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# CRIMINALS, CLASSROOMS, AND KANGAROO COURTS: WHY COLLEGE CAMPUSES SHOULD NOT ADJUDICATE SEXUAL ASSAULT CASES

Ashley Sarkozi\*

## I. INTRODUCTION

College is an incredible time for personal growth. It provides numerous avenues and opportunities for academic achievement, intellectual evolution, and career development. The college campus also provides many opportunities for social interaction, engaging peers, and developing relationships. As such, the college adventure also includes the exploration and development of sexual experiences. For the most part, these encounters occur agreeably and without major complication aside from the hurt feelings that may be attendant to misunderstood or misplaced passion. Sometimes, however, campus sexual encounters go terribly wrong.

Take, for example, John Doe and J.C.—college students at Brandeis University.<sup>1</sup> The two met as freshmen in the fall of 2011, where they began a romantic and sexual relationship.<sup>2</sup> However, between their sophomore and junior years, J.C. broke up with John.<sup>3</sup> They remained friends for four months after, but then their relationship deteriorated.<sup>4</sup> In January 2014, two years and four months after their relationship first began and six months after their relationship ended, J.C. “observed that a gay male student seemed to

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1. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 570 (D. Mass. 2016).

2. *Id.* at 574.

3. *Id.*

4. *Id.*

be attracted to John.”<sup>5</sup> John believed that J.C., who was also attracted to the student, was jealous of John.<sup>6</sup> On January 13, 2014, J.C. sent the student a Facebook friend request, which the student denied.<sup>7</sup> The very next day, January 14, 2014, J.C. filed a complaint against John, accusing him of sexual assault.<sup>8</sup> The allegations read as follows: “Starting in the month of September, 2011, the Alleged violator of Policy [John] had numerous inappropriate, nonconsensual sexual interactions with me. These interactions continued to occur until around May 2013.”<sup>9</sup>

After 2011, likely in response to federal pressure under Title IX,<sup>10</sup> Brandeis changed its procedures for sexual misconduct cases, removing many protections it previously had in place for student defendants.<sup>11</sup> By 2014, Brandeis had eliminated a hearing of any kind.<sup>12</sup> These procedures made the entire process one of secrecy, preventing the accused from knowing the details of the charges, seeing the evidence (including a report made by the university), obtaining an attorney, cross-examining the accuser and other adverse witnesses, and effectively appealing the decision.<sup>13</sup> John alleges that after J.C. filed his complaint, John was removed from his residence, classes, paid campus job, community advisor position, and student-elected position on a University Board.<sup>14</sup> All these actions were based solely off the two-sentence allegation.<sup>15</sup>

Next, a “Special Examiner” process began, in which the Special Examiner, who was an outside lawyer, interviewed John, J.C., administrators, and other witnesses provided by the parties.<sup>16</sup> The Special Examiner then compiled a report based off these interviews.<sup>17</sup> John was never provided notes from the interviews of J.C.’s witnesses, was not allowed to confront or cross-examine his

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 575.

11. *Id.* at 570.

12. *Id.*

13. *Id.*

14. *Id.* at 575.

15. *Id.*

16. *Id.* at 583–84.

17. *Id.* The complaint alleges none of these witnesses were eyewitnesses to the alleged incidents. *Id.* at 584.

accuser or any of the witnesses, and was not provided the Special Examiner's report until after his case was closed.<sup>18</sup> In the report, the Special Examiner concluded that John had committed sexual violence when, during the span of their nearly two-year long relationship, John kissed J.C. when he was sleeping, looked at his private areas in the communal bathrooms, and at one point a year and a half into their relationship tried to perform oral sex on J.C. and when J.C. objected, John slept on the floor.<sup>19</sup> The Special Examiner also found that John committed sexual violence when, in the beginning of their relationship, John put his hand on J.C.'s groin, and J.C. removed John's hand after a period of time.<sup>20</sup> After the Special Examiner made these findings, the Dean of Academic Services was chosen to act as a final decision maker.<sup>21</sup> The Dean accepted the findings unilaterally, without the recommendation of any panel.<sup>22</sup>

Following the Dean's acceptance of the Special Examiner's findings, a panel of three University administrators recommended a sanction of a "disciplinary warning," despite never deciding the merits of the case itself.<sup>23</sup> This punishment required John to undergo sensitivity training and resulted in a mark on John's permanent record stating that he was found responsible for sexual misconduct.<sup>24</sup> John appealed the decision, and the appeal was rejected.<sup>25</sup> After his appeal, John's reputation was tarnished in multiple news stories, including one in which J.C. claimed John "anally raped" him.<sup>26</sup> Brandeis students "publicly taunted and accused John of rape," he was fired from his internship, and another potential employer stopped responding to his emails.<sup>27</sup>

John sued the university, and a federal district court in Massachusetts found that John's disciplinary hearing lacked basic fairness.<sup>28</sup> Despite Brandeis being a private school, the court found that John's hearing lacked procedural fairness because he was not

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18. *Id.* at 583–84.

19. *Id.* at 587–89.

20. *Id.* at 587.

21. *Id.* at 584.

22. *Id.*

23. *Id.*

24. *Id.* at 585.

25. *Id.*

26. *Id.* at 592.

27. *Id.*

28. *Id.* at 601–08.

given notice of his charges, he had no right to counsel, he had no right to confront his accuser, he had no right to cross-examine other witnesses, he had no right to examine evidence or witness statements, he had no right to call witnesses and present evidence, he had no right to an effective appeal, he had no access to the special examiner's report, there was no separation of investigation, prosecution, and adjudication functions, and the university used a burden of proof (preponderance of the evidence) lower than the one used for all other forms of student misconduct (clear and convincing).<sup>29</sup>

This case is not an isolated incident. There are currently 110 lawsuits against colleges and universities alleging due process violations in sexual assault cases.<sup>30</sup> Robert Shibley, Senior Vice President of the Foundation for Individual Rights in Education, estimates that he receives two calls a week from students who claim that they were falsely accused of sexual assault in campus disciplinary proceedings.<sup>31</sup> A student found responsible for sexual assault can not only be suspended or expelled from school, but the student's permanent record can be tarnished, thereby limiting the student's educational, employment, and housing opportunities.<sup>32</sup> Additionally, a student found guilty can be permanently stigmatized, which can cause severe adverse impacts in the student's professional and personal life.<sup>33</sup> A federal judge explained that a finding of guilt can have significant consequences for post-graduate educational and employment opportunities, and will likely cause substantial social and personal repercussions similar to those of a criminal

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29. *Id.*

30. *Welcome to Title IX for All*, TITLE IX FOR ALL, <http://www.titleixforall.com/#section-legal-risk-management> (last visited Aug. 21, 2016).

31. Robert Carle, *The Trouble with Campus Rape Tribunals*, PUB. DISCOURSE (July 14, 2014), <http://www.thepublicdiscourse.com/2014/07/13369>.

32. *See, e.g., Brandeis Univ.*, 177 F. Supp. 3d at 601 (Sanctions include "ineligibility for campus housing, loss of opportunity to participate in campus activities or employment, suspension, and expulsion."); Justin Wm. Moyer, *University Unfair to Student Accused of Sexual Assault, Says California Judge*, WASH. POST (July 14, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/07/14/judge-ucsd-used-unfair-procedures-when-it-found-male-student-responsible-for-sexual-misconduct> (The student, who was found guilty of sexual assault, was suspended for over a year, meaning he would need to reapply to the university.).

33. Emily Shire, *Sexual Assault: The Accused Speak Out*, DAILY BEAST (Jan. 26, 2016) (The accused, who was branded a rapist, suffers from depression and insomnia as a result of being found guilty in what he claims was an unfair campus adjudication.).

conviction.<sup>34</sup> One student explained the consequences he faced from the allegations alone, stating:

The complaint lodged against me caused me and my family immense grief, and as a simple Google search of my name reveals, its malignant effects have not abated. It cost me my reputation and credibility, the opportunity to become a Rhodes scholar, the full-time job offer I had worked so hard to attain, and the opportunity to achieve my childhood dream of playing in the NFL. I have had to address it with every prospective employer whom I've contacted, with every girl that I've dated since, and even with Harvard Law School during my admissions interview. It is a specter whose lingering presence is rooted in its inexplicability.<sup>35</sup>

This Note argues that sexual assault adjudications do not belong on college campuses because colleges cannot provide a sufficient level of due process to defendants. Part II explores the background of sexual assault legislation for college campuses that receive federal funding. Part III analyzes the specific due process issues in campus proceedings, including mandating a preponderance of the evidence standard, prohibiting defendants from cross-examining witnesses, limiting defendants' right to counsel, and exhibiting clear biases against defendants. Part IV concludes that sexual assault adjudications do not belong on college campuses because they cannot provide adequate due process rights for the accused.

## II. HISTORICAL FRAMEWORK

### A. Title IX

Congress first began to address the problem of sex discrimination on college campuses in 1972, when it amended the Higher Education Act and enacted Title IX.<sup>36</sup> Title IX states that “[n]o person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity

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34. *Brandeis Univ.*, 177 F. Supp. 3d at 601–02.

35. Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, BOS. GLOBE (Nov. 3, 2014), <https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html>.

36. 20 U.S.C. § 1681 (2012).

receiving federal financial assistance.”<sup>37</sup> Title IX was not originally designed to address the adjudication of sexual harassment claims, and nothing in its legislative history nor in its first seven years of existence suggests that it was.<sup>38</sup> Rather, Title IX originally helped women make significant strides in their representation and participation in collegiate athletics.<sup>39</sup> In fact, Title IX has been credited with the creation of the Women’s Basketball Association and the U.S. women’s soccer team’s victory in the 1999 World Cup.<sup>40</sup>

In 1979, the public attention shifted to the issue of sexual assault on college campuses when Catharine MacKinnon published a book in which she argued that sexual harassment is a form of discrimination.<sup>41</sup> In 1980, the National Advisory Council on Women’s Education Programs reviewed Title IX, concluded it should be interpreted to prohibit sexual harassment, and urged the Department of Education’s Office of Civil Rights (“OCR”) to implement regulations.<sup>42</sup> Over the next thirteen years, OCR issued administrative guidance prohibiting school employees from sexually harassing students.<sup>43</sup> It was not until 1992 that the Supreme Court recognized that sexual harassment could fall under Title IX gender discrimination.<sup>44</sup>

In 1997, the OCR published its first Sexual Harassment Guidance (“1997 Guidance”), which described two types of conduct that constitute sexual harassment under Title IX: quid pro quo harassment and hostile-environment harassment.<sup>45</sup> Quid pro quo harassment occurs when a school employee “conditions a student’s

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37. *Id.*

38. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013); see *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting) (“When Title IX was enacted in 1972, the concept of ‘sexual harassment’ as gender discrimination had not been recognized or considered by the courts.”).

39. Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 601 (2013).

40. *Id.* at 601–02.

41. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 143–49 (1979).

42. Hendrix, *supra* note 39, at 601.

43. Henrick, *supra* note 38, at 51.

44. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

45. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997).

participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature."<sup>46</sup> Hostile-environment harassment refers to any sexually harassing conduct, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature "by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment."<sup>47</sup> This meant that schools were required to take action based on the conduct of students if those schools knew or should have known of the harassment, and failing to effectively do so would result in Title IX violations.<sup>48</sup>

Some portions of the 1997 Guidance were supportive of student defendants, limiting public disclosure of the names of the accuser and the accused and stating that procedures should ensure due process rights for students at public universities, as well as any additional rights created for public or private university students under state law.<sup>49</sup> However, other portions limited the rights of the accused. For example, while the 1997 Guidance said due process rights should be ensured, it failed to explicitly lay out what procedures would constitute adequate due process. Another portion required a school to process a sexual assault case even if a criminal case was pending.<sup>50</sup> This meant that the defendant could be forced either to testify or face expulsion if not provided the right against self-incrimination.<sup>51</sup> These statements could then be used in a subsequent criminal proceeding, obliterating Fifth Amendment<sup>52</sup> protections against self-incrimination in that trial.<sup>53</sup>

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46. *Id.*

47. *Id.*

48. *Id.* at 12,038–40 ("Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.").

49. *Id.* at 12,037, 12,045.

50. *Id.* at 12,045.

51. Henrick, *supra* note 38, at 58.

52. U.S. CONST. amend. V.

53. Henrick, *supra* note 38, at 58.



Until 1999, the Supreme Court had not addressed whether Title IX could make a school liable for failing to respond to sexual violence between two students. In *Davis v. Monroe County Board of Education*,<sup>54</sup> a case in which a public school fifth-grader accused her classmate of sexual assault, the Supreme Court expanded Title IX's harassment prohibitions to include cases of student-to-student conduct.<sup>55</sup> The Court held that for a school to be liable for a private cause of action under Title IX, it must act with "deliberate indifference to known acts of harassment in its programs or activities," where the harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to educational opportunity or benefit."<sup>56</sup>

OCR issued a Revised Sexual Harassment Guidance in 2001 ("2001 Guidance"), which focused on preventing and remedying sexual harassment in schools.<sup>57</sup> In its 2001 Guidance, OCR again stated that a school may be subject to administrative enforcement under Title IX if it either knew or should have known of the harassment—a standard for liability that is much easier to meet than the actual knowledge standard employed by the Supreme Court for private causes of action in *Davis*.<sup>58</sup> While the 2001 Guidance focused heavily on rights of complainants, it did little to help due process rights for defendants. Instead, it included a new heading entitled "Due Process Rights of the Accused," which used language from the 1997 Guidance in a rearranged form and failed to actually give explicit due process rights to the accused.<sup>59</sup> Both Guidances focused on the rights of the complainants and failed to include any direction regarding a university's obligation to provide specific due process rights to the accused.

### *B. Dear Colleague Letter*

On April 4, 2011, OCR issued a "Dear Colleague" letter (the

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54. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

55. *Id.* at 633.

56. *Id.*

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

58. Compare *id.* at iv, with *Davis*, 526 U.S. at 633.

59. Henrick, *supra* note 38, at 58–59; see REVISED GUIDANCE, *supra* note 57, at 22.

“Letter”) addressing the issue of sexual assault on college campuses.<sup>60</sup> The Letter was sent to every college and university receiving federal funding.<sup>61</sup> The Letter explained that the requirements under Title IX pertaining to sexual harassment also applied to sexual violence, which could include rape, sexual assault, sexual battery, and sexual coercion.<sup>62</sup> It outlined vague procedures that colleges should follow to comply with Title IX, including publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures.<sup>63</sup> The Letter required schools to conduct a “prompt, thorough, and impartial” investigation into sexual assault allegations.<sup>64</sup> If a school finds that harassment occurred, it must stop the behavior, prevent its recurrence, and remedy its effects on the victim.<sup>65</sup>

While OCR claimed it did not change the law, it instructed schools on how OCR interprets the law.<sup>66</sup> In response, many schools amended their procedures for adjudicating sexual assault allegations.<sup>67</sup> Further, several of these interpretations seemed to create entirely new laws. For example, the Letter stated that schools must now handle complaints of sexual assaults that occurred off campus.<sup>68</sup> Schools previously had no obligation to investigate alleged sexual assaults that occurred off campus.<sup>69</sup> The Letter also required that a preponderance of the evidence standard be used in campus adjudications.<sup>70</sup>

The Letter, while nineteen pages, included a mere two sentences discussing the due process rights of the accused.<sup>71</sup> It stated, “[p]ublic

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60. Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleague (Apr. 4, 2011) [hereinafter *Dear Colleague Letter*], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

61. *Id.* at 1.

62. *Id.* at 1–2.

63. *Id.* at 5.

64. *Id.*

65. *Id.* at 4.

66. *Id.* at 1 n.1.

67. *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

68. *Dear Colleague Letter*, *supra* note 60, at 4.

69. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999); *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654, 656 (8th Cir. 1997).

70. *Dear Colleague Letter*, *supra* note 60, at 4.

71. *Id.* at 12.

and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.<sup>72</sup> Even in the two sentences that were designated to the rights of the defendant, the Letter caveated these rights with the rights of the complainant, framing them as applicable only insofar as they did not delay or restrict any protections of the complainant. Finally, the Letter failed to provide a mandatory appeals process.<sup>73</sup> This is especially harmful to the wrongly accused, who have no direct administrative mechanism through which to challenge a wrongful guilty finding.

### C. *The Campus SaVE Act*

In March 2013, President Obama signed the Campus Sexual Violence Elimination Act (the “Campus SaVE Act”) into law as part of the Violence Against Women Reauthorization Act.<sup>74</sup> The Campus SaVE Act applies to almost all institutions of higher education, since it is directed toward those that participate in financial aid programs under Title III and Title IV.<sup>75</sup> The Campus SaVE Act codified many provisions of the Letter.<sup>76</sup> For example, it incorporated the Letter’s prompt and impartial internal investigation and resolution procedures and its requirement that alleged sexual assault victims be advised of their right to file internal complaints, criminal complaints, or both.<sup>77</sup> By contrast, the statute did not require a preponderance of the evidence standard as set forth by the Letter, but rather mandated only that institutions must specify the standard of evidence they will use.<sup>78</sup> The statute also allowed both parties to have others present at the proceeding, including an advisor of their choice.<sup>79</sup> However, whether or not this advisor may be a lawyer is ambiguous, and whether or not this advisor may speak is equally ambiguous.

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72. *Id.*

73. *Id.*

74. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (2013) (codified at 20 U.S.C. § 1092(f)(8)).

75. *Id.* § 304(a)(5), 127 Stat. at 90 (codified at 20 U.S.C. § 1092(f)(8)(A)).

76. Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 453 (2014).

77. § 304(a)(5), 127 Stat. at 89–92 (codified at 20 U.S.C. § 1092(f)(8)(B)).

78. *Id.* § 304(a)(5), 127 Stat. at 90 (codified at 20 U.S.C. § 1092(f)(8)(A)(ii)).

79. *Id.* § 304(a)(5), 127 Stat. at 91 (codified at 20 U.S.C. § 1092(f)(8)(B)(iv)(II)).

*D. Questions and Answers on Title IX and Sexual Violence*

On April 29, 2014, OCR issued a Questions and Answers document (the “Document”), which aimed to provide schools with additional guidance regarding their obligations under Title IX.<sup>80</sup> The Document reiterated that the definition of sexual violence falls under sex discrimination, and that this could include rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.<sup>81</sup> Sexual harassment, on the other hand, includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.<sup>82</sup> In a Title IX Resource Guide released shortly after the Document, OCR added that sex-based harassment could include verbal acts and name-calling, could be based off the student’s actual or perceived sex or sexual orientation, and did not necessarily need to be conduct of a sexual nature.<sup>83</sup> Thus, violent acts of rape and sexual assault were now officially lumped into the same adjudicatory procedures as simple acts of teasing.

Next, OCR clarified that in determining whether a hostile environment has been created under Title IX, a school should evaluate both objective and subjective perspectives.<sup>84</sup> However, the Document then stated in the next sentence that the standard is a reasonable person in the alleged victim’s position,<sup>85</sup> implying an objective, rather than subjective, standard.<sup>86</sup> Further, schools can be responsible for violating Title IX even if the alleged victim does not report the incident.<sup>87</sup> A school can also be required to take action even if the alleged perpetrator is not a student at that school.<sup>88</sup>

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80. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE ii (2014) [hereinafter QUESTIONS AND ANSWERS], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

81. *Id.* at 1.

82. *Id.*

83. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., TITLE IX RESOURCE GUIDE 15–16 (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>. *But see* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 667 (1999) (Kennedy, J., dissenting) (“A university’s power to discipline its students for speech that may constitute sexual harassment is . . . circumscribed by the First Amendment.”).

84. QUESTIONS AND ANSWERS, *supra* note 80, at 1.

85. *Id.*

86. In both the civil and criminal context, the reasonable person standard has been viewed as an objective one. *See* Restatement (Second) of Torts § 283 (1965) (The standard of the reasonable man is an objective one.); *see also* Yarborough v. Alvarado, 541 U.S. 652, 663 (2004) (holding the *Miranda* custody test is a reasonable person test, which depends on objective factors).

87. QUESTIONS AND ANSWERS, *supra* note 80, at 2.

88. *Id.* at 9. (While the appropriate response will differ depending on the school’s control

The Document reiterated that schools are required to have a Title IX coordinator who should not have a job that creates a conflict of interest—such as also serving as general counsel to the school in legal claims alleging Title IX violations.<sup>89</sup> It also explained other conflicts of interest, such as a Title IX coordinator also serving as the Director of Athletics, serving as the Dean of Students, or serving on a hearing board of an appeal.<sup>90</sup> Yet, notably, it failed to mention that Title IX coordinators should not partake in multiple roles of investigator, attorney, and judge in campus adjudicatory proceedings.

OCR emphasized in the Document that the Campus SaVE Act did not alter a school's Title IX obligations.<sup>91</sup> This includes the preponderance of the evidence standard set out by the Dear Colleague letter.<sup>92</sup> Cross-examination is still substantially limited, as the Document strongly discouraged parties from questioning one another, and it instead suggested that a trained third-party, such as the hearing panel, should ask the questions they deem appropriate.<sup>93</sup> Further, a school is not even required to allow a defendant to cross-examine other witnesses.<sup>94</sup> Finally, while an appeals process was recommended, it is still not required.<sup>95</sup>

#### *E. Enforcement of Title IX and the Campus SaVE Act*

If OCR receives a complaint that a college or university has violated its Title IX obligations, it will begin enforcement procedures.<sup>96</sup> OCR will investigate the school and attempt to secure voluntary compliance.<sup>97</sup> If unsuccessful, OCR can refer the institution to the Justice Department for criminal prosecution and may begin proceedings to terminate the institution's federal funding.<sup>98</sup> The reality, however, is that OCR has never used its power to terminate federal funds, and Title IX enforcement hardly

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over the alleged perpetrator, a school should report incidents to the alleged perpetrator's school and encourage it to take action.).

89. *Id.* at 11–12.

90. *Id.* at 12.

91. *Id.* at 44.

92. *Id.* at 26.

93. *Id.* at 31.

94. *Id.*

95. *Id.* at 37.

96. Henrick, *supra* note 38, at 55.

97. *Dear Colleague Letter*, *supra* note 60, at 16.

98. *Id.*

ever becomes adversarial.<sup>99</sup> “[T]he threat of losing [federal money] is enough to secure ‘voluntary’ compliance with OCR’s requests.”<sup>100</sup> OCR can only go after schools; it does not have the authority to punish an accused student, which is left to the institution.<sup>101</sup>

In May 2014, OCR published a list on its website of all schools under investigation for “possible violations of federal law over the handling of sexual violence and harassment complaints.”<sup>102</sup> The number grew from 55 in May 2014<sup>103</sup> to 195 as of June 2016 and continues to rise.<sup>104</sup> However, these investigations can take years to complete, leaving schools confused regarding the legal sufficiency of their policies.<sup>105</sup> As a result of these investigations, schools have changed their sexual assault policies, taking away due process rights for the accused in the process.<sup>106</sup>

To add to this confusion, the U.S. Department of Education is in charge of enforcing the Campus SaVE Act.<sup>107</sup> As of March 2014, complainants can file a formal complaint with the Clery Act Compliance Division when a school violates their rights under SaVE.<sup>108</sup> A school may face warnings or fines up to \$35,000 per

99. Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0>.

100. Henrick, *supra* note 38, at 55.

101. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 247 (2009) (“Title IX reaches institutions and programs that receive federal funds . . . which may include nonpublic institutions . . . but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals.”).

102. *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP’T OF EDUC. (May 1, 2014), [https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix?utm\\_source=FindYouthInfo.gov&utm\\_medium=Federal%20links&utm\\_campaign=Reports-and-Resources](https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix?utm_source=FindYouthInfo.gov&utm_medium=Federal%20links&utm_campaign=Reports-and-Resources).

103. *Id.*

104. Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges than Most People Know*, HUFFINGTON POST (June 16, 2016, 4:49 PM), [http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment\\_us\\_575f4b0ee4b053d433061b3d](http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d) (As of June 2016, “there were 246 ongoing investigations by the U.S. Department of Education into how 195 colleges and universities handle sexual assault reports under the gender equity law. A Freedom of Information Act request . . . revealed another 68 Title IX investigations into how 61 colleges handle sexual harassment cases.”).

105. Janet Napolitano, Policy Essay, “*Only Yes Means Yes*”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL’Y REV. 387, 396 (2015).

106. *Rethink Harvard’s Sexual Harassment Policy*, *supra* note 67.

107. *Frequently Asked Questions*, CAMPUS SAVE ACT, <http://thecampussaveact.com/faq> (last visited Aug. 20, 2016).

108. *Id.*

violation.<sup>109</sup> Thus, schools could have both Title IX and Clery Act complaints against them and face multiple and possibly contradictory investigations and rulings.

While *United States v. Morrison*<sup>110</sup> struck down portions of the Violence Against Women Act that provided complainants a federal remedy against students accused of sexual assault,<sup>111</sup> complainants can still seek federal recourse against their institutions for Title IX violations.<sup>112</sup> Thus, in addition to OCR enforcing Title IX and the Department of Education enforcing the Campus SaVE Act, private individuals can also sue universities under Title IX. Thus, schools face the possibility of multiple liabilities and federal sanctions if found in non-compliance with Title IX.

### III. ANALYSIS

Due process rights have been consistently recognized for students attending public colleges.<sup>113</sup> In *Goss v. Lopez*,<sup>114</sup> the Supreme Court held that even students facing a temporary suspension must be given notice and an opportunity to be heard,<sup>115</sup> noting in dictum that suspension over ten days or expulsions might require more robust procedures.<sup>116</sup> Private schools' disciplinary procedures, while facing less scrutiny, have been subject to a "fundamental" or "basic" fairness standard and must not be arbitrary or capricious.<sup>117</sup> The Supreme Court has given greater deference to a university's procedural requirements when the student's dismissal was based on an academic dismissal rather than a violation of the rules of conduct.<sup>118</sup>

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109. *Id.*

110. *United States v. Morrison*, 529 U.S. 598 (2000).

111. *Id.* at 627.

112. Henrick, *supra* note 38, at 74.

113. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (recognizing that students attending a public college have a right to due process).

114. 419 U.S. 565 (1975).

115. *Id.* at 581.

116. *Id.* at 584.

117. *See* *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983) ("We also examine the hearing to ensure that it was conducted with basic fairness."); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994) ("The College has agreed to provide students with proceedings that conform to a standard of 'fundamental fairness' and to protect students from arbitrary and capricious disciplinary action to the extent possible within the system it has chosen to use."). This standard is uncertain, and there is little case law that provides guidance. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601 (D. Mass. 2016).

118. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

However, both OCR and colleges limit student defendants' rights to due process by mandating a preponderance of the evidence standard, prohibiting defendants from cross-examining witnesses, limiting defendants' right to counsel, and exhibiting clear biases against accused defendants. By labeling a violent act of sexual assault as a simple act of sex discrimination, the government mandates universities to create an administrative adjudicatory process determining guilt for a recognized violent crime on top of already existing civil and criminal litigation processes. By creating this parallel system, rights that defendants would hold in both civil and criminal proceedings are evaded. Student defendants face harsh criminal-like penalties for an extremely serious allegation oftentimes hinging on witness credibility, yet are provided almost no procedural safeguards in this process.

#### A. *Preponderance of the Evidence Standard*

The Dear Colleague Letter mandates that college campuses use a preponderance of the evidence standard,<sup>119</sup> unlike the criminal system which utilizes a beyond a reasonable doubt standard.<sup>120</sup> While the Campus SaVE Act seems to make the preponderance of the evidence standard voluntary because it requires only that colleges report which type of standard they are going to use, a federal district court judge in the District of Columbia recently ruled that this act has no effect on Title IX enforcement.<sup>121</sup> Thus, colleges are still required to utilize a preponderance of the evidence standard, despite congressionally mandated federal law suggesting otherwise.

According to the Supreme Court, “[t]he function of a standard of proof . . . is to ‘instruct the factfinder concerning the degree of

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119. *Dear Colleague Letter*, *supra* note 60, at 4.

120. *Addington v. Texas*, 441 U.S. 418, 423–24 (1979).

121. *See Doe v. U.S. Dep’t of Health & Human Servs.*, 85 F. Supp. 3d 1, 12 (D.D.C. 2015) (holding that the Campus SaVE Act did not affect Title IX and did not change how colleges process claims of sex discrimination); *see also* QUESTIONS AND ANSWERS, *supra* note 80, at 26, 44 (mandating that a preponderance of the evidence is required, even after the Campus SaVE Act was in effect, and explaining that no part of the Violence Against Women Reauthorization Act, including § 304, relieves a school of its Title IX obligations). Indeed, it seems OCR is still going after schools that do not use a preponderance of the evidence standard. In December 2014, OCR found Harvard Law School was not in compliance with Title IX, in part because it used the clear and convincing standard for sexual misconduct claims. Stephanie Francis Ward, *Lawyers Are Dealing with Changing Rules on College Sexual Assault*, A.B.A. J. (Mar. 1, 2015) [hereinafter *Crisis of Consent*], [http://www.abajournal.com/magazine/article/lawyers\\_are\\_dealing\\_with\\_changing\\_rules\\_on\\_college\\_sexual\\_assault](http://www.abajournal.com/magazine/article/lawyers_are_dealing_with_changing_rules_on_college_sexual_assault).



confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”<sup>122</sup> There are three different standards which “serve[] to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”<sup>123</sup> In cases involving monetary disputes between private parties, a mere preponderance of the evidence standard is used because society has a minimal concern with the outcome.<sup>124</sup> In criminal cases, however, a beyond a reasonable doubt standard is imposed due to the magnitude of the interests of the defendant and to “exclude as nearly as possible the likelihood of an erroneous judgment.”<sup>125</sup> The intermediate clear, unequivocal, and convincing standard is used to protect particularly important individual interests in civil cases, such as deportation and denaturalization.<sup>126</sup> The standard is also used in cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.<sup>127</sup> The Supreme Court has said that “[t]he 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>128</sup>

Regardless of whether it is a government-imposed standard or a standard chosen by a university, a preponderance of the evidence standard is an inappropriate legal standard to use during a sexual assault campus disciplinary proceeding. In these cases, defendants do not face monetary consequences; rather, they face expulsion and stigmatization, and as a result are often not able to transfer to other schools or find employment.<sup>129</sup> Additionally, those found guilty of sexual assault face substantial reputational injury in their professional and social lives.<sup>130</sup> This can result in total destruction of a defendant’s future. Due to the magnitude of the interests involved in campus sexual assault adjudications, anything less than a

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122. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 424.

127. *Id.*

128. *Id.*

129. *See supra* notes 32–35.

130. *Id.*

reasonable doubt standard provides defendants with an unfairly biased trial.

The Department of Education argues that schools must use a preponderance of the evidence standard to be consistent with Title IX standards because they use a preponderance of the evidence standard in evaluating Title IX complaints that determine school fund termination.<sup>131</sup> It also points to the Supreme Court's use of a preponderance of the evidence standard in civil litigation involving discrimination under Title VII.<sup>132</sup> However, these comparisons fall flat. The issues at stake in Title IX cases, Title VII cases, and any complaints or administrative hearings involving the Department of Education involve monetary issues, not determining a student's guilt in a sexual assault allegation and subsequently expelling the student from college. A college disciplinary proceeding determines whether the accused is guilty, whereas OCR evaluates whether a school's response to the alleged sexual assault was unreasonable.<sup>133</sup> Under a preponderance of the evidence standard, campus adjudications place accused students into a metaphorical prison cell by the most undemanding standard, a standard that society has otherwise deemed unacceptable in a criminal proceeding for the exact same charge.

### B. Cross-examination

Student defendants are oftentimes prohibited from confronting and cross-examining alleged victims and other adverse witnesses.<sup>134</sup> OCR discourages allowing alleged perpetrators from questioning alleged victims because it could be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.<sup>135</sup> Defendants are also prohibited from asking witnesses questions directly in interviews or hearings.<sup>136</sup> If a witness wants

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131. *Dear Colleague Letter*, *supra* note 60, at 11.

132. *Id.* at 10.

133. Hendrix, *supra* note 42, at 610.

134. *See, e.g.*, Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 604 (D. Mass. 2016) (The defendant was not permitted to cross-examine his accuser, either directly or through counsel.); Doe v. Regents of Univ. of Cal., 210 Cal. Rptr. 3d 479, 505 (Ct. App. 2016) (The defendant and his attorney were not permitted to directly cross-examine the accuser, and the Panel Chair asked less than one-third of the defendant's questions.); Carle, *supra* note 31 (In 2011, Yale reported thirteen student sexual assault allegations. None of the accused students were permitted to cross-examine their accusers.).

135. *Dear Colleague Letter*, *supra* note 60, at 12.

136. *Crisis of Consent*, *supra* note 121.

confidentiality, his or her identity is not shared with the accused.<sup>137</sup> However, due to the strong interests of the defendant in avoiding expulsion and permanent stigmatization and the fact that these cases turn on issues of witness credibility, alleged perpetrators should have a right to cross-examine both their accusers and adverse witnesses.

Under the Sixth Amendment, criminal defendants have a constitutional right to confront the witnesses against them.<sup>138</sup> This right is circumvented by using an administrative process rather than a criminal prosecution. While the Supreme Court has not specifically spoken on the right of defendants in campus tribunals to cross-examine their accusers,<sup>139</sup> it has spoken clearly and loudly on the issue of cross-examining witnesses in administrative proceedings, finding that “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”<sup>140</sup> Sexual assault cases almost always turn on questions of fact determined by the credibility of the accuser and accused.<sup>141</sup> Thus, these are the very cases that should require the defendant the opportunity to confront adverse witnesses in order to satisfy fundamental due process. Further, although some courts suggest that at a minimum, cross-examination may be appropriate when asked through a third party<sup>142</sup> (who may pick and choose which submitted questions to ask<sup>143</sup>), this kind of cross-examination is not nearly effective as a cross-examination from a seasoned attorney, who is able to ask effective follow-up questions

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137. *Id.*

138. U.S. CONST. amend. VI.

139. Lower courts have noted that while the right to cross-examination is not one required for due process in school disciplinary proceedings, when a case turns on credibility, the “cross-examination of witnesses might [be] essential to a fair hearing.” *Brandeis Univ.*, 177 F. Supp. 3d at 605 (quoting *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997)).

140. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

141. *See, e.g., Brandeis Univ.*, 177 F. Supp. 3d at 605 (“The entire investigation thus turned on the credibility of the accuser and the accused.”); *Donohue*, 976 F. Supp. at 146 (“[T]he determination of whether sexual misconduct occurred here largely turned on the credibility of [the defendant] and the plaintiff.”); *Doe v. Regents of Univ. of Cal.*, 210 Cal. Rptr. 3d 479, 504 (Ct. App. 2016) (“[T]he Panel’s findings are likely to turn on the credibility of the complainant . . .”).

142. *Donohue*, 976 F. Supp. at 147; *Regents of Univ. of Cal.*, 210 Cal. Rptr. 3d at 504.

143. *Regents of Univ. of Cal.*, 210 Cal. Rptr. at 504–06. The court held that while only nine of thirty-two cross-examination questions were asked, there is no requirement under California law that requires cross-examination in an administrative hearing. *Id.* at 504. It then listed some of the questions not asked at the hearing, and held that the procedure was fair because those questions had already been asked or the answers had already been provided either in the report prepared by the school, in another part of the hearing, or in other documents provided to the panel. *Id.* at 505–06. This is contrary to the cross-examination process in any civil or criminal trial.

depending on a complainant's answers. Undoubtedly, a defendant accused of sexual assault should have the right to fully cross-examine both the complainant and other adverse witnesses.

### C. Right to Counsel

While OCR does allow schools to permit parties to have lawyers at any stage of the proceedings, it does not *require* schools to allow them.<sup>144</sup> The Campus SaVE Act does allow parties to have an advisor of their choice present at a hearing, but does not specify whether this may be an attorney or whether the advisor may speak.<sup>145</sup> Many universities either do not allow for attorneys at all or severely limit the scope of an attorney's representation.<sup>146</sup> For example, in one case, an attorney was allowed to participate up until the most important part of the process—the hearing itself.<sup>147</sup> This means that despite defendants being subject to a preponderance of the evidence standard used in civil cases, they are oftentimes not offered the same protection of having an attorney present.<sup>148</sup>

First, students should have the right to hire their own attorney in campus sexual assault tribunals.<sup>149</sup> Without an attorney present, students may either choose to fully defend themselves and risk self-incrimination and exposing strengths and weaknesses of their case to a criminal prosecutor, or choose to not contest the school's charges and face expulsion. Further, if a student is prohibited from cross-examining his or her accuser and is also prohibited from having an

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144. *Dear Colleague Letter*, *supra* note 60, at 12.

145. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(5), 127 Stat. 54, 91 (2013) (codified at 20 U.S.C. § 1092(f)(8)(B)(iv)(II)).

146. *Rethink Harvard's Sexual Harassment Policy*, *supra* note 67.

147. *Regents of Univ. of Cal.*, 210 Cal. Rptr. 3d at 503.

148. *Writer Says That Some Who Believe College Rape Cases Should Be Handled by the Criminal Justice System Are Practicing 'A Subtle Misogyny'*, CMTY. OF THE WRONGLY ACCUSED (May 18, 2015, 8:58 AM), <http://www.cotwa.info/2015/05/writer-says-that-some-who-believe.html>.

149. Eugene Volokh, *Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, VOLOKH CONSPIRACY (Feb. 19, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints> (Fundamental fairness requires “the right to the assistance of counsel in preparation for and conduct of the hearing.”); *Rethink Harvard's Sexual Harassment Policy*, *supra* note 67 (raising concerns about “[t]he failure to ensure adequate representation for the accused”); see *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 604 (D. Mass. 2016) (“Brandeis engaged an outside attorney, presumably with years of experience and training, to investigate and prosecute serious charges of sexual assault and other sexual misconduct. But it expected a student, approximately 21 years old, with no legal training or background, to defend himself, alone, against those same charges.”).

attorney, any kind of meaningful cross-examination is impossible. With an issue as serious as sexual assault, which oftentimes hinges on witness credibility, students should undoubtedly have the right to hire their own attorney.

Second, not only should students be allowed attorneys, but defendants unable to afford counsel on their own should be provided an attorney.<sup>150</sup> The criminal system has long recognized the constitutional right to court-appointed counsel for those who cannot afford an attorney.<sup>151</sup> However, by adjudicating sexual assault crimes through campus tribunals rather than the criminal system, this right is completely evaded. Thus, student defendants face harsh criminal-like penalties for recognized violent crimes, yet they are not provided the same constitutional safeguards.

#### *D. Inherent Bias*

Rather than an unbiased jury deciding guilt, biased school administrators who have strong financial incentives decide responsibility in these cases. College campuses have enormous financial incentives in sexual assault cases because acquitting an accused student carries the threat that OCR could exercise its enforcement authority.<sup>152</sup> If found guilty in such an investigation, a college could face losing over half a billion dollars in federal funding.<sup>153</sup> All but a handful colleges in America depend on these finances to run, and could be forced to shut down without them. Even if schools did not shut down, students could lose desperately needed grant and loan money,<sup>154</sup> forcing them to pay tuition out-of-pocket or drop out of school.

As a result of OCR investigations, many schools have set out harsh reform policies to their sexual assault procedures in an effort to avoid losing federal funding.<sup>155</sup> For example, in July 2014, as a result

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150. See *Rethink Harvard's Sexual Harassment Policy*, *supra* note 67 (raising concerns about “[t]he failure to ensure adequate representation for the accused, particularly for students unable to afford representation”).

151. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

152. Henrick, *supra* note 38, at 81.

153. *Id.*

154. See *Fast Facts: Financial Aid*, NAT'L CTR. EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=31> (last visited Aug. 7, 2016) (In 2013–14, 85% of students at four-year undergraduate institutions received financial aid.).

155. *Rethink Harvard's Sexual Harassment Policy*, *supra* note 67. Fifteen years prior to these OCR investigations, Justice Kennedy warned that “[t]he prospect of unlimited Title IX liability

of being investigated for Title IX violations, Harvard University introduced a new university-wide policy aimed at preventing sexual harassment and sexual violence based on gender, sexual orientation, and gender identity.<sup>156</sup> Twenty-eight Harvard Law professors wrote a letter, calling the policy “inconsistent with many of the most basic principles we teach.”<sup>157</sup> They described how it lacked the basic elements of fairness and due process and how it was overwhelmingly stacked against the accused.<sup>158</sup>

Schools also run the risk of being sued by individual students under Title IX violations, which could cost them millions of dollars.<sup>159</sup> In fact, there have been several high-profile monetary settlements for complainants, including *Simpson v. University of Colorado*, which settled for \$2.85 million, and *Williams v. Board of Regents of the University System of Georgia*, which settled for an undisclosed six-figure sum.<sup>160</sup> While sexual assault complainants may sue a university over deliberate indifference to a sexual harassment grievance, student defendants face a more difficult path, as they are required to show an erroneous finding that occurred as a result of sex bias.<sup>161</sup> This means that even if a school reacts to an accused student’s innocence with deliberate indifference, the student has no established Title IX right “per se indicative of sexual discrimination.”<sup>162</sup> Therefore, to avoid risk, colleges have a strong incentive to convict accused students.<sup>163</sup> This effectively creates a loophole around the Supreme Court’s decision in *Morrison*.<sup>164</sup> Rather than complainants suing their alleged attackers directly, alleged victims simply incentivize schools to punish those accused of

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will, in all likelihood, breed a climate of fear.” *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 681 (1999) (Kennedy, J., dissenting).

156. *Rethink Harvard’s Sexual Harassment Policy*, *supra* note 67.

157. *Id.*

158. *Id.*

159. Henrick, *supra* note 38, at 74–75.

160. *Id.*

161. *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). However, while the two-prong test established in *Yusuf* still remains in effect, the Second Circuit recently eased the required pleading standard, adopting the *McDonnell Douglas* burden-shifting framework set forth in Title VII cases. Thus, to survive a motion to dismiss, a student must merely allege facts that support a minimal plausible inference that (1) there was an erroneous finding, and (2) sex bias was a motivating factor behind the erroneous finding. *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016); *Yusuf*, 35 F.3d at 715.

162. Henrick, *supra* note 38, at 75.

163. *Id.* at 74.

164. *Id.*

sexual violence in order to avoid costly lawsuits.<sup>165</sup>

In addition to financial interests, schools have an interest in maintaining their reputation, and administrators have personal interests in keeping their jobs.<sup>166</sup> While in the past a school's interest in its reputation caused "shameful indifference to sexual assault,"<sup>167</sup> colleges today have an interest in not "being branded 'soft' on sexual assault by victims' rights groups and by the media."<sup>168</sup> In fact, one school administrator noted he acted in ways he could not justify to himself out of fear for his institution's reputation:

[M]y 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 the line in a way I sometimes have trouble justifying to myself.<sup>169</sup>

Additionally, unlike the criminal system, which has separate entities performing various aspects of the case, a university performs the "functions of investigation, prosecution, fact-finding, and appellate review in one office, and . . . that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial."<sup>170</sup> Wielding absolute authority, "[t]hey evaluate the evidence and determine the facts. Without attorneys present to counter unreasonable claims or object to a line of questioning, nervous panelists often subject witnesses to random and/or incriminating questions."<sup>171</sup> An impartial trial with fair evidence is simply nonexistent when the investigator, prosecutor, judge, and jury are one and the same.<sup>172</sup> Sixteen Pennsylvania Law School professors wrote a letter asking why the federal government requires such serious cases to be handled by academics in campus

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165. *Id.*

166. *Id.* at 81.

167. *Id.* at 82.

168. *Id.*

169. *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students>.

170. *Rethink Harvard's Sexual Harassment Policy*, *supra* note 67.

171. *Id.*

172. *See Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 606 (D. Mass. 2016) ("The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious.").

adjudications, rather than by professional judges and lawyers.<sup>173</sup> They propose that “[p]erhaps it is time to funnel the more serious cases through the criminal justice process and to make that process much more accessible to and supportive of sexual assault complainants.”<sup>174</sup> Indeed, perhaps it is time to let the justice system do what it is designed to do.

Finally, universities suffer from bias due to the particular ideological beliefs of the institution.<sup>175</sup> Universities strongly favor rights of female complainants and presume male defendants guilty before proven innocent. For example, at Stanford University, the school training manual instructs judicial panelists that “persuasive and logical” behavior is a sign of defendant’s 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. The great majority of allegations of abuse—though not all—are substantially accurate. An abuser almost never ‘seems like the type.’”<sup>176</sup> At Duke University, Dean Sue Wasiolek stated that if a male and female were both unable to give consent because they were intoxicated, “it is the responsibility in the case of the male to gain consent before proceeding with sex.”<sup>177</sup> Ironically, these instructions create the very sex discrimination they were meant to prevent. They favor female complainants and shatter the fundamental basis of our justice system, which presumes a defendant is innocent until proven guilty.

A general training guide used by universities also largely favors the rights of the accuser, with the tips favoring a panelist to find guilt.<sup>178</sup> For example, one of the “tips” states: “False allegations of rape are not common.”<sup>179</sup> The “tip” explained this by stating that

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173. Volokh, *supra* note 149.

174. *Id.*

175. Henrick, *supra* note 38, at 83.

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

177. KC Johnson, *Duke, Grossly Unfair Again, Is Back in Court*, MINDING THE CAMPUS (May 29, 2014), [http://www.mindingthecampus.com/2014/05/duke\\_grossly\\_unfair\\_again\\_is\\_b](http://www.mindingthecampus.com/2014/05/duke_grossly_unfair_again_is_b).

178. KC Johnson, *How Judges of Campus Sex Offenses Are ‘Trained’*, MINDING THE CAMPUS (Oct. 28, 2014), <http://www.mindingthecampus.org/2014/10/how-judges-of-campus-sex-offenses-are-trained>.

179. U. OF PA., SEXUAL MISCONDUCT COMPLAINTS: 17 TIPS FOR STUDENT DISCIPLINE ADJUDICATORS (TEMPLATE) (2012), <http://www.legalmomentum.org/sites/default/files/reports/Guide%20for%20Discipline%20Panels%20on%20Sexual%20Violence%20for%20Distribution.doc>.



recent research at a major northeastern university suggested that over a ten-year period, 5.9% of its cases involved false allegations and that “reputable” research placed the rate in the general population between 2% and 10%.<sup>180</sup> However, data suggests that this number ranges from 9% to 50%.<sup>181</sup> Further, despite explaining that this “tip” is based on “reputable” research, the guide provides only one citation.<sup>182</sup> The sole citation is an article co-authored by David Lisak, which includes a study of 136 cases over a ten-year period and critiques of other existing research.<sup>183</sup> Notably, the “tip” also fails to explain that Lisak’s study showed that 44.9% of the 136 cases did not proceed to any prosecution or disciplinary action because of insufficient evidence, accusation withdrawal, failure to identify the alleged perpetrator, or mischaracterization of the incident.<sup>184</sup> An additional 13.9% of the 136 cases were unable to be assigned into a category due to insufficient information regarding the incident, such as the victim or alleged perpetrator not being identified.<sup>185</sup> This leads one to wonder what does constitute a false allegation. Lisak defines it narrowly: “The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted.”<sup>186</sup> Essentially, it is only a false allegation if there is a zero percent chance the accused student is guilty.<sup>187</sup> Not only is this tip based on a disputed statistic, but it essentially dispels the need to look at the facts in the case because by definition, the facts are irrelevant.<sup>188</sup> The allegation alone implies guilt. Therefore, our system of jurisprudence is highly distorted. On the other side of the spectrum, some schools treat athletes as demi-gods,<sup>189</sup> presuming

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180. *Id.*

181. STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 374–75 (2007).

182. U. OF PA., *supra* note 179.

183. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010), <https://icdv.idaho.gov/conference/handouts/False-Allegations.pdf>.

184. *Id.* at 1328–29.

185. *Id.*

186. *Id.* at 1319.

187. Johnson, *supra* note 178.

188. *Id.*

189. Valerie Strauss, *How Many Colleges Mishandle Sexual Assault Cases—And What to Do About It*, WASH. POST (July 31, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/07/31/how-many-colleges-mishandle-sexual-assault-cases-and-what-to-do-about-it>.

them innocent even when there may be clear evidence showing guilt. It is the same problem, but with a different predetermined outcome. Justice must be objective and blind; campuses are neither.

#### IV. CONCLUSION

There is no doubt that campus adjudications suffer from a serious lack of due process for the accused. However, campus adjudications cannot be “fixed” by adding more due process rights for defendants because fundamentally, campus adjudications cannot ever provide the proper level of due process. Even if OCR amended its guidelines and mandated a beyond a reasonable doubt standard, right to counsel, and right to cross-examine adverse witnesses, the trial would still suffer from extreme bias and clear conflicts of interest. A fair trial is impossible when a school administrator plays the roles of investigator, prosecutor, judge, and jury. It is impossible when the person playing these roles also suffers from personal and financial incentives. Ultimately, “[a] school is an academic institution, not a courtroom or administrative hearing room,”<sup>190</sup> and it is impossible for a school to fairly adjudicate a recognized violent crime.

Campus sexual assault adjudications represent a shift in attempting to circumvent the existing legal apparatus in favor of a regulatory apparatus to adjudicate criminal behavior. In the effort to accomplish this, a violent crime has been turned into a simple act of discrimination. Defendants in these proceedings have lost basic and fundamental due process rights and the very biases our justice system aims to eliminate are pushed to the center stage. These kangaroo courts created by the Department of Education and college campuses are the antithesis of our justice system and should be eliminated to ensure the ideals of justice, liberty, and freedom on the very campuses these procedures purportedly serve to protect. We all agree that criminal behavior does not belong on campus. But neither does its adjudication.

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190. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88 (1978).

