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

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IT'S NOT COMPLICATED: CONTAINING CRIMINAL LAW'S INFLUENCE ON THE TITLE IX PROCESS

Margaret Drew*

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ABSTRACT

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

The primary topic of ongoing concern is how Title IX investigations and hearing processes are conducted. Review, and in some cases revision, of campus policies was prompted by two interconnected influences. The first was the referenced letter from the Department of Education, and the second was due process and other criticisms raised by those who advocate within the criminal justice framework. This essay explores the impact that criminal law and criminal lawyers have had on Title IX processes. Part of this exploration will include the ABA Criminal Justice Section's recommendations on how Title IX sexual harassment complaints should be handled. Unknown at the time of this writing is whether the administration will be influenced by these recommendations, although to date it has not. As of this publication, Secretary of Education, Betsy DeVos, met with representative survivors and their advocates, as well as those who claim to have been wrongfully accused. The Secretary also accepted comments on deregulation, which included a review of Title IX regulations. The proposed regulation review was part of the administration's "Enforcing the Regulatory Reform Agenda." We can anticipate change, although when and what change is undetermined now. To date, the primary action taken by Secretary DeVos was the rescission of the Obama Era "Dear Colleague" letter discussed early in this article.¹ Incorporated throughout this discussion are the changes, as well as the complications, that develop when the Title IX process is viewed through a criminal justice lens. Particularly explored, is how stereotypes regarding women's credibility forms the

¹ Valerie Strauss, *DeVos Withdraws Obama Era Guidance on Campus Sexual Assault. Read the Letter*. WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/09/22/devos-withdraws-obama-era-guidance-on-campus-sexual-assault-read-the-letter/?utm_term=.57b561dbeeeb.

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

More changes from the Secretary of Education are expected, which makes consideration of the concerns addressed in this article vital.

I. INTRODUCTION

In October 2014, 28 Harvard law professors (“the Harvard Professors”) published a letter protesting changes Harvard made to its Title IX² investigation and hearing processes that are triggered upon the University’s receipt of sexual assault reports.³ Their letter followed an investigation of Harvard Law School and Harvard University for possible Title IX violations by the Office of Civil Rights of the Department of Education (DOE).⁴ The investigation and the resulting letter addressed the school’s obligations upon receiving reports of sex discrimination and sexual abuse.⁵ Harvard was not alone. Scores of institutions of higher learning were investigated around the same time and some investigations remain ongoing.⁶ Previously, in 2011, DOE issued a “Dear Colleague” letter (DCL) to campuses around the country

² Title IX is that portion of the Civil Rights Act of 1964 that incorporated the “Educational Amendments” of 1972. 20 U.S.C. §§ 1681–1688 (2006). 20 U.S.C. § 1681 specifically states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

³ Travis Anderson, *Harvard Law Professors Want University’s New Sexual Harassment Policy Changed*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/metro/2014/10/14/harvard-law-professors-want-university-new-sexual-harassment-policy-changed/HZ72eaMcLgRgoq4DL9ZBOO/story.html>.

⁴ See Press Release, U.S. Dep’t of Educ. Releases List of Higher Educ. Insts. with Open Title IX Sexual Violence Investigations (May 1, 2014), <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

⁵ Many other institutions of higher education were investigated, as well. Some of those investigations are ongoing. The focus on Harvard for the initial portion of this article stems from the reactions of a portion of the faculty who, unlike other faculties, were proactive in their criticism of the newly enacted policies.

⁶ Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm_term=.76829a0cd2ba.

addressing the need for uniformity, with some flexibility, in how campuses handle sexual assault complaints.⁷

Sexual assault is the most underreported violent crime⁸ which means that it is also one of the least addressed on college campuses, with less than 5% of attempted or completed rapes reported.⁹ The DCL followed many years of higher education's indifference and confusion over handling complaints of campus-related sexual assault. For decades, colleges and universities virtually ignored sexual assault complaints, often advising the complainant to seek therapy, take time off from school, or transfer.¹⁰ If a hearing was held, the standard of proof employed was not uniform. "Preponderance of the evidence," "clear and convincing" and "beyond a reasonable doubt" were used at the discretion of the institution, although preponderance of the evidence predominated.¹¹ An early study revealed that those students reporting violations were frequently ignored during a school's investigation.¹²

⁷ Russlynn Ali, Dear Colleague Letter, U.S. Dept. of Educ., Off. for C.R., 4 (Apr. 4, 2011) [hereinafter Dear Colleague Letter]. The Obama administration, especially Vice-President Biden, continued working on this issue through the White House Task Force to Protect Students from Sexual Assault. *See Not Alone: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 1* (2014), <https://www.justice.gov/ovw/page/file/905942/download>; *THE SECOND REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT* (2014), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF>; *Fact Sheet: Resource Guide and Recent Efforts to Combat Sexual Violence on College and University Campuses*, THE WHITE HOUSE: OFFICE OF THE VICE PRESIDENT (Sept. 17, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/17/fact-sheet-resource-guide-and-recent-efforts-combat-sexual-violence>.

⁸ Heather M. Karjane, Bonnie S. Fisher, & Francis T. Cullen, *Sexual Assault on Campus: What Colleges and Universities are Doing About It*, U.S. DEP'T OF JUSTICE at ii (2005), <https://permanent.access.gpo.gov/lps66801/205521.pdf>.

⁹ *Id.* at 3.

¹⁰ *See generally* Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 MONT. L. REV. 31, 32 (2017); Phil Catanzano, Remarks at Massachusetts Continuing Legal Education, Campus Sexual Assault: Emerging Issues in Title IX Investigations and Litigation, (June 16, 2017).

¹¹ Condor Friedersdorf, *What Should the Standard of Proof Be in Campus Rape Cases?* ATLANTIC (June 17, 2016), <https://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505/>; Jake New, *Supermajority Requirement in the Minority*, INSIDE HIGHER ED. (Jan. 6, 2017), <https://www.insidehighered.com/news/2017/01/06/few-colleges-use-controversial-sexual-misconduct-policy-adopted-stanford>; Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120, 122 (tbl.6.12) (2002) [hereinafter Karjane, et al., *Campus Sexual Assault*].

¹² Karjane, Fisher & Cullen, *supra* note 8, at 10.

For example, often the accused would be kept apprised of an investigation's status, but not the accuser.¹³

Among other things, the DCL instructed campuses to use the civil "preponderance of the evidence" standard when determining whether the accused should be found responsible for the alleged assaultive behavior.¹⁴ DOE clarified that use of the civil standard was not optional for Title IX decision-making if schools did not wish to risk federal sanctions.¹⁵ The letter addressed other concerns, such as the accuser's right to appeal a finding that the accused student is "not responsible" for the conduct alleged.¹⁶ Contemporaneously to issuing the DCL, DOE and the Department of Justice (DOJ) announced investigations into schools alleged to have violated Title IX.¹⁷

As part of the settlement agreement with DOE, Harvard amended its sexual assault policy to incorporate DOE's recommendations, adopting the tenets set out in the 2011 DCL.¹⁸ In so doing, the school came into line with many other colleges and universities regarding the handling of sexual assault complaints.¹⁹ The Harvard revisions added nothing new to the Title IX debate or process. The revisions did not set any new standards or introduce innovative processes. The faculty commentary that followed, however, breathed renewed life into the criticism of how Title IX investigations and hearings are conducted.²⁰ The Harvard faculty's critique of Title IX campus processes was not the only one. Members of the University of Pennsylvania's law faculty raised like concerns.²¹ But the Harvard faculty grievances received more public attention.²²

Both the status and stature of the complaining professors brought notice and publicity to their grievances, reopening the debate

¹³ *Id.*

¹⁴ Dear Colleague Letter, *supra* note 7.

¹⁵ *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*, DEP'T OF EDUC.: OFFICE OF CIVIL RIGHTS (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html>.

¹⁶ *Id.*

¹⁷ *Department of Justice and Education Reach Agreement with Tehachapi, California, Public Schools to Resolve Harassment Allegations*, DEP'T OF JUSTICE (July 1, 2011), https://www.justice.gov/opa/pr/departments-justice-and-education-reach-agreement-tehachapi-california-public-schools-resolve_

¹⁸ *A New Sexual Assault Policy*, HARV. GAZETTE (July 2, 2014), <https://news.harvard.edu/gazette/story/2014/07/a-new-sexual-assault-policy/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Ashe Schow, *UPenn Law Professors Speak Out Against New Campus Sexual Assault Policy*, WASH. EXAMINER (Feb. 18, 2015), <http://www.washingtonexaminer.com/upenn-law-professors-speak-out-against-new-campus-sexual-assault-policy/article/2560365>.

²² Anderson, *supra* note 3.

not only as to the Title IX hearings' standard of proof, but to other concerns addressed within a criminal due process framework. While due process protections must be addressed within the Title IX system, the commentary that followed at times overstated the frequency of due process transgressions. The Boston Globe noted that Alan Dershowitz called the new Harvard policy "political correctness run amok."²³ That statement betrays a lack of understanding of why the lower civil standard of proof was deemed appropriate for Title IX hearings, a topic to be explored further below.

One difficulty that arises when viewing the Title IX hearing process through a criminal defense lens is that one can lose sight of the fact that the Title IX process is indeed a *civil* matter. Due process protections are a concern for all involved. Indeed, many schools have responded to due process complaints by instituting additional protections for the accused, as also will be addressed below. But fundamentally, the design of Title IX hearings largely avoids being like criminal or civil court proceedings in significant ways; and certainly, Title IX hearings are not intended to supplant those held within justice system frameworks.

II. PERSPECTIVES

Sexual assault and other gender-violence allegations are serious and have enormous consequences, both for the accused and for the harmed student.²⁴ Unlike legal frameworks, Title IX is intended to be an educational process, as well as one that determines whether a student has violated the institution's honor code.²⁵

The educational component of Title IX inquiry and decision-making is often overlooked. Education has been recognized as an institutional goal for decades, although sexual assault as a Title IX

²³ *Id.*

²⁴ This discussion is not intended to dismiss concerns of due process and fundamental fairness. To its credit, Harvard Law School appointed a committee to study those concerns. This article focuses, however, on the failure of the Harvard Professors and others to consider why civil, and in particular Title IX hearings, are deliberately designed in ways that do not align with the criminal justice system.

²⁵ Katherine Baker, Deborah Brake, & Nancy Chi Cantalupo, *Title IX and the Preponderance of the Evidence: A White Paper*, FEMINIST LAW PROFESSORS 6-7 (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf>. See also, Laura Bennet, D. Matt Gregory, Chris Loschiavo, & Jennifer Waller, *Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses*, ASS'N OF STUDENT CONDUCT ADMIN. 1 (2014), <http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf> ("First and foremost, it is important to understand that a learning-centered, fundamentally fair student conduct process should occur on all campuses.").

concern was under-acknowledged until this century.²⁶ Many Title IX administrators instituted effective responses to gender-based harassment so that a student who has been harmed can be provided a remedy that restores safety to the greatest extent possible. At the same time, the institution looks to seize educational opportunities that might assist in avoiding future violence or other complained of behavior.²⁷ Educators and campus administrators are fully aware that, in many cases, student offenders have not reached full brain development.²⁸ Separating out the chronic misogynists and the serial rapists from the newly arrived, intoxicated freshmen who may yet be capable of reform is part of the Title IX goals of many colleges and universities. Physical and emotional immaturity may not necessarily mitigate the consequences for the offending student. But what those circumstances do provide is an opportunity for the school to engage the offending student in educational measures, which reinforces the school's prevention goals.

This educational component makes the Title IX process unique among available remedial choices. Additionally, it makes the universities' goals and options decidedly unlike the purpose and goals of the criminal justice system.²⁹ For example, Title IX administrators have no power to enter sanctions that would result in the accused's registration as a sex offender. Nor can administrators recommend or order criminal remedies, such as incarceration.³⁰ Indeed, the scope of remedies available to universities and colleges is limited, the most

²⁶ Larry A. DeMatteo & Don Weisner, *Academic Honor Codes: A Legal and Ethical Analysis*, 19 S. ILL. U. L.J. 49, 56–58 (1994). Nowhere in the cited article do the authors address sexual offenses. Other articles authored in the same era likewise fail to mention sexual offenses. See, e.g., Kimberly C. Carlos, *The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes*, 65 UMKC L. REV. 937, 948 (Summer 1997). This omission gives support to the need to implement Title IX and other legislation that addresses gender based concerns.

²⁷ See Beth Howard, *How Colleges Are Battling Sexual Violence*, U.S. NEWS & WORLD REPORT (Aug. 28, 2015), <https://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence>.

²⁸ Recent information indicates that human brains do not fully develop until the mid-twenties. See *Young Adult Development Project*, MASS. INST. OF TECH. <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Oct. 26, 2017).

²⁹ Brad J. Reich, *When is Due Process Due: Title IX, "The State," And the Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1 (2017); Jed Rubenfield, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> ("If college rape trials become a substitute for criminal prosecution, they will paradoxically help rapists avoid the punishment they deserve and require in order for rape to be deterred.").

³⁰ *Id.*

severe sanction being expulsion.³¹ While a limited number of schools suggest that expulsion be considered whenever a sexual assault is found to have occurred,³² expulsion is not the favored or most common consequence.³³ Even if expulsion is the sanction, it is not always a bar to later enrollment in a different, or even the same, school.³⁴ Expelled students whose cases were particularly notorious might encounter difficulty enrolling in successor educational institutions, but most expelled students do not face future difficulty enrolling in higher education. Most universities do not note the cause of expulsion on a student's record.³⁵ Yet this reality goes unacknowledged in much of the discourse, which focuses on difficulties faced by the responsible student and leaves unmentioned the financial, emotional and psychological harm of the survivor.

The Harvard Professors' pronouncement was followed by a series of public complaints from criminal defense attorneys.³⁶ In one interview, Harvey Silverglate, an experienced Boston defense attorney,

³¹ Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence – With U-Va. a Prime Example*, WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html?utm_term=.96eb3146b755_

³² See Carleigh Stiehm, *Duke Changes Sanctioning Guidelines for Sexual Assault Cases*, CHRONICLE, (July 9, 2013), http://www.dukechronicle.com/article/2013/07/duke-changes-sanctioning-guidelines-sexual-assault-cases_

³³ See Anderson, *supra* note 31.

³⁴ See Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, HUFFINGTON POST (Oct. 23, 2014), http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html.

³⁵ *Id.* (“The offense won’t necessarily show up on a transcript. And administrators can simply note in a student’s file that he or she faced disciplinary action without recording actual details.”).

³⁶ See FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <https://www.thefire.org/?s=title+ix%20https://www.thefire.org/?s=title+ix> (last visited Nov. 13, 2017). For more recent comments see Dugan Arnett, *Defending the Accused, Law Firms Specialize in Campus Sexual Assault* (Sept. 7, 2017), <https://www.bostonglobe.com/lifestyle/2017/09/07/college-heavy-boston-law-firms-focus-representing-those-accused-campus-sexual-assault/Qm8Ukejlx9k6iaKzKtZP/story.html>; K.C. Johnson, *Harvard Joins the Ivy League's Race to the Bottom*, MINDING THE CAMPUS: SHORT TAKES (July 28, 2014), <http://www.mindingthecampus.org/2014/07/harvard-joins-the-ivy-leagues-race-to-the-bottom/>; Matthew Kaiser, *Some Rules About Consent are 'Unfair to Male Students'*, TIME (May 15, 2014), <http://time.com/99959/campus-sexual-assault-matthew-kaiser/>; Judith Shulevitz, *Accused College Rapists Have Rights, Too*, NEW REPUBLIC (Oct. 11, 2014), https://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists_

called the current situation the “Campus Sexual Assault Panic.”³⁷ He likened the current Title IX investigations to McCarthyism and other frenzies that saw hundreds banished and otherwise punished for exercising basic rights.³⁸ The analogies falter, however, because campus sexual assault is a real and widespread problem.³⁹

The sexual assault risk for women⁴⁰ entering college is higher than for women in the general population.⁴¹ In earlier studies, a female college student’s risk of sexual assault was placed at 20%.⁴² A 2015 report placed the rate⁴³ of undergraduate females at risk for sexual assault at more than 26%.⁴⁴ The rate for transgender, genderqueer, and other gender non-conforming students is even greater, at more than 29%.⁴⁵ While the rate of completed forced rapes and rapes that occur while the target is impaired declines from freshman to senior year, the rate of other forms of unwanted sexual contact does not.⁴⁶ The rate of reported campus sexual assaults, including completed rapes, is 28%.⁴⁷ Concern regarding campus sexual assault is neither frenetic nor hyperbolic.

For decades, campuses either refused to address sexual assault or resolved the problem through inappropriate measures, such as forcing the harmed student to leave the school.⁴⁸ This was done without any semblance of a hearing or other formal opportunity for a harmed student to be heard. Slowly, administrators began to admit that sexual assault

³⁷ Harvey Silverglate, *The New Panic: Campus Sex Assaults*, BOS. GLOBE (Feb. 20, 2015), <https://www.bostonglobe.com/opinion/2015/02/20/the-new-panic-campus-sex-assaults/0X0a9RoCySmrLUMFQ73kWM/story.html>.

³⁸ *Id.*

³⁹ Rebecca Campbell & Sharon M. Wasco, *Understanding Rape and Sexual Assault*, 20 J. INTERPERSONAL VIOLENCE 128 (2005).

⁴⁰ Karjane, Fisher, & Cullen, *supra* note 8, at ii. All references to women include transwomen.

⁴¹ *Id.* at ii, 2.

⁴² Karjane, et al., *Campus Sexual Assault*, *supra* note 10.

⁴³ See DAVID CANTOR ET AL., REPORT ON AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT at xiii (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf. Readers are cautioned that rates vary from campus to campus.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at iv.

⁴⁷ *Id.*

⁴⁸ Joseph Shapiro, *Campus Rape Victims: A Struggle for Justice*, NAT’L PUB. RADIO (Feb. 24, 2010), <http://www.npr.org/templates/story/story.php?storyId=124001493> (“The result is that large numbers of women who say they’ve been assaulted feel dissatisfied with the results, and large numbers of women end up leaving school.”).

is a campus problem.⁴⁹ Even though some remedies followed, such as an institutional hearing process as prescribed by Title IX,⁵⁰ little was done to address systemic bias. Indeed, in 2002, Harvard University's then-president, Lawrence Summers, announced that sexual harassment/assault cases would not trigger any action by the school unless the allegations were corroborated.⁵¹ Advocates for sexual assault survivors were shocked at this announcement and one filed a complaint with DOE's Office of Civil Rights (OCR) claiming that the new requirement was rooted in gender discrimination.⁵² The basis of the claimed discrimination was that because most sexual assault complaints are filed by women, women would bear a disparate impact from the changed policy.⁵³ An investigation followed.⁵⁴ In 2003, OCR found that Harvard's demand for corroboration of sexual assault allegations did not have a disparate impact on women.⁵⁵ The requirement was found not to be discriminatory because the right to file a complaint remained available and the policy would be applied to all complainants regardless of sex.⁵⁶

According to some Harvard officials, "their policy was implemented to prevent unnecessarily long and troublesome investigations in cases that ultimately lack a definitive conclusion. It

⁴⁹ This should not be confused with a school's developing competency in the subject matter. Recognition of the problem and designing appropriate responses are separate matters.

⁵⁰ See generally Risa L. Lieberwitz, et al., *The History, Uses, and Abuses of Title IX* (June 2016), <https://www.aaup.org/file/TitleIXreport.pdf>; Gina Maisto Smith & Leslie Marie Gomez, *Effective Implementation of the Institutional Response to Sexual Misconduct Under Title IX and Related Guidance*, NAT'L ASS'N COLL. & UNIV. ATTORNEYS (June 19–22, 2013), http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf.

⁵¹ Anne K. Kofol, *No Easy Answers: Assessing Sexual Policies at Harvard's Peer Institutions*, HARV. CRIMSON (June 6, 2002), <http://www.thecrimson.com/article/2002/6/6/no-easy-answers-at-a-may/?page=single>; Wendy Murphy, *Women: Harvard is Violating Our Civil Rights*, SEC. ON CAMPUS, (2003), https://web.archive.org/web/20080516054128/https://www.securityoncampus.org/lawyers/murphy_titleix.html.

⁵² DeMatteo & Weisner, *supra* note 26.

⁵³ *Id.* (detailing how survivors' attorney Wendy Murphy filed the underlying complaint); Roxanne Tingir, *As Harvard Faces Investigation, GI Policy Appears Acceptable*, THE HOYA (Aug. 30, 2002), <http://www.thehoya.com/as-harvard-faces-investigation-gu-policy-appears-acceptable/>.

⁵⁴ *Id.*

⁵⁵ *Victory for Fundamental Fairness at Harvard*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 8, 2003), <https://www.thefire.org/victory-for-fundamental-fairness-at-harvard/>.

⁵⁶ *Id.*

was created upon recommendation of a faculty committee investigating sexual assault cases on campus.”⁵⁷ Eventually the corroboration requirement was withdrawn.⁵⁸ But Summers had already received an opinion from Harvard counsel that the Title IX complaint over the policy had no legal validity.⁵⁹

Those who advocate for sexual assault survivors remained outraged by Summers’ comments on two fronts. First, they saw that the corroboration requirement ignored the reality that sexual assault usually happens in private and without witnesses.⁶⁰ While Harvard cited an email as possible corroborative evidence,⁶¹ advocates knew that email exchanges following an assault often do not reference the assault and that any communication is more likely to be used against the survivor.⁶² If requiring corroborating evidence were the legal norm, even fewer sexual assault cases would be prosecuted, because there is simply, “[n]ot enough evidence.”⁶³

Secondly, many survivors and their advocates viewed the demand for corroborating evidence as an extension of the old-but-

⁵⁷ *Id.*

⁵⁸ Amit R. Paley, *In Search of a More Open Veritas*, HARV. CRIMSON (June 10, 2004), <http://www.thecrimson.com/article/2004/6/10/in-search-of-a-more-open/?page=single>. In April, 2003, the Faculty followed the advice of the committee and essentially reversed its vote of a year earlier by removing its requirement of “corroborating evidence” in sexual assault cases. Sarah M. Seltzer, *Leaning Committee Signals Major Change in Sexual Assault Policy*, HARV. CRIMSON (June 5, 2003), <http://www.thecrimson.com/article/2003/6/5/leaning-committee-signals-major-changes-in/>.

⁵⁹ David H. Gellis, *Government Begins Probe of Sexual Assault Policy*, HARV. CRIMSON (Aug. 9, 2002), <http://www.thecrimson.com/article/2002/8/9/government-begins-civil-rights-probe-of/>; Tingir, *supra* note 53.

⁶⁰ Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1947 (2016).

⁶¹ Murphy, *supra* note 51; Tingir, *supra* note 53 (“The complaint argues that the preliminary evidence clause in the assault policy, which mandates specific testimony or evidence such as a harassing e-mail, will prevent many cases from ever being heard in front of Harvard College’s administrative board.”).

⁶² Susan Chira, *A Post-Cosby-Trial Question: Is the System Stacked Against Women?*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/arts/television/bill-cosby-mistrial-sexual-assault-andrea-constand.html> (discussing the ways in which the odds are stacked against sexual assault victims at trial).

⁶³ Bernice Yeung, *A Problem of Evidence*, HUFFINGTON POST (Nov. 14, 2013), http://www.huffingtonpost.com/bernice-yeung/sexual-assault-rape_b_3917144.html; see also David Margolick, *The Corroboration Requirement in Prosecuting Sexual Abuse*, N.Y. TIMES (Sept. 22, 1984), <http://www.nytimes.com/1984/09/22/nyregion/the-corroboration-requirement-in-prosecuting-sexual-abuse.html> (“Law libraries are replete with examples of seemingly convincing cases that had to be dropped for lack of corroboration.” Referring to cases of sexual assaults on children.)

thriving myth that women lie; particularly, women lie about sexual assault.⁶⁴ Although this myth has been disproved repeatedly,⁶⁵ it remains the platform from which demands for corroboration spring. This topic will be explored further.

III. CONFUSION AND CONFLATION BETWEEN THE CRIMINAL, CIVIL JUSTICE AND TITLE IX SYSTEMS

Confusion between Title IX and criminal justice adjudications is ongoing and significant. This confusion exists among the public as well as within the on-campus community.⁶⁶

As an illustration, in one case, a Minnesota prosecutor failed to prosecute members of an athletic team who were alleged to have sexually assaulted a woman.⁶⁷ The public believed that there would be no consequences for the accused, not understanding that there could be consequences for the students through the Title IX process distinct from criminal prosecution. Educational institutions' ability to enter sanctions for assault, even if a case does not proceed within the criminal justice system, is misunderstood. "This belief reflect[s] a pervasive misunderstanding of the campus investigation and adjudication process, which is completely independent from the criminal justice system."⁶⁸

Likewise, why the state fails to prosecute many sexual assault cases remains unknown and unappreciated by the public. When the basic issue is whether a party to sexual conduct gave consent, prosecutors frequently decline to charge the alleged assailant.⁶⁹ The

⁶⁴ Lindsay Brice & Caroline Palmer, *Understanding Title IX Investigations*, 74 BENCH & B. MINN. 24, 26 (2017) (citing Kimberly Lonsway, Joanne Archambault, & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault* 3 THE VOICE 2 (2009), http://ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf (stating that between 2–8% of sexual assault reports made to police are false)). This percentage range is no doubt high because sexual assault survivors are not often treated well by police due to gender bias and unless trained, police will consider inconsistencies in reports as evidence of falsity.

⁶⁵ *False Reporting, Office on Violence Against Women*, NAT'L SEXUAL VIOLENCE RES. CTR. (2012) http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf [hereinafter *False Reporting*].

⁶⁶ Brice & Palmer, *supra* note 64.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Cassia C. Spohn, et al., *Prosecutors' Charging Decisions in Sexual Assault Cases: A Multi-Site Study, Final Report* (Oct. 28, 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/197048.pdf> (Draft) (examining the factors that lead prosecutors to charge in sexual assault cases). In one case, a prosecutor

basis for this outcome is unrelated to whether the crime happened. Instead, the decision rests on the prosecutor's perceived likelihood of success. When two parties are the only witnesses to the alleged assault, juries tend to favor the accused.⁷⁰ This creates a disincentive for the prosecutor to proceed in cases that turn on the issue of whether both parties consented to the sexual behaviors ("consent" cases). Likewise, declining prosecution is a common outcome for sexual assault cases when alcohol is involved.⁷¹ The decision not to prosecute merely reflects the difficulty prosecutors face in bringing successful sexual assault complaints and should not be interpreted that the assault did not occur.

More criticism of DCL demands resulted from the instruction that accusers, as well as the accused, have a right to appeal a decision by the Title IX adjudicators.⁷² For example, the accuser might wish to appeal a decision that the accused is not responsible for the alleged behavior, or that the behavior did not violate school policy. In an opinion appearing in the *Washington Post*, a popular blog contributor stated: "The letter required universities to allow accusers to appeal not-guilty findings, a form of double jeopardy."⁷³ Two misconceptions are

declined to prosecute an alleged sexual assault because the victim could not confirm whether or not she had consented. *Id.* at 62.

⁷⁰ Sara F. Dudley, *Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements*, 46 GOLDEN GATE U. L. REV. 117, 130 (2016).

⁷¹ See generally Teresa P. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, NAT'L DIST. ATTORNEYS ASS'N (Aug. 2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf (advising prosecutors to follow a three-part approach to dealing with alcohol-facilitated sexual assault consisting of: "1) making the charging decision; 2) analyzing credibility and corroboration" where they weigh everything from the victim's ability to remember to the victim's likeability; "and 3) trying the case.").

⁷² See *ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct*, AM. BAR ASS'N 6 (June 2017), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf> [hereinafter *CJS Task Force Recommendations*].

⁷³ K.C. Johnson & Stuart Taylor, *The Path to Obama's 'Dear Colleague' Letter*, VOLOKH CONSPIRACY (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.e05f48303b6f; see also Andrew Kloster, *The Violence Against Women Act and Double Jeopardy in Higher Education*, STAN. L. REV. (Oct. 2012), <https://www.stanfordlawreview.org/online/the-violence-against-women-act-and-double-jeopardy-in-higher-education/>; Drew Musto, *How Could the Education Department's New Title IX Guidance Affect Cornell?*, CORNELL DAILY SUN (Sept. 24, 2007), <http://cornellsun.com/2017/09/24/how-could-the-education-departments-new-title-ix-guidance-affect-cornell/>; <https://cei.org/blog/dept-education-should-end->

encompassed in this quote. First, Title IX adjudicatory panels do not decide guilt, they decide responsibility. Also, double jeopardy is a criminal concept unrelated to civil matters.⁷⁴ As with most civil decisions, results of a civil process are inadmissible in a related criminal proceeding so there is no risk of double jeopardy.⁷⁵ Second, the author misapplies a prosecutor's inability to appeal a not-guilty jury finding. No such prohibition exists on the civil side. Any party to a civil action may appeal a result that is against the weight of the evidence or otherwise fails to comply with other legal standards.⁷⁶ Despite the criticism, many schools have policies that permit either student to appeal.⁷⁷

Some universities compounded the conflation of civil and criminal processes by using criminal terminology when referencing Title IX hearings. For example, one school's Title IX policy previously required that a "prosecution team" be assembled to investigate an honor code complaint.⁷⁸ This misuse of language is not a new dilemma. In a 1997 article, one author references Northwestern University's requirement that the "prosecutor" disclose all information to the accused.⁷⁹

double-jeopardy-complaint-provision; Jeannie Suk Gersen, *Betsy Devos, Title IX, and the "Both Sides" Approach to Sexual Assault*, *NEW YORKER* (Sept. 8, 2017), <https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault>; Alanna Vagianos, *Betsy DeVos Says the Title IX System Has 'Failed' Both Survivors and the Accused*, *HUFFINGTON POST* (Sept. 7, 2017, 2:26 PM), https://www.huffingtonpost.com/entry/betsy-devos-announces-she-plans-to-roll-back-title-ix-guidelines_us_59b14e36e4b0dfaafcf5dfeb_

⁷⁴ Jimmy Gurule, *The Double Jeopardy Dilemma: Does Criminal Prosecution and Civil Forfeiture in Separate Proceedings Violate the Double Jeopardy Clause?*, *NOTRE DAME L. SCH. SCHOLARLY WORKS* (1996); see also Johnson & Taylor, *supra* note 73.

⁷⁵ *Project: Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992, Double Jeopardy*, 81 *GEO. L. J.* 1219, 1219-21 (Apr. – May 1993).

⁷⁶ *Standards of Review*, *LAWYERS.COM*, <http://research.lawyers.com/standards-of-review-on-appeal.html> (last visited Nov. 13, 2017).

⁷⁷ See *Title IX Hearing Board – Formal Process*, *BRESCIA UNIV.*, <https://www.brescia.edu/title-ix-hearing-board-formal-process> (last visited Nov. 13, 2017).

⁷⁸ Washington College of Law of American University instituted a new policy in August, 2017. See Letter from Fanta Aw, Interim Vice President of Campus Life, Am. Univ., to Am. Univ. Students (Aug. 17, 2017), <http://www.american.edu/ocl/TitleIX/Title-IX-Changes-F2017.cfm>. For another school's policy, see *Charleston School of Law Honor Council Rules*, <http://charlestonlaw.edu/wp-content/uploads/2017/05/Honor-Council-Rules-3-19-13.pdf> (last visited Nov. 5, 2017).

⁷⁹ Carlos, *supra* note 26.

Some commentators and practitioners add to the confusion between the civil and criminal worlds by referring the Title IX process as “quasi-criminal”.⁸⁰ But, the process is not criminal. The process may elicit evidence that a crime has been committed, but the Title IX process does not substitute, nor is it intended to substitute, for the criminal process. Other civil hearings uncover evidence that could be used to prove crimes. Tort cases seeking remedies for child abuse and wrongful death are two examples. Either matter could involve conduct that is actionable on the criminal side of the law. Simply because a civil matter may have criminal consequences for the accused, the imposition of criminal-like standards or categorizing the matter as anything other than a civil action is not justified.

The imposition of criminal standards on Title IX administrators would disable the process, and further frustrate a harmed student. A claim unsupported by substantial third-party evidence would likely be unsuccessful.⁸¹ Title IX administrators are not officers of the court. They need not be lawyers. While there is concern that some administrators are not properly trained to conduct Title IX hearings,⁸² that problem is not resolved by converting Title IX hearings into criminal-style ones. Indeed, as one commentator noted: “The more federal obligations force colleges and universities to act like prosecutors and courts, the less able educational institutions will be to carry out their basic mission of educating.”⁸³

IV. TITLE IX HEARINGS STANDARD: THE MISPLACED FOCUS

One of the more contentious debates on Title IX hearings is which standard of proof should be used to determine an individual’s responsibility. The DCL made clear that the appropriate standard by which allegations should be judged is “preponderance of the

⁸⁰ See, e.g., Samantha Harris, *Federal Court: Campus Sexual Assault Hearings are ‘Quasi-Criminal’ in Nature*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 20, 2016), <https://www.thefire.org/federal-court-campus-sexual-assault-hearings-are-quasi-criminal-in-nature/>.

⁸¹ The author represented one student whose case went to the grand jury. The jury refused to indict even though there were two witnesses. The client was passed out from alcohol at the time of the assault.

⁸² Sarah Edwards, *Pushing Back Against the Pushback*, 23 DUKE J. GENDER & L. POL’Y 121,133 (citing Rubenfield, *supra* note 29).

⁸³ Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, DISP. RESOL. MAG. 27, 29 (Spring 2016), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2016/7_RCIA.authcheckdam.pdf.

evidence.”⁸⁴ This standard is normally employed in civil matters,⁸⁵ such as torts, child custody disputes between parents, worker’s compensation, civil rights, and an array of other civil matters. All U.S. states employ this standard for civil protection order matters.⁸⁶

Not surprisingly, victim advocates overwhelmingly argue for the use of the preponderance of the evidence standard in sexual assault cases.⁸⁷ The clients they represent have encountered credibility bias and victim-blaming, particularly when they use or have used alcohol or drugs. Survivors have experienced humiliation when cross-examined about their choice of wardrobe and other matters. Survivor advocates argue that using the preponderance of the evidence standard is necessary to have at least a chance to overcome bias.⁸⁸ The preponderance of the

⁸⁴ Dear Colleague Letter, *supra* note 7. Despite any confusion the public may have between civil and criminal proceedings, the results of a recent poll indicate that when provided with sufficient information to understand the separate nature of Title IX proceedings, responders support the use of the lower civil standard of proof. Justin Mayhew, *Polling Results: Voters Nationwide Overwhelmingly Support Title IX, Other Protections for Survivors of College and K-12 Sexual Assault*, NAT’L WOMEN’S L. CTR. (May 16, 2017), <https://nwlc.org/resources/voters-nationwide-overwhelmingly-support-title-ix-other-protections-for-survivors-of-college-and-k-12-sexual-assault/>. A recent poll of over 800 voters resulted in several findings that support both the continuation of schools’ involvement in the Title IX process relative to sexual assault complaints as well as the continued use of the preponderance of the evidence standard. *Id.* Among the results of the May, 2017 polling were: U.S. voters view sexual assault as a major issue in the country today. *Id.* More than nine in ten voters (92%) say that sexual assault is a serious problem, with 63% saying it is a “very serious” problem. *Id.* When it comes to sexual assault in schools, U.S. voters agree that educational institutions must proactively deal with sexual violence in their schools: 94% of voters nationwide agree that K-12 schools, colleges, and universities have a responsibility to address campus sexual assault, with 83% agreeing “strongly.” *Id.* A similar proportion support using the preponderance of evidence standard in student discipline proceedings—with 94% agreeing that a school should discipline a student who more likely than not raped or sexually assaulted a classmate. *Id.* The polled voters were initially asked if they approved of the President’s performance. *Id.* The response was 44% approval and 49% disapproval. *Id.* These responses are important in evaluating other findings because essentially the responders have similar views toward the seriousness of sexual assault, as well as the need for schools to address the problem, without significant regard to party affiliation. *Id.*

⁸⁵ See generally John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569 (2015).

⁸⁶ Maryland had been the only state using the “clear and convincing” standard for civil protection order hearings. Maryland changed their standard to “preponderance of the evidence” in 2014. S. 33, 2107 Gen. Assemb., Reg. Sess. (Md. 2017).

⁸⁷ See Elizabeth Sommer, *Use of Preponderance of Evidence in Campus Adjudication of Sexual Misconduct* (Dec. 2015) (unpublished M.A. thesis, Northern Michigan University) (on file with The Commons).

⁸⁸ Consider the following for example: “Phil, the standard we use at the present time is a preponderance of the evidence. It’s actually - it was at one time years ago clear

evidence standard does not assure survivors that the responding student will be held responsible.⁸⁹

In 2016 Professors Katherine Baker, Deborah Brake, and Nancy Chi Cantalupo authored a white paper advocating for the continued use of the preponderance of the evidence standard.⁹⁰ The white paper was endorsed initially by 60 law professors, and that number later climbed to over 100.⁹¹ The professors point out that Title IX complaints address sex discrimination, of which sexual harassment is a component.⁹² Forced rape is the extreme physical end of the sexual harassment spectrum. “Sexual harassment, violence and predation are a form of gender *discrimination* and must be dealt with as such.”⁹³

The professors argue that discrimination cases traditionally employ the preponderance of the evidence standard, a standard that is used in civil rights cases.⁹⁴ Title IX matters fall squarely under the jurisdiction of the Office of Civil Rights.⁹⁵ “By insisting on such equal treatment of sexual harassment complainants, OCR is ensuring that victims of sexual harassment will be treated no worse than victims of racial and other harassment are when they must prove their allegations.”⁹⁶ They argue further that “the 2011 DCL and in particular its clarification regarding the preponderance standard are fully consistent with the approach of our nation’s sexual harassment, antidiscrimination and other civil rights laws.”⁹⁷

and convincing evidence. At - most schools - some schools adopted the preponderance standard, some the clear and convincing standard until the dear colleague letter, and they all were required to go to the preponderance standard. The American College of Trial Lawyers and many other authorities believed that that is really at the heart of the problem in terms of ensuring fairness and due process to respondents in these circumstances.” Paul Kelly, Remarks at Massachusetts Continuing Legal Education, Campus Sexual Assault: Emerging Issues in Title IX Investigations and Litigation, (June 16, 2017).

⁸⁹ Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use in Higher Education Campus Conduct Processes*, ASSOC. FOR STUDENT CONDUCT ADMIN.,

<http://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf> (in favor of preponderance standard).

⁹⁰ Baker, Brake, & Cantalupo, *supra* note 25.

⁹¹ *Id.* As of this writing 110 law professors have signed the White Paper. *Id.*

⁹² *Id.*

⁹³ *Id.* at 4.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 12. Of note is the lack of attention this White Paper received among most major news outlets, particularly those that had earlier reported on the 2014 Harvard Law professors’ letter. This, even though the White Paper was endorsed by more law professors than those promoted by the Harvard and Penn law faculty members. Neither the Boston Globe nor the New York Times produced an article on the White

Those who argue for a higher standard for Title IX hearings do so only for cases involving sexual assault/harassment. Race discrimination and other honor code violations would retain the preponderance of the evidence standard. In contrast to students alleging sexual assault through the Title IX process, the accused students who sue their schools in civil court alleging due process violations receive the benefit of the preponderance of the evidence standard.

V. SYSTEMIC BARRIERS TO SUCCESSFUL CRIMINAL SEXUAL ASSAULT PROSECUTIONS

Sexual assault criminal trials rarely provide relief or remedy for the survivors. “Criminal law has a woeful track record of addressing sexual assault.”⁹⁸ It would be wise to stop looking to the criminal justice system for solutions to campus sexual assault, particularly if survivors are to have a path to effective remedies. As one author opines, rather than continuing to use the criminal justice system as a model for Title IX adjudications, we ought to learn from its (the criminal justice system’s) failures.⁹⁹

Individual survivors are not in control of whether their criminal cases are prosecuted. While a victim’s wishes may be a factor in determining whether a case proceeds to trial, prosecutors must weigh the well-being of the community and the goals of the district attorney when making decisions on which cases to accept. As noted, many prosecutors are reluctant to accept campus sexual assault cases where consent to the sexual behavior is the central issue or where alcohol was

Paper. Professor Cantalupo wrote a responsive New York Times online piece in which she debated the standard issue with another law professor, but the paper did not precede nor follow up with a standalone article as it had with the Harvard Law professors’ letter. See Nancy Chi Cantalupo & John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault?*, N.Y. TIMES (Jan. 4, 2017), <https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases>; Jess Bidgood & Tamar Lewin, *Some Harvard Professors Oppose Policy on Assaults*, N.Y. TIMES (Oct. 15, 2014), <https://www.nytimes.com/2014/10/16/education/harvard-law-professors-back-away-from-sexual-misconduct-policy.html>. There was coverage by the Huffington Post. See Tyler Kingkade, *Law Professors Defend Use of Preponderance Standard in Campus Rape Cases*, HUFFINGTON POST (Aug. 7, 2016), http://www.huffingtonpost.com/entry/preponderance-of-evidence-college-sexual-assault_us_57a4a6a4e4b056bad215390a_

⁹⁸ Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 KAN. L. R. 961, 965 (2016).

⁹⁹ Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 389 (2016).

involved.¹⁰⁰ This decision is based upon the belief that no jury will convict when the complainant and the defendant provide conflicting testimony or the victim's behavior was not "perfect." This results in states' attorneys declining to prosecute.¹⁰¹ When these cases do proceed, successful results favor the defense.

Statistics on the prosecution of sexual assault cases vary, but all are dismal.¹⁰² At most, 20% of sexual assault cases are reported to the police.¹⁰³ Of those reported cases, only an average of 27¹⁰⁴-37% are prosecuted.¹⁰⁵ Of those tried, only 26% of prosecutions are successful with the definition of success being variable.¹⁰⁶

Sexual assault survivors, including survivors of campus sexual assault, may choose to not call police. There are many reasons for this.¹⁰⁷ Confusion over what occurred, shame that an assault happened at all, and self-guilt often lead to non-reporting.¹⁰⁸ Additionally, reports of insensitive police interrogations and victim-blaming argue for survivor avoidance of any component of the criminal justice system.¹⁰⁹

Participation in the criminal process is difficult under the best of circumstances. Retelling the intimate details of a sexual assault to a room full of strangers and being subjected to aggressive, and often insensitive, cross examination can be re-traumatizing.¹¹⁰ Many sexual

¹⁰⁰ Rebecca Leitman Veidlinger, *How to Improve Prosecutions of College Campus Sexual Assault*, 48 PROSECUTOR 18 (2014) ("Few can dispute that college campus sexual assaults--those that often occur between individuals with pre-existing relationships in the same peer group and often involve large amounts of alcohol--are some of the most difficult for prosecutors.").

¹⁰¹ Robin Wilson, *Why Colleges Are on the Hook for Sexual Assault*, CHRON. HIGHER EDUC. (June 6, 2014), <http://www.chronicle.com/article/Why-Colleges-Are-on-the-Hook/146943>.

¹⁰² Keep in mind that the numbers reported are at the high end of studies. Much depends upon definitions. For example, those convicted may have been convicted of a felony but not sexual assault or may have pleaded to misdemeanors. In that case, the reported number is misleading as to how many defendants are convicted of sexual or other assault.

¹⁰³ Kimberly Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN, 145, 147.

¹⁰⁴ *Id.* at 157.

¹⁰⁵ *Top Ten Things Advocates Need to Know*, CTR. FOR RESEARCH ON VIOLENCE AGAINST WOMEN (Dec. 2011), https://opsvaw.as.uky.edu/sites/default/files/07_Rape_Prosecution.pdf.

¹⁰⁶ Lonsway & Archambault, *supra* note 103, at 157.

¹⁰⁷ See Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/>.

¹⁰⁸ *Id.*

¹⁰⁹ See BONNIE S. FISHER ET AL., NAT'L INST. OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000).

¹¹⁰ Rebecca Adams, *For Victims of Sexual Assault, There's Little Incentive to Come Forward — Besides Justice*, HUFFINGTON POST (2014),

assault survivors remark that engaging the criminal justice system was severely re-traumatizing.¹¹¹ One report from England describes a sexual-assault victim's post-trial suicide.¹¹² As an alternative, survivors may elect to use a college or university's Title IX process as a method of redress that avoids the criminal justice system entirely.

VI. CULTURAL BARRIERS FOR SEXUAL ASSAULT SURVIVORS.

Professor Deborah Brake argues that there are two significant reasons why those concerned about Title IX due process focus on the standard of proof.¹¹³ The first is the “battle for empathy” between sexual assault survivor and students that have been wrongfully accused.¹¹⁴ Second is “disagreement about the appropriate stringency of a disciplinary framework in responding to sexual assault in a campus setting.”¹¹⁵ To supplement Prof. Brake's thoughtful work, I posit a third reason why those defending accused students focus on the standard of proof as problematic. I propose that running through the debate over adjudication of campus sexual assault, and the use of the preponderance of the evidence standard, is the mistrust of women and the misogyny that perpetuates the myth that women lie. The culture of male privilege, if not supremacy, is the mostly invisible barrier to survivor relief in sex discrimination cases.

Sexual assault allegations strike at the core of the male cultural view of women being less credible than men. Accordingly, sexual assault survivors fear they will not be believed when they disclose that an assault occurred.¹¹⁶ And often they are not, leading to failure of either prosecutors to bring charges or to successfully prosecute sexual assault cases. In many ways, the design of the criminal justice system contributes to these failures.

http://www.huffingtonpost.com/2014/12/15/victims-sexual-assault-come-forward-justice_n_6294152.html; see also *Allowing Adult Sexual Assault Victims to Testify at Trial Via Live Video Technology*, VIOLENCE AGAINST WOMEN: BULLETIN 1–2 (Sept. 2011), <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify>.

¹¹¹ Kelly Alison Bhere, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 *DRAKE L. REV.* 293, 325–26 (2017).

¹¹² Amelia Gentleman, *Prosecuting Sexual Assault: 'Raped All Over Again'*, *THE GUARDIAN* (Apr. 13, 2013), <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court>.

¹¹³ Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 *MONT. L. REV.* 109, 110 (2017).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *Abstract*.

¹¹⁶ Dudley, *supra* note 70, at 134.

Prosecutors and other system actors may not be properly trained in conducting trauma-informed investigations and prosecutions, resulting in adverse consequences for survivors. When police are not properly trained in trauma-induced behavior, particularly related to sexual assault, the outcome can be devastating.¹¹⁷ “For victims whose cases are improperly unfounded, this practice creates a sense of betrayal and distrust that can have devastating effects on victim recovery. Moreover, the public awareness that sexual assault cases are not taken seriously will inevitably affect the willingness of future victims to report to police.”¹¹⁸

Often those observing traumatized individuals do not know how to interpret their observations. Traumatized people can behave in ways others find odd.¹¹⁹ An enhanced startle response and other counter-intuitive behaviors make sense when viewed through a trauma response lens.¹²⁰ But most observers do not connect the puzzling behavior with the survivor’s past adverse experiences.¹²¹ Trauma survivors seemingly have unpredictable and unusual behavior.¹²² Accordingly, an observer may discount what survivors say, either from frustration or disinterest. Disregard is common in sexual assault investigations and leads to conclusions of false reporting, even when a sexual assault occurred.¹²³ This pattern of overestimating the number of false reports introduces bias into the investigation and prosecution because it promotes assigning less or no credibility to survivors than to those who are accused. This is especially true if the reporting witness’ behavior is assessed as problematic.¹²⁴

Improper investigation and assessment can result from lack of resources, lack of education, or for other reasons. For prosecutors, as well as for other advocates, insufficient preparation time creates an impediment to successful prosecutions. The busy prosecutor may have hundreds of pending cases. Finding the time to adequately learn the facts of an assault can be onerous. Time constraints may limit the

¹¹⁷ *Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement*, NAT’L CTR. FOR WOMEN & POLICING 9 (May 2001).

¹¹⁸ *Id.*

¹¹⁹ *A Treatment Improvement Protocol: Trauma-Informed Care in Behavioral Health Services*, in TREATMENT IMPROVEMENT PROTOCOL SERIES, 57 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. Ch. 3 (2014), <https://www.ncbi.nlm.nih.gov/books/NBK207191/> (presenting the behaviors and emotional responses that are common following trauma).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See generally Lonsway, Archambault, & Lisak, *supra* note 64.

¹²⁴ *Id.*

prosecutor's ability to understand the survivor's perspective and the impact of crime-related trauma.

Other impacts of trauma can further complicate investigation and prosecution. When trauma occurs, memory can become disconnected.¹²⁵ Like a sheet of glass shattering, one may be able to reconnect many or most of the pieces, and some strands are so damaged that complete repair may be impossible. So it is with trauma and memory.¹²⁶ The universal experience of trauma is grief. Whether death of a loved one comes suddenly or not, one certainty is that the grief response can be severe and extended, and it likely will be different from others who are experiencing the same loss.¹²⁷ “The dynamics of trauma and the impacts of gender-based harassment and interpersonal violence are complex, particularly given that individual responses are unique and vary over time.”¹²⁸

Likewise, survivors responses are often misjudged when the observer does not understand, or ignores, the fact that survivors will vary in their responses to trauma.¹²⁹ Some observers create an image of how one “should” respond to different types of trauma, including intimate-partner violence and sexual assault.¹³⁰ In sexual assault cases, the survivor is expected to retell the assault narrative in a logical, consistent, and linear fashion, and to do so multiple times.¹³¹ Reliance upon and cooperation with law enforcement is expected, even though neither is the norm. The survivor is expected to be compliant and not disruptive. When the survivor behaves in a manner not in accordance with the “mythical norm,”¹³² the survivor is judged as not credible. This inaccurate conclusion is compounded when the survivor is gay,

¹²⁵ James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented Memories*, TIME (Dec. 9, 2014) <http://time.com/3625414/rape-trauma-brain-memory/>.

¹²⁶ *Id.*

¹²⁷ See Marty Tousley, *How We Mourn: Understanding Our Differences*, GRIEF HEALING (Oct. 21, 2013), <http://www.griefhealingblog.com/2013/10/how-we-mourn-our.html> (“Although men, women, adolescents and children mourn differently from one another, none of those ways is inappropriate.”); see also Martha Tousley *Understanding Different Mourning Patterns In Your Family*, GRIEF HEALING (2013), <http://www.griefhealing.com/column-different-grief-patterns.htm>.

¹²⁸ Smith & Gomez, *supra* note 83.

¹²⁹ See Barbara Herman, *Why 'Discrepancies' In Rolling Stone Rape Story Don't Mean 'Jackie' Is Lying*, INT'L BUS. TIMES (Dec. 10, 2014), <http://www.ibtimes.com/why-discrepancies-rolling-stone-rape-story-dont-mean-jackie-lying-1747528>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 116 (1984).

transgender, a person of color, or belongs to another marginalized group.¹³³

The survivor's first statement to an investigator may differ in some details from a report the survivor gives two weeks later. "For example, victims might give inconsistent or untrue information out of trauma or disorganization. Those who are traumatized do not always think coherently and cannot necessarily provide information that is 100% complete and accurate. In addition, victims may also have memory impairment due to alcohol or drug use."¹³⁴ When memory begins to re-organize, some details may emerge while others remain a blur.¹³⁵ Even small details, such as the color of the assailant's clothing, may be unclear. Even when not relevant, the smallest inconsistent detail will be used by defense counsel to attack the reporting witness' credibility.¹³⁶ The prosecutor may need to find sufficient funds to hire a trauma expert to explain the impact of trauma on the survivor's behavior, memory, and presentation.

Without an expert to explain why traumatic memories may vary in detail at different times, the consequence of inconsistent survivor reporting results in acquittal as lawyers, judges and juries finding the survivor-witness not credible. "Unfortunately, cases are sometimes seen as unfounded when the victim 'changes her story' by recalling additional information, telling different aspects of the same story, or making inconsistent statements out of trauma and cognitive disorganization."¹³⁷ The very symptoms that could support the claimed traumatization to a knowledgeable and empathetic observer are instead used to suppress or reject the survivor's narrative. Without an expert witness, a judge or jury may not understand this variation on the expected norm of human narrative. Further, this conflation of trauma-responsive behavior with credibility gives support to the commonly believed myth that women lie.¹³⁸

¹³³ See generally *ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE*, Vol. 1 (Claire Renzetti & Jeffrey Edleson eds. 2008).

¹³⁴ Lonsway, Arhumbault, & Lisak, *supra* note 64, at 5.

¹³⁵ *Id.*

¹³⁶ This is, of course, part of defense counsel's job. Confronting witnesses is a constitutionally protected right for criminal defendants under the Sixth Amendment to the U.S. Constitution. U.S. CONST. amend. VI.

¹³⁷ *Successfully Investigating Acquaintance Sexual Assault*, *supra* note 117, at 7.

¹³⁸ Chira, *supra* note 62. This scenario played out in the recent Bill Cosby trial, where the jury was "hung" based in part on inconsistent statements made by the reporting witness. Ray Sanchez et al., *Bill Cosby trial: Mistrial declared After Jury Deadlocks*, KION 5/46 (June 17, 2017, 7:33 AM)

<http://www.kion546.com/news/top-stories/bill-cosby-jury-deliberating-on-saturday/547349438>. This account addresses several concerns that hamper sexual assault prosecutions including the "he said, she said" phenomena where consent to

VII. LIAR MYTHOLOGY

Abusers accusing their targets of lying is part of the dynamic of abusive relationships. The same happens in acquaintance sexual assault cases. The allegations of lying can be effective because the myth that women lie is culturally accepted.¹³⁹ This unsupported accusation continues to be a pervasive and insidious part of the sexual assault dialogue on and off campus. While a small number of sexual assault cases involve false allegations, they are a distinct minority of reports.¹⁴⁰ Yet the myth continues.¹⁴¹ And as one author notes, this myth's "status quo is quite effectual at silencing victims."¹⁴² In addition, the notorious Rolling Stone article "Jackie's story" did untold damage to survivors' credibility, reinforcing the stereotype of the lying woman.¹⁴³

One danger of raising the standard of proof at Title IX hearings is that the survivor-as-liar myth is reinforced. Despite the beyond a reasonable doubt standard being nearly impossible to meet, public and private interpretations of a failed prosecution is that the person making the allegations lied. The nuance of why sexual assault prosecutions fail is not considered. In addition to suppressing the narrative of those who have been harmed, the myth of the survivor-as-liar injures fundamental concepts of justice, including the perception of fair hearings. Fairness implies that parties have an equal opportunity to make their case. But victims with cognitive impairments and other issues that result from the harm that is the topic of the hearing have reduced the likelihood of achieving a fair result.

sexual activity is an issue, trauma induced inconsistencies, late reporting, and misinterpretation of post-assault behavior. *Id.*

¹³⁹ Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, BEST OF ABA SECTIONS: GEN. PRAC. SOLO & SMALL FIRM 40 (1997), https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/schafran.html.

¹⁴⁰ See *False Reporting*, *supra* note 65.

¹⁴¹ See David Csordas, *Rolling Stone Cannot Undo Damage to Rape Victims Around the Country*, DAILY CAMPUS (Nov. 14, 2016), <http://dailycampus.com/stories/2016/11/14/rolling-stone-cannot-undo-damage-to-rape-victims-around-the-country> (reporting on how the myth was enhanced by the Rolling Stones' poorly verified and sensationalist publication of Jackie's Story).

¹⁴² Sarah M. Buel, *De Facto Witness Tampering*, 29 BERKELEY J. GENDER L. & JUST. 72, 93 (2014).

¹⁴³ Csordas, *supra* note 141.

VIII. THE STUDIES ON FALSE SEXUAL ASSAULT REPORTING

Studies of false reporting of sexual assault cases generally place the rate between 2% and 8%.¹⁴⁴ Looking at prior studies since 2000, Northeastern University researchers placed the rate of false reports at 5.9%.¹⁴⁵ The earlier the studies, the higher the rate of cases determined to be “false.”¹⁴⁶ An important factor in determining “false” reports to law enforcement is how the officers define “false reporting.” “It is notable that in general the greater the scrutiny applied to police classifications, the lower the rate of false reporting detected. Cumulatively, these findings contradict the still widely promulgated stereotype that false rape allegations are a common occurrence.”¹⁴⁷

The authors of the Northeastern University report identified a fundamental problem in the methodology of reports of women lying about sexual assault, namely police case mis-classification.¹⁴⁸ The issue of police mis-categorization was discussed in detail in a study by retired police sergeant Joanne Archambault along with Kimberley Lonsway and Dr. David Lisak.¹⁴⁹ What these researchers noted was that when more rigorous standards were applied to the categories created by law enforcement, the rate of false reporting decreased.¹⁵⁰ “[W]hen more methodologically rigorous research has been conducted, estimates for the percentage of false reports begin to converge around 2-8%.”¹⁵¹ Significantly, this percentage is based largely upon police determinations of falsehood.¹⁵²

Police historically have been skeptical, if not hostile, toward sexual assault reporters.¹⁵³ Often categorization of sexual assault reports as “false” is based upon nothing more than an officer’s personal judgment.¹⁵⁴ Consequently, myth upon stereotype upon myth has been woven into sexual assault narratives for so long it is part of the culture. Archambault, Lonsway, and Lisak succinctly summarized the influence that stereotypes of false reporting and false reporters has:

¹⁴⁴ David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault, A Study of Ten Years of Reported Cases*, 16 *VIOLENCE AGAINST WOMEN* 1318, 1329 (2010).

¹⁴⁵ *Id.* at 1329.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1330.

¹⁴⁸ *Id.* at 1322.

¹⁴⁹ Lonsway, Archambault, & Lisak, *supra* note 64.

¹⁵⁰ *Id.* at 2.

¹⁵¹ *Id.* at 2.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Concerns regarding the legitimacy of a sexual assault report are often triggered by the presence of “red flags,” based on specific characteristics of the victim, suspect, or assault. Yet many of these “red flags” are based on our cultural stereotypes of what constitutes “real rape.” As professionals, we are often reluctant to believe that we share these stereotypes, but the reality is that everyone in our society is exposed to the same cultural messages about sexual assault, and they inevitably influence how we think about it. Because these are societal stereotypes, they impact not only jurors but also the other professionals involved in sexual assault response (e.g., law enforcement professionals, forensic examiners, victim advocates, prosecutors, and other professionals).¹⁵⁵

The authors went on to identify these “red flags” the officers used in determining whether a sexual assault report is false to include: the victim was not hysterical; the accused was not a stranger; the victim had reported sexual assault in the past; the victim had used “bad judgment;” and the victim had no signs of physical injury.¹⁵⁶ Other “red flags” were identified by the researchers, the presence of any number of which often results in a lack of police investigation.¹⁵⁷ These “red flags” lead officers to assume that reports were false based upon the decision-maker’s misunderstanding or bias.¹⁵⁸ Other characteristics that could result in officers assuming a report is false are a victim’s failure to cooperate with the criminal justice system and the victim recanting.¹⁵⁹

How system actors define what makes a reporter credible influences their determination of the false reporting rate. Characteristics the actors rely upon in assessing credibility, however, disregard actual trauma symptoms and presume a uniform response to trauma. Archambault, Lonsway, and Lisak warn that the behavior of the suspect also should not determine whether a report is false. The accused’s outrage or respected status within the community should not influence how or whether police or prosecutors investigate. Only evidence-based investigation can determine the accuracy of a sexual-assault report.¹⁶⁰ Simply because some aspects of a report cannot be substantiated does

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Id.* at 3–4.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 4–5.

not support categorizing the entire report as false.¹⁶¹ Unfortunately for those who are sexually assaulted, many of those assessing their credibility will not understand the role of bias in their decision-making.

All women are affected by the perpetuation of the myth that women lie. But some experience similar and even more exaggerated presumptions of incredulity. Trans women, gay men, other members of sexually diverse groups, along with native women, immigrants, differently abled and others who historically have experienced enhanced bias due to their status are treated dismissively when reporting abuse.¹⁶² This discrediting, whether perpetuated explicitly or implicitly, makes seeking remedies for sexual assault more difficult.¹⁶³

Added to the burden of diminished credibility resulting from the perception of an individual's status, survivors of assault must overcome the frequent lack of corroborating evidence that adjudicators seek.¹⁶⁴ Few sexual assaults and acts of intimate partner violence happen in public. While witnesses may recall seeing the person claiming to be harmed before or after the assault, witnesses who can testify to specific assaultive behaviors are rare.¹⁶⁵ Even though college women, particularly first-year students, experience sexual assault at a rate higher than the general population, they encounter enormous difficulties in persuading others that the reported events happened.¹⁶⁶

Eighty to ninety percent of campus sexual assaults are committed by an individual known to the survivor.¹⁶⁷ Yet criminal trials in these cases are rarely successful because the stereotypical rapist is assumed to be a stranger to the victim.¹⁶⁸ Campus adjudicators

¹⁶¹ *Id.* at 6.

¹⁶² Trans women and other sexual minorities, along with native women, women of color, and the disabled, among others, report sexual assault at much higher rates than the general population.

¹⁶³ Indeed, race results causes results for both the student that was harmed and the student alleged to have done the harm: school discipline in general is more severe when the alleged offender is a student of color. See Press Release, U.S. Dept. of Ed., Office for Civil Rights, U.S. Educ. Dep't Reaches Settlement with Lodi Unified Sch. Dist. in Cal. (Aug. 24, 2014), <https://www.ed.gov/news/press-releases/us-education-department-reaches-settlement-lodi-unified-school-district-california>.

¹⁶⁴ Lonsway, Archambault, & Lisak, *supra* note 64.

¹⁶⁵ See generally Jajini Vaidyanathan, *Will Stanford Sexual Assault Case Silence Future Victims?* BBC NEWS (June 7, 2016), <http://www.bbc.com/news/world-us-canada-36375300> (showing that an exception is the CA case where the bicyclists witnessed the assault). But in that case, despite overwhelming evidence and a guilty finding, the assailant received only a six-month jail term. *Id.*

¹⁶⁶ Karjane, Fisher, & Cullen *supra* note 8, at ii.

¹⁶⁷ *Id.* at 2.

¹⁶⁸ Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 SEX ROLES, 385, 386 (2005) http://www.ariel.ac.il/images/stories/site/personalsites/sarahbendavid/mamrim/mamrim2/rape_perceptions.pdf.

understand that the one who commits a sexual assault is likely known to the target.

The myth of false reporting reaches deep into the Title IX debate. Candice Jackson, Deputy Assistant Secretary in DOE's Department of Civil Rights, exemplified this point when she commented that 90% of campus sexual assault claims "fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"¹⁶⁹ In the same interview, she commented that often there is "not even an accusation that these accused students overrode the will of a young woman."¹⁷⁰ Outrage followed and Jackson apologized.¹⁷¹ Still, the original comment is reflective of and gives significant support to the myth that women are manipulative, lie and make false allegations for suspect reasons, including their regret.¹⁷²

In the face of pervasive cultural bias against them, sexual assault survivors will not have an effective remedy to on-campus assault if the criminal hearing standard of beyond a reasonable doubt becomes the norm in Title IX cases. Even the "clear and convincing" standard would create similar barriers. "Clear and Convincing," sometimes used in the criminal justice system, is the civil system's "beyond a reasonable doubt" equivalent in that the standard of proof demands overwhelming proof so that no reasonable person could deny the resulting decision.¹⁷³ For these reasons, and like civil protection order hearings, the Title IX

¹⁶⁹ Rachel Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get Devos's Ear*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html?_r=0&mtref=www.nytimes.com&gwh=627AB60900EE1830AB944F4B8C40265&gwt=pay.

¹⁷⁰ *Id.*

¹⁷¹ Sarah Brown, Ed. *Dept. Official Apologizes for '90%' Remark on Campus Rape, What's the Research?*, CHRON. HIGHER EDUC. (July 12, 2017), <http://www.chronicle.com/article/Ed-Dept-Official-Apologizes/240634>.

¹⁷² Some advocates voiced concern that the belief that sexual assault survivors lie is pervasive within the current administration. See, e.g., Annie Waldman, *DeVos Pick to Head Civil Rights Office Once Said She Faced Discrimination for Being White*, PROPUBLICA (Apr. 14, 2017), <https://www.propublica.org/article/devos-candice-jackson-civil-rights-office-education-department> (noting that Jackson labeled women accusing the President of sexual assault as "fake victims").

¹⁷³ *Clear and Convincing Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Oct. 26, 2017) ("[A] party must prove that it is substantially more likely than not that it is true."); *Evidentiary Standards and Burdens of Proof*, JUSTIA.COM, <https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof/> ("Some courts have described this standard as requiring the plaintiff to prove that there is a high probability that a particular fact is true.").

process is intended to determine whether it is more likely than not that assault or other gender harassment occurred.¹⁷⁴ While not precluding pursuit of criminal charges, the Title IX process can provide an effective alternative. The Title IX process never was intended to replicate complaint, indictment, and trial.¹⁷⁵ What the objecting Harvard Professors overlooked is that the process, as reinforced by the DCL letter, was intentionally designed to *not* mimic a criminal hearing.¹⁷⁶

Title IX can present as a friendlier forum capable of providing remedies a survivor seeks, such as moving the responsible student out of the dorm or changing the responsible student's class schedule. And while the preponderance of the evidence standard gives no guarantee of success, the standard at least creates a setting for the harmed students to have a reasonable opportunity to overcome the bias that accompanies allegations of sexual assault. As referenced above, the DCL clarified that accusers and the accused have rights in the Title IX investigation and adjudication process, rights which are independent of the criminal justice system.¹⁷⁷ This clarification was an effort to provide a pathway for survivors to overcome the biases they encounter when sexual assault reports are filed. Nonetheless, the bias remains difficult to root out.

The credibility attached to the criminal justice system is reflected in the following exchange: one law school administrator with whom I spoke indicated that they would not consider taking disciplinary action against a student who had a civil protection no-contact order entered against them based upon behaviors that occurred on campus. The same administrator explained that they would take action if the student were convicted of a criminal violation of the protection order. When asked what would make the difference, the administrator indicated that they would be persuaded by the higher standard of proof used in criminal matters.¹⁷⁸ The juxtaposition of the feminine civil protection order process and the masculine criminal justice one is striking.¹⁷⁹ In essence, the (male) criminal justice system carries an

¹⁷⁴ See *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS 13 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁷⁵ Edwards, *supra* note 82, at 140.

¹⁷⁶ See Dear Colleague Letter, *supra* note 7.

¹⁷⁷ See *Know Your Rights: Title IX Requires Your School to Address Sexual Violence*, U.S. DEPT. OF EDUC., OFFICE OF CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf> (last visited Oct. 26, 2017) (providing a general discussion of the distinct rights provided through Title IX).

¹⁷⁸ Notes on file with author following interview of the administrator.

¹⁷⁹ The civil protection order system is one in which the clear majority of petitioners are female, while the criminal justice system is one in which the majority of accused, defenders and other system players are male. See Shannan Catalano, *Intimate*

inherent credibility that civil (female) systems do not. To the extent that the DCL encouraged processes that accommodate survivor trauma and attempted to minimize system influences that are inherently biased toward survivors, the DCL's approach was culturally competent.

IX. EDUCATION RESPONDS

As criminal defense lawyers became more vocal in their demands that the Title IX process permit "speaking" participation of counsel, and higher levels of proof, some institutions responded by altering the process by which Title IX sexual assault complaints are adjudicated.¹⁸⁰ While controversy on the hearing standard remains, some institutions have reacted to concerns expressed by the criminal law faculty and the broader criminal defense bar.

For instance, some schools changed their decision-making process from a "hearings" model to an investigatory process that eliminates witnesses' testimony.¹⁸¹ This model avoids questions of who participates in hearings. How schools implemented this change varies. Some schools substituted an investigation conducted by one individual who then makes the decision as to responsibility based upon the preponderance of the evidence standard.¹⁸² This system is not preferred, due to the greater likelihood that implicit¹⁸³ or confirmation¹⁸⁴ bias will

Partner Violence: Attributes of Victimization, U.S DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (1992–2011), <https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf>; Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, AM. CON. SOC. L. & POL'Y, <http://gavelgap.org/pdf/gavel-gap-report.pdf>; *Justice for All: Who Prosecutes in America?* WHOLELEADS.US, <http://wholeleads.us/justice/> (79% of prosecutors are male); Brian A. Reaves, *Felony Defendants in Large Urban Counties 2009 – Statistical Tables*, U.S DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

¹⁸⁰ See Letter from Fanta Aw, *supra* note 78.

¹⁸¹ Kelly, *supra* note 88, at 13 ("What is the model that these investigations take? Increasingly the investigator - single investigator or co-investigator model is preferred. There are still some places I think who do this by hearing.")

¹⁸² *CJS Task Force Recommendations*, *supra* note 72, at 3; see also Melanie Bennett, *Sexual Misconduct Adjudication: The Single Investigator Model*, EDURISK (Apr. 2016), [https://www.edurisksolutions.org/blogs/?Id=2801;Bennet, Gregory, Loschiavo, & Waller, *supra* note 25; Kelly, *supra* note 88, at 14](https://www.edurisksolutions.org/blogs/?Id=2801;Bennet, Gregory, Loschiavo, & Waller, supra note 25; Kelly, supra note 88, at 14) ("Depending on the resources of the institution sometimes an institution has a whole cadre of internal investigators ready to handle these things. Sometimes there is one person who's on call to do them, sometimes there is nobody and it's always an external investigator who is called in.")

¹⁸³ Michael Henry, et al., *The 7 Deadly Sins of Title IX Investigations*, ASSOC. OF TITLE IX ADMINS. 10 (2016) https://atixa.org/wordpress/wp-content/uploads/2012/01/7-Deadly-Sins_Short_with-Teaser_Reduced-Size.pdf.

¹⁸⁴ *Id.* at 8.

influence the adjudicator's findings.¹⁸⁵ Under another model, the sole investigator submits the report to a panel of three adjudicators who then decide whether the accused is responsible for the alleged behavior.¹⁸⁶ The panel members use the preponderance of the evidence standard in reaching their decision.¹⁸⁷ This process engenders less criticism as shared deliberations and decision-making can serve to correct individual bias.¹⁸⁸

The investigatory process has advantages for the student parties. Students report preferring the system because more privacy is preserved, particularly as a lengthy hearing in the presence of peers can be avoided.¹⁸⁹ The investigatory model, when implemented appropriately, provides a forum where the witness or student-party can explain their version of events in a less formal setting. The less formal setting for questioning reduces tension and can lead to more disclosures. Additionally, this setting permits greater opportunity to provide follow-up explanations when queried by the investigator.¹⁹⁰ As critics would caution, this system can work well if due process protections are in place.¹⁹¹ In eliminating the controversial hearings option, some of the complaints about the hearings process were eliminated. For example,

¹⁸⁵ *Id.* at 10.

¹⁸⁶ Margaret Bernetich, *How I Made Peace: Ending Sexual Assault on College Campuses in the United States*, COLL. SAINT BENEDICT & SAINT JOHN'S U. (Apr. 27, 2017),

http://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1131&context=elce_cseday. Once all written responses and rebuttals are made, a copy of the report, any written responses, and any rebuttals go to a judicial panel made up of three adjudicators staff and faculty members of the respective institutions who have been exhaustively trained. *Id.* Typically, at least three adjudicators sit on any single hearing panel. Melanie Bennett, *Title IX and Beyond: The Adjudicatory Process*, EDURISK, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiGm4D9-p3XAhXF7YMKHVifCU0QFggoMAA&url=https%3A%2F%2Fwww.edurisksolutions.org%2FWorkArea%2FDownloadAsset.aspx%3Fid%3D2572&usg=AOvVaw1DFKJsczYfXSZh4dfJeskn> (last visited Nov. 5, 2017).

¹⁸⁷ See, e.g., *Title IX and Sexual Misconduct Resources and Reporting Information*, LORAS COLL. <http://www.loras.edu/campus-life/health-and-safety/title-ix-resources-and-reporting/> [hereinafter LORAS COLL.] (last visited Nov. 5, 2017).

¹⁸⁸ Henry, et al., *supra* note 183. Some schools are looking to outsource investigations. See Jeremy Bauer-Wolf, *Outsourcing Rape Investigations*, INSIDE HIGHER ED (Oct. 2017), <https://www.insidehighered.com/news/2017/10/09/some-colleges-opt-outsource-title-ix-investigations-hearings>. A regional approach has been suggested, as well. See Edwards, *supra* note 82.

¹⁸⁹ Notes on file with author following interview of students.

¹⁹⁰ *Id.*

¹⁹¹ In 1999 only 40% of schools offered any due process protections for the accused. Karjane, Fisher, & Cullen, *supra* note 8, at 10.

the discussion of the appropriate role of counsel at the hearings became moot.

Not all universities embrace the investigatory process. Many still utilize the hearings model,¹⁹² where witnesses are presented, and both the student claiming harm and the accused student may choose to appear.¹⁹³ Even at these hearings, however, traditional cross examination is not the norm. As directed by the DCL, and as practiced in many domestic violence courts, the accused student's questions are submitted to the hearings officers who then pose selected questions to the accuser.¹⁹⁴ This method is employed to reduce the likelihood of a harmed student's re-traumatization while still accommodating the accused's need to inquire of the witness.¹⁹⁵ There are other safeguards that can be put into place for the protection of the accused student. Those will be discussed in the recommendation section.

X. THE ORGANIZED CRIMINAL DEFENSE BAR RESPONDS

A. *American College of Trial Attorneys*

Last spring, the American College of Trial Lawyers (ACTL) issued a White Paper on Campus Sexual Assault Investigations.¹⁹⁶ The report was

¹⁹² See *Title IX Hearing Board – Formal Process*, BRESCIA UNIV., <https://www.brescia.edu/title-ix-hearing-board-formal-process> (last visited Nov. 5, 2017) (describing the Kentucky school's hearings policy in Title IX investigations). California Western School of Law makes hearings discretionary. *Title IX – XI. Hearing*, CALIF. W. SCHOOL OF LAW, <https://www.cwsl.edu/about-us/required-disclosures/title-ix-sexual-harassment-and-discrimination-policy/title-ix-xi-hearing> (last visited Nov. 5, 2017).

¹⁹³ See for example Loras College that maintains a three-panel hearing process. LORAS COLL., *supra* note 187. See also New, *supra* note 11 (discussing Stanford University and Duke University's requirement of a unanimous vote in Title IX hearings); *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, DUKE UNIV., <https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix> (last visited Nov. 5, 2011) (providing two types of discretionary hearings: an administrative hearing and a hearing panel); *Vassar College Regulations for 2016–2017*, <https://deanofthecollege.vassar.edu/documents/college-regulations/VassarCollegeRegulations.pdf> (last visited Nov. 5, 2017).

¹⁹⁴ See Dear Colleague Letter, *supra* note 7. This approach is one of the recommendations of an American Bar Association Criminal Justice Section taskforce on campus sexual assault discussed in more length later. *CJS Task Force Recommendations*, *supra* note 72.

¹⁹⁵ *CJS Task Force Recommendations*, *supra* note 72, at 8–9.

¹⁹⁶ *White Paper on Campus Sexual Assault Investigations*, AM. COLL. TRIAL LAWYERS (March 2017), http://www.thealiadviser.org/wp-content/uploads/2017/03/Task_Force_Allegations_of_Sexual_Violence_White_Paper_FINAL.pdf [ACTL *White Paper*].

issued by the organization's Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence. The Task Force was organized in response to due process concerns relating to campus sexual assault hearings as promoted by OCR.¹⁹⁷ Like the Harvard and Pennsylvania Law School faculty members, ACTL members were specifically concerned about possible due process inadequacies in the Title IX investigation and hearing processes.¹⁹⁸ ACTL members made clear that their concerns stemmed from the perspective of the accused student.¹⁹⁹ Acknowledged in the white paper is the difficulty that colleges and universities are faced with when determining an appropriate process when a sexual assault allegation is received.²⁰⁰ The report notes several cases where the courts have recognized due process failures on the part of educational institutions.²⁰¹ The report further notes that OCR has recognized due process failures on the part of some institutions that resulted in gross violations of the rights of accused.²⁰²

ACTL made several recommendations,²⁰³ among them that the standard employed at Title IX sexual assault hearings be "clear and convincing" evidence.²⁰⁴ As noted, this standard on the civil side of the law is barely distinguishable from the criminal "beyond a reasonable doubt." For reasons discussed below, ACTL's promotion of a higher standard of proof ignores the historical and cultural reasons for using the "preponderance of the evidence" standard. The due process inequities ACTL and others complained of, such as insufficient notice of allegations and the right to written findings, are indeed worthy of addressing. But any inadequacies reflected in those concerns do not result from any failure of the preponderance of the evidence standard of proof.

The American Bar Association's (ABA) Criminal Justice Section (CJS) subsequently issued its own recommendations, many of which comport with those made by ACTL.²⁰⁵ The Section's recommendation and report, however, acknowledged the definitional unworkability of the "clear and convincing" standard.²⁰⁶ Their exploration of appropriate standards and other recommendations, are discussed below.

¹⁹⁷ *Id.* at 1.

¹⁹⁸ *Id.* at 1–2.

¹⁹⁹ *Id.* at 2.

²⁰⁰ *Id.* at 11.

²⁰¹ *Id.* at 9, 10.

²⁰² *Id.* at 8.

²⁰³ *Id.* at 11–17.

²⁰⁴ *Id.* at 12.

²⁰⁵ See *CJS Task Force Recommendations*, *supra* note 72.

²⁰⁶ *Id.* at 7–8.

B. *American Bar Association Criminal Justice Section*

i. Background

In a June 26, 2017, press release, the ABA announced the CJS publication of its recommendations for Title IX proceedings when sexual misconduct is alleged.²⁰⁷ The recommendations were produced by a taskforce organized by CJS for the purpose of reviewing Title IX investigations and hearings.²⁰⁸ For reasons set out below, the recommendations are mixed. Some are easily implemented solutions that will enhance due process without being unduly burdensome to the affected educational institutions. Others contribute to the confusion some schools experience in trying to adapt their models to accommodate fairness while preserving school autonomy over process development.

As the press release announced: “The report provides recommendations to guide colleges and universities for resolving allegations of sexual misconduct.”²⁰⁹ Before proceeding to a discussion of the recommendations, several unusual circumstances are worth noting. First, while the recommendations were unanimously adopted by the Criminal Justice Council, the recommendations are not ABA policy.²¹⁰ Second, any proposal that the recommendations become policy could be met with significant resistance from some entities within the wider ABA constituency.²¹¹ Publishing the recommendations may be a way for the CJS to test reactions and elicit responses from various ABA entities and members before a final decision is made whether to seek policy status for the recommendations.²¹² As a CJS website points out, the recommendations are not policy “at this time.”²¹³

First, as noted in the CJS press release, “[t]he [CJC’s] endorsed findings urge the nation’s private and public colleges and universities to adopt a disciplinary system in sexual misconduct cases that includes procedural and substantive due process protections for the accused

²⁰⁷ *ABA Task Force on College Due Process Rights and Victim Protections Releases Final Report*, AM. BAR ASS’N (June 26, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/06/aba_task_force_onco.html [hereinafter *ABA Press Release*].

²⁰⁸ *CJS Task Force Recommendations*, *supra* note 72, at 1.

²⁰⁹ *ABA Press Release*, *supra* note 207.

²¹⁰ *Id.*

²¹¹ See *CJS Task Force Recommendations*, *supra* note 72, at 1, n. 1 (indicating that the ABA Commission on Domestic and Sexual Violence and the ABA Section of Civil Rights and Social Justice has not endorsed the recommendations).

²¹² *How You Can Develop Policy*, AM. BAR ASS’N 2, https://www.americanbar.org/groups/international_law/leadership/policy_development.html (last visited Oct. 26, 2017) (outlining the process for creating ABA policy).

²¹³ *CJS Task Force Recommendations*, *supra* note 72.

while protecting the rights and interests of the victim.”²¹⁴ Further, the lawyers comprising the task force included an impressive range of experience, from defense counsel to victim advocates.²¹⁵ Second, there is a strong implication that within the ABA there are sources of opposition to the recommendations. While the press release gives no hint of internal opposition, the CJS taskforce’s report notes that “[a]lthough these *Recommendations* were unanimously endorsed for publication by the Criminal Justice Section Council, they have not been endorsed by any other section of the ABA, including the ABA Commission on Domestic and Sexual Violence and the ABA Section of Civil Rights and Social Justice.”²¹⁶

The recommendations were issued with task force members having heard from ABA entities that bring civil and victim advocacy perspectives to the topic at hand. But more importantly, the footnote suggests that at least two ABA entities view the task force as not having achieved a balanced perspective in recommending how universities may best proceed with Title IX complaints. Surprisingly, the task force chair acknowledged that the product was both rushed and the result of compromise, rather than an agreement on best practices.²¹⁷ The chair informs readers that the recommendations were created as a collective stating that, “[t]he recommendations were necessarily the product of extensive discussions and compromise. Various stakeholders agreed to bend on certain provisions to obtain other provisions of import to them and to reach unanimity.”²¹⁸ The chair is to be applauded for encouraging the art of compromise. This is not always easy to do when gender issues are the topic of debate. As will be explored however, compromise can result in provisions that are perplexing to those not part of the original discussion. In this regard, it is imperative to distinguish compromise from best practices. Also, it is important to note again that these recommendations are not ABA policy. Policy must be approved by the ABA House of Delegates.²¹⁹ These recommendations have not been approved.²²⁰

²¹⁴ *ABA Press Release*, *supra* note 207.

²¹⁵ *Id.* For a full roster of task force members, see *Relevant Experience of Task Force Participants*, AM. BAR ASS’N (June 2017), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/Relevant_Experience_of_Task_Force_Participants.authcheckdam.pdf.

²¹⁶ *CJS Task Force Recommendations*, *supra* note 72, at 1, n. 1. In the interest of disclosure, the author is an ABA member and is past chair and current liaison to its Commission on Domestic and Sexual Violence.

²¹⁷ *Id.* at 1.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

ii. The Recommendations

As an example of a clear recommendation, Recommendation IA, “Cooperation with, and Independence from, Law Enforcement” reads:

The Task Force recognizes the school’s responsibility to address sexual misconduct on its campus for protection of its community. Schools should be able to determine whether a violation of school policy has occurred regardless of whether there has been a violation of criminal law. Where police investigation has been initiated, schools should work cooperatively with law enforcement to the extent permissible by state and federal law.²²¹

Having recognized that educational institutions have an interest in addressing allegations of campus sexual assault,²²² the terms of this recommendation affirm the institutional authority’s right (and obligation under the DCL) to proceed expeditiously with internal investigations even if a criminal investigation has commenced. No additional burdens are placed on the institution because cooperation with law enforcement is demanded only to the extent required by state and federal law.²²³ For most institutions, this recommendation maintains the status quo, as do the recommendations for maintaining confidentiality and for a thorough and fair investigation.²²⁴ Some recommendations are not controversial and restate fundamental fairness principles upon which all can agree. Examples of those principles are the need for confidentiality,²²⁵ the need for a balanced investigation,²²⁶

²²¹ *Id.* at 2.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 2, 5.

²²⁵ *Id.* at 2. CJS Recommendation I C, *Confidentiality*: “Schools should put in place provisions to guard against the improper disclosure of confidential information created or gathered during an investigation. Parties, witnesses, investigators, decision-makers, and advisors should abide by these provisions. Schools should notify parties about the scope and limits of the school’s ability to maintain confidentiality. For example, a school may have to provide documents in compliance with a court subpoena.” *Id.*

²²⁶ *Id.* CJS Recommendation I B, *Investigate Both Sides*, states: “The school’s investigator must conduct a prompt, fair, and impartial investigation. The investigation should be thorough, and both parties should have the right to participate by identifying witnesses and identifying and/or providing relevant information to the investigator. Investigators should equally seek out both inculpatory and exculpatory evidence.” *Id.*

and the need for impartial decision-makers.²²⁷ By contrast, other recommendations are murky and so strained in usefulness as to clearly have been the result of an unsatisfactory compromise. Yet, other provisions are straightforward and helpful. Still more provisions are concerning because they unnecessarily limit school autonomy. This section focuses primarily on those provisions that implicate the applicable standard of proof to be used in Title IX hearings and those that impact the perception of survivor credibility.

a. Recommendation II A: Alternatives to Traditional Adjudication

CJS Recommendation II A, “Alternatives to Traditional Adjudication”, encourages the use of non-hearing methods of resolution.²²⁸ This recommendation excludes the use of mediation, however, which long has been a concern for those who advocate for gender violence survivors.²²⁹ Mediation sends a silent message that if both parties would just be reasonable, all matters can be resolved. Mediation often ignores the inherent power imbalance between those who are harmed and those who have harmed. Survivors can feel responsible to make the mediation work, even at the expense of their own interests.²³⁰ Since 2000, ABA policy recommends that as a rule, mediation not be used in domestic violence cases.²³¹ The same or similar dynamics are at play in sexual assault matters. One should not underestimate the likelihood of re-traumatization in alternative dispute resolution processes. One of the reasons the ABA adopted the policy of

²²⁷ *Id.* at 5. CJS Recommendation III D, *Impartial Decision-maker*, which reads in part: “As a matter of fundamental fairness, schools and their designated personnel must be fair, impartial, and free of conflicts of interest.” *Id.*

²²⁸ *Id.* at 3. CJS Recommendation II A, *Alternatives to Traditional Adjudication*, states: “Where appropriate, the Task Force encourages schools to consider non-mediation alternatives to resolving complaints that are research or evidence-based, such as Restorative Justice processes. Both parties must freely and voluntarily agree to such processes in order for them to be utilized, and they may withdraw their consent to the process at any time, stopping its use.” *Id.*

²²⁹ Susan Pollett, *Mediating Domestic Violence: A Potentially Dangerous Tool*, 77 N.Y. ST. B. ASS’N J. 42, 43 (Sept. 2005).

²³⁰ Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call For Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 437 (2011).

²³¹ See AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, SECTION OF DISPUTE RESOLUTION, SECTION OF FAMILY LAW, STEERING COMM. ON THE UNMET LEGAL NEEDS OF CHILDREN, TORT AND INS. PRACTICE SECTION, AM. BAR ASS’N RESOLUTION 109B at 1 (2000).

permitting survivors to opt-out of court ordered mediation²³² is that the risk that the individual who caused harm will use the process to further manipulate and harm the survivor is high.²³³ Abusive individuals can manipulate the resolution process and the survivor simultaneously.²³⁴ As with any failure of the alternative dispute resolution process, blame for the failure is often placed on the survivor.²³⁵

While recognizing the risks mediation poses to survivors, the recommendations do not recognize similar inherent vulnerability to survivor well-being with other methods of dispute resolution. There may be cases where an informed and healing survivor elects mediation rather than to go through a grueling hearing process. But this process should be explored only if independently suggested by the harmed party.

Contrast the recommendation's support for the use of restorative justice and other "proven" alternative dispute resolution methods.²³⁶ The use of restorative justice and other forms of resolution can seem appealing, but alternative forms of dispute resolution are promoted most often in perceived "relationship" cases, as well as gender violence matters, without assessing the opportunity that the process creates for further harm. Recommending restorative justice solutions is trendy, often endorsed by those who do not understand the process. In this regard, the CJS recommendations fail institutions and those who have been harmed. While the recommendation's use of alternative methods is for "appropriate" cases only, guidance is lacking as to which cases are appropriate for alternative resolution.

The CJS has been critical of schools for mishandling Title IX hearings.²³⁷ But the recommendations that schools engage alternative

²³² *Id.* Specifically, the language of resolution 109B encourages providing a survivor the ability to "opt-out" of court ordered mediation. *Id.* The report addresses mediation in the broader sense. *Id.* at 2.

²³³ One aspect of mediation that was not addressed by the CJS is a survivor's possible desire to engage alternative processes. Should a well-informed survivor choose mediation, there may be circumstances where the process would be engaged. The blanket prohibition ignores the reality that survivor choice needs to be considered. In this author's experience, the closer survivors are to the alleged event, the less able that student will be adequately assess the use of the mediation or other alternative process.

²³⁴ Margaret B. Drew, *Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)*, 32 OHIO ST. J. ON DISP. RESOL. 31–32 (forthcoming).

²³⁵ *Id.* at 37.

²³⁶ *CJS Task Force Recommendations*, *supra* note 72, at 3. CJS Task Force Recommendation II A, *Alternatives to Traditional Adjudication*, states: "The Task Force encourages schools to consider non-mediation alternatives to traditional adjudication such as Restorative Justice processes." *Id.*

²³⁷ See *Report: ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections*, AM. BAR ASS'N (June 2017),

resolution processes would thrust Title IX adjudicators further into areas of practice for which most will be unprepared. Alternative methods, including the specifically mentioned restorative justice method, should be used only by individuals highly trained in the practice.²³⁸ That caveat is absent from the CJS recommendations. To suggest the use of restorative justice, without more, disrespects the practice which those involved have spent decades developing. The CJS report states: "Although [restorative justice] is geared towards reintegrating the transgressing student back into the community, it is also dedicated to helping the victim heal and move forward."²³⁹ The priorities are misstated. One goal may be the reintegration of the transgressing student, but the process has several victim-centered steps to accomplish before reintegration can be addressed. Restorative justice is perhaps most used in the criminal justice setting, yet the recommendations are silent on the preconditions demanded by the criminal justice system when restorative methods are employed.

For example, prior to engaging the restorative justice process, the accused must acknowledge responsibility for the alleged behavior.²⁴⁰ Often, restorative justice is not an option until guilt has been determined. For the restorative process to be suggested and implemented before the accused acknowledges wrongdoing may result in some accused students manipulating the restorative process for the sole purpose of lessening the severity of their consequences. In those instances, the process will be re-traumatizing for the survivor, given that the survivor agreed to less-than-maximum sanctions, only to realize that the accused has not changed behavior and remains a danger to the broader community.²⁴¹ The process may also be re-traumatizing for the survivor who had insufficient time for healing to begin. The same applies where the experts have not spent adequate preparation time with individually with both students.

<https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/AB-A-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf> [hereinafter *CJS Task Force Report*].

²³⁸ Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGO. L. REV. 265, 316–17 (2001).

²³⁹ *CJS Task Force Report*, *supra* note 237, at 5.

²⁴⁰ Christina L. Lyons, *Restorative Justice: Can it Help Victims and Rehabilitate Criminals?* CQ RESEARCHER (Feb. 5, 2016), <http://www.skidmore.edu/campusrj/karp-vitae-files/media/CQR-Restorative-Justice.pdf>.

²⁴¹ Jill Filipovic, *Restorative Justice in Domestic Violence Cases is Justice Denied*, GUARDIAN (Jan. 12, 2013), <https://www.theguardian.com/commentisfree/2013/jan/12/restorative-justice-domestic-violence> (offers a critique of restorative justice in domestic violence cases because of the way the abuser manipulates his victim).

Title IX and restorative justice can blend well if the tenets inherent to the restorative process are honored. In the restorative justice process, for instance, one precondition is the responsible party's acknowledgement of the wrong as described by the survivor²⁴² and both parties preparation over an extended time for the encounter,²⁴³ no matter in what form that encounter occurs.²⁴⁴ The process must be survivor-centered, including that commencement and continuation of the process be entirely under the survivor's control.²⁴⁵ Because of the healing and preparation time required for an effective restorative process, one author wisely suggested that the process be used in Title IX matters well after the adjudicatory one concludes. An example of appropriate use being when a student who has been suspended from campus is preparing to return.²⁴⁶

The goal of repairing harm to the extent possible is another tenet of restorative justice.²⁴⁷ The process may need time and several meetings before healing remedies begin to unfold. One value in using the restorative system is to assess whether the responsible party has truly accepted fault and to see if that student can tolerate an ongoing victim-centered process. If the student who caused the harm can engage in the process and sincerely recognize their responsibility to contribute to the repair of harm, a shift in the offensive behavior may result. Then the process would be compatible with the educational perspective of Title IX administrators.

Despite the cautions noted, because assault survivors encounter bias when they engage formal processes, alternative dispute systems may be appealing to the survivor, because the survivor may believe they will keep some control of the outcome. It then becomes the school's

²⁴² Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 190–91 (2016).

²⁴³ *Id.* at 191.

²⁴⁴ "Meeting" can occur through remote conferencing, for example. See *CJS Task Force Recommendations*, *supra* note 72, at 3.

²⁴⁵ Coker, *supra* note 243, at 194 (citing Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in RESTORATIVE JUSTICE & VIOLENCE AGAINST WOMEN 220 (James Ptacek ed., 2009)) ("RJ can better meet victims' justice needs to (1) contribute input into key decisions ... about their case, (2) receive response with minimal delay, (3) tell their story without interruption by adversarial and sometimes hostile questioning, (4) receive validation, (5) shape a resolution that meets their material and emotional needs, and (6) feel safe referencing.").

²⁴⁶ Coker, *supra* note 243, at 206, (citing Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 253 (2014)).

²⁴⁷ Megan Condon, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL'Y 487, 497 (2010).

responsibility to create a process that is true to restorative justice principles. The CSJ recommendation does not indicate which other alternative processes may be considered by the colleges and universities. But a caution to administrators is that protection of the survivor must be paramount to any alternative process.

b. Recommendation II B: The Adjudicatory v. Investigative Models

The Title IX decision-making methods used by colleges and universities are adjudicatory. The student accused of causing harm is found to be responsible or not, which is the essence of adjudication.²⁴⁸ More commonly, the varying models are referred to as the “hearings” model and “investigatory” model.²⁴⁹ For consistency that language will be used here, although the CJS recommendations and report uses the “adjudicatory” language when referencing those processes that use a hearing as part of their decision-making.²⁵⁰

The recommendations appropriately recognize the opportunity for bias under the varying models.²⁵¹ Most concerning is the investigatory model when the investigator also functions as the decision-maker.²⁵² When a fact finder is also the adjudicator, challenging the fact finder’s bias prior to a decision being entered is unlikely to be successful. Both sides are done a disservice in this model, particularly where the investigator is poorly trained. The CJS wisely recommends that when an investigatory model is used, the investigator not be the decision-maker.²⁵³

The recommendations and report voice a preference for the hearings model, believing that the opportunity for the panel members to hear from witnesses directly provides some protection against bias.²⁵⁴

²⁴⁸ *CJS Task Force Recommendations*, *supra* note 72, at 3 (“The adjudicatory model has a hearing in which both parties are entitled to be present, evidence is presented, and the decision-maker(s) determine(s) whether a violation of school policy has occurred. This does not require the parties to be present in the same room.”).

²⁴⁹ *See, e.g., CJS Task Force Recommendations*, *supra* note 72, at 3.

²⁵⁰ *See Id.*

²⁵¹ *Id.* (“It was the consensus of the Task Force that the single investigator model, which consists of having an investigator also serve as the decision-maker, carries inherent structural fairness risks especially as it relates to cases in which suspension or expulsion is a possibility. Should a school choose to use the investigatory model, the Task Force recommends that the investigator and the decision-maker be different persons and adopt additional procedural protections consist with these recommendations.”).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *CJS Task Force Report*, *supra* note 237, at 8–9.

The presumption is that hearings officers will be able to assess credibility better by hearing from the witnesses directly.²⁵⁵ Studies show that judges have no greater ability to determine credibility by observing the witnesses than does the general population.²⁵⁶ Unless the judge or hearings officers are well-trained and appreciate the influence of trauma on testimony, direct observation of the harmed student is more likely to result in a finding that the harmed student is “not credible.” Bias against the traumatized is inherent in the judging process.²⁵⁷

In an advisory sheet on this issue instructing the New York judiciary, judges are encouraged to consider inconsistency as a factor in assessing credibility.²⁵⁸ This article has already explored reasons why inconsistency may in fact be evidence that a trauma occurred. Yet, in looking for bright lines in assessing credibility, judges and other hearings officers fall into the trap of believing that inconsistency is a reliable indicator of false allegations.²⁵⁹

c. Recommendation III E: Silence

CJS provided the following recommendation: “In the interest of fundamental fairness, and recognizing the prospects of parallel or follow-on criminal proceedings, the respondent’s silence should not be the basis of a finding of responsibility.”²⁶⁰ If adopted, this recommendation would undercut any sense of balance within the Title IX process. While understanding defense counsel’s concerns, the recommendation enhances the movement to transform the process into a “quasi-criminal” one. The limitation on how adjudicators may interpret silence would apply to the responding student only. Yet some students who have been sexually harassed or assaulted choose to remain

²⁵⁵ *Id.*

²⁵⁶ Peter McClellan, Chief Judge at Common Law, Supreme Court of New South Wales, Address at the Local Courts of New South Wales Annual Conference 2006: Who is Telling the Truth? Psychology, Common Sense, and the Law (March 28, 2012), <http://www.austlii.edu.au/au/journals/NSWJSchol/2006/14.pdf> (“Moreover, it has been found that ‘judges and lawyers do not do better than lay people in detecting deception – while they perform better than if they had simply guessed, they do not perform much better than that guess’. These studies suggest that credit may not necessarily be given where credit is due.”) (quoting Paul Ekman & Maureen O’Sullivan, *Who Can Catch a Liar?* 46 AM. PSYCHOL. 913 (Sept. 1991)).

²⁵⁷ *CJS Task Force Report*, *supra* note 237, at 7.

²⁵⁸ *Credibility of Witnesses*, N.Y. STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/judges/cji/1-General/CJI2d.Credibility.pdf>.

²⁵⁹ *False Reporting*, *supra* note 65 (“Consequently, what may be typical behavior for a sexual assault victim is commonly misperceived as being contrived, inconsistent or untrue. These beliefs and biases help explain why the rate of false allegations tends to be inflated and why many inaccurately believe false reports are commonplace.”).

²⁶⁰ *CJS Task Force Recommendations*, *supra* note 72, at 5.

silent about the concerning events. Alternatively, a traumatized student might be unable to respond during investigation or cross-examination, but the investigation proceeds despite survivor non-cooperation if other witnesses are available. Without balancing the protections that come with a choice to remain silent, the decision-makers could interpret the silence of the student who is alleged to have been harmed as an indication that the alleged violations are without basis while making no adverse inference from the accused's silence.

This recommendation reflects criminal law where a defendant is not required to testify and failure to do so cannot be used against the defendant when the evidence is assessed in determining criminal guilt.²⁶¹ While the drafters may have considered this recommendation to be a due process necessity, this requirement injures the integrity of the Title IX process by depriving the decision-makers of information. This recommendation is unnecessary and a procedural change discussed below should satisfy any concerns about student self-incrimination.

d. Recommendation V D: Standards of Proof

The root causes of unfairness are addressed by some of the CJS authors in other taskforce recommendations.²⁶² Impartiality, for example, is a lynchpin of due process.²⁶³ But the recommendations fall short when focusing on the standard of proof as a key to fairness in Title IX hearings. As said by Prof. Deborah Brake, “[t]he actual impact of OCR’s endorsement of the [preponderance of evidence] standard is disproportionate to the pitched debate it has prompted.”²⁶⁴

The CJS task force reports that the group could not reach agreement on which would be the appropriate standard to be applied in Title IX decision-making, although the members agreed that the standard should not be “beyond a reasonable doubt.”²⁶⁵ Their solution was to create new hearings standards.²⁶⁶ The resulting standards were a creative attempt to reach consensus but they do not enhance fairness.

²⁶¹ See U.S. CONST. amend. V.

²⁶² See, e.g., *CJS Task Force Report*, *supra* note 238, at 7–8 (recognizing bias as a cause of unfairness).

²⁶³ See *Id.* at 7. CJS task force standard II. B states: “As the Supreme Court acknowledged in *Withrow v. Larkin* (1975), a ‘fair trial in a fair tribunal is a basic requirement of due process’ and it applies to both court cases and hearings before administrative agencies. ‘Not only is a biased decision maker constitutionally unacceptable,’ the Court wrote, ‘but “our system of law has always endeavored to prevent even the probability of unfairness”’” *Id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (internal citations omitted)).

²⁶⁴ Brake, *supra* note 113, at 110.

²⁶⁵ *CJS Task Force Recommendations*, *supra* note 72, at 7.

²⁶⁶ *Id.* at 7–8.

The CJS recommendations promote two standards of proof. But the variation does not turn upon the seriousness of the allegation.²⁶⁷ Which of the newly designed standards is to be followed turns instead on the decision-making process utilized by the educational institution, namely on the number of decision-makers involved.²⁶⁸ This leaves the strictness of the standard to be applied to the vagaries of fate. Whether one attends a school that incorporates a hearing as part of the adjudication process and uses multiple individuals as decision-makers will determine which standard of proof is triggered.

For those schools where the investigator acts as sole decision-maker, a responsible finding would be appropriate only if the decision-maker “[a]fter assessing the quality of the evidence” is *firmly convinced* that finding of responsible is justified.²⁶⁹ For students attending a school where a panel makes the decision of whether the accused student is responsible, they should do so “if the evidence unanimously convinces them to *reasonably conclude that a finding of responsibility is justified.*”²⁷⁰ Unknown is whether requiring a unanimous panel counterbalances the lower standard (when compared with “firmly convinced”) of “reasonably concludes.”²⁷¹

Both standards favor the accused. Unanimity will be difficult to achieve given barriers noted earlier. The CJS recommendations and report competently discuss the opportunity for bias and recommends diversity of the decision-making panel as a remedy.²⁷² The best way to diversify the hearings panel is to expand the number of decision-makers. To do so, however, would likewise expand the number of participants who must reach unanimity under the CJS standards. The unanimity requirement more closely resembles jury deliberations in criminal matters, rather than deliberations in the civil context. Unanimity favors the accused and typically is an essential component of the “reasonable doubt” standard. Unanimity permits the high criminal standard of proof to enter into decision-making, albeit through the back door.

²⁶⁷ *Id.* at 8 (suggesting one standard of proof where there is a panel of decision-makers comprised of at least three people, but a higher standard of proof where there is only one decision-maker).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ It should be noted that immediately prior to recommending each standard of proof, the task force informed the adjudicator(s) *how* to assess the evidence. *Id.*

²⁷² *Id.* at 7. CJS Task Force Recommendations V. A.: “The Task Force recognizes that there are inherent benefits to having a diverse panel when deciding responsibility or sanctions. A panel can be diverse across a number of dimensions including gender, race, age, sexual orientation, and position within the university. The inclusion of students can also provide an important perspective.” *Id.*

Furthermore, the recommendations offer no guidance on how to measure “firmly convinced” or how that phrase is defined. Nor is there any explanation of the differences between “firmly convinced”, “clear and convincing,” and “beyond a reasonable doubt.” If, however, one goal is to eliminate or greatly reduce the number of appeals from the initial adjudication (which appears to be the case²⁷³), the standards of proof as recommended may accomplish that goal. “Firmly convinced” is subjective. There is no legal standard, objective or not, to which “firmly convinced” may be compared. There is virtually no way to prove that a decision-maker was *not* firmly convinced of the ultimate determination, thus eliminating appeal even in the face of error.

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

XI. THE AUTHOR’S RECOMMENDATIONS

While the principles of the DCL continue to guide Title IX processes, there are changes that institutions can make to enhance due process protections for all concerned. The unfairness some accused have experienced results from utilizing inappropriate decision-makers. For example, one student was found “responsible” even where the survivor informed the decision-maker that she did not believe the student was present when the offensive behavior occurred.²⁷⁴ This version of events was supported by two additional accused.²⁷⁵ Yet, incredibly, the hearings officer declared the student responsible.²⁷⁶ That student should not have been found responsible under any standard. The failure of the hearings officer to find the student not responsible reveals the ineptitude of the selected decision-maker, not the use of an improper standard.

A second problem concerns the use of risk-averse school administrators who refuse to take any action that might incur the disfavor of DOE. The perceived fear is that the federal government will terminate funding streams if schools fail to find the accused students responsible, even though DOE has never imposed this sanction. This fear-based decision-making results in some students being found responsible, even where little evidence supports that finding. In other

²⁷³ The grounds for appeal under the CJS recommendations are narrow. *Id.* at 5.

²⁷⁴ Catanzano, *supra* note 10.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

cases, the remedy imposed for a student found responsible may be extreme under the circumstances, and may not be the result that either student seeks. Once again, the inappropriate response of the decision-makers is unrelated to the standard of proof.

Any decision-maker motivated by fear of losing federal funds if they find the responding students “not responsible” has an insurmountable conflict of interest. The failure of officers to recuse themselves from participation in the process reveals corruption that a change in standard will not cure. Because these problems with Title IX procedures will not be changed by use of a different standard, I recommend that Title IX campus decision-makers continue to employ “preponderance of the evidence” as the adjudicatory standard.

Other recommendations are:

- Before the commencement of any investigation, both parties should be given information, both in writing and orally, regarding legal options and consequences. The student alleging harm must be informed of legal options, including the ability to sue the accused in tort to recover damages. The student who has been harmed should know of their option to obtain a civil protection order as an alternative or as a compliment to the Title IX process. Survivors must be made aware that the school may or will report the incident(s) to the police, which could trigger criminal charges being filed against the accused, even over the survivor’s objections. The accused student must be informed, prior to the commencement of any process, that the allegations, if proven, could result in criminal charges being filed against the responding student. In addition, the student should be advised that other civil consequences could result, such as an action seeking financial damages.
- Both parties must be informed that they may seek the advice of counsel prior to the commencement of the investigatory process and any time during the process.²⁷⁷
- Title IX and any related statutes should be amended to require that none of the evidence (verbal or written) provided by the student alleging harm or the accused shall be used as

²⁷⁷ Prof. Merle Weiner argues for schools providing counsel to all survivors in *Legal Counsel for Survivors of Campus Sexual Violence*, 29 *YALE J. L. & FEMINISM* 123, 123 (2017) (forthcoming). See also Kelly Alison Bhere, *supra* note 111.

evidence in any related criminal proceeding. This amendment would eliminate concern that participation in proceedings would create a basis for a criminal complaint to issue or be used against the student at any subsequent related criminal hearing. Adjudicators would be more likely to receive the information necessary for a fair adjudication if both the student alleging harm and the accused participate in the process. This statutory amendment would assist survivors who may wish to participate in subsequent criminal proceedings but are concerned that statements made during the Title IX process would be used against them at any subsequent criminal hearing. This is of particular concern if the harmed student is still experiencing memory disorganization or other traumatic consequences at the time of the Title IX hearing.

- Inform both parties prior to the commencement of the Title IX process whether the allegations have been or will be reported to the police or any other criminal justice system player.²⁷⁸
- When the investigator's report is prepared, but prior to its finalization or distribution to any third-party decision-maker, the reporting and responding students must be given an opportunity to review the report. The student alleging harm as well as the accused student shall have an opportunity to respond to any information that the students find inaccurate. The students may suggest additional witnesses to be interviewed or other evidence to be reviewed that might counter the information a student believes incorrect. The student and investigator's responses should be noted in the report.²⁷⁹
- Those whose expertise is in sexual and intimate partner abuse should be included as decision-makers. Those in the field are experts not only in what *is* gender violence but are also the ones who can best screen out what *is not* gender violence. Often these experts are omitted from panels

²⁷⁸ This comports with notice requirements recommended by both the ACTL and CJS Title IX taskforces. *See* Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence, *supra* note 145, at 15; *CJS Task Force Recommendations*, *supra* note 72, at 4.

²⁷⁹ The CJS endorsed a comparable recommendation in Taskforce Recommendation III. C. *CJS Task Force Recommendations*, *supra* note 72, at 4–5.

because they are presumed to be biased. This presumption is an extension of the myth that those whose fields include gender violence or other feminist-based studies hate men and will always support the student claiming to have been harmed. These perceptions are extensions of liar mythology.²⁸⁰

- Expanding the number of members of adjudicatory panels from three to five, where possible, will permit schools to ensure greater diversity in the decision-making process. Attention should be paid to include racially diverse members of the campus community, as well as those with diverse sexualities and abilities. This diversity will strengthen the panel's ability to sort out the biases and misconceptions that can inadvertently undermine the process of reaching a fair result. Diversity of the panel's composition will stimulate creativity in fashioning solutions if a "responsible" finding results. Decision should be by majority vote.²⁸¹

The reasons for appeal as voiced both by the CJS and ACTL have merit and should apply to both the student claiming harm as well as the student accused of causing harm. The students should have the right to appeal the Title IX decision-maker's findings where the finding of "responsible or not responsible" has insufficient basis in the evidence presented.

XII. CONCLUSION

Colleges and Universities have an opportunity to design hearing systems that surpass those of the civil or criminal justice systems. The

²⁸⁰ The absurdity of precluding gender violence experts as Title IX decision makers is best demonstrated in student alcohol and drug cases. Best practice argues for including addiction experts in the Title IX process because of their unique perspective in fashioning remedies. Gender violence experts can do the same.

²⁸¹ The Criminal Justice Section has long advocated for racial diversity and the elimination of bias. See *Criminal Justice Section: Racial Justice & Diversity*, AM. BAR ASS'N (Sept. 28, 2016), <http://apps.americanbar.org/dch/committee.cfm?com=CR202000>. One suggestion for improvement in the courts was noted in the section's Perceptions of Justice Report: "Recognize that perceptions run all ways: judges, court personnel, attorneys, and litigants all make assumptions about the people they see." *Perceptions of Justice: A Dialogue on Race, Ethnicity, and the Courts*, AM. BAR ASS'N JUDICIAL DIV. LAWYER'S CONFERENCE (2008–2011), https://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2011_poj_writtenreport.authcheckdam.pdf; see also, *CJS Task Force Report*, *supra* note 238, at 7.

formula for ensuring fairness in Title IX processes is not complicated. The integrity of the investigators and adjudicators depends upon their willingness to be educated on cultural biases around women and sexual assault and the consequences of those biases. Understanding trauma and its impact on survivors is essential for creating a fair hearing environment. Including fair notice and warnings to all involved students in Title IX investigations and adjudications will become a new model functioning properly outside of the legal systems. In other words, ensure the integrity of the process and the players. It is that simple.

Despite debate over whether and to what extent campuses should be involved in sexual assault matters,²⁸² the likelihood is that campuses will have significant ongoing involvement in both the design and implementation of Title IX processes.

There are multiple reasons why campuses have a responsibility to address harm to students. If not persuaded by the moral reasons for preventing harassment and assault, there are legal ones in addition to Title IX. Campus administrators, like other landlords,²⁸³ have a responsibility to address known safety risks for their residents. For Clery reporting²⁸⁴ as well as marketing reasons, schools have an interest in making their campuses as safe as possible for the wider campus community.

A major impediment for campus Title IX administrators to overcome is an inherent conflict of interest. Many campuses create a dangerous environment by largely ignoring enforcement of campus alcohol and drug restrictions. In addition, campus administrators often approach sexual assault matters from a risk management perspective only. Preventing lawsuits by students found responsible for sexual harassment can be a major influence on administrators.²⁸⁵ Focusing on preventing lawsuits does, of course, undermine prevention efforts. Appeasement of those who hate women, people of color, and other vulnerable populations is not an effective deterrent. Indeed, any policy based on appeasing the aggressor only encourages more violations.²⁸⁶

²⁸² Brake, *supra* note 113, at 153.

²⁸³ STUART M. SPEISER, ET AL., 3 AMERICAN LAW OF TORTS § 14:6, Westlaw (March 2017 update) (“As to those who enter premises upon business which concerns the occupier and upon his or her invitation express or implied, the occupant is under an affirmative duty to protect them, not only against dangers of which he or she knows but also against those which with reasonable care the occupier might discover.”)

²⁸⁴ See generally U.S. DEP'T OF EDUC., HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 1-3 (2016 ed.), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

²⁸⁵ This approach ignores the rising number of lawsuits brought by students who have been the targets of harm.

²⁸⁶ This is why those experienced in intimate partner abuse and practitioners of restorative justice insist upon the offending party's acknowledgment of the harm and

Criminal lawyers have reminded campus administrators and others of the need for additional due process protections to be in place before and during Title IX processes. Ensuring fairness in the process does not require transforming existing Title IX models into criminal ones. Simple but important reforms can be made that enhance fairness while preserving the integrity of the Title IX system as an independent, education-based process. While existing campus Title IX processes may be akin to civil ones, the processes are not aligned with either the civil or criminal justice systems and should remain that way.

Title IX processes need room to evolve. The 2011 DCL was the first time that an administration took an assertive position that sexual assault survivors were not receiving fair campus hearings. The backlash of men claiming to have had unjust outcomes should inform us on how to improve Title IX practices, but should not come at the expense of survivor protections. Some hearings officers may have “overcorrected” but those failures are the result of poor training and selection of decision-makers. The overwhelming number of campus sexual assault survivors are women, both trans and straight women, as well as gay men. None of these populations is the most powerful voice in our culture. Resolution of disputed Title IX process questions are not complicated. Once those involved accept that the vast majority of sexual assault complaints are not fabricated and that systems need to be rid of that bias, clarity can be restored in designing Title IX systems. Any changes campuses make to how sexual assault matters are handled must acknowledge the reality of who on campus is most victimized.

accountability for it. These measures are aimed at preventing future violence and are not punitive.