. Jason Garshfield, *The Underlying Problems of SB 967 and Affirmative Consent*, DAILY NEXUS (Feb. 12, 2016, 11:21 AM), <http://dailynexus.com/2016-02-12/the-underlying-problems-of-sb-967-and-affirmative-consent/>.

116. *Id.*

117. Press Release, Found. for Individual Rights in Educ., Statement on California's "Affirmative Consent" Bill (Feb. 13, 2014), <https://www.thefire.org/fire-statement-on-california-affirmative-consent-bill/> [hereinafter FIRE Statement]. *But see* Ezra Klein, "Yes Means Yes" Is A Terrible Law, and I Completely Support It, VOX (Oct. 13, 2014, 10:30 AM), <http://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it> (arguing that although affirmative consent laws cause "a haze of fear and confusion over what counts as consent," men need to be afraid during sexual encounters in order to create a shift in current sexual practices on college campuses).

118. *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 10, 2015), <https://chronicle-assets.s3.amazonaws.com/5/items/biz/pdf/memorandum-mock.pdf>. In that case, Corey Mock was accused of sexually assault and was ultimately expelled. *Id.* In the hearing, the UTC Chancellor "erroneously shifted the burden of proof onto Mr. Mock, when the ultimate burden of proving a sexual assault remained on the charging party, UTC." *Id.* at 11. The judge noted that [the accused] must come forward with proof of an affirmative verbal response that is credible in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party's most private body parts. Absent the tape recording of a

Proponents of affirmative consent laws maintain that these laws encourage open communication about sex and protect women who were “too frightened or shocked to object” to sexual encounters.¹¹⁹ They argue that all too often, women are “told that they were not raped because they never physically resisted or verbally rejected their aggressor’s attempts to engage in sexual contact.”¹²⁰ Therefore, proponents of affirmative consent laws maintain that they effectively narrow the circumstances in which consent is valid, providing women with protection and autonomy over their sexual encounters.¹²¹

Both sides of the debate acknowledge that the inconsistency surrounding sexual encounters and how to prove consent contributes to the mishandling of sexual assault cases, often leaving victims without justice due to administrative blunders or lack of physical evidence.¹²² However, although affirmative consent laws ideally protect potential victims, in reality they are impracticable to follow, impossible to prove, and provide “a confusing and legally unworkable standard for consent to sexual activity.”¹²³

IV. DUE PROCESS REQUIRES BRIGHT-LINE REGULATIONS OF SEXUAL MISCONDUCT ON CAMPUS

The influx of litigation facing universities illustrates an urgent need for revisions in campus adjudication proceedings and applicable legislation.¹²⁴ Because college campuses lack many of the constitutional protections afforded by the court systems, clearly enumerated standards, including the implementation of a higher standard of proof and the guarantee of independent adjudicators, are necessary to safeguard the rights of accused students and victims alike.¹²⁵

verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party’s consent strains credulity and is illusory.

Id. at 12.

119. Chandler Delamater, Comment, *What “Yes Means Yes” Means for New York Schools: The Positive Effects of New York’s Efforts to Combat Campus Sexual Assault Through Affirmative Consent*, 79 ALB. L. REV. 591, 613 (2015).

120. *Id.* at 613.

121. *Id.*

122. See Jackson, *supra* note 67 (noting that colleges both respond too weakly to sexual assault allegations and simultaneously botch the hearings of the claims they investigate).

123. See FIRE Statement, *supra* note 117.

124. See *supra* Part III.B.

125. See FIRE Statement, *supra* note 117.

A. *The Mathews Factors Are Insufficient for Determining Due Process Rights in Sexual Assault Proceedings*

In *Mathews v. Eldridge*, the Supreme Court laid out a flexible balancing test to determine what process was due in an administrative capacity.¹²⁶ However, the scope of Title IX has reached far beyond the limited arena that it was created to address.¹²⁷ Title IX encompasses sexual misconduct that, despite falling within the adjudication power of universities, has more severe ramifications than can be adequately safeguarded by laws intended to address administrative violations.¹²⁸

While balancing tests may be effective for regulating procedures in public schools, in which courts have generally agreed that certain rights can be limited, students on university campuses who are accused of sexual misconduct should have enumerated due process protections in regards to their hearings and investigations.¹²⁹ Additionally, although a more flexible, factor-based approach may allow discretion in fact-specific circumstances, a uniform framework actually benefits both victims and accused students.¹³⁰ With consistent and stable regulations, universities will be able to respond to allegations of sexual misconduct “without fear of liability for violating an alleged perpetrator’s due-process rights” and thus be more effective and confident in protecting victims.¹³¹ Consequently, enumerated regulations will benefit both accused students and victims of sexual misconduct by guaranteeing a process

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

127. *Title IX Legislative Chronology*, HOLLAND SENTINEL (Dec. 27, 2017, 10:00 AM), <https://www.hollandsentinel.com/news/20171227/title-ix-legislative-chronology>. Over the years, the government afforded Title IX with varying levels of power. *Id.* For example, in 1984, the scope of Title IX was limited to athletic scholarships. *Id.* However, in 1988, the Civil Rights Restoration Act of 1987 restored Title IX’s institution-wide coverage. *Id.* In subsequent years, the power and scope of Title IX continued to vary until 2011, when the Obama administration issued the Dear Colleague Letter reaffirming the power of Title IX’s protections. *Id.*

128. *See* Johnson, *supra* note 69.

129. E.A. Gjelten, *When Can Schools Limit Students’ Free Speech Rights?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/research/education-law/when-can-schools-limit-students-free-speech-rights.html> (last visited Oct. 3, 2019). For example, public school students still have First Amendment rights, but schools can restrict students’ speech in certain situations, such as if it is lewd, disruptive to the school environment, or promotes illegal drug use. *Id.*

130. *See* Triplett, *supra* note 69, at 491.

131. *Id.* Balancing obligations to both survivors of sexual assault and accused students creates a liability trap for institutions that are unsure how to proceed in the face of the “competing legal considerations.” *Id.* at 506.

that enables full and fair investigations of claims.¹³² Therefore, although courts often balance the three *Mathews* factors in order to determine whether sufficient due process is afforded in school settings, the precarious nature of university adjudications requires bright-line regulations to ensure that campus regulations universally provide students with constitutionally mandated protections.¹³³

B. Proposals for Mechanisms that Better Protect Due Process Rights

1. Raise the Standard of Proof to “Clear and Convincing”

The requisite standard of proof varies by case classification.¹³⁴ Civil cases have historically required a much lower standard of proof than criminal cases (by a preponderance of the evidence as opposed to beyond a reasonable doubt), as the punishments in civil adjudications are less severe, and the violations are considered less morally blameworthy.¹³⁵ The application of this civil standard of proof to Title IX adjudications on college campuses, although helpful in ensuring that the guilty are punished, results in a significant risk of wrongful convictions for crimes that stray widely from the traditional civil violation.¹³⁶ Additionally, the use of the lowest burden of proof in sexual

132. *Id.* Currently, the level and quality of procedures provided is university-dependent; thus, “students are subjected to fundamentally different processes depending on the institution they attend.” *Id.* Students attending private universities are less protected than their public-school counterparts, as courts have determined that students are protected only when the procedures are fundamentally unfair. *Id.* at 498. Although it is outside of the scope of this Note to address the difference in due process rights between publicly and privately funded universities, it would be in the best interests of students nationwide if sexual assault policies and procedures were consistent regardless of the type of institution a student attended. *Id.* at 511.

133. *See, e.g.,* *Plummer v. Univ. of Hous.*, 860 F.3d 767, 772 (5th Cir. 2017), *as revised* (June 26, 2017).

134. *The Differences Between a Criminal Case and a Civil Case*, FINDLAW, <https://criminal.findlaw.com/criminal-law-basics/the-differences-between-a-criminal-case-and-a-civil-case.html> (last visited Oct. 3, 2019).

135. *Id.* Because crimes are considered offenses against society as a whole and have much greater consequences than civil violations, criminal cases are harder to prove and provide many more procedural protections to the defendant. *Id.*

136. John Villasenor, *A Probabilistic Framework for Modelling False Title IX ‘Convictions’ Under the Preponderance of the Evidence Standard*, 15 L. PROBABILITY & RISK 223, 235 (2016), <https://doi.org/10.1093/lpr/mgw006>. Under a study using even the most conservative framework, “an innocent defendant faces a five times higher risk of being wrongly found guilty when a preponderance of the evidence standard is used as opposed to under a beyond a reasonable doubt standard.” *Id.* at 237. More realistic models (“relative to the conservative model” mentioned) expose a much larger

misconduct cases “dismantles constitutional due process rights for the accused with the imposition of a mere preponderance of the evidence standard for purported *felony-level* criminal conduct.”¹³⁷ In order to ensure that sexual assault crimes on campuses are adjudicated fairly, the standard of proof must be raised to match the gravity and reprehensibility of the crime.¹³⁸

According to the Dear Colleague Letter, the preponderance standard was required for campus adjudications.¹³⁹ Under the current administration, campuses are permitted to choose between the preponderance standard (defined as “the greater weight of evidence,” which boils down to whether the respondent “more likely than not” committed the offense) and the “clear and convincing” standard, which is met in cases where “the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.”¹⁴⁰ Although Title IX is a federal civil rights law, and therefore courts would typically employ the preponderance of the evidence standard characteristic of civil cases,

[civil trials afford] many fundamental protections that are typically absent from campus tribunals, including impartial judges, unbiased juries of one’s peers, representation by counsel, mandatory “discovery” processes to ensure that all parties have access to relevant information, restrictions on unreliable evidence like hearsay or prior bad acts, and sworn testimony under penalty of perjury.¹⁴¹

margin, indicating that the preponderance of the evidence standard is much more likely to result in the conviction of innocent defendants than a more stringent standard. *Id.* While the consequences of conviction are undoubtedly less severe than in a criminal court, it is still important to examine the effect of a substantially heightened false-conviction risk on accused university students. *Id.*

137. Allison L. Marciniak, Note, *The Case Against Affirmative Consent: Why the Well-Intentioned Legislation Dangerously Misses the Mark*, 77 U. PITT. L. REV. 51, 61 (2015) <https://doi.org/10.5195/lawreview.2015.383>. “Undoubtedly, lowering the standard of proof will capture more perpetrators of sexual assault, just as lowering the standard of proof required in a criminal trial would statistically capture more thieves or murderers. Yet, courts maintain the high standard in criminal trials no matter how small the offense.” *Id.* at 66. The argument for using a preponderance of the evidence standard in campus tribunals centers around capturing more guilty students, but it fails to take into account the fundamental reason for a more stringent standard for criminal acts: when liberty interests are at stake, there must be heightened protection against their deprivation. *Id.*

138. Johnson, *supra* note 69.

139. Dear Colleague Letter, *supra* note 40.

140. Legal Info. Inst., *Clear and Convincing Evidence*, CORNELL L. SCH., https://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Oct. 3, 2019).

141. FIRE Statement, *supra* note 117.

Additionally, civil violations generally lack the moral reprehensibility, societal stigma, and grave punishment typical in sexual assault cases.¹⁴² Because sexual assault is so distinct from other civil offenses—and Title IX claims are adjudicated in forums that lack the protection typically afforded by courts—the standard of proof used in civil cases is too lax to provide protection for accused students and ensure punishment for guilty perpetrators.¹⁴³

Proponents of the preponderance standard in Title IX adjudications contend that the lower threshold encourages victims to report their experiences; because sexual assault cases are notoriously difficult to adjudicate, the preponderance standard allows more convictions and requires less exacting evidence.¹⁴⁴ Certainly, underreporting is an issue; the Rape, Abuse & Incest National Network reported that four out of every five female, college-aged victims did not report her sexual assault to the police.¹⁴⁵ However, although a weaker standard of proof may incentivize victims to report their experiences and ease convictions, it also removes procedural protections for accused students and greatly increases the risk of false condemnations of innocent individuals.¹⁴⁶

142. *The Differences Between a Criminal Case and a Civil Case*, *supra* note 134; *see also* Marciniak, *supra* note 137, at 66. Standards of proof generally reflect the interests at stake for the accused; accordingly, “[h]eighted standards of proof in criminal trials ‘are an expression of fundamental procedural fairness, requir[ing] a more stringent standard . . . than for ordinary civil litigation’ and reflect the liberty interests at stake for an accused.” *Id.* (quoting *In re Winship*, 397 U.S. 358, 372 (1970)). Consequently, the preponderance of the evidence standard is inappropriate for sexual assault allegations in campus tribunals because the act itself subjects the perpetrator to the same societal stigma and condemnation as it would in a criminal court. *Id.*

143. FIRE Statement, *supra* note 117.

144. Amy Chmielewski, Comment, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 173–74 (2013) (advocating the preponderance of the evidence standard for college sexual assault adjudications).

145. *The Criminal Justice System: Statistics*, RAPE ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct. 3, 2019). When asked for their reason for not reporting, 13% of victims responded that they did not believe the police would do anything to help, while 2% responded that they did not believe the police could do anything. *Id.* However, because 30% of victims did not cite a reason or provided a reason other than the main categories cited (and sexual violence statistics are difficult to measure), it is still unclear how many victims did not report because of a perception of ineffective bureaucratic systems. *Id.*

146. *See* Villasenor, *supra* note 136, at 227. The model relied on the rates of false convictions in the criminal justice system to create a probabilistic model used to determine likely false guilty determinations in Title IX adjudications. *Id.* at 225. Even under the most conservative version of the model, an innocent person with a 1% probability of being found guilty under the beyond a reasonable doubt standard was five times more likely to be found guilty under the preponderance of the evidence standard. *Id.* at 237.

A similar argument by proponents of the preponderance standard is its typical use in civil disputes for federal civil rights laws such as Title IX.¹⁴⁷ However, even though Title IX was intended to address sex discrimination in athletics, its scope now reaches much more broadly and encompasses violations that amount to criminal conduct.¹⁴⁸ Because the conduct that falls under Title IX campus adjudication is more serious than initially intended, the standard of proof must be increasingly more stringent in order to match the severity of the crimes.¹⁴⁹ The “middle” standard of proof—clear and convincing evidence—is arguably most appropriate in Title IX claims, at least as long as they remain within university domain.¹⁵⁰ If universally adopted, this standard would more effectively balance the interests of both the victim and the accused by requiring sufficient evidence of guilt, while stopping short of the high standard used in criminal courts, which possess much broader resources.¹⁵¹

Additionally, some scholars have proposed a “sliding standard of proof that changes with the severity of the punishment or crime,” which would assist in individually identifying the many infractions under the umbrella of Title IX and handling them accordingly.¹⁵² As discussed previously, the scope of Title IX has broadly expanded to cover discrimination in all educational institutions receiving federal funds, including “recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.”¹⁵³

147. Chmielewski, *supra* note 144, at 146–47.

148. *See Title IX Legislative Chronology*, *supra* note 127. The scope of Title IX was limited in 1984 by the Supreme Court. *Id.* In 1988, the Civil Rights Restoration Act reestablished the wide breadth of Title IX by mandating that, “[i]f any program or activity in an educational institution receives federal funds, all of the institution’s programs and activities must comply.” *Id.* Over the next twenty years, various government decisions caused the power of Title IX to wax and wane. *Id.* Because the Dear Colleague Letter was rescinded in 2017, it is unclear how powerful Title IX will be in the coming years. *Id.*

149. Johnson, *supra* note 69.

150. Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J.L. & PUB. POL’Y 533, 560 (2017).

151. *Id.*

152. *Id.* at 561. With this variable standard of proof, the judge would be able to set the standard on a case-by-case basis based on the individual facts and possible punishment. *Id.* For instance, a judge would be able to employ a higher standard of proof if the accused student faced expulsion, while only a preponderance of the evidence standard would be required if the possible punishment was probation. *Id.*

153. *Title IX and Sex Discrimination*, U.S. DEP’T EDUC., OFF. FOR C.R., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last modified Sept. 25, 2018); *see also* Nathan R. Cordle, *Title*

Each category requires a vastly different level of treatment; for example, typical Title IX adjudication policies and levels of review may correctly address gender preference in athletic programs, but sexual harassment and assault arguably require a heightened level of scrutiny and care.¹⁵⁴ Rather than attempting to create a universal set of policies to handle very different infractions, Title IX violations could be categorized according to their degree of seriousness and handled accordingly.¹⁵⁵ This tactic would alleviate the pressure on school administrators to create a catch-all solution for a wide umbrella of problems, while still ensuring that sex discrimination in the educational realm is handled appropriately.¹⁵⁶

2. Employ Independent, Impartial Adjudicators

Despite being well-intentioned, the Dear Colleague Letter ultimately created a “parallel justice system for sexual assault” by requiring campuses, which had “generally deferred to the criminal-justice system for the most-serious crimes,” to “conduct their own proceeding for every sexual allegation.”¹⁵⁷ Due to regulations imposed by the Dear Colleague Letter, universities were required to adjudicate claims that far surpassed their regular scope, leading to inadequate investigations conducted by university officials who were unequipped to handle claims of that magnitude.¹⁵⁸ Additionally, the administration favored a “single investigator” model, “whereby the school appoint[ed] a staff member to act as detective, prosecutor, judge, and jury” to

IX at 45: The Evolution and Impact on LGBTQ+ Rights, A.B.A (May 15, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/title-ix-at-45-the-evolution-and-impact-on-lgbtq-rights/. The American Bar Association notes that Title IX has become a powerful tool used to combat discrimination, including discrimination based on gender identity; however, under the Trump administration, it is unlikely that rights of the LGBTQ+ community will continue to be prioritized. *Id.*

154. See Baker, *supra* note 150, at 558–61; see also Johnson, *supra* note 69.

155. See Baker, *supra* note 150, at 561.

156. See *id.* at 561–63; see also Bernstein, *supra* note 8 (advocating removal of sexual assault claims to the criminal justice system to allow colleges to focus on “the important and necessary task of presiding over the entire range of sexual harassment behavior that does not amount to criminal activity but results in a hostile environment—the original intent behind Title IX.”).

157. See Yoffe, *supra* note 11.

158. Joyce, *supra* note 60. Universities have also been accused of overcorrecting “after decades of failing to take student sexual violence seriously enough.” *Id.* However, the criminal justice system is also notorious for failing to handle sexual violence cases adequately. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1999 (2016).

handle the Title IX claims.¹⁵⁹

Because universities now have wide discretion in how to address Title IX claims, adjudicators of Title IX violations vary by campus.¹⁶⁰ Some universities use only a single-investigator, a method that bypasses the live hearing stage and results in a decision rendered by one individual.¹⁶¹ This model is widely employed by universities, although the American Bar Association's task force recommended against its use:

[T]he single investigator model, which consists of having an investigator also serve as the decision-maker, carries inherent structural fairness risks especially as it relates to cases in which suspension or expulsion is a possibility. Should a school choose to use the investigatory model, the task force recommends that the investigator and the decision-maker be different persons and adopt additional procedural protections consist with these recommendations.¹⁶²

Other universities use the adjudicatory model, which includes a hearing at which both parties are entitled to be present; however, the specific form varies by university.¹⁶³ Some campuses, such as Vassar College in Poughkeepsie, New York, have elected to hire retired judges to adjudicate claims,

159. See Yoffe, *supra* note 11.

160. Belkin, *supra* note 59.

161. Jonathan Cook, *The Single Investigator Model Versus the Hearing Panel Model: Pros & Cons*, NEW ENG. STUDENT DEF. (Sept. 28, 2018), <https://nestudentdefense.com/blog/2018/9/28/recommended-sexual-assault-procedure-corrections-for-colleges-and-universities>.

162. TAMARA R. LAVE, AM. BAR ASS'N, CRIM. JUSTICE SECTION, RECOMMENDATIONS AND REPORT FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/Due_Process_Task_Force_Recommendations.pdf. The ABA task force also recommended that the standard of proof be elevated if the investigatory model is used at a university. *Id.* Though it declined to categorize the standard of proof as "clear and convincing," the task force articulated the standard by stating that in order to convict an accused student,

the decision-maker should find that there is sufficient evidence that is relevant, probable, and persuasive to firmly convince him or her that the respondent engaged in the alleged misconduct, and that the evidence supporting a finding of responsibility significantly outweighs any evidence that the respondent is not responsible for the alleged misconduct.

Id. at 7–8.

163. *Id.* at 2.

as faculty-members expressed discomfort with filling the role.¹⁶⁴ Other campuses have hired outside parties to conduct the investigations and hearings, such as lawyers or other trained professionals who are more versed in legal proceedings than campus officials.¹⁶⁵ Problematically, many campuses choose to have internal officials conduct the hearings, which has been criticized as creating a conflict of interest for both the accuser and the accused.¹⁶⁶

In order to ensure that campus adjudications are as unbiased as possible and to protect the due process rights of all parties, it is crucial to have a panel of fact-finders who are both unconnected to the university and trained in tactics to address both perpetrators and survivors of trauma.¹⁶⁷ As noted by various outlets, including university personnel themselves, “[s]tudent conduct administrators simply lack the investigative ability, impartiality, professional training, and legal knowledge required to reliably adjudicate sexual assault cases.”¹⁶⁸ Sexual misconduct cases are difficult even for the criminal justice system, as they are often plagued by insufficient evidence, credibility issues, and conflicting testimony.¹⁶⁹ Nevertheless, because Title IX violations remain in the domain of university adjudication for the present, all universities should employ neutral third parties—optimally, retired judges, as done by Vassar—to provide the most fair and unbiased proceedings possible.¹⁷⁰ Specific training, ideally based in a trauma-informed approach, should be mandated for all decision makers of sexual misconduct claims in order to promote accuracy,

164. Belkin, *supra* note 59. However, even some schools that involve judges to make determinations still defer to the school administration for the ultimate decision. See Jeremy Bauer-Wolf, *Outsourcing Rape Investigations*, INSIDE HIGHER ED (Oct. 9, 2017), <https://www.insidehighered.com/news/2017/10/09/some-colleges-opt-outsource-title-ix-investigations-hearings>. For example, at Vassar, a pool of three judges hears the case and then “make[s] a recommendation that is either adopted or rejected by the dean of students.” *Id.*

165. See Bauer-Wolf, *supra* note 164.

166. *Id.*

167. See Cook, *supra* note 161 (describing a hearing at American University where the investigator in the case actually began advocating on behalf of the opposing party during the hearing); see also Jeffrey J. Nolan, *Why Campuses Should Conduct Trauma-Informed Sexual Assault Investigations*, NAT’L CTR. FOR CAMPUS PUB. SAFETY (2016), <https://www.nccpsafety.org/training-technical-assistance/webinars/why-campuses-should-conduct-trauma-informed-sexual-assault-investigations> (click “View the Archived Webinar”).

168. FIRE Statement, *supra* note 117.

169. Topping & Barr, *supra* note 19. The criminal justice system is notorious for mishandling rape cases, including demanding excessive personal information from rape victims and determining whether to charge an assailant based in part by the behavior of the victim. *Id.* This is due in part to mishandling cases and in part to the inherent difficulty of processing sexual misconduct crimes. *Id.*

170. Belkin, *supra* note 59.

and ensure the fair consideration and comprehension of evidence.¹⁷¹ Through detailed and consistent training, universities will be able to provide a thorough and reliable approach to Title IX claims.¹⁷²

3. Provide a Consistent, Workable Definition of Consent

Despite the fact that most schools provide publicly available sexual assault policies and consent definitions, they are varied at best and completely contradictory at worst.¹⁷³ Because obtaining consent lies at the crux of most, if not all, sexual misconduct allegations, it is critical to have a consistent, workable standard for how to define and measure it.¹⁷⁴ As universities adjust their policies to meet ever-changing guidelines, most define consent to some extent, though these definitions are often contradictory, vague, or counterintuitive.¹⁷⁵ Some policies are contradictory within themselves; for example,

171. Nolan, *supra* note 167. Trauma-informed approaches assist fact-finders in comprehending evidence, including seemingly erratic or counterintuitive behaviors displayed by survivors. CREATING GUIDANCE FOR ADDRESSING SEXUAL ASSAULT TASK FORCE, AM. COLL. HEALTH ASS'N, ADDRESSING SEXUAL AND RELATIONSHIP VIOLENCE: A TRAUMA-INFORMED APPROACH 32–33 (2018), https://www.acha.org/documents/resources/Addressing_Sexual_and_Relationship_Violence_A_Trauma_Informed_Approach.pdf (emphasizing the importance for law enforcement officials to have training in trauma-informed responses and interview techniques). With adjudicators more informed and better equipped to deal with specific sexual misconduct cases, hearings would ideally produce more thorough and accurate decisions. *Id.* at 51 (identifying the need to “[c]reate policies and procedures that . . . ensure due process for all students” as a key principle of the trauma-informed approach).

172. *See generally id.* at 5–9, 46–49 (describing how educating, training, and informing university staff provides a workable solution to handling Title IX claims).

173. Laurie M. Graham et al., *Sexual Assault Policies and Consent Definitions: A Nationally Representative Investigation of U.S. Colleges and Universities*, 16 J. SCH. VIOLENCE 243, 248 (2017), <https://doi.org/10.1080/15388220.2017.1318572>. For example, at a meeting of officials from ten North Carolina system schools, officials expressed difficulty with creating policies and compiling meaningful data system-wide due to a lack of standard definitions. *See* Cole Villena, *Inconsistent Sexual Assault Definitions Hamper UNC-System Campus Security Committee*, DAILY TAR HEEL (Sept. 27, 2018, 12:39 AM), <https://www.dailytarheel.com/article/2018/09/security-committee-0926-unc-system-me-too-sexual-assault-higher-ed-campus-definition-spellings-ecu-ncsu-nccu-unc>. One official noted that students “don’t get why consent at NC State is not the same as consent at UNC or at Central or wherever,” displaying the issues that inconsistent definitions create in implementing uniform sexual misconduct policies. *Id.*

174. *See generally* Stephen J. Schulhofer, *Consent: What It Means and Why It’s Time to Require It*, 47 U. PAC. L. REV. 665, 667–68 (2016) (dismissing the “no means no” and “yes means yes” theories of consent and providing an alternative solution that looks at the “totality of the person’s conduct”).

175. Maria Lencki, *University Offers Students Contradictory Instructions on Sexual Consent*, C. FIX (Dec. 19, 2018), <https://www.thecollegefix.com/university-offers-students-contradictory-instructions-on-sexual-consent/>; *see also* Gersen & Suk, *supra* note 13, at 894 (noting that “the definition of

the University of Michigan defines consent as “a clear and unambiguous agreement, expressed outwardly through mutually understandable words or *actions*, to engage in a particular activity,”¹⁷⁶ while elsewhere in the explanation of the policy, there is a sentence that warns students that consent cannot be assumed by actions.¹⁷⁷ Other policies are consistent internally, but vary widely between campuses: some universities utilize the affirmative consent standard, requiring explicit verbal agreement,¹⁷⁸ while others allow consent to be obtained via actions.¹⁷⁹ Still others provide hypothetical scenarios in order for students to visualize consent and understand the probable punishment of violating the boundaries in each particular incident.¹⁸⁰

Another crucial discrepancy lies in how campuses handle consent when one or both of the parties is under the influence of alcohol or another intoxicant.¹⁸¹ While some schools plainly assert that consent is unable to be given

sexual assault turns entirely on the meaning of consent”).

176. *University of Michigan Policy & Procedures: Consent*, U. MICH., <https://studentsexualmisconductpolicy.umich.edu/content/1-consent> (last visited Oct. 3, 2019) (emphasis added).

177. Sexual Assault Prevention & Awareness Ctr., *What is Consent?*, U. MICH., <https://sapac.umich.edu/article/49> (last visited Sept. 23, 2019).

178. See, e.g., *Sexual Misconduct Policy*, PEPP. U., https://www.pepperdine.edu/student-life/student-code-of-conduct/overlay-pages/overlay_sexual_misconduct.htm (last updated Aug. 19, 2019) (defining sexual assault and affirmative consent).

179. See, e.g., *Title IX: Definitions*, BAYLOR U. (Jan. 9, 2017), <https://www.baylor.edu/titleix/index.php?id=873168>.

180. See, e.g., *Sexual Misconduct Scenarios*, YALE U. (Sept. 9, 2013), https://provost.yale.edu/sites/default/files/files/Sexual-Misconduct-Scenarios_Sept2013.pdf. For example, one hypothetical describes an encounter and its likely consequence:

Devin and Ansley are engaging in a consensual sexual encounter, which Devin begins to intensify. Ansley responds by pulling away slightly, moving Devin’s hands and saying “not so fast; I’m not sure.” Devin cooperates briefly but then intensifies the contact once more. Ansley inches backwards and then becomes still. Nonetheless, Devin has sex with Ansley.

While the initial sexual activity was consensual, that consent was not sustained. The UWC penalty would likely range from multi-semester suspension to expulsion.

Id. at 3.

181. Lori E. Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should “Yes” Mean “No”?*, 91 IND. L.J. 1363, 1368–69 (2016). Because of a “lack of a carefully crafted, uniform definition based on scientific evidence,” it is hard for schools to determine at what level intoxication becomes incapacitation—and therefore at what level consent is no longer viable. *Id.* at 1368. Although many schools accept the notion that a student who has experienced a “blackout” is completely incapable of conscious thought, science does not support that notion. *Id.* at 1370. The existence of a blackout does not necessarily establish how drunk a student is, and consequently does not speak to the individual ability to consent. *Id.* Put more simply, “[a] student can be severely intoxicated without suffering from a blackout, and a student can suffer from a blackout without being severely intoxicated.” *Id.*

while intoxicated to any degree, others attempt to define the degree of intoxication that constitutes incapacitation.¹⁸² As many universities conflate the word intoxication with incapacitation—concepts that once had very distinct meanings, but are now often used interchangeably—administrations ignore the realities of collegiate life and utilize “more ideology than logic” in policy creation.¹⁸³ Consequently, policies are instituted that fundamentally misunderstand the individual’s capacity to consent and relegate some presumably voluntary behavior to sexual misconduct.¹⁸⁴

Moreover, affirmative consent laws, although written to clearly define situations in which valid consent can be given, actually further convolute the debate.¹⁸⁵ Although the importance of finding a viable solution to fairly handle sexual assault cases is inarguably paramount, “the ‘yes means yes’ standard faces the same administrative hearsay problem as its outdated ‘no means no’ counterpart” by simply continuing the credibility debate on which party is being honest, while simultaneously broadening the definition of sexual assault.¹⁸⁶ Although affirmative consent laws theoretically provide individuals with a more explicit framework to utilize when defining consent, these laws, as currently written, ignore the realities of human sexuality (such as relying on nonverbal behavior), while maintaining the same ambiguities as their predecessors.¹⁸⁷

182. See Tyra Singleton, *Conflicting Definitions of Sexual Assault and Consent: The Ramifications of the Title IX Male Gender Discrimination Claims Against College Campuses*, 28 HASTINGS WOMEN'S L.J. 155, 163 (2017).

183. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<https://nyti.ms/119MFK7>]. When discussing universities that issue a blanket ban on consent obtained while intoxicated, the author identifies problematic scenarios: “Now consider that one large survey showed that around 40 percent of undergraduates, both men and women, had sex while under the influence of alcohol. Are all these students rape victims? And what if both parties were under the influence?” *Id.*

184. *Id.*

185. See *supra* Part III.C.

186. Marciniak, *supra* note 137, at 71.

187. *Id.* at 54, 56; see also Colleen Flaherty, *Missing the Mark on Consent*, INSIDE HIGHER ED (Aug. 14, 2017), <https://www.insidehighered.com/news/2017/08/14/study-suggests-big-difference-between-how-college-men-describe-affirmative-consent>. In this article, Flaherty described a study that examined how consent policies were being put into practice by college-aged men. *Id.* The study found that when asked to explain their most recent sexual encounters, the participants described relying predominantly on physical, nonsexual indicators of interest—notably, moaning and eye-contact. *Id.* According to the study’s writer, Nicole Bedera, often “men may believe they’re meeting the standard of consent set by their institutions but are actually falling short.” *Id.*

The affirmative consent standard has also proved unworkable in broader social settings outside of university campuses.¹⁸⁸ In early 2018, Aziz Ansari, a well-known comedian and actor, was accused of sexual assault after an encounter with a woman using the pseudonym Grace.¹⁸⁹ Via an internet post, Grace shared her story of her meeting with Ansari, which involved a dinner date and a sexual encounter that left her feeling uncomfortable and violated.¹⁹⁰ Grace described the encounter, detailing a subsequent text exchange in which she asserted that Ansari “ignored clear nonverbal cues . . . [and] kept going with advances.”¹⁹¹ However, when she expressed these feelings to Ansari, he vehemently apologized, noting that he had not realized he had crossed her boundaries, and that he was under the impression that the encounter had been “completely consensual.”¹⁹²

The story was troubling to many because under affirmative consent standards, Ansari would be a rapist—simply for being unable to read Grace’s mind.¹⁹³ Similar to other critics of affirmative consent, New York Times writer Bari Weiss expressed concern that such stories “transform[] what ought to be a movement for women’s empowerment into an emblem for female helplessness” by suggesting that a woman has no agency in sexual encounters.¹⁹⁴ Despite purportedly acting “aggressive and selfish and obnoxious,” Ansari appears to have simply been unable to ascertain that Grace was uncomfortable at first, but ultimately respected her refusal once it was expressed.¹⁹⁵ This example, like many others both on university campuses and in the broader

188. Bari Weiss, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader.*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html> [<https://nyti.ms/2EIbKzZ>].

189. Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE.NET (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>.

190. *Id.*

191. *Id.*

192. Megan Thomas, *Aziz Ansari Responds to Sexual Assault Allegation: ‘I Was Surprised and Concerned’*, CNN (last updated Jan. 16, 2018, 9:46 AM), <https://www.cnn.com/2018/01/15/entertainment/aziz-ansari-responds/index.html> (reporting Ansari’s response to the accusation, in which he stated, “The next day, I got a text from her saying that although ‘it may have seemed okay,’ upon further reflection, she felt uncomfortable. It was true that everything did seem okay to me, so when I heard that it was not the case for her, I was surprised and concerned.”).

193. Weiss, *supra* note 188.

194. *Id.*

195. *Id.* (explaining that when Grace said “no” for the first time, Mr. Ansari responded, “How about we just chill, but this time with our clothes on?”).

social sphere, evidences the reality that affirmative consent—at least as currently articulated—does not provide a legally workable standard that protects victims of sexual assault while also accurately reflecting consensual encounters.¹⁹⁶

Additionally, as currently written, affirmative consent laws, such as California's Senate Bill 967, seemingly require the accused student to prove consent was obtained rather than the complainant to prove that it was not.¹⁹⁷ Some scholars have suggested that affirmative consent be used as an affirmative defense, rather than a conceptual definition,¹⁹⁸ while others have completely negated the feasibility of the concept in collegiate interactions.¹⁹⁹ In a study conducted by *The Washington Post* and the Kaiser Family Foundation, eighty-three percent of students acknowledged familiarity with affirmative consent standards, but differed wildly in their comprehension of its application.²⁰⁰ Actions such as getting a condom and undressing oneself were interpreted by some students as constituting consent, while others maintained that those actions were insufficient.²⁰¹ The study revealed that even on campuses with affirmative consent standards that purport to rid any ambiguity from the definition, students are still unsure what actions establish voluntary agreement for further sexual activity.²⁰² Because of the interpretation issues and resistance

196. See FIRE Statement, *supra* note 117; Weiss, *supra* note 188.

197. See Garshfield, *supra* note 115.

198. Noah Hilgert, Note, *The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws*, 58 ARIZ. L. REV. 867, 898 (2016) ("If one of the goals of the affirmative consent standard is to redirect criminal scrutiny from the alleged victim to what the defendant did or did not do, the statutory language needs to reflect that value. . . . The defendant . . . could nonetheless prove that he or she had obtained consent by a preponderance of the evidence, thus reserving consent as an affirmative defense.").

199. See Marciniak, *supra* note 137, at 52.

200. See WASH. POST-KAISER FAMILY FOUND., SURVEY OF COLLEGE STUDENTS ON SEXUAL ASSAULT 12, 14 (2015), <https://www.washingtonpost.com/apps/g/page/national/washington-post-kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/>.

201. *Id.* at 13–14 (finding that 47% of both men and women answered that taking off your own clothes establishes consent, with 49% saying no, 3% saying it depends, and 1% having no opinion; 40% of both men and women answered that getting a condom establishes consent, with 54% saying no, 4% saying it depends, and 1% having no opinion).

202. Nick Anderson & Peyton M. Craighill, *College Students Remain Deeply Divided Over What Consent Actually Means*, WASH. POST (June 14, 2015, 7:02 PM), http://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e_story.html. See generally Shaw, *supra* note 181, at 1412 (maintaining that an affirmative consent standard is inappropriate on college campuses until the criminal justice system develops it more fully).

plaguing affirmative consent laws, they must unambiguously be worded to preserve the presumption of innocence of the accused and ensure that the burden of proof—as in all cases—rests solely with the prosecutor.²⁰³

4. Facilitate Interaction Between Campuses and Law Enforcement

From officers who are skeptical of victims to prosecutors that can choose not to file charges against the alleged perpetrator, the criminal justice system has been widely criticized for its failure to effectively adjudicate sexual violence cases.²⁰⁴ This belief that the criminal justice system fails sexual assault victims is one of the main rationales for adjudicating these types of claims in university tribunals.²⁰⁵ However, universities are also condemned for mishandling sexual misconduct claims, prompting an influx of litigation from accused students who claim that unqualified school administrators bungled their adjudication proceedings.²⁰⁶ To make matters worse, universities in certain states face state and federal laws that differ on which officials are required to report sexual assault claims, which creates confusion among university administrators and leads to a lack of communication between campuses and law enforcement.²⁰⁷

Title IX and the criminal justice system have very different purposes in terms of adjudicating sexual violence claims; while Title IX addresses com-

203. See Garshfield, *supra* note 115. *But see* Hilgert, *supra* note 198, at 883 (arguing that there is no right to a presumption of innocence in university tribunal hearings, as that protection rests solely with criminal defendants).

204. Cassia Spohn, *How the Criminal Justice System Is Failing Sexual Assault Victims*, MIC (Apr. 24, 2013), <https://mic.com/articles/37597/how-the-criminal-justice-system-is-failing-sexual-assault-victims>.

205. Bernstein, *supra* note 8.

206. See Yoffe, *supra* note 11; cases cited *supra* note 89. However, while accused students are up in arms regarding the lack of constitutional rights afforded to them in campus proceedings, victims have continued to lament the lax treatment of perpetrators. See Jackson, *supra* note 67. In several cases, Yale University found sufficient evidence of nonconsensual sexual encounters; however, the perpetrators simply received “written reprimands” and were not expelled or suspended from school. OFFICE OF THE PROVOST, YALE UNIV., REPORT OF COMPLAINTS OF SEXUAL MISCONDUCT 3, 4, 7 (2013), <https://provost.yale.edu/sites/default/files/files/July2013Report.pdf>. This type of minimal punishment for students found guilty of sexual assault is unfortunately common on university campuses across the country. See Jackson, *supra* note 67.

207. Jake New, *Making Title IX Work*, INSIDE HIGHER ED (July 6, 2015), <https://www.insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective>.

plaints through the lens of equal access to education, the criminal justice system exists to punish wrong-doing.²⁰⁸ Proponents of removing sexual assault allegations from Title IX jurisdiction maintain that instead of moving these types of cases to unqualified universities, “the focus should be on developing procedures and evidentiary rules within the criminal justice system that provide a more open and non-biased review of the facts in cases of criminal sexual assault, generally.”²⁰⁹ Although it is beyond the scope of this Note to discuss in depth the many difficulties that plague sexual assault investigations and convictions (especially within the criminal justice system), it is helpful to consider how universities and law enforcement can work together to protect both victims and the accused.²¹⁰

Susan Riseling, the chief of police and associate vice chancellor at the University of Wisconsin at Madison, offered several suggestions as to how the two entities could create a symbiotic relationship, including having the “Title IX investigator . . . watch the police’s interview through a television feed, and prompt the detective to ask any additional questions.”²¹¹ In encouraging police involvement in Title IX adjudication, universities would permit oversight of their adjudication processes while simultaneously utilizing available resources to ensure a full and fair investigation.²¹² Because many due process complaints by accused students stem from a lack of procedural protections afforded by university administration, input from law enforcement would imbue Title IX determinations with specific experience from trained professionals who have familiarity in handling such serious allegations.²¹³

Additionally, police involvement would aid in criminally prosecuting cases, which “can only be done if the cases are being investigated fully by trained police officers, not just Title IX investigators, who have to meet a much lower standard of evidence than a prosecutor would.”²¹⁴ In this way,

208. See Rubinfeld, *supra* note 183.

209. Bernstein, *supra* note 8.

210. See New, *supra* note 207 (discussing suggestions to help facilitate the intersection of campus police investigations and college disciplinary investigations for sexual assault cases).

211. *Id.*

212. *Id.*

213. *Id.* As mentioned previously, universities have notoriously been criticized for failing to treat victims properly during sexual assault investigations. See Rubinfeld, *supra* note 183. Cooperation with law enforcement would also assist universities in communicating appropriately with victims of sexual violence, as police are trained in interviewing trauma survivors. See New, *supra* note 207.

214. New, *supra* note 207; see also Saul, *supra* note 12 (likening sexual assault claims to “murder, arson, and kidnapping” to argue that universities alone are unequipped to handle rape allegations on

intervention by law enforcement facilitates the pursuit of justice while protecting all parties involved: victims are able to see their attackers formally prosecuted, while accused students are shielded from false convictions by the higher standard of proof required by the criminal justice system.²¹⁵ Overall, a symbiotic relationship between universities and law enforcement—regardless of whether the allegations are ever formally filed in the criminal justice system—would benefit all parties by working to ensure a fair, adequate process and a full investigation of claims.²¹⁶

V. CONCLUSION

Even though the exact statistics are impossible to determine, sexual assault is undeniably a pervasive problem on university campuses nationwide that has increasingly garnered attention from both governmental entities and the media.²¹⁷ Because of this, universities' obligations extend far beyond those owed to the government under Title IX and other reporting regulations.²¹⁸ They must create sexual violence policies that protect victims while

campus).

215. See New, *supra* note 207; see also Rubinfeld, *supra* note 183. The campus process works to protect student safety in educational institutions and is generally much faster than the criminal investigation and prosecution. See Peter McPherson, Letter to the Editor, *Why Colleges Play a Role in Handling Sexual Assault Cases*, CHIC. TRIB. (Sept. 22, 2017, 3:36 PM), <https://www.chicagotribune.com/news/opinion/letters/ct-letters-college-sexual-assault-devos-20170922-story.html>. Although some argue university adjudication should be completely eliminated, “[c]ampus sexual assault processes and law enforcement proceedings are in no way mutually exclusive and are not in conflict with each other.” *Id.* Therefore, a more effective solution would allow both forums to investigate all allegations in order to ensure campus safety. *Id.*

216. See New, *supra* note 207; see also Howard, *supra* note 7 (noting that many victims, including those who report their experiences to university officials, do not want sexual assault charges formally filed for a variety of reasons, including the fact that less than four percent of rape cases reported to police result in referrals to prosecutors).

217. See *Campus Sexual Violence: Statistics*, *supra* note 1; see, e.g., Emanuella Grinberg & Evan Simko-Bednarski, *Columbia University Settles with Student Accused of Sexual Assault*, CNN, <https://www.cnn.com/2017/07/16/us/columbia-university-mattress-project-lawsuit/index.html> (last updated July 17, 2017, 9:16 AM). In a highly publicized incident covered by several media outlets, Columbia student Emma Sulkowicz accused Paul Nungesser, an international student from Germany, of sexual assault. *Id.* Sulkowicz carried her mattress on her back in protest after both the university and law enforcement declined to pursue charges against Nungesser. *Id.* However, despite never being formally indicted, Nungesser experienced continuous harassment from Sulkowicz and her supporters, resulting in him filing suit against Columbia for violating his right to an education free from gender-based discrimination. *Id.* Although the suit was repeatedly dismissed, Columbia ultimately settled the case with Nungesser. *Id.*

218. *The Clery Act*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/the-clery-act/> (last visited

simultaneously providing constitutional protections to accused students—a presumption of innocence, adequate access to evidence, and the right to present a full and meaningful defense.²¹⁹ They must carefully balance the interests of both parties to guarantee that their adjudication processes provide full and fair investigations.²²⁰ And, they must do so while facing vague definitions of the crimes, contradictory guidelines regarding proceedings,²²¹ and vehement media scrutiny.²²²

The responsibility falls to the government—specifically, the Department of Education—to create clear and equitable policies to handle the rampant sexual violence that occurs on university campuses every day, beginning by implementing bright line regulations such as requiring the “clear and convincing” evidence standard, the employment of independent adjudicators, and a uniform definition of consent across campuses.²²³ Additionally, in conjunction, both universities and students can work to dismantle the rape culture that encompasses university campuses.²²⁴ Societal attitudes towards rape must be

Oct. 3, 2019). Beyond just Title IX, there are several other federal regulations that universities must comply with regarding sexual assault policies and reporting. *Id.* The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act requires universities to publicly disclose crime statistics for certain categories of crimes, such as homicide, murder, sex offenses, and robbery. *Id.*

219. *See supra* Part IV.

220. *See supra* Part IV; *see also* Howard, *supra* note 7 (describing the “revamping” of universities’ sexual assault policies in a way that is more beneficial to both parties).

221. *See* Yoffe, *supra* note 11.

222. *See* Grinberg & Simko-Bednarski, *supra* note 217; *see also* Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/brock-turner-appeal.html> [<https://nyti.ms/2OqlbZH>]. In 2016, Stanford student Brock Turner was convicted of sexually assaulting an intoxicated student, a case that drew national attention to sexual violence on college campuses. *See* Hauser, *supra*. Turner received a notoriously lax sentence from the criminal justice system, but was also expelled from Stanford and banned from stepping foot on campus, which was described as “the harshest sanction that a university can impose on a student” by Stanford. *Id.*; Statement from Stanford University Regarding Brock Turner Case (June 6, 2016), <https://news.stanford.edu/2016/06/06/stanford-university-statement-regarding-brock-turner-case/> [hereinafter Stanford Statement]. Stanford received massive public backlash for its role in the investigation, but insisted that “Stanford University, its students, its police and its staff members did everything they could.” *See* Stanford Statement, *supra*.

223. *See* Green, *supra* note 27 (describing current proposals for sexual misconduct policies on campuses); *see also supra* Part IV.

224. *See* Andrea Durbach & Damian Powell, *Sexual Assault at Universities: The Same Degrading Attitudes Permeate Society*, GUARDIAN (Aug. 2, 2017, 2:00 PM), <https://www.theguardian.com/commentisfree/2017/aug/03/sexual-assault-at-universities-the-same-degrading-attitudes-permeate-society>; *see also* Charlene Senn, *Rape at Universities: One Program Is Proven to Reduce It*,

revamped, as students must develop a respect for bodily autonomy and a thorough understanding of what constitutes consent—or more importantly, lack thereof.²²⁵ Additionally, in order to create a safer educational atmosphere for all students, schools must work to dispel the stigma around reporting sexual violence and engender an environment that protects the rights to an education for all students.²²⁶ Most importantly, both the government and the universities cannot forget that these evolutions must occur under the protection of the Constitution; as the Supreme Court so eloquently declared in 1969, students do not “shed their constitutional rights . . . at the schoolhouse gate.”²²⁷

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CONVERSATION (Sept. 4, 2017, 7:02 PM), <http://theconversation.com/rape-at-universities-one-program-is-proven-to-reduce-it-82636> (advocating a comprehensive solution that includes educating bystanders, empowering women, and shifting social norms).

225. See Durbach & Powell, *supra* note 224; see also Senn, *supra* note 224 (emphasizing the importance of perpetrator responsibility rather than women-blaming).

226. See Durbach & Powell, *supra* note 224 (noting that reporting processes “must be clearly and prominently signposted” so that every student is aware of the services available).

227. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Though the Court in *Tinker* was focused on First Amendment rights, the fundamental idea behind the decision is applicable: individual constitutional rights are central to the American system and remain protected, even on university campuses. *Id.*

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