

## When Campus Sexual Misconduct Policies Violate Due Process Rights

Blair A. Baker

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### Recommended Citation

Baker, Blair A. (2017) "When Campus Sexual Misconduct Policies Violate Due Process Rights," *Cornell Journal of Law and Public Policy*: Vol. 26 : Iss. 3 , Article 8.

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# NOTE

## WHEN CAMPUS SEXUAL MISCONDUCT POLICIES VIOLATE DUE PROCESS RIGHTS

*Blair A. Baker\**

Jamie and Alex, both equally intoxicated, have sex one night in Alex’s dorm room. After that evening, they exchange friendly text messages. A few months pass, and they stop talking when Alex begins to see someone new. Jamie files a formal claim with the university, alleging that the sex they had that night months ago was not consensual. The investigator, hired to handle just Title IX cases, believes Jamie’s version of the facts slightly more than Alex’s. That is, the investigator finds in favor of Jamie’s story by a preponderance of the evidence. And that university’s procedure does not provide for a real hearing before a neutral adjudicator. Alex is expelled.

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\* Yale College, Bachelor of Arts, 2015; Cornell Law School, J.D. Candidate, 2018; Editor-in-Chief, *Cornell Journal of Law and Public Policy*, Volume 27. Thank you to my family for their unconditional love and for instilling in me a passion to stand up for others and what I believe in, even when it is unpopular to do so; to Professor Cynthia Bowman for her guidance and editing during the writing process; to Professor Kevin Clermont for his advice and support with the topic; and to the Honorable Robin Rosenbaum for her mentorship and for teaching me to be an independent thinker and writer. Last but not least, thank you to Sue Pado and the editors of JLPP for their editing, feedback, and friendship. I hope that this Note encourages others to take a walk in someone else’s shoes and exercise understanding, so that a sensitive yet productive conversation can catalyze social and political change.

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## INTRODUCTION

In 2015, the Association of American Universities evaluated twenty-seven schools that surveyed their students and found that one in four female students experiences nonconsensual sexual contact during their time in college.<sup>1</sup> When a student alleges an instance of sexual misconduct to officials at his or her school, the institution launches an investigation to determine whether to take disciplinary action. In the past, universities<sup>2</sup> failed to hold offending students accountable for their actions and social norms discouraged survivors from coming forward—creating a dangerous culture of silence.<sup>3</sup> Research efforts and the media

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<sup>1</sup> See DAVID CANTOR ET AL., ASS'N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, ASS'N AM. U., at iii. 57 tbl.3-2, 59 tbl.3-4 (2015), [http://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf](http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf).

<sup>2</sup> In this Note, the words “university” and “college” are used interchangeably, referring to a higher education institution that is eligible to receive federal grants through Title IV of the Higher Education Act of 1965.

<sup>3</sup> See Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2293 (2016).

exposed these inadequacies and the pervasiveness of sexual misconduct on campus, driving national debate as well as the White House, Congress, and universities into action.

When analyzing campus sexual misconduct adjudications, it is important to understand the current legal context. The legal landscape includes the intersection of federal law, state law, administrative law, and individual college policies. In April 2011, the Department of Education's (DOE) Office for Civil Rights (OCR) released a *Dear Colleague Letter* to all Title IX institutions that particularly catalyzed university policy reform.<sup>4</sup> The OCR is authorized by Congress to enforce Title IX's prohibition on sex discrimination "by issuing rules, regulations, or orders of general applicability"<sup>5</sup> and has issued significant guidance over time about how OCR interprets Title IX. Guidance is not formally, legally binding, but if schools do not comply with the Department of Education's guidance, they risk losing federal funding. In the wake of this threat, colleges overcorrected their sexual assault policies by adopting policies that shirk the legally mandated due process rights of students accused of misconduct and effectively presume their guilt.

In 2013, Congress passed the Campus Sexual Violence Elimination Act as a part of the Violence Against Women Reauthorization Act.<sup>6</sup> This law codified various parts of the Department of Education's 2011 *Dear Colleague Letter* that vaguely protect the complainant, but mostly focus on increasing transparency surrounding sexual misconduct reports on campus. Today, there are many bills circulating in Congress relating to campus sexual misconduct policies, although none have been passed. Their future is unclear under the Trump Administration. States have taken matters into their own hands to adopt new laws defining consent for school adjudication as well as in the criminal law. This Note, however, will focus on those who choose only to file complaints with their university. Finally, every college has a different policy with its own definitions for sexual misconduct, sexual violence, sexual assault, sexual harassment, rape, etc., as well as its own procedure for how the school adjudicates the alleged misconduct.

Justice is only justice if the determinative method is just; and while the protection of victims is crucial, the adjudicatory process must carefully balance both parties' rights in order to avoid creating a new victim. The clash of these two sets of victims, and the emotion that surrounds

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<sup>4</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *DEAR COLLEAGUE LETTER* (2011) [hereinafter *DEAR COLLEAGUE LETTER*], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>5</sup> 20 U.S.C. § 1682.

<sup>6</sup> See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (to be codified at 20 U.S.C. § 1092(f)).

these issues, is creating an environment where it is becoming impossible to address and ultimately solve the issue of sexual misconduct on campus. The current system is failing everybody, and this Note will attempt to shed light on the specifics of the procedural concerns, in hopes that a productive conversation will ensue.

Due process in the United States refers to the constitutional right to fair treatment under the judicial system. When one envisions due process, one pictures “a neutral decision maker, the separation of roles providing for checks on the prior decision maker and non-ratification of one’s own prior decisions, procedural equality, and appeals on matters of law and fact as well as procedure.”<sup>7</sup> Many universities’ policies have tilted their procedures in favor of the complainant, evading some, if not all, of these characteristics of due process.

There are multiple factors to consider when evaluating the effectiveness of various campuses’ adjudication processes. This Note will introduce numerous issues that upset the balance of campus sexual misconduct policies and due process rights. Part I will address the background of Title IX and why schools handle these allegations in the first place. Part II will describe the current federal and state legislative landscape, as well as various schools’ procedures, highlighting the issues that undermine due process rights. Part III will describe the line of lawsuits facing universities because of their policies. Part IV will discuss the potential future of federal, state, and administrative law, as well as the steps schools must take to make their policies efficient and just. Finally, Part V will discuss the need for broad educational reform surrounding the issue of sexual misconduct.

## I. HOW COLLEGE CAMPUSES BEGAN HANDLING SEXUAL MISCONDUCT

### A. *The History and Path of Title IX*

Title IX, passed in 1972, is the federal law intended to eliminate sex discrimination in federally funded educational programs.<sup>8</sup> Schools that receive any grant from the federal government, including all public schools and the vast majority of private schools, are subject to the rules of Title IX. Until recently, Title IX was commonly thought of in the context of college athletics.<sup>9</sup> Catharine MacKinnon first attempted to expand Title IX to address the problem of sexual harassment on campus in

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<sup>7</sup> Janet Halley, *A Call to Reform the New Harvard University Sexual Harassment Policy and Procedures* 14 (Oct. 28, 2014), <http://orgs.law.harvard.edu/acs/files/2014/10/ACSPost.o14.pdf>.

<sup>8</sup> See 20 U.S.C. § 1681(a) (2012) (“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.”).

<sup>9</sup> ROBERT L. SHIBLEY, *TWISTING TITLE IX* 5 (2016).

the 1977 case *Alexander v. Yale University*.<sup>10</sup> In that case, six plaintiffs sued Yale University with complaints of various kinds of sexual harassment. The court held that sexual harassment constituted a form of sexual discrimination under Title IX.<sup>11</sup>

A few years later, the 1986 Supreme Court case *Meritor Savings Bank v. Vinson* established that Title VII, which governs employment discrimination sexual harassment, did not require intent but could be based on an environment that is hostile to men or women.<sup>12</sup> In 1999, the Supreme Court addressed the applicability of the hostile environment doctrine to schools in *Davis v. Monroe County Board of Education*.<sup>13</sup> Attorneys for Georgia fifth-grader LaShonda Davis argued that the school district's "deliberate indifference" to the sexual harassment of Davis by a fellow student violated Title IX by allowing a hostile environment to be created that effectively deprived her of an education.<sup>14</sup>

This line of cases ultimately established the role that Title IX plays in campus sexual assault and harassment cases today. As a result, schools adjudicate sexual misconduct allegations in the same fashion that other claims, such as plagiarism, are also addressed. Nevertheless, some argue that these offenses (assault, rape, etc.) are crimes, not school disciplinary violations, and object to the notion that these claims should be handled at all by school administrators.

### *B. Legal and Policy Reasons Why Sexual Misconduct Allegations Are Not Exclusively Handled by the Criminal Justice System*

Colleges have traditionally handled all types of disputes between students: non-criminal disputes, such as plagiarism and academic dishonesty, as well as criminal ones, such as non-sexual assault and burglary. Still, many people reject campus adjudication of sexual misconduct allegations, asserting that the matter should be left to the criminal justice system.<sup>15</sup> It is important to distinguish, however, that the two systems have very different purposes. Title IX is a civil rights statute mandating equal access to education when one student harms another. Sexual misconduct leaves victims unequal as students and impedes their ability to

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<sup>10</sup> 631 F.2d 178 (2d Cir. 1980).

<sup>11</sup> *See id.*

<sup>12</sup> *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 57 (1986).

<sup>13</sup> 526 U.S. 629, 650 (1999) (holding that schools may be liable to students for student-on-student sexual harassment when the school is "deliberately indifferent to sexual harassment, of which [the school has] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school").

<sup>14</sup> *See id.* at 651.

<sup>15</sup> *See, e.g.*, Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>.

attend or complete school. By contrast, the criminal justice system focuses on protection of the public by punishment, retribution, and incapacitation; it cannot ensure equality, nor remedy inequality, as civil rights statutes do.

There are also policy reasons why campuses should be responsible for adjudicating sexual misconduct cases between students. The history of rape law is convoluted, and generally, the criminal justice system has not taken rape seriously or treated victims appropriately.<sup>16</sup> The system, though slowly improving, has ineffectively addressed acquaintance rape without extrinsic force, the most common scenario.<sup>17</sup> These critiques are justified and should serve as reasons for reform instead of universities assuming the role of law enforcement and infringing the due process rights of respondents.

The criminal justice system must ultimately be responsible for everyone who endures sexual violence, whether it occurs on or off campus. To be identified as a rapist and expelled from college seems to be a catastrophic outcome for a respondent who is innocent, but not nearly harsh enough for one who is in fact guilty. Congress is currently drafting bills that recognize the role law enforcement should play in campus sexual misconduct tribunals; these bills call for standardizing the cooperation between universities and law enforcement.<sup>18</sup> In the meantime, colleges are responsible for maintaining a safe environment for students to learn equally, and sexual misconduct prohibits that outcome.

Even when a college follows fair procedures (whether “fair” means procedures that are equivalent to those in the criminal justice system or some middle ground is up for debate), the college, unlike the criminal justice system, is vulnerable to civil lawsuits by whichever party is unsatisfied with the result. Courts have not been consistent regarding what constitutes due process; however, they have expressed disapproval of campus adjudications that failed to provide notice of all of the charges to the accused, failed to provide the accused with adequate opportunity to review evidence, had a Title IX office or officer that played multiple roles during the proceedings, barred equal access to legal representation, or denied the accused student adequate opportunity to confront witnesses.<sup>19</sup>

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<sup>16</sup> See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1999 (2016).

<sup>17</sup> See *id.*

<sup>18</sup> See generally Campus Accountability and Safety Act, S. 590, 114th Cong. (2015).

<sup>19</sup> See *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*10 (W.D. Va. Aug. 5, 2015) (finding that plaintiff’s alleged flaws in the school’s proceedings, including omitting and failing to consider particular evidence “amount[ed] to ‘a practice of railroad[ing] accused students’”); see also *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 732 (E.D. Va. 2015) (finding that the school’s procedure was flawed

Victims of sexual violence should be treated with respect but our universities must be places where one is innocent until proven guilty. Standing up for the rights of the accused is not to diminish or attack the rights or experiences of victims. In the next section, this Note will discuss the federal and state laws surrounding campus sexual misconduct today.

## II. THE CURRENT LEGAL LANDSCAPE SHAPING COLLEGE POLICIES AND PROCEDURES

### A. *Recent Legislation and Regulations*

Through Title IX, the government has acted on the assumption that “male domination is so pervasive that women need special protection” under the law.<sup>20</sup> As a result, the legal framework that determines how colleges adjudicate sexual misconduct allegations evades due process. Schools have an obligation to provide fair and meaningful access to hearings, charges, representation, and evidence to students who are accused, too. The integrity of the process is critical for both the students who are accused, as well as for victims and their advocates. Wrongful accusations may be infrequent, or sometimes unintentional, but the danger of them is real, and abandoning the presumption of innocence threatens the purpose of the Fifth, Sixth, and Fourteenth Amendments.<sup>21</sup>

The next section sets forth the background necessary to understand the controversies that have arisen in wake of the Department of Education’s 2011 *Dear Colleague Letter*. Specifically, the OCR mandates sparked the White House, Congress, state legislatures, and universities to reform federal, state, and university policies in order to address the issue of campus sexual misconduct.

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based on its “failure to provide a neutral arbiter without prior involvement in the case”); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778–79 (S.D. Ohio 2015) (finding the Title IX investigator’s “discourage[ing] a witness from testifying at the disciplinary hearing . . . troubling”). *See generally Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*13 (D. Md. Aug. 21, 2015) (“SU barred plaintiffs from reviewing witness statements and the list of witnesses prior to the hearing, and failed to provide plaintiffs with all evidence that was to be presented to the Board.”); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 750 (S.D. Ohio 2014) (finding that the complaint survived a motion to dismiss because it “recounts Defendants having rushed to judgment, having failed to train UCB members, having ignored the Prosecutor, having denied Plaintiff counsel, and having denied Plaintiff witnesses . . . because he was a male accused of sexual assault”). *See also* Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 *FORDHAM L. REV.* 2289, 2307 (2016).

<sup>20</sup> Judith Schulevitz, *Accused College Rapists Have Rights, Too*, *NEW REPUBLIC* (Oct. 1, 2014), <https://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-acused-campus-rapists>.

<sup>21</sup> *See Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).



### 1. The Department of Education's *Dear Colleague Letter*

The OCR supervises federally funded institutions and investigates allegations of sex discrimination.<sup>22</sup> The agency requires schools to independently investigate and adjudicate accusations of sexual harassment and assault in order to comply with the requirements of Title IX.<sup>23</sup> Since 2011, the OCR has released “Dear Colleague” letters and several guidance documents directed to universities setting standards for sexual misconduct disciplinary proceedings on campuses.<sup>24</sup> While these letters do not have the binding force of statute or duly promulgated regulations,<sup>25</sup> because no “notice-and-comment” rulemaking procedure occurred,<sup>26</sup> schools run the risk of losing federal funding and being investigated for violating Title IX if they do not comply with the Department of Education’s requirements.<sup>27</sup>

On April 4, 2011, the OCR issued the infamous *Dear Colleague Letter* encouraging universities to become more aggressive in the investigation and adjudication of sexual violence complaints as well as outlining requirements for schools’ procedures.<sup>28</sup> The letter demanded “adequate, reliable, and impartial investigation of complaints,”<sup>29</sup> and also required schools to distribute a notice of nondiscrimination and appoint a Title IX coordinator on campus to receive and process complaints.<sup>30</sup> The

<sup>22</sup> See 20 U.S.C. §§ 1681–1682 (2012).

<sup>23</sup> See *id.*

<sup>24</sup> See DEAR COLLEAGUE LETTER, *supra* note 4; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX> (providing complete list of guidance documents).

<sup>25</sup> Although courts have yet to address the specific legality of OCR’s compulsory “guidance,” there is a strong argument that OCR’s requirements constitute “state action” because they have a direct impact on campus disciplinary outcomes. “[W]hen the government forces a private institution to do something that would violate due process if done by a government institution, that does violate the due process clause.” Hans Bader, *No, OCR’s April 4, 2011 Dear Colleague Letter Is Not Entitled to Deference*, AXS (Aug. 17, 2013), <http://liberty-unyielding.com/2015/09/30/no-ocrs-april-4-2011-dear-colleague-letter-not-entitled-deference>.

<sup>26</sup> Only the 1997 and 2001 OCR guidance documents complied with the Administrative Procedure Act’s (APA) notice and comment procedures. Administrative Procedure Act, 5 U.S.C. § 553 (2012) (providing the requirements for the informal rulemaking process). As Cornell Law professor Cynthia Bowman has observed, OCR’s guidance is “not an administrative regulation, has not been subjected to notice and comment, and thus does not have the status of law.” Michael Linhorst, *Rights Advocates Spar Over Policy on Sexual Assault*, CORNELL DAILY SUN (Apr. 3, 2012); see DEAR COLLEAGUE LETTER, *supra* note 4, at 1 n.1. Many have noted that this guidance did not follow notice-and-comment rulemaking procedures and have argued that it is therefore not legally binding on schools. See, e.g., Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 60–61 (2013).

<sup>27</sup> See 20 U.S.C. §§ 1681, 1682 (2012).

<sup>28</sup> The letter required that schools “take immediate and effective steps to end . . . sexual violence” in order to protect students’ civil rights. See DEAR COLLEAGUE LETTER, *supra* note 4, at 2.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> See *id.* at 6–7.

guidance also required universities to implement and publish grievance procedures, including timeframes, which “must meet the Title IX requirement of affording a complainant a proper and equitable resolution.”<sup>31</sup> The letter clarified that schools must notify both parties of the school’s determination within sixty days, as well as provide equal opportunities for both parties to present witnesses and evidence as well as appeal the school’s judgment.<sup>32</sup>

More controversially, OCR mandated that schools use a preponderance of the evidence standard (a “more likely than not” standard) in adjudicating campus sexual misconduct.<sup>33</sup> The letter noted that disciplinary procedures using a clear and convincing evidence standard, which most schools used at the time, were not fair and impartial under Title IX.<sup>34</sup>

The letter further mandated that schools treat procedures equitably as between the parties, including “not allow[ing] the alleged perpetrator to review the complainant’s statement without also allowing the complainant to review the alleged perpetrator’s statement.”<sup>35</sup> Both parties must have an “equal opportunity to present relevant witnesses and other evidence,” and both parties should have “similar and timely access” to relevant information.<sup>36</sup> The letter additionally stated that schools were not required to allow students to retain representation (legal or other), but if a school did allow representation, the school must allow that right to each party equally.<sup>37</sup>

Moreover, OCR established steps that universities should take in order to protect the accuser. These include a mandate that schools inform and provide complainants with options for avoiding the alleged perpetrator, such as changing living situations, class schedules, and no-contact orders.<sup>38</sup> OCR also wrote that school procedures should address potential retaliatory harassment against the accuser.<sup>39</sup> Also, OCR “strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing,”<sup>40</sup> because “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”<sup>41</sup> Finally, OCR stated that colleges should inform

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<sup>31</sup> *Id.* at 8–9.

<sup>32</sup> *See id.* at 11–12.

<sup>33</sup> *See id.* at 11.

<sup>34</sup> *See id.* at 11, 11 nn.26 & 28.

<sup>35</sup> *Id.* at 11–12.

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *See id.* at 12.

<sup>38</sup> *See id.* at 15.

<sup>39</sup> *See id.* at 16.

<sup>40</sup> *Id.* at 12.

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

complainants of their right to report a crime to the police and should not discourage students from doing so.<sup>42</sup>

Three years later, on April 29, 2014, OCR issued additional guidance. The 2014 letter once again mandated that universities use the preponderance of the evidence standard of proof, ensure the complainant's safety during the process, not use students as adjudicators, and prohibit investigators and adjudicators from asking questions about the accuser's past sexual encounters with anyone other than the accused.<sup>43</sup>

Significantly, OCR has yet to uniformly define sexual misconduct offenses on college campuses. The Department of Education mentioned in draft amendments to the Violence Against Women Act<sup>44</sup> that it believes definitions would create ambiguity, particularly in jurisdictions that are silent on the definition of consent.<sup>45</sup>

These various requirements have forced universities to change their former policies drastically, with regards to their specific procedures as well as the standard of proof, out of fear that the Department of Education will pursue their school for a violation of Title IX.<sup>46</sup> In sum, the *Dear Colleague Letter* applied pressure on colleges to maintain a victim-friendly environment, which is admirable and necessary, but in turn has created a situation that can be insensitive to the accused and "tilted in favor of the alleged victim."<sup>47</sup> These situations do not have to be mutually exclusive; and there must be a solution in which victim-friendly is not synonymous with procedurally adverse to respondents.

## 2. Federal Legislation

Congress responded to the conversation surrounding sexual misconduct and the *Dear Colleague Letter* when, on March 7, 2013, it passed the Campus Sexual Violence Elimination Act (Campus SaVE Act).<sup>48</sup> Seeking to increase transparency with respect to sexual violence on college campuses, the Act mandated that colleges report instances of "do-

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<sup>42</sup> See *id.* at 10.

<sup>43</sup> OCR based the preponderance of the evidence requirement on the standard for other proceedings involving discrimination under Title VI and Title VII. See DEAR COLLEAGUE LETTER, *supra* note 4, at 11 nn.26 & 28.

<sup>44</sup> Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (to be codified at 20 U.S.C. § 1092(f)).

<sup>45</sup> See *id.*

<sup>46</sup> Shanlon Wu, *Lawyer: Yale Basketball Case Shows the Difficulty of Campus Sexual Assault Investigations*, WASH. POST (Mar. 18, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/18/lawyer-yale-basketball-case-shows-the-difficulty-of-campus-sexual-assault-investigations>.

<sup>47</sup> Alexandra Fries, Note, *Student-On-Student Sexual Assault Policy: How a Victim-Centered Approach Harms Men: A Close-Up on Notre Dame's Changes to Its Student Handbook*, 39 J.C. & U.L. 633, 645 (2013).

<sup>48</sup> See 20 U.S.C. § 1092(f).

mestic violence, dating violence, and stalking,” publish the details of disciplinary proceedings, and provide training for all participating school officials.<sup>49</sup> Congress also decided to make part of the OCR guidance federal law, codifying the requirements that universities publish the details of their disciplinary procedures, provide prompt notice to each party, and create awareness and prevention programs.<sup>50</sup> Nevertheless, Congress notably chose not to codify the preponderance of the evidence standard of proof, only requiring that schools use a uniform standard and provide a “prompt, fair, and impartial” proceeding and determination.<sup>51</sup>

Congress took an important step in the right direction when it provided that “the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.”<sup>52</sup> Nonetheless, Congress has yet to codify specific definitions and many necessary due process protections.

It is in society’s best interest for Congress to mandate specific definitions and procedures with regards to campus sexual misconduct. Federal law could create uniformity among universities and address the need for clarity; nevertheless, it is presently quiet on any specific way universities should carry out adjudications, due process protections, and the standard of proof. Consequently, universities, fearful of losing federal funding, abide by the *Dear Colleague Letter*’s requirements and have yet to challenge the authority of the Department of Education’s rule.

### 3. State Legislation: Affirmative Consent Laws

As there is no nationwide legislation dictating specific procedures, standards of proof, or definitions, states have taken it into their own hands to pass laws reforming definitions surrounding sexual misconduct. At the same time that OCR enhanced enforcement of Title IX, many states adopted affirmative consent standards.

Affirmative consent, also referred to as the “yes means yes” movement, requires consent to be “ongoing” throughout any sexual encounter.<sup>53</sup> In 2014, California was the first state to institute such a standard when Governor Jerry Brown signed the first statewide affirmative consent law, stating that consent was “an affirmative, unambiguous, and conscious decision by each participant to engage in mutually agreed-

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<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> Amanda Hess, “No Means No” Isn’t Enough. We Need Affirmative Consent Laws to Curb Sexual Assault., SLATE (June 16, 2014), [http://www.slate.com/blogs/xx\\_factor/2014/06/16/affirmative\\_consent\\_california\\_weights\\_a\\_bill\\_that\\_would\\_move\\_the\\_sexual.html](http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weights_a_bill_that_would_move_the_sexual.html).

upon sexual activity.”<sup>54</sup> New York Governor Andrew Cuomo followed California’s lead by overseeing new legislation that states, “Affirmative consent is a knowing, voluntary and mutual decision among all participants to engage in sexual activity” and “consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.”<sup>55</sup> Additionally, the New York law states that “consent cannot be given when a person is incapacitated” and that “silence or lack of resistance, in and of itself, does not demonstrate consent.”<sup>56</sup> New Jersey, New Hampshire, and Connecticut have also introduced affirmative consent bills.<sup>57</sup>

Schools are required to adopt the prescribed affirmative definitions of consent in states that have adopted affirmative consent legislation.<sup>58</sup> Moreover, approximately 1,400 institutions of higher education across the country have chosen to use some type of affirmative consent definition in their sexual misconduct policies, according to the National Center for Higher Education Risk Management.<sup>59</sup> The next section describes the current state of university policy regarding campus sexual misconduct adjudications.

## B. Current Campus Policies and Standards

Although Congress and the Department of Education mandated vague requirements, the *Dear Colleague Letter* and subsequent legislation left a considerable amount of room for universities to adopt their own definitions and procedures for their sexual misconduct policies. Because the legislative process is unpredictable and extensive, universities must take matters into their own hands by protecting the rights of both parties equally and properly training every administrator or faculty member involved in these adjudications.

### 1. Definitions

Universities generally have the discretion to define terms the way they wish. For example, under Yale University’s sexual misconduct policy, sexual assault is “any kind of nonconsensual sexual contact, includ-

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<sup>54</sup> See *id.* California legislation was amended and signed by Governor Brown on September 24, 2014. S.B. 967, 2013–14 Leg., Reg. Sess. (Cal. 2016) (“‘Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity.”); see also CAL. EDUC. CODE § 67386(a)(1) (2014) (codifying S.B. 967).

<sup>55</sup> A8244, 2015–16 Leg., Reg. Sess. (N.Y. 2015).

<sup>56</sup> See *id.*

<sup>57</sup> Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (July 28, 2015), <https://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html>.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

ing rape, groping, sexual penetration (which is the insertion of a penis, finger, or object into another person's vagina or anus), or any other non-consensual sexual touching."<sup>60</sup> Further, sexual activity requires consent, which is defined as "positive, unambiguous, and voluntary agreement to engage in a specific activity throughout the consensual encounter" and cannot be obtained from someone who is "asleep or otherwise mentally or physically incapacitated, whether due to alcohol, drugs, or some other condition."<sup>61</sup> At Yale, consent must be "ongoing" at each stage of an encounter but "cannot be inferred from the absence of a 'no'" or presumed from "contextual factors."<sup>62</sup> The policy's definition of sexual harassment includes verbal statements that have the "effect" of creating an "intimidating" environment.<sup>63</sup>

Alternatively, Harvard's policy forbids what it calls "unwelcome conduct of sexual nature," stating that "conduct is unwelcome if a person did not request or invite it and regarded the unrequested or uninvited conduct as undesirable or offensive."<sup>64</sup> In 2014, a group of Harvard Law professors signed a protest letter expressing their dissatisfaction with Harvard University's policy changes after the *Dear Colleague Letter*.<sup>65</sup> The letter, published in *The Boston Globe*, began,

We find the new sexual harassment policy inconsistent with many of the most basic principles we teach. We also find the process by which this policy was decided and imposed on all parts of the university inconsistent with the finest traditions of Harvard University, of faculty governance, and of academic freedom.<sup>66</sup>

The law professors argued that the definition of unwanted conduct was too vague<sup>67</sup> and took issue with their university's broad definition of sexual violence, arguing that it is "starkly one-sided as between complainants and respondents, and entirely inadequate to address the com-

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<sup>60</sup> YALE UNIV., REPORT OF COMPLAINTS OF SEXUAL MISCONDUCT BROUGHT FORWARD FROM JULY 1, 2015 THROUGH DECEMBER 31, 2015 17 (2016), <http://provost.yale.edu/sites/default/files/files/February-2016-Report.pdf>.

<sup>61</sup> *Id.*

<sup>62</sup> See Jennifer Braceras, *College Sex Meets the Star Chamber*, WALL ST. J. (Oct. 23, 2016), [www.wsj.com/articles/college-sex-meets-the-star-chamber-1477001578](http://www.wsj.com/articles/college-sex-meets-the-star-chamber-1477001578).

<sup>63</sup> See YALE UNIV., *supra* note 60.

<sup>64</sup> HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY AND PROCEDURES FOR THE FACULTY OF ARTS AND SCIENCES HARVARD UNIVERSITY 4–5 (2016), [http://www.fas.harvard.edu/files/fas/files/sexual\\_and\\_gender-based\\_harassment\\_policy\\_and\\_procedures\\_for\\_the\\_fas\\_.pdf](http://www.fas.harvard.edu/files/fas/files/sexual_and_gender-based_harassment_policy_and_procedures_for_the_fas_.pdf).

<sup>65</sup> Elizabeth Bartholet et al., Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZn7nU2UwuUuWMnqbM/story.html>.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

plex issues in these unfortunate situations involving extreme use and abuse of alcohol and drugs.”<sup>68</sup> Harvard Law School is not the only school that has received criticism from faculty, students, and the public; recently, the presence of campus sexual misconduct procedures in the media has sparked nationwide criticism and debate.<sup>69</sup>

Although many universities have thorough and largely uncontroversial definitions for sexual misconduct, the issues are that (1) some definitions are still ambiguous and (2) universities’ definitions differ. The subtle differences in definitions across the nation can make it difficult for students to clearly understand what constitutes—and differentiates—sexual misconduct, sexual assault, consent, and sexual harassment on campus.

## 2. Procedures

Although the Department of Education released general requirements on how to conduct campus sexual misconduct adjudications, universities are otherwise free to design their own specific procedures within those parameters. Universities decide whether to hold a hearing, who will oversee the hearing, and who will serve as decision-makers. Hearing panels oftentimes include university administrators, whose job stability could likely depend on their reaching the decision most convenient and politically appropriate for the university.<sup>70</sup> Other times, universities appoint a single administrator or official to function as both the investigator and decision-maker in these cases.<sup>71</sup>

Additionally, universities can limit, and in some cases, forbid cross-examination of adverse witnesses. The rules of evidence do not apply in campus adjudications—adjudicators commonly consider hearsay, and there is no requirement that all evidence be shared with both parties at the same time, oftentimes leaving the respondent with little time to pre-

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<sup>68</sup> See *id.*

<sup>69</sup> See *The Debate: How Should College Campuses Handle Sexual Assault?*, TIME 29 (May 15, 2014), <http://time.com/100038/college-sexual-assault-debate/>.

<sup>70</sup> There is significant “pressure on schools to hold students responsible for serious harm even when—precisely when—there can be no certainty about who is to blame for it. Such calls are core to every witch hunt.” Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement; Backing off the Hype in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106 (2015).

<sup>71</sup> Typically, Title IX coordinators play multiple roles, including “advis[ing] complainants how to file their complaints, receiv[ing] the complaints, conduct[ing] the investigation, hold[ing] the hearing if any, decid[ing] on responsibility, and hear[ing] any appeals,” which presents a conflict of interest problem. *Reauthorizing the Higher Education Act: Combating Campus Sexual Assault: Hearing on S. 590 Before the S. Health, Educ., Labor & Pensions Comm.*, 114th Cong. 2 (2015) (statement of Janet Halley, Royall Prof. of Law, Harvard Law School).

pare a defense.<sup>72</sup> Further, many universities do not require hearings to be recorded or explanations for decisions.<sup>73</sup> Finally, some universities' policies do not have a statute of limitations and thus have the authority to investigate and act on allegations that may be years old.<sup>74</sup>

Another letter, signed by law professors from over fifteen top law schools, declared that the OCR had "unlawfully expanded the nature and scope of institutions' responsibility to address sexual harassment thereby compelling institutions to choose between fundamental fairness for students and their continued acceptance of federal funding."<sup>75</sup> Specifically, these letters admonished the institutions for "[t]he absence of any adequate opportunity to . . . confront witnesses and present a defense at an adversary hearing," the denial of legal representation for the accused, and the conflict of interest presented by Title IX investigators playing multiple roles in sexual misconduct investigations and adjudications.<sup>76</sup>

Another central issue is how colleges address the issue of intoxication. At some schools, it is possible that a respondent can be found guilty simply if the complainant establishes that he or she was intoxicated by drugs or alcohol.<sup>77</sup> The technical term used widely now in these policies is incapacitation—many policies prohibit students from having sexual contact with another student who is "incapacitated" by a substance; however, the line between intoxication and incapacitation is ambiguous and thin.<sup>78</sup> Both parties are required to meet specific requirements, which vary depending on the school, when the adjudicator is establishing a determination of intoxication. The standard of proof, which is discussed next, plays an important part in these determinations. In these cases, the adjudicators must decide if there is a preponderance of the evidence to

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<sup>72</sup> See *id.* ("Even when there is a hearing, proper concern for the well-being of complainants has led to unfair restraints on the right of the accused to probe evidence and ask questions.").

<sup>73</sup> See *id.*

<sup>74</sup> See YALE UNIV., *supra* note 60.

<sup>75</sup> Larry Alexander et al., *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault*, 1 (2016) (footnote omitted), <https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf>.

<sup>76</sup> Barthelet et al., *supra* note 65.

<sup>77</sup> See COLUMBIA UNIV., GENDER-BASED MISCONDUCT OFFICE, GENDER-BASED MISCONDUCT POLICY AND PROCEDURES FOR STUDENTS 8–9 (2016), <http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf>; BROWN UNIV., SEXUAL AND GENDER-BASED HARASSMENT, SEXUAL VIOLENCE, RELATIONSHIP AND INTERPERSONAL VIOLENCE AND STALKING POLICY 7–8 (2016), <http://www.brown.edu/web/documents/title-ix/brown-university-title-ix-policy.pdf>; DUKE UNIV., DEP'T OF STUDENT AFFAIRS, STUDENT SEXUAL MISCONDUCT POLICY AND PROCEDURES: DUKE'S COMMITMENT TO TITLE IX (2017), <https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix>; STANFORD UNIV., ADMINISTRATIVE GUIDE: 1.7.3 PROHIBITED SEXUAL CONDUCT (2016), <https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-3>.

<sup>78</sup> See COLUMBIA UNIV., *supra* note 77; BROWN UNIV., *supra* note 77; DUKE UNIV., *supra* note 77; STANFORD UNIV., *supra* note 77.



suggest that a person was too intoxicated to consent. Further, some universities hold the two students to different standards with respect to intoxication in these procedures. For example, at Brown and other schools, if two students were drinking, engaged in sexual contact, and later an accusation was made, the 2015 policy states, “[a] charged student’s use of any drug, including alcohol, judged to be related to an offense will be considered an exacerbating rather than a mitigating circumstance.”<sup>79</sup>

Many universities have made progress with reforming their policies to address these and other due process concerns; however, many have not, due to their fear of being investigated by the OCR and losing federal funding. There is a crucial need for uniformity among schools’ policies so there is no discrepancy between how someone is treated because of which school they choose to attend. Moreover, procedure is not the only aspect of sexual misconduct tribunals that interferes with due process rights; many have also criticized the lower standard of proof.

### 3. Standard of Proof

In addition to definitions and procedures, the standard of proof is a critical element of due process. The *Dear Colleague Letter* requires colleges to use a preponderance of the evidence standard when determining guilt or innocence in sexual misconduct cases.<sup>80</sup> The preponderance of the evidence standard means that a complainant need only show that it is more likely than not that a perpetrator committed the alleged act for liability to be found and consequences imposed.<sup>81</sup> This is the lowest evidentiary standard, only requiring a bit more than 50% certainty.<sup>82</sup> To put it in context, the criminal justice system uses the higher beyond a reasonable doubt standard, and civil cases involving significant reputational damage require the clear and convincing evidence standard.<sup>83</sup>

These standards reflect the severity of the punishment: the criminal penalty of jail time is more severe than the civil punishments of reputational damage and potential loss of future prospects. But in campus sex-

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<sup>79</sup> Brown University has since changed their position on intoxication with respondents, but other colleges maintain that a charged student’s use of alcohol will be exacerbating rather than mitigating. Compare BROWN UNIV., SEXUAL HARASSMENT POLICY 2–3 (2015), [https://www.brown.edu/about/administration/institutional-diversity/sites/oidi/files/SexualHarassmentPolicy\\_January2015\\_0.pdf](https://www.brown.edu/about/administration/institutional-diversity/sites/oidi/files/SexualHarassmentPolicy_January2015_0.pdf) with MINN. STATE COLLS. & UNIVS., PROCEDURE 1B.3.1 RESPONSE TO SEXUAL VIOLENCE 5–6 (2017), <http://www.mnscu.edu/board/procedure/1b-03p1.pdf>; Emily Yoffe, *The College Rape Overcorrection*, SLATE: DOUBLE X (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html).

<sup>80</sup> See DEAR COLLEAGUE LETTER, *supra* note 4.

<sup>81</sup> See *id.*; Henrick, *supra* note 26, at 53.

<sup>82</sup> See *Evidentiary Standards and Burdens of Proof*, JUSTIA, <https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof> (last visited Feb. 5, 2017).

<sup>83</sup> See *id.*

ual misconduct cases, school administrators, who may have no legal background, are adjudicating criminal offenses with the lower civil standard of proof. Further, this decision is being made after the transparent nature of the civil university process had already caused the student body to pass social judgment and, in some cases, attracted the attention and pressure of the national media, throwing out any presumption of innocence. Preponderance of the evidence enables administrators to expel and label a student as a rapist for life when they may only be 51% sure the alleged incident occurred, or when the evidence is equal on both sides but the administrators believe the complainant 1% more. This reality is terrifying for those who are potentially innocent.

Because the punishment for campus sexual misconduct offenses is significant—from suspension to expulsion—many universities previously used the higher clear and convincing evidence standard.<sup>84</sup> Some colleges, for example, Cornell University, used clear and convincing evidence for all campus code violations, and still do, except for sexual offenses.<sup>85</sup> The consequence of expulsion and the accompanying publicity can cause wrongfully condemned students to lose employment prospects and suffer irreparable reputational and psychological damage. In situations with so much to lose, it is important that there is little room for error.

Again, the preponderance of the evidence standard means that an accused student can be found guilty if the panel believes there is no more than a 51% chance the accusations against the respondent are valid. A decision maker rules based on whose side they believe slightly more. In a recent case at Yale, a spokesperson said, “[W]here cases involve judgments about the witnesses’ credibility, all of the available corroborating or contradictory information is carefully weighed to determine who is telling the truth.”<sup>86</sup> The spokesperson acknowledged the delicacy of the issue when he stated, “In making credibility determinations, panel members weigh many factors, including contemporaneous statements, the consistency or inconsistency or statements and behavior, and truthfulness regarding secondary issues.”<sup>87</sup>

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<sup>84</sup> See Djuna Perkins, *Behind the Headlines: An Insider’s Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults*, 59 Bos. B.J. 19 (2015), <http://www.bostonbar.org/docs/default-document-library/boston-bar-journal-summer-2015-edition-vol-59-no-3.pdf>.

<sup>85</sup> See CORNELL UNIV., POLICY 6.4: PROHIBITED BIAS, DISCRIMINATION, HARASSMENT, AND SEXUAL AND RELATED MISCONDUCT (2017), [https://www.dfa.cornell.edu/sites/default/files/vol6\\_4.pdf](https://www.dfa.cornell.edu/sites/default/files/vol6_4.pdf).

<sup>86</sup> Marc Tracy, *Expelled Yale Player Says Decision Was Unfair and Excessive*, N.Y. TIMES (Mar. 14, 2016), <https://www.nytimes.com/2016/03/15/sports/basketball/yale-basketball-captain-says-he-was-wrongfully-expelled.html>.

<sup>87</sup> Wu, *supra* note 46.

In sum, at some schools, students accused of sexual misconduct in campus adjudicatory systems have no right to a lawyer and limited opportunity to defend themselves against their accuser's statements. Further, a panel merely has to conclude that there is a 51% chance the assault or harassment occurred to suspend or expel that student. This raises serious questions of due process protections, and lawsuits against universities have acknowledged and pursued many of these issues.

Congress, states, and schools have developed new policies in response to the sexual misconduct conversation, pressure from the White House, and more specifically the Department of Education's 2011 *Dear Colleague Letter*. These policies have made it easier to report accusations of sexual misconduct, which is a good thing; however, they have in turn made it easier to find a student guilty based on low standards of proof, which is troubling. The recent overcorrection needs to be reevaluated, not because society is too lenient on rapists and other exploiters of victims, but because of the real danger of holding an innocent person responsible.<sup>88</sup>

### III. RELATED LITIGATION

Students accused of sexual misconduct violations can bring lawsuits against their universities, either by alleging the violation of their due process rights, or by alleging that their school intentionally discriminated against them because of their gender under Title IX. These lawsuits are expensive for universities. United Educators, a higher education insurance company, conducted a study of the 262 insurance claims it paid to students between 2006 and 2010 due to sexual misconduct cases.<sup>89</sup> The group paid \$36 million, with 72% of the payouts going to the accused students who protested their treatment by universities.<sup>90</sup> The following section describes some of this litigation.

#### A. *Due Process Litigation*

Since the 2011 *Dear Colleague Letter*, many students have sued their schools for procedural due process violations, alleging they had been found wrongfully responsible for sexual misconduct.<sup>91</sup> In these cases, courts have begun to recognize the precarious factors of various

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<sup>88</sup> See Judith Schulevitz, *Accused College Rapists Have Rights, Too*, NEW REPUBLIC (Oct. 1, 2014), <https://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists>.

<sup>89</sup> See Yoffe, *supra* note 79.

<sup>90</sup> See *id.*

<sup>91</sup> According to data tracking, over 100 due process lawsuits have been filed by students found responsible for sexual misconduct violations since OCR's issuance of its "Dear Colleague" letter. See *Database: Due Process Lawsuits Against Colleges and Universities*, TITLE IX FOR ALL, <https://titleixforall.knack.com/databases#due-process-lawsuits3/intro5>.

universities' disciplinary procedures when evaluating whether or not a school violated a student's due process rights. As discussed, these factors include, but are not limited to, whether the school provided the student with adequate notice of the charges against him or her, afforded the student the right to confront, and provided the student with a right to counsel.<sup>92</sup>

In 2016, a student prevailed in federal court for his claim against George Mason University for violating his due process rights during a sexual misconduct adjudication.<sup>93</sup> The student was a sophomore when he was accused of nonconsensual sex with a female student. The two were in a relationship that involved consensual, sadomasochistic sex, and had an agreement that they would stop if she said a safe word. The female student alleged that during one encounter, when asked, she told the male student that she was unsure if she wanted to continue.<sup>94</sup> The male student argued that she never used the couple's safe word, so he did not stop.<sup>95</sup> The female later alleged that the male student admitted to having sex with her even after she said the safe word, however, the disciplinary panel initially found the male student not guilty of sexual misconduct.<sup>96</sup> The female student appealed the case, though, and this time, the school ruled against the male student and he was expelled. He later learned that his expulsion was due to not only the alleged sexual assault but also other accusations against him, of which he had not been notified, from previous years. The federal court ruled that the university violated due process because the student was not given an opportunity to defend himself when the school failed to notify him of the other charges, and noted the problematic fact that the dean had "made up his mind so definitively that nothing the accused student might have said could have altered his decision."<sup>97</sup>

In another case, a federal court rejected Brandeis University's attempt to dismiss a claim by an expelled student.<sup>98</sup> In that case, the student was accused of sexually assaulting his long-term partner. When the two broke up, the former partner "attended two sessions of university-sponsored sexual assault training, which began (in his words) to change his 'thinking' about his relationship."<sup>99</sup> He reported his partner for assault, describing instances in which his partner awakened him with a kiss

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<sup>92</sup> See *supra* note 19.

<sup>93</sup> See *Doe v. Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d 583 (E.D. Va. 2015).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

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

<sup>98</sup> See *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016).

<sup>99</sup> *Id.* at 570.

and continued even when told to stop, performed unwanted oral sex on him, and touched his groin while the two watched a movie.<sup>100</sup> The court held that Brandeis University failed to provide sufficient notice of the charges against the accused student and did not allow him to cross-examine the complainant or his witnesses.<sup>101</sup> The judge expressed particular concern that the school permitted a former lawyer for the Department of Education's Office for Civil Rights to investigate and serve "as prosecutor, judge, and jury" in the case.<sup>102</sup> Also in October 2016, the Department of Education itself found that Wesley College violated the rights of an accused student when it failed to provide him with a full opportunity to respond to charges, rebut allegations, or defend himself at his hearing.<sup>103</sup>

In sum, state and federal courts, as well as agencies, have concluded that various universities failed to give adequate due process to students accused of sexual misconduct. The cases described above demonstrate courts' recent disapproval and serve as a wake-up call to the Department of Education, universities, and society that there is an immediate need for reform.

## B. Gender Discrimination Litigation

When students file lawsuits against their universities, they often allege a Title IX claim for intentional gender discrimination as well as a violation of their due process rights. The discrimination claim asserts that the university in question followed a policy of bias favoring one sex over the other in a disciplinary proceeding, even if its true motivation was to avoid bad publicity or liability.<sup>104</sup>

Claims for intentional gender discrimination rarely survive a motion to dismiss, and the complaints that do usually settle.<sup>105</sup> In order to survive a motion to dismiss, a plaintiff must show both that the school reached an erroneous decision about the guilt of the student<sup>106</sup> and that

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<sup>100</sup> See *id.* at 571.

<sup>101</sup> See *id.* at 603.

<sup>102</sup> *Id.* at 606.

<sup>103</sup> See Braceras, *supra* note 62; see also WESLEY COLL., RESOLUTION AGREEMENT, COMPLAINT NO. 03-15-2329 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-b.pdf>.

<sup>104</sup> *Doe v. Columbia Univ.*, 831 F.3d 46, 59 n.11 (2d Cir. 2016).

<sup>105</sup> See Yoffe, *supra* note 79; see also Justin Wm. Moyer, *How a Michigan College Student Beat a Sexual Assault Allegation*, WASH. POST (Sept. 16, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/16/how-a-college-student-beat-a-sexual-assault-allegation>; Ashe Schow, *Here Come the Settlements Over Lack of Due Process in Campus Sexual Assault Hearings*, WASH. EXAMINER (Jan. 27, 2015), <http://www.washingtonexaminer.com/here-come-the-settlements-over-lack-of-due-process-in-campus-sexual-assault-hearings/article/2559331>.

<sup>106</sup> In *Yusuf v. Vassar College*, the Second Circuit Court of Appeals described the types of claims students can bring to argue that a school's disciplinary proceedings violated Title IX:

the school's decision regarding the severity of the punishment and the adjudication itself was affected by the student's gender.<sup>107</sup> Courts generally dismiss these specific types of cases because of the difficulty in proving a causal link between the alleged erroneous outcome and the student's gender. The tendency to dismiss these cases at the pleadings stage is troubling for those plaintiffs who may be innocent, as discovery is often necessary to gather the necessary evidence that supports the arguments in their complaints.<sup>108</sup> Until courts allow these complaints to survive past the pleadings stage, students who may have been found wrongly responsible for sexual misconduct have no chance at judicial review under these claims.

Regardless, these cases are important for this Note because aspects of the decisions express criticism of campus sexual misconduct adjudications and suggest the need for additional protections for the accused. Specifically, courts have condemned schools' policies that "amount to 'a practice of railroading accused students'"<sup>109</sup> and are characterized by a "lack of common sense."<sup>110</sup>

Although no court has expressly held that a policy required by the Department of Education and the *Dear Colleague Letter* violates due process, Oklahoma Wesleyan University just filed a lawsuit against the Department of Education specifically challenging the legality of the letter.<sup>111</sup> Courts are beginning to establish the line for what aspects of procedures violate due process in school disciplinary process. Moving forward, universities need to make sure their efforts weigh both Title IX goals and procedural due process equally, as to not infringe the rights of accused students.

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"erroneous outcome" claims and "selective enforcement" claims. Erroneous outcome means "that the plaintiff was innocent and wrongly found to have committed an offense" and requires the plaintiff to show that the school erroneously found him or her responsible for the alleged misconduct. Selective enforcement claims assert "that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." See 35 F.3d 709, 715 (2d Cir. 1994).

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

<sup>108</sup> A plaintiff's complaint needs to assert specific factual allegations that the school or the school's procedures intentionally discriminated against him or her on the basis of gender in order to pass the pleadings stage. Facts could be "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*; see also *Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*12 (D. Md. Aug. 21, 2015).

<sup>109</sup> *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*10 (W.D. Va. Aug. 5, 2015) (quoting *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996)).

<sup>110</sup> *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712 (E.D. Va. 2015).

<sup>111</sup> See Press Release, Okla. Wesleyan Univ., *Oklahoma Wesleyan Files Suit Challenging Department of Education* (Aug. 15, 2016), <http://www.okwu.edu/blog/2016/08/oklahoma-wesleyan-files-suit-challenging-department-education>.

#### IV. THE FUTURE OF CAMPUS SEXUAL MISCONDUCT ADJUDICATIONS

Whether decreasing due process rights increases justice is hotly controversial. Improved due process rights for accused students in campus sexual misconduct cases sounds like a good idea until one takes into account the history of rape law and the obstacles victims face.<sup>112</sup> In situations where the only evidence is one partner's word against the other partner's word, and with no required procedural protections guaranteeing the accused rights to hearings, cross-examinations, or rules of evidence, the outcome seems to rely on a coin-toss level of certainty. Although there has historically been a problematic tendency to automatically doubt and blame accusers, a solution must be reached without creating a new problem by automatically doubting and blaming the accused. Schools need to tread lightly, because over-correcting this problem means innocent students may be expelled. Whether one takes issue with the definitions, procedures, or standard of proof (or all of the above), there is clearly much work to be done.

##### A. Proposed Legislation

Currently, Congress is considering three additional bills: the Campus Accountability and Safety Act (CASA), the Safe Campus Act, and the Fair Campus Act.<sup>113</sup> States are also discussing a number of bills that concern sexual misconduct and affirmative consent.

##### 1. Federal Legislation

###### a. The Campus Accountability and Safety Act

CASA, introduced by Senators Claire McCaskill of Missouri, Kirsten Gillibrand of New York, and Richard Blumenthal of Connecticut, would standardize college responses to sexual misconduct allegations and provide additional procedural protection for accusers.<sup>114</sup> Specifically, the Act would require schools to appoint a confidential advisor for accusers to provide support and assistance throughout the reporting and hearing process, provide accusers and the accused with notice of the initiation of an investigation within twenty-four hours, provide specialized training for all involved in the proceedings, and enter a memorandum of understanding with local law enforcement agencies to describe the role that each agency would play during an investigation.<sup>115</sup> CASA would

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<sup>112</sup> See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 2005 (2016).

<sup>113</sup> Campus Accountability and Safety Act, S. 590, 114th Cong. (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015); Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015).

<sup>114</sup> See S. 590.

<sup>115</sup> See *id.* §§ 3, 4, 7.

additionally impose civil penalties upon schools for noncompliance, and require that schools publish the results of surveys every two years about their students' experiences with sexual misconduct on campus.<sup>116</sup> Finally, under CASA, the Department of Education would be required to publicize the names of schools under investigation for Title IX violations.<sup>117</sup>

#### b. The Safe Campus Act and the Fair Campus Act

The Safe Campus Act<sup>118</sup> and the Fair Campus Act,<sup>119</sup> also being considered by Congress, are very similar to each other. Both acts require the following rights for the students: that both parties receive written notice of the investigation and a meaningful opportunity to respond to allegations, the right to representation, equal access to all evidence, and the right to cross-examine witnesses.<sup>120</sup> Both acts prohibit individuals, such as a Title IX officer or an administrative official, from playing multiple roles in the adjudicatory process.<sup>121</sup> Finally, both acts create a private right of action for respondents found wrongfully responsible and allow universities to use any standard of proof they choose.<sup>122</sup>

The only difference between the two bills is that the Safe Campus Act requires colleges to notify law enforcement of any allegations before initiating their own investigation on campus.<sup>123</sup> Law enforcement must be notified for the complainant to pursue the case at all. If the complainant does not wish to inform the police, the Safe Campus Act states that the school "may not initiate or otherwise carry out any institutional disciplinary proceeding with respect to the allegation."<sup>124</sup>

Hopefully, Congress will enact legislation requiring campus procedures to include protections for the due process rights of accused students. In the meantime, reform is left to the states and to individual universities.

### 2. State Legislation: The Affirmative Consent Debate

States are rethinking how they define consent, sexual assault, and sexual misconduct both on campus and in their criminal justice systems. As mentioned, a few states have signed affirmative consent into law; however, many more are presently considering passing bills.

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<sup>116</sup> *See id.* § 4.

<sup>117</sup> *See id.* § 2.

<sup>118</sup> H.R. 3403.

<sup>119</sup> H.R. 3408, 114th Cong. (2015).

<sup>120</sup> *See* H.R. 3403 § 2; H.R. 3408 § 2.

<sup>121</sup> *See* Safko, *supra* note 3, at 2301.

<sup>122</sup> *See* H.R. 3403 § 2; H.R. 3408 § 2.

<sup>123</sup> *See* H.R. 3403 § 2; H.R. 3408 § 2.

<sup>124</sup> *See* H.R. 3403 § 2; H.R. 3408 § 2.



Critics of the “yes means yes” approach claim that “it is impracticable for the government to require students to obtain affirmative consent at each stage of a physical encounter, and to later prove that attainment in a campus hearing.”<sup>125</sup> These critics claim that what these policies really mean is that “if someone accuses another student of sexual assault in a situation like this, then the student who did not come forward is immediately considered to be the one responsible for initiating the conduct.”<sup>126</sup> A *New York Times* article argues that the “redefinition of consent . . . encourages people to think of themselves as sexual assault victims when there was no assault” and that “people can and frequently do have fully voluntary sex without communicating unambiguously.”<sup>127</sup> Its author, Yale Law professor Jed Rubenfeld, asserts, “Under the new consent standards, that can be deemed rape if one party later feels aggrieved.”<sup>128</sup> Professor Rubenfeld argues for a focus on prevention and points to the problem of alcohol on campus.<sup>129</sup> He believes that if a student is voluntarily intoxicated (but not incapacitated), he or she remains responsible for his or her sexual choices.

By contrast, a “no means no” approach could mean that when two people are in a romantic situation voluntarily, whether that be in a relationship, or even on a date, one partner could presume the sexual consent of the other, so long as the other does not clearly rebut that presumption.<sup>130</sup> Hypothetically, using a “no means no” approach, if a couple is on a date, the other partner can have sex with them without asking, as long as his or her partner does not say no verbally or through obvious conduct.

The results of a recent study show that the ways men and women comprehend consent are

almost directly opposed to each other: one study found that 61 percent of men say they rely on nonverbal cues—body language—to indicate if a woman is consenting to a sexual act, while only 10 percent of women say they actually give consent via body language (most say they wait to be asked.)<sup>131</sup>

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<sup>125</sup> FIRE STATEMENT ON CALIFORNIA “AFFIRMATIVE CONSENT” BILL, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Feb. 13, 2014), <https://www.thefire.org/fire-statement-on-california-affirmative-consent-bill/>; see also Jake New, *The “Yes Means Yes” World*, INSIDE HIGHER EDUCATION (Oct. 17, 2014), <https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies>.

<sup>126</sup> *Id.*

<sup>127</sup> Rubenfeld, *supra* note 15.

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

<sup>129</sup> See *id.*

<sup>130</sup> Sherry F. Colb, *Making Sense of “Yes Means Yes”*, JUSTIA: VERDICT (Oct. 29, 2014), <https://verdict.justia.com/2014/10/29/making-sense-yes-means-yes>.

<sup>131</sup> Jessica Bennett, *Campus Sex . . . With A Syllabus*, N.Y. TIMES (Jan. 9, 2016), <https://www.nytimes.com/2016/01/10/fashion/sexual-consent-assault-college-campuses.html>.

This evidence provides a strong argument for adopting a “yes means yes” standard, and being unequivocally certain our partners expressly consented. Such a change should accompany additional procedural reform. The movement for affirmative consent takes a step in the right direction culturally, while the increased due process protections for the accused will protect any potentially innocent respondents from being unjustly convicted.

### *B. Additional Due Process Protections on Campus*

As previously discussed, courts have taken issue with campus adjudications that lack clear legal proceedings. Specifically, the most problematic issues include, but are not limited to, the following: procedures failing to provide notice of all charges to the accused, failing to provide enough opportunity to review and refute the evidence, involving an unfair hearing, lacking equal access to representation, denying students an opportunity to confront witnesses, and using a Title IX office to serve as investigator and decision-maker.

In 2016, Cornell University redesigned their policy 6.4 as a result of extensive feedback on and off campus.<sup>132</sup> The revisions redefined the investigator’s role so that the investigator would no longer offer an opinion regarding responsibility, instead leaving that solely to the hearing panel.<sup>133</sup> The revised process also provided for a hearing with a trained panel and gave the parties the opportunity to testify and request witnesses.<sup>134</sup> The hearing panel, however, now conducts all of the questioning to avoid traumatic circumstances.<sup>135</sup> The revision also calls for a hearing chair to preside over the hearing, ensuring that the panelists understand the policy and procedures, standards of proof, and evidentiary issues. This hearing chair will not vote. Next, the revision gives both parties access to a trained advisor who can accompany them to every meeting and proceeding during the process. This advisor can help with written submissions and provide advice throughout the adjudication. Finally, the procedure provides for appeals to a three-member panel if either party disagrees with the decision of the panel.<sup>136</sup>

Even with Cornell’s new policies protecting the accused, the school still faced criticism by Judge Faughnan of the Tompkins County Supreme Court. The judge criticized the policy’s tolerance for delays,

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<sup>132</sup> See CORNELL UNIV., *supra* note 85.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

which defies the federal law mandating “prompt” investigations.<sup>137</sup> This shows that even the most progressive policies have room for improvement and are being torn apart by lawsuits filed by losing parties in sexual misconduct adjudications.

Furthermore, Harvard Law School recently announced different procedures than the rest of Harvard University.<sup>138</sup> The law school now affords its students additional protections, which include providing representation to students who cannot afford it and hiring independent lawyers (such as retired judges) to adjudicate cases.<sup>139</sup> But too many schools have yet to address this need for procedural reform, often lacking the same resources as universities like Harvard and Cornell.

In conclusion, the reforms described in this section are in response to criticism of policies designed to respond to the *Dear Colleague Letter*. Moving forward, college procedures should be updated to at least include rights to a fair hearing, instructions that panelists presume accused students innocent until proven guilty, cross-examination of all witnesses, adequate time to prepare a defense, and sufficient notice of all allegations and evidence.

### C. *Changing the Standard of Proof*

Minimally, universities need to improve their procedures to add due process protections. Perhaps schools should also adopt uniform definitions for sexual misconduct on campus, if Congress will not do so through federal legislation. Regardless, implementing a higher standard of proof would serve as a safeguard for the accused. With the preponderance of the evidence standard, an adjudicator finding against a complainant is arguably in some cases concluding that it is more likely than not that he or she is lying.<sup>140</sup> These determinations are particularly delicate in a case that has equal evidence on both sides.<sup>141</sup> Inevitably, many adju-

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<sup>137</sup> See Alisha Gupta, *Judge Suggests Cornell Revise Sexual Assault Policy 6.4*, CORNELL DAILY SUN (Nov. 30, 2016), <http://www.cornellsun.com/2016/11/30/judge-suggests-cornell-revise-sexual-assault-policy-6-4>.

<sup>138</sup> See Emily Bazelon, *Return of the Sex Wars*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html>.

<sup>139</sup> See *Title IX Policy*, HARV. LAW SCH., <http://hls.harvard.edu/title-ix/policies-and-procedures> (last visited Dec. 1, 2016).

<sup>140</sup> See Conor Friederdorf, *What Should the Standard of Proof Be in Campus Rape Cases?*, ATLANTIC (June 17, 2016), <http://www.theatlantic.com/politics/archive/2016/06/campus-sexual-misconduct/487505>.

<sup>141</sup> See *id.*; See also Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1119 (1987)(Preponderance of the evidence acts to minimize the expected cost of error if an error against the accuser is just as costly as an error against the accused. On the other hand, proof beyond a reasonable doubt prevails in criminal cases and means a high degree of probability or even almost certainty, serving to minimize the expected cost of error because the error of convicting the innocent is especially costly.)

dicators may feel pressure to render verdicts that confirm the allegations of accusers—pressure that, depending on one’s perspective— either endangers innocents or is an overdue correction to the systematic oppression that victims of sexual misconduct have faced. Additionally, the adjudicator is hyper-aware of the pressures from the Department of Education and the media; the attention coming from pro-victim advocates, not those who worry about due process for the accused.<sup>142</sup>

Courts have yet to speak directly to the *Dear Colleague Letter*’s mandate that schools use a preponderance of the evidence standard of proof. Nevertheless, a few courts have included a discussion of the standard in their decisions. In *Yu v. Vassar College*, the Second Circuit Court of Appeals evaluated the plaintiff’s argument that the disciplinary panel replaced the preponderance of the evidence standard with a presumption of male guilt.<sup>143</sup> Additionally, the court in *Doe v. University of Massachusetts-Amherst* noted that use of the lowest standard of proof “tip[s] the scale in favor of the complainant in cases where testimony from both parties is credible.”<sup>144</sup>

While preponderance of the evidence makes convictions easier to reach, it could mean that for every one hundred students who are disciplined, as many as forty-nine of them may be innocent.<sup>145</sup> Additionally, requiring the accused to establish that he or she obtained affirmative consent, which is often nearly impossible to prove, tips the balance further and leaves too much room for error.<sup>146</sup> The next sections will analyze the issues surrounding the standards of proof and argue for a clear and convincing standard to be re-adopted when adjudicating sexual misconduct on college campuses.

## 1. The Case for Clear and Convincing

The *Dear Colleague Letter* states that the use of the clear and convincing standard would be inequitable because preponderance is the standard that courts apply in civil damages actions for sex discrimination

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<sup>142</sup> See Susan Svrluga, *We’ve Defended Lots of Campus Sexual Assault Cases, So We Know Just How Unfair They Are*, WASH. POST (Jul. 24, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/07/24/weve-tried-lots-of-campus-sexual-assault-cases-so-we-know-just-how-unfair-they-are>.

<sup>143</sup> See *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 461–62 (S.D.N.Y. 2015) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). Under Title VII, individuals can bring claims for both intentional discrimination and practices or procedures that have a discriminatory effect, or disparate impact, on a protected class. *Ricci*, 557 U.S. at 577.

<sup>144</sup> *Doe v. Univ. of Mass.-Amherst*, 2015 U.S. Dist. LEXIS 91995, at \*22 (D. Mass. July 14, 2015), *appeal docketed*, No. 15-01856 (1st Cir. July 28, 2015).

<sup>145</sup> Alan Dershowitz, *Innocent Until Proven Guilty? Not Under ‘Yes Means Yes.’*, WASH. POST (Oct. 14, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk>.

<sup>146</sup> See *id.*

under Title IX.<sup>147</sup> This logic, in the context of many universities' new procedures, is faulty. The new procedures accord the accused party almost none of the protections he or she would enjoy in civil litigation under Title IX, and they can lead to expulsion, the termination of a professional career, and lasting psychological trauma.

Critics argue that sexual assault is not “harassment” or “discrimination”; instead, it is a felony crime and should be treated as such with a higher standard of proof.<sup>148</sup> On the other hand, there are many who argue that a preponderance of the evidence standard appropriately protects the interests of the accusers over those of the accused and believe that it is not reasonable to think that accusers would lie about sexual misconduct or assault.<sup>149</sup> These arguments rely on the idea that sexual misconduct proceedings, whether criminal or on-campus, are usually traumatic and painful for a victim of sexual misconduct. On the other hand, a journalist at *The Atlantic*, Conor Friedersdorf, wrote,

On the substantive question, though, I've read about too many cases of wrongful convictions in the criminal-justice system, where the accused are afforded a right-to-counsel and the “beyond a reasonable doubt” standard of proof, to think that “a preponderance of the evidence” is sufficient in proceedings with no right to counsel.<sup>150</sup>

Thus, it can be argued that universities should not be expelling students, who in some cases do not have access to lawyers, unless they have clear and convincing proof that that student committed sexual misconduct because the chance of wrongful condemnation is simply too risky.

At the very least, the standard of proof should be higher because, especially in an age of social media and inevitably decreased privacy, the consequences of being expelled can have lifelong effects on a student's reputation, career prospects, and relationships. In a case with ambiguous facts and with witnesses testifying about things that happened months earlier when they were intoxicated, an adjudicator only has to find that it

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<sup>147</sup> See DEAR COLLEAGUE LETTER, *supra* note 4, at 11.

<sup>148</sup> See Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294>.

<sup>149</sup> See Lavina M. Weizel, Note, *The Process That Is Due: Preponderance of the Evidence As the Standard of Proof for University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1645–55 (2012) (arguing that the preponderance of the evidence standard appropriately balances the interests of accused students in continued education and the risk of erroneous deprivation of the students' interests); Amy Chmielewski, Note and Comment, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 148 (2013).

<sup>150</sup> Conor Friedersdorf, *What Should the Standard of Proof Be in Campus Rape Cases?*, ATLANTIC (June 17, 2016), <http://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505>.

was more likely than not that sexual misconduct happened.<sup>151</sup> This thought is certainly unsettling.

In sum, if a campus decision-maker cannot say there is significant evidence that an accused party committed the misconduct, the accused party should not be found guilty. The next section of this Note will explore the possibility of a sliding standard of proof that changes with the severity of the punishment or crime.

## 2. A Variable Standard of Proof

Supporters of a higher standard of proof believe that false convictions are worse than false acquittals, an idea that dates back to the famous Blackstone theory that it is “better that ten guilty persons escape than that one innocent suffer.”<sup>152</sup> In other words, it is preferable to acquit an arguably innocent defendant, even if there is a chance they could be guilty. Wrongful convictions are avoided by having a higher standard of proof in criminal courts; however, civil sexual misconduct adjudications on campuses employ the lowest standard of proof.

Professor Kevin Clermont of Cornell Law School discusses a “variable standard of proof” in his book *Standards of Decision in Law*.<sup>153</sup> Clermont theorizes that if courts or adjudicating bodies knew more about “the base rates for a specific type of case” or about “the realities of the particular case itself,” they could adjust the standard of proof.<sup>154</sup> In effect, an ideal judge setting the standard of proof on a case-by-case basis could improve “accuracy by offsetting the unavailability or inadmissibility of evidence in the particular case.”<sup>155</sup> In other words, the standard of proof could slightly vary case-by-case and issue-by-issue. For example, if the punishment for a violation of sexual misconduct is expulsion, universities might employ the higher clear and convincing standard of proof. Thus, a decision-maker would be required to have more evidence in order to expel a student than under the preponderance of the evidence standard. On the other hand, if the punishment is merely probation, perhaps the decision-maker should apply the preponderance of the evidence standard.

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<sup>151</sup> See, e.g., Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 80–81 (2013); Barclay Sutton Hendrix, Note, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 610–15 (2013).

<sup>152</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*352; see also Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 62 FL. L. REV. 432, 433 (2011).

<sup>153</sup> See generally KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW (2013).

<sup>154</sup> See *id.* at 15–16.

<sup>155</sup> See *id.*

Because we do not live in a world where facts are always clear, or enough time exists to litigate cases under their own standards of proof, the law has evolved towards standards of proof that are assigned to broad categories of cases and issues instead of a sliding scale. The argument behind different standards for different punishments is interesting, though, and could be an alternative option to the preponderance of the evidence standard in campus sexual misconduct adjudications.

#### V. THE UNDERLYING NEED FOR EDUCATION AND CULTURAL CHANGE

Regardless of policy, procedural reform, definitions, and standards of proof, prevention by education is the ultimate solution to the issue of sexual misconduct, both on and off campus. The ambiguities and inconsistencies surrounding these issues, coupled with the difficulties of having sensitive and productive conversations, are hindering progress. Currently, education about campus sexual misconduct is shifting from education focused on reducing risks to education focused on increasing awareness about the critical and too-often misinterpreted issue of consent.<sup>156</sup>

It is understandably frustrating for college students to grow up in an environment where consent and sexual offenses are not necessarily taught in middle school and high school sexual education classes, then attend college where the definitions and procedures vary from that of their neighbors and what they may have learned at home. This issue is further complicated by a culture of excessive drinking and compounded by the lack of checks and protections for accused parties. Universities need to do their best to reform current policies, definitions, and standards of proof so that the procedures for adjudicating campus sexual misconduct are fair, clear, and consistent.

The conversation around these areas of conflict is delicate, especially in a sensitive political climate. Nevertheless, these are discussions that need to occur now because this reform needs to happen immediately. The educations and futures of many students are at risk if the government, universities, and society do not commit to finding appropriate solutions.

#### CONCLUSION

Universities are in a delicate and difficult predicament; their obligations extend far beyond mere compliance with the Department of Education's requirements. Universities must balance the duty to protect all students equally under Title IX with the responsibility to protect victims and restore justice in these uniquely "non-criminal," yet criminal, adjudic-

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<sup>156</sup> See *id.*

cations. They must weigh the preservation of the rights of freedom of speech and expression with the protection of vulnerable minorities. They must accord the right to privacy of students to live and interact autonomously with the responsibility to address dangerous cultural practices that occur on campus. Nevertheless, it is critical to realize that these harmonies can exist without sacrificing the necessary improvement of protection and redress for victims of sexual misconduct.

Legal systems have standards of proof and complicated procedure not to protect the guilty, but the innocent. Fighting injustice with a method that puts innocents at risk is something all people should condemn. The status quo is dangerous because the lowest standard of proof is combined with procedures that do not afford respondents the same rights and safeguards they would have in a civil case with similar stakes, let alone a criminal case for the same offense. Further, the civil aspect of campus adjudications allows the media and community at large to pass judgment on a respondent's guilt before the adjudicator or panel has made the decision. If preponderance of the evidence is to remain the DOE's standard of choice, university procedures need to be dramatically revamped to include guaranteed due process rights for respondents.

The recent election and what it means for Title IX remains largely unknown; however, the President chose Betsy DeVos, a public school reform advocate and former chair of the Michigan Republican Party, for Secretary of Education. Though it is unclear what DeVos specifically intends to accomplish with respect to Title IX, she is unlikely to support the law's aggressive enforcement.

Title IX's capacity to prevent and redress misconduct has been notably diminished due to the ambiguities and inconsistencies both between and within campus policies and procedures. Today, the ball again lies in Congress' court to improve and clarify the Department of Education's interpretations and rules regarding Title IX. Universities are running real risks that their students will be expelled on oftentimes flimsy proof that would never lead to their conviction in criminal court, their liability in an action for civil damages, or their discipline under a clear and convincing standard.

Again, these conversations are challenging due to the tension between objectivity and empathy as well as the emotional trauma surrounding these issues. Moving forward, the best thing advocates, policymakers, and concerned students can do is listen to each other in order to understand ways to promote social justice.



