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It's Not Complicated: Containing Criminal Law's Influence on the Title IX Process

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Abstract

Title IX processes that address campus sexual assault are undergoing dramatic changes in structure as well as in review. After receipt of the Department of Education's 2011 "Dear Colleague" letter, colleges and universities were impelled to review how their institutions were implementing Title IX. From website information through decision making on alleged violations, the ways in which higher education addresses federally guided changes is a matter of national conversation. This essay addresses change in light of campus sexual assault allegations, and does not explicitly address other forms of Title IX complaints, such as athletic funding and opportunities. This essay will limit discussion to sexual harassment and sexual discrimination Title IX claims only, particularly, sexual assault.

The primary topic of ongoing concern is how Title IX investigations and hearing processes are conducted. Review, and in some cases revision, of campus policies was prompted by two interconnected influences. The first was the referenced letter from the Department of Education, and the second was due process and other criticism by those who advocate within the criminal justice framework. This essay explores the impact that criminal law and criminal lawyers have had on the Title IX processes. Part of this exploration will include the recently released ABA Criminal Justice Section's recommendations on how Title IX sexual harassment complaints should be handled. Unknown at the time of this writing is whether the administration will be influenced by these recommendations. As of this publication Secretary DeVos has met with representative survivors and their advocates, as well as those who claim to have been wrongfully accused. At a minimum we know that the topic has her attention. As this publication goes to print, Secretary DeVos has requested comments on de-regulation in "Enforcing the Regulatory Reform Agenda." We can anticipate change, when and what is undetermined at this time.

Incorporated throughout this discussion will be the complications, as well as changes, that develop when the Title IX process is viewed through a criminal justice lens. Particularly explored, is how the stereotypes regarding women's credibility

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forms the foundation of challenges faced by survivors of sexual assault who seek relief. The last section of this essay addresses proposed recommendations to address the needs of those accused as well as protecting the harmed student.

I. Background

In October 2014, 28 Harvard Law Professors published a letter protesting changes Harvard made to its Title IX investigation and hearing processes that are triggered upon receipt of Title IX sexual assault reports.[1] Their letter followed an investigation by the Office of Civil Rights of the Department of Education (DOE). Harvard University and Harvard Law School were under investigation for possible violations of Title IX[2] obligations regarding sex discrimination and sexual abuse allegations.[3] Those institutions certainly were not alone. Scores of institutions of higher learning were investigated around the same time and some investigations remain ongoing.[4]

Previously, in 2011, the DOE issued a "Dear Colleague" letter (DCL) to campuses around the country addressing the need for uniformity, with some flexibility, in how campuses handle sexual assault complaints.[5] Sexual assault is the most

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[1] Title IX is that portion of the Civil Rights Act of 1964 that incorporated the "Educational Amendments" of 1972. 20 USC Sec. 1681-1688 (2006) Sec. 1681 specifically states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

[2] See Press Release, U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i

[3] Many other institutions of higher education were investigated, as well. Some of those investigations are ongoing. The focus on Harvard for the initial portion of this article stems from the reactions of a portion of the faculty who, unlike other faculties, were proactive in their criticism of the newly enacted policies.

[4] Nick Anderson, At first, 55 schools faced sexual violence investigations. Now the list has quadrupled., Wash. Post (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm_term=.76829a0cd2ba

[5] Russlynn Ali, Dear Colleague Letter, U.S. Dept. of Ed., Office for Civil Rights, 4 (April 4, 2011). The Obama administration, especially Vice-President Biden, continued working on this issue through the White House Task Force to Protect Students from Sexual Assault. For the taskforce's reports, see: First Report "Not Alone", https://www.justice.gov/ovw/page/file/905942/download; Second Report https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF; and Fact Sheet https://obamawhitehouse.archives.gov/the-press-office/2015/09/17/fact-sheet-resource-guide-and-recent-efforts-combat-sexual-violence

underreported violent crime[6] which means that it is also one of the least addressed on campus, with only 5% of attempted or completed rapes reported.[7]

The DCL followed many years of indifference and confusion over how to handle complaints of campus related sexual assault. For decades colleges and universities virtually ignored sexual assault complaints, often advising the complainant to seek therapy, take time off from school, or transfer.[8] When a hearing was held, the standard of proof employed was not uniform. "Preponderance of the evidence", "clear and convincing" and "beyond a reasonable doubt" were used at the discretion of the institution.[9] An early study revealed that students reporting violations were frequently ignored during the course of a school's investigation. Often the accused would be kept apprised of an investigation's status, but not the accuser.[10]

Among other things, the DCL instructed campuses to use the civil "preponderance of the evidence" standard when determining whether the accused should be found responsible for the alleged assaultive behavior. In so doing, the Vice-President clarified that use of the lower civil standard was not optional.[11] The letter addressed other concerns, such as the right of accusers to appeal a finding that the accused is "not responsible" for the conduct alleged.[12] Contemporaneously, the Department of Education (DOE) and the Department of Justice (DOJ) announced investigations into schools alleged to have violated Title IX.[13]

As part of the settlement agreement with DOE, Harvard amended its sexual assault policy to incorporate DOE's recommendations, adopting the tenets set out in the

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[6] Heather M. Karjane, Bonnie S. Fisher and Francis T. Cullen, Sexual Assault on Campus: What Colleges and Universities are Doing About It (2005) https://permanent.access.gpo.gov/lps66801/205521.pdf at ii.
[7] Id at 3.
[8] Andrea A. Curcio, Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law, 78 Mont. L. Rev. 31, 32 (2017); Campus Sexual Assault: Emerging Issues in Title IX Investigations and Litigation, Massachusetts Continuing Legal Education, June 16, 2017

[9] Condor Friedersdorf, What Should the Standard of Proof Be in Campus Rape Cases? The Atlantic (June 17, 2016), https://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505/, Jake New, Supermajority Requirement in the Minority, Inside Higher Ed (Jan. 6, 2017), https://www.insidehighered.com/news/2017/01/06/few-colleges-use-controversial-sexual-misconduct-policy-adopted-stanford; Karjane, Bonnie S. Fisher & Francis T. Cullen, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120, 122 tbl.6.12 (2002).
[10] Campus Sexual Assault Supra, note 6 at 11.
[11] Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts (April 4, 2011), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html
[12] Id.
[13] Department of Justice and Education Research Agreement with Tehachapi, California, Public Schools to Resolve Harassment Allegations (July 1, 2011). https://www.justice.gov/opa/pr/departments-justice-and-education-reach-agreement-tehachapi-california-public-schools-resolve

2011 DCL. In so doing, the school came into line with many other colleges and universities regarding the handling of sexual assault complaints. The Harvard revisions added nothing new to the Title IX debate or process. The revisions did not set any new standards or introduce innovative processes. The faculty commentary that followed, however, gave renewed life to the criticism of how Title IX investigations and hearings are conducted. The critique by the Harvard faculty of Title IX campus process was not the first. Earlier, members of University of Pennsylvania's law faculty had raised like concerns.[14] But the Harvard faculty grievances were more public.[15]

Both the status and stature of the complaining Harvard professors brought notice and publicity to their grievances, reopening the debate not only as to the Title IX hearings' standard of proof, but to other concerns addressed within a criminal due process framework. While certainly due process protections must be addressed within the Title IX process, the commentary that followed was at times overstated. The Boston Globe noted that Alan Dershowitz called the new policy "political correctness run amok."[16] That statement betrays a lack of understanding of why the lower civil standard was deemed necessary, a topic to be explored below. A difficulty that arises in viewing the Title IX hearing process through a criminal defense lens is that one can lose sight of the fact that the Title IX process is indeed a *civil* matter. Due process protections are a concern for all involved. Indeed, many schools have responded to due process complaints by instituting additional protections for the accused, as will also be addressed below. But fundamentally, the design of Title IX hearings largely avoids being like criminal or civil court proceedings in significant ways and certainly are not intended to supplant hearings held within the justice system frameworks.

II. Perspectives

Sexual assault and other gender-violence allegations are serious ones that have enormous consequences both for the accused and for the harmed student.[17] Title IX

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[14] Schow, Ashe, UPenn law professors speak out against new campus sexual assault policy, Wash. Examiner, (Feb.18, 2015), http://www.washingtonexaminer.com/upenn-law-professors-speak-out-against-new-campus-sexual-assault-policy/article/2560365

[15] Travis Anderson, Harvard Law Professors Want University's New Sexual Harassment Policy Changed, Boston Globe (October 15, 2014) (accessed July 23, 2017 8:44 PM). https://www.bostonglobe.com/metro/2014/10/14/harvard-law-professors-want-university-new-sexual-harassment-policy-changed/HZ72eaMcLgRgoq4DL9ZBOO/story.html

[16] Id.

[17] This discussion is not intended to dismiss concerns of due process and fundamental fairness. To its credit, Harvard Law School appointed a committee to study the concerns. This article focuses, however, on the failure of the professors to considering why civil, and in particular Title IX hearings, are deliberately designed in ways that would not be appropriate in the criminal justice system.

is intended to be an educational process, as well as one that determines whether a student has violated a school's honor code.[18]

The educational component of Title IX inquiry and decision-making is often overlooked but has been recognized as an institutional goal for decades.[19] The goal of many Title IX administrators is to institute effective remedies to gender based harassment so that the student who has been harmed can be provided a remedy that restores safety to the greatest extent possible. Contemporaneously, where feasible, the institution looks to seize educational opportunities that might assist in avoiding future violence or other complained of behavior.[20] Educators and campus administrators are fully aware that, in many cases, student offenders are of an age where their brains are not yet fully developed.[21] Separating out the chronic misogynist and the serial rapist from the newly arrived, intoxicated freshman who may be capable of reform is part of the Title IX goals of many colleges and universities. None of the cited circumstances mitigate what has been done to and needs to be done for the harmed student. Nor should those factors necessarily mitigate the consequences for the offending student. But what it does provide is an opportunity for the school to engage the student in educational measures, which may reinforce the school's preventive ones.

This educational component makes the Title IX process unique among available remedial choices. And it makes the university's goals decidedly unlike the purpose and goals of the criminal justice system.[22] Title IX administrators have no power to enter sanctions that would result in the accused's registration as a sex offender.

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[18] Katherine Baker, Deborah Brake, and Nancy Chi Cantalupo Title IX and the Preponderance of the Evidence: A White Paper, (2016) at 7 http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf

[19] Larry A. DeMatteo and Don Weisner, Academic Honor Codes: A Legal and Ethical Analysis, 19 S. Ill. U. L.J. 49 (Fall, 1994). Nowhere in the cited article do the authors address sexual offenses. Other articles authored in the same era likewise fail to mention sexual offenses. See for example, Kimberly C. Carlos, The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes, 65 UMKC L. Rev. 937 (Summer, 1997).
This omission gives support to why there was a need to implement Title IX and other legislation that addresses gender based concerns.

[20] See Beth Howard, How Colleges Are Battling Sexual Violence, U.S. News & World Report (Aug. 28, 2015), https://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence

[21] Recent information is that human brains do no fully develop until the mid-twenties. See MIT's Young Adult Development Project http://hrweb.mit.edu/worklife/youngadult/brain.html and related studies.

[22] Brad J. Reich, When is Due Process Due: Title IX "The State," And the Public College and University Sexual Violence Procedures, 11 Charleston L. Rev. 1 (2017), https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html (If college rape trials become a substitute for criminal prosecution, they will paradoxically help rapists avoid the punishment they deserve and require in order for rape to be deterred.)

Nor can administrators recommend or order criminal remedies, such as incarceration. Indeed, the scope of remedies available to universities and colleges is limited, the most severe sanction being expulsion. While a limited number of schools suggest that expulsion be considered whenever a sexual assault is found to have occurred,[23] expulsion is no longer the favored or most common consequence.[24] Some students found responsible and expelled for sexual assault may have difficulty enrolling in successor institutions of higher learning based upon the case notoriety. But most do not. Expulsion based on Title IX violations is not always a bar to later enrollment in a different or the same school.[25] Most universities will not automatically note the cause of expulsion on a student's record.[26] Yet this reality goes unacknowledged in much of the discourse which focuses on difficulties faced by the responsible student and leaves unmentioned the financial, emotional and psychological harm of the survivor.

Following the Harvard professors' pronouncement was a series of public complaints by criminal defense attorneys. In one interview, Harvey Silverglate, an experienced Boston defense attorney, called the current situation the "Campus Sexual Assault Panic."[27] He likened the current Title IX investigations to McCarthyism and other frenzies that saw hundreds banished and otherwise punished for exercising basic rights. The analogies falter, however, because campus sexual assault is a real and widespread problem.[28]

The sexual assault risk for entering college women[29] is higher than for women in the general population.[30] Female college students' risk of sexual assault in earlier

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[23] See Carleigh Stiehm, Duke Changes Sanctioning Guidelines for Sexual Assault Cases, The Chronicle (July 9, 2013) (accessed July 23, 2017 8:20 PM) http://www.dukechronicle.com/article/2013/07/duke-changes-sanctioning-guidelines-sexual-assault-cases

[24] See Nick Anderson, Colleges Often Reluctant to Expel for Sexual Violence – with U-Va. A Prime Example, The Wash. Post (December 15, 20140. https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html?utm_term=.a1261a2f6360

[25] See Tyler Kingkade, How Colleges Let Sexual Predators Slip Away to Other Schools, HuffPost (Oct. 23, 2014), http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html

[26] Id. (The offense won't necessarily show up on a transcript. And administrators can simply note in a student's file that he or she faced disciplinary action without recording actual details.)

[27] Harvey Silverglate, The New Panic: Campus Sex Assaults, The Boston Globe (Feb. 20, 2015) (accessed July 23, 2017 at 8:18 PM) https://www.bostonglobe.com/opinion/2015/02/20/the-new-panic-campus-sex-assaults/0X0a9RoCySmrLUMFQ73kWM/story.html.

[28] Rebecca Campbell & Sharon M. Wasco, Understanding Rape and Sexual Assault, 20 J. of Interpersonal Violence (2005).

[29] Supra, note 6 at ii All references to women includes transwomen.

[30] Surpa,note 6 at 2.

studies was placed at 20%.[31] A 2015 report placed the rate[32] of undergraduate females at-risk for sexual assault at more than 26%.[33] The rate for transgender, genderqueer and other gender non-conforming students is even greater, at more than 29%.[34] While the rate of completed forced rapes and rapes while the target is impaired declines from freshman to senior year, the rate of other forms of unwanted sexual contact does not.[35] The rate of reported campus sexual assaults, even for completed rapes, is only 28%.[36] Concerns regarding campus sexual assault is neither frenetic nor hyperbolic.

For decades, campuses either refused to address sexual assault or resolved the problem by forcing the harmed student to leave the school.[37] All was done without any semblance of a hearing or other formal opportunity for a harmed student to be heard. Slowly, campus administrators began to admit that sexual assault is a campus problem.[38] But institution of a hearings process did nothing to eliminate bias against women. Indeed, in 2002, then President of Harvard University, Lawrence Summers, announced that sexual harassment/assault cases would not trigger any action by the school unless the allegations were corroborated.[39] Advocates for sexual assault survivors were shocked and one filed a complaint with DOE's Office of Civil Rights (OCR) claiming that the new requirement was based in gender discrimination. The basis of the claimed discrimination was that because most sexual assault complaints are filed by women and they would, therefore, bear a disparate impact from the changed policy.[40] An investigation followed.[41] In 2003,

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[31] Id.
[32] Readers of the AAU report referenced in footnote 33 are cautioned that rates vary from campus to campus.
https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf
[33] David Cantor, Bonnie Fisher et al, Report on AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, Association of American Universities, Sept. 2015 @xiii,
https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pd
[34] Id @ iv
[35] Id.
[36] Id.
[37] Joseph Shapiro, Campus Rape Victims: A Struggle for Justice, NPR (Feb. 24, 2010) http://www.npr.org/templates/story/story.php?storyId=124001493 (The result is that large numbers of women who say they've been assaulted feel dissatisfied with the results, and large numbers of women end up leaving school.)
[38] This should not be confused with a school's developing competency in the subject matter. Recognition of the problem and designing appropriate responses are separate matters.
[39] Victory for Fundamental Fairness at Harvard, Foundation for Individual Rights in Education (April 8, 2013) (accessed July 23, 2017 8:25 PM) https://www.thefire.org/victory-for-fundamental-fairness-at-harvard/
[40] See Id. detailing how survivors' attorney Wendy Murphy filed the underlying complaint.
[41] Roxanne Tinger, As Harvard Faces Investigation, GI Policy Appears Acceptable, The Hoya (Aug. 30, 2002) http://www.thehoya.com/as-harvard-faces-investigation-gu-policy-appears-acceptable/

OCR found the demand for corroboration did not have a disparate impact upon women. This particular requirement was found not to be discriminatory because the right to file a complaint remained available and the policy would be applied to all complainants regardless of sex.

"Harvard officials said their policy was implemented to prevent unnecessarily long and troublesome investigations in cases that ultimately lack a definitive conclusion. It was created upon recommendation of a faculty committee investigating sexual assault cases on campus."[42]

Eventually, however, the corroboration requirement was withdrawn. But Summers had already received an opinion from Harvard counsel that the Title IX complaint over the policy had no legal validity.[43]

Those who advocate for sexual assault survivors were outraged on two fronts. They saw the corroboration requirement as ignoring the reality of how and where sexual assault happens: in private and without witnesses. While Summers cited an email as possible corroborative evidence, advocates knew that email exchanges following an assault often do not reference any assault and that any communication at all is more likely to be used against the survivor.[44] If requiring corroborating evidence were the legal norm, even fewer sexual assault cases would be prosecuted. "Eyewitnesses and physical evidence (in sexual assault cases) are rare."[45]

Secondly, many survivors and their advocates viewed the demand for corroborating evidence as an extension of the old, but thriving, myth that women lie. And that women particularly lie about sexual assault.[46] Although this myth has been disproved over and over again,[47] it remains the platform from which demands for corroboration spring. This topic will be explored further.

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[42] Supra, note 12

[43] The Crimson, *Government Begins Probe of Sexual Assault Policy*, Aug. 9, 2002 http://www.thecrimson.com/article/2002/8/9/government-begins-civil-rights-probe-of/

[44] Susan Chira, A Post-Cosby-Trial Question: Is the System Stacked Against Women? N.Y. Times (June 20, 2017), https://www.nytimes.com/2017/06/20/arts/television/bill-cosby-mistrial-sexual-assault-andrea-constand.html (Discusses the ways in which the odds are stacked against sexual assault victims at trial)

[45] Bernice Yeung, A Problem of Evidence, Huff Post (Nov. 14, 2013), http://www.huffingtonpost.com/bernice-yeung/sexual-assault-rape_b_3917144.html

[46] Lindsay Brice and Caroline Palmer, *Understanding Title IX Investigations*, 74-Feb Bench & B. Minn.24, 26 (2017) citing Kimberly Lonsway, Joanne Archambault, David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 2, The Voice, http://ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf stating that between 2-8% of sexual assault reports made to police are false. This percentage range is no doubt high because sexual assault survivors are not often treated well by police due to gender bias (see Brice and Palmer at 26) and unless trained, police will consider inconsistencies in reports as evidence of falsity.

[47] http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf

III. Confusion and Conflation Between The Criminal, Civil Justice and Title IX Systems

Confusion between the Title IX and criminal justice adjudication processes has been ongoing and significant. The confusion exists among the general public as well as on campus.

Authors Brice and Palmer wrote about a Minnesota case where the prosecutor, to the outrage of the general public, failed to prosecute members of an athletic team who were alleged to have sexually assaulted a woman.[48] The general public did not understand that there could be consequences for the students through the Title IX process despite the lack of criminal prosecution. The general public did not understand that educational institutions have the ability to enter sanctions even if a case does not proceed within the criminal justice system. "This belief reflected a pervasive misunderstanding of the campus investigation and adjudication process, which is completely independent from the criminal justice system."[49]

Likewise, unknown and unappreciated by the general public, is the confusion that results when the state fails to prosecute any sexual assault case. When the fundamental issue is whether or not consent to sexual conduct was given, prosecutors often decline to charge the alleged assailant. The reason for this outcome is unrelated to whether the crime happened, but results from the prosecutor's perceived likeliness of success. When the two parties are the only witnesses to the assault, juries tend to favor the accused.[50] Likewise, declining prosecution is a common outcome of sexual assault cases when alcohol is involved.[51] Declination does not mean that a crime did not happen. Declination merely reflects the difficulty prosecutors face in bringing successful sexual assault complaints.

More criticism resulted from the DCL's instruction that survivors have a right of appeal. As earlier referenced, the DCL clarified that accusers, as well as the accused, have a right to appeal a decision by the Title IX adjudicators. For example, the accuser might wish to appeal a decision that the accused is not responsible for

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[48] Lindsay Brice and Caroline Palmer, supra, note 39

[49] Id at 25

[50] Dudley, Sara F., Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements, 46 Golden Gate U. L. Rev. 117, 130 (2016).

[51] Teresa P. Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault, American Prosecutors Research Institute, August 2007 advising prosecutors to follow a three-part approach to dealing with alcohol-facilitated sexual assault consisting of 1) Making a changing decision, 2) analyzing credibility and corroboration where they weigh everything from the victim's ability to remember to the victim's likability, and 3) trying the case

the alleged behavior or that the behavior did not violate school policy. In an opinion appearing in the Washington Post, a popular blog contributor stated: "The letter required universities to allow accusers to appeal not-guilty findings, a form of double jeopardy." Two misconceptions are encompassed in the quote. Title IX adjudicatory panels do not decide guilt, they decide responsibility. Also, double jeopardy is a criminal concept unrelated to civil matters.[52] As with most civil decisions, results of a civil process are inadmissible in a related criminal proceeding so there is no risk of double jeopardy. [53]

Some universities compound the conflation of civil and criminal processes by using criminal terminology when referencing Title IX hearings. For example, one school's Title IX policy requires that a "prosecution team" be assembled to investigate an honor code complaint.[54] This misuse of language is not a new dilemma. In a 1997 article, the author references Northwestern University's requirement that the "prosecutor" disclose all information to the accused.[55]

Some commentators and practitioners add to the confusion between the civil and criminal worlds by referring the Title IX process as "quasi-criminal". The process is not criminal. The process may elicit evidence that a crime has been committed, but the Title IX process does not substitute, nor is it intended to substitute, for the criminal process. Other civil hearings uncover evidence that could be used to prove crimes. Tort cases seeking remedies for child abuse and wrongful death are two examples. Either matter could involve conduct that is actionable on the criminal side of the law. Simply because a civil matter may have criminal consequences for the accused, does not justify the imposition of criminal-like standards or categorizing it as other than a civil action.

The imposition of criminal standards on Title IX administrators would disable the process, as well further frustrate a harmed student. A claim unsupported by substantial third party evidence would likely be unsuccessful.[56] Title IX administrators are not officers of the court. They need not be lawyers. While there is concern that some administrators are not properly trained to conduct Title IX

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[52] The Volokh Conspiracy, The Path to Obama's 'Dear Colleague' Letter, The Wash. Post (January 31, 2017) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.9839c3a7181d

[53] Jim Titus et al., Double Jeopardy, 81 Geo. L.J. 1219, 1220 (1993)

[54] Washington College of Law of AU

[55] Kimberly C. Carlos, The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes, 65 UMKC L. Rev. 937. 948 (Summer, 1997).

[56] The author represented one student whose case went to the grand jury. The jury refused to indict despite the fact that there two witnesses. The client was passed out from alcohol at the time of the assault.

hearings,[57] that problem is not resolved by converting Title IX hearings into criminal style ones.

"The more federal obligations force colleges and universities to act like prosecutors and courts, the less able educational institutions will be to carry out their basic mission of educating."[58]

IV Title IX Hearings Standard: The Misplaced Focus

Despite the credibility barriers faced by survivors, one of the more contentious debates on Title IX hearings remains the standard of proof used to determine whether an individual is "responsible" for alleged accusations. The DCL made clear that the appropriate standard by which allegations should be judged is "preponderance of the evidence."[59] This standard is routinely employed in civil matters including torts,[60] child custody disputes between parents, worker's compensation, civil rights and an array of other civil matters. All US states employ this standard for civil protection order matters.[61]

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[57] Pushing Back Against the Pushback, 23 Duke Journal of Gender & Law Policy 121,122 citing Jed Rubenfeld, Mishandling Rape, NYT (Nov. 15, 2014).

[58] Smith and Gomez, supra note 15 at 31.

[59] Despite any confusion the public may have between civil and criminal proceedings, the results of a recent poll indicate that when provided with sufficient information to understand the separate nature of Title IX proceedings, responders support the use of the lower civil standard of proof. A recent poll of over 800 voters resulted in several findings that support both the continuation of schools' involvement in the Title IX process relative to sexual assault complaints as well as the continued use of the preponderance of the evidence standard. Among the results of the May, 2017 polling were: U.S. voters view sexual assault as a major issue in the country today. More than nine in ten voters (92%) say that sexual assault is a serious problem, with 63% saying it is a "very serious" problem. When it comes to sexual assault in schools, U.S. voters agree that educational institutions must proactively deal with sexual violence in their schools: 94% of voters nationwide agree that K-12 schools, colleges, and universities have a responsibility to address campus sexual assault, with 83% agreeing "strongly." A similar proportion support using the preponderance of evidence standard in student discipline proceedings—with 94% agreeing that a school should discipline a student who more likely than not raped or sexually assaulted a classmate. The polled voters were initially asked if they approved of the President's performance. The response was 44% approval and 49% disapproval. These responses are important in evaluating other findings because essentially the responders have similar views toward the seriousness of sexual assault, as well as the need for schools to address the problem, without significant regard to party affiliation. The poll was conducted by Public Policy Polls on behalf of the National Women's Law Center and can be found here: https://nwlc.org/resources/voters-nationwide-overwhelmingly-support-title-ix-other-protections-for-survivors-of-college-and-k-12-sexual-assault/

[60] See John Leubsdorf, The Surprising History of the Preponderance Standard of Civil Proof, 67 Fla. L. Rev. 1569 (2015).

[61] Maryland had been the only state using the "clear and convincing" standard for civil protection order hearings. Maryland changed their standard to "preponderance of the evidence" in 2014. https://legiscan.com/MD/bill/SB333/2014

Not surprisingly, victim advocates overwhelmingly argue for the use of the preponderance of the evidence standard.[62] The sexual assault clients they represent have experienced credibility bias and victim-blaming, particularly where they use or have used alcohol or drugs. Survivors have experienced humiliations when cross-examined about their choice of wardrobe and other matters. Their advocates argue that using the preponderance of the evidence standard is necessary to have at least a chance to overcome bias and the standard does not assure survivors of a finding that the responding student will be held responsible.[63]

In 2016 Professors Katherine Baker, Deborah Brake, and Nancy Chi Cantalupo authored a white paper advocating for the continued use of the preponderance of the evidence standard. The white paper was endorsed initially by 60 law professors. That number later climbed to over 100.[64] The professors point out that Title IX complaints address sex discrimination, of which sexual harassment is a component. Forced rape is the extreme physical end of the sexual harassment spectrum. "Sexual harassment, violence and predation are a form of gender *discrimination* and must be dealt with as such." [65] The professors argue that discrimination cases traditionally employ the preponderance of the evidence standard, a standard that is used in civil rights cases.[66] Title IX matters fall squarely under the Office of Civil Rights.[67] "By insisting on such equal treatment of sexual harassment complainants, OCR is ensuring that victims of sexual harassment will be treated no worse than victims of racial and other harassment are when they must prove their allegations."[68] They argue that "[T]he 2011 DCL and in particular its clarification regarding the preponderance standard are fully consistent with the approach of our nation's sexual harassment, antidiscrimination and other civil rights laws."[69]

Of note is the lack of attention this White Paper received among most major news outlets, particularly those that had earlier reported on the 2014 Harvard Law professors' letter. This, even though the white paper was endorsed by more law

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[62] See Elizabeth Sommer, Use of Preponderance of Evidence in Campus Adjudication of Sexual Misconduct, Northern Michigan University, The Commons, 4 (Dec. 2015).
[63] ASCA, The Preponderance of Evidence Standard: Use in Higher Education Campus Conduct, Processeshttp://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf (in favor of preponderance standard)
[64] Supra, note 19 As of this writing 110 law professors have signed the White Paper.
[65] Id. at 4.
[66] Id
[67] Id.
[68] Id.
[69] Id. at 12.

professors than those promoted by the Harvard Law and Penn law faculty members. [70]

V. Systemic Barriers to Successful Criminal Sexual Assault Prosecutions

Sexual assault criminal trials rarely provide relief or remedy for the survivors. "Criminal law has a woeful track record of addressing sexual assault."[71] This should be sufficient reason why we would be wise to stop looking to the criminal justice system for answers and solutions to campus sexual assault, particularly if we want survivors to have a path to effective remedies. As one author opines, rather than continuing to use the criminal justice system as a model for Title IX adjudications, we ought to learn from its (the criminal justice systems) failures.[72]

Individual survivors are not in control of whether their criminal track cases are prosecuted. While victim's wishes can be a factor in determining whether a case proceeds to trial, prosecutors must weigh the well-being of the community and the goals of the district attorney in making decisions on which cases to accept. As noted, many prosecutors are reluctant to accept campus sexual assault cases where consent to the sexual behavior is the central issue or where alcohol was involved.[73] This decision is based upon the belief that no jury will convict when the complainant and the defendant provide conflicting testimony leading states'

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[70] Neither the Boston Globe nor the New York Times produced an article on the white paper. Prof. Cantalupo wrote a responsive New York Times on-line piece in which she debated the standard issue with another law professor https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases but the paper did not precede nor follow up with a standalone article as it had with the Harvard Law professors' letter. https://www.nytimes.com/2014/10/16/education/harvard-law-professors-back-away-from-sexual-misconduct-policy.html There was coverage by the Huffington Post. http://www.huffingtonpost.com/entry/preponderance-of-evidence-college-sexual-assault_us_57a4a6a4e4b056bad215390a later picked up by inusanews on line https://www.inusanews.com/article/3453591511/law-professors-defend-preponderance-standard-campus-rape-cases. Sixteen law professors signed the Penn Law Title IX letter, 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/?utm_term=.63a0fb41d864 and twenty-eight professors signed the Harvard Law letter, https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html

[71] Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 Kansas Law Review 961, 965 (2016).

[72] Erin Collins, The Criminalization of Title IX, 13 Ohio St. J. Crim. L. 365, 389 (2016).

[73] Rebecca Leitman Veidlinger, How to Improve Prosecutions of Campus Sexual Assault, 48-JUN Prosecutor 18 (2014) ("Few can dispute that college campus sexual assaults--those that often occur between individuals with pre-existing relationships in the same peer group and often involve large amounts of alcohol--are some of the most difficult for prosecutors.").

attorneys to decline prosecution.[74] When these cases do proceed, successful results favor the defense.

Statistics on the prosecution of sexual assault cases vary, but all are dismal.[75] At most, 20% of sexual assault cases are reported to the police.[76] Of those reported cases, only an average of 27[77]-32.1% are prosecuted.[78] Of those tried, only 26% of prosecutions are successful.[79]

Sexual assault survivors, including survivors of campus sexual assault, may choose to not call police. There are many reasons for this.[80] Confusion over what occurred, shame that an assault happened at all, and self-guilt often lead to non-reporting.[81] Additionally, reports of insensitive police interrogations and victim blaming argue for survivor avoidance of any component of the criminal justice system.[82]

Participation in the criminal process is difficult under the best of circumstances. Retelling the intimate details of what occurred during a sexual assault to a room full of strangers and being subjected to aggressive, and often insensitive, cross examination can be re-traumatizing.[83] Many sexual assault survivors remark that engaging the criminal justice system was severely re-traumatizing.[84] One report

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[74] Robin Wilson, Why Colleges are on the Hook for Sexual Assault, The Chronicle of Higher Education (June 6, 2014), http://www.chronicle.com/article/Why-Colleges-Are-on-the-Hook/146943
[75] Keep in mind that the numbers reported are at the high end of studies. Much depends upon definitions. For example, those convicted may have been convicted of a felony but not sexual assault or may have pleaded to misdemeanors.
[76] Kimberly Lonsway and Joanne Archambault, The "Justice Gap" for Sexual Assault Cases, Future Directions for Research and Reform, Violence Against Women, 18(2) 145-168 at 147.
[77] Id. at 157
[78] University of Kentucky Center for Research on Violence Against Women, Top Ten Things Advocate Need to Know, https://opsvaw.as.uky.edu/sites/default/files/07_Rape_Prosecution.pdf
[79] Supra, note 76 at 157 Author's note: Keep in mind that the numbers reported are at the high end of studies. Many of those studying the cited categories report single digit results. Much depends upon definitions. For example, those convicted may have been convicted of a felony but not sexual assault or may have pleaded to misdemeanors. In that case, the reported number is misleading as to how many defendants are convicted of sexual or other assault.

[80] See Eliza Gray, Why Victims of Rape in College Don't Report to the Police, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/
[81] Id.
[82] See Fisher, B.S., Cullen, F.T., & Turner, M.G., The Sexual Victimization of College Women. National Institute of Justice, Bureau of Justice Statistics, 23 (2000).
[83] Rebecca Adams, For Victims of Sexual Assault, There's Little Incentive To Come Forward — Besides 'Justice, Huffington Post (Dec. 15, 2014), http://www.huffingtonpost.com/2014/12/15/victims-sexual-assault-come-forward-justice_n_6294152.html; See also https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify
[84] Kelly Alison Bhere, Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys, 65 Drake L. Rev. 293, 325 (2017).

from England discusses a victim's post trial suicide.[85] Consequently, survivors may elect to use a college or university's Title IX process as a method of redress that avoids the criminal justice system entirely. In an ideal world, the survivors would also then avoid all of the accompanying re-traumatization the criminal process can bring.

VI. Cultural Barriers for Sexual Assault Survivors.

Prof. Deborah Brake, argues that there are two significant reasons why those concerned about Title IX due process focus on the standard of proof. The first is the "battle for empathy between the assault survivor and the wrongfully accused."[86] Second is "disagreement about the appropriate stringency of a disciplinary framework in responding to sexual assault in a campus setting." [87] To supplement Prof. Brake's thoughtful work, I posit a third reason why those defending accused students focus on the standard of proof as problematic. I propose that running through the debate over adjudication of campus sexual assault, and the use of the preponderance of the evidence standard, is the mistrust of women and the misogyny that perpetuates the myth that women lie.

Sexual assault survivors fear they will not be believed.[88] And often they are not. In many ways, the design of the criminal justice system contributes to the failure of sexual assault prosecutions. Prosecutors and other system actors may not be properly trained in conducting trauma- informed investigations and prosecutions.

> When police are not properly trained in trauma induced behavior, particularly related to sexual assault, the outcome can be devastating. For victims whose cases are improperly unfounded, this practice creates a sense of betrayal and distrust that can have devastating effects on victim recovery. Moreover, the public awareness that sexual assault cases are not taken seriously will inevitably affect the willingness of future victims to report to police.[89]

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[85] Amelia Gentleman, Prosecuting Sexual Assault: 'Raped All Over Again,' The Guardian (April 13, 2013).
[86] Deborah L. Brake, Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard Montana Law Review, Vol. 78, p. 109, 2017.
[87] Id.
[88] Supra, Note 50 at 134.
[89] National Center for Women and Policing, *Successfully Investigating Sexual Assault: A National Training Manual,* (2001) at 8.
file:///C:/Users/Margaret/Documents/Title%20IX%20Paper/Successfully%20Investigating%20Acquaintance%20Sexual%20Assault%20-%20A%20Natl%20Training%20Manl%20Law%20Enforcmt.pdf

Often those observing traumatized individuals do not know how to interpret their observations. Traumatized people can behave in ways others find odd. An enhanced startle response and other counter-intuitive behaviors make sense when viewed through a trauma response lens. But most observers would not connect the behavior with past adverse experiences. Trauma survivors seemingly have unpredictable and unusual behavior.[90] Accordingly, an observer may discount what survivors say, either from frustration or disinterest. This disregard is common in sexual assault investigations and leads to conclusions of false reports even when an assault occurred.[91]

This pattern of overestimating the number of false reports introduces bias into the investigation and prosecution because it promotes assigning less or no credibility to survivors. This is especially true if the reporting witness' behavior is assessed as problematic.[92]

Sometimes improper investigation and assessment is due to lack of resources. For prosecutors, as well as other advocates, insufficient preparation time creates an impediment to successful prosecutions. The busy prosecutor may have hundreds of pending cases. Finding the time to adequately learn the facts of an assault can be onerous. Time constraints may limit the prosecutor's ability to understand the survivor's perspective and the impact of crime-related trauma.

Other impacts of trauma can further complicate investigation and prosecution. When trauma occurs, memory can become disconnected.[93] Like a sheet of glass shattering, you may be able to reconnect many or most of the pieces, but some strands are so damaged that complete repair may be impossible. So it is with trauma and memory.[94] Most of us have experienced trauma in the form of grief. Whether death of a person close to us comes suddenly or not, one thing we can be sure of is that our grief response can be severe, and it likely will be different from

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[90] Center for Substance Abuse Treatment (US), Trauma-Informed Care in Behavioral Health Services, Rockville (MD): Substance Abuse and Mental Health Services Administration (US) (Treatment Improvement Protocol (TIP) Series, No. 57.) Chapter 3, Understanding the Impact of Trauma (2014) https://www.ncbi.nlm.nih.gov/books/NBK207191/ (presents the behaviors and emotional responses that are common following trauma)

[91] See generally: False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault, The Voice, Volume 3, No. 1

[92] Kimberly Lonsway, Joanne Archambault, David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 2, The Voice, http://ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf at 3.

[93] James Hopper & David Lisak, Why Rape and Trauma Survivors Have Fragmented Memories, TIME (Dec. 9, 2014), http://time.com/3625414/rape-trauma-brain-memory/

[94] Id.

others who are experiencing the same loss.[95] "The dynamics of trauma and the impacts of gender-based harassment and interpersonal violence are complex, particularly given that individual responses are unique and vary over time."[96]

The fact that there is no uniform personal response to trauma does not, however, prevent the misguided judgement of a survivor's traumatic response. Some observers create an image of how one "should" respond to all sorts of trauma, including intimate partner violence and sexual assault. The expectations of the misinformed rarely are met. In sexual assault cases, the survivor is expected to retell the assault narrative in a logical, consistent and linear fashion, and to do so multiple times.[97] Reliance and cooperation with law enforcement is expected, even though it is not the norm. The survivor is expected, as well, to be compliant, not disruptive. This suppression of the survivor's trauma responses to the assault takes precedence to the survivor's needs. When the survivor behaves in a fashion not in accordance with the "mythical norm,"[98] the survivor is deemed not credible. This inaccurate conclusion is compounded when the survivor is gay, transgender, black or belongs to another marginalized group.[99] The symptoms that could support the claimed traumatization to a knowledgeable and empathetic observer, are instead used to suppress the survivor's narrative.

Consequently, the survivor's first statement to an investigator may differ in some details from a report the survivor gives two weeks later. "For example, victims might give inconsistent or untrue information out of trauma or disorganization. Those who are traumatized do not always think coherently and cannot necessarily provide information that is 100% complete and accurate. In addition, victims may also have memory impairment due to alcohol or drug use."[100]

When memory begins to re-organize, some details may emerge while others remain a blur.[101] Even small details, such as the color of the assailant's clothing, may be

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[95] See Marty Tousley, RN MS, *Grief Healing*, http://www.griefhealingblog.com/2013/10/how-we-mourn-understanding-our.html stating that "[a]lthough men, women, adolescents and children mourn differently from one another, none of those ways is inappropriate." See also Martha Tousley, RN MS, *Understanding Different Mourning Patterns In Your Family*, http://www.griefhealing.com/column-different-grief-patterns.htm

[96] Gina Misto Smith and Leslie M. Gomez, The Regional Center for Investigation and Adjudication; A Proposed Solution to the Challenges of Title IX Investigations in Higher Education, Dispute Resolution Magazine 27, 29 (Spring 2016) https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2016/7_RCIA.authcheckdam.pdf

[97] Barbara Herman, Why 'Discrepancies' In Rolling Stone Rape Story Don't Mean 'Jackie' Is Lying, International Business Times (Dec. 10, 2014), http://www.ibtimes.com/why-discrepancies-rolling-stone-rape-story-dont-mean-jackie-lying-1747528

[98] Audrey Lorde, Sister Outsider at 116

[99] Encyclopedia of Interpersonal Violence, Volume 1 (on order through ILL)

[100] Supra, note 92, at 5.

[101] Supra, note 93.

unclear. Even when not relevant, the smallest inconsistent detail will be used by defense counsel to attack the reporting witness' credibility.[102] The prosecutor may need to find sufficient funds to hire a trauma expert to explain the impact of trauma on the survivor's behavior and presentation. Since an expert is likely to be needed in many cases, the cost of expert witnesses can be significant. Without an expert to explain why traumatic memories may vary in detail at different times, the consequence of inconsistent survivor reporting often results in acquittal as lawyers, judges and juries finding the survivor-witness not credible., "Unfortunately, cases are sometimes seen as unfounded when the victim "changes her story" by recalling additional information, telling different aspects of the same story, or making inconsistent statements out of trauma and cognitive disorganization."[103]

Conflating trauma-responsive behavior with credibility gives support to the commonly believed myth that women lie.[104]

VI. Liar Mythology

Abusers accusing their targets of lying is part of the dynamic of abusive relationships. The same happens in acquaintance sexual assault cases. The allegations of lying can be effective because the myth that women lie is culturally accepted.[105] This unsupported accusation continues to be a pervasive and insidious part of the sexual assault dialogue on and off campus. While not denying that a small number of sexual assault cases involve false allegations, they are a distinct minority of reports.[106] Yet the myth continues. [107] And as one author notes, this myth's "status quo is quite effectual at silencing victims."[108] In addition, the notorious Rolling Stone's "Jackie's story" did untold damage to survivors' credibility,

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[102] This is, of course, part of defense counsel's job. Confronting witnesses is a constitutionally protected right for criminal defendants under the Sixth Amendment to the US Constitution.
[103] National Center for Women and Policing, supra, note 64 at 6.
[104] Supra note 44. This scenario played out in the recent Cosby trial. Reports are that the jury was "hung" based in part on inconsistent statements made by the reporting witness. http://www.kion546.com/news/top-stories/bill-cosby-jury-deliberating-on-saturday/547349438 This account addresses several concerns that hamper sexual assault prosecutions including the "he said, she said" phenomena where consent to sexual activity is an issue, trauma induced inconsistencies, late reporting and misinterpretation of post-assault behavior.
[105] Lynn Hecht Schafran, Credibility in the Courts: Why Is There a Gender Gap?, https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/schafran.html
[106] See supra Note 47.
[107] See David Csordas, Rolling Stone Cannot Undo Damage to Rape Victims Around the Country, The Daily Campus (Nov. 14, 2016) reporting on how the myth was enhanced by the Rolling Stones' poorly verified and sensationalist publication of Jackie's Story. http://dailycampus.com/stories/2016/11/14/rolling-stone-cannot-undo-damage-to-rape-victims-around-the-country
[108] Sarah M. Buel, De Facto Witness Tampering, 29 Berkeley J. Gender L. & Just. 72, 93 (2014).

reinforcing the stereotype of the lying woman.[109] One danger of raising the standard of proof at Title IX hearings is that the survivor as liar myth is reinforced. When you have a "beyond a reasonable doubt standard" that is near impossible to meet, public and private interpretation of a failed prosecution is that the person making the allegations lied. The nuance of why sexual assault prosecutions fail is not considered. In addition to suppressing the narrative of those who have been harmed, the myth of the sexual assault survivor as liar injures concepts of "justice" including the perception of fair hearings.

VII. The Studies On False Sexual Assault Reporting

Studies of false reporting of sexual assault cases generally place the rate between 2 and 8%.[110] Looking at prior studies, including their own, since 2000, Northeastern University researchers place the rate of false reports at 5.9%.[111] The earlier the studies, the higher the rate of cases determined to be "false". An important factor in determining "false" reports to law enforcement is how the officers define "false reporting". "It is notable that in general the greater the scrutiny applied to police classifications, the lower the rate of false reporting detected. Cumulatively, these findings contradict the still widely promulgated stereotype that false rape allegations are a common occurrence."[112]

The authors identified a fundamental problem in the promulgation of reports of women lying about sexual assault. The issue of police mis-categorization was discussed in detail in a study by retired Sergeant Joanne Archambault along with Kimberley Lonsway and Dr. David Lisak.[113] What the researchers noted was that once more rigorous standards were applied to the categories created by law enforcement the lower the rate became. "[W]hen more methodologically rigorous research has been conducted, estimates for the percentage of false reports begin to converge around 2-8%."[114] Significantly, this percentage is based largely upon police determinations of falsehood. Police historically have been skeptical, if not hostile, toward sexual assault reporters. Often case placement in categories of "false" were

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[109] Supra, note 107.
[110] David Lisak, Lori Gardinier, Sarah C. Nicksa and Ashley M. Cote, Violence Against Women, False Allegations of Sexual Assault, A Study of Ten Years of Reported Cases, 1318, 1329 (2010).
[111] Id. at 1329.
[112] Id. at 1330.
[113] False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault, The Voice, Volume 3, No. 1
[114] Id. at 2.

based upon nothing more than the officer's personal judgment.[115] Consequently, myth upon stereotype upon myth has been woven into government narratives for so long it is part of US culture.

The authors succinctly summarized the influence that stereotypes of false reporting and false reporters has:

> Concerns regarding the legitimacy of a sexual assault report are often triggered by the presence of "red flags," based on specific characteristics of the victim, suspect, or assault. Yet many of these "red flags" are actually based on our cultural stereotypes of what constitutes "real rape." As professionals, we are often reluctant to believe that we share these stereotypes, but the reality is that everyone in our society is exposed to the same cultural messages about sexual assault, and they inevitably influence how we think about it. Because these are societal stereotypes, they impact not only jurors but also the other professionals involved in sexual assault response (e.g., law enforcement professionals, forensic examiners, victim advocates, prosecutors, and other professionals). [116]

The researchers identified "false red flags" the officers used in determining whether a sexual assault report is false. Some of these include: the reporter was not hysterical, nor was the accused a stranger; the victim had reported sexual assault in the past; the reporter had used "bad judgment"; there were no signs of physical injury.[117] May more "red flags" were identified by the researchers, any number of which often results in lack of investigation. The reports were merely assumed to be "false" based upon the decision maker's misunderstanding or bias. Other characteristics that could result in system players assuming a report is false are failure to cooperate with the criminal justice system and recanting.[118]

How system actors individually and systemically define what makes a reporter credible influences their determination of the false reporting rate. Characteristics the actors rely upon in assessing credibility, however, disregard actual trauma symptoms and presume a uniform response to trauma. The authors warn that the behavior of the suspect also cannot determine whether a report is false. The accused's upset or outrage, or respected status within the community, should not influence how or whether police or prosecutors investigate. Only evidence based investigation can determine accuracy of the report.[119] And simply because some

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[115] Id.
[116] Id at 3.
[117] Id at 3-4.
[118] Id at 4. These stereotypes are as common in domestic abuse cases as in sexual assault.
[119] Id at 4-5.

aspects of a report cannot be substantiated does not support categorizing the report as false. Unfortunately, for those who are sexually assaulted, many of those assessing their credibility will ignore or not understand the role of bias in their decision-making.

All women are affected by the perpetuation of the myth that women lie. But others experience similar and more exaggerated presumptions of incredulity. Trans women, gay men, other members of a sexually diverse groups, along with native women, immigrants, disabled and others who historically have experienced enhanced bias due to their status, are treated dismissively when reporting abuse.[120] This discrediting, whether perpetuated explicitly or implicitly, makes seeking remedies for sexual assault more difficult.[121]

Added to the burden of diminished credibility resulting from the perception of an individual's status, survivors of assault must overcome the frequent lack of corroborating evidence that adjudicators seek. Few sexual assaults and acts of intimate partner violence happen in public. While witnesses may recall seeing the person claiming to be harmed before or after the assault, witnesses who can testify to specific assaultive behaviors are rare.[122] Even though college women, particularly first year students, experience sexual assault at a rate higher than the general population, they encounter enormous difficulties in persuading others that the events described happened.[123]

80% to 90% of campus sexual assaults are committed by an individual known to the survivor.[124] Criminal complaints in these cases are rarely successful. Yet, the stereotypical rapist is a stranger to the victim.[125] It may be that campus

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[120] Trans women and other sexual minorities, along with native women and women of color, the disabled among others, report sexual assault at much higher rates than the general population.
[121] Indeed, race results in harsh results for both the student that was harmed and the student alleged to have done the harm. School discipline in general is more severe when the alleged offender is a student of color. See, for example, OCR's Report on Settlement with Lodi CA Unified School District, https://www.ed.gov/news/press-releases/us-education-department-reaches-settlement-lodi-unified-school-district-california
[122] Jajini Vaidyanathan, Will Stanford Sexual Assault Case Silence Future Victims? BBC News (June 7, 2016) Showing that an exception is the CA case where the bicyclists witnessed the assault. http://www.bbc.com/news/world-us-canada-36375300. But in that case, despite overwhelming evidence and a guilty finding, the assailant received only a six-month jail term. A cultural barrier not explored in this essay is the higher regard often given to young assailants than to victim in not wanting to further damage the young assailant's life.
[123] Supra at note 6, at ii.
[124] Id at 2.
[125] Sarah Ben-David and Ofra Schneider, Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance, Sex Roles, Vol. 53, Nos. 5/6, 386 (September 2005) http://www.ariel.ac.il/images/stories/site/personalsites/sarahbendavid/mamrim/mamrim2/rape_perceptions.pdf

adjudicators understand better than the general public the likelihood that the one who commits a sexual assault is likely known to the target.

The myth of false reporting reaches deep into the Title IX debate. Candice Jackson, is Deputy Assistant Secretary in DOE's Department of Civil Rights. Recently she commented that 90% of campus sexual assault claims were cases of "we were both drunk." She commented that the cases "fall into the category of 'we were both drunk, we broke up and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'" [126] In the same interview, she commented that "in most cases, there is not even an accusation that the accused student overrode the will of a young women."[127]

Outrage followed and Jackson apologized.[128] But the original comment is reflective of and gives significant support to the myth that women are manipulative and lie.[129]

In the face of cultural bias against them, sexual assault survivors and those reporting other forms of sex discrimination will not have any effective remedy to on campus assault if the criminal hearing standard becomes the norm in Title IX cases. Even the "clear and convincing" standard would create same barrier the higher criminal one. "Clear and Convincing" is the civil systems' "beyond a reasonable doubt" equivalent.[130] For these reasons, and like civil protection order hearings, the Title IX process is intended to determine whether it is more likely than not that assault or other gender harassment occurred.[131] While not precluding pursuit of criminal charges, the Title IX process (also like civil protection order proceedings) can provide an effective alternative. The Title IX process never was

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[126] The Chronicle of Higher Education, July 12, 2017 http://www.chronicle.com/article/Ed-Dept-Official-Apologizes/240634 citing Jackson's interview with the New York Times https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html

[127] Id.

[128] Id.

[129] Some advocates voiced concern that the belief that sexual assault survivors lie is pervasive within the current administration, noting that Jackson labeled women accusing the President of sexual assault as "fake victims". https://www.propublica.org/article/devos-candice-jackson-civil-rights-office-education-department

[130] Cornell Law School, Legal Information Institute, "[A] party must prove that it is substantially more likely than not that it is true" https://www.law.cornell.edu/wex/clear_and_convincing evidence; "Some courts have described this standard as requiring the plaintiff to prove that there is a high probability that a particular fact is true." Justicia.com, https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof/ Some criminal cases are tried on the "clear and convincing" standard.

[131] See U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, pg. 13, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

intended to replicate complaint, indictment and trial.[132] What the objecting Harvard professors overlooked is that the process, as reinforced by the DCL letter, was intentionally designed to *not* mimic a criminal hearing.

Title IX can present as a friendlier forum capable of providing the remedies a survivor seeks. And while the preponderance of the evidence standard gives no guarantee of success, the standard at a minimum creates a setting for the harmed students to have a reasonable opportunity to overcome the bias that accompanies their allegations of sexual assault.

As earlier referenced, the DCL clarified that accusers and the accused have rights in the Title IX investigation and adjudication process, which rights are independent of the criminal justice system."[133] This was an effort to provide a pathway for survivors to overcome the biases they encounter when sexual assault reports are filed. But the bias is difficult to root out.

One administrator with whom I spoke indicated that they would take not consider disciplinary action regarding a student who had a no-contact order entered against that student based upon behaviors that occurred on campus. The same administrator explained that they would take action if the student were convicted of a criminal violation of the protection order. When asked what would make the difference, the administrator indicated that they would be persuaded by the higher standard of proof used in criminal matters.[134] The juxtaposition of the feminine civil protection order process and the masculine criminal justice one is striking.[135] In essence, the (male) criminal justice system carries an inherent credibility that civil (female) systems do not.

VIII. Education Responds

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[132] Sarah Edwards, The Case in Favor of OCR's Tougher Title IX Policies: *Pushing Back Against the Pushback*, 23 Duke Journal of Gender Law and Policy, 121, 140 (2015).
[133] See U.S. Dept. of Education, Office of Civil Rights, Know Your Rights: Title IX Requires Your School to Address Sexual Violence, https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf (for a general discussion of the distinct rights provided through Title IX).

[134] Notes on file with author.
[135] The civil protection order system is one in which the clear majority of petitioners are female. The criminal justice system is one in which the majority of defenders as well as he system players are male. See Intimate Partner Violence: Attributes of Victimization 1992-2011 https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf ; Felony Defendants in Large Urban Counties 2009, https://www.bjs.gov/content/pub/pdf/fdluc09.pdf; The Gavel Gap, http://gavelgap.org/pdf/gavel-gap-report.pdf; Justice for All: Who Prosecutes in America? http://wholeads.us/justice/ (79% of prosecutors are male.)

As criminal defense lawyers became more vocal in their demands that the Title IX process permit "speaking" participation of counsel, and higher levels of proof, some institutions responded by altering the process by which Title IX sexual assault complaints are adjudicated. While controversy on the hearing standard remains, some institutions have taken action to address concerns expressed by the criminal law faculty and the broader criminal defense bar. One specific changeis addressed here.

Some schools changed their decision-making process from a "hearings" one to an investigatory process that eliminates hearings where witnesses testify. Those schools that made this change substituted an investigation conducted by one individual who then makes the decision as to responsibility based upon the preponderance of the evidence standard. This system is not preferred, due to the greater likelihood that implicit[136] or confirmation[137] bias will influence the adjudicator's findings.[138] Under another model, the investigator submits the report to a panel of three adjudicators who then decide whether the accused is responsible for the alleged behavior. The panel members use the preponderance of the evidence standard in reaching their decision. This process engenders less criticism as shared deliberations and decision-making can act as a correction to individual bias.[139]

The investigatory process has advantages for the student parties. Students report preferring the system because more privacy is preserved, particularly as a lengthy hearing in the presence of peers can be avoided.[140] The investigatory model, when implemented appropriately, also provides a forum where the witness or student-party can explain their version of the event in a less formal setting. The less formal setting for questioning reduces tension and can lead to more disclosures. And the setting permits greater opportunity to provide follow up explanations when queried by the investigator. [141] As critics would caution, this system can work well if due process protections are in place.[142]

These changes resolved some, but not all, of the complaints raised by critics merely because the hearings option was no longer available. That change terminated the discussion of what should be counsel's role at Title IX hearings.

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[136] Michael Henry, JD, et al., The 7 Deadly Sins of Title IX Investigations, 10 (2016). https://atixa.org/wordpress/wp-content/uploads/2012/01/7-Deadly-Sins_Short_with-Teaser_Reduced-Size.pdf
[137] Id. at 8.
[138] Id. at 10.
[139] Id.
[140] Notes on file with author
[141] Notes on file with author
[142] In 1999 only 40% of schools offered any due process protections for the accused. Supra, note 6, at 10. And as reported by some accused, there have been instances of disregard of due process for the accused in more recent cases.

Not all universities embrace the investigatory process. Many still utilize the hearings model, where witnesses are presented, and both the student claiming harm and the accused student may choose to appear. Even at these hearings, however, traditional cross examination is not the norm. As directed by the DOL, and as practiced in many domestic violence courts, the accused student's questions are submitted to the hearings officers who then pose selected questions to the accuser.[143] This method is employed to reduce the likelihood of a harmed student's re-traumatization while still accommodating the accused's need to inquire of the witness. There are other safeguards that can be put into place for the protection of the accused student. Those will be discussed in the recommendation section.

IX. The Organized Criminal Defense Bar Responds

A. American College of Trial Attorneys

Last spring, the American College of Trial Lawyers (ACTL) issued a White Paper on Campus Sexual Assault Investigations. [144] The report was issued by the organization's Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence. The Task Force was organized in response to due process concerns to campus sexual assault hearings as currently promoted by OCR. Like the Harvard and Pennsylvania Law School faculty members, ACTL members were concerned specifically about due process inadequacies in the Title IX investigatory and hearings processes. ACTL members made clear that their concerns were from the perspective of the accused student. Acknowledged in the white paper is the difficulty that colleges and universities are faced with when determining an appropriate process when a sexual assault allegation is received.[145] The report notes several cases where the courts have recognized due process failures on the part of educational institutions[146] The report also notes that OCR has recognized due process failures that on the part of institutions resulted in gross violations of the rights of accused.[147]

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[143] This approach is one of the recommendations of an ABA Criminal Justice Section taskforce on campus sexual assault discussed in more length later.

[144] Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence (2017) https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_finala2532c0c4a8867689490ff0000aa0c0c.pdf?sfvrsn=2

[145] Id. ACTL report at 3 https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_finala2532c0c4a8867689490ff0000aa0c0c.pdf?sfvrsn=2

[146]

[147]

ACTL made several recommendations[148] among them that the standard at sexual assault hearings be "clear and convincing", a hearing that on the civil side of the law is barely distinguishable from "beyond a reasonable doubt". For reasons discussed below, the organzation's promotion of a higher standard of proof ignores the historical and cultural reasons for using the "preponderance of the evidence" standard. The due process inequities ACTL and others complained of, such as insufficient notice of allegations and the right to written findings, are indeed worthy of addressing. But those concerns do not result from any failure of the preponderance of the evidence standard of proof.

The American Bar Association's Criminal Justice Section subsequently issued its own recommendations, many of which comport with those made by ACTL. The Section's recommendation and report, however, acknowledged the definitional unworkability of the "clear and convincing" standard. Their exploration of appropriate standards, and other recommendations, are discussed below.

B. American Bar Association Criminal Justice Section

1. *Background*

In a June 26, 2017 press release,[149] the American Bar Association (ABA) announced their Criminal Justice Section's (CJS) publication of "recommendations" for the conduct of Title IX proceedings when sexual misconduct is alleged. The recommendations were a produced by a taskforce organized by the section for purposes of reviewing Title IX investigations and hearings. For reasons set out below, the recommendations are mixed. Some recommendations are easily implemented solutions that will enhance due process without being unduly burdensome to the affected educational institutions. Others contribute to the confusion some schools experience in trying to adapt their models to accommodate fairness while preserving school autonomy over process development.

As the CJS writings announce, "The report provides recommendations to guide colleges and universities for resolving allegations of sexual misconduct."[150] Before proceeding to a discussion of the recommendations, several anomalies are worth noting. First, as the press release notes, while the recommendations were

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[148] Supra, note 146 (ACTL report) at 12.
[149] ABA Task Force on College Due Process Rights and Victim Protections Releases Final Report, ABA (June 26, 2017) https://www.americanbar.org/news/abanews/aba-news-archives/2017/06/aba_task_force_onco.html
[150] *Id.*

unanimously adopted by the Criminal Justice Council, those recommendations are not ABA policy.[151] And for reasons discussed next, any proposal that the recommendations become policy could be met with significant resistance from some entities within the wider ABA constituency. Publishing the recommendations now may be a way for the CJS to test reactions and elicit responses from various ABA entities and members before a final decision is made whether to seek policy status for the recommendations.[152] As a CJS website points out, the recommendations are not policy "at this time".[153]

The second and related point of interest concerns the strong implication of sources of opposition to the recommendations. As noted in the press release: "The (CJC) endorsed findings urge the nation's private and public colleges and universities to adopt a disciplinary system in sexual misconduct cases that includes procedural and substantive due process protections for the accused while protecting the rights and interests of the victim." [154] And further, the lawyers comprising the task force included an impressive range of stakeholders, ranging from defense counsel to victim advocates.[155]

The press release gives no hint of internal opposition within the task force. Yet, significantly, the report notes that

> Although these Recommendations were unanimously endorsed for publication by the Criminal Justice Section Council, they have not been endorsed by any other section of the ABA, including the ABA Commission on Domestic and Sexual Violence and the ABA Section of Civil Rights and Social Justice.[156]

The report notes that two liaisons, one from each of the noted entities, were originally designated as "liaisons" from their respective entities.[157] However, before publication of the report, these two liaisons were elevated to member status in

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[151] *Id.*
[152] See How You Can Develop Policy, ABA https://www.americanbar.org/groups/international_law/leadership/policy_development.html outlining the process for creating ABA policy.
[153] ABA Task Force on College Due Process Rights and Victim Protections, ABA https://www.americanbar.org/groups/criminal_justice/committees/campus.html
[154] *Supra*, note 151.
[155] *Id.* For a full roster of task force members see https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/Relevant_Experience_of_Task_Force_Participants.authcheckdam.pdf
[156] ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (Report) at fn 1. https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf
[157] Id at 13.

"recognition of their significant contributions."[158] Certainly, the ABA Commission on Domestic and Sexual Violence would have a compelling interest in the development of standards used in campus Title IX hearings, as would the Section of Civil Rights and Social Justice, whose major reason for being is the protection of the sort of rights (such as due process) being considered within the Title IX context.

Nonetheless, the recommendations issued with task force members having heard from ABA entities that bring civil and victim advocacy perspectives to the topic at hand. Whatever the status history of its members, to have two ABA entities make public that they do not endorse the report and recommendations gives pause as to whether the recommendations will be approved by the House of Delegates, if submitted. But more importantly the note suggests that at least two ABA entities view the task force as not having achieved a balanced perspective in recommending how universities may best proceed with Title IX complaints.

Significantly, and somewhat surprisingly, the chair acknowledges that the product was both rushed and the result of compromise, rather than an agreement on best practices. As to the report being rushed, the chair explained:

> Although the Task Force worked expeditiously, it did so because members were eager to try to have a positive impact on this critical area of public policy. The Task Force believed it likely that the new administration would release new directives to replace the 2011 Dear Colleague Letter, issued by the U.S. Department of Education Office for Civil Rights.[159] In the greatest of traditions of the ABA and the Criminal Justice Section, members wanted to contribute to the public discussion.[160]

Later, the chair informs readers that the recommendations were created as a collective. "The recommendations were necessarily the product of extensive discussions and compromise. Various stakeholders agreed to bend on certain provisions to obtain other provisions of import to them and to reach unanimity."[161] The chair is to be applauded for encouraging, if not reviving, the art of compromise. This is not always easy to do when gender issues are the topic of

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[158] Supra note 158 (ACTL report) at 1.

[159] At the time that the CJS recommendations were released, the administration had begun cutting back on Obama era Title IX policies. Most notably, the policy of permitting students the right to use the bathroom of the sex with which they identify had been rolled back. https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.6443fa331e23

[160] Supra, note 146 at 1.

[161] Id.

debate. And, as will be explored, compromise can result in provisions that are perplexing to those not part of the original discussion.

2. *The Recommendations*

With the above caveats, certain provisions are worth noting. Some are murky and so strained in usefulness as to clearly have been the result of an unsatisfactory compromise. Yet, other provisions are straightforward and helpful. Additional provisions are concerning because they unnecessarily limit school autonomy. In discussion, I will focus on primarily on those provisions that implicate the applicable standard of proof to be used in Title IX hearings and those that impact the perception of survivor credibility, whether due to cultural bias or misunderstanding of trauma induced behaviors.

As an example of clarity, Recommendation IA, "Cooperation with, and Independence from, Law Enforcement" reads:

> The Task Force recognizes the school's responsibility to address sexual misconduct on its campus for protection of its community. Schools should be able to determine whether a violation of school policy has occurred regardless of whether there has been a violation of criminal law. Where police investigation has been initiated, schools should work cooperatively with law enforcement to the extent permissible by state and federal law.[162]

Having recognized that educational institutions have an interest in addressing allegations of campus sexual assault, [163] the terms of this recommendation affirms the institutional authority's right (and obligation under the DCL) to proceed expeditiously with internal investigations even if a criminal investigation has commenced. No additional burdens are placed on the institution because cooperation with law enforcement is demanded only to the extent required by federal law. For most institutions, this recommendation maintains the status quo, as do the recommendations for maintaining confidentiality and for a thorough and fair investigation.[164]

Other recommendations are not controversial and restate fundamental fairness principles upon which all can agree. Examples of those principles are the need for

[162] Id. at 2, A.
[163] Id. at 2, I.
[164] Id. At I, B and III, D

confidentiality,[165] the need for an investigation that is balanced,[166] and the need for impartial decision-makers.[167]

a. Recommendation II A: "Alternatives to Traditional Adjudication"

CJS Recommendation II A,[168] "Alternatives to Traditional Adjudication", encourages the use of non-hearing methods of resolution.

This recommendation excludes the use of mediation, however, which long has been a concern for those who advocate for gender violence survivors.[169] Mediation sends a silent message that if both parties would just be reasonable, all matters can be resolved. Mediation often ignores the inherent power imbalance between those who are harmed and those who have harmed. Often survivors feel responsible to make the mediation work, even at the expense of their own interests.[170] Since 2000, the ABA has had a policy recommending that as a general rule, mediation not be used in domestic violence cases.[171] The same or similar dynamics are at play in sexual assault matters. One should not underestimate the likelihood of re-traumatization in alternative dispute resolution processes. One of the reasons the ABA adopted the policy of permitting survivors to opt-out of mediation[172] is the opportunity for the individual who harmed the intimate partner to use the process to further

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[165] CJS Recommendation I C, *Confidentiality* "Schools should put in place provisions to guard against the improper disclosure of confidential information created or gathered during an investigation. Parties, witnesses, investigators, decision-makers, and advisors should abide by these provisions. Schools should notify parties about the scope and limits of the school's ability to maintain confidentiality. For example, a school may have to provide documents in compliance with a court subpoena."

[166] CJS Recommendation I B, *Investigate Both Sides* "The school's investigator must conduct a prompt, fair, and impartial investigation. The investigation should be thorough, and both parties should have the right to participate by identifying witnesses and identifying and/or providing relevant information to the investigator. Investigators should equally seek out both inculpatory and exculpatory evidence."

[167] CJS Recommendation III D which reads in part "As a matter of fundamental fairness, schools and their designated personnel must be fair, impartial, and free of conflicts of interest."

[168] CJS Recommendation II A reads "Where appropriate, the Task Force encourages schools to consider non-mediation alternatives to resolving complaints that are research or evidence-based, such as Restorative Justice processes. Both parties must freely and voluntarily agree to such processes in order for them to be utilized, and they may withdraw their consent to the process at any time, stopping its use."

[169] Susan Pollett, Mediating Domestic Violence: A Potentially Dangerous Tool, 77 N.Y. St. B.J.42 (Sept.2005).

[170] Symposium: Energy and the Environment: Preventing and Resolving Conflicts: Article: The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call For Empirical Studies of Mediation Effectiveness, 12 Cardozo J. Conflict Resol. 425, 437 (Spring 2011).

[171] See ABA Resolution 109B (2000) and accompanying report at 1.

[172] Specifically, the language of resolution 109B encourages providing a survivor the ability to "opt-out" of court ordered mediation. The report addresses mediation in the broader sense.

manipulate and harm them.[173] Abusive individuals can manipulate the process as well as well as the survivor.[174] As with any failure of the alternative dispute resolution process, blame is often placed on the survivor.[175]

While recognizing the risks of mediation to the survivor, the recommendationsdo not recognize similar inherent risks of other methods of dispute resolution. There may be cases where an informed and healing survivor elects mediation rather than go through the grueling hearing process. The important missing provision is that this process be engaged only if suggested by the harmed student.

Contrast the recommendation's support for the use of restorative justice and other "proven" alternative dispute resolution methods.[176] The use of restorative justice and other forms of resolution can seem appealing, but alternative forms of dispute resolution are promoted most often in perceived "relationship" cases, as well as gender violence matters.

Recommending restorative justice solutions is trendy. But here the CJS recommendation fails institutions and those who have been harmed. While the recommendation's use of alternative methods "appropriate" cases only, little guidance is given as to which cases are appropriate for alternative forms of resolution. As with civil litigation, it may be that negotiation, while the investigation is ongoing, may prove to be an appropriate form of resolution.

The recommendations are critical of schools for mishandling Title X hearings. But the recommendations that schools engage alternative resolution processes would thrust Title IX adjudicators into new areas of practice for which most will be unprepared. Alternative methods, including the specifically mentioned restorative justice, should be used only through individuals highly trained in the practice.[177] That caveat is absent from the CJS recommendations. To suggest the use of restorative justice, without more, disrespects the practice which those involved have spent decades developing. The recommendation and report state: "Although RJ is

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[173] One aspect of mediation that was not addressed by the CJS is a survivor's desire to engage the alternative process. Should a well-informed survivor choose mediation, there may be circumstances where the process would be engaged. The blanket prohibition ignores the reality that survivor choice needs to be considered. In this author's experience, the closer survivors are to the alleged event, the less able that student will be adequately assess the use of the mediation or other alternative process.
[174] Margaret B. Drew, Collaboration and Intention: Making the Collaborative Family Law Process Safe(r), 32 Ohio St. J. on Disp. Resol. 373, 422 (2016).
[175] See Id. at 421-22.
[176] CJS Task Force Report II. A. which says "The Task Force encourages schools to consider non-mediation alternatives to traditional adjudication such as restorative justice processes.
[177] Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. Negotiation L. Rev. 265, 316-17 (spring 2001).

geared towards reintegrating the transgressing student back into the community, it is also dedicated to helping the victim heal and move forward." [178] The priorities are mis-stated. One goal may be the reintegration of the transgressing student, but the process has several victim-centered steps to accomplish before reintegration can be addressed. Restorative justice is routinely used in the criminal justice setting, perhaps the court proceeding most experienced in its use. Unaddressed in the recommendations is that certain conditions must be met before use of the restorative process is appropriate.

For example, there is no mention that the restorative justice process is not appropriate unless the accused has acknowledged responsibility for the alleged behavior.[179] In the criminal justice system, restorative justice is not an option until guilt is determined. For the restorative process to be suggested and implemented before the accused acknowledges wrongdoing will result in some accused students manipulating the restorative process only to lessen the severity of their consequences. In those instances, the process will prove to be re-traumatizing for the survivor, where the survivor has agreed to less than maximum sanctions, then discovers that the accused has not changed behavior and remains a danger to the broader community.[180] Secondly, the restorative justice process can be re-traumatizing for the survivor if the survivor has not had sufficient time for healing to begin. The process will be re-tramatizing, as well, if there has not been significant time spent in preparing the survivor and the individual who caused the harm. As one who supports the use of alternative resolution processes within the Title IX system, I do so only if the tenets inherent to the alternative process are honored. In the restorative justice process, for instance, one precondition as mentioned, is the responsible party's acknowledgement of the wrong as described by the survivor[181] and both parties having been sufficiently prepared over time for the encounter,[182] no matter in what form that encounter occurs.[183] And that process must be survivor centered, including that commencement and continuation of the

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[178] Report of CJS Taskforce at 5.
https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf
[179] Christina L. Lyons, Restorative Justice: Can it Help Victims and Rehabilitate Criminals? CQ Researcher (Feb. 5, 2016)
http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2016020500
[180]
[181] Donna Coker, Crime Logic, Campus Sexual Assault, and Restorative Justice, 49 Tex. Tech L. Rev 147, 190-91 (fall 2016).
[182] Id. at 91.
[183] "Meeting" can occur through remote conferencing, for example. This variation is recognized in the CJS Recommendations at 3.

process be entirely under the survivor's control.[184] Because of the healing and preparation time required for an effective restorative process, one author wisely suggested that the process be used well after the adjudicatory one concludes; an example being when a student who has been suspended from campus is preparing to return.[185]

The goal of repairing harm, to the extent possible, is another tenet of restorative justice.[186] The process may need time and several meetings before healing remedies begin to unfold. One value in using the restorative system is to assess whether the responsible party has truly accepted fault, and to see if that student can tolerate an ongoing victim-centered process. If the student who caused the harm can engage the process and sincerely recognize their responsibility to contribute to the repair, a shift in the offensive behavior may result. This would be in line with the educational perspective of Title IX administrators.

Despite the cautions noted, because assault survivors encounter bias when they engage formal processes, alternative dispute systems may be appealing to the survivor, because the survivor may be able to keep some control of the outcome.

b. Recommendation IIB: The Adjudicatory v Investigative Models.

The Title IX decision making methods used by colleges and universities are adjudicatory. The student accused of causing harm is found to be responsible or not, which is the essence of adjudication. More commonly the varying models are referred to as the "hearings" model and "investigatory" model. For consistency, I will use that language here, although the CJS report uses the "[a]djudicatory" language when referencing those processes that use a hearing as part of their decision-making. As the recommendations and report explain: "[t]he adjudicatory model has a hearing in which both parties are entitled to be present, evidence is presented, and the decision-maker(s) determine(s) whether a violation of school policy has occurred."[187]

The recommendations appropriately reflect concern with the opportunity for bias under the varying models. Most concerning is the investigatory model where the investigator also functions as the decision-maker. When a fact finder is adjudicator

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[184] Supra, note 182 citing Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE & ABUSE 242, 246 (2014) Stating that "RJ can better meet victims' justice needs to (1) contribute input into key decisions ... about their case, (2) receive response with minimal delay, (3) tell their story without interruption by adversarial and sometimes hostile questioning, (4) receive validation, (5) shape a resolution that meets their material and emotional needs, and (6) feel safe referencing."
[185] Coker, supra note 181 @206
[186] Megan Condon, Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence, 17 Geo. J. on Poverty L. & Pol'y 487, 497 (2010).
[187] CJS Recommendations at 3.

in any setting, there can be no challenge to the fact finder's bias prior to a decision being entered. Both sides are done a disservice in this model, particularly where the investigator is poorly trained. The CJS recommends that when an investigatory model is used, the decision maker not be the investigator.[188]

The recommendations and report voice a preference for the hearings model, believing that the opportunity for the panel members to hear from witnesses directly provides some protection against bias. The opinion is that the hearings officers will better be able to assess credibility by hearing from the witnesses directly. Maybe. Studies show that judges have no greater ability to determine credibility by observing the witnesses than the general population. But most likely not. Unless the judge or hearings officers are well-trained and accepting of the consequences of trauma on testimony, direct observation of the harmed student is likely to result in a finding of the witness being "not credible." In an advisory sheet found on this issue through the New York Courts, judges are encouraged to consider inconsistency as a factor in assessing credibility.[189] Already explored are reasons why inconsistency may in fact be evidence that a trauma occurred. Yet, in looking for bright lines in assessing credibility, judges and hearings officers fall into the trap of believing that inconsistency is a reliable indicator of false allegations.[190]

c. Recommendation III E -Silence

"In the interest of fundamental fairness, and recognizing the prospects of parallel or follow-on criminal proceedings, the respondent's silence should not be the basis of a finding of responsibility."[191]

If adopted, this recommendation would undercut any sense of balance within the Title IX process. While understanding defense counsel's concerns, the recommendation enhances the movement to manipulate the process into a "quasi-criminal" one.

The limitation on how the adjudicators may interpret silence would apply to the responding student only. Yet some students who have been sexually harassed or assaulted choose to remain silent about the concerning events. Or the traumatized student might be unable to respond during investigation or cross-examination but investigation might proceed despite survivor non-cooperation if other witnesses are available. Without balancing the protections that come with a choice to remain

[188] CJS Recommendations at 3.
[189] Credibility of Witnesses http://www.nycourts.gov/judges/cji/1-General/CJI2d.Credibility.pdf
[190] See Supra Note 41 ("Consequently, what may be typical behavior for a sexual assault victim is commonly misperceived as being contrived, inconsistent or untrue. These beliefs and biases help explain why the rate of false allegations tends to be inflated and why many inaccurately believe false reports are commonplace."
[191] CJS Recommendations at 5.

silent, the decision-makers would be free to interpret the silence of the student who is alleged to have been harmed as an indication that the alleged violations are without basis, supporting liar mythology and compounding survivor bias.

This recommendation has its source, of course, in criminal law where a defendant is not required to testify and failure to do so cannot be used against the defendant as the evidence is assessed in determining criminal guilt.[192] While the drafters may have deemed this recommendation to be a due process necessity, this requirement injures the integrity of the Title IX process by depriving the decision-makers of important information. The author finds this recommendation unnecessary and in her recommendations below suggests a procedural change that should satisfy any concerns about student self-incrimination.

d. Recommendation V- D: *Standards of Proof*

The root causes of unfairness in earlier recommendations. Impartiality, for example, is a lynchpin of due process.[193] But the recommendations fallshort when focusing on the standard of proof as a key to fairness in Title IX hearings. As said by Prof. Deborah Brake, "[t]he actual impact of OCR's endorsement of the POE standard is disproportionate to the pitched debate it has prompted." [194]

The recommendations authorsreportthat the group could not reach agreement on which would be the appropriate standard to be applied in Title IX decision-making, although the members agreed that the standard should not be "beyond a reasonable doubt."[195] Members could not agree on any other legal standard. The solution was to create standards to be used at hearings.[196] The standards thus created were a creative attempt to reach consensus but do not resolve any uncertainty.

The CJS recommendations promote two standards of proof. But the variation does not turn upon the seriousness of the allegation. Which of the newly designed standards is to be followed turns on the decision-making process utilized by the educational institution. This leaves the strictness of the standard to be applied left to the vagaries of fate. Whether one attends a school that incorporates a hearing as part of the adjudication process and uses multiple individuals as decision-makers, will determine which standard of proof is triggered.

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[192] 5th Amendment to US constitution https://www.archives.gov/founding-docs/bill-of-rights-transcript
[193] See CJS task force standard II. B. which says "As the Supreme Court acknowledged in Withrow v. Larkin (1975), a "fair trial in a fair tribunal is a basic requirement of due process" and it applies to both court cases and hearings before administrative agencies. "Not only is a biased decisionmaker constitutionally unacceptable," the Court wrote, "but 'our system of law has always endeavored to prevent even the probability of unfairness.'"
[194] Deborah Brake, supra, note 64 at 110.
[195] Introductory information to V-D. CJS Recommendations at 7.
[196] Supra, note 158 at 7.

For those schools where the investigator acts as sole decision-maker, a responsible finding would be appropriate only if the decision maker "[a]fter assessing the quality of the evidence" is *firmly convinced* that finding of responsible is justified.[197]

For those where a panel makes the decision of whether the accused student is responsible, they should do so "if the evidence unanimously convinces them to *reasonably conclude that a finding of responsibility is justified*." [198] Unknown is whether requiring a unanimous panel counterbalances the lower standard of "reasonably concludes."[199] Both standards favor the accused. Unanimity will be difficult to achieve given barriers noted earlier. Therecomendations and report competently discuss the opportunity for bias and recommends diversity of the panel as a remedy.[200] The best way to diversify the hearings panel is to expand the number of decision-makers. To do so, however, would likewise expand the number of participants who must reach unanimity. The unanimity requirement more closely resembles jury deliberations in criminal matters, rather than deliberations in civil context. The recommendation offers no guidance on how to measure "firmly convinced" or how it is defined. Nor is there any explanation of the differences between "firmly convinced", "clear and convincing" and "beyond a reasonable doubt." If, however, one goal is to eliminate or greatly reduce the number of appeals from the initial adjudication (which appears to the be the case[201]), the standards of proof as recommended may accomplish that goal. "Firmly convinced" is subjective. There is no legal standard, objective or not, to which 'firmly convinced" may be compared. There is virtually no way to prove that a decision-maker was *not* firmly convinced of the ultimate determination, thus eliminating civil appeal even in the face of blatant error.

Entirely new standards, such as those proposed by the CJS, may find favor with the administration despite (or because of) the barriers they create for the student reporting harm. Adoption of entirely new standards is seductive because the adoption would end debate over traditional legal standards.

X. The Author's Recommendations

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[197] CJS Taskforce Recommendation V-D

[198] Id.

[199] It should be noted that immediately prior to recommending each standard of proof, the task force informed the adjudicator(s) *how* to assess the evidence. Id.

[200] CJS Task Force Recommendations IV. V. A. which says "The Task Force recognizes that there are inherent benefits to having a diverse panel when deciding responsibility or sanctions. A panel can be diverse across a number of dimensions including gender, race, age, sexual orientation, and position within the university. The inclusion of students can also provide an important perspective."

[201]

While this author recommends that the principles of the DOE 2011 "Dear Colleague" letter continue to guide Title IX processes, there are changes that institutions can make to enhance due process protections for all concerned. The unfairness that some accused have experienced results from utilizing inappropriate decision-makers. For example, one student was found "responsible" even where the survivor informed the decision maker that she did not believe the student was present when the offensive behavior occurred. This version of events was supported by two additional accused. Yet, incredibly, the hearings officer declared the student responsible.[202] Under any standard of proof, that student should not have been found at fault. The failure of the hearings officer to find the student not responsible indicates the ineptitude of the selected decision maker.

A second problem concerns the use of administrative risk-averse bureaucrats who refuse to take any action that might incur the ire of DOE. The perceived fear is that the federal government will terminate funding streams as a sanction is unfounded. DOE has never imposed this sanction. Fear- based decision-making results in some students being found responsible, even where little evidence supports that finding. In other cases, the remedy imposed for a student found responsible may be extreme under the circumstances, and may not be the result that either student seeks. Once again, the inappropriate response of the decision-makers is unrelated to the standard of proof. Any decision maker motivated from fear of losing federal funds if they find the responding students "not responsible" has an insurmountable conflict of interest. The failure of that officer to recuse themselves from participation in the process is corruption that a change in standard will not cure. I recommend that Title IX campus decision-makers continue to employ "preponderance of the evidence" as the adjudicatory standard.

Other recommendations are:

- Before the commencement of any investigation, both parties should be given information regarding legal options and consequences, both in writing and orally. The survivor must be informed of legal options, including the ability to sue the accused in tort in order to recover damages. The student who has been harmed should know of the option to obtain a civil protection order as an alternative or as a compliment to the Title IX process. Survivors must be made aware that the school may or will report the incident(s) to the police, which could trigger criminal charges being filed against the accused, even over the survivor's objections.

[202] Campus Sexual Assault: Emerging Issues in Title IX Investigations and Litigation, Massachusetts Continuing Legal Education, June 16, 2017

The responding student must be informed, prior to the commencement of any process, that the allegations, if proven, could result in criminal charges being filed against the responding student. In addition, the student should be advised that other civil consequences could result, such as an action seeking financial damages.

- Both parties must be informed that they may seek the advice of counsel prior to the commencement of the investigatory process.[203]

- Both students face difficult decisions on whether to participate in Title IX proceedings when criminal charges may be filed. This dilemma is particularly burdensome on the responding student. The Title IX and any related statute should be amended to require that none of the evidence (verbal or written) provided by the student alleging harm or the accused shall be used as evidence in any related criminal proceeding. This amendment would eliminate concern that participation in proceedings would create a basis for a criminal complaint to issue. Additionally, the adjudicator(s) would be more likely to receive all pertinent information if both the student alleging harm and the accused participate in the process. This statutory amendment would assist survivors who may wish to participate in subsequent criminal proceedings but are concerned that statements made during the Title IX process would be used against them at any subsequent criminal hearing. This is of particular concern if the harmed student is still experiencing memory disorganization and other traumatic consequences at the time of the Title IX hearing.
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- Inform both parties prior to the commencement of the Title IX process whether or not the allegations have been or will be reported to the police or any other criminal justice system players.[204]
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- When the investigator's report is prepared, but prior to its finalization or distribution to any third-party decision-maker, the reporting and responding students have an opportunity to review the report. The harmed student as well as the accused students shall have an opportunity

[203] Prof. Merle Weiner argues for schools providing counsel to all survivors in *Legal Counsel for Survivors of Campus Sexual Violence*, 29 Yale J. L. & Fem. 123 (2017) (forthcoming). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983101 See also, Kelly Alison Bhere, supra, note 84.

[204] This comports with notice requirements recommended by both the ACTL and CJS Title IX taskforces.

to respond to any factual information that the students finds inaccurate. The students may suggest additional witnesses to be interviewed or other evidence reviewed that might counter the information a student deems incorrect. The student and investigator's responses should be noted in the report. [205]

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- Those whose expertise is in sexual and intimate partner abuse should be included as decision-makers. Those in the field are expert not only in what *is* gender violence but also, they are the ones who can best screen out what *is not* gender violence. Often these experts are omitted from panels because they are presumed to be biased. This presumption is an extension of mythologies that those whose fields include gender violence or other feminist based studies hate men and will always support the student claiming to have been harmed. These perceptions are extensions of liar mythology and reflect transference on the part of men who promote the myth.[206]

Expanding the number of members of adjudicatory panels from three to five, where possible, will permit schools to ensure greater diversity to the panels. Attention should be paid to include racially diverse members of the campus community, as well as those with diverse sexualities and abilities. This diversity will strengthen the panel's ability to sort out the biases and misconceptions that can inadvertently undermine the process of reaching a fair result. Diversity of the panel's composition will stimulate creativity in fashioning solutions if a "responsible" finding results after decision. Decision should be by majority vote. [207]

The reasons for appeal as voiced both by the CJS and ACTL have merit and should apply to both the student claiming harm as well as the student accused of causing harm. The students should have the right to appeal

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[205] The CJS endorsed a comparable recommendation in Taskforce Recommendation C.

[206] The absurdity of precluding gender violence experts as Title IX decision makers is best demonstrated in student alcohol and drug cases. Best practice argues for including addiction experts in the Title IX process because of their unique perspective in fashioning remedies. Gender violence experts can do the same.

[207] The Criminal Justice Section has long advocated for racial diversity and the elimination of bias. One suggestion for improvement in the courts was noted in the section's Perceptions of Justice Report (2008-2011) "Recognize that perceptions run all ways: judges, court personnel, attorneys, and litigants all make assumptions about the people they see." https://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2011_poj_writtenreport.authcheckdam.pdf See also the CJS Taskforce's discussion of bias, implicit and confirming. CJS Taskforce Report @7 https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf

the finding of the Title IX decisionmaker where the finding of "responsible or not responsible" has no basis in the evidence presented.

Conclusion

Despite debate over whether and to what extent campuses should be involved in sexual assault matters,[208] the likelihood is that campuses will have significant ongoing involvement. While the federal government may revise process instructions to educational institutions, repeal of Title IX is unlikely.

There are multiple reasons why campuses have a responsibility to address harm to students. For example, like many landlords[209], campus administrators have a responsibility to address known safety risks for their "tenants". And for marketing and other reasons, schools have an interest in making their campuses as safe as possible for the wider campus community.

A major impediment for campus Title IX administrators to overcome is, of course, an inherent conflict of interest. Many campuses create a dangerous environment by largely ignoring enforcement of campus alcohol and drug restrictions. In addition, campuses administrators often approach sexual assault matters from a risk management perspective only. Preventing lawsuits by students found responsible for sexual harassment can be a major influence on administrators.[210] This goal does, of course, undermine prevention efforts. Appeasement of those who hate women, people of color and other vulnerable populations, is not an effective deterrent. Indeed, any policy of appeasing the aggressor only encourages more violations. [211]

In the meantime, criminal lawyers have reminded campus administrators and others of the need for additional due process protections to be in place before and during Title IX processes. Ensuring fairness in the process does not require transforming existing Title IX models into criminal ones. Simple but important reforms can be made that enhance fairness while preserving the integrity of the Title IX system as an independent, education-based process. While existing campus

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[208] Deborah Brake, supra, note 64 @ 153

[209] Charles F. Krause, 3 American Law of Torts § 14:6 ("As to those who enter premises upon business which concerns the occupier and upon his or her invitation express or implied, the occupant is under an affirmative duty to protect them, not only against dangers of which he or she knows but also against those which with reasonable care the occupier might discover.")

[210] This approach ignores the rising number of lawsuits brought by students who have been the targets of harm.

[211] This is why those experienced in intimate partner abuse and practitioners of restorative justice insist upon the offending party's acknowledgment of the harm and accountability for it. These measures are aimed at preventing future violence and are not punitive.

Title IX processes may be akin to civil ones, the processes are not aligned with either the civil or criminal justice systems and should remain that way.

Title IX processes need room to develop. The 2011 DCL was the first time that an administration took an assertive position that sexual assault survivors were not receiving fair campus hearings. The backlash of men claiming to have had unjust outcomes should inform us on how to improve Title IX practices but should not result in the elimination of survivor protections. Some hearings officers may have "overcorrected" but those failures are the result of poor training and selection of decision makers. The overwhelming number of campus sexual assault survivors are trans and "straight" women, and gay men. None of these populations are the most powerful voices in our culture. Any changes campuses make to how sexual assault matters are handled must acknowledge the reality of who on campus is most victimized. To this end, the 2011 DCL established culturally informed protections.