

## Dalliances, Defenses, and Due Process: Prosecuting Sexual Harassment in the Me Too Era

Kenneth Lasson

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# **Dalliances, Defenses, and Due Process: Prosecuting Sexual Harassment in the Me Too Era**

Kenneth Lasson

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## **AUTHOR'S NOTE**

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*[A]ny time a woman is put in a position where she is inferior, subordinate . . . she should complain, she should not be afraid. . . . [But t]he person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that. . . . [E]veryone deserves a fair hearing.*

Ruth Bader Ginsburg<sup>1</sup>

## INTRODUCTION

While the heightened awareness of sexual predation in the workplace is, in many ways, a welcome development, the new norms currently being promulgated and implemented have already fallen prey to the law of unintended consequences, not to mention the limitations of law itself. Perhaps the most remarkable result of the plethora of prosecutions—especially those taking place on American campuses—is that, despite widespread recognition of their lack of rudimentary due process, so little has been done to correct the failures.

Just as cultural attitudes have changed toward politics, entertainment, and literature, so too have perspectives on relationships in corporate boardrooms, university campuses, and common workplaces. Just as uninvited sexual encounters contribute to the growing spate of allegations concerning improprieties both subtle and overt, what might well have begun as a traditional college or office romance—where casual dalliances can and often do lead to marriage—may just as easily turn from serious to sour.

In the wide world of the law, meanwhile, the growing phenomena of uncorroborated allegations—especially those that result in suspensions or dismissals—present serious questions of fairness and remedy. In the spheres of public education and employment, everyone with a healthy respect for traditional American values might be justifiably dismayed by the almost total absence of due process. In the private arena, where the concept of due process is much less applicable, there are few viable remedies for the unfairly accused.

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<sup>1</sup> Jeffrey Rosen, *Ruth Bader Ginsburg Opens Up About #MeToo, Voting Rights, and Millennials*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millennials/553409/> [<https://perma.cc/LB3C-VBQY>].

In recent years, there have been over 150 law review articles addressing the problem, yet it persists and is growing.<sup>2</sup> Could the circumstance be that such academic analyses go widely unread and unheeded, or is there some other cause for the endemic recalcitrance?<sup>3</sup>

This Article will likewise examine the prosecution of sexual harassment in what has come to be called the Me Too Era, not only by analyzing the constitutional application and limitations of due process, the promulgation of Title IX policies<sup>4</sup> on campuses and their effect on public students and employees, and the limited remedies available to workers in private entities, but to suggest as well ways by which academics can move their message beyond theory and into pragmatic solutions with greater impact.

## I. THE SWIRL OF ALLEGATIONS

*Heav'n has no Rage, like Love to Hatred turn'd,  
Nor Hell a Fury, like a Woman scorn'd*

William Congreve<sup>5</sup>

The movement that encourages women to describe their negative sexual experiences and say “me too” can be traced to a 2007 campaign begun by Tarana Burke, a New York-based advocate for gender equity.<sup>6</sup> She began using the phrase to raise awareness of the

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<sup>2</sup> See, e.g., Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940 (2016); J. Brad Reich, *When Is Due Process Due?: Title IX, “The State,” and Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1 (2017); Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN ST. L. REV. 1001 (2016); Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15 (2017).

<sup>3</sup> My somewhat jaundiced views on this subject were penned years ago. See Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990).

<sup>4</sup> 20 U.S.C. § 1681 (2018) (prohibiting discrimination in educational opportunities on the basis of sex).

<sup>5</sup> WILLIAM CONGREVE, *THE MOURNING BRIDE, A TRAGEDY* (1697), reprinted in *THE COMPLETE PLAYS OF WILLIAM CONGREVE* 317, 361 (Herbert Davis ed., 1967).

<sup>6</sup> Alanna Vagianos, *The ‘Me Too’ Campaign Was Created by a Black Woman 10 Years Ago*, HUFFPOST (Oct. 17, 2017, 1:44 PM), [https://www.huffpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago\\_n\\_59e61a7fe4b02a215b336fee](https://www.huffpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago_n_59e61a7fe4b02a215b336fee) [https://perma.cc/FX52-4CRG].

pervasiveness of sexual abuse and assault, but it did not develop into the broader movement of that name until 2017 with the widespread use of the Me Too hashtag following the Harvey Weinstein sexual abuse allegations.<sup>7</sup>

The current litany of accusations began shortly after charges against movie producer Harvey Weinstein came to light in early October of 2017. After a wave of employees and actresses alleged sexual harassment and assault in explosive back-to-back reports in *The New York Times* and *The New Yorker*,<sup>8</sup> Weinstein was fired from the studio he co-founded.<sup>9</sup>

Since then, the roster of alleged rogues has become lengthy. It includes CBS Chief Executive Officer Leslie Moonves; network television anchors Matt Lauer and Charlie Rose; journalists Mark

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<sup>7</sup> In 2017, *Time* magazine named Burke, among a group of other prominent activists dubbed “the silence breakers,” as its “Person of the Year.” Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/RRR9-SCFT>]; see also *infra* Part II.C.ii.

<sup>8</sup> Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/4KE4-A8WH>] [hereinafter Farrow, *From Aggressive Overtures to Sexual Assault*]; Ronan Farrow, *Harvey Weinstein’s Army of Spies*, NEW YORKER (Nov. 6, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies> [<https://perma.cc/8ADH-N9YL>]; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/357X-TU3P>]. Among those accusing Weinstein were actresses Gwyneth Paltrow, Angelina Jolie, and Asia Argento, the last of whom tweeted a list of names of more than eighty women who had allegedly been sexually harassed, assaulted, raped, or molested by Weinstein dating back to the late 1970s. Ashley Boucher, *Asia Argento Tweets List of Harvey Weinstein Accusers*, WRAP (Oct. 28, 2017, 10:38 AM) <https://www.thewrap.com/asia-argento-tweets-list-of-harvey-weinstein-accusers/> [<https://perma.cc/JU77-L8DT>] (last updated Oct. 28, 2017, 11:06 AM).

<sup>9</sup> Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS (Jan. 10, 2018, 4:34 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> [<https://perma.cc/4TL8-QQUN>] (last updated Jan. 10, 2018, 9:34 PM); Kantor & Twohey, *supra* note 8. Weinstein has denied all of the allegations, claiming that the relationships were consensual. Farrow, *From Aggressive Overtures to Sexual Assault*, *supra* note 8.

Halperin, Glenn Thrush, and Michael Oreskes; film directors Roy Price, Oliver Stone, and Morgan Spurlock; actors Ben Affleck, Ben Vereen, Kevin Spacey, Dustin Hoffman, Steven Seagal, and Jeremy Piven; comedian Louis CK; conductor Charles Dutoit; celebrity chefs Mario Batali and John Besh; professional football players-turned-analysts Heath Evans, Ike Taylor, and Marshall Faulk; literary critic Leon Wieseltier; former U.S. Senator Al Franken; the late President George H.W. Bush; and the current President Donald J. Trump.<sup>10</sup>

In 2018, a record number of American CEOs left their jobs for various reasons, including sexual misconduct and economy-related concerns.<sup>11</sup> According to a study by Price Waterhouse's consulting division, more executives are being dismissed from large companies for "ethical lapses" than financial performance.<sup>12</sup> The behavior cited for their dismissal stems from a range of incidents related to fraud, bribery, insider trading, environmental disasters, inflated resumes, and allegations of sexual misconduct or indiscretions.<sup>13</sup> The findings confirm "that corporate boards are beginning to approach such allegations with a 'zero-tolerance stance,' driven in part by societal pressures since the beginning of the Me Too movement."<sup>14</sup>

A number of the accused celebrities have strongly denied any impropriety. Among them are journalists Ryan Lizza, Bill O'Reilly,

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<sup>10</sup> See Corey, *supra* note 9. See Tucker Carlson, *Tucker Carlson: The Media's New Star Witness Against Trump Is Unraveling and Only Trying to Sell Books*, FOX NEWS (June 26, 2019), <https://www.foxnews.com/opinion/tucker-carlson-the-medias-new-star-witness-against-trump-is-unravelling-and-only-trying-to-sell-books> [https://perma.cc/4P5G-KNUX], for a recent allegation against Trump.

<sup>11</sup> Ntokozo Miya, *Record Number of CEOs Leaving Their Jobs: Study*, SOWETAN LIVE (Jan. 11, 2019, 1:02 PM), <https://www.sowetanlive.co.za/business/2019-01-11-record-number-of-ceos-leaving-their-jobs-study/> [https://perma.cc/8HXR-8XWK].

<sup>12</sup> Mackenzie Garrity, *PwC: 39% of CEOs Ousted in 2018 Were Involved in Scandals*, BECKER'S HOSP. REV. (May 16, 2019), <https://www.beckershospital-review.com/hospital-management-administration/pwc-most-ceos-ousted-in-2018-were-involved-in-scandals.html> [https://perma.cc/R5QP-ABW2].

<sup>13</sup> *Id.* "The study found that companies' chief executives were being pushed out for poor financial performance around 35 percent of the time." Chris Mills Rodrigo, *Study Finds Misconduct Is the Top Reason CEOs Are Leaving Large Companies*, HILL (May 21, 2019, 12:09 PM), <https://thehill.com/homenews/444761-study-finds-misconduct-is-the-top-reason-ceos-are-leaving-large-companies> [https://perma.cc/4SXX-YXF7].

<sup>14</sup> Rodrigo, *supra* note 13; Miya, *supra* note 11.

and Mark Halperin; actors James Franco, Ryan Seacrest, and Ed Westwick; singer R. Kelly; filmmakers Paul Haggis, Brett Ratner, and James Toback; ballet producer Peter Martins; talk-show host Tavis Smiley; political candidate Roy Moore; musical director James Levine; and public radio personality Garrison Keillor.<sup>15</sup>

Meanwhile, as latter-day perspectives have similarly changed in the world of politics, entertainment, and literature, the growing spate of allegations concerning improprieties both on campus and in the workplace has increasingly resulted in summary dismissals of those accused.

After the lengthy exposés in *The New York Times* and *The New Yorker*, many women responded in a variety of ways. Accusers are often asked why they have waited so long to come forward. The following are statements made by some of the accusers in response to that question.

*I never told anyone what happened to me, but when women . . . tell their stories it helps everyone to speak up, especially those with lower incomes, who can't risk losing their jobs because of a boss who tries to force sex on them.*<sup>16</sup>

*My abuser was raping women before I was born. People knew and did nothing to protect the victims. When he got to me, no one believed he would "go that young." I was called a liar. I was told that it was my fault, because I should have said something sooner. I*

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<sup>15</sup> Corey, *supra* note 9; Nicholas Hautman, *Bill O'Reilly Denies Sexual Harassment Allegations in First TV Interview Since Fox News Firing: 'This Was a Hit Job,'* US WKLY. (Sept. 19, 2017), <https://www.usmagazine.com/celebrity-news/news/bill-oreilly-denies-sexual-harassment-allegations-on-today-w504225/> [https://perma.cc/F2G5-9EZY]; Lacey Rose, *Ryan Seacrest Denies "Reckless" Allegations from Former Stylist*, HOLLYWOOD REP. (Nov. 17, 2017, 4:52 PM), <https://www.hollywoodreporter.com/news/ryan-seacrest-denies-reckless-misconduct-allegations-stylist-1059704> [https://perma.cc/FJG5-HH8C]. Additionally, allegations of sexual abuse by the late singer Michael Jackson have been strongly denied by his estate. See Kristin Corry, *Director Stands by Film Detailing Michael Jackson Sexual Abuse Allegations*, VICE (Jan. 29, 2019, 5:00 PM), [https://noisey.vice.com/en\\_au/article/mbzexp/leaving-neverland-michael-jackson-documentary-director-dan-reed](https://noisey.vice.com/en_au/article/mbzexp/leaving-neverland-michael-jackson-documentary-director-dan-reed) [https://perma.cc/AW97-PNNX].

<sup>16</sup> The Mail, *Beyond the Bounds*, NEW YORKER, Oct. 30, 2017, at 3.

*was called crazy. These are the reasons we don't speak. When we finally do, we get asked, "Why now?" As if there's a time limit on trauma. . . . We talk about assault as if it were a new phenomenon, as if it weren't the people in positions of authority who are so often responsible: lawyers, judges, priests, teachers, police officers, doctors, C.E.O.s. Why do we act so shocked? The subject of sexual abuse is treated like global warming—we think that if we pretend it's not happening, then maybe it will go away.<sup>17</sup>*

*Sexual harassment and assault is an issue that crosses all boundaries, political or otherwise. It's about predators in power who know that they are untouchable, and the people who enable them. My experience of sexual harassment, like that of so many other women, ranges from mild to extreme. . . . I remember standing in a bathroom at the restaurant where he first made a pass at me, looking at myself in the mirror and trying to figure out how to rebuff this person without losing the job I loved. In the end I couldn't. After months of abuse, I quit.<sup>18</sup>*

In a relatively short time thousands of women have similarly come forward to reveal their personal experiences, a phenomenon which has served to illustrate the ubiquitous magnitude of the problem. The movement has allowed much greater freedom and impetus for women to speak out about harassment and abuse, to question the privilege accorded to prominent figures in the workplace, and to cultivate a sense of solidarity—all of which have encouraged greater public

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* See also Jennifer Earl, *Ruth Bader Ginsburg Shocks Sundance Crowd with Her Own #MeToo Story*, FOX NEWS (Jan. 22, 2018), <https://www.foxnews.com/politics/ruth-bader-ginsburg-shocks-sundance-crowd-with-her-own-metoo-story> [<https://perma.cc/EH5K-B6WH>] (discussing Justice Ginsburg's personal experience of sexual harassment and why she believes women have kept silent for so long) (last updated Jan. 29, 2018).

scrutiny of systemic sexism.<sup>19</sup> Historically, laws against sexual assault have long been lenient.<sup>20</sup> Husbands were allowed to enforce compliance by their wives, and many women were held not to be rape victims unless they could prove they had forcefully resisted.<sup>21</sup>

On the other hand, not all of the substantial commentary engendered by the Me Too phenomenon has been affirmative. As concluded by Heather McDonald, a number of mainstream institutions have become exceedingly painstaking in efforts to hire, promote, or compensate employees based on gender and race ratios.<sup>22</sup> “[W]hite males in particular” often “have to clear a very high bar” so that an artificial standard of gender equity can be satisfied.<sup>23</sup> Besides the possibility of uncorroborated accusations against men for sexual harassment or assault, “[w]omen could lose out on opportunities at work because men will be afraid to work with them.”<sup>24</sup>

Camille Paglia, a longtime critic of many aspects of modern culture, questions whether the current wave of decades-old unsubstantiated allegations will do anything more than revive old stereotypes of women as over-reacting. “My philosophy of equity feminism,” she says, “demands removal of all barriers to women’s advancement in the political and professional realms. However, I oppose special protections for women in the workplace. Treating women as more vulnerable, virtuous or credible than men is reactionary, regressive, and ultimately counterproductive.”<sup>25</sup>

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<sup>19</sup> Hannah Gulko, *Acknowledging Both Sides of #MeToo*, PIPE DREAM (Jan. 24, 2018), <https://www.bupipedream.com/opinions/90590/acknowledging-both-sides-of-metoo/> [<https://perma.cc/Y98P-QU89>].

<sup>20</sup> KC Johnson & Stuart Taylor, Jr., Opinion, *Will the ABA Reject Due Process?*, WALL ST. J., Aug. 12, 2019, at A21. The writers are co-authors of *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA’S UNIVERSITIES* (2017).

<sup>21</sup> Johnson & Taylor, *supra* note 20.

<sup>22</sup> Heather MacDonald, *The Negative Impact of the #MeToo Movement*, IMPRIMIS (Apr. 2018), <https://imprimis.hillsdale.edu/the-negative-impact-of-the-metoo-movement/> [<https://perma.cc/6483-8G6P>].

<sup>23</sup> *Id.*

<sup>24</sup> Anna North, *Why Women Are Worried About #MeToo*, VOX (Apr. 5, 2018, 9:30 AM), <https://www.vox.com/2018/4/5/17157240/me-too-movement-sexual-harassment-aziz-ansari-accusation> [<https://perma.cc/CJJ7-KS2D>].

<sup>25</sup> Paul Epps, *Camille Paglia on #MeToo and Damsels in Distress*, EPPSNET (Feb. 27, 2018), <http://eppsnet.com/2018/02/camille-paglia-on-metoo-and-damsels-in-distress/> [<https://perma.cc/NU67-2UMA>].

In the wide world of the law, the Me Too movement poses serious questions of fairness and remedy. Not only law professors, but all citizens with a healthy respect for traditional American values of civil liberties might be justifiably dismayed by one aspect of the torrential deluge recently flooding the media alleging sexual improprieties in the workplace: the almost total absence of due process. Nowadays there are few institutional guardrails to prevent wrongful accusations on social media.<sup>26</sup> It is our challenge and obligation to put them in place.

## II. SEXUAL POLITICS IN PRACTICE

*We need to be careful about a rush to judgment  
and conflating different kinds of accusations.*

Laura Kipnis<sup>27</sup>

In practice, the concept of due process applies primarily to matters of public law and procedure, as embodied in the Fifth and Fourteenth Amendments to the United States Constitution. Due process pertains to the fundamental rights granted to all citizens, such as freedom of life and liberty, and a guarantee that all individuals will be treated fairly.<sup>28</sup>

In this regard, it is important to note the difference between substantive due process and procedural due process. The former involves restrictions imposed upon the government that limit its ability to infringe upon personal liberties. Substantive due process enables

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<sup>26</sup> In May of 2019, an interesting analysis of the problem, at once perceptive and perplexing/puzzling, appeared in *The New Yorker*. See Emily Nussbaum, *TV's Reckoning with #MeToo*, NEW YORKER, May 27, 2019; Jane Mayer, *The Case of Al Franken*, NEW YORKER, July 29, 2019.

<sup>27</sup> Cathy Young, *Is Office Romance Still Allowed?* WALL ST. J. (Dec. 1, 2017, 11:11 AM), <https://www.wsj.com/articles/is-office-romance-still-allowed-1512144685> [<https://perma.cc/YG2c-V9PV>]. See *infra* notes 33–49 and accompanying text.

<sup>28</sup> “The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta* [sic].” Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855). In the 1884 case of *Hurtado v. California*, the Court said that Due Process clause in the Fourteenth Amendment “refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.” 110 U.S. 516, 535 (1884).

courts to prevent authorities from acting arbitrarily in any way that might deprive citizens of life, liberty, or property without a free and fair trial. Procedural due process ensures fairness in the course of all proceedings against an individual, including the requirement of proper notice and a chance to be heard by a competent authority before such action by the government can take place.<sup>29</sup>

### A. Due Process on Campus

Nowhere is due process more applicable—and more in jeopardy—than in the area of higher education. Although the Supreme Court has held that due process requires laws not to be unreasonable, arbitrary, or capricious, “many campus proceedings seem to fit that description.”<sup>30</sup> It is not unusual, for example, “for a male student to be investigated and adjudicated for sexual assault without ever having received specific, written notice of the allegations against him.”<sup>31</sup> Public school students have substantially more rights than those in private schools, especially when it comes to infractions of disciplinary codes of conduct. Students at private colleges and universities do not

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<sup>29</sup> *Difference Between Procedural and Substantive Due Process*, DIFFERENCEBETWEEN.COM (Sept. 21, 2013), <https://www.differencebetween.com/difference-between-procedural-and-substantive-due-process/> [<https://perma.cc/7PES-VDGA>].

<sup>30</sup> Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017) <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [<https://perma.cc/FS94-7JVE>] [hereinafter Yoffe, *The Uncomfortable Truth*]. See also *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). “The touchstone of due process is protection of the individual against arbitrary action of government.” *Id.* (citation omitted).

<sup>31</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30. “The Foundation for Individual Rights in Education, a civil-liberties group, found in a report released on September 5 [in 2017] analyzing due-process procedures at the country’s top-ranked colleges and universities that about half fail to offer this minimal protection.” *Id.*; see FIRE, SPOTLIGHT ON DUE PROCESS 2017 (2017), <https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2017/> [<https://perma.cc/Y4WE-V4PR>]. See also Jeremy Bauer-Wolf, *Fairness Questioned*, INSIDE HIGHER ED (Sept. 5, 2017), <https://www.insidehighered.com/news/2017/09/05/new-report-ranks-colleges-due-process-protections> [<https://perma.cc/Y6TE-MEB5>].

always have the same rights of due process, such as notice, hearings, and the ability to confront accusers.<sup>32</sup>

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In 2015, Laura Kipnis, a professor of film studies at Northwestern University, wrote an essay for *The Chronicle of Higher Education* that challenged “her school’s ban on sex between professors and students, and more broadly against the growing obsession with trauma and vulnerability among feminists on campus.”<sup>33</sup> She focused specifically on the case of Peter Ludlow, a colleague at Northwestern who had been brought down by accusations of sexual misconduct toward two students.<sup>34</sup> Kipnis called it “feminism hijacked by melodrama” where the “imagination’s obsession with helpless victims and powerful predators” is “shaping the conversation of the moment, to the detriment of those whose interests are supposedly being protected, namely students.”<sup>35</sup> Kipnis was brought up on a Title IX complaint alleging that she had created a “hostile environment” shortly after the publication of her article.<sup>36</sup> An investigation ensued that lasted for seventy-two days.<sup>37</sup> Although the university ultimately cleared her of any wrongdoing, the complaint engendered a heated national debate about free speech, safe spaces, and especially about whether the

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<sup>32</sup> See Johanna Matloff, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 Suffolk U. L. Rev. 169, 174 (2001).

<sup>33</sup> Michelle Goldberg, *The Laura Kipnis Melodrama*, NATION (Mar. 16, 2015), <https://www.thenation.com/article/laura-kipnis-melodrama/> [https://perma.cc/2CNL-3SAJ]. See Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), <https://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351> [https://perma.cc/A39U-4VM7]. See also Jennifer Senior, ‘Unwanted Advances’ Tackles Sexual Politics in Academia, N.Y. TIMES (Apr. 5, 2017), <https://www.nytimes.com/2017/04/05/books/review-laura-kipnis-unwanted-advances.html> [https://perma.cc/DSV6-QE6V].

<sup>34</sup> Cathy Young, *Professor Laura Kipnis – She Faced Title IX Charges for Writing an Essay*, MINDING CAMPUS (May 9, 2017), <https://www.mindingthe-campus.org/2017/05/09/professor-laura-kipnis-she-faced-title-ix-charges-for-writing-an-essay/> [https://perma.cc/2SPL-UWQZ].

<sup>35</sup> Kipnis, *supra* note 33.

<sup>36</sup> Senior, *supra* note 33.

<sup>37</sup> *Id.*

federal government had vastly overreached in its enforcement of Title IX policies in higher education.

In 2017, Kipnis described her ordeal in a full-length book entitled *Unwanted Advances: Sexual Paranoia Comes to Campus*, which detailed a chilling and shadowy world of accusations against professors.<sup>38</sup> In the end she argues for more honesty about the sexual realities and ambivalences on campus, where men alone are being blamed for mutually drunken sex, and a woman's right to be treated as a consenting adult is being stifled by academic bureaucrats.<sup>39</sup> The book struck a chord with a number of students and professors around the country who had similarly been subjected to Title IX charges—and who likewise discovered that they did not know of what they had been accused until they sat face to face with investigators.<sup>40</sup> Equally disturbing was that they were often “discouraged, if not forbidden . . . from bringing in outside counsel or presenting exculpatory evidence . . . .”<sup>41</sup>

Today, says Kipnis, students and faculty alike are focused much more on their vulnerability than on celebrating sexual freedom.<sup>42</sup> Armed with “a new, academically fashionable definition of ‘consent’—which insists that sex is never truly consensual between adults unless they both have equal power—women can now retroactively declare they never truly agreed to specific sexual acts, even whole relationships.”<sup>43</sup> Thus, “we seem to be breeding a generation of students, mostly female students, deploying Title IX to remedy sexual ambivalences or awkward sexual experiences,” and campus administrators appear all too willing to “adjudicate relationship disputes” following breakups.<sup>44</sup> This, in Kipnis' view, “was the case with Ludlow's accusers, whose stories were full of inconsistencies and improbabilities.”<sup>45</sup>

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<sup>38</sup> LAURA KIPNIS, *UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS* (2017).

<sup>39</sup> *Id.* at 17.

<sup>40</sup> Senior, *supra* note 33.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

In the end, not only do today's young college women feel pervasive pressure to engage in casual sexual relationships; often fueled by alcohol, "they seem to have trouble saying no."<sup>46</sup> At the same time, they have come to expect, if not demand, to be protected by administrative authorities.<sup>47</sup> For their part, universities are now almost obsessively vigilant about shielding them from "ideas that might be considered offensive or traumatizing."<sup>48</sup> Moreover, there appears to be little firm evidence that specifically targeting male behavior has yielded a decline in sexual assaults.<sup>49</sup> Kipnis concluded that a better solution would be mandatory self-defense classes for freshmen women.<sup>50</sup>

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The difficulty of discerning consent from coercion is abundantly demonstrated in cases where drinking is involved. In August of 2016, for example, two students at Cornell had a heterosexual encounter, after which the woman filed a complaint with the university claiming that she had consumed too much alcohol to give valid consent.<sup>51</sup> The male student submitted a list of questions to the university panel for the woman to answer, but Cornell failed to ask them all, and refused to forward any additional questions that he later offered.<sup>52</sup> The university panel that convened to hear the case recommended that the male

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Drew Musto, *Cornell Followed Its Rules in Finding Male Student Guilty of Sexual Assault and Can Suspend Him, Judge Rules*, CORNELL DAILY SUN (Dec. 30, 2017), <https://cornellsun.com/2017/12/30/cornell-followed-its-rules-in-finding-male-student-guilty-of-sexual-assault-and-can-suspend-him-judge-rules/> [<https://perma.cc/ZC2C-8PVA>].

<sup>52</sup> William A. Jacobson, *23 Cornell Law Profs Support Suspended Male Student in Title IX Court Appeal*, LEGAL INSURRECTION (Apr. 1, 2018, 7:30 PM), <https://legalinsurrection.com/2018/04/23-cornell-law-profs-support-suspended-male-student-in-title-ix-court-appeal/> [<https://perma.cc/C2PQ-H57B>].

student, “John Doe,” be suspended for two years.<sup>53</sup> In December of 2017, the New York State Supreme Court ruled in Cornell’s favor.<sup>54</sup>

The accused student appealed the suspension to the Appellate Division of the New York State Supreme Court, arguing that his Constitutional right to cross-examine his accuser had been denied.<sup>55</sup> In April of 2018, twenty-three Cornell Law School professors filed an amicus brief in support of the accused student.<sup>56</sup> “[W]e believe that in this case, a Cornell disciplinary hearing panel failed to comply with an important procedural safeguard clearly set out in Cornell’s Title IX policy—the right of an accused student to have a disciplinary hearing panel conduct inquiry of his accuser about proper topics that he proposed . . . .”<sup>57</sup>

In another case still working its way through the court system, a student sued Oberlin College—where there is a 100% conviction rate for accused students who go to hearings.<sup>58</sup> The legal odds facing students, almost all of whom are men, can be daunting because campus procedures afford few of the procedural protections available in court.<sup>59</sup> At private universities, where there may be few, if any, constitutional due process rights, a number of courts defer to the campus procedures, and students are left with little recourse but to argue that the university did not follow its own rules.<sup>60</sup>

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<sup>53</sup> Musto, *supra* note 51.

<sup>54</sup> Doe v. Cornell Univ., 70 N.Y.S.3d 750 (2017). The court ruled that “Cornell substantially complied with its Policy and Procedures in handling these complaints, and that its determinations were rationally based.” *Id.* at 767.

<sup>55</sup> Doe v. Cornell Univ., 80 N.Y.S.3d 695, 696–97 (2018).

<sup>56</sup> Jacobson, *supra* note 52.

<sup>57</sup> *Id.* The New York courts refused to accept the amicus brief—even though Cornell did not oppose it. E-mail from Sheri Lynn Johnson, Professor of Law, Cornell Law School, to Kenneth Lasson, Professor of Law, Univ. of Baltimore (Feb. 6, 2010, 4:30 PM) (on file with author).

<sup>58</sup> Jacobson, *supra* note 52. Complaint at 4, Doe v. Oberlin College, No. 1:17 CV 1335, 2019 WL 1439115, at \*2 (N.D. Ohio Mar. 31, 2019); Doe v. Oberlin College, No. 1:17 CV 1335, 2019 WL 1439115, at \*2 (N.D. Ohio Mar. 31, 2019) (granting defendant’s motion to dismiss).

<sup>59</sup> Jacobson, *supra* note 52.

<sup>60</sup> See Duncan Reid, *Current Title IX Regulations Deny Accused Students Fundamental Rights*, OBERLIN REV. (Apr. 13, 2018), <https://oberlinreview.org/16035/opinions/current-title-ix-regulations-deny-accused-students-fundamental-rights/> [<https://perma.cc/6RK3-BVHZ>].

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There is an uncomfortable truth about campus rape policies.<sup>61</sup> Because they are primarily focused on protecting the victims of sexual assault and often ignore due process standards, the mere accusation of wrongdoing can seriously hinder the accused students' ability to attend college or obtain employment. College students accused of sexual misconduct are routinely denied due process in campus judicial proceedings. However, "an increasing number of those students have been taking their universities to court, arguing that unfair campus proceedings violated their constitutional due process rights, breached contracts, and even discriminated against them on the basis of sex."<sup>62</sup>

Since April of 2011, when the Office for Civil Rights issued its "Dear Colleague" letter, more than fifty lawsuits have been initiated.<sup>63</sup> Two significant rulings, both favorable to the accused-student plaintiffs, were *Doe v. Washington & Lee University* and *Mock v. University of Tennessee at Chattanooga*.<sup>64</sup> In *Washington & Lee University*, the university's motion to dismiss Doe's Title IX claim was denied.<sup>65</sup> The claim alleged that the university had unlawfully discriminated against him on the basis of sex during its disciplinary proceedings.<sup>66</sup> This ruling was noteworthy because many accused-student plaintiffs that attempted such Title IX claims had failed.<sup>67</sup> In some cases, judges dismissed the Title IX claims finding that the students had not offered sufficient evidence to show that the

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<sup>61</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>62</sup> Samantha Harris, *Due Process Legal Update: Judges in Virginia, Tennessee Rule in Favor of Accused Students*, FIRE (Aug. 18, 2015), <https://www.thefire.org/due-process-legal-update-judges-in-virginia-tennessee-rule-in-favor-of-accused-students/> [<https://perma.cc/YFZ7-T49Q>].

<sup>63</sup> *Id.*; see also U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (2011), [https://obamawhitehouse.archives.gov/sites/default/files/dear\\_colleague\\_sexual\\_violence.pdf](https://obamawhitehouse.archives.gov/sites/default/files/dear_colleague_sexual_violence.pdf) [<https://perma.cc/4GC4-647W>] (outlining steps to be taken in cases alleging sexual harassment) [hereinafter DEAR COLLEAGUE LETTER].

<sup>64</sup> Harris, *supra* note 62; *Doe v. Washington & Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015); *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. filed Aug. 4, 2015).

<sup>65</sup> *Washington & Lee Univ.*, 2015 WL 4647996, at \*12.

<sup>66</sup> *Id.* at \*1-2.

<sup>67</sup> Harris, *supra* note 62.

university's wrongful actions were motivated by gender discrimination.<sup>68</sup> As one court explained, the alleged biased treatment could have been "prompted by lawful, independent goals,' such as a desire (enhanced, perhaps, by the fear of negative publicity or Title IX liability to the victims of sexual assault) to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity."<sup>69</sup>

In the *Washington & Lee University* case, the court found that the Title IX officer who investigated the allegations against the plaintiff had also given a presentation on an article entitled *Is it Possible That There Is Something In Between Consensual Sex And Rape . . . And That It Happens To Almost Every Girl Out There?*<sup>70</sup> Upon consideration of the evidence, the court held that gender bias could be inferred from the school's presentation.<sup>71</sup> The court reasoned that the article, "written for the female-focused website *Total Sorority Move*," provided details of "a consensual sexual encounter between a man and the female author of the article, who comes to regret the incident when she awakens the next morning."<sup>72</sup> Although the plaintiff's Title IX claim proceeded to the next stage of litigation, the case was ultimately dismissed.<sup>73</sup>

Barely a week later, in August of 2014, a student at the University of Tennessee-Chattanooga named Corey Mock was found guilty of sexual assault.<sup>74</sup> Although the encounter was disputed, the university stated that he had failed "to prove he had obtained 'affirmative consent' from the accuser."<sup>75</sup> Mr. Mock testified, however, that "the female student's actions during intercourse led him to believe that she had consented to sex."<sup>76</sup> Mock later sued the school.<sup>77</sup>

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

<sup>69</sup> *Id.*

<sup>70</sup> *Washington & Lee Univ.*, 2015 WL 4647996, at \*3.

<sup>71</sup> *Id.* at \*10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*12.

<sup>74</sup> Johnson & Taylor, *supra* note 20.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; see also Mock v. Univ. of Tenn. at Chattanooga, No. 14-1687-II, at \*19 n.6 (Tenn. Ch. Ct. filed Aug. 4, 2015) ("Mr. Mock testified that he felt that everything that happened had been consensual . . .").

<sup>77</sup> Johnson & Taylor, *supra* note 20.

A Tennessee state court ruled in his favor, finding that the university abused its discretion and acted arbitrarily and capriciously.<sup>78</sup> The judge held that the university's policy of requiring "the accused to affirmatively prove consent . . . is flawed and untenable if due process is to be afforded."<sup>79</sup> The standard "erroneously shifted the burden of proof" to the accused.<sup>80</sup>

Mr. Mock's experience was "hardly unique."<sup>81</sup> At least three states—California, Connecticut, and New York—require educational institutions to find in favor of accusers unless they gave "affirmative consent," meaning a "positive manifestation by words or actions of consent to each sex act during an encounter."<sup>82</sup> In practice, "these

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<sup>78</sup> *Mock*, No. 14-1687-II, at \*23.

<sup>79</sup> Johnson & Taylor, *supra* note 20; *see also Mock*, No. 14-1687-II, at \*23.

<sup>80</sup> Johnson & Taylor, *supra* note 20; *see also Mock*, No. 14-1687-II, at \*23.

<sup>81</sup> Johnson & Taylor, *supra* note 20.

<sup>82</sup> *Id.* New York's affirmative consent statute states:

1. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: "Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression."
2. Each institution's code of conduct shall reflect the following principles as guidance for the institution's community:
  - a. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.
  - b. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.
  - c. Consent may be initially given but withdrawn at any time.
  - d. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.
  - e. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.

statutes authorize proceedings in which the decision-maker effectively presumes guilt and requires the accused to disprove it.”<sup>83</sup> The court’s decision turned on the use of an affirmative consent standard, which an increasing number of campuses now use to define consent. Under this standard, consent is viewed not as the absence of a “no” but rather as a clear verbal or non-verbal assent.<sup>84</sup> But these “undermine the presumption of innocence by shifting the burden of proof to the accused student . . . .”<sup>85</sup> The judge in the *Mock* agreed:

*[The accused] must come forward with proof of an affirmative verbal response that is credible in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party’s most private body parts. Absent the tape recording of a verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party’s consent strains credulity and is illusory.*<sup>86</sup>

In November of 2014, a twenty-three year-old University of Massachusetts (“UMass”) student named Kwadwo “Kojo” Bonsu had a sexual encounter with a white female student, which ended with an

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- f. When consent is withdrawn or can no longer be given, sexual activity must stop.

N.Y. EDUC. LAW § 6441 (McKinney 2015).

<sup>83</sup> Johnson & Taylor, *supra* 20. See generally Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015).

<sup>84</sup> Harris, *supra* note 62.

<sup>85</sup> *Id.*; see Robert Shibley, *For Some ‘Affirmative Consent’ Supporters, Injustice Is a Feature, Not a Bug*, DAILY CALLER (Oct. 16, 2014, 3:49 PM), <https://dailycaller.com/2014/10/16/for-some-affirmative-consent-supporters-injustice-is-a-feature-not-a-bug/> [<https://perma.cc/EXZ4-6P7M>]. “[Affirmative consent] effectively shifts the burden of proof to the accused, making him or her guilty until proven innocent. The question is no longer whether or not someone actually consented to a sexual act, it’s whether the accused can prove that they received such consent—and short of a videotape of the entire encounter, that proof is unlikely to exist.” *Id.*

<sup>86</sup> *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II, at \*12 (Tenn. Ch. Ct. filed Aug. 4, 2015); Harris, *supra* note 62.

exchange of phone numbers.<sup>87</sup> At the time, Bonsu was pursuing a degree in chemical engineering from the University of Massachusetts at Amherst.<sup>88</sup> The American-born son of Ghanaian immigrants, Bonsu was a member of the National Society of Black Engineers, played guitar in a UMass jazz band, and tutored young musicians at a local high school.<sup>89</sup>

Bonsu's female counterpart later wrote that while in retrospect she should have left if she did not want to continue the encounter, at the moment she succumbed to the student culture at UMass in which women who "become sexually involved with men . . . owe it to them to follow through."<sup>90</sup> She stated: "I want to fully own my participation in what happened, but at the same time recognize that I felt violated and that I owe it to myself and others to hold him accountable for something . . . ."<sup>91</sup> She proceeded to file a complaint with both the dean of students and the Amherst police, alleging that she had been sexually assaulted.<sup>92</sup> After a police investigation, the case was closed with no charges filed.<sup>93</sup> In January of 2015, the school sent Bonsu an email that a serious allegation had been lodged against him, and that until a hearing was held he could not contact his accuser, visit dormitories other than his own, or enter the student union.<sup>94</sup> Shortly thereafter, the accuser complained to the school that Bonsu had violated the no-contact order by trying to add her as a friend on Facebook.<sup>95</sup> Bonsu denied the allegation and offered the university access to his Facebook account and phone records.<sup>96</sup> The university declined the offer—instead sending him a new set of restrictions: effective immediately, he would be banned from all university housing and permitted on campus only to attend classes.<sup>97</sup> Bonsu reached out to

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<sup>87</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30. Yoffe describes at length a number of the case histories that are noted in this article. *See supra* Part II.A.

<sup>88</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

the student group that helps minority students, which organized an email campaign on his behalf.<sup>98</sup> The university responded by banning Bonsu from campus completely, ostensibly because the emails had disclosed the accuser's name.<sup>99</sup>

Bonsu's lawsuit characterized the period that followed as extremely stressful, during which he lost weight, contracted pneumonia, and was forced to drop two classes.<sup>100</sup> Nor could he appear at a hearing because of the sickness.<sup>101</sup> But the school refused to reschedule the hearing, which went forward without Bonsu present.<sup>102</sup> Although he was found not responsible for sexual misconduct, he was punished for using his accuser's name in the emails.<sup>103</sup> Not only was the permanent ban from campus extended and his graduation postponed, he was also required to get counseling to address his decision-making.<sup>104</sup> The University of Massachusetts denied all of Bonsu's allegations, but in September of 2018, settled the lawsuit for undisclosed terms.<sup>105</sup>

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In August of 2019, Dartmouth College settled a suit by nine women who had accused three professors of sexual assault and harassment for \$14 million.<sup>106</sup> "The school's president . . . thanked the women who 'courageously came forward alongside other students to

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

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

<sup>105</sup> *Id.* Bonsu "applied to universities in other states, but was not accepted. He spent a year studying music at a community college, unable to pursue his engineering degree. Eventually he was accepted into the engineering program at the University of Maryland at Baltimore County . . . a year and a half after he had left UMass." *Id.*

<sup>106</sup> Marina Pitofsky, *Dartmouth Reaches \$14 Million Settlement in Sexual Harassment, Assault Lawsuit*, HILL (Aug. 7, 2019, 2:49 PM), <https://thehill.com/blogs/blog-briefing-room/news/456584-dartmouth-reaches-14-million-settlement-in-sexual-harassment> [<https://perma.cc/UQZ7-CMMQ>].

bring to my administration's attention a toxic environment.”<sup>107</sup> Following the accusations, all three of the professors retired or resigned.<sup>108</sup>

Schools that did not adhere to the Title IX guidelines, which had been promulgated during President Barack Obama's administration, were threatened with the risk of losing federal funds.<sup>109</sup> At least one consequence of such strictures, perhaps unintended, has been the loss on many campuses of the right to be presumed innocent until proven guilty. While it is true that until relatively recently many women's claims of sexual assault were routinely disregarded, “the remedies that have been pushed on campus in recent years are unjust to men . . . and ultimately undermine the legitimacy of the fight against sexual violence.”<sup>110</sup>

The Obama regulations adopted the lowest possible burden of proof in cases involving allegations of sexual misconduct: a “preponderance of evidence” (that is, over a 50% likelihood of guilt) as opposed to “proof beyond a reasonable doubt” (the highest legal standard, as required by criminal courts).<sup>111</sup> Penn State, for example, instructs its Title IX administrators “to find the accused guilty if they deem there is a 50.01 percent likelihood that a violation occurred . . . .”<sup>112</sup> Moreover, in order to prevent intimidating or traumatizing the accuser, severe restrictions were placed on the ability of the accused to cross-examine.<sup>113</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* Dartmouth President Philip J. Hanlon stated: “I cannot express strongly enough my deep disappointment that these individuals violated their positions of trust to these, and other, students and members of our community. . . . Their conduct flies in the face of Dartmouth's mission and core values. That is why my colleagues and I moved to revoke their tenure. Through this process, we have learned lessons that we believe will enable us to root out this behavior immediately if it ever threatens our campus community again.” *Id.* See Holly Cramer, *Dartmouth College Unveils New Sexual Misconduct Policy*, WBUR (Aug. 13, 2019), <https://www.wbur.org/edify/2019/08/13/ivy-league-harassment-assault-stalking-exploitation> [<https://perma.cc/4J9B-5LWJ>].

<sup>109</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>110</sup> *Id.* See also Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 908 (2016).

<sup>111</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

The Office of Civil Rights (“OCR”) “urged all institutions of higher education to hire a full-time Title IX coordinator.”<sup>114</sup> To comply, many schools designated a lone staff member to function as “detective, prosecutor, judge, and jury.”<sup>115</sup> “Large universities were encouraged to appoint multiple coordinators.”<sup>116</sup>

The Obama rules established what constitutes sexual violence that requires investigation by a university: “rape, sexual assault, sexual battery, and sexual coercion.”<sup>117</sup> They broadly characterized sexual harassment “as ‘any unwelcome conduct of a sexual nature,’ including [verbal] remarks.”<sup>118</sup> Schools were advised to investigate all reports of such conduct, including “those in which the alleged victim refused to cooperate,” as well those that came from third parties.<sup>119</sup> The regulations required colleges and universities to conduct their own proceedings, even if a police investigation was already in process.<sup>120</sup>

In 2013, the Departments of Education and Justice expanded the definition of sexual harassment, noting that it was inappropriate to consider “whether ‘an objectively reasonable person’ of the same gender would find the actions or remarks offensive . . . .”<sup>121</sup> Flirtatious comments or sexual jokes have now become punishable in some schools.<sup>122</sup> Others require that consent must be given soberly for it to

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* Some notable examples: “Harvard now has 55 Title IX coordinators . . . . Wellesley College last year announced its first full-time coordinator to oversee sex discrimination on its all-female campus. Ozarks Technical Community College, which has no residential facilities and has had one report of sexual assault since 2013, now has a full-time Title IX coordinator.” *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* “By early 2014, the terminology used . . . to describe the two parties in still-unresolved sexual-assault cases had begun to change.” *Id.* “Complainants” were now called “victims” or “survivors,” and “alleged perpetrators” became just “perpetrators.” *Id.* See also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter Nondiscrimination in Education Programs].

be considered valid.<sup>123</sup> Still, others require affirmative consent—each touch must be preceded by an explicit, verbal grant of permission.<sup>124</sup>

When school employees are made aware of possible instances of sexual assault or harassment, many schools require these employees to make reports to the Title IX office.<sup>125</sup> Some investigations continue even though the alleged victim denies that any sexual assault or harassment occurred.<sup>126</sup>

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Now comes the American Bar Association, which in August of 2019 promulgated a resolution that would “urge legislatures and courts to redefine *criminal* sexual assault and apply standards like the one in the *Mock* case.”<sup>127</sup> This resolution had originally been advanced by the ABA’s Criminal Justice Section and Commission on Domestic and Sexual Violence, to the effect that “the law should define consent in sexual assault cases as the assent of a person who is competent to give

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<sup>123</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>124</sup> *Id.* “A training video on sexual consent for incoming students at Brown University, for instance, included this stipulation, among many others: ‘Consent is knowing that my partner wants me just as much as I want them.’” *Id.* See also *Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 316 (D.R.I. 2016) (explaining the affirmative consent required by the University code).

<sup>125</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>126</sup> *Id.* “There are no national data that let us know the prevalence of third-party reports, but they appear to be a significant source of allegations. The University of Michigan’s most recent ‘Student Sexual Misconduct Annual Report’ says that the school’s Office for Institutional Equity ‘often receives complaints about incidents from third parties.’” *Id.* See UNIV. OF MICH., ANNUAL REPORT REGARDING STUDENT SEXUAL & GENDER-BASED MISCONDUCT & OTHER FORMS OF INTERPERSONAL VIOLENCE JULY 2017 – JUNE 2018, 6 (2018), <https://hr.umich.edu/sites/default/files/student-sex-misconduct-report-fy-18.pdf> [<https://perma.cc/47JC-QRMX>]. “Yale release[d] a semiannual report of all possible sexual-assault and harassment complaints. Its report for the latter half of 2015 included a new category: third-party reports in which the alleged victim, after being contacted by the Title IX office, refused to cooperate. These cases made up more than [thirty] percent of all undergraduate assault allegations.” Yoffe, *The Uncomfortable Truth*, *supra* note 30. See OFFICE OF THE PROVOST, YALE UNIV., REPORT OF COMPLAINTS OF SEXUAL MISCONDUCT 13 (2015), <https://hr.umich.edu/sites/default/files/student-sex-misconduct-report-fy-18.pdf> [<https://perma.cc/79ZU-BLWL>].

<sup>127</sup> Johnson & Taylor, *supra* note 20.

consent to engage in a specific act of sexual penetration, oral sex, or sexual contact and provide that consent is expressed by words or action in the context of all the circumstances.”<sup>128</sup> Having already considered the issue, American Law Institute (“ALI”) rejected the affirmative consent language proposed by those seeking to revise the ALI’s Model Penal Code.<sup>129</sup>

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In July of 2019, *The New Yorker* published a thorough and sympathetic narrative of the Al Franken saga, which strongly criticized the group of Democratic senators who actively hounded Franken out of office.<sup>130</sup> The article, by veteran reporter Jane Mayer, elicited many responses. Some questioned the motives of both the magazine and the author. Mayer had received acclaim in 2018 for her coverage of Brett Kavanaugh, the then-Supreme Court nominee, and his alleged sexual evils, in a piece that had scant factual evidence.<sup>131</sup> Now, Mayer appears more concerned with due process, questioning the political motivations of one of Franken’s accusers. Could it be that “[a]fter decades of defending sexual misconduct by powerful Democratic figures,” Mayer, *The New Yorker*, and their media allies are “finally willing to reset a social standard?”<sup>132</sup> In the wake of Me Too, is it plausible that Democrats and their allies in the media were not really concerned about Franken’s alleged victims but instead were looking to

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See Mayer, *supra* note 26.

<sup>131</sup> See Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, from Brett Kavanaugh’s College Years*, NEW YORKER (Sept. 23, 2018), <https://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez> [<https://perma.cc/KZ45-SGKR>].

<sup>132</sup> Ben Shapiro, *Shapiro: Why the Left Is Reconsidering Al Franken*, DAILY WIRE (July 24, 2019), [https://www.dailywire.com/news/49860/shapiro-why-left-reconsidering-al-franken-ben-shapiro?amp&utm\\_source=shapironewsletter&utm\\_medium=email&utm\\_content=072519-news&utm\\_campaign=position1&\\_\\_twitter\\_impression=true](https://www.dailywire.com/news/49860/shapiro-why-left-reconsidering-al-franken-ben-shapiro?amp&utm_source=shapironewsletter&utm_medium=email&utm_content=072519-news&utm_campaign=position1&__twitter_impression=true) [<https://perma.cc/BT86-U5WE>] (“Many now claim that Sen. Kirsten Gillibrand, D-N.Y., was the real villain in this scenario, having rushed for Franken’s scalp precipitously.”).

establish a moral ground “upon which to attack Trump and demand that Republicans disown him?”<sup>133</sup>

Mayer’s story also brought forth a storm of backlash from feminist writers and websites.<sup>134</sup> Similar allegations have been made about former Vice President Joe Biden. A former Nevada state assemblywoman, Lucy Flores, alleged that Biden behaved improperly with her in 2014, and published her claims:

*I felt him get closer to me from behind. He leaned further in and inhaled my hair. I was mortified. I thought to myself, ‘I didn’t wash my hair today and the vice-president of the United States is smelling it. And also, what in the actual f\*ck? Why is the vice-president of the United States smelling my hair?’ He proceeded to plant a big slow kiss on the back of my head.*

...

*It was shocking because you don’t expect that kind of intimate behavior, you don’t expect that kind of intimacy from someone so powerful.*

...

*Part of the reason why I decided to finally say something is because those behaviors were not being taken very seriously. . . . I just can’t imagine that there was never a situation where someone said to him,*

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<sup>133</sup> *Id.*

<sup>134</sup> See, e.g., Christina Cauterucci, *What Jane Mayer Gets Wrong About Al Franken*, SLATE (July 22, 2019, 9:21 PM), <https://slate.com/news-and-politics/2019/07/al-franken-jane-mayer-new-yorker-leeann-tweedden.html> [<https://perma.cc/EEB6-G3SF>]; Daniel Greenfield, *New Yorker and Jane Mayer Use Clinton Playbook to Rehab Al Franken*, FRONTPAGE MAG. (July 22, 2019), <https://www.frontpagemag.com/point/2019/07/new-yorker-and-jane-mayer-use-clinton-playbook-daniel-greenfield/> [<https://perma.cc/FNA7-9FZJ>]; Anna Merlan, *The New Yorker Seriously Mischaracterized the Story of One of Al Franken’s Accusers*, JEZEBEL (July 26, 2019, 12:00 PM), <https://jezebel.com/the-new-yorker-seriously-mischaracterized-the-story-of-1836673266> [<https://perma.cc/483S-CZR3>]; Esther Wang, *‘He’s No Weinstein’: The New Yorker’s Distorted Defense of Al Franken*, JEZEBEL (July 22, 2019, 3:00 PM), <https://theslot.jezebel.com/he-s-no-weinstein-the-new-yorker-s-distorted-defense-o-1836599392> [<https://perma.cc/QX7S-YDAF>].

*'Mr. Vice President, you probably should stop doing that.'*<sup>135</sup>

Biden responded almost immediately:

*In my many years on the campaign trail and in public life, I have offered countless handshakes, hugs, expressions of affection, support, and comfort. And not once - never - did I believe I acted inappropriately. If it is suggested I did so, I will listen respectfully. But it was never my intention.*

*I may not recall these moments the same way, and I may be surprised at what I hear. But we have arrived at an important time when women feel they can and should relate their experiences, and men should pay attention. And I will.*

*I will also remain the strongest advocate I can be for the rights of women.*<sup>136</sup>

The due process problems that result from these procedures are palpable. Nowadays the terms “nonconsensual” and “unwanted” sex are frequently conflated. Regardless of gender and sexual orientation, many people engage in consensual sex that may in fact be unsolicited and unwanted. Ambivalence is often a part of human sexuality. But a number of “schools no longer require women to say or signal no in order for an encounter to be considered nonconsensual.”<sup>137</sup> Sobriety itself is a vague standard that could cover any amount of alcohol consumption.<sup>138</sup>

All such standards fly in the face of a Supreme Court ruling that states sexual harassment in a school setting must be “severe, pervasive,

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<sup>135</sup> Gabrielle Seunagal, *Joe Biden Faces Allegations of Sexual Impropriety*, USA HERALD (Apr. 1, 2019), <https://usaherald.com/joe-biden-faces-allegations-sexual-impropriety/> [<https://perma.cc/XJ8F-A78Q>].

<sup>136</sup> *Id.*

<sup>137</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>138</sup> In California, Connecticut, and New York, affirmative-consent codes for college students have been signed into law. See *Affirmative Consent Laws (Yes Means Yes) State by State*, AFFIRMATIVE CONSENT, <https://affirmativeconsent.com/affirmative-consent-laws-state-by-state/> [<https://perma.cc/XT34-9VH9>].

and objectively offensive.”<sup>139</sup> Title IX proceedings also “raised civil libertarians’ concerns about freedom of speech.”<sup>140</sup> Likewise, they ignore basic Constitutional safeguards “such as receipt of a specific, written complaint; clear rules of evidence; knowledge of the testimony of adverse witnesses; and the rights to discovery, cross-examination, and the calling of expert witnesses.”<sup>141</sup> And the student can be expelled for declining to answer questions.<sup>142</sup> Further, “whatever he says in an administrative hearing can be turned over to law-enforcement authorities and used against him in a criminal proceeding.”<sup>143</sup> Expulsion for sexual assault can have a severely negative impact on both the student and the institution.<sup>144</sup> In an era where technological record-keeping is ubiquitous, and may reflect virtually unchallengeable biases, it may well serve to destroy prospects for a chosen career.<sup>145</sup>

Both the American Association of University Professors and the American College of Trial Lawyers have urged universities to return to using the “clear and convincing” standard of proof in Title IX proceedings.<sup>146</sup> Law professors at Harvard Law School and the University of Pennsylvania published “open letters expressing their concern that OCR has undermined due process and justice.”<sup>147</sup> The National Association of Criminal Defense Lawyers (“NACDL”) called the proposed new ABA standard a “‘radical change in the law’ that ‘assumes guilt in the absence of any evidence regarding consent . . .

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<sup>139</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30; *see* *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

<sup>140</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* *See* Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL’Y REV.* 387 (2015).

<sup>144</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>145</sup> *Id.* *See* Geoffrey R. Stone, *Academic Freedom Under Siege*, *HUFFPOST* (May 31, 2015, 12:08 AM), [https://www.huffpost.com/entry/academic-freedom-under-si\\_b\\_7481620](https://www.huffpost.com/entry/academic-freedom-under-si_b_7481620) [<https://perma.cc/6SS5-CKK2>].

<sup>146</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>147</sup> *Id.* *See* Jake New, *Professors Urge Department of Education to Revise Sexual Assault Guidance*, *INSIDE HIGHER ED* (May 17, 2016, 3:00 AM), <https://www.insidehighered.com/news/2016/05/17/professors-urge-department-education-revise-sexual-assault-guidance> [<https://perma.cc/XY2X-Z4YR>].

merely upon evidence of a sex act with nothing more.”<sup>148</sup> “By ‘requiring an accused person to prove affirmative consent to each sexual act rather than requiring the prosecution to prove lack of consent’ . . . any law based on the proposal would violate the Due Process Clauses of the Fifth and 14th amendments [sic].”<sup>149</sup> Some criminal-defense lawyers, like Scott Greenfield, more bluntly declare that these laws would “result in the conviction of innocent men.”<sup>150</sup> Those supporting the ABA resolution highlight the “dubious science” of the so-called “neurobiology of trauma” and the idea of “frozen fright,” occurring when “a person confronted by an unexpectedly aggressive partner or stranger succumbs to panic, becomes paralyzed by anxiety, or fears that resistance will engender even greater danger.”<sup>151</sup>

As Emily Yoffe notes in *The Bad Science Behind Campus Response to Sexual Assault*, these claims are based on circular reasoning.<sup>152</sup> The researchers argue that a variety of behaviors can yield the conclusion that an assault occurred, including “the absence of verbal or physical resistance, [and] the inability to recall crucial parts of an alleged assault.”<sup>153</sup> They also note that claims should not be doubted or questioned just because of a “changing story.”<sup>154</sup> These criteria have already served to promote unfairness in campus Title IX tribunals.<sup>155</sup> Under this paradigm, “the accused is always guilty.”<sup>156</sup>

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<sup>148</sup> Johnson & Taylor, *supra* note 20. See Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/> [https://perma.cc/7A3L-XZQA] [hereinafter Yoffe, *The Bad Science*].

<sup>149</sup> Johnson & Taylor, *supra* note 20.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* See also Sally Satel, *Experiments in Doubt*, WALL ST. J., Aug. 15, 2019, at A13 (reviewing NICOLAS CHEVASSUS-AU-LOUIS, *FRAUD IN THE LAB* (2019)).

<sup>152</sup> Johnson & Taylor, *supra* note 20; see Yoffe, *The Bad Science*, *supra* note 148.

<sup>153</sup> Johnson & Taylor, *supra* note 20.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* “The University of Mississippi, for instance, trained sexual-assault adjudicators that even lying by an accuser should be interpreted as evidence that the accused is guilty.” *Id.* See Yoffe, *The Bad Science*, *supra* note 148.

Beyond the essential unfairness of Title IX procedures on campus, the consent guidelines are so unrealistic and impractical that they are likely to be ignored. What goes on in the bedroom does not lend itself to contract-style negotiation, which both stifles spontaneity and invites awkwardness.<sup>157</sup> It also fails to take into account the strong possibility of drinking before sex—a common way to lower inhibitions for both men and women.<sup>158</sup> In the real world, people “can legally consent to sex,” even if they may later come to regret their decision.<sup>159</sup> On many campuses, the strict application of the Title IX guidelines does not require “such knowledge or intent . . . for an adjudication to determine that a violation has occurred.”<sup>160</sup> Instead, the accuser’s version of the truth is almost always accepted. A 2014 White House report, “Rape and Sexual Assault: A Renewed Call to Action,” found that less than ten percent of reported rapes are false.<sup>161</sup> These assertions are replicated in campus materials that are distributed to students.<sup>162</sup> In fact there is little, if any, empirical data on false-rape complaints.<sup>163</sup> To the contrary, a study conducted by a U.S. Air Force judge advocate, who has defended men accused of sexual assault, concluded that the various surveys seeking to confirm the “veracity of accusers are methodologically unsound.”<sup>164</sup> The he-said-she-said nature of many campus investigations can be amply illustrated.

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<sup>157</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* See THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 16 (2014), [https://obama-white-house.archives.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](https://obama-white-house.archives.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf) [<https://perma.cc/W4X4-JCBM>].

<sup>163</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>164</sup> *Id.* See CTR. FOR PROSECUTOR INTEGRITY, WRONGFUL CONVICTIONS OF SEXUAL ASSAULT: AN UNTOLD STORY OF SYSTEMATIC INJUSTICE (2016), <http://www.prosecutorintegrity.org/wp-content/uploads/2016/01/Wrongful-Convictions-of-Sexual-Assault.pdf> [<https://perma.cc/9A8Q-HBH7>]; see also Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945 (2004); David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010), <https://cdn.atixa.org/website-media/atixa.org/>

In January of 2017, for example, an investigation of the University of Southern California's ("USC") football team's kicker, Matt Boormeester, led to his expulsion.<sup>165</sup> When word got back to the USC tennis coach that a neighbor thought he saw Boormeester hurt his girlfriend, a USC tennis player, he reported the incident to the Title IX office.<sup>166</sup> After a lengthy investigation, Boormeester was suspended and "a no-contact order was placed on the couple" while they were on campus.<sup>167</sup> "Eventually USC found Boormeester responsible for violating the school's student code of conduct . . . as well as for violating the no-contact order."<sup>168</sup> As a result, he was expelled.<sup>169</sup>

But Boormeester's girlfriend, Zoe Katz, later insisted, in a statement to *The Los Angeles Times*, that "nothing untoward happened," and that she would not have stood for any improper conduct toward her.<sup>170</sup> She further said that Boormeester had been "falsely accused" and that "the investigation went on despite her adamant objection; that Title IX administrators treated her in a 'dismissive and demeaning' way and told her she was a 'battered' woman; and that during 'repeated interrogations,' her words were ' . . . misquoted and taken out of context.'"<sup>171</sup>

Boormeester "filed suit against the school seeking to have his expulsion overturned."<sup>172</sup> In response, USC averred that it stood by its investigation:

*Katz "initially confirmed" the version of events supplied by the neighbor and other witnesses, that she asked for the no-contact order, and that she texted that*

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wp-content/uploads/2016/03/12193336/Lisak-False-Allegations-16-VAW-1318-2010.pdf [<https://perma.cc/QJA5-3MPX>].

<sup>165</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* See Nathan Fenno, *Former USC Kicker Matt Boormeester Asks Court to Reverse Expulsion; School Says Girlfriend Alleged Previous Abuse*, L.A. TIMES (Aug. 22, 2017, 5:35 PM), <https://www.latimes.com/sports/sportsnow/la-sp-matt-boormeester-petition-20170822-story.html> [<https://perma.cc/WQ9D-W482>].

<sup>170</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

*she was worried Boermeester would find out she had spoken with the Title IX investigator. USC said her “attempts to protect Petitioner were consistent with a recognized pattern of recanting in intimate partner violence that may be motivated by love or fear of reprisal.” Katz called the university’s statements “ludicrous,” again denying its allegations, and noted that she and Boermeester are still dating.<sup>173</sup>*

In March of 2018, a Los Angeles Superior Court judge refused to overturn his expulsion from the university.<sup>174</sup>

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In 2018, a group of academics issued a Statement in Support of Due Process in Campus Disciplinary Proceedings:

*Whereas fair and non-biased disciplinary proceedings are essential for the investigation and adjudication of sexual misconduct allegations on college campuses;*

*Whereas investigations that are balanced, objective, and fair are an essential element of due process;*

*Whereas both complainants and the accused benefit from an even-handed and transparent process that guarantees procedural due process;*

*Whereas Supreme Court Justice Ruth Bader Ginsburg has spoken in favor of enhancing campus processes by noting, “The person who is accused has a right to defend herself or himself . . . everyone deserves a fair hearing;”*

*Whereas law professors from Harvard University, Penn Law, Cornell University, and other*

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<sup>173</sup> *Id.*

<sup>174</sup> Joey Kaufman, *Judge Denies Former USC Kicker Matt Boermeester’s Bid to Re-enroll at School*, L.A. DAILY NEWS (Mar. 21, 2018, 7:10 PM), <https://www.dailynews.com/2018/03/21/judge-denies-former-usc-kicker-matt-boermeesters-bid-to-re-enroll-at-school/> [<https://perma.cc/YKB9-QSB7>].

*institutions have issued Open Statements in support of campus due process;*

*Whereas a 2017 YouGov poll found strong bipartisan public support for due process in Title IX cases on college campuses:*

- *81% of respondents believed the accused should have the right to be informed of the charges against him.*
- *61% said accused students should have the right to cross-examine their accusers.*
- *67% agreed that students accused of crimes on campus should enjoy the same legal protections that they would receive in a court of law.*

*Whereas false allegations of sexual assault dissipate scarce resources and undermine the credibility of victims;*

*Whereas over 25 editorials published in both liberal and conservative venues have expressed support for the recently announced plan of the U.S. Department of Education to enhance campus due process protections;*

*Therefore, the undersigned law professors, other legal experts, and scholars urge members of Congress to speak out in support of Constitutionally rooted due process rights on campus.<sup>175</sup>*

That we have arrived at a point of such dissonance in the service of American justice should be troubling. The use of Title IX regulatory guidelines has empowered schools to punish alleged perpetrators of ambiguous sexual encounters, while trained law-enforcement officials and the judicial system—which must prove guilt beyond a reasonable

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<sup>175</sup> Statement in Support of Due Process in Campus Disciplinary Proceedings, Stop Abusive and Violent Environments, coordinated by saveservices.org, <http://www.saveservices.org/wp-content/uploads/Due-Process-Statement-11.29.2018.pdf> [<https://perma.cc/C7P3-5QEH>] [hereinafter Due Process Statement].

doubt—cannot.<sup>176</sup> Institutions of higher education should rightly seek to protect students from physical harm, but they should be held to a higher account: to teach “how an open society functions” and protect the civil liberties of all its citizens.<sup>177</sup>

Besides the application of specific procedural guidelines in Title IX actions, the federal government also requires that all institutions of higher education offer training to their staffs about the effects of “neurobiological change” in victims of sexual assault, so that they will be able to conduct “‘trauma informed’ investigations and adjudications.”<sup>178</sup> The underlying premise is that people who have been sexually assaulted trigger a “cascade of neurotransmitters and stress hormones” that both impede their capacity for rational thought and interfere with their memory, to a point that they may find it difficult to recall the facts of the assault or to describe it chronologically—or even to offer verbal or physical resistance.<sup>179</sup>

Meanwhile, those charged with adjudicating the allegations are instructed that none of these factors—the inability to resist an assault, to recall specifics about it, or to be consistent about the facts—should raise suspicions as to the validity of the claim.<sup>180</sup> Instead, adjudications may use these behaviors as “evidence that an assault occurred.”<sup>181</sup> Various federal and state agencies have reinforced this theory by way of policy initiatives or legislation.

In 2013, for example, the National Center for Campus Public Safety offered campus administrators a “Trauma-Informed Sexual Assault Investigation and Adjudication” curriculum.<sup>182</sup> The University of Texas at Austin released a report entitled “The Blueprint for Campus Police: Responding to Sexual Assault,” which examined “‘victim-centered and trauma-informed’ investigations, asserting: ‘Trauma victims often omit, exaggerate, or make up information when

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<sup>176</sup> Yoffe, *The Uncomfortable Truth*, *supra* note 30.

<sup>177</sup> *Id.*

<sup>178</sup> Yoffe, *The Bad Science*, *supra* note 148.

<sup>179</sup> *Id.* See Melissa Hamilton, *The Reliability of Assault Victims’ Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL’Y REV. 269, 289–90 (2015).

<sup>180</sup> Yoffe, *The Bad Science*, *supra* note 148.

<sup>181</sup> *Id.*

<sup>182</sup> Yoffe, *The Bad Science*, *supra* note 148. See NAT’L CTR. FOR CAMPUS PUB. SAFETY, <https://www.nccpsafety.org/> [<https://perma.cc/F6BJ-EL5Z>].

trying to make sense of what happened to them or to fill gaps in memory.”<sup>183</sup> It added that “due to the neurobiology of trauma, victims may suffer from a rape-induced paralysis called tonic immobility.”<sup>184</sup> In 2015, Illinois passed a law entitled “Preventing Sexual Violence in Higher Education,” which similarly requires that campus personnel be trained in the “‘neurobiological impact of trauma’; other states are considering similar legislation.”<sup>185</sup>

But the claim that a sexual-assault victim’s memory is generally accurate, though perhaps fragmented or disoriented, appears to contradict modern scientific knowledge.<sup>186</sup> Indeed, the idea of “recovered memory” has been widely challenged if not fully debunked. The theory gained traction in the 1980s and 1990s, when several best-selling books convinced patients that “their problems were caused by repressed memories of childhood sexual abuse, often at the hands of their father.”<sup>187</sup> With the help of therapists, victims recovered their memories and initiated the healing process.<sup>188</sup>

Over time, however, various researchers have concluded that the whole notion of recovered memory is fundamentally flawed. It has been suggested that therapists supplied false memories to vulnerable people, which led to unfounded accusations.<sup>189</sup> In his 2003 book *Remembering Trauma*, Richard McNally, a clinical psychologist at Harvard, concluded that recovered memory “is a piece of psychiatric folklore devoid of convincing empirical support.”<sup>190</sup> Elizabeth Loftus, another widely respected American cognitive psychologist, says that trying to reconstruct alcohol-induced memory fragmentation is “very vulnerable to post-event suggestion”—making it easy to manifest exaggerated and possibly false memories, which can ultimately feel completely authentic.<sup>191</sup> She sees this as “extremely worrisome.”<sup>192</sup>

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<sup>183</sup> Yoffe, *The Bad Science*, *supra* note 148.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* See 110. ILL. COMP. STAT. 155 (2015).

<sup>186</sup> Yoffe, *The Bad Science*, *supra* note 148.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* See, e.g., ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* (3d ed.1994); EILEEN FRANKLIN & WILLIAM WRIGHT, *SINS OF THE FATHER* (1991).

<sup>189</sup> Yoffe, *The Bad Science*, *supra* note 148.

<sup>190</sup> *Id.* See RICHARD J. McNALLY, *REMEMBERING TRAUMA* (2003).

<sup>191</sup> Yoffe, *The Bad Science*, *supra* note 148.

With universities feeling the pressure to address sexual assault, “they sometimes fill these offices with people whose bias and agendas lead them to create victimhood.”<sup>193</sup>

In the mid-2000s, a few researchers began studying whether “tonic immobility”—the well-documented fear of harm that elicits a catatonic state of being unable to speak or move (similar to the “playing dead” technique used by prey animals finding themselves in jeopardy)—could be applied to humans.<sup>194</sup> There remains a good deal of debate as to whether there is a scientific basis to reach that conclusion. At least one recent case that challenged the recovered-memory theory resulted in exoneration of a wrongfully accused defendant. In July of 2017, a male student at the University of Oregon filed a lawsuit in federal court against the university after being suspended for supposedly sexually assaulting a female student, arguing that the accuser had provided inconsistent accounts of the alleged incident.<sup>195</sup> He claimed there had been no sexual contact that night, and presented both electronic evidence and statements by witnesses that directly disproved her timeline.<sup>196</sup> The complaint also noted that the Title IX officer concluded that the accuser’s “stories shifted because she suffered from trauma-induced memory problems.”<sup>197</sup> The suspension was overturned with the court finding that the university had conducted an unfair process, partly because the male student did not have the opportunity in the original proceeding to rebut the Title IX officer’s memory claims.<sup>198</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* See ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE* (1994). See also FREDERICK CREWS, *THE MEMORY WARS: FREUD’S LEGACY IN DISPUTE* (1995); MALCOLM MACMILLAN, *FREUD EVALUATED: THE COMPLETED ARC* (1991).

<sup>194</sup> *Id.* See Francine Russo, *Sexual Assault May Trigger Involuntary Paralysis*, SCI. AM. (Aug. 4, 2017), <https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis/> [<https://perma.cc/3NLZ-7UW2>].

<sup>195</sup> Yoffe, *The Bad Science*, *supra* note 148.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* See Jack Pitcher, *Male Student Sues UO Over Handling of Sexual Assault Investigation*, DAILY EMERALD (July 16, 2017), [https://www.dailyemerald.com/news/administration/male-student-sues-uo-over-handling-of-sexual-assault-investigation/article\\_b70a0a57-eb88-5d0f-8f6d-6b90c70ce63f.html](https://www.dailyemerald.com/news/administration/male-student-sues-uo-over-handling-of-sexual-assault-investigation/article_b70a0a57-eb88-5d0f-8f6d-6b90c70ce63f.html) [<https://perma.cc/V6VC-82Q8>].

But such legal challenges are relatively rare. Just as many rapes go unreported because the process of reporting them can be a miserable experience for the victim, so too are defending accusations in court both expensive and troubling for the wrongfully accused. Just as no matter what precedes or follows an accusation of assault, the accused is usually perceived as guilty, so too is it that men wrongly accused are often tarnished even if exonerated.<sup>199</sup>

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The role that race plays in campus sexual assault is largely ignored by the government.<sup>200</sup> While predators are often stereotyped as rich, white, or fraternity athletes, the facts are often otherwise.<sup>201</sup> Janet Halley, a professor at Harvard Law School, notes that “American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women,” only to be eventually followed by revelations that the alleged perpetrators were not guilty.<sup>202</sup> She further “observed the phenomenon at her own university: ‘Case after Harvard case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents.’”<sup>203</sup> Jeannie Suk Gersen, another Harvard Law School professor, likewise found

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<sup>199</sup> In any event, some doubt exists as to whether requirements for corroborating evidence help or harm the pursuit of justice. Benjamin Rachlin, *Who to Believe*, NEW REPUBLIC (Dec. 3, 2018), <https://newrepublic.com/article/152305/who-to-believe-sexual-assault> [<https://perma.cc/9P9C-CVBT>]. See, e.g., Bret Stephens, Commentary, *Betsy DeVos Ends a Campus Witch Hunt*, N.Y. TIMES, Sept. 8, 2017, at A23; Adam Candeub, *Why Revoking Obama’s Sex Assault Letter Won’t End Campus Witch Hunts*, FEDERALIST (Jan. 16, 2018), <https://thefederalist.com/2018/01/16/revoking-obamas-sex-assault-letter-wont-end-campus-witch-hunts/> [<https://perma.cc/LT7H-KKE2>].

<sup>200</sup> Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/> [<https://perma.cc/LR97-RE3Z>] [hereinafter Yoffe, *The Question of Race*].

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* See Halley, *supra* note 83.

that administrators handling sexual-misconduct cases see mostly complaints against minorities.<sup>204</sup>

As the definition of sexual assault used by colleges has broadened, and as the standards for proving assault have been lowered, it is certainly possible that “unconscious biases might tip some women toward viewing a regretted encounter with a man of a different race as an assault,” thereby disadvantaging men of color in adjudication of the charges against them.<sup>205</sup>

In 2014, at the University of Findlay in Ohio, two Black students had separate sexual encounters with a white female student.<sup>206</sup> According to a suit they filed in federal court, not only were the encounters consensual but the female student also bragged about them afterward to her friends.<sup>207</sup> But shortly thereafter, “she filed a written complaint of sexual assault.”<sup>208</sup> Two days later, the accused student athletes were expelled, “and their names and photos were printed in the local paper.”<sup>209</sup>

Although under the Trump administration the Department of Education rescinded Obama’s regulatory guidance, for many students the damage had already been done. The lack of due process made young Black men especially vulnerable.<sup>210</sup> According to the Center for

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<sup>204</sup> Yoffe, *The Question of Race*, *supra* note 200. See *An Imperfect Process: How Campuses Deal with Sexual Assault*, JEANNIESUKGERSEN.COM (Jan. 28, 2014) <https://jeanniesukgersen.com/campus-sexual-assault/> [https://perma.cc/Q3J3-CJXD].

<sup>205</sup> Yoffe, *The Question of Race*, *supra* note 200. See Anne Hendershott, *A White Sociologist and the Doctrine of the Black Insider*, MINDING CAMPUS (Aug. 10, 2017), <https://www.mindingthecampus.org/2017/08/10/a-white-sociologist-and-the-doctrine-of-the-black-insider/> [https://perma.cc/34X4-AVQ7].

<sup>206</sup> Yoffe, *The Question of Race*, *supra* note 200.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* “Findlay’s president, Katherine Fell, said that the university had dealt with ‘a serious incident of sexual assault on our campus, and we’ve done it with compassion, thorough research and effectiveness.’” *Id.* See also Robby Soave, Opinion, *Is This the Most Unfair Campus Rape Investigation Ever?*, NEWSWEEK (Jan. 13, 2016, 2:07 PM), <https://www.newsweek.com/university-findlay-campus-rape-investigation-415331> [https://perma.cc/622B-STJ7].

<sup>210</sup> Michael Jones, *Believe the Survivor? Here’s 11 Times Young Black Men Were Railroaded by Campus Sexual Assault Claims*, C. FIX (Nov. 7, 2018), <https://www.thecollegefix.com/believe-the-survivor-heres-11-times-young-black-men-were-railroaded-by-campus-sexual-assault-claims/> [https://perma.cc/XDC3-B2QM].

Prosecutor Integrity, there are “parallels between the treatment of Black men accused of rape during the infamous Jim Crow period, and the adjudication of sexual assault cases in the current era.”<sup>211</sup> Many Black students have suffered under false allegations or poorly administered campus tribunals. Students are often suspended or expelled, and many have their promising sports careers derailed. This includes athletes suspended or expelled from colleges and universities across the country: Tennessee, Sacred Heart, Pennsylvania, Oregon, Findlay, Brown, Colorado State, Saddleback, Harvard, and North Carolina.<sup>212</sup>

A number of other similar cases have been reported. “In November 2014, five 18-year-old black male freshmen at William Paterson University [in New Jersey] were arrested for allegedly holding a female student in a room and forcing her to perform sexual acts.”<sup>213</sup> Soon after the arrests, the president of the university, Kathleen Waldron, issued a statement saying that she was “angry and dismayed that this crime was committed on our campus,” and that her “deepest concern [was] for the victim of this criminal act who has courageously stepped forward to take legal action and seek justice.”<sup>214</sup> The accused students were jailed for nine days, and after a grand jury ruled there was insufficient evidence to go forward with an indictment, they were freed.<sup>215</sup> Despite their exoneration, the accused students were not allowed back on campus nor were able to continue their education.<sup>216</sup> Two of them filed suit, saying that the sexual encounters in question had been initiated by the woman, as she had done at least once previously with each, and were entirely consensual.<sup>217</sup>

Less than five percent of the student population at Colgate University were Black in the 2013–14 academic year, yet Black male students were accused of fifty percent of the sexual violations reported

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Yoffe, *The Question of Race*, *supra* note 200.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* See Nick Rummell, *Ex-Students Say College Botched Rape Inquiry*, COURTHOUSE NEWS SERV. (Jan. 7, 2016), <https://www.courthousenews.com/ex-students-say-college-botched-rape-inquiry/> [<https://perma.cc/6EYQ-NT57>].

<sup>216</sup> Yoffe, *The Question of Race*, *supra* note 200.

<sup>217</sup> *Id.*

on campus.<sup>218</sup> The ratios were less in preceding years, but still broadly disproportionate. Melissa Kagle, a former assistant professor at Colgate, “became a prominent critic of Colgate’s handling of sexual misconduct” charges.<sup>219</sup> Once a rape victim herself, she had come to understand that people’s memory and judgment could become clouded over time which helped to “creat[e] a reflex to presume guilt.”<sup>220</sup> “In several cases that she had come to know closely . . . ‘people believed something terrible happened when it hadn’t.’”<sup>221</sup>

In 2017, a United States Court of Appeals found that the University of Cincinnati had violated the rights of a male student. The University suspended him for sexual assault even when it failed to provide him with an opportunity to cross-examine his accuser in any form after she failed to appear for his hearing.<sup>222</sup> The Obama administration discouraged the cross-examination of students by students, “writing that it could be ‘traumatic or intimidating.’”<sup>223</sup> In so doing, however, the accused party was precluded from “test[ing] the credibility of his accuser.”<sup>224</sup>

It is important to bear in mind that virtually all of the many stories that have surfaced in the Me Too Era are largely anecdotal. There is little hard data that has been subjected to thorough, objective, and intellectual scrutiny. “[W]e do not know whether systematic racial bias is at work in campus-sexual-assault complaints,” and if it is, to what extent.<sup>225</sup> More definitive analysis is needed to determine if and how

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* See *Campus Kangaroo Courts Target Nonwhite Men: ‘Nobody Wants to Talk About It,’* C. FIX (Sept. 11, 2017), <https://www.thecollegefix.com/bulletin-board/campus-kangaroo-courts-target-nonwhite-men-nobody-wants-talk/> [<https://perma.cc/NU6K-RL37>].

<sup>222</sup> *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 396 (6th Cir. 2017); Emily Yoffe, *Reining in the Excesses of Title IX*, ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/> [<https://perma.cc/2LUA-3Dq9>] [Yoffe, *Reining in the Excesses*].

<sup>223</sup> Yoffe, *Reining in the Excesses*, *supra* note 222.

<sup>224</sup> *Id.*

<sup>225</sup> Yoffe, *The Question of Race*, *supra* note 200.

racial bias affects the disposition of sexual assault cases where the accused is a racial minority.<sup>226</sup>

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The promulgators of these Title IX injustices now go well beyond simply denying due process to university students accused of often unsubstantiated and frequently false charges of sexual harassment and assault. The so-called “Safe Transfer Act” would “require a posting or a warning on the academic transcript of any student found by a college or university to have violated the school’s rules or policies with regard to Title IX’s policies on sexual harassment and assault”—thereby destroying any hope for these students to transfer to other colleges and universities.<sup>227</sup> The legislation, if enacted, would notify admissions offices that the incoming student has a record of misconduct and could be a threat to the students and staff.<sup>228</sup> None of this will matter, at least not until the next presidential election, if proposed changes to Title IX regulations are adopted.

In 2018, Secretary of Education Betsy DeVos proposed sweeping new changes to the guidelines that would pay greater deference to due process, declaring that the Obama-era rules and procedures had created a “‘failed system’ that brought justice neither to accuser nor accused.”<sup>229</sup> Whereas the training materials used by schools now—many of which are filled with “assumptions that female accusers have experienced life-threatening ordeals and that male accused are serial predators”—are held closely by the schools, who have even gone to court to prevent the accused from gaining access to them, the proposed changes to Title IX would have stringent standards of impartiality and nonbias.<sup>230</sup>

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<sup>226</sup> *Id.* See David R. Williams & Selina A. Mohammed, *Discrimination and Racial Disparities in Health: Evidence and Needed Research*, 32 J. BEHAV. MED. 20, 21–22 (2009).

<sup>227</sup> Anne Hendershott, Opinion, *Denying Due Process for Campus Sexual Assault Cases*, WASH. TIMES (Jan. 4, 2017), <https://www.washingtontimes.com/news/2017/jan/4/denying-due-process-for-campus-sex-assault-cases/> [<https://perma.cc/GBY5-MSZ5>].

<sup>228</sup> *Id.*

<sup>229</sup> Yoffe, *Reining in the Excesses*, *supra* note 222.

<sup>230</sup> *Id.*

The rules under the Obama administration were so focused on remedying alleged sexual assault that campus employees were held responsible for reporting Title IX violations even when the victim did not want to make a formal complaint. The scope of what these mandated reporters could identify as a sexual assault was very broad—even “rumors and hearsay” could be sufficient for a complaint.<sup>231</sup> As a result, some students have been accused, “labeled as perpetrators and punished even when no victim has come forward, or when the alleged victim strenuously objects to the adjudication.”<sup>232</sup>

Rejecting the model that accepts rumors as evidence, the revised rules would adopt the definition of sexual harassment used by the Supreme Court: “unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school’s education program or activity.”<sup>233</sup> Moreover, they would reject the low “preponderance of the evidence” standard in favor of the more robust “clear and convincing evidence” standard.<sup>234</sup> In addition, the proposed regulations address many of the specific due process deficiencies identified in the appellate rulings, including an insufficient hearing process, lack of cross-examination, inadequate credibility assessment, insufficient notice, inadequate investigation, conflicting roles of college officials, improper use or exclusion of witness testimony, potential sex bias, and misuse of affirmative consent policy.<sup>235</sup>

These proposals were almost immediately met with resistance by many college presidents and administrators, who said they would not willingly change their current policies. New York Senator Kirsten Gillibrand responded to the DeVos proposals by saying that DeVos favors “predators over survivors.”<sup>236</sup> Connecticut Senator Richard Blumenthal called the proposals “[d]eplorable & disgusting.”<sup>237</sup> Pennsylvania Attorney General Josh Shapiro said that striking the

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> The new regulations include a number of provisions designed to restore due process on campus. See *Nondiscrimination in Education Programs*, *supra* note 122.

<sup>236</sup> Yoffe, *Reining in the Excesses*, *supra* note 222.

<sup>237</sup> *Id.*

policies put in place by the Obama administration would “make college campuses less safe, not more safe.”<sup>238</sup> The activist group Know Your IX is clear on the question, believing that the proposals are a way of protecting schools against charges of covering up rape and sexual harassment.<sup>239</sup> The naysayers ignore the reality of the issue that all of the proposed reforms seek to address, the rising number of lawsuits claiming unfair adjudications—many of which resulted in verdicts favorable to the accused.<sup>240</sup>

In September of 2018, a group of nearly 300 leading law professors and other scholars signed a “Due Process Statement” that enunciated principles for the investigation and adjudication of campus sexual assault allegations.<sup>241</sup> The statement, aimed particularly at the current Title IX guidelines, was “designed to correct the erosion of procedural protections that has shortchanged identified victims and accused students in recent years.”<sup>242</sup> A few months later the statement was hand-delivered to every member of Congress and their staffs, together with an analysis of more than a dozen appellate court decisions from campus sexual assault cases—a majority of which found in favor of the accused.<sup>243</sup> The pace of decisions favoring the accused students continued to accelerate; by the end of 2018, 181 cases resulted in favorable, or at least partially favorable, results for the accused.<sup>244</sup> In some of them, colleges opted to settle the lawsuit prior to a judicial decision, rather than pursue expensive and potentially embarrassing litigation.<sup>245</sup>

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<sup>238</sup> Susan Berry, *Report: DeVos Campus Sex Assault Rules to Include Due Process for Accused*, BREITBART (Nov. 15, 2018), <https://www.breitbart.com/politics/2018/11/15/report-devos-campus-sex-assault-rules-to-include-due-process-for-accused/> [https://perma.cc/474K-9GT9].

<sup>239</sup> Yoffe, *Reining in the Excesses*, *supra* note 222.

<sup>240</sup> *Id.*; see also Johnson & Taylor, *supra* note 20.

<sup>241</sup> Due Process Statement, *supra* note 175.

<sup>242</sup> *Campus Due Process is Becoming the Law of the Land*, STOP ABUSIVE AND VIOLENT ENVIRONMENTS, <http://www.saveservices.org/sexual-assault/restore-fairness/> [https://perma.cc/G27F-UMVH] [hereinafter *Campus Due Process*].

<sup>243</sup> STOP ABUSIVE AND VIOLENT ENVIRONMENTS, APPELLATE COURT DECISIONS FOR ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT, 2013-2018 (2019), <http://www.saveservices.org/wp-content/uploads/Appellate-Court-Cases-Report.pdf> [https://perma.cc/FQ3G-8MD6] [hereinafter APPELLATE COURT DECISIONS REPORT].

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

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The absence of options and protections such as discovery and cross-examination sometimes works unintended consequences for those engaged in consensual sexual activity. Christina Hoff Sommers, author of *The War Against Boys* and *Who Stole Feminism?*, coined the term “victim feminism” to describe what she believes is an exaggeration of the sexual assault problem.<sup>246</sup> In the past few years, she says, many campuses “have descended into a kind of sexual McCarthyism where due process was suspended and the presumption of innocence was replaced by ‘guilty because accused.’”<sup>247</sup> For Sommers, equity feminism is simply about gender equity: fair treatment, respect and dignity.<sup>248</sup> But today it has been replaced by what she calls “fainting couch feminism,” a brand of feminism “which views women as fragile and easily traumatized” and as members of “an oppressed and silenced class.”<sup>249</sup>

An equity feminist, by contrast, “does not assume that all sex under the influence is assault, or that men are automatically to blame.”<sup>250</sup> Sommers rightly asserts that college administrative tribunals largely lack the training and resources to investigate and adjudicate sexual assaults, some of which are criminally categorized as felonies.<sup>251</sup> Sommers also argues that “a major source of the trouble is binge drinking . . . [and] alcohol prevention programs are part of the solution. Some women say that is blaming the victim. Teaching people how to avoid becoming victims isn’t blaming the victim. It’s common sense.”<sup>252</sup> But now campus officials around the country “are quietly amending the Supreme Court standard so harassment includes anything that makes another student uncomfortable. Even jokes, satire

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<sup>246</sup> Stephanie Saul, ‘*Victim Feminism*’ and Sexual Assault on Campus, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/education/edlife/christina-hoff-sommers-sexual-assault-feminism.html> [<https://perma.cc/8NX4-LHS5>].

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

and offhand remarks can lead to charges and have. Title IX was never intended as a guide to good manners.”<sup>253</sup>

## B. Public Employees

### i. The Supreme Court

That sexual harassment and gender inequality existed long before the Me Too movement can be illustrated by the experience of United States Supreme Court Justice Ruth Bader Ginsburg: “Every woman of my vintage knows what sexual harassment is, although we didn’t have a name for it. . . . The attitude toward sexual harassment was simply, ‘Get past it. Boys will be boys.’”<sup>254</sup> She described an incident that occurred when she was a student at Cornell University in the early 1950s.<sup>255</sup> Concerned about a big chemistry exam, the instructor told her not to worry because he would give her a practice exam to make her more comfortable with the material.<sup>256</sup> “The next day . . . the test is the practice exam. And I knew exactly what he wanted in return.”<sup>257</sup> Ginsburg said she did not just ignore the professor’s gesture: after the exam, she confronted him: “I went to his office and I said, ‘How dare you! How dare you’ . . . [a]nd that was the end of that.”<sup>258</sup>

In 1964, after Justice Ginsburg had begun teaching at Rutgers Law School, she quickly realized she was being paid less than her male colleagues.<sup>259</sup> Banding together with co-workers, she filed a complaint based on the Equal Pay Act and negotiated a settlement.<sup>260</sup> Recently, Justice Ginsburg revealed that she is less concerned about the potential backlash of the Me Too movement than she might have been if the movement had occurred twenty years ago.<sup>261</sup>

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<sup>253</sup> *Id.*

<sup>254</sup> Earl, *supra* note 18.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* Another example of gender inequality recalled by Ginsburg occurred in 1972, when she was a professor at Columbia. Told that the university issued layoff notices to twenty-five women in the maintenance department—but not to a single man—Ginsburg informed the administration that it was violating Title VII of the Civil Rights Act; Columbia quickly found a way to avoid laying off anyone. *Id.*

<sup>261</sup> *Id.*

## ii. The Kavanaugh Case

Perhaps the most momentous case to involve the burgeoning Me Too movement came in the summer of 2018, with the nomination of United States Supreme Court Justice Brett Kavanaugh for a seat on the Supreme Court following the resignation of Justice Anthony Kennedy. Almost immediately, a pitched political battle ensued between Democrats, uniformly in opposition, and Republicans, almost entirely in favor. The debate grew most contentious when Justice Kavanaugh was accused of having sexually assaulted several women when he was in high school in the early 1980s.<sup>262</sup>

The Senate Judiciary Committee heard testimony from Christine Blasey Ford and two other women, Deborah Ramirez and Julie Swetnick, both of whom came forward with similar charges of abuse.<sup>263</sup> Justice Kavanaugh categorically denied all of the allegations.<sup>264</sup> After much contentious debate, the Senate voted 50-48 to confirm his nomination.<sup>265</sup>

Even some who once supported him came out in opposition. One was Benjamin Wittes, Editor-in-Chief of *Lawfare* and a senior fellow at the Brookings Institution. Writing for *The Atlantic*, he declared:

*If I were a senator, I would not vote to confirm Brett Kavanaugh. These are words I write with no pleasure, but with deep sadness. . . . I have no hostility to or particular fear of conservative jurisprudence. I have a long relationship with Kavanaugh, and I have always liked him. I have admired his career on the D.C. Circuit. I have spoken warmly of him. I have published*

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<sup>262</sup> Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018), [https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b\\_story.html](https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html) [<https://perma.cc/7ZVB-C6ZL>].

<sup>263</sup> Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/E45W-Q3JG>].

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

*him. I have vouched publicly for his character—more than once—and taken a fair bit of heat for doing so.*<sup>266</sup>

Wittes went on to note he was “keenly aware that rejecting Kavanaugh on the record currently before the Senate [would] set a dangerous precedent” because the allegations against him were not only unproven, but rebuttable.<sup>267</sup> So what then was his problem with the nominee? It was Justice Kavanaugh’s “howl of rage” as he tried to defend the charges against him, during which he unleashed a partisan attack against Democrats on the Senate Judiciary Committee.<sup>268</sup> This, said Wittes, was a “performance . . . wholly inconsistent with the conduct we should expect from a member of the judiciary.”<sup>269</sup> Charlie Sykes, another conservative commentator sympathetic to the nominee said, “[e]ven if you support Brett Kavanaugh . . . that was breathtaking as an abandonment of any pretense of having a judicial temperament. . . . It’s possible, I think, to have been angry, emotional, and passionate without crossing the lines that he crossed—assuming that there are any lines anymore.”<sup>270</sup>

Democratic Senators Kirsten Gillibrand and Kamala Harris “declared that they *knew* Justice Kavanaugh did what Ford alleged before hearing the testimony of either party.”<sup>271</sup> After Republican

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<sup>266</sup> Benjamin Wittes, *I Know Brett Kavanaugh, but I Wouldn’t Confirm Him*, ATLANTIC (Oct. 2, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/why-i-wouldnt-confirm-brett-kavanaugh/571936/> [https://perma.cc/ZJ9L-KSQQ].

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* On the other hand, Wittes found Ford to be “wholly credible.” “By my read, we have two witnesses who both profess 100 percent certainty of their position—one whose testimony is wholly credible and marginally corroborated in a number of respects, and the other whose testimony is not credible on a number of important atmospheric points surrounding the alleged event. It’s not a tie, and it doesn’t go to the nominee.” *Id.* See also Judith Donath, *The Secret to Brett Kavanaugh’s Specific Appeal*, ATLANTIC (Sept. 29, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/why-do-republicans-still-support-brett-kavanaugh/571699/> [https://perma.cc/3AB5-2A6R]; Caitlin Flanagan, *The Abandoned World of 1982*, ATLANTIC (Sept. 25, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/kavanaugh-ford/571066/> [https://perma.cc/EVE9-ZR3T].

<sup>271</sup> Emily Yoffe, *Does Anyone Still Take Both Sexual Assault and Due Process Seriously?*, ATLANTIC (Oct. 13, 2018) (emphasis added), <https://www.theatlantic.com/ideas/archive/2018/10/does-anyone-still-take-both-sexual-assault-and-due-process-seriously/>

Senator Susan Collins declared that, having thoroughly reviewed the evidence, she would cast a decisive vote for Justice Kavanaugh, *The New York Times* columnist Alexis Grenell was similarly cavalier: “Senator Collins subjected us to a slow funeral dirge about due process and some other nonsense I couldn’t even hear through my rage headache . . . .”<sup>272</sup>

In their rush to embrace the slogan “#BelieveSurvivors,” Democrats may actually have helped confirm Justice Kavanaugh.<sup>273</sup> After attorney Michael Avenatti released a statement by Ms. Swetnick alleging that at numerous high-school parties Justice Kavanaugh drugged the drinks of teenage girls who were then gang-raped, Democratic Senator Chuck Schumer, then minority leader, immediately demanded that Justice Kavanaugh withdraw.<sup>274</sup> All of this became ammunition for Republicans to defend him.<sup>275</sup>

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[www.theatlantic.com/ideas/archive/2018/10/sexual-assault-has-become-partisan-issue/572893/](http://www.theatlantic.com/ideas/archive/2018/10/sexual-assault-has-become-partisan-issue/572893/) [<https://perma.cc/47GH-PF5M>] [hereinafter Yoffe, *Does Anyone*].

<sup>272</sup> Alexis Grenell, Opinion, *White Women, Come Get Your People*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/opinion/lisa-murkowski-susan-collins-kavanaugh.html> [<https://perma.cc/Y7RW-9BVK>].

<sup>273</sup> Yoffe, *Does Anyone*, *supra* note 271.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*; see also Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html> [<https://perma.cc/TN3S-ZT2Y>]. A corollary to #Believe Survivors is the tenuous assertion that there is scientific evidence that accusers are almost always telling the truth. That claim is not supported by facts. Even if it were, the guilt of an accused person should not be based on statistics. Yoffe, *Does Anyone*, *supra* note 271. After Kavanaugh was confirmed, dozens of ethics complaints that had been lodged by members of the public against him—including that he had made false statements under oath and inappropriate partisan statements during the hearing—were dropped, because federal laws governing judicial conduct do not apply to Supreme Court justices. Tucker Higgins, *Dozens of ‘Serious’ Conduct Complaints Against Justice Brett Kavanaugh Are Dismissed Because He Was Confirmed to the Supreme Court*, CNBC (Dec. 18, 2018, 3:55 PM), <https://www.cnn.com/2018/12/18/dozens-of-complaints-against-brett-kavanaugh-dismissed.html> [<https://perma.cc/PU8B-HNFQ>]. But the newly elected Democratic Senate majority has indicated that Kavanaugh will likely be investigated for perjury. Jack Crowe, *House Judiciary Democrat: Kavanaugh Will ‘Likely’ Be Investigated for Perjury*, NAT’L REV. (Jan. 21, 2019, 12:26 PM), <https://www.nationalreview.com/news/house->

In the wake of Justice Kavanaugh's hearing, sexual violence has become yet another addition to the growing list of vociferously argued partisan issues.<sup>276</sup> Republicans are more inclined to dismiss accusers, while Democrats are dismissive of the idea that fairness and due process are necessary for the accused.<sup>277</sup> Neither side denies that the growing number of women coming forth with their experiences of sexual abuse is a serious problem that cannot be ignored, but it has become increasingly evident that when a woman makes an allegation against a specific man, a different set of obligations appears to surface.<sup>278</sup> Giving sole credence to the accusing women means abandoning our traditional standards for seeking justice. While accusers should be taken seriously, so must the accused be treated fairly and respectfully, not to mention being sensitive to the long-term consequences that even the mere allegation of sexual abuse can cause.<sup>279</sup>

That did not appear to happen in November of 2017, when U.S. Senator Al Franken, a Democrat from Minnesota, was publicly accused by several women of touching them inappropriately while they were being photographed together.<sup>280</sup> Franken welcomed the Senate Ethics Committee inquiry that ensued, stating that "he was confident it would clear him."<sup>281</sup> But in December, Democratic Senator Kirsten Gillibrand said she had seen enough and called for Franken to resign immediately.<sup>282</sup> Within an hour, at least ten other Democratic senators and the chairman of the Democratic National Committee were demanding the same thing; by late afternoon, over

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judiciary-democrat-brett-kavanaugh-will-likely-be-investigated-for-perjury/  
[<https://perma.cc/A7WD-7TYP>].

<sup>276</sup> Yoffe, *Does Anyone*, *supra* note 271.

<sup>277</sup> *Id.*

<sup>278</sup> Emily Yoffe, *The Problem With #BelieveSurvivors*, ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/brett-kavanaugh-and-problem-believesurvivors/572083/> [<https://perma.cc/9PYQ-P9YL>] [*hereinafter* Yoffe, *Problem with #BelieveSurvivors*].

<sup>279</sup> *Id.* In her *Atlantic* series, Yoffe reported that many of the accused students she interviewed said "the allegations against them were grossly unfair" and all of them revealed that even after they were eventually cleared, their lives had been profoundly damaged—even to the point where one contemplated suicide. *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

thirty senators had echoed the idea that they believed the women accusers.<sup>283</sup>

Such blind belief is obviously dangerous to due process. It turns out that both the left and right of the political spectrum are prone to label men as subject to what's come to be a catch-phrase—"toxic masculinity"—and likely predators.<sup>284</sup> We need look no further than Great Britain, which recently adopted a rule that law-enforcement personnel "must believe reports of sexual violation."<sup>285</sup> The result was foreseeable: when police failed to properly investigate claims and ignored exculpatory evidence, dozens of prosecutions collapsed—creating such a breakdown in policework and the criminal justice system that even the head of an organization that advocates for victims of child abuse spoke out against the new policy.<sup>286</sup>

In late 2017, Judge Alex Kozinski, of the United States Court of Appeals for the Ninth Circuit, announced his retirement amid allegations of sexual misconduct by former law clerks and others.<sup>287</sup> Judge Kozinski was accused of inappropriate touching and making sexual comments.<sup>288</sup> He later apologized, attributing the issue to his sense of humor and candor.<sup>289</sup> Ethical charges against him were dropped because only sitting judges are subject to the judicial ethics code.<sup>290</sup> Misconduct in the federal judiciary is relatively rare, but it

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<sup>283</sup> Elana Schor & Seung Min Kim, *More Than Two Dozen Democratic Senators Call on Franken to Resign*, POLITICO (Dec. 6, 2017, 11:31 AM), <https://www.politico.com/story/2017/12/06/gillibrand-calls-on-franken-to-resign-282112> [https://perma.cc/9NMX-DBE8].

<sup>284</sup> Yoffe, *Does Anyone*, *supra* note 271. See Suzannah Weiss, *6 Harmful Effects of Toxic Masculinity*, BUSTLE (Feb. 23, 2016), <https://www.bustle.com/articles/143644-6-harmful-effects-of-toxic-masculinity> [https://perma.cc/H55J-UAUH], for a summary of the meaning of "toxic masculinity."

<sup>285</sup> Yoffe, *Problem with #BelieveSurvivors*, *supra* note 278.

<sup>286</sup> *Id.*

<sup>287</sup> Debra Cassens Weiss, *Kozinski Announces His Immediate Retirement After More Women Accuse Him of Sexual Misconduct*, ABA J. (Dec. 18, 2017, 9:19 AM), [http://www.abajournal.com/news/article/kozinski\\_announces\\_his\\_immediate\\_retirement\\_after\\_more\\_women\\_accuse\\_him\\_of](http://www.abajournal.com/news/article/kozinski_announces_his_immediate_retirement_after_more_women_accuse_him_of) [https://perma.cc/MAS5-GGPT].

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Joan Biskupic, *Judicial Council Takes No Action Against Former Judge Alex Kozinski*, CNN (Feb. 5, 2018, 6:44 PM), <https://www.cnn.com/2018/02/05/>

does occur. According to the Federal Judiciary Workplace Conduct Working Group, it is “more likely to take the form of incivility or disrespect than overt sexual harassment, and it frequently goes unreported.”<sup>291</sup>

### C. Private Entities

What is often referred to as “romance in the workplace” has long been common practice, becoming especially prevalent once women were able to escape the necessity of being homebound housewives or were otherwise forced by circumstances to seek outside employment. One result is that in today’s world, a large number of marriages get their start in office relationships.<sup>292</sup> Another is that a large percentage of office affairs involve at least one person who is already married at the time.<sup>293</sup> Either set of social dynamics is complicated by both essential human nature and the natural instincts that have long been characterized as the “Battle of the Sexes.”<sup>294</sup>

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politics/alex-kozinski-sexual-misconduct-case-dropped/index.html  
[https://perma.cc/MT6N-NFXV].

<sup>291</sup> CHIEF JUSTICE’S YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2018), <https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf> [https://perma.cc/T6ZT-JQXE]; Debra Cassens Weiss, *Chief Justice Roberts: ‘Incivility or Disrespect’ More Frequent Than ‘Overt Sexual Harassment’ in the Federal Judiciary*, ABA J. (Jan. 2, 2019, 10:20 AM), <http://www.abajournal.com/news/article/workplace-misconduct-in-the-federal-judiciary-isnt-isolated-roberts-says-in-year-end-report> [https://perma.cc/8ZFJ-EXRG].

<sup>292</sup> See, e.g., Susan Adams, *How to Have a Successful Office Romance*, FORBES (Aug. 24, 2015, 10:20 AM), <https://www.forbes.com/sites/susanadams/2015/08/24/how-to-have-a-successful-office-romance-4/#24990d273d08> [https://perma.cc/P3F4-FFDD].

<sup>293</sup> *Number of Workers Reporting Office Romances at a 10-Year High, Finds Annual CareerBuilder Valentine’s Day Survey*, CAREERBUILDER (Feb. 9, 2017), <http://press.careerbuilder.com/2018-02-01-Office-Romance-Hits-10-Year-Low-According-to-CareerBuilders-Annual-Valentines-Day-Survey> [https://perma.cc/9CX5-PGJR].

<sup>294</sup> This battle has been waged for millennia. See ARISTOPHANE, *LYSISTRATA*. This play was first performed in classical Athens in 411 BC and tells the story of a woman’s quest to end the Peloponnesian War by withholding sex from all men, knowing that was the only thing they truly desired. An early exposé of a male-dominated society, *Lysistrata*, was produced in the same year as the *Thesmophoriazusae*, a play which also focused on gender-based issues. See EDGAR BERMAN, *THE COMPLEAT CHAUVINIST: A SURVIVAL GUIDE FOR THE BEDEVILED MALE* (1982), for a more modern, satirical view.

Even in civil court cases, defendants have numerous protections not typically found in Title IX proceedings, such as receipt of a specific, written complaint; clear rules of evidence; knowledge of the testimony of adverse witnesses; and the rights to discovery, cross-examination, and the calling of expert witnesses. The absence of options and protections, such as discovery and cross-examination, sometimes works against complainants too.

i. The Cosby Case

One of the most celebrated sexual abuse cases detailed numerous accusations against Bill Cosby, whose fame as a standup comedian was superseded by his role in the highly popular sitcom, *The Cosby Show*. There he played the father figure in an upper-middle-class Black family in New York City. Likewise, outside the show, he represented the image of a moral arbiter for the Black community.

Allegations against Cosby of sexual improprieties emerged well after the show left the airwaves, but most came beyond the statute of limitations for criminal proceedings.<sup>295</sup> Numerous civil charges came afterwards.<sup>296</sup> Although Cosby admitted to casual sex involving the use of Quaaludes with young women, and recognized the illegality of the use of such unprescribed drugs, he insisted that all of his romantic encounters were consensual.<sup>297</sup> Various repercussions ensued following the more recent claims. Former sponsors and community organizations have distanced themselves from the comedian, television networks have stopped airing re-runs of *The Cosby Show*, and many colleges and universities have rescinded his honorary degrees.<sup>298</sup>

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<sup>295</sup> Graham Bowley & Jon Hurdle, *Bill Cosby Is Found Guilty of Sexual Assault*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/arts/television/bill-cosby-guilty-retrial.html> [https://perma.cc/GR8B-XPQM]; Kyle Kim, Christina Littlefield & Melissa Etehad, *Bill Cosby: A 50-Year Chronicle of Accusations and Accomplishments*, SAN DIEGO UNION-TRIB. (Sept. 25, 2018, 11:34 AM), <https://www.sandiegouniontribune.com/news/la-et-bill-cosby-timeline-htmlstory.html> [https://perma.cc/MC8U-NEWP].

<sup>296</sup> Jason Le Miere, *Bill Cosby Case Ends in Mistrial: What Happens Next to the Comedian Accused of Sexual Assault?*, NEWSWEEK (June 17, 2017, 10:33 AM), <https://www.newsweek.com/bill-cosby-case-verdict-mistrial-626332> [https://perma.cc/6DR3-5J4T].

<sup>297</sup> Bowley & Hurdle, *supra* note 295; Kim, Littlefield & Etehad, *supra* note 295.

<sup>298</sup> Devon Ivie, *42 Universities on the Status of Bill Cosby's Honorary Degrees*, VULTURE (June 19, 2018), <https://www.vulture.com/2015/10/bill-cosby-honorary-degrees.html> [https://perma.cc/HS9N-QDXU].

In December of 2015, three felony charges of aggravated assault were filed against Cosby in Montgomery County, Pennsylvania. In June of 2017, his first trial on those charges ended with a hung jury.<sup>299</sup> In April of 2018, however, he was found guilty of three counts of aggravated indecent assault, and in September of 2018 he was sentenced to three to ten years in state prison and fined \$25,000.<sup>300</sup>

## ii. Other High-Profile Cases

Beginning largely in November of 2017, accusations of assault and harassment against Hollywood producer Harvey Weinstein triggered similar reports against other men. As more women came forward, corporate America began to contend with allegations of misconduct by other men in positions of power.

By the end of 2018, the “firestorm of accusations” against Weinstein had “spread from entertainment and media across other areas of business and government in the U.S. and abroad.”<sup>301</sup> As this occurred, “[c]orporate broads, sports teams, nonprofits, and other organizations have become increasingly willing to call out misdeeds” unrelated to financial performance, and furthermore, to “part ways with offenders.”<sup>302</sup>

During that period, nearly 800 prominent figures in a number of industries—the vast majority of them men—had been publicly accused of a broad range of misconduct, consisting of sexual transgressions,

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<sup>299</sup> Le Miere, *supra* note 296.

<sup>300</sup> David DeKok, *Bill Cosby, in Cuffs, Imprisoned for Up To 10 Years for Sexual Assault*, REUTERS (Sept. 25, 2018, 6:02 AM), <https://www.reuters.com/article/us-people-cosby/bill-cosby-sentenced-to-up-to-10-years-in-prison-for-sexual-assault-idUSKCN1M5190> [<https://perma.cc/FT9D-6XUK>]. That sentence, which also included the cost of the prosecution, is being appealed. Associated Press, *Bill Cosby’s Lawyers Want to Get Him Out of Jail, Appeal Conviction and Sentence*, USA TODAY (Oct. 7, 2018, 5:18 PM), <https://www.usatoday.com/story/life/2018/10/07/cosby-lawyers-ask-court-void-conviction-prison-sentence/1560254002/> [<https://perma.cc/YA2M-D3QS>] (last updated Oct. 8, 2018, 10:02 AM). Bail was denied in September 2018. *Id.*

<sup>301</sup> Jeff Green & Suzi Ring, *Moonves Pay Punishment Caps Year of CEO Naming and Shaming*, BLOOMBERG (Dec. 20, 2018, 5:16 AM), <https://www.bloomberg.com/news/articles/2018-12-20/moonves-payout-loss-caps-wave-of-ceos-called-out-on-bad-behavior> [<https://perma.cc/J85Y-4STT>] (last updated Dec. 20, 2018, 10:19 AM).

<sup>302</sup> *Id.*

rape, lewd comments, and abuse of power.<sup>303</sup> That is more than one new accusation each day for twelve months.<sup>304</sup> As a result of these accusations, hundreds have been fired or faced other personal or professional consequences.<sup>305</sup> Some have apologized for specific actions or have otherwise more vaguely acknowledged that they had possibly committed some sort of past transgression.<sup>306</sup>

After the Weinstein story broke, actress Alyssa Milano took to Twitter, calling for women to share their own stories of sexual harassment, and to share them using the hashtag #MeToo—a call-out which generated 609,000 posts carrying that hashtag by just the next day.<sup>307</sup> Among the accused was William Voge, chairman of the law firm of Latham & Watkins LLP, one of the highest grossing law firms in the world. He was accused of spending two nights exchanging sexual text messages with a married mother.<sup>308</sup> She went public with their indiscretion, telling even his professional colleagues, and Voge reacted by threatening to take legal action.<sup>309</sup>

Although Voge claimed that he and the woman did not have a physical relationship, their virtual encounter nonetheless had repercussions.<sup>310</sup> The sordid story made public headlines. His sexting partner, Andrea Vassell, was investigated by local police for “alleged

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<sup>303</sup> Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/> [<https://perma.cc/P459-NPJA>].

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* “The data, compiled by Bloomberg, are limited to publicly reported allegations of sex-related bad behavior in national, state and local media, trade publications and the public record.” *Id.* A broader data set is maintained by crisis consultant Davia Temin. *Id.*

<sup>307</sup> *Id.* See also Stephanie Petit, *#MeToo: Sexual Harassment and Assault Movement Tweeted Over 500,000 Times as Celebs Share Stories*, PEOPLE (Oct. 16, 2017, 4:00 PM), <https://people.com/movies/me-too-alyssa-milano-heads-twitter-campaign-against-sexual-harassment-assault/> [<https://perma.cc/4UUW-CRFQ>].

<sup>308</sup> Sara Randazzo, *The Sexting Scandal That Toppled One of America’s Most Powerful Lawyers*, WALL ST. J. (July 13, 2018, 9:29 AM), <https://www.wsj.com/articles/the-sexting-scandal-that-toppled-one-of-americas-most-powerful-lawyers-1531488579> [<https://perma.cc/P54K-ZU3E>].

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

harassment by electronic means,” which is a misdemeanor.<sup>311</sup> A lawyer, she documented their entire electronic relationship.<sup>312</sup> That record included “a month’s long cascade of emails and texts that tracked a roller-coaster path from courtesy to intimacy to anger . . . .”<sup>313</sup> Both said they felt “betrayed by the other,” and continued to face “strained marriages and humiliation.”<sup>314</sup> At one point, Voge and Vassell spoke over the telephone and he later sent an apology by text message, in which he stated that he wished not to have further contact.<sup>315</sup> She rejected his apology and refused to reconcile, writing: “You are insane if you think I am not coming after you with everything I have. . . . Men abuse and exploit women and then the church that is dominated by male Elders steps forward and tells the women to forgive. That stupid sh— stops with me!”<sup>316</sup>

Through his attorney, Mr. Voge made it clear that unless she stopped contacting him, he would “pursue every criminal and civil remedy” available.<sup>317</sup> His ultimatum was not successful. Vassell unleashed a flood of angry emails to his friend, family, and colleagues, as well as more to Voge himself.<sup>318</sup> After she sent copies of their text exchange to the general counsel at Latham & Watkins, the firm’s leadership decided to accept Voge’s resignation.<sup>319</sup>

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Intel, a major manufacturer of microprocessor chips used in most personal computers and server systems, has long prided itself as a “standard-setter in corporate governance.”<sup>320</sup> In business for over a

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<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* “Ten days after losing his job, Voge sent Latham’s partnership an email: ‘For those of you who had the courage to tell me of your disappointment, I want you to know that your disappointment in me will never exceed my own disappointment in myself.’” *Id.*

<sup>320</sup> Don Clark, *Intel C.E.O. Brian Krzanich Resigns After Relationship with Employee*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/>

half-century, Intel has a strict non-fraternization policy which prohibits “managers from sexual or romantic relationships with employees who report directly or indirectly to them.”<sup>321</sup> In June of 2018, the chief executive officer of Intel, 58-year-old Brian Krzanich, abruptly resigned after admitting he had a “past consensual relationship” with a subordinate employee.<sup>322</sup> An investigation by internal and external counsel found that Krzanich had violated the company’s non-fraternization policy.<sup>323</sup> Where such a severe response to a past violation could reflect Intel’s commitment to a safe and equitable work environment, former employees reported that Krzanich’s personality was arrogant and tended to create enemies.<sup>324</sup> They also speculated that the Me Too movement may have played a part in Intel’s response.<sup>325</sup> Krzanich’s resignation was but one of a number of high-profile cases that led executives to leave their jobs at Nike, Lululemon Athletic, Social Finance, Boeing, Hewlett-Packard, and Priceline.<sup>326</sup>

In November of 2017, Wayne Levin, the general counsel of Lions Gate Entertainment, disappeared after allegations by a former subordinate, Wendy Jaffe, who filed legal documents alleging that she had been abused with nonconsensual sexual contact by Levin for more than a decade.<sup>327</sup> As Jaffe told *The Wall Street Journal*, “It was never really about sex, it was about controlling someone and asserting power and that continued even when the physical component stopped.”<sup>328</sup> People close to the company suggested that the Me Too movement had made “allegations of sexual misconduct more publicly damaging in

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technology/intel-ceo-resigns-consensual-relationship.html  
[<https://perma.cc/TSH2-TJDQ>].

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> Ben Fritz & Alexandra Berson, *At Lions Gate, a Drama in the Legal Department*, WALL ST. J. (July 20, 2018, 12:30 PM), <https://www.wsj.com/articles/at-lions-gate-a-drama-in-the-legal-department-1532104228> [<https://perma.cc/VD6C-NY9H>].

<sup>328</sup> *Id.*

Hollywood.”<sup>329</sup> Her accusations resulted in a \$2.5 million payment from Lions Gate.<sup>330</sup>

During settlement negotiations emails revealed that Levin had spoken highly about Jaffe’s work, and she had called him “a good man.”<sup>331</sup> She later indicated that she had written nice things about Levin in order to stop the alleged abuse, stating: “It’s complicated when the head of legal is the person who is hurting you.”<sup>332</sup> She claimed that the situation was particularly complicated because she also thought of Levin as a mentor, and noted the unfairness of leaving a job she liked because of someone else’s actions.<sup>333</sup> This response is common: psychologists say that victims of sexual harassment often stay in abusive relationships with their superiors in the hope that the behavior will stop, rather than risk the fallout of a confrontation, and that these factors are even more prevalent when the employee has no prior employment experience from which to get recommendations.<sup>334</sup>

Levin’s attorney stated that in order to enable the cash settlement, his client agreed to forgo an anticipated \$1 million bonus he was due by virtue of a major acquisition in 2016.<sup>335</sup> Jaffe expressed anger upon learning of the source of the funds, and attempted to return the money, claiming that she did not want Levin to think he could make up for the alleged mistreatment by paying her out of his own pocket.<sup>336</sup> The two went back and forth: Levin refused to accept her check, so she sent him \$20,000 in single-dollar bills.<sup>337</sup> According to Levin’s attorney, he has not touched the money.<sup>338</sup>

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In late 2018, the prominent Southern Baptist leader, Paige Patterson, was removed as president of Southwestern Baptist

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

Theological Seminary amid a Me Too moment within the evangelical community.<sup>339</sup> “A massive backlash resulted from women upset over comments he made in the past that [were now] perceived as sexist and demeaning”—shaming and silencing women and hiding predatory abusers while shunning victims.<sup>340</sup> However, millionaire donors showed their support for Patterson by threatening the seminary with the loss of its accreditation and noting that the seminary could face investigation because of claims that the trustees had “violated school bylaws by convening the meeting at which they fired Patterson without giving him proper notice.”<sup>341</sup>

Corporate boards have lately been quicker to take action, often announcing a CEO’s departure as soon as the misconduct is disclosed.<sup>342</sup> While “there were an average of 40 days between the first accusations and a firing” in 2017, that number shrunk to approximately zero a year later.<sup>343</sup> A “company [that] keeps a running tally of reports of noteworthy people accused of misconduct related to harassment and other associated misbehavior” reported that its “list now totals more than 1,000 individuals, including 67 CEOs, all men, who have been accused over the last three years.”<sup>344</sup> Of the accused, “only 12 have kept their jobs.”<sup>345</sup>

Among those who agree that the Me Too movement dangerously presumes guilt in those accused of sexual misconduct is Harvard Law School Professor Elizabeth Bartholet. Professor Bartholet is primarily concerned with the many cases of “anonymous complaints, and of

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<sup>339</sup> Julie Zauzmer, *Angry Donors Threaten to Withhold Money from Seminary That Fired Paige Patterson*, WASH. POST (July 4, 2018, 6:00 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/07/04/angry-donors-threaten-to-withhold-money-from-seminary-that-fired-paige-patterson/> [https://perma.cc/9BGV-F7QF].

<sup>340</sup> Bobby Ross Jr., Sarah Pulliam Bailey & Michelle Boorstein, *Prominent Southern Baptist Leader Removed as Seminary President Following Controversial Remarks About Abused Women*, WASH. POST (May 23, 2018, 8:38 PM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/05/23/prominent-southern-baptist-leader-removed-as-seminary-president-following-controversial-remarks-about-abused-women/> [https://perma.cc/ST5R-BDLF].

<sup>341</sup> Zauzmer, *supra* note 339.

<sup>342</sup> Green & Ring, *supra* note 301.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* “Among the accusations of misconduct tracked . . . 210 were made outside of the U.S., including 60 in Europe.” *Id.*

claims made by women” that are denied by men, which result in the termination of careers “without any investigation of the facts.”<sup>346</sup> She says:

*Some argue that women who speak out should simply always be believed. Others argue that if some innocent men must be sacrificed to the cause of larger justice, so be it. I find this deeply troubling. . . . In the current climate, men are called out for actions ranging from requests for dates and hugs on the one hand to rape and other forced sexual contact on the other, as if all are the same and all warrant termination. . . . women are not so weak as to need this kind of protection.*<sup>347</sup>

Although Professor Bartholet joined in praising the movement that has helped to expose actual abuse, she critiqued the policies promulgated during the Obama presidency that used a preponderance of the evidence standard in sexual assault cases on college and university campuses.<sup>348</sup>

### III. REMEDIES

*Nobody will ever win the battle of the sexes.  
There is too much fraternizing with the enemy.*

Henry Kissinger<sup>349</sup>

The options for redressing false accusations of sexual abuse in the workplace are not especially attractive for those wishing to avoid either unwanted widespread publicity or the high costs usually associated with bringing suit. The possibilities for redress rest primarily among the following types of lawsuits: defamation, malicious prosecution or abuse of process, breach of contract, or wrongful termination of employment.

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<sup>346</sup> Tom Ciccotta, *Harvard Law Professor Elizabeth Bartholet: #MeToo Is Dangerous Because It Presumes Guilt*, BREITBART (Jan. 25, 2018), <https://www.breitbart.com/tech/2018/01/25/harvard-law-prof-metoo-is-dangerous-because-it-presumes-guilt/> [perma.cc/Y3FE-FNB4].

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Henry Kissinger Quotes*, GOODREADS, [https://www.goodreads.com/author/quotes/28442.Henry\\_Kissinger](https://www.goodreads.com/author/quotes/28442.Henry_Kissinger) [https://perma.cc/ZRN8-VKJW].

Harm to a businessperson's professional (or personal) reputation can be of great consequence. An allegation of dishonesty can be devastating to corporate profits. Some statements are automatically presumed to be defamatory. Any accusation of sexual misconduct is defamatory per se—that is, it is presumed to constitute defamation if, in fact, it was false and made maliciously or recklessly. Likewise, accusing someone of having committed a crime, or of being racist or sexist, will be presumed to be defamatory.<sup>350</sup> Besides the possibility of recovering financial losses caused by defamatory statements, one may also prevail by proving mental or physical anguish. Opinions, however, are protected speech, as long as they are not made “with knowledge of their false implications.”<sup>351</sup> Truth is always a defense to a charge of defamation. In addition, someone who is in the public eye may have to prove actual malice.<sup>352</sup> A businessperson can also sue under a theory of malicious prosecution or abuse of process using a criminal or civil proceeding.<sup>353</sup> Such an action must prove a variety of elements to prevail, and can likewise be expensive and time-consuming.

There are many legal reasons to fire an employee, and, because most states have “at-will” employment laws, an employer is often under no obligation to give any reason at all.<sup>354</sup> But, at-will employment does not allow companies to fire people based on an individual's age, race, color, religion, sex, national origin, or disability.<sup>355</sup> “Seniors may be fired for following directions [sic],

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<sup>350</sup> See Clay Calvert, *False Accusations of Homophobia and Racism: Are They Libelous?*, HUFFPOST (July 17, 2014, 5:53 PM), [https://www.huffingtonpost.com/clay-calvert/false-accusations-of-homo\\_b\\_5597047.html](https://www.huffingtonpost.com/clay-calvert/false-accusations-of-homo_b_5597047.html) [<https://perma.cc/RA6E-8CTZ>] (last updated Sept. 16, 2014); see also RODNEY A. SMOLLA, 1 RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, AND PRINT § 6:34 (2d ed. 2019).

<sup>351</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (holding that the *New York Times-Butts-Gertz* requirements for culpability protect free expression).

<sup>352</sup> *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 87 (1st Cir. 2007).

<sup>353</sup> See *Nelson v. Bulso*, 149 F.3d 701, 702–04 (7th Cir. 1998) (discussing a suit alleging malicious prosecution, abuse of process, and defamation, which arose out of the defendant's suggestion that the Tennessee prosecutor investigate the plaintiff, resulting in indictment and arrest).

<sup>354</sup> 31 Am. Jur. Trials 317 § 4, Westlaw (database updated Aug. 2019).

<sup>355</sup> *Id.* at § 5.

missing work, failing to adhere to company policies,” or merely for being perceived as unreliable.<sup>356</sup>

The law also allows employers to be “held accountable for forcing employees to quit on their own” if they “create an environment that feels hostile or otherwise unwelcoming.”<sup>357</sup> This frequently leads to a senior quitting his or her job, or being coerced into early retirement; such actions are also considered illegal reasons for termination as long as the coercion can be reasonably proven.<sup>358</sup> Similarly, employees cannot be fired for whistle-blowing (which is generally protected by statute or explicit policy), or for voting or serving on a jury, even if it affects his or her work schedule adversely.<sup>359</sup>

In July of 2015, Republican lawmakers attempted to redress the lack of due process for the accused on campus by introducing two bills that would have required universities to provide specific procedural rights to students accused of sexual misconduct.<sup>360</sup> These procedural rights included: notice of the charges two weeks before the hearing, the right to all inculpatory and exculpatory evidence before the hearing, the right to confront witnesses by direct questioning, and representation by an attorney at all stages of the process, including the investigation.<sup>361</sup> Both bills died in committee.<sup>362</sup>

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<sup>356</sup> *Legal and Illegal Terminations*, SENIOR ASSISTANCE, <https://senior-assistance.org/edd/wrongful-termination/legal-and-illegal-terminations/> [<https://perma.cc/UX5G-NB74>].

<sup>357</sup> *Id.*; see also 33 Am. Jur. Proof of Fact 3d. 235 Westlaw (database updated Nov. 2019).

<sup>358</sup> See, e.g., Lee Grayson, *Laws Regarding Forcing Someone into Retirement*, HOUS. CHRON., <https://smallbusiness.chron.com/laws-regarding-forcing-someone-retirement-47294.html> [<https://perma.cc/8ZKB-ZCK8>]; *Legal and Illegal Terminations*, *supra* note 356.

<sup>359</sup> *Legal and Illegal Terminations*, *supra* note 356. See 28 U.S.C. § 1875 (2008).

<sup>360</sup> Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015).

<sup>361</sup> H.R. 3408; H.R. 3403.

<sup>362</sup> *H.R. 3408 (114<sup>th</sup>): Fair Campus Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr3408> [<https://perma.cc/NTM7-ZPR3>]; *H.R. 3403 (114<sup>th</sup>): Safe Campus Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr3403> [<https://perma.cc/JG7A-MADB>]. Three states have enacted legislation that require colleges or universities in the state higher education system to provide a student accused of certain misconduct a right to be represented by an attorney. See ARK. CODE ANN. § 6-60-109 (West 2015); N.C. GEN. STAT. ANN. § 116-40.11 (West 2013); N.D. CENT. CODE ANN. § 15-10-56 (West 2015).

The Safe Campus Act was designed to prevent colleges from pursuing internal investigations in cases of campus sexual assault: it would have required schools to report each allegation of sexual violence to local law enforcement authorities for investigation, after obtaining written consent from the purported victim.<sup>363</sup> Only then could schools apply their own internal disciplinary procedures.<sup>364</sup> The provision in the Safe Campus Act requiring an alleged victim to report an act of sexual violence to law enforcement before the accused student could be punished has generated controversy. Those who opposed the bill highlighted “low reporting rates in cases of sexual assault and insist[ed] forced reporting to the police will inhibit even more victims from coming forward as victims of a sexual crime.”<sup>365</sup> This criticism spurred introduction of the Fair Campus Act, which “does not require sexual assault victims to report to the police in order for there to be a college investigation.”<sup>366</sup>

Last year, *Inside Higher Ed* reported that accused students suing the institutions that suspended or expelled them are now increasingly

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<sup>363</sup> H.R. 3403.

<sup>364</sup> *Id.* “In cases where deemed necessary to protect the safety of the alleged victim, schools would be permitted to impose interim measures such as temporary suspensions, no contact orders, adjustments to class schedules, and changes in housing assignments. These interim measures would be lifted after the completion of the law enforcement investigation if it did not result in an indictment. Alleged victims would have the right to submit a joint request with law enforcement for interim measures if both agreed that they would not protect the safety of the alleged victim, and schools would be required to honor such a request. Students would be protected from being disciplined for violations of school rules that came to light as a result of their reporting of sexual violence.” *Safe Campus Act*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Safe\\_Campus\\_Act](https://en.wikipedia.org/wiki/Safe_Campus_Act) [<https://perma.cc/5WF8-R987>].

<sup>365</sup> *Safe Campus Act*, *supra* note 364. The Safe Campus Act is supported by the Foundation for Individual Rights in Education and the National District Attorneys Association. *Id.* Among the more outspoken opponents of this bill are the National Panhellenic Conference and the North American Inter-fraternity Conference. *Id.* See also Tyler Kingkade, *28 Groups That Work with Rape Victims Think the Safe Campus Act Is Terrible*, HUFFPOST (Sept. 13, 2015, 1:00 PM), [https://www.huffpost.com/entry/rape-victims-safe-campus-act\\_n\\_55f300cce4b063ecbfa4150b?guccounter=1](https://www.huffpost.com/entry/rape-victims-safe-campus-act_n_55f300cce4b063ecbfa4150b?guccounter=1) [<https://perma.cc/KT55-WRF8>] (last updated Sept. 17, 2015).

<sup>366</sup> *Safe Campus Act*, *supra* note 364.

prevailing in court.<sup>367</sup> Various observers, including federal and state judges hearing the cases, noted that “the flurry of recent successes for disciplined students may show how some colleges and universities are eliminating ‘basic procedural protections’ in an attempt to combat campus sexual assault.”<sup>368</sup>

Meanwhile, more accused students were challenging their punishments in court; however, many lawsuits were dismissed outright. Then, in April of 2016, “the California Court of Appeals ruled against the University of Southern California in a lawsuit brought by a student suspended for allegedly sexually assaulting a woman during group sex.”<sup>369</sup> The encounter started off as consensual but soon turned violent.<sup>370</sup> The University argued that “the accused student had violated its sexual misconduct policy . . . not by harming the woman himself, but by failing to stop other men from slapping her and for later leaving her alone with them.”<sup>371</sup>

Accused students also prevailed in suits they brought against many notable schools including the University of Colorado at Boulder, Swarthmore College, Xavier University in Ohio, the University of California at San Diego, the University of Tennessee at Chattanooga, Middlebury College in Vermont, James Madison and George Mason Universities in Virginia, and Brandeis University in Massachusetts.<sup>372</sup>

In the Brandeis University case, Judge F. Dennis Saylor expressed concern that the University acted as “prosecutor, judge and jury” and “appear[ed] to have substantially impaired, if not eliminated, an

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<sup>367</sup> Jake New, *More Students Punished over Sexual Assault Are Winning Lawsuits Against Colleges*, INSIDE HIGHER ED (Nov. 5, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges> [<https://perma.cc/BXK2-DJ8U>] [hereinafter New, *More Students Punished*].

<sup>368</sup> Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault> [<https://perma.cc/7HAQ-TWXC>] [hereinafter New, *Out of Balance*].

<sup>369</sup> *Id.*; see *Doe v. Univ. of S. Cal.*, 200 Cal. Rptr. 3d 851, 855 (Cal. Ct. App. 2016).

<sup>370</sup> New, *Out of Balance*, *supra* note 368; see *Univ. of S. Cal.*, 200 Cal. Rptr. 3d at 861–62.

<sup>371</sup> New, *Out of Balance*, *supra* note 368.

<sup>372</sup> *Id.*; see also STOP ABUSIVE AND VIOLENT ENVIRONMENT, LAWSUITS AGAINST UNIVERSITIES FOR ALLEGED MISHANDLING OF SEXUAL MISCONDUCT CASES 3–4 (2016), <http://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf> [<https://perma.cc/Z3AC-XW2E>].

accused student's right to a fair and impartial process."<sup>373</sup> Judge Saylor held that it was not enough "simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning."<sup>374</sup>

Gary Pavela, editor of the Association of Student Conduct Administration's *Law and Policy's Report*, and former president of the International Center for Academic Integrity, stated: "[i]n over 20 years of reviewing higher education law cases, I've never seen such a string of legal setbacks for universities, both public and private, in student conduct cases. . . . Something is going seriously wrong."<sup>375</sup> Joe Cohn, the legislative policy director at the Foundation for Individual Rights in Education ("FIRE"), notes that an increasing number of courts have begun to recognize the inherent due process flaws where campus tribunals decide such cases in highly politicized environments.<sup>376</sup> He claims "the more extreme pressure that campuses feel to expel accused students, the more you're going to see successful cases brought by accused students."<sup>377</sup>

Indeed, several recent cases have noted that Title IX investigations or media criticism against universities for a poor response to a previous victim of sexual violence led to a proliferation of inadequate hearings.<sup>378</sup> "Colleges and universities are escalating and criminalizing the prosecution of sexual misconduct cases, while eliminating basic due process for the accused," Pavela said. He also noted:

*Title IX does not require this approach and courts are unlikely to allow it. . . . We're seeing the fruits of OCR's due process silence now. University sexual misconduct policies are losing legitimacy in the eyes of*

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<sup>373</sup> Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 573 (2016); New, *Out of Balance*, *supra* note 368.

<sup>374</sup> *Brandeis Univ.*, 177 F. Supp. 3d at 573.

<sup>375</sup> New, *Out of Balance*, *supra* note 368.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

*the courts. That's a disaster for Title IX enforcement. And OCR shares ample responsibility for it.*<sup>379</sup>

A recent study performed by FIRE found that:

- Nearly three quarters (73.6%) of America's top 53 universities do not guarantee students that they will be presumed innocent until proven guilty.
- Only slightly more than half of schools (52.8%) require that fact-finders—the institution's version of judge and/or jury—be impartial.
- Fewer than one third of institutions (30.2%) guarantee a meaningful hearing, where each party may see and hear the evidence being presented to fact-finders by the opposing party.
- ...
- Most institutions have one set of standards for adjudicating charges of sexual misconduct and another for all other non-academic charges. 86.8% of rated universities receive a D or F for protecting the due process rights of students accused of sexual misconduct.<sup>380</sup>

FIRE recommends that colleges and universities wishing to investigate charges of sexual assault should establish policies that include the following:

1. A clearly stated presumption of innocence, including a statement that a person's silence shall not be held against them.
- ...

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<sup>379</sup> *Id.* Not all agree. "No court has expressly held something that's required by the Department of Education and its Dear Colleague letters as violating due process," said Erin Buzuvis, director of the Center for Gender and Sexuality Studies at Western New England University. *Id.*

<sup>380</sup> FIRE, SPOTLIGHT ON DUE PROCESS 2018 (2018), <https://www.thefire.org/spotlight/due-process-reports/due-process-report-2018/> [<https://perma.cc/YUN7-EUA8>] [hereinafter, FIRE, SPOTLIGHT ON DUE PROCESS 2018]. See, e.g., *West Virginia University: Fraternities Punished Without a Semblance of Due Process*, FIRE, <https://www.thefire.org/cases/west-virginia-university-fraternities-punished-without-a-semblance-of-due-process/> [<https://perma.cc/2VSK-ABUY>].

2. Timely and adequate written notice of the allegations before any meeting with an investigator or administrator at which the student is expected to answer questions. Information provided should include the time and place of alleged policy violations, a specific statement of which policies were allegedly violated and by what actions, and a list of people allegedly involved in and affected by those actions.  
...
3. Adequate time to prepare for a reasonably prompt disciplinary hearing. Preparation shall include access to all evidence to be used at hearing.  
...
4. The right to impartial fact-finders, including the right to challenge fact-finders for conflicts of interest.  
...
5. The right to a meaningful hearing process. This includes having the case adjudicated by a person or group of people—ideally, a panel—distinct from the person or people who conducted the investigation (i.e. the institution must not employ a “single-investigator” model).  
...
6. The right to present all evidence to the fact-finder.  
...
7. The ability to question witnesses, including the complainant, in real time, and respond to another party’s version of events.  
...
8. The active participation of an advisor of choice, including an attorney (at the student’s sole discretion), during the investigation and at all proceedings, formal or informal.  
...
9. The meaningful right of the accused to appeal a finding or sanction.  
...

10. A requirement that factual findings leading to expulsion be agreed upon by a unanimous panel or supported by clear and convincing evidence.<sup>381</sup>

As noted at the beginning of this article, even though there has been such widespread agreement among legal scholars about the striking failure of due process in the prosecution of students accused of sexual harassment, the very large question remains: why has there been such a paucity of remedial action?<sup>382</sup>

The calls for reform have been ample. Many of the Title IX sexual-assault trials, past and present, that have taken place were and are patently unconstitutional. As one law review note argues: “We have reached a point where merely arguing for fair [and due] process can trigger charges of sexism, rape apology, and so on.”<sup>383</sup> Universities themselves are loath to incur the significant costs that additional procedural safeguards would necessitate.<sup>384</sup>

Title IX’s capacity to prevent and redress sexual misconduct has been notably diminished by the ambiguities and inconsistencies of the current guidelines. Until and unless Congress acts to clarify and improve the Department of Education’s procedures, accused students can be expelled on flimsy evidence that would simply not lead to a conviction in criminal court.<sup>385</sup> Still others believe that even if Title IX guidelines were amended to require a right to cross-examine adverse witnesses, “the trial would still suffer from extreme bias and clear conflicts of interest. . . . Ultimately, [a] school is an academic

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<sup>381</sup> FIRE, SPOTLIGHT ON DUE PROCESS 2018, *supra* note 380.

<sup>382</sup> See Rubenfeld, *supra* note 2; see also Blair A. Baker, Note, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. L. & PUB. POL’Y 533 (2017); Kelly Rice, Comment, *Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-Campus Sexual Assault Claims*, 67 DEPAUL L. REV. 763 (2018); Ashley Sarkozi, Note, *Criminals, Classrooms, and Kangaroo Courts: Why College Campuses Should Not Adjudicate Sexual Assault Cases*, 50 LOY. L.A. L. REV. 123 (2017).

<sup>383</sup> Rubenfeld, *supra* note 2, at 68.

<sup>384</sup> See Reilly, *supra* note 2, 1025 (“The Seventh Circuit in *Osteen* warned that the involvement of attorneys in a discipline proceeding would judicialize the process, and undesirably shift the tone of discipline cases from educational to adversarial. Beyond tone, the involvement of attorneys for both sides will no doubt expand the duration of the process, potentially outliving the time to degree for the students involved.”).

<sup>385</sup> Rice, *supra* note 382, at 764.

institution, *not* a courtroom or administrative hearing room.”<sup>386</sup> Could the failure to heed the calls of academics be simply a reflection of the fact that law-review articles go widely unread?<sup>387</sup> Or is some other cause at play for the endemic recalcitrance?

Congress relies on staffers for background research to help craft pending legislation. The primary source for this data has long been the Congressional Research Service (“CRS”), which was established in 1914 as a separate department within the Library of Congress.<sup>388</sup> Its purpose is to provide comprehensive and reliable legislative research and analysis that is “timely, objective, authoritative, and confidential, thereby contributing to an informed national legislature.”<sup>389</sup>

Over time, however, the service has become politicized. CRS analysts were informed “not to end their reports with a section titled ‘conclusion,’” which sounded too definitive and authoritative, but instead to close with an “observations” section.<sup>390</sup> Researchers were dispirited to “see Congress treating [their work] less as sources of information than as weapons for use in partisan warfare.”<sup>391</sup> Many felt that “Congress, the centerpiece of our democratic machine, [had become] crippled by partisan gridlock.”<sup>392</sup> We must work to ensure that any revisions of campus sexual assault policy do not repeat this mistake. As Professor Rubinfeld perceptively points out:

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<sup>386</sup> Sarkozi, *supra* note, 382, at 147.

<sup>387</sup> Lasson, *supra* note 3, at 943. My views there were penned more as a plea to reduce coerced and often poorly written articles than to discourage scholars with something to say from espousing their thoughts. This current article is intended to spur them to action beyond the confines of the academy.

<sup>388</sup> Kevin R. Kosar, *Why I Quit the Congressional Research Service*, WASH. MONTHLY (Jan./Feb. 2015), <https://washingtonmonthly.com/magazine/janfeb-2015/why-i-quit-the-congressional-research-service/> [<https://perma.cc/YYL3-3U9M>].

<sup>389</sup> *Congressional Research Service*, USAGOV, <https://www.usa.gov/federal-agencies/congressional-research-service> [<https://perma.cc/7YFJ-PRPC>]. The original name was the Legislative Reference Service. Kosar, *supra* note 388. With the Legislative Reorganization Act of 1970, Congress renamed the agency the Congressional Research Service and significantly expanded its statutory obligations. *Id.*

<sup>390</sup> Kosar, *supra* note 388.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* See also Kevin R. Kosar, *The Atrophy of the Congressional Research Service’s Role in Supporting Committee Oversight*, 64 WAYNE L. REV. 149 (2018).

*Future historians will wonder how we went through this looking glass. They will ask what combination of activism and appeasement, of real victimization and false victim-mongering, could have led to this new hysteria in which a morning kiss becomes an act of “sexual violence,” its perpetrator to be marked with a scarlet letter, and all this done under the trappings of law, but where the proceedings take place in such secrecy that the accused isn’t even to know what he is accused of. They will wonder how so many in positions of respect and authority, who knew or should have known what was happening . . . willingly participated or did not speak.<sup>393</sup>*

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The idea of “evidence-based legislation” seeks to ensure that the best available scientific data is used when drafting and enacting new statutes.<sup>394</sup> Drawn from the definition of “evidence-based medicine,” which is “the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients,”<sup>395</sup> this concept calls upon legislative bodies to inform their legislation with the best available scientific evidence.<sup>396</sup>

One group that is supportive of evidence-based legislation is Results for America (“RFA”). Its 2018 “Federal Standard of Excellence” highlights the extent to which nine federal agencies have built the infrastructure necessary to use data, evidence, and evaluation when making budget, management, and policy decisions.<sup>397</sup> RFA’s

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<sup>393</sup> Rubinfeld, *supra* note 2, at 68–69.

<sup>394</sup> RESULTS FOR AMERICA, 9 WAYS TO MAKE FEDERAL LEGISLATION EVIDENCE-BASED: 2019 WHAT WORKS GUIDE FOR CONGRESS (2019), <https://results4america.org/wp-content/uploads/2019/02/What-Works-Legislation-2019-9-Ways-to-Make-Legislation-More-Evidence-Based.pdf> [<https://perma.cc/4BK7-DKUJ>].

<sup>395</sup> David L. Sackett et al., *Evidence Based Medicine: What It Is and What It Isn’t*, 312 BRIT. MED. J. 71, 71 (1996).

<sup>396</sup> RESULTS FOR AMERICA, *supra* note 394, at 1.

<sup>397</sup> Press Release, Results for America, Results for America Releases 2018 Invest in What Works Federal Standard of Excellence (Nov. 29, 2018), <https://>

“Invest in What Works Policy Series” provides ideas and research to policymakers to drive public funds toward evidence-based, results-driven solutions.<sup>398</sup> The group hopes to make “investing in what works the ‘new normal,’ so that when policy-makers make decisions, they start by seeking the best evidence and data available, then use what they find to achieve better results.”<sup>399</sup> In the absence of remedial legislation on current Title IX regulations, the success of groups like the RFA remains to be seen.

## CONCLUSION

This Article has sought to examine the prosecution of sexual harassment in the so-called Me Too Era, not only by highlighting the failures of due process in the promulgation of Title IX policies on campus, but by suggesting ways academics can move their message beyond theory and into pragmatic solutions with greater impact.

Whether it succeeds in those goals remains largely to be seen.

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results4america.org/press-releases/results-america-releases-2018-invest-works-federal-standard-excellence/ [https://perma.cc/G93U-AZFQ].

<sup>398</sup> *Id.*

<sup>399</sup> RESULTS FOR AMERICA, *supra* note 394, at 8.