

**Title:** A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses

**Abstract:** Under Title IX, colleges and universities must resolve claims of rape and sexual assault between students. My article examines Title IX's administrative and civil enforcement mechanisms to determine what incentives the statute creates for educators dealing with these issues. Unfortunately, I conclude that innocent accused students are unduly prone to false convictions in campus sexual assault adjudications. The only way to fix the problem is to leave claims of sexual violence to the civil and criminal justice systems.

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## A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses

*[The federal government] has determined that the College addressed the complainant's allegation of sexual assault by assisting with the police investigation. The College was under no obligation to conduct an independent investigation of the alleged sexual assault, as it involved a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney.<sup>1</sup>*

### **Preface**

*Among the numerous articles written about Title IX's applicability to claims of sexual assault on campus, many frame the issue in terms of the struggle of (female) survivors of sexual assault to overcome an entrenched patriarchal campus culture that condones violence and is otherwise indifferent to women.<sup>2</sup> Empowering victims of sexual violence to seek justice is critically important, and the author fully supports gender equality in all aspects of life including higher education. The author nevertheless takes three different approaches to Title IX in this paper than is typical of these Title IX commentators, none of which should be confused with a lack of concern for the feminist ideals reflected in other publications. First, he uses gender-neutral pronouns to describe both alleged perpetrators of sexual violence and alleged survivors in recognition of the fact that both men and women can suffer and commit such acts. Second, he uses the label "complainant" instead of "victim" or "survivor" to recognize that student defendants are and should be presumed innocent until proven otherwise. Finally, and most fundamentally, this piece will shift the reader's focus to the rights of accused students in campus disciplinary processes for sexual misconduct because he believes the attainment of Title IX's noble goals cannot come at the expense of the civil rights of innocent people. Those who might be inclined to dismiss the author's viewpoint or the remedy he advocates as insensitive to the needs of rape survivors or somehow anti-feminist in its tone should keep an open mind as they read. Also, readers should consider what they would feel if they or a loved one were falsely or erroneously accused of sexual assault and subject to the current standard operating campus procedures outlined herein. If we cannot say with confidence that an accused student would get a fair trial were they charged with sexual assault, is it justifiable to allow colleges and universities to continue adjudicating such offenses?*

### **I: Introduction**

The author wishes to thank the following people for helping to shape his thoughts and objectives while writing this paper: Professor Jeannie Suk, Professor Martha Chamallas, Hans Bader, Ellen Berkman, Joseph Hall, Max Levine, Sochet Phoeun, and his parents, Randy and Joanne Henrick.

<sup>1</sup> United States Department of Education ("DOE") Office for Civil Rights ("OCR"), Letter of Resolution in Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005). As explained *infra*, the DOE issued a letter in April 2011 that both purports to disavow this position while simultaneously claiming that the letter is not a change in law or OCR's enforcement policy.

<sup>2</sup> See, e.g., Diane Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J. L. & GENDER 407, 421 (2008) (claiming that "schools will often privilege the rights of their profit-generating football players over the rights of their female students" in sexual violence cases involving student-athletes).

In April of 2011, the U.S. Department of Education’s Office for Civil Rights (“OCR”) issued a “Dear Colleague” letter (“the Letter”) to all institutions under its purview, which includes any college or university receiving federal funding, addressing sexual violence in educational programs and activities.<sup>3</sup> The Letter is OCR’s first publication focusing primarily on instances of student-against-student rape and sexual assault in school settings; among other innovations, it lays out specific procedures educators now must follow in investigating and resolving these claims.<sup>4</sup> While some have “applaud[ed]” the Letter<sup>5</sup> and others have expressed concern with its implications,<sup>6</sup> almost all commentators agree that it is one of the most significant developments in the current body of law governing claims of sexual violence on college campuses. Given the extraordinary impact that these policies have on the lives of thousands of students each year, this paper will examine the Letter and the forty years of administrative and judicial development preceding it to determine whether colleges and universities are the most effective adjudicators of sexual assault and rape allegations on campus. Unfortunately, institutions of higher learning are hindered by several powerful and problematic incentives to falsely convict accused students in these types of cases.<sup>7</sup> Removing claims of sexual violence from college campuses to civil and criminal judicial systems is the only viable way to correct this problem and ensure that sexual assault adjudication is equitable and impartial for all affected parties.<sup>8</sup>

By way of background, the Letter represents the latest interpretation of Title IX of the Educational Amendments of 1972. Title IX states that “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

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<sup>3</sup> “Dear Colleague” Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (April 4, 2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (hereinafter, “the Letter” or “April 4, 2011 Letter”).

<sup>4</sup> *See infra* Part II(C).

<sup>5</sup> National Center for Higher Education Risk Management, *NCHERM Reaction to the April 4<sup>th</sup>, 2011 OCR Dear Colleague Title IX Guidance on Campus Sexual Assault*, <http://www.ncher.org/documents/NCHERMReactiontotheDearColleagueLetter4.6.11.pdf> (hereinafter, “NCHERM”).

<sup>6</sup> Letter from Will Creeley, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education, to Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education Office for Civil Rights, May 5, 2011, *available at* <http://thefire.org/article/13142.html>.

<sup>7</sup> For details as to the incentives universities face to convict based on OCR’s administrative enforcement, including its ability to terminate an institution’s federal funding and its current obsession with complainant rights at the expense of fairness for accused students, *see infra* Parts II(A) and (C). For information as to the incentives universities face from the imbalance of power between alleged victims of sexual violence and alleged perpetrators vis-à-vis bringing civil damage claims against the institution, *see infra* Parts III(A) and (B).

<sup>8</sup> For a more detailed examination of why colleges are inherently incapable of resolving claims of sexual violence between students, *see infra* Part IV(A). For a response to some of the common arguments as to why colleges must handle these allegations anyway, *see infra* Part IV(B).

discrimination under any education program or activity receiving Federal financial assistance.”<sup>9</sup> As the wording suggests, Title IX was not originally designed to adjudicate claims of sexual violence on college campuses: nothing in its legislative history and first seven years of existence suggests an intent to reach claims of sexual misconduct in any setting. In 1979, however, Catharine Mackinnon published a groundbreaking book arguing that “sexual harassment” is a form of sex discrimination.<sup>10</sup> Over the next thirteen years, OCR issued an administrative guidance prohibiting school employees from sexually harassing students<sup>11</sup> and the Supreme Court expanded Title IX’s private right of action to allow suits for money damages in teacher-to-student harassment cases.<sup>12</sup> By 2000, both OCR and the Supreme Court had also expanded Title IX’s harassment prohibitions to include cases of student-to-student conduct in higher education settings.

Sexual harassment under Title IX is “unwelcome conduct of a sexual nature,” subject to caveats that the behavior must be serious enough to impact the survivor’s access to educational opportunities by creating a hostile environment. The definition encompasses a wide range of activities, including “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature” such as posting sexual materials in classrooms.<sup>13</sup> At its most extreme, “sexual harassment” also encompasses allegations of sexual violence between students: a felony-equivalent claim that a student suffered a rape, sexual assault or sexual battery at the hands of a classmate is certainly “unwelcome conduct of a sexual nature,” to understate the issue.

Under Title IX, schools are required to conduct a “prompt, thorough, and impartial” investigation into any allegation of rape or sexual assault reported on campus.<sup>14</sup> If the school finds that harassment occurred, administrators must stop the behavior, prevent its recurrence, and remedy its effects on the victim (including, as needed, by disciplining the harasser).<sup>15</sup>

Like any statutory right, Title IX is only as effective as the remedy it provides for a school’s noncompliance. Title IX has a dual enforcement scheme: someone who claims to have been a victim of sex discrimination, i.e., a “complainant,” can both sue his or her educational

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<sup>9</sup> 20 U.S.C. § 1681 (2006).

<sup>10</sup> CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). Although some scholars reject the idea that sexual harassment is *per se* discriminatory in nature, see Michael S. Greve, *Sexual Harassment: Telling the Other Victims’ Story*, 23 N. KY. L. REV. 523, 540 n.45 (1996), the law is now well-settled that it is.

<sup>11</sup> *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996), *cert denied*, 519 U.S. 861 (1996).

<sup>12</sup> *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992).

<sup>13</sup> U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2* (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (hereinafter, “2001 Guidance”).

<sup>14</sup> 2001 Guidance at 15.

<sup>15</sup> *Id.* at 12-13, 16.

institution directly in civil court and also file a complaint with OCR, a federal executive agency with the power to terminate the federal funding of any institution that violates the statute.

This paper begins in Part II by examining OCR's Title IX administrative enforcement. For this section, the author compiled significant original research. Using the Freedom of Information Act, he obtained more than 220 administrative enforcement decisions from thirteen OCR offices, including the main headquarters in Washington, D.C. and twelve branch offices across the country. Most of these decisions have never before been published or examined in academic literature, and they provide an inside look at how OCR operates and carries out its mandate to enforce Title IX on college campuses. This section also traces the history of Title IX by examining the agency's various Guidances and directives, reviewing every major OCR publication from the year of Title IX's enactment in 1972 to the latest OCR Letter of April 4, 2011.

As noted *infra*, OCR's primary concern is now decidedly the rights of complainants. Since 1997, the agency has devoted little if any time to ensuring that sexual assault hearings are "equitable"<sup>16</sup> and "impartial"<sup>17</sup> for both the defendant and the complainant, despite the fact that OCR's mission is exactly that. Over the years, OCR has issued a series of publications that escalate the rights of the complainant and mandate new procedures for resolving complaints in a way that does not sufficiently protect the due process rights of falsely accused students. Beginning with OCR's first sexual harassment guidance dealing with student-to-student harassment, which has remained in effect with limited modification since 2001, these procedures have limited complainant control of the grievance process and conflicted with accused student constitutional rights. The April 4, 2011 Letter added still more rights and protections for complainants, such as a mandatory "preponderance of the evidence" standard for all campus tribunals and new evidentiary and appeal rules. This Letter also included a new provision that complainants (but not accused students) be notified of their legal rights.

While OCR has issued these formal policy documents, Part II points out that actual enforcement is frequently inconsistent, with various offices resolving similar issues in different and often conflicting ways. Nevertheless, administrative enforcement decisions like the often-cited case of Sonoma State University<sup>18</sup> strongly suggest that anti-due-process ideological biases can be present in OCR enforcement officers, and individual cases can go further than OCR policies in deciding what Title IX requires. In some instances, and in total violation of basic principles of double jeopardy, OCR has also enticed schools to re-examine an acquitted student without notice to him or her until the second investigation begins.<sup>19</sup>

The net effect of the administrative enforcement scheme is that schools have an incentive to convict anyone who is charged with sexual assault or rape as a matter of risk aversion for the institution. As noted, OCR has the authority to revoke a college's federal funding if it finds the institution violated Title IX (although OCR has never exercised that power). For some schools, the sums at stake exceed half a billion dollars. Because OCR primarily cares about the rights of the complainant, as evidenced by its Guidances and enforcement opinion letters, convicting carries a much lower risk of administrative enforcement than does acquittal.

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<sup>16</sup> 34 C.F.R. § 106.8(b) (2011).

<sup>17</sup> 2001 Guidance at 15.

<sup>18</sup> OCR Complaint No. 09-93-2131 (Apr. 29, 1994) (hereinafter, "Sonoma").

<sup>19</sup> See *infra* Part II(D).

As Part III notes, legal rights for complainants and accused students in civil court further compound a university's incentive to convict in every case. Under Title IX, a school's deliberate indifference to a complainant's claim that he or she was raped or sexually assaulted is automatically an actionable violation for money damages. Deliberate indifference to an accused student's innocence, by contrast, is not actionable absent further proof of sex discrimination (which for all practical purposes is impossible to muster). Schools thus only face liability exposure to complainants under Title IX, meaning conviction does not carry any risk of significant penalty. The exposure is all the more compelling because of its potential magnitude: in recent years, Title IX suits have led to six-figure settlements in at least three cases.

Nor do accused students have any meaningful guarantees outside of Title IX's framework that a school would have to weigh as a counterbalance to the threat of litigation from a complainant. Theories by which an accused could challenge unfair discipline for sexual misconduct, such as a breach of contract or a violation of the Due Process Clause, rarely if ever succeed and are subject to minimal damage awards. As a result, schools providing the bare minimum processes without sufficient procedural safeguards to prevent false convictions have little to fear from students who are subject to biased or erroneous proceedings.

Quite simply, the process of resolving sexual misconduct allegations under Title IX is fundamentally unfair to the accused and unduly prone to false convictions. Part IV concludes that the only viable reform is to leave claims of rape and sexual assault to the professionalism and impartiality of civil and criminal courts. Courts, unlike universities, do not have direct financial incentives to convict or acquit and can thus judge cases properly. Nor do the actors in a court system such as jurors drawn from the community have career ambitions that are as readily tied to the verdict in sexual assault trials as are those of universities officials. Furthermore, judicial systems do not have inherent reputational interests that come into play during sexual assault adjudication, unlike their university counterparts. Finally, courts are less susceptible to bias and ideological prejudice than are campus disciplinarians because courts diffuse power and accountability across a number of independent actors and institutions while simultaneously imposing fair and impartial adjudication procedures before a case arises.

Although there are a number of criticisms that might militate in favor of attempting to reform university adjudication of sexual violence instead of abolishing it outright, none of them are sufficiently persuasive to allow the present system to continue. As Part IV explains, nothing about an institution's mandate to provide an educational environment that is free from sex discrimination requires it to actually adjudicate rape or sexual assault claims (and analogies to the contrary from Title VII are inapposite). Furthermore, concerns about the underreporting of sexual assault or speculations about the frequency of false or mistaken complaints cannot justify imposing a system of adjudication in which innocent people are prone to conviction for offenses they did not commit. Nor can claims about the uniqueness of university discipline or academic freedom justify the status quo. Finally, if the court system is still not up to the task of handling rape and sexual assault, reform efforts should focus on making it fair and accessible for everyone.

## **II: Administrative Enforcement of Title IX**

### **A. Background**

OCR's administrative enforcement begins upon receipt of a complaint alleging that a college or university has violated Title IX. OCR investigates and, to the extent the institution is in violation, attempts to secure voluntary compliance. If those efforts fail, OCR has the authority to

refer the institution to the Justice Department for criminal prosecution and/or to begin proceedings to terminate the institution's federal funding.

In practice, OCR's Title IX enforcement rarely if ever becomes adversarial. In fact, OCR has never once used its power to terminate funds.<sup>20</sup> Given the amount of federal money most universities receive, the mere threat of losing it is enough to secure "voluntary" compliance with OCR's requests.<sup>21</sup>

Importantly, OCR's jurisdiction does not extend to individual students. OCR can only investigate the university as a recipient of federal funding; it does not have the authority to directly punish or sanction an accused student in any way, leaving that up to the institution itself.<sup>22</sup>

Eight key documents from the past forty years reflect OCR's administrative Title IX policy:

- A 1981 memorandum that was OCR's first foray into sexual harassment law;
- Four versions (1988, 1995, 1997, and 2008) of an OCR pamphlet titled "Sexual Harassment: It's Not Academic";<sup>23</sup>
- 1997 and 2001 Guidances OCR issued via notice-and-comment rulemaking concerning student-to-student sexual harassment; and
- The Letter OCR issued on April 4, 2011 purporting to clarify existing requirements in the 2001 Guidance that pertain to claims of rape or sexual assault.

The above documents are written in a style that is at best dense, vague, and self-contradictory,<sup>24</sup> and all focus primarily on the rights of complainants. In fact, despite its legal duty to ensure that college sexual assault adjudications are "equitable"<sup>25</sup> and "impartial"<sup>26</sup> to all parties including the

<sup>20</sup> See Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 88 (D.D.C. 2003); Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUB. INTEGRITY, Feb. 25, 2010, [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1946](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1946).

<sup>21</sup> For example, Yale's federal funding totaled \$510.4 million in 2010 and the University of Illinois received roughly \$600 million (which accounted for almost a fifth of its entire operating revenue). YALE UNIV., FINANCIAL REPORT 2009-2010, <http://www.yale.edu/finance/controller/resources/docs/finrep09-10.pdf>; Def.'s Mot. To Stay J. Pending Appeal, *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, Case No. 10 C 0568 (N.D. Ill. Apr. 12, 2011), at ¶ 28, <http://www.uillinois.edu/our/news/2011/April12.Motiontostay.pdf>.

<sup>22</sup> See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

<sup>23</sup> OCR has required schools to conform their sexual harassment procedures to this pamphlet. *E.g.*, Vatterott College, OCR Complaint No. 07-10-2034 (Aug. 26, 2010).

<sup>24</sup> See, *e.g.*, 2001 Guidance at 9 (advising that a student's immediate reaction after experiencing alleged harassment is both relevant and irrelevant in determining whether a hostile environment exists, and also advising that the timeliness of a harassment complaint both does and does not go to the complainant's credibility). See also Grayson Sang Walker, *Note: The Evolution and Limits of the Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 103-04 (2010).

<sup>25</sup> 34 C.F.R. § 106.8(b) (2011).

accused, OCR has never defined a university's obligation to provide due process protections for student defendants except to say that doing so should not unduly restrict or delay a complainant's Title IX rights.<sup>27</sup> OCR's enforcement seems predicated on an unspoken and rather naive assumption that all complaints of harassment are brought in good faith; there is no OCR publication or federal regulation mandating any punishment for false accusations of rape or sexual assault (no matter how malicious or injurious to the reputation and academic standing of the accused).

### **B. OCR's Policy Guidance: 1972-April 3, 2011**

From Title IX's passage in 1972 until 1997, OCR never claimed authority over rape or sexual assault between students. OCR's 1981 memorandum defined "sexual harassment" as "verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient* [of federal funding], that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title [sic] IX."<sup>28</sup> Similarly, both the 1988 and 1995 versions of "Sexual Harassment: It's Not Academic" disclaimed any Title IX applicability to student-to-student allegations.<sup>29</sup>

The 1988 and 1995 versions also valued complainant control of the sexual harassment grievance process. Both emphasized that "an exemplary procedure would provide the [complainant] with a variety of sources of initial, confidential and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint *with its required subsequent investigation and resolution*," implying that not every complaint of sexual harassment had to end with a full-dress formal investigation.<sup>30</sup> OCR advised colleges to offer students several alternative courses of action beyond pursuing charges, including doing nothing, taking personal action such as sending a letter to the alleged harasser, or requesting informal third-party mediation (with no qualifications that an incident of "severe" harassment could not be mediated should the complainant want it to be).

Furthermore, the pamphlets stressed that those accused of sexual harassment have rights. They each pointed out that sexual harassment is an "especially sensitive nature of . . . sex discrimination," and emphasized that "[i]nvestigating sexual harassment complaints often requires

<sup>26</sup> 2001 Guidance at 15.

<sup>27</sup> See 2001 Guidance at 22; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12045 (finalized Mar. 13, 1997) (hereinafter "1997 Guidance"); April 4, 2011 Letter at 12.

<sup>28</sup> *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996), *cert denied*, 519 U.S. 861 (1996) (emphasis in original). See also *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 662 (1999) ("For the first 25 years after the passage of Title IX – until 1997 – [OCR's] regulations drew the liability line, at its most expansive, to encompass only those to whom the school delegated its official functions.").

<sup>29</sup> U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (hereinafter, "1988 Pamphlet"); U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 6-7 (1995) (hereinafter, "1995 Pamphlet").

<sup>30</sup> 1988 Pamphlet at 5; 1995 Pamphlet at 8-9 (emphasis added).

inquiries into interpersonal relations and may also involve professional ethics, behavior and judgment. Awareness of and sensitivity to the potentially negative effect on the lives and careers of both parties involved is of great importance in handling an investigation.”<sup>31</sup> In keeping with the goals of fairness and sensitivity, both pamphlets also asked of institutional grievance procedures, “Is every effort made to protect the confidentiality of the parties?”<sup>32</sup>

In 1997 however, Title IX policy changed for the worse with the issuance of OCR’s new Sexual Harassment Guidance and revised Pamphlet. To begin, the 1997 Guidance dispensed with complainant control of the grievance process, stating that “[i]n some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”<sup>33</sup> (Notably, because the Guidance does not define “sexual assault,” the mere label a complainant attaches to an encounter could preclude mediation).<sup>34</sup> The 1997 version of “Sexual Harassment: It’s Not Academic” similarly mandated that “if a school receives information that sexual harassment may have occurred, the school should move quickly to determine what happened” no matter what the complainant requests be done.<sup>35</sup>

Furthermore, although portions of the 1997 Guidance were supportive of student defendants,<sup>36</sup> other parts curtailed rights of the accused. For example, one section required a school to process a sexual assault allegation even if criminal charges are pending for the same incident<sup>37</sup> (although subsequent OCR decisions have inexplicably declined to enforce that

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<sup>31</sup> 1988 Pamphlet at 3-5 (emphasis added); 1995 Pamphlet at 6-9 (emphasis added).

<sup>32</sup> 1988 Pamphlet at 9; 1995 Pamphlet at 14-15.

<sup>33</sup> 1997 Guidance at 12045.

<sup>34</sup> “Sexual assault” has varying definitions in different jurisdictions. See AEQUITAS: THE PROSECUTOR’S RESOURCE ON VIOLENCE AGAINST WOMEN, STATUTORY COMPILATION: RAPE AND SEXUAL ASSAULT LAWS (2009), <http://www.nsvrc.org/publications/statutory-compilation-rape-and-sexual-assault-laws#attachments>.

<sup>35</sup> U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 10 (1997). Academic research suggesting that many sexual assault survivors do not report their experiences has undoubtedly contributed to these policies. See, e.g., Bonnie S. Fisher, Francis T. Cullen, and Michael G. Turner, *The Sexual Victimization of College Women*, at 15, Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, available at <http://www.nij.gov/pubs-sum/182369.htm>.

<sup>36</sup> One part advised that “[b]ecause of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser,” 1997 Guidance at 12037, while another stated that students at both public and private colleges have rights (albeit implying that those rights must not restrict or unnecessarily delay the Title IX rights of the complainant), *id.* at 12045.

<sup>37</sup> 1997 Guidance at 12045. In applying this rule, OCR has at least stated that “investigations into sexual assault allegations may be delayed for reasonable periods of time when criminal investigations are simultaneously underway and institutions do not want to interfere with those proceedings.” Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006).

policy).<sup>38</sup> The 1997 Guidance could thus force accused students to choose between a rock and a hard place:

Because college disciplinary boards generally do not afford a right against self-incrimination, the accused may be forced to testify or face expulsion. Statements made by the accused during the hearing, or to the investigating dean, may then be used against the student in the criminal case, even though he could not have been forced to testify in the criminal trial itself.<sup>39</sup>

In this way, the Guidance could potentially conflict with an accused student's constitutional right against self-incrimination.

OCR's most current Revised Sexual Harassment Guidance (2001) did not fix these problems.<sup>40</sup> In fact, despite specific requests to "expand and strengthen" due process rights, OCR merely opted for a new heading ("Due Process Rights of the Accused") while using language from the 1997 Guidance in a slightly rearranged form.<sup>41</sup> By 2008, "Sexual Harassment: It's Not Academic" did not mention the accused at all except to say, "it also may be appropriate to counsel the harasser to ensure that he or she understands that retaliation is prohibited."<sup>42</sup>

Defenders of the Guidances might argue that precluding the voluntary mediation of sexual assault complaints and requiring an investigation of all sexual harassment allegations irrespective of the complainant's wishes or pending criminal charges are good developments, even though they infringe on complainant autonomy and accused student rights. Arguably, they would say, these policies will lead to justice for survivors who are too traumatized or intimidated to come forward voluntarily, and they will also make sure that the victim can find timely vindication before the students have graduated or sacrificed their college careers waiting for the court process to conclude. As scholars have noted in the context of domestic violence, however, one-size-fits-all requirements and mandatory "no-drop" provisions are debatable in terms of their fairness and effectiveness.<sup>43</sup> Some complainants would also contest the idea that they need the government to

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<sup>38</sup> Buffalo State College, *supra*.

<sup>39</sup> Paul E. Rosenthal, *Note: Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1252 (1997).

<sup>40</sup> *See* 2001 Guidance at 21 (keeping the preclusion of voluntary mediation in sexual assault cases and the requirement that a school investigate even while criminal charges are pending).

<sup>41</sup> *See* 2001 Guidance at viii, 31. The 2001 version ends with an admonition to respect accused rights, rather than ending as the 1997 version did with a caveat that accused rights should not unduly delay the rights of the complainant, but the language is the same in both versions.

<sup>42</sup> U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 15 (2008). The 1997 version of "Sexual Harassment: It's Not Academic" had already dropped all language from the 1995 version about the need to be sensitive of the potentially negative effects of a sexual harassment investigation.

<sup>43</sup> *See* Erin L. Han, *Note: Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003).

inform them of their own best interests: in one recent case, for example, a complainant so rejected Title IX's demand for colleges to handle cases while criminal charges are pending that she went to court to try to enjoin her school's process until after court proceedings had concluded.<sup>44</sup>

### C. OCR Policy Guidance: April 4, 2011-Present

OCR's latest pronouncement on Title IX and sexual violence, the April 4, 2011 Dear Colleague letter ("the Letter"), perpetuates the problems of the 2001 Guidance and also exacerbates many of them. The Letter suffers from drafting defects and a failure to conform to the laws governing administrative rulemaking. As will be explained, it also effectuates a presumption that all accused students are guilty and it institutes four reforms that will increase convictions without regard to guilt or innocence: lowering the burden of proof in campus sexual assault trials to "preponderance of the evidence," establishing suspect evidentiary rules, requiring schools to inform only complainants of their legal rights, and giving the Title IX coordinator unbridled discretion to revise any sanction issued in a sexual assault proceeding. As applied, the Letter's requirement that those who handle sexual assault proceedings have "training" also poses grave concerns for accused student rights.

To begin, the Letter is sloppy and hastily drafted (perhaps to ensure it would be published in time for President Obama to announce his candidacy for reelection that same day).<sup>45</sup> Page 5 imposes two contradictory obligations on schools at once, stating that "[i]f the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation" (emphasis added). One has to wonder, how is a school supposed to investigate consistent with a complainant's request that no investigation happen?

While OCR's puzzling requirement might have been clarified via feedback from notice and comment rulemaking, OCR did not employ that procedure in promulgating the Letter (in contrast to its promulgation of both the 1997 and 2001 Guidances). At least one law professor at Cornell University has noted that OCR's refusal to use notice and comment rulemaking means the letter has no legal authority whatsoever.<sup>46</sup> Furthermore, even though OCR justified its actions by claiming that the Letter "does not add requirements to applicable law,"<sup>47</sup> at least three different

<sup>44</sup> See *Stefanowicz v. Bucknell Univ.*, No. 10-CV-2040, 2010 U.S. Dist. LEXIS 106333, 2010 WL 3938243 (M.D. Pa. Oct. 5, 2010).

<sup>45</sup> See Michael D. Shear, *Obama Begins Re-Election Facing New Political Challenges*, N.Y. TIMES, Apr. 4, 2011, <http://thecaucus.blogs.nytimes.com/2011/04/04/obama-launches-re-election-facing-new-political-challenges/?hp>.

<sup>46</sup> Michael Linhorst, *Rights Advocates Spar Over Policy on Sexual Assault*, CORNELL DAILY SUN, Apr. 4, 2012, <http://www.cornellsun.com/section/news/content/2012/04/04/rights-advocates-spar-over-policy-sexual-assault> (quoting a letter from Professor Cynthia Bowman stating that OCR's letter "is not an administrative regulation, has not been subjected to notice and comment, and thus does not have the status of law.").

<sup>47</sup> April 4, 2011 Letter at 1 n.1. As OCR knows, notice-and-comment rulemaking is required of agencies seeking to overrule past practices and establish new substantive rules. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); Ari Cohn, *Did the Office*

facts demonstrate that the Letter does impose new legal obligations. First, while the Supreme Court and OCR have previously held that schools have no obligation to investigate or respond to harassment that takes place off-campus and outside of an educational program or activity,<sup>48</sup> page 4 of the Letter now states “[i]f a student files a complaint with the school, *regardless of where the conduct occurred*, the school must process the complaint in accordance with its established procedures” and “[t]he school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates” (emphasis added). Second, even though OCR has stated that “there is no requirement under Title IX that a recipient provide a victim’s right of appeal,”<sup>49</sup> page 12 of the Letter admonishes “if a school provides for appeal of the findings or remedy, it must do so for both parties.” Finally, portions of the Letter contain requirements that OCR has never before defined, a fact that raises considerable questions as to how they could have predated the letter.<sup>50</sup>

Of course, the Letter’s most problematic aspect is its formalization of a presumption of guilt in campus adjudications. Part of the problem comes from what OCR does not say: just two sentences out of its 19 pages discuss due process protections for only those defendants fortunate enough to attend state universities,<sup>51</sup> implying that the rights of accused students do not even merit lengthy discussion (and further suggesting by negative implication that accused students at private

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*for Civil Rights’ April 4 ‘Dear Colleague’ Letter Violate the Law?*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Sept. 12, 2011, available at <http://thefire.org/article/13547.html>.

<sup>48</sup> *Davis*, 526 U.S. at 645 (“[B]ecause the harassment must occur ‘under’ ‘the operations of’ a funding recipient . . . the harassment must take place in a context subject to the school district’s control . . .”); University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2009); Oklahoma State University, OCR Complaint No. 06-03-2054 (June 10, 2004) (“A University does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.”). See also *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654 (8th Cir. 1997) (holding that a professor’s off-campus sexual harassment of a student in his private practice was not actionable under Title IX).

<sup>49</sup> University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006). *Accord*, Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“[A]ppeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University.”); Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996).

<sup>50</sup> For example, page 18 tells schools to “conduc[t], in conjunction with student leaders, a school or campus ‘climate check’ to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence” without defining what a “climate check” is.

<sup>51</sup> April 4, 2011 Letter at 12 (“Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”).

universities, which are still subject to Title IX, do not have any rights at all).<sup>52</sup> The Letter also states at 15-16 that “[w]hen taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain,” implying that alleged perpetrators should not remain and automatically suffer life-upending punishments like expulsion from their residences upon accusation because they are always guilty. The writing on the wall from this treatment of due process rights is unmistakable: it implies, “oddly and ominously, that the statutory rights of the accuser trump the constitutional due-process rights of the accused.”<sup>53</sup>

To effectuate its new presumption, the Letter institutes four procedural reforms of campus sexual assault trials that will lead to increased convictions irrespective of an accused student’s guilt or innocence. First, pages 10-11 mandate a new burden of proof of “preponderance of the evidence,” the lowest possible threshold. A broad consensus of those involved in university adjudication, including the Committee on Women in the Academic Profession of the American Association of University Professors, would argue that this burden is inappropriately low.<sup>54</sup> So would Congress, which has already rejected legislation that would lower the burden as OCR has done and appears poised to do so again.<sup>55</sup>

Second, the Letter establishes a quasi-code of procedure that raises serious constitutional concerns. Page 11 note 29 admonishes that “[a]ccess should not be given to privileged or confidential information [such as] communications between the complainant and a counselor,” without defining whose law determines what information is considered “privileged” or who is a

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<sup>52</sup> As explained *infra*, a student’s theoretical right to have a college follow its own procedures as a matter of contract law is almost never an adequate safeguard against wrongful discipline.

<sup>53</sup> Wendy Kaminer, *Sexual Harassment and the Loneliness of the Civil Libertarian Feminist*, ATL., Apr. 6, 2011, available at <http://www.theatlantic.com/national/archive/2011/04/sexual-harassment-and-the-loneliness-of-the-civil-libertarian-feminist/236887/>.

<sup>54</sup> See Letter from Ann E. Green, Chair of the Committee on Women in the Academic Profession of the American Association of University Professors, to Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education Office for Civil Rights, Aug. 18, 2011, available at <http://www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf>; James M. Picozzi, *Note: University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96 YALE L.J. 2132, 2159 n.17 (1987) (“Courts, universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of ‘clear and convincing’ evidence.”).

<sup>55</sup> The Campus SaVE Act, which would have required “preponderance of the evidence” in sexual assault hearings, was introduced and died in committee during the 111<sup>th</sup> Congress 2009-2010 “lame duck” legislative session (H.R. 6461). Although reintroduced in the 112<sup>th</sup> Congress, it has been stalled in committee since April 14, 2011. See S. 834, 112th Congress. Senator Patrick Leahy also dropped language from the 2011 reauthorization of the Violence Against Women Act that would have codified preponderance of the evidence in campus trials. *Threat to Student Due Process Rights Dropped from Draft of Violence Against Women Act*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Nov. 14, 2011, <http://thefire.org/article/13852.html>.

“counselor.”<sup>56</sup> Notably, the provision includes “information regarding the complainant’s sexual history” (albeit without defining what that phrase means). Because an accused student cannot introduce evidence to which s/he has not been given access, this provision presumably operates as a new *de facto* rape shield law for college disciplinary proceedings. While Federal Rule of Evidence 412 bars the introduction of a complainant’s sexual history in court, there are both legislative and constitutional exceptions.<sup>57</sup> The Letter, by contrast, does not mention exceptions of any kind. Will the Letter’s evidentiary policy apply to discipline at public universities in a manner that is consistent with accused student constitutional rights?

Third, the Letter creates a mismatch in all proceedings by requiring schools to inform only complainants of their legal rights. Page 16 orders schools to “ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental services, and their right to file a complaint with local law enforcement,” without specifying that accused students, too, are entitled to similar notice.<sup>58</sup> Such an imbalance of notice is hardly equitable.

Finally, complainants now have a right to have a school’s Title IX coordinator conduct a supreme review of all sanctions. In seeming contrast to the requirement at page 12 that appeals of remedies for sexual harassment be equal for both accused and complaining students, page 18 now gives the college Title IX coordinator jurisdiction over all discipline to determine if “the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee” (without specifying any criteria to gauge the Title IX coordinator’s exercise of discretion or stating that the accused is entitled to any similar kind of review).

It is also worth noting that although OCR’s vague requirement insisting upon “training” for those who adjudicate claims of sexual violence<sup>59</sup> sounds reasonable and consistent with past practices, it in fact poses a strong threat to accused student rights. From instructing their Title IX coordinators to revising their misconduct procedures, over 800 educational institutions have turned to the National Center for Higher Education Risk Management (NCHERM) for guidance.<sup>60</sup>

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<sup>56</sup> Federal and state law diverge on privileges as federal courts do not recognize a reporter’s privilege. *See In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). It could be argued that Title IX applies federal privilege law in defining this term in the April 4, 2011 Letter because Title IX is a federal statute, but it could just as easily be that the law of the state where the college is located controls.

<sup>57</sup> *See* F.R.E. 412; *Olden v. Kentucky*, 488 U.S. 227 (1988).

<sup>58</sup> Similarly, many schools have a “women’s center” designed to support complainants without any institution to provide support to the accused akin to a public defender’s office.

<sup>59</sup> *See* April 4, 2011 Letter at 12 (stating that “If an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner” without defining what constitutes either forensic evidence or a trained forensic examiner).

<sup>60</sup> NCHERM recently grossed \$425,000 from a seminar it ran to train colleges on the role of a Title IX coordinator. Sandy Hingston, *The New Rules of College Sex*, PHILA. MAGAZINE, Sept. 2011, available at [http://www.phillymag.com/articles/the\\_new\\_rules\\_of\\_college\\_sex/](http://www.phillymag.com/articles/the_new_rules_of_college_sex/). *See also* Sarah Lipka, *The Fearmonger*, CHRONICLE OF HIGHER EDUC., Nov. 20, 2011, <http://chronicle.com/article/The-Fearmonger/129833>. For a list of all organizations that have

NCHERM's founding partner, Brett Sokolow, a self-described sexual assault activist, has publically stated he looks forward to seeing more accused students expelled.<sup>61</sup> Universities, acting on NCHERM's advice, have changed their definitions of "sexual assault" to require a showing of affirmative consent for acquittal, which sounds perilously close to requiring an accused to prove his or her innocence as an affirmative defense.<sup>62</sup> NCHERM also urges schools to redefine sexual misconduct to criminalize voluntary sex resulting from so-called "unreasonable pressure," turning any consensual encounter into a potential violation based on opaquely worded guidelines.<sup>63</sup> The Letter does not condemn these practices.

Defenders of the Letter would likely argue that developments such as a complainant right of appeal or a lower burden of proof simply create an "equitable" process; although they may appear to be victim-centered, these commentators would argue, that is only because campus judicial processes have usually focused exclusively on accused student rights.<sup>64</sup> Critics of the author's views might also argue that to insist on higher burdens of proof is to return to the dark

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employed NCHERM, *see Our Clients*, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT., <http://ncher.org/clients.html>.

<sup>61</sup> Hingston, *supra*.

<sup>62</sup> *See* Kristin Jones, *An Uncommon Outcome at Holy Cross*, CTR. FOR PUB. INTEGRITY, Feb. 24, 2010, [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1947/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1947/) ("[Sokolow] recommends that schools frame sexual assault as an offense without consent, rather than an offense against the will of the victim. The difference, he says, shifts the responsibility from the victim having to prove refusal to consent, and requires the initiator of the sexual activity to demonstrate that consent was given.").

<sup>63</sup> BRETT A. SOKOLOW, NCHERM MODEL SEXUAL MISCONDUCT POLICY 9 (2010), *available at* <http://www.ncher.org/documents/MODELSEXUALMISCONDUCTPOLICY1-10.pdf> ("Amanda and Bill meet at a party. They spend the evening dancing and getting to know each other. Bill convinces Amanda to come up to his room. From 11:00pm until 3:00am, Bill uses every line he can think of to convince Amanda to have sex with him, but she adamantly refuses. He keeps at her, and begins to question her religious convictions, and accuses her of being "a prude." Finally, it seems to Bill that her resolve is weakening, and he convinces her to give him a "hand job" (hand to genital contact). Amanda would never had done it but for Bill's incessant advances . . . *Bill is responsible for violating the university Non-Consensual Sexual Contact policy. It is likely that a university hearing board would find that the degree and duration of the pressure Bill applied to Amanda are unreasonable. Bill coerced Amanda into performing unwanted sexual touching upon him. Where sexual activity is coerced, it is forced. Consent is not effective when forced. Sex without effective consent is sexual misconduct.*") (emphasis in original).

<sup>64</sup> *See* W. Scott Lewis, Sandra K. Schuster, and Brett A. Sokolow, *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes to Address Campus Sexual Violence*, NAT'L CTR. FOR HIGHER ED. RISK MGMT., 2011, at 4, *available at* <http://ncher.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENTIAL.pdf>. As explained *infra* Part III(B), of course, the suggestion that there are even minimally effective safeguards to protect accused students in disciplinary proceedings is preposterous.

days of presuming that all complainants are dishonest.<sup>65</sup> (It would be highly unlikely for defenders to adopt OCR's stated justifications for the lower burden, as even former OCR attorneys have noted that they make little sense).<sup>66</sup> The first response to these disagreements is that they should have been discussed before the Letter's issuance: OCR's Letter, which purports to add no new requirements to existing law but does so in reality, should have gone through notice-and-comment rulemaking to give everyone a chance to be heard and to give these important issues thorough consideration. A second response is that the Letter by its own admission does not seek equal rights for both the accused and the complainant, but rather superior rights for complainants: only complainants are entitled to have a school inform them of their rights, and even in the realm of appeals, which are theoretically supposed to be "equal" under the Letter, only complainants can ask the Title IX coordinator to review a sanction against the accused to see if another remedy should have been provided. An accused student has no right of review to the Title IX coordinator in any circumstance. Third, there is nothing about insisting on more proof that is tantamount to calling complainants liars. Instead, a higher burden reflects the necessity of certainty before convicting an accused student of the highly stigmatizing offense of sexual assault:

[M]indful that the function of legal process is to minimize the risk of erroneous decisions, the [Supreme] Court has noted that an intermediate standard of proof (*e.g.*, the "clear and convincing" standard) may be employed in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant, because the interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.<sup>67</sup>

A higher burden of proof is also especially appropriate in academic settings because college officials do not have the same degree of professional competence as do trained judges and police officers, and the evidence of what happened in a typical sexual assault case is usually murky and prone to an increased risk of erroneous conviction. And finally, even OCR has previously explained why complainants should not have appeal rights: it approved of a school's limiting appeal rights to the accused because "he/she is the one who stands to be tried twice for the same allegation."<sup>68</sup>

#### **D. OCR Administrative Enforcement Opinions**

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<sup>65</sup> See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 953 (2004) (arguing that colleges should employ a preponderance standard as a way of rejecting the legacy of the corroboration requirement from criminal law in campus disciplinary proceedings).

<sup>66</sup> Former OCR Civil Rights Attorney Hans Bader, *Education Department Changes Burden of Proof in Sexual Harassment Cases Under Title IX*, OPENMARKET.ORG, April 11, 2011, <http://www.openmarket.org/2011/04/11/education-department-changes-burden-of-proof-in-sexual-harassment-cases-under-title-ix/>.

<sup>67</sup> Creeley letter, *supra* (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

<sup>68</sup> Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996).

This section of the paper explores Title IX policy as reflected in OCR administrative enforcement opinions,<sup>69</sup> which although publicly available must be obtained through a lengthy and at times cumbersome process of filing a Freedom of Information Act (FOIA) request. While OCR's letters are not binding judicial precedents,<sup>70</sup> the office has cited them in support of policies announced in its Guidances<sup>71</sup> and, as detailed *supra*, some contradict recent OCR assertions about what Title IX requires of sexual assault investigations.

A note on the difficulty of researching and writing this section is in order. The material cited herein came from FOIA requests with the 12 regional OCR offices that currently process Title IX complaints and OCR's national headquarters in Washington, D.C. The offices are not consistent in how they code, classify and retrieve information, and some do not follow their own self-imposed systems.<sup>72</sup> Thus, many produced irrelevant and/or non-responsive material. Two FOIA requests seeking the same information from the same office can also produce different responsive documents,<sup>73</sup> and OCR's FOIA officers may issue contradictory advice and instructions regarding the regulations that govern the Department's responsibilities.<sup>74</sup> OCR also destroys its

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<sup>69</sup> Most letters reviewed for this section predate OCR's April 4, 2011 Letter.

<sup>70</sup> "Dear Colleague" Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, U.S. Department of Education (Jan. 25, 2006) *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> ("OCR resolution letters . . . are fact-specific statements of the investigative findings and dispositions in individual cases and are not formal statements of OCR policy.").

<sup>71</sup> *See* 2001 Guidance at 24-39; 1997 Guidance at 12046-51.

<sup>72</sup> While OCR Atlanta has codes that include "sexual harassment" and "sexual violence," the case of Erskine College, OCR Complaint No. 04-04-2016 (date not given) was miscoded as "different treatment/denial of benefits" even though it involved sexual assault. In addition, OCR San Francisco chose to redact a paragraph of its opinion in Sonoma State University on grounds of "unwarranted invasion of personal privacy" while a different OCR office provided the Sonoma opinion in full.

<sup>73</sup> The author filed a request to OCR Boston in April 2011 seeking "all OCR documents, including settlement agreements and letters of explanation/closure, pertaining to Title IX complaints of sexual harassment and sexual violence (rape, sexual assault, etc), filed by college/university students within your region," as limited to peer-to-peer harassment complaints. The materials produced in response omitted the student-to-student sexual assault case of Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006), which was produced in response to a request by another requester on file with the author from October 2010 seeking "decisions from the Office of Civil Rights addressing Title IX complaints regarding sexual harassment and sexual violence filed by College and University students." As one other commentator recently noted, "it appears that the DOE is engaging in a systemic FOIA violation." Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011).

<sup>74</sup> For example, in denying the author's initial request for a fee waiver, OCR New York informed him that he should appeal pursuant to 34 C.F.R. § 5.64(b). The author discovered, however, that

case files roughly fifteen years after monitoring the final Title IX settlement, meaning some cases are lost forever. While the author tried to review every Title IX enforcement letter ever issued concerning sexual violence at colleges and universities, the difficulties of obtaining the material mean that this section is likely incomplete.

OCR's enforcement is best described as inconsistent. OCR has variously held, for example, that giving an accused student access to the complainant's statement before requiring a response to the charges is, or is not, a Title IX violation;<sup>75</sup> that a complainant either does or does not have any obligation to prove that s/he has been sexually harassed;<sup>76</sup> and that a university does or does not violate Title IX by providing the accused with an opportunity to appeal an adverse decision without notifying the complainant that the appeal will take place.<sup>77</sup> OCR also is or is not concerned when one party to a sexual assault allegation receives more information about how the grievance process works than the other, depending on whether the disadvantaged student is the complainant or the accused.<sup>78</sup> It is especially puzzling that two of those four sets of contradictory opinions were issued in the same year as each other.

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the cited provision had been repealed over a year and a half earlier. *See* Availability of Information to the Public, 75 Fed. Reg. 33509 (June 14, 2010). OCR Philadelphia also purported to charge the author a \$3.00 processing fee, yet OCR's national headquarters mailed the author's check back uncashed with a note stating that the minimum fee that can be assessed is \$5.00.

<sup>75</sup> Compare Bethany Lutheran College, OCR Complaint No. 05-08-2043 (June 23, 2008) (giving the accused access to the complainant's statement before requiring him to respond to sexual assault allegations *does not* violate Title IX) with Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994, 15 pages) (giving the accused access to the complainant's allegations before requiring him to respond *does* violate Title IX).

<sup>76</sup> Compare Erskine College, OCR Complaint No. 04-04-2016 (date not given) (finding a Title IX violation when the school "required the complainant to prove that she had been sexually harassed rather than requiring the college to fully investigate the charge and issue findings and a report") with Central Washington University, OCR Complaint No. 10-94-2068 (Dec. 28, 1994) (stating that a school did *not* violate Title IX even though under its procedures, "the complainant is responsible for presenting the evidence to support his/her claim of discrimination").

<sup>77</sup> Compare Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007) ("[W]e further find that the University's policy of not providing notice that an appeal may take place is not equitable.") with Duke University, OCR Complaint No. 11-07-2024 (June 29, 2007) ("Because [the two] appeals were decided on procedural grounds, OCR is unable to conclude that there was a violation of Title IX" for failing to inform the complainant that they would occur).

<sup>78</sup> Compare Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007) ("We also find that the pre-hearing procedures are not equitable because the student charged is given a great deal more information than the victim, including a pre-hearing meeting where the student charged is given an opportunity to present his/her side of the story and discuss the hearing procedures, notified of his/her right to a representative or counsel, provided copies of the Code of Conduct, hearing procedures, and a summary of the evidence.") with Indiana University, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (finding no Title IX violation even though the college supplied the complainant with a special advocate who showed the complainant a video about how the

Surprisingly, many OCR enforcement letters also challenge popular assumptions about best practices for sexual misconduct resolution. For example, despite the widespread belief that victims have to be afforded amnesty for underage drinking in order to come forward, OCR has allowed schools to punish complainants for underage drinking and/or drug use that occurred during their alleged assaults.<sup>79</sup> OCR has also said that a nine-month delay between filing charges and resolution satisfies Title IX's requirement that grievance procedures be "prompt."<sup>80</sup> Nor do accused students have to be suspended or expelled from an institution when found guilty in order for their schools to be Title IX compliant.<sup>81</sup>

In general, accused students do not file Title IX grievances. There is only one case, Bates College, which concerns a Title IX administrative complaint alleging wrongful discipline for sexual misconduct.<sup>82</sup> The opinion noted that the complainant was allowed to revise her statement midway through the hearing, an incomplete handwritten note was the only transcript of the proceedings, the Dean of Students served as both investigator and counselor to the complainant, the complainant's therapist was added as a witness on the morning of the hearing, and those determining the accused's sentence considered allegations for which he had never been sanctioned or found guilty. OCR's investigation also discovered that the College was violating the terms of a

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disciplinary process works, answered the complainant's questions, and served as the complainant's advocate during the hearing while the complainant participated via conference call, while refusing to supply the accused with a similar advocate).

<sup>79</sup> Wenatchee Valley College at Omak, OCR Complaint No. 10-05-2010 (June 24, 2005) (drinking); Boston University, OCR Complaint No. 01-02-2037 (Apr. 25, 2003) (marijuana); Boston University, OCR Complaint No. 01-02-2006 (Apr. 25, 2003) (drinking).

<sup>80</sup> University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008); University of Vermont, OCR Complaint No. 01-95-2022 (Mar. 27, 1995).

<sup>81</sup> Massachusetts College of Art and Design, OCR Complaint No. 01-10-2046 (Oct. 8, 2010) (approving, in a case of sexual assault, a sentence of disciplinary probation, a no-contact order, educational counseling and an educational workshop, noting that "the sanctions that the College did impose appeared reasonably calculated to prevent further harassing conduct by the Student"); Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006) (approving of a written reprimand and a letter of apology in a sexual assault case); University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (holding in a case of rape that "there is no indication that the sanctions were not reasonably calculated to end the harassment and prevent it from recurring," where the sanctions were a two-quarter suspension (including one summer quarter), one year academic probation, requiring the accused to write a paper and a book report about sexual harassment, suspension from residence until the papers were completed, and prohibiting further contact with the complainant); Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996) (approving a sentence of one year of social probation). Skidmore even suggests that asking OCR to review a penalty is *per se* inappropriate. *Id.* ("In determining whether a violation of Title IX exists, OCR examines whether the institution in question has taken appropriate action in response to the alleged violation; it does not review the sufficiency of any findings made, *or any penalties imposed.*") (emphasis added).

<sup>82</sup> OCR Complaint No. 01-00-2085 (Oct. 19, 2001).

court order that required the university to amend its procedures to protect accused student rights. Yet unlike in letters analyzing complainant claims, which focus merely on whether hearings are “equitable” and find Title IX violations when they are not, Bates College applied a “different treatment” analysis. It required the accused, in essence, to prove that a female accused student would not have been treated as unfairly as he was. Unsurprisingly, the opinion concluded that there was insufficient evidence of a Title IX violation.<sup>83</sup>

As for how OCR resolutions of complainant grievances treat accused students, not all of them are actively hostile to accused student rights.<sup>84</sup> OCR letters have held that a school has no Title IX obligation to investigate harassment charges after a complainant or the accused graduates.<sup>85</sup> Nor does a school have to hold a formal hearing if after an investigation the school concludes that a sexual assault charge is unsubstantiated.<sup>86</sup> Prior OCR letters have also ruled that a school’s failure to engage “emergency discipline” features in sexual assault cases such as temporarily suspending accused students is not a Title IX violation.<sup>87</sup> And, at least one OCR opinion approved a process whereby an accused student brought disciplinary counterclaims against a complainant.<sup>88</sup>

Some letters, however, are blatantly against the accused in their tone and holdings. Sonoma State University,<sup>89</sup> a case that many commentators cite in discussing Title IX policy,<sup>90</sup> is

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<sup>83</sup> Courts apply the same double standard to Title IX’s private right of action. *See* Part III(A).

<sup>84</sup> One even said, “Title IX does not prohibit the use of due process,” Harvard University, OCR Complaint No. 01-02-2041 (Apr. 1, 2003). *Accord*, Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“OCR recognizes (and does not question) that the University chose to employ its Disciplinary Process in this case in order to afford [the accused] his due process rights before taking potential disciplinary action against him.”). While these statements about due process are tautological as applied to public schools, it is significant that OCR said them while investigating private universities.

<sup>85</sup> Texas Women’s University, OCR Complaint No. 06-95-2023 (Mar. 8, 1995) (“Prior to the initiation of an investigation of the complaint allegations, OCR determined that the allegations, whether true or not, are now moot due to the fact that the complainant has completed her studies at TWU. In consideration of the fact that, since the complainant’s graduation, no personal remedy remains and no class or systemic violations are alleged, we will pursue this matter no further.”); University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008) (approving of the fact that “[t]he University took no action against Student C because he had graduated and it had no jurisdiction over him.”). *See also* University of California, Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994) and attached Voluntary Resolution Plan (requiring a school to reopen an investigation of a student who voluntarily withdrew *should he be readmitted*, implying that voluntarily withdrawal precludes such investigations).

<sup>86</sup> Bates College, OCR Complaint No. 01-04-2051 (Feb. 3, 2005).

<sup>87</sup> University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008).

<sup>88</sup> Boston University, OCR Complaint No. 01-02-2006 (Apr. 25, 2003).

<sup>89</sup> Sonoma, *supra*.

particularly noteworthy for three reasons. First, despite the fact that OCR did not recognize student-to-student sexual harassment as a form of conduct that Title IX prohibits until 1997,<sup>91</sup> the OCR investigator who handled the case in 1994 unilaterally declared that allegations of student-to-student sexual violence were within OCR's jurisdiction.<sup>92</sup> Second, Sonoma employed a bizarre definition of the phrase "hostile environment," stating that sanctions which deter future harassment are sufficient to "cleanse" a hostile environment in a given case while also opining that harassment that occurs in private between two people can "poison" an entire educational atmosphere.<sup>93</sup> Third – and in contrast to both civil and criminal court systems, where a defendant must always be served with a complaint or an indictment before being required to respond – Sonoma declared that telling the accused what he or she is accused of, even doing so mere seconds before demanding the accused explain him/herself without the benefit of counsel, violates Title IX.<sup>94</sup> As Sonoma illustrates, specific OCR enforcement officers may have agendas beyond OCR's top-down guidance materials and there are no clear checks and balances on any one officer to prevent them from having their own way in a given case.

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<sup>90</sup> E.g., Hogan *supra*.

<sup>91</sup> See Part II(B) *supra*.

<sup>92</sup> Sonoma, *supra*. All of OCR San Francisco appears to have acted similarly, as numerous other opinions predating the 1997 Guidance applied a similar definition either explicitly or by investigating allegations of student-to-student harassment. See Humboldt State University, OCR Complaint No. 09-94-2105 (Oct. 3, 1994); University of California, Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994); Foothill College, OCR Complaint No. 09-94-2021 (June 10, 1994); Occidental College, OCR Complaint No. 09-93-2100 (May 2, 1994); California State Polytechnic University, Pomona, OCR Complaint No. 09-92-2127-I (Dec. 28, 1992). See also *Doe by & Through Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995) (holding that no duty to respond to peer-to-peer harassment existed at this time).

<sup>93</sup> Sonoma ("A hostile environment not only affects the direct victims of the sexual harassment, but poisons the educational environment for all students and staff. Appropriate sanctions must be designed to persuade potential harassers to refrain from unlawful conduct and thus, [sic] cleanse the hostile environment.").

<sup>94</sup> "*Id.* ("OCR found that specific factual assertions from [the complainant's statements] were read to the accused, Student 1, at the initial meeting concerning the complaints. In other words, prior to being questioned regarding the allegations, Student 1 was permitted to rebut specifics from the complainants' allegations. The complainants were never afforded a similar opportunity for rebuttal. SSU thereby precluded the possibility of conducting an impartial inquiry designed to determine the veracity of the allegations and credibility of witnesses . . . OCR found that from that point when Student 1 was permitted access to the complainants' specific factual allegations the investigation into the complaints was tainted because SSU could not complete a thorough and objective investigation without asking independent and objective questions. Student 1's answers were preordained by SSU's questions. Any possibility of making a determination of the credibility of the witnesses and veracity of their testimony was irreparably harmed at the outset.") (emphasis added). For a case in which OCR contradicted its own rule, see Bethany Lutheran College, OCR Complaint No. OCR Case No. 05-08-2043 (June 23, 2008).

Even worse, in some instances OCR has enticed schools to secretly agree to reinvestigate a student who was previously acquitted of wrongdoing. Recently, and in seeming disregard of the fact that “OCR does not serve as an appellate authority that reviews the merits of individual decisions by universities under their grievance procedures,”<sup>95</sup> OCR and colleges have started to sign contracts in which OCR drops Title IX charges against the institution on the condition that the school secretly agree to reinvestigate a sexual harassment allegation, with no notice to the accused until the second investigation begins.<sup>96</sup> The school, in essence, signs away the student’s rights to protect itself; because a Title IX administrative complaint is strictly between the government and the college, an accused student is usually not made a party to it or even given notice that it is happening.<sup>97</sup> In these cases, a conviction upon subsequent investigation is all but assured: no risk-averse institution would dare defy OCR’s unstated command to convict on the second try. OCR’s practice contradicts both intrinsic notions of fundamental fairness to the accused and even prior OCR opinions about the scope of both a college’s and the agency’s own authority,<sup>98</sup> but no one has yet been able to mount a legal challenge (perhaps because the agency’s covert method of operation has heretofore eluded detection).

In summary, OCR’s administrative enforcement scheme is increasingly skewed toward complainants at the expense of accused student rights. In this regard, individual enforcement letters may go even further than formal policy guidances.

### III: Private Rights of Action

<sup>95</sup> University of New England, OCR Complaint No. 01-04-2038 (Sept. 30, 2005).

<sup>96</sup> Alderson-Broaddus College, OCR Complaint No. 03-11-2015 (May 6, 2011); Rider University, OCR Complaint No. 02-09-2101 (Apr. 8, 2010); Southern Illinois University - Carbondale, OCR Complaint No. 05-09-2133 (Nov. 18, 2009); University of Maryland Baltimore, OCR Complaint No. 03-07-2121 (July 16, 2008); Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007); Illinois College, OCR Complaint No. 05-06-2154 (Dec. 18, 2006).

<sup>97</sup> In Southern Illinois University – Carbondale, for example, OCR’s letter specifically states that “OCR conducted interviews with the Complainant and eight university employees” but not the accused despite the fact that OCR’s disposition of the case required that the accused be reinvestigated. OCR Complaint No. 05-09-2133 (Nov. 18, 2009).

<sup>98</sup> In University of California, Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994), OCR sought increased sanctions against two students who were found to have committed rape. However, the college and the students had signed settlement contracts. OCR concluded that the college could not breach its contract with its students, stating “[a]fter extensive discussions, OCR and UCSC *did not find sound legal authority which would allow UCSC to breach the agreements, which were contracts between UCSC and the students.* While OCR finds deplorable the terms and results of the agreements reached between UCSC and Students A and D, no further action is available to OCR.” (emphasis added). Because a student and a college have a contractual relationship as explained *infra*, OCR’s practice violates Santa Cruz’s principle that a school cannot breach an agreement with its students: the outcome of a disciplinary process, when the school’s procedures are followed, must necessarily become part of that same contractual relationship such that a school cannot retry an accused student for the same offense.

The administrative enforcement scheme outlined in Part II would be more than enough on its own to put all accused students at risk of conviction regardless of guilt or innocence. Campus sexual assault trials are all the more stacked against the defendant, however, because complainants have vastly superior private rights of action in court against their educational institutions.

### **A. Different Rights Under Title IX for Complainants and Accused Students**

Title IX, which prohibits colleges from engaging in sex discrimination, is enforceable through a private right of action in federal court.<sup>99</sup> In 1992, the Supreme Court interpreted the statute as allowing suits for money damages in response to a school employee's sexual harassment of a student.<sup>100</sup> Questions then arose about student-to-student harassment. Could Title IX make a school liable for failing to respond to sexual violence between its students, as Title VII makes employers liable for failing to prevent or remedy hostile environment sexual harassment between coworkers?

Until 1999, the answer to that question in one federal circuit was no. In *Rowinsky v. Bryan Independent School District*,<sup>101</sup> the Fifth Circuit held that complainants do not have any such private right of action because "[t]he mere existence of sexual harassment does not necessarily constitute sexual discrimination" by the institution. Instead, *Rowinsky* held that "a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX [sic] if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys."<sup>102</sup> *Rowinsky's* standard forces complainants to analyze every disciplinary case a school has ever adjudicated in order to prove that the result in theirs was symptomatic of a broader pattern of gender bias. Because a school that is equally indifferent to the rights of male and female complainants cannot be said to be violating Title IX under *Rowinsky's* reasoning, the case provides no meaningful theory of relief for complainants in the face of university indifference to sexual assault.

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<sup>99</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979). It is not clear that the creation of a judicial right of action would be the result if *Cannon* were retried today, however. See generally JACK M. BEERMANN, EMANUEL LAW OUTLINES: ADMINISTRATIVE LAW 183, 189 (2010) (noting that the Supreme Court has since embraced Justice Powell's arguments in the *Cannon* dissent that "judicial implication of a private right of action violate[s] separation of powers because it place[s] the federal courts in a legislative role."). It is also important to remember that Title IX's private right of action only authorizes suits against institutional recipients of federal funds, not individual students. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

<sup>100</sup> *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992).

<sup>101</sup> 80 F.3d 1006, 1016 (5th Cir. 1996), *cert denied*, 519 U.S. 861 (1996).

<sup>102</sup> *Id.* at 1016. *Rowinsky* was one of several conflicting appellate interpretations of Title IX's private right of action that existed before *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). See *Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997); *Doe v. Univ. of Ill.*, 138 F.3d 653 (7th Cir. 1998); *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 132 F.3d 949, 960-61 (4th Cir. 1997) *vacated and District Court decision aff'd en banc*, 169 F.3d 820 (4th Cir. 1999); *Oona, R.S. v. McCaffrey*, 143 F.3d 473 (9th Cir. 1998).

In 1999, however, the Supreme Court issued its opinion in *Davis v. Monroe County Board of Education*.<sup>103</sup> *Davis* established that complainants have a private right of action for money damages under Title IX when a school “acts with deliberate indifference to known acts of harassment in its programs or activities.”<sup>104</sup> The Court also specified that student-to-student sexual harassment is actionable under Title IX “only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”<sup>105</sup> While *Davis* dealt with harassment of elementary school students, the dissent noted that “the majority’s holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their individual students.”<sup>106</sup>

One conclusion of law that all nine justices in *Davis* agreed upon was that a single incident of alleged student-to-student sexual harassment, including rape or sexual assault, generally cannot support a Title IX claim for money damages.<sup>107</sup> While several courts have been faithful to *Davis* in holding that a single allegation of sexual assault on a college campus is not actionable,<sup>108</sup> many others have disregarded the Supreme Court’s caveat in cases of university students and sexual violence.<sup>109</sup> In so holding, the latter group has essentially turned Title IX into the law held

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<sup>103</sup> 526 U.S. 629 (1999).

<sup>104</sup> *Id.* at 633.

<sup>105</sup> *Id.* at 652-53.

<sup>106</sup> *Id.* at 667 (Kennedy, J., dissenting).

<sup>107</sup> *See id.* at 652-53 (“[T]he [Title IX] provision that the discrimination occur ‘under any education program or activity’ suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. *Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level* in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”) (emphasis added); *id.* at 677 (Kennedy, J., dissenting) (“The majority’s reference to a ‘systemic effect’ does nothing to clarify the content of its standard. *The majority appears to intend that requirement to do no more than exclude the possibility that a single act of harassment perpetrated by one student on one other student can form the basis for an actionable claim. That is a small concession indeed.*”) (emphasis added). In revising its 1997 Guidance, OCR refused to comply with this aspect of *Davis*’s holding even while claiming that the 2001 Guidance is consistent with *Davis*. *See* 2001 Guidance at v-vi, 6.

<sup>108</sup> *See* *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007); *Allen v. Univ. of Vt.*, 973 A.2d 1183, 1189 (Vt. 2009) (interpreting the Vermont state equivalent of Title IX, which is identical in wording to the *Davis* standard).

<sup>109</sup> *See* *Jennings v. Univ. of N.C.*, 444 F.3d 255, 274 n.12; *Albiez v. Kaminski*, No. 09-CV-1127, 2010 WL 2465502, at \*6 (E.D. Wisc. June 14, 2010); *Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at \*3 (D. Conn. Mar. 26, 2003); *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. App. 2008). A similar split exists in cases involving students under the age of 18, with decidedly more authority on the side that one incident is sufficiently severe. *Compare* April 4,

unconstitutional by *United States v. Morrison*.<sup>110</sup> *Morrison* struck down the portions of the Violence Against Women Act that provided a direct civil remedy for complainants to sue accused perpetrators in federal court for crimes motivated by gender. Because giving complainants a direct federal remedy against accused students for sexual assault is unconstitutional, Title IX instead now provides an indirect remedy by giving complainants recourse against their institutions (and by extension, giving complainants a method of incentivizing their schools to punish those accused of sexual violence as a means of preventing costly law suits).

In recent years, Title IX claims have led to high-profile monetary settlements for complainants. To give just three examples, *Simpson v. University of Colorado* settled for \$2.85 million, *J.K. v. Arizona Board of Regents* settled for \$850,000, and *Williams v. University of Georgia* settled for an undisclosed six-figure sum.<sup>111</sup> Although one commentator has expressed caution that these cases may be limited to the extremity of their facts,<sup>112</sup> they stand for the general proposition that the failure to conform to Title IX can lead to financially-disastrous consequences for an educational institution. That knowledge hangs like a Sword of Damocles over risk-averse administrators as they adjudicate campus sexual assault allegations.

It might sound intuitive that any aspect of a sexual assault proceeding implicates concerns of gender discrimination and that sexual violence is so intertwined with the prospect of discrimination based on sex that *Davis*'s holding should extend to accused students as well. It could be argued that a school's reacting to an accused student's innocence with deliberate indifference, much like a school's reacting with indifference to a complainant's suffering, should implicate Title IX's concerns given the sexualized context. Were Title IX so interpreted, both complainants and accused students would have equivalent rights under the statute. Each would have a claim against their school if seriously mistreated, and the law would recognize that both wrongful acquittals and wrongful convictions are *per se* indicative of sex discrimination. Universities, in turn, would have equivalent liability concerns from both the accused and the complainant, and would thus be motivated to treat them equally.

Sadly, the law does not work that way. While a school's deliberate indifference to a sexual harassment grievance is now automatically sex discrimination, and thus actionable under Title IX, a school's deliberate indifference to an accused student's innocence is not. As a paradoxical consequence, accused student "rights" under Title IX resemble *Rowinsky*'s impossible-to-meet threshold: as first established in *Yusuf v. Vassar College*,<sup>113</sup> an accused student bringing a Title IX claim must allege two elements to survive a motion to dismiss: 1) his or her discipline was erroneous, and 2) "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding."<sup>114</sup> Several cases have granted motions to dismiss in accused-

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2011 Letter at 3 n.10 (one incident sufficient) with *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003) (one incident insufficient).

<sup>110</sup> 529 U.S. 598 (2000).

<sup>111</sup> Walker, *supra*, at 124 n.185, 126, and 101 respectively.

<sup>112</sup> *See id.* at 128-30.

<sup>113</sup> 35 F.3d 709 (2d Cir. 1994).

<sup>114</sup> *Id.* at 715. Vassar College's Assistant Dean of Student Life once declared of the falsely accused, "They have a lot of pain, but it is not a pain that I would necessarily have spared them. I

student Title IX suits because “[the plaintiff]’s allegations at best reflect a bias against people accused of sexual harassment and in favor of victims and indicate nothing about gender discrimination.”<sup>115</sup> Even if the student’s case can proceed in court long enough to obtain discovery access to old university case files, a school that treats male and female accused students equally poorly will get off scot free. The only case since *Yusuf* in which a court has not dismissed an accused’s Title IX claim out of hand, *Vaughan v. Vermont Law School*, remains ongoing. While *Vaughan*’s most recent ruling suggests that accused students can bring Title IX claims when they are barred from attending the same classes as their complainants,<sup>116</sup> it is unclear what the court will ultimately hold.

In summary, Title IX’s courtroom playing field is imbalanced: accused students do not have a meaningful private right of action, while complainants have secured at least three six-figure settlements in the last five years.

### **B. Private Rights of Action for the Accused Outside of Title IX**

It has been argued that accused students have guarantees outside of Title IX that ensure sexual assault hearings are fair.<sup>117</sup> Unlike complainants, however, accused students do not have

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think it ideally initiates a process of self-exploration. ‘How do I see women?’ ‘If I didn’t violate her, could I have?’ ‘Do I have the potential to do to her what they say I did?’ Those are good questions.” Nancy Gibbs, *When Is It Rape?*, TIME MAG. (June 24, 2001), <http://www.time.com/time/magazine/article/0,9171,157165,00.html#ixzz1QyYlxYPD>.

<sup>115</sup> *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996). See also *Mallory v. Ohio Univ.*, 76 Fed. App’x. 634, 640 (6th Cir. 2003); Order Under Seal at 6-8, *Doe v. Univ. of Mont.*, Case 9:12-cv-00077-DLC (D. Mont. May 10, 2012), available at [http://missoulia.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf\\_683eaa12-c0c6-11e1-8193-001a4bcf887a.html](http://missoulia.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf_683eaa12-c0c6-11e1-8193-001a4bcf887a.html) (page 190-192 of 281); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009); *Torrespico v. Columbia Coll.*, No. 97 C 8881, 1998 U.S. Dist. LEXIS 15714, at \*54 (N.D. Ill. Sept. 29, 1998). Although one sexual harassment case involving a professor held that Title IX’s implementing regulations require procedural fairness to the accused, another case reached a contrary holding and the issue has not received significant citation thereafter. Compare *Starishevsky v. Hofstra Univ.*, 612 N.Y.S.2d 794, 797 (N.Y. Sup. Ct. 1994) with *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193-94 (D. Minn. 1997).

<sup>116</sup> See Case No. 2:10-cv-276, 2011 U.S. Dist. LEXIS 86429, at \*10-17 (D. Vt. Aug. 4, 2011).

<sup>117</sup> See Holly Hogan, *The Real Choice in a Perceived “Catch-22”: Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277 (2009). Hogan’s article does not support its own thesis. While note 2 claims that her analysis applies to private colleges “as a practical matter” “because private higher education institutions often model their disciplinary proceedings on due process requirements,” she freely concedes that “private colleges generally are not state actors for purposes of due process” and thus have no obligation to do so (whereas all but two colleges nationwide must comply with Title IX). She also alleges that Title IX, but not due process, requires impartiality in investigating a sexual assault grievance, rendering her contention that the two doctrines provide equivalent guarantees of fairness patently untrue. See *id.* at 286-88.

rights that could serve as a counterweight to Title IX's incentives. This section explores the three most common theories upon which an accused student could sue his or her college for erroneous discipline, explaining why none of them adequately protect the innocent.<sup>118</sup>

First, public universities must respect the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution in disciplining students. The Clause, however, only confers two rights: the right to "some kind of notice" of the charges and the right to be "afforded some kind of hearing," as the Supreme Court said in *Goss v. Lopez*.<sup>119</sup> Judges usually uphold policies "consistent with the bare-minimum requirements of due process," sometimes while even labeling them "less-than-desirable for an institution of higher learning."<sup>120</sup> For universities, "the direction almost entirely is, 'How can we whittle down our due process procedures? What is the bare minimum that we have to do?'"<sup>121</sup> In essence, "[t]he procedural game too many universities in this country play is to give students enough process to fulfill the vague dictates of *Goss*, but not enough for the student to have a fair opportunity to defend himself -- not enough to keep the university, and its officials, from having their way with him."<sup>122</sup>

Second, students at private colleges have a judicially created right to "fundamentally fair" discipline.<sup>123</sup> However, during his research the author was unable to find a single case of an accused student successfully pursuing a "fundamental fairness" claim. Judges have even upheld a student's sentence while calling the procedures that led to it "fundamentally unfair."<sup>124</sup>

Finally, students at both public and private universities usually have some kind of implied state law contractual right to receive any procedural protections that a college voluntarily promises to provide in its student manual.<sup>125</sup> One of the clearest problems with the contract theory is that if an institution follows its own rules, the accused student has no recourse no matter how unjustified

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<sup>118</sup> As explained *infra*, some states such as New York and Arizona provide other protections. They too do not carry severe enough consequences for violation of an accused student's rights to be on par with the violation of a complainant's rights.

<sup>119</sup> 419 U.S. 565 (1975).

<sup>120</sup> See *Flaim v. Med. Coll. Of Ohio*, 418 F.3d 629, 632 (6th Cir. 2005).

<sup>121</sup> Sarah Lipka, *Discipline Goes on Trial at Colleges*, CHRONICLE OF HIGHER EDUC., Mar. 27, 2009, available at <http://chronicle.com/article/Discipline-Goes-on-Trial-at/30030>.

<sup>122</sup> Picozzi, *supra*, at 2149-50.

<sup>123</sup> *E.g.*, *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575 (Pa. Super. Ct. 1990). A few states also apply higher standards to private colleges. See, *e.g.*, *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283, 286 (N.Y. Sup. Ct. 2004) (granting review of university discipline under New York's Article 78); CAL. EDUC. CODE § 94367 (West 2009) (extending First Amendment protection to students at private universities).

<sup>124</sup> *Wilson v. Allegheny Coll.*, A.D. No. 2003-978, 2005 Pa. Dist. & Cnty. Dec. LEXIS 485, at \*25 (Crawford Cnty. Ct. of Common Pleas Dec. 12, 2005).

<sup>125</sup> See, *e.g.*, *Harwood v. Johns Hopkins Univ.*, 747 A.2d 205, 209 (Md. Ct. Spec. App. 2000); *Marquez v. Univ. of Wash.*, 648 P.2d 94, 96 (Wash. Ct. App. 1982).

his or her sentence. Another problem is that artful drafting can prevent the manual from providing any substantive protection: courts in some jurisdictions have incredibly given effect to clauses stating “this is not a contract” which vitiate any rights the manual might have provided.<sup>126</sup> Even if a university’s procedures do create a contractual entitlement, courts typically construe the university’s promises not against the college but against the student in determining whether the university complied.<sup>127</sup>

Accused student suits under the Due Process Clause, fundamental fairness, contractual theories, or even simple common law negligence usually end in dismissal. To the extent that a claim succeeds, the remedy typically consists of a court ordering the university to rehear the charges with any deviations from the university’s own policies remedied.<sup>128</sup> Damages, if awarded, are minimal: in September 2011, for example, a student walked away with just \$26,500 after a jury held that Sewanee: the University of the South had been negligent in unjustly convicting him of rape.<sup>129</sup> His case may be the only instance of a court awarding damages to a wrongfully convicted student in a case of alleged sexual violence.<sup>130</sup>

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<sup>126</sup> See *Millien v. Colby Coll.*, 874 A.2d 397, 400-01, 406 (Me. 2005). See also Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements*, 9 U. N.H. L. REV. 443, 468 (2011). But see *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1307 (N.Y. 1980) (“As Mr. Justice Felix Frankfurter wrote almost 40 years ago in *McNabb v United States* (318 U.S. 332, 347), ‘The history of liberty has largely been the history of observance of procedural safeguards.’ If that be true in the dealings of the State with citizens enmeshed with its criminal justice system it is no less true in the dealings of a college with the members of its student body. To suggest, as does the dissent, that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words. We do not countenance that in other relationships nor should we between student and college.”) (emphasis added).

<sup>127</sup> See *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 382 (Mass. 2000) (Ireland, J., dissenting) (chastising the majority for doing so).

<sup>128</sup> See Anderson, *supra*, at 1013-14 (“There are about thirty-five written decisions in state and federal courts involving students who have sued their colleges or universities as a result of being disciplined for sexual assault. Ordinarily, disciplined students are only successful when colleges or universities are found to have deviated from the procedures outlined in their own disciplinary policies. When a student wins such a lawsuit, a court then orders that the college or university grant the student a new disciplinary hearing untainted by the procedural anomaly.”).

<sup>129</sup> Collin Eaton, *Jury Verdict in Sex-Assault Case at Sewanee Sends Warning to Private Colleges*, CHRONICLE OF HIGHER EDUC., Sept. 2, 2011, <http://chronicle.com/article/Jury-Verdict-in-Sex-Assault/128884/>. The jury awarded \$50,000 but reduced the sum because it deemed the student partially responsible for the university’s negligence. It bears mentioning here that although players on the Duke University lacrosse team obtained substantial settlements from the college as a result of the rush to judgment they suffered, theirs is not a case of erroneous discipline because the school never actually punished them beyond canceling their lacrosse season and shamefully failing to speak out against the media and campus firestorms they endured. See STUART TAYLOR JR. AND

To summarize: as one commentator aptly noted several years before Title IX's far-reaching implications were fully understood, "[i]f colleges and universities scrupulously follow their own procedures, they have little to worry about in terms of suits from disciplined students. They should perhaps be more concerned with federal civil suits when they receive and ignore complaints from women who were sexually assaulted."<sup>131</sup>

#### IV: Proposed Reform

There have been a variety of approaches to dealing with student misconduct in higher education settings. From the *in loco parentis* era of the early 20<sup>th</sup> century through the student rights revolution of the 1960s and 1970s to Title IX's influence today, courts and the federal government have sought to find a way to balance institutional autonomy with protection for the rights of those accused of wrongdoing. As the previous sections have illustrated, however, Title IX's current framework creates disproportionate incentives to punish innocent students in cases of sexual violence. It is time to throw in the towel on university adjudication of those claims. As the United Kingdom recognized more than fifteen years ago,<sup>132</sup> as other commentators have noted,<sup>133</sup>

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K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007).

<sup>130</sup> As of 2010, one author noted that "Significant research on this point has discovered no cases where a court has overturned a school's decision to sanction a student for peer sexual violence and awarded the student monetary compensation." Nancy Chi Cantalupo. *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, NASPA JOURNAL ABOUT WOMEN IN HIGHER EDUCATION Vol. 3 no. 1 at 69 (2010), available at <http://journals.naspa.org/njawhe/vol3/iss1/4/>.

<sup>131</sup> Anderson, *supra*, at 1014. See also Cantalupo, *supra*, at 71 (noting that institutions "are in a much less favorable position vis-à-vis survivors suing for mishandling of their campus peer sexual violence cases" than vis-à-vis "students accused of peer sexual violence who have been disciplined and feel they have been mistreated by the institution."); Wendy Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007, 1010 (2006) ("The simple truth is, there is no right of redress for the accused student because schools are free to punish the student as they see fit without governmental regulations or interference."). Ms. Murphy is most notoriously known for her anti-due-process quotes as a commentator during the Duke lacrosse false rape case of 2006-2007, such as "Stop with the presumption of innocence. It doesn't apply to Duke." K.C. Johnson, *The Wendy Murphy File*, DURHAM-IN-WONDERLAND (Dec. 31, 2006, 12:01 A.M.), <http://durhamwonderland.blogspot.com/2006/12/wendy-murphy-file.html>.

<sup>132</sup> Graham Zellick, *Letter to the Editor – Why Campus Justice is No Substitute for Criminal Prosecution*, CHRONICLE OF HIGHER EDUC., Feb. 14, 1997, <http://chronicle.com/article/Why-Campus-Justice-Is-No/77157/> (noting that the U.K. Committee of Vice-Chancellors and Principals concluded that "it was neither safe nor prudent for universities to abrogate to themselves a role which was properly the domain of the criminal courts" in light of "principles of due process and natural justice for people who are also members of our academic communities, and a proper recognition of the limits of the powers which we have available to us.").

and as even OCR opinion letters have stated,<sup>134</sup> society should leave cases of rape and sexual assault to the civil and criminal justice systems.

Given the weakness of our current system, this proposal makes perfect sense. Consider that legislation in Tennessee recognizing a university's limited institutional competence to handle criminal matters has already been enacted. Under "Robbie's Law," a university must call in local police whenever a homicide or rape has been reported.<sup>135</sup> It is only a short step to go from Robbie's Law, which still allows campus police to take the lead on rape investigations, to a fairer, more objective policy in which universities must simply refrain from conducting a judicial process that should be handled by the civil and criminal courts. Under the new proposal, students accused of rape or sexual assault would be investigated by local police and/or be subject to civil suit by complainants directly. The university would be relieved of its Title IX obligation and under no threat of losing federal funding by failing to conduct its own trial.

Critics might object and suggest that college disciplinary systems can be reformed to protect the innocent. For example, states could follow the lead of jurisdictions like New York (which gives students a judicial right to challenge disciplinary convictions at both public and private universities)<sup>136</sup> or Arizona (which by statute provides for a right of appeal from hearings at public colleges and provides for attorney's fees if the student is successful).<sup>137</sup> While expanding appeal rights or due process protections would certainly help improve the status quo, fundamental reform of the campus sexual assault adjudication system is impossible in light of the irreparable conflicts of interest inherent in university disciplinary adjudication outlined below. The only way to make sexual assault trials truly equitable for both parties is to take them out of university hands.

#### **A. Why Universities Should Not Handle Sexual Assault Claims**

Assuming that university administrators had the necessary training and experience to competently adjudicate sexual assault claims – which most do not<sup>138</sup> – four interests would still

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<sup>133</sup> Azhar Majeed, *Naomi Schaefer Riley in 'Chronicle' on the Need to Allow Room for Law Enforcement to Handle Campus Crime*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Nov. 18, 2011, <http://thefire.org/article/13869.html>.

<sup>134</sup> Buffalo State College, *supra*.

<sup>135</sup> Press Release, Security on Campus, "'Robbie's Law' Campus Crime Scene Investigation Bill Clears Tennessee House, Senate (Feb. 25, 2004), [http://securityoncampus.org/index.php?option=com\\_content&view=article&id=201.&Itemid=75](http://securityoncampus.org/index.php?option=com_content&view=article&id=201.&Itemid=75).

<sup>136</sup> *See, e.g.*, *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283, 286 (N.Y. Sup. Ct. 2004) ("[U]niversities are not beyond judicial review. Under CPLR article 78, such institutions, even private ones, are accountable for the proper discharge of their self-imposed and statutory obligations.").

<sup>137</sup> ARIZ. REV. STAT. ANN. §§12-910, 12-348, 41-1007 (2012).

<sup>138</sup> For arguments to that effect from a former Dean of Harvard College, *see* HARRY LEWIS, EXCELLENCE WITHOUT A SOUL: DOES LIBERAL EDUCATION HAVE A FUTURE? 193 (2006) (noting "the folly of academics operating in realms beyond their expertise" and further opining, "confident of the superiority of its wisdom on matters of both justice and sex, the Harvard Faculty refused to acknowledge its incompetence to be fair, wise, or even logical in coping with rape.").

seriously impede their objectivity. The most obvious is financial. As detailed *supra*, acquitting an accused student carries the threat that OCR could exercise its enforcement authority and thereby cost a college over half a billion dollars in federal funding. There could also be civil litigation from the complainant, which to date has had more high-profile impact on college campuses than comparable suits from accused students. And, in light of the NCAA's unprecedented \$60 million fine against Penn State in July 2012, there is now reason to fear that any misconduct by university athletes or athletic personnel (including a perceived failure to take strong enough action against perpetrators of sexual violence, the offense for which Penn State was fined) could open up the institution to further sanctions.<sup>139</sup> As a pure matter of risk aversion, therefore, colleges have a very strong incentive to convict accused students in all circumstances.

The second interest concerns a university official's professional career. "The primary goal of modern academic administrators is to buy peace during their tenure and to preserve the appearance of competence *on their watch* – an appearance essential to their careers."<sup>140</sup> Accordingly, "faced with a student disturbance, a university administrator may not be thinking as a teacher or even an adjudicator; [s/]he is more likely thinking in utilitarian terms about what is best for the institution at the expense of individual justice, or just as a bureaucrat protecting his job."<sup>141</sup> As with a university's financial incentives, only mistreating complainants carries consequences: while Duke's president kept his job after the campus rushed to judge its innocent lacrosse team during a high-profile false rape case in 2006-2007,<sup>142</sup> and while two different presidents of Brown University have each survived high-profile law suits from accused students in sexual misconduct cases over the past fifteen years,<sup>143</sup> "the president, chancellor, athletic director and football coach" of the University of Colorado were all fired after the Title IX case of *Simpson v. University of Colorado* came to light<sup>144</sup> and Penn State's president of sixteen years was terminated just three

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<sup>139</sup> Pete Thamel, *Sanctions Decimate the Nittany Lions Now and for Years to Come*, N.Y. TIMES, July 23, 2012, <http://www.nytimes.com/2012/07/24/sports/ncaafootball/penn-state-penalties-include-60-million-fine-and-bowl-ban.html>.

<sup>140</sup> ALAN CHARLES KORS AND HARVEY SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* 313 (1998) (emphasis in original).

<sup>141</sup> See Picozzi, *supra*, at 2144. Cf. *In re Oracle*, 824 A.2d 917, 938 (Del. Ch. 2003) ("[O]ur law also cannot assume -- absent some proof of the point -- that corporate directors are, as a general matter, persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk.").

<sup>142</sup> For more details, see TAYLOR JR. AND JOHNSON, *supra*.

<sup>143</sup> The most recent claim occurred in 2010, see Bale *infra*. The other occurred in 1996. See Dan Subotnik, "Hands Off": *Sex, Feminism, Affirmative Consent and the Law of Foreplay*, 16 S. CAL. REV. L. & SOCIAL JUSTICE 249 (2007).

<sup>144</sup> Megan Ryan, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference Held at Harvard Law School*, 31 HARV. J.L. & GENDER 378, 385 (2008).

days after then-unproven allegations arose that the college did not respond to child sexual abuse by former assistant football coach Jerry Sandusky.<sup>145</sup>

A third interest is a university's reputation. Because universities appeal to popular sentiment to attract students and receive alumni donations, they shun negative publicity. Their aversion to bad press has caused shameful indifference to sexual assault in the past,<sup>146</sup> most recently in Penn State's cover-up of Jerry Sandusky's serial child molestation. In coming years, however, as universities find themselves increasingly accountable to "the grievances of those who might occupy buildings, disrupt the campus, and attract the media [such as] [t]he self-appointed militants who claim to speak on behalf of all . . . feminist women"<sup>147</sup> (many of whom disfavor any due process for the accused),<sup>148</sup> the interest in preventing the institution from "being branded 'soft' on sexual assault by victims' rights groups and by the media" will come to dominate a university's thinking.<sup>149</sup> As one administrator said, "my fear – yes, it's fear – of seeing my institution's name in *Inside Higher Ed* or *The Chronicle of Higher Education* as the subject of an investigation, or, even worse, having the 'letter of agreement' OCR makes public displayed for all to read – makes me toe

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<sup>145</sup> Sara Hebel and Brad Wolverton, *Penn State Trustees Fire President and Legendary Coach*, CHRONICLE OF HIGHER EDUC., Nov. 10, 2011, <http://chronicle.com/article/Penn-State-Trustees-Fire/129714/>; Jack Stripling, *Spanier's National Footprint Fades*, CHRONICLE OF HIGHER EDUC., Nov. 14, 2011, <http://chronicle.com/article/Spaniers-National-Footprint/129785/> (noting that the president has been shunned by his other former organizations and lost many career prospects).

<sup>146</sup> See Nina Bernstein, *On College Campuses, Athletes Get Off Easy*, N.Y. TIMES, Nov. 11, 2011, <http://www.nytimes.com/2011/11/12/us/on-college-campuses-athletes-often-get-off-easy.html> (detailing how university police have suppressed crime reporting on campus to protect the institution's reputation).

<sup>147</sup> See KORS AND SILVERGLATE, *supra*, at 314.

<sup>148</sup> See Tom Bale, *Letter to the Editor: In Defense of U's Handling of McCormick*, BROWN DAILY HERALD, Nov. 13, 2011, <http://www.browndailyherald.com/letter-in-defense-of-u-s-handling-of-mccormick-1.2670225#.TsG1aZzrViA> ("The university is to be applauded for . . . [its] message to all males: 'You need to check your behavior carefully before you enter into a relationship with a woman. *There will be no due process if you are accused of rape. The woman's version of what happened will always be accepted over the man's account.* If a male student knew that was the policy hopefully this would serve as a check on sexually aggressive behavior.") (emphasis added). In the McCormick case, Brown is alleged to have forced out an innocent accused student to placate a prominent alumni donor. See *McCormick v. Dresdale*, CA. No. 09-474 S, 2010 U.S. Dist. LEXIS 53049 (D.R.I. May 28, 2010).

<sup>149</sup> Anonymous, *Essay: OCR Guidelines on Sexual Assault Hurt Colleges and Students*, INSIDE HIGHER ED., Oct. 28, 2011, <http://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students>. See also Lipka, *Discipline Goes on Trial*, *supra* ("in cases that generate strong public pressure, especially those involving athletes and allegations of sexual assault, [p]rotestors' calls for action – and fears of liability for inaction – can prompt institutions to swiftly discipline accused students. 'Administrators have a strong inducement to basically punish first and ask questions later,' says Mr. Pavela.") (emphasis added).

the line in a way I sometimes have trouble justifying to myself.”<sup>150</sup> Schools responding to sexual assault will remember how Dickinson College garnered adverse media attention in March 2011 when students stormed and occupied the President’s Office to demand harsher sentences for sexual misconduct.<sup>151</sup> Cases involving wrongfully accused students do not carry the same media or reputational concerns for institutions, as even the Duke lacrosse case did not have lasting consequences for anyone involved.<sup>152</sup> In fact, Duke amended its sexual assault procedures just two years later to erode due process rights for the accused.<sup>153</sup>

Fourth and finally, ideology plays a role in sexual assault trials to the increasing detriment of the accused as some universities institutionalize the anti-due-process biases of their administrators.<sup>154</sup> At Stanford, for example, the school training manuals instruct would-be jurors in sexual misconduct cases that “act[ing] persuasive and logical” is a sign of guilt and that “[e]veryone should be very, very cautious in accepting a man’s claim that he has been wrongly accused of abuse or violence.”<sup>155</sup> For some schools, a desire to change societal and cultural attitudes toward sexual violence (or perhaps a simple desire to see what they want to see) can even lead to illegal conduct: the University of California-Davis, for example, was recently caught violating federal law by over reporting the number of rapes on campus to the federal government.<sup>156</sup>

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<sup>150</sup> Anonymous, *supra*.

<sup>151</sup> See Marylynne Pitz, *Dickinson College to Change Sexual Assault Policy After Sit-In*, PITTSBURGH POST-GAZETTE, Mar. 6, 2011, <http://www.post-gazette.com/pg/11065/1130102-454.stm>; Elizabeth Gibson, *Dickinson College Students Demand More Changes to School’s Sexual Misconduct Policy*, PATRIOT-NEWS, Mar. 4, 2011, [http://www.pennlive.com/midstate/index.ssf/2011/03/dickinson\\_college\\_students\\_dem.html](http://www.pennlive.com/midstate/index.ssf/2011/03/dickinson_college_students_dem.html).

<sup>152</sup> See K.C. Johnson, *Where Are They Now?*, DURHAM-IN-WONDERLAND (Nov. 05, 2007, 12:01 A.M.), <http://durhamwonderland.blogspot.com/2007/11/where-are-they-now.html>.

<sup>153</sup> *Duke University: Overbroad and Unjust Sexual Misconduct Policy*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/case/821.html> (linking to all of FIRE’s materials on the case).

<sup>154</sup> See Greve, *supra*, at 537 (“[A] fair hearing on sexual harassment charges is out of the question. At best, the case will be heard by faculty members or administrators whose incentives--in the form of federal regulations and pressure from campus agitators--uniformly cut in the direction of convicting . . . ; the less fortunate . . . will be asked to appear before a panel of ideologues and equal opportunity officers with an institutional interest in maximizing the number of convictions. Either way, a conviction is a foregone conclusion.”).

<sup>155</sup> Mike Armstrong and Daniel Barton, *Op-Ed: A Thumb on the Scale of Justice*, STANFORD DAILY, Apr. 29, 2011, <http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/>; *Stanford University: Biased Sexual Misconduct Procedures and Unjust Guilty Finding*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/case/869.html> (linking to all of FIRE’s materials on the case).

<sup>156</sup> Jennifer Epstein, *Overreporting Sexual Assaults*, INSIDE HIGHER ED., Oct. 2, 2009, <http://www.insidehighered.com/news/2009/10/02/davis>.

The civil and criminal courts do not suffer comparable financial incentives to convict innocent people because there is no statute or enforcement mechanism by which a court could forfeit its funding or pay astronomical sanctions based on the outcome of a trial. Furthermore, protections such as 43 U.S.C. § 1983 (which allows suits for prosecutorial and police misconduct) and the rules of professional ethics give criminal and civil defendants meaningful ways to respond to unfair treatment at the hands of those in power.

Nor do courts suffer from the university's problem of disciplinarian job security. While prosecutors are undoubtedly sensitive to the political impact of high-profile litigation, election cycles or appointment regimes protect them and the judges who try their cases from instant accountability to popular sentiment. Jurors, who are not repeat players in the justice system, are also always free to do what is right instead of what is popular. Even if the political environment in which universities operate could be reformed, it is unclear how to ameliorate the impact of a student affairs officer's career concerns while letting colleges adjudicate sexual violence. To whom would an official be accountable, if not the institution directly? In the informal world of academia, how could insulation of the ultimate decision maker be credibly assured?

Similarly, as to reputational or ideological interests, the justice systems already mitigate the impact of individual and institutional biases by diffusing power and responsibility among a number of different people, including legislators, trial judges, appellate judges, jurors, and party representatives (be they prosecutors, police or civil attorneys). The division helps curb the biases of any one actor or the reputational interests of those who are accountable to the public, such as a prosecutor up for reelection. By contrast, "[a] university administrator may-and frequently does-fill all the roles of police (enforcing rules and identifying those who break them), prosecutor (deciding who should be charged for breaking the rules), judge (agreeing who should be charged for breaking the rules and deciding on fact-finding procedures) and jury (deciding if the individual is guilty as charged). By melding all of these roles in one person, these functions no longer check one another."<sup>157</sup> Hiring additional personnel to fulfill all of these roles would be prohibitively expensive at many institutions, and there is no guarantee that it would adequately solve the problems.

Furthermore, while any procedural reforms on campus would have to start largely from scratch, the justice systems already mitigate the risk of undeserved punishment through effective safeguards. Here, too, there is an important separation of powers protection: no individual courtroom is allowed to establish its own Rules of Evidence or Civil/Criminal Procedure in the midst of a given case, but rather all must conform their practices to rules set out by a different organization long before a controversy arises. Colleges, by contrast, currently do not have to have

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<sup>157</sup> Picozzi, *supra*, at 2141-42 and n.50. See also *Smith v. Denton*, 895 S.W.2d 550, 555 (Ark. 1995) ("Throughout the proceedings, Dr. Smith acted in a variety of often-conflicting capacities. He was at once investigator, prosecutor, witness, and judge."). Such a system is not fair, *cf.* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821 (1994) (Scalia, J., concurring) ("That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers. And it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials..."), and at odds with America's philosophy of government, see MONTESQUIEU, *SPIRIT OF THE LAWS XI*, available at [http://www.constitution.org/cm/sol\\_11.htm](http://www.constitution.org/cm/sol_11.htm).

rules of evidence at all.<sup>158</sup> Because a college can tailor its procedures to the facts of a given case, colleges have the power to make outcome-determinative evidentiary rulings and have done so to the detriment of accused students.<sup>159</sup> Universities also have no obligation to disclose relevant or exculpatory evidence to the accused, and there are no rights to discovery.<sup>160</sup> The procedures governing college adjudications do not even meet the minimal standards for administrative due process, for there is no ban on secret *ex parte* communications between a complainant and the ultimate decision maker.<sup>161</sup> Rather than try to reinvent the wheel on campus, colleges should leave sexual assault adjudication to institutions with procedures that are already in place.

In summary, colleges currently suffer from four interests that negatively impact treatment of the accused (financial, job security, reputational, and ideological), each of which would be difficult if not impossible to remedy and all of which are at least mitigated to a greater extent by the U.S. court systems. Accordingly, courts should be the venue for handling cases of sexual misconduct on campus.

### **B. The Prevalence of Sexual Assault on Campus and the Nature of Campus Discipline Do Not Change the Analysis**

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<sup>158</sup> *E.g.*, *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987); *Henson v Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983). As discussed in Part II(B) *supra*, however, the federal government has recently begun establishing a pro-complainant “Rules of Evidence” for campus sexual assault trials that could be unconstitutional.

<sup>159</sup> University tribunals have considered such credible evidence as a one-month-after-the-fact determination that a complainant “looked like a rape victim,” *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 379 (Mass. 2000), or the unverified hearsay testimony of anonymous secret witnesses, *Fraad-Wolff v. Vassar Coll.*, 932 F. Supp. 88, 92 (S.D.N.Y. 1996), while ignoring evidence that the accused was medically incapacitated on the day he allegedly committed sexual harassment, *Yusuf v. Vassar Coll.*, 35 F.3d 709, 712-13 (2d Cir. 1994).

<sup>160</sup> *See Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 18 (D. Me. 2005). *Gomes* even approved the school’s giving evidence to the complainant but not the accused, *Id.* at 19-22, while in criminal court the prosecution has to disclose all exculpatory evidence to the defense, *see Brady v. Maryland*, 373 U.S. 83 (1963). Civil courts, similarly, have mechanisms for compelling the disclosure of evidence and for punishing the failure to do so. *See, e.g.*, FED. R. CIV. P. 37.

<sup>161</sup> *See Indiana University*, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (finding insufficient evidence of a Title IX violation, and thus finding that the grievance procedures were “equitable,” despite the fact that the Dean of Students unilaterally lengthened the accused’s suspension from one summer to a full year after the Dean “talked to [the complainant’s] father” and received an *ex parte* letter from the complainant). Even in administrative hearings under the Administrative Procedure Act, *ex parte* contacts of this type are strictly forbidden. 5 U.S.C. § 557(d) (2006). There is at least anecdotal evidence that this practice is quite common in the informal world of academia. *See Lewis, supra*, at 169 (“Far more than in any other area of student life, students and parents resorted to manipulation and anger to influence the course of [acquaintance rape] procedures.”). Without discovery or voir dire procedures, accused students cannot find out about these contacts.

Six arguments sometimes arise from complainant advocates, university officials, and judges (or all three) as to why college discipline for rape or sexual assault should continue as is or with minimal modification even in light of the risk of unfair punishments. All six are unpersuasive. Each will be addressed in turn below.

**1. Colleges must adjudicate claims as part of their obligation to provide a learning environment that is free of sex discrimination.**

While schools unquestionably have both a moral and legal obligation to provide a non-discriminatory educational environment, it does not logically follow that they must be empowered to investigate and prosecute rape and sexual assault themselves. As OCR recognized in its opinion letter in the Buffalo State College case, a school that immediately informs criminal authorities of alleged criminal conduct and cooperates in the subsequent investigation has met its obligation: if a jury finds the accused guilty after a fully impartial trial with attendant procedural safeguards, the school can then take disciplinary action of its own.<sup>162</sup> For closer cases in which prosecutors refuse to indict, a school that informs both the complainant and the accused of their rights in a civil trial could also be said to have acted appropriately. Separating the obligation to avoid discrimination based on sex with the actual adjudication of a sexual assault claim simply conforms policy to a college's limited institutional competence. Much as with murder, arson, or any other felony equivalent crime, colleges simply should not be allowed to play the roles of amateur police department and District Attorney's office with their student body. An accused should only be subject to supplemental discipline for these offenses after a full criminal or civil adjudication with procedural safeguards.

In discussing a school's obligations under Title IX, supporters of the statute often reference Title VII, which prohibits sexual harassment as a form of sex discrimination in the workplace. If colleges have to adjudicate claims of sexual violence between their employees, the thinking goes, they should also have to do so for claims between their students. There are at least three reasons why that argument is incorrect. First, Title VII deals with norms in an adult professional setting; Title IX, by contrast, applies in dormitories and other non-work settings, making any analogy between the two statutes or comparison of their precedents "inapposite."<sup>163</sup> Second, while Congressional statutes cap damages in Title VII suits, Title IX allows for unlimited liability recovery and thus significantly increases the statute's ability to incentivize a university adjudicator.<sup>164</sup> Finally, while most states allow tort claims for wrongful discharge in the employment context as a *de facto* counterweight to Title VII for accused employees, there are few counterweights for accused college student to sue for wrongful sanction, forced leave of absence, or expulsion as explained *supra* Part III(B). Accordingly, Title IX should not authorize colleges to adjudicate sexual violence even if Title VII would.

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<sup>162</sup> A university must have some authority to take emergency measures to protect its students in certain cases. As with temporary restraining orders and preliminary injunctive relief in civil litigation, however, there must also be some mechanism for timely and impartial review of the university's exercise of its emergency authority.

<sup>163</sup> *Davis*, 526 U.S. at 675, 682 (Kennedy, J., dissenting).

<sup>164</sup> *Id.* at 68.

## 2. Sexual assault is highly underreported and a serious problem on campus.

One utilitarian theory argues that colleges must handle sexual assault because doing so will bring more justice in the aggregate, as many victims will not come forward otherwise and the problem is massive in scale. The theory concedes that colleges will occasionally convict innocent people, but argues that such is the price to be paid for empowering survivors.

There is a difficult tension in sexual assault adjudication between avoiding the injustice or a wrongful conviction and avoiding the injustice of a wrongful acquittal, and no system is likely to ever get all cases right. Nevertheless, any process designed to resolve such claims can only be legitimate if determining guilt or innocence is the first priority. Justifying institutionalized unfairness to a given defendant in the exercise of power because of a perceived need to reform a broader social problem is contrary to the very idea of civilized justice. Adjudications “are supposed to be about individuals, not symbols; over facts and evidence, not social theories; [and] over guilt or innocence, not social transformation.”<sup>165</sup> Even if sexual assault is as underreported as complainant advocates claim,<sup>166</sup> and while recognizing that sexual violence is reprehensible, convicting the innocent to atone for society’s sins or to bring about change remains an unjustifiable use of authority and a dangerous judicial precedent.

## 3. Complainants do not lie or make mistakes when reporting sexual assault.

Critics of changing the present system often argue that instances of false or mistaken accusations are not frequent enough to require colleges to burden meritorious complaints with excessive due process hurdles to overcome. Upon closer examination, such an argument made alongside the claim that sexual violence on campus is grossly underreported contradictorily posits that complainants are very often wrong in claiming they have *not* been raped,<sup>167</sup> while rarely incorrect in claiming that they *have* been raped.

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<sup>165</sup> Greve, *supra*, at 541.

<sup>166</sup> For arguments that there is no evidence of underreporting, and for critical analysis of social science research purporting to prove otherwise, see Heather MacDonald, *The Campus Rape Myth*, CITY JOURNAL VOL. 18 NO. 1, 22-33 (2008); Cathy Young, *Sexual Assault on Campus—Is It Exaggerated?*, MINDINGTHECAMPUS, Apr. 18, 2011, [http://www.mindingthecampus.com/originals/2011/04/\\_by\\_cathy\\_young\\_1.html](http://www.mindingthecampus.com/originals/2011/04/_by_cathy_young_1.html); Chad Herman, *One-in-One-Thousand-Eight-Hundred-Seventy-Seven*, PITTSBURGH POST-GAZETTE, Feb. 28, 2011, <http://communityvoices.sites.post-gazette.com/index.php/opinion/the-radical-middle/27667--one-in-one-thousand-eight-hundred-seventy-seven>.

<sup>167</sup> Surveys estimating the statistical prevalence of rape on college campuses almost always reclassify a number of responses as rape even though the actual respondents claim to have not been raped. See Macdonald, *supra*; Fisher et. al., *supra* at 15, 13 (noting that half of those it counted as victims of sexual violence to arrive at its famous “one in four” statistic did not classify themselves as such, while also acknowledging that the study plays such definitional games as defining attempted rape as receiving a verbal rape threat). Fisher et al. freely acknowledge that there has never been a longitudinal study tracking a class of students from start to finish, as opposed to a

Although it is true that society should strive to make justice readily available for rape survivors, the argument that alleged victims are rarely incorrect cannot support the current college adjudication system. The most obvious problem is that because the precise rate of false or mistaken reporting is unknowable,<sup>168</sup> the argument has no empirical support. In addition, it is indisputable that false complaints do happen: using OCR's "preponderance of the evidence" standard in determining whether probable cause exists, police concluded in 2010 and 2011 alone that a university complainant makes a false rape allegation more than once per calendar month.<sup>169</sup> Relying on the good faith or accuracy of complaints does not protect the innocent in these situations, regardless of how often they happen.

**4. Because discipline is an educational experience without criminal consequences, it does not require procedural protections.**

Some university administrators claim that because a college judicial proceeding does not involve the loss of liberty, as could a criminal trial, it should not be subject to due process. They also say that procedural restrictions impede adjudication's effectiveness as a tool for educational development because discipline is supposed to be cooperative, not adversarial.<sup>170</sup>

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statistical sampling employing questionable methodology, proving that one in four college women will be sexual assaulted during their time in school. *Id.* at 37.

<sup>168</sup> There is no evidence that only two percent of rape claims are false. Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947 (2000). See also Anderson, *supra*, at 984-86 (discussing the debate over the number of false reports).

<sup>169</sup> There were twenty-five cases (and possibly more) in 2010 and 2011 in which police determined that university students had filed false complaints. In roughly half, complainants recanted their stories or admitted their allegations were untrue. Also in roughly half, police filed criminal charges against the complainant. Articles concerning false accusations at the following universities are on file with the author and are also searchable via Google: Dartmouth, Texas A&M, McNeese State University, George Fox University, Oregon State University, Messiah College, Seton Hall, Goshen College, Otterbein University, Arkansas Tech, Marshall University, The University of Georgia, The University of Northern Iowa, Plattsburgh State, The University of South Dakota, The University of Delaware, South Dakota State University, Indiana University at Bloomington, The University of Cincinnati, The University of North Dakota ("UND"), Penn State, Elon University, Oakland University, Purdue, and Spring Arbor University. The case at Penn State occurred in March 2010 and does not involve the child sexual abuse scandal from November 2011. *University Police: Alleged Rape on Campus Did Not Happen*, PENN STATE LIVE, Mar. 2, 2010, <http://live.psu.edu/story/44931>. For over a year, UND refused to reconsider its conviction of an accused student even when informed that the police had charged the complainant with filing a false rape report. *University of North Dakota: Accuser is Criminally Charged with Lying to Police, But School Refuses to Reopen Misconduct Case*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/case/868.html> (linking to all of FIRE's materials on the case).

<sup>170</sup> See Donald D. Gehring, *The Objectives of Student Discipline and the Process that's Due: Are They Compatible?*, NASPA JOURNAL Vol. 38 no. 4 at 477 (2001), available at

As to claims about possible sentences, even civil trials have procedural rules that a college does not replicate even though civil courts resolve purely private disputes. Furthermore, given the substantial economic impact of being denied a college degree<sup>171</sup> and the stigma that comes with branding someone a convicted rapist,<sup>172</sup> a university's disciplinary sanctions such as suspension, expulsion, and a negative notation on a transcript that could preclude admission to other programs or future jobs are serious enough to warrant procedural protections. Finally, the fact that a campus disciplinary proceeding does not carry a jail sentence does not excuse the need for it only to punish the guilty. There is no legitimacy in a system that does not fairly resolve claims, regardless of what the punishment is.

As to the argument about discipline as a teaching tool, educational objectives do not excuse the need for procedural safeguards because students cannot learn anything from being punished for offenses they did not commit. More importantly, even if the university is correct about discipline in other contexts, "a case involving student-on-student sexual misconduct is per se adversarial" and never cooperative.<sup>173</sup> As such, it should be left to an adversary system.

### 5. Due process interferes with academic freedom.

Judges typically use a variation of this reasoning when refusing to closely scrutinize university discipline.<sup>174</sup> The federal executive branch, however, has no similar reservations about reviewing a university's proceedings. Today, OCR is permitted to second-guess the grades a school gives to a complainant if he or she suffered sexual harassment in a context totally unrelated to the class.<sup>175</sup> In light of the sea change that Title IX has wrought, the judiciary's quixotic

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<http://journals.naspa.org/jsarp/vol38/iss4/art6/> ("Procedures [that] incorporate the right to counsel, confrontation and cross-examination of witnesses and multiple appeals ... are confusing to students [and] preclude the 'opportunity for developmental efforts' ..."). Disciplined students do not tend to share the university's perspective. See Picozzi, *supra*, at 2150 ("There's nothing magically collegial about a university; once a student is charged, a full-fledged adversarial relationship exists, and university officials are like everyone else. They play to win."); Sarah Lipka, *Most Students Report Satisfaction with Campus Judicial Systems*, CHRONICLE OF HIGHER EDUC., Mar. 29, 2011, <http://chronicle.com/article/Most-Students-Report/126925> (noting that half of disciplined students did not learn anything from the experience).

<sup>171</sup> See Picozzi, *supra*, at 2139 n.41; Jennifer Gonzalez, *Bachelor's Degree is Still Best Path to Middle-Class Jobs and Earnings, Report Says*, CHRONICLE OF HIGHER EDUC., Nov. 14, 2011, <http://chronicle.com/article/Bachelors-Degree-Is-Still/129784/>.

<sup>172</sup> See *Addington v. Texas*, 441 U.S. 418, 424-25 (1979) (insisting on higher burdens of proof in civil cases involving "allegations of fraud or some other quasi-criminal wrongdoing.").

<sup>173</sup> Lisa Tenerowicz, *Note: Student Misconduct at Private Colleges and Universities: A Roadmap for 'Fundamental Fairness' in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 691 n.119 (2001).

<sup>174</sup> *Osteen v. Henley*, 13 F.3d 221, 225-26 (7th Cir. 1993); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000).

unwillingness to get more involved in university discipline only fosters an imbalance of power that leads to false convictions.

More fundamentally, however, nothing about academic freedom requires giving a university the power to adjudicate claims of felony crime between its students. If anything, removing sexual assault adjudications from colleges will increase academic freedom by limiting the government's reach into how the university is doing its job.

#### **6. The criminal and civil justice systems are too slow or otherwise inadequate in their response to sexual assault on campus.**

The civil and criminal justice systems have a long history of insensitivity toward crimes of sexual violence. Fortunately, they have experienced significant overhaul since the 1970s.<sup>176</sup> While critics will undoubtedly argue that much work remains to be done, courts are in a much better position to resolve these allegations than they once were. If they are still not up to the task, efforts should be focused on reforming them to make them effective for all assault survivors. Proposals such as creating a “fast track” system for the adjudication of claims of sexual violence on campus could make the courts an even more effective method of resolving these claims, as these would prevent survivors from having to sacrifice their college careers waiting for justice to be served.

### **V: Conclusion**

Because of Title IX, educational institutions face numerous incentives to wrongfully convict in cases of alleged sexual violence on campus. OCR, with the threat of terminating all federal funding to a university behind its words, has issued guidance documents and publications that increasingly escalate the threat while ignoring the rights of innocent accused students. Courts, similarly, have expanded a university's exposure to suits from dissatisfied complainants while taking little if any interest in the claims of those who claim to have been wrongfully disciplined. In the coming years, as the April 2011 Letter begins to make its impact felt on campuses nationwide, false rape convictions will increase substantially due to the desire of colleges and universities to placate OCR and avoid potential liability from dissatisfied complainants at the

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<sup>175</sup> See 2001 Guidance at 15-16 (requiring schools to consider a number of remedies for a harassed student, including “making tuition adjustments” or simply recalculating grades without certain quizzes or tests factored in); Indiana University, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (noting that a complainant in a student-to-student sexual assault case was granted “quite extraordinary” academic relief, including the changing of a C+ grade to a B- and changing three grades of “D” and one “Incomplete” to “W” for withdrawn, despite the fact “that students are generally not permitted to ‘withdraw’ from courses they have completed.”); Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006) (allowing the complainant to complete half of her law school education at another institution as a result of an alleged student-to-student sexual assault). By contrast, judicial deference in matters of academics is well established. See, e.g., *Regents of the Univ. of Mi. v. Ewing*, 474 U.S. 214 (1985); *Bd. Of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

<sup>176</sup> See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008).

expense of just and fair adjudication of student cases. As best expressed by one federal judge in a 2012 law suit, “from a normative perspective, the process applied to [the alleged attacker] and the behavior of University officials in investigating and prosecuting [a claim of sexual assault] offends the Court’s sense of fundamental fairness and appears to fall short of the minimal moral obligation of any tribunal to respect the rights and dignity of the accused.”<sup>177</sup>

Thus, we stand at a crossroads: Will the reality of uneven justice on campuses that Title IX has wrought continue without correction? Can colleges adjudicate sensitive claims of interpersonal violence and counter-claims of innocence, in light of their inherent financial and institutional self-preservation interests looming over the outcome?

Quite simply, the law must recognize that a university (like any institution) has limits. Society must assign the adjudication of sexual assault to civil and criminal court systems, to ensure justice for all concerned.

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<sup>177</sup> Order Under Seal at 12, *Doe v. Univ. of Mont.*, Case 9:12-cv-00077-DLC (D. Mont. May 10, 2012), *available at* [http://missoulian.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf\\_683eaa12-c0c6-11e1-8193-001a4bcf887a.html](http://missoulian.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf_683eaa12-c0c6-11e1-8193-001a4bcf887a.html) (page 196 of 281).