

TITLE IX VIOLATIONS ARISING FROM TITLE IX INVESTIGATIONS: THE SNAKE IS EATING ITS OWN TAIL

JOE DRYDEN, DAVID STADER, JEANNE L. SURFACE

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TITLE IX VIOLATIONS ARISING FROM TITLE IX INVESTIGATIONS: THE SNAKE IS EATING ITS OWN TAIL

JOE DRYDEN*, DAVID STADER**, JEANNE L. SURFACE***

ABSTRACT

In 2011, the Department of Education Office of Civil Rights published a Dear Colleague Letter (DCL) detailing the department's views on the roles and responsibilities of colleges and universities under Title IX specifically as they relate to allegations of sexual assault. Numerous studies conclude that close to 1 in 5 college women are sexually assaulted while enrolled in institutions of higher education. Many of these studies are flawed yet they are being used as the justification for administrative overreach. Despite not having the legal authority, the DCL changed the legal standard to be applied when conducting sexual assault investigations from the clear and convincing to the preponderance of the evidence standard, and threatened to withhold federal funds if immediate and effective steps were not taken to end sexual assaults on college campuses. This pressure from the OCR resulted in an overly broad approach where the rights of the accused are being routinely ignored. Over the last couple of years, dozens of cases have been brought by expelled or suspended students claiming that school officials committed Title IX and due process violations during their respective Title IX investigations. Some have also successfully pursued claims for breach of contract.

This paper examines the prevalence of sexual assaults on college campuses and is critical of published reports as being overly inclusive. It reviews early cases, which were typically dismissed under both the selective enforcement and erroneous outcome prongs, and later cases where courts found that school officials acted improperly and

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violated the rights of the accused. Sexual assault on college campuses is a serious problem and all allegation should be investigated promptly, but not at the expense of due process. Policy and practice recommendations are included.

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I. INTRODUCTION: IS THE SNAKE EATING ITS OWN TAIL?

The motivation for this paper arose out of a concern for the rights of the accused in sexual assault investigations,¹ and a disbelief in the statistics being used to justify additional governmental intrusion into the operation of public and private colleges and universities.² It appeared as though the Department of Education's response to the widely publicized and growing epidemic of sexual assaults on college campuses, both real and manufactured, was *ultra vires*, beyond the scope of their authority. Indeed, even under Secretary of Education, Ted Mitchell, admitted that the 2011 Dear Colleague Letter (DCL) did not have the force of law in response to questions about department overreach.³ In Senate hearings, Senator Lankford (R-Okla.) argued that when federal funding is at stake, the 2011 DCL was indistinguishable from a regulation which should have been subjected to public notice and comment.⁴ University and college presidents argued that the "guidance" was vague and inconsistent, yet it is the standard by which the Office of Civil Rights determines whether schools are in compliance with Title IX investigations pursuant to allegations of sexual assault.⁵

1. See generally Harvey A. Silvergate & Josh Gewalb, *Fire's Guide to Due Process and Campus Justice*, FIRE (2014), <https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/>.

2. See David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *Violence & Victims* 73 (2002) [hereinafter Lisak & Miller]; see also BONNIE FISHER, FRANCIS CULLEN, & MICHAEL TURNER, U.S. DEP'T OF JUSTICE, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* (2000). These reports, and others claim that as many as 1 in 4 women who go to college end up being sexually assaulted while enrolled. The operative question is, how is the term "sexual assault" being defined?

3. Ashe Schow, *Education Department officials' candid acknowledgement*, WASHINGTON EXAMINER (Oct. 7, 2015), <http://www.washingtonexaminer.com/education-department-officials-candid-acknowledgement/article/2573581>.

4. *Id.*

5. Jake New, *Must vs. Should: Colleges say the Department of Education's guidance on campus sexual assault is vague and inconsistent*, INSIDE HIGHER ED 1 (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>.

Colleges and universities are under great pressure and find themselves in what amounts to a lose-lose-lose environment. When allegations of sexual assault are reported, school officials must conduct an immediate and thorough investigation, or they risk Title IX lawsuits from complainants and investigations from the OCR.⁶ Colleges and universities across the country are punishing accused students based upon scant evidence and/or biased investigations in an effort to demonstrate that they take allegations of sexual assault seriously.⁷ As a consequence, a plethora of cases have been filed by male students claiming violations of Title IX, due process, and breach of contract, and many have been successful.⁸

Unilateral action by Russlynn Ali, Assistant Secretary for Civil Rights in the Department of Education, changed the standard of proof typically employed by colleges and universities when investigating allegations of sexual assault from the clear and convincing evidence standard to the preponderance of the evidence standard.⁹ The DCL used threatening language and established an unreachable standard by stating that any institution which does not take “immediate and effective steps to end sexual harassment and sexual violence” will lose federal financial assistance.¹⁰ The unilateral action by the Assistant Secretary for

6. U.S. Dep’t of Educ. Assistant Sec’y of Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT OF EDUC. 2, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (last visited Apr. 5, 2017).

7. *See Wells v. Xavier*, 7 F. Supp. 3d 746, 747 (S.D. Ohio 2014). The University had been investigated twice in two years for mishandling sexual assault allegations and had entered into a plea agreement with the OCR. *Id.* The U.S. District Court in Rhode Island noted this same pressure in *Doe v. Brown*, when Chief Judge William Smith wrote “[m]any of the recent cases, including this one, allege that the pressure on universities from the OCR has caused a backlash against male students accused of sexual assault.” *Doe v. Brown*, 166 F. Supp. 3d 177, 181 (D. R.I. 2016).

8. *See Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016); *Doe v. Washington & Lee Univ.*, No. 6:14–CV–00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015); *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL., 2015 WL 4394597 (Cal. Super. July 5, 2015); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748 (D. Md. 2015); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).

9. U.S. DEPT OF EDUC., DEAR COLLEAGUE LETTER 11 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter DCL].

10. *Id.* at 2.

Civil Rights created an environment where the due process rights of college students accused of sexual assault or harassment are being routinely ignored in order to show that college officials take sexual assault allegations seriously.

Before we examine the impact of the DCL on college and university sexual assault investigations in greater detail, the authors feel compelled to acknowledge that sexual assaults on college campuses are a serious and pernicious problem and all reports of sexual violence should be investigated thoroughly without out any predisposition. We, as a society, should expect all institutions of higher education (IHE) to continuously engage in a concerted and good faith effort to reduce the occurrence or sexual assault to the greatest extent practicable and to mitigate any damage so caused. Despite a recent ruling in California, which held that universities technically have no duty to protect their students from known threats of violence,¹¹ universities and colleges are now required “to take immediate and effective steps to” protect students from sexual abuse and harassment, which is considered to be a form of gender discrimination under Title IX.¹² Those who are found to have committed a sexual assault should be punished in a manner commensurate with their actions both civilly and criminally, but not at the expense of due process.

An organization known as Title IX for All has amassed a database of cases where the rights of the accused appear to have been bypassed in a rush to judgment.¹³ NPR conducted a special series on sexual assaults on college campuses where author Tovia Smith stated: as colleges and universities “continue to scramble under federal pressure to overhaul how they handle cases of sexual

11. *Regents of the Univ. of Cal. v. Super. Ct. of L.A. Cty.*, 193 Cal. Rptr. 3d 447, 464 (Cal. Dist. Ct. App. 2015), *cert. granted*, *Regents of Univ. of Cal., v. S.C.*, 364 P.3d 174 (Cal. 2016).

12. DCL, *supra* note 9, at 2.

13. *Due Process Lawsuits Database*, TITLE IX FOR ALL, <https://titleixforall.knack.com/databases#due-process-lawsuits3/intro5/> (last visited Apr. 5, 2017). (Access to this database is free but requires a login and password which can easily be generated by going to the website at <http://www.titleixforall.com/> and clicking on the “explore resources” tab. Select “Due Process Lawsuits;” then “enter database;” and then “click this link” to register.) [hereinafter *Due Process Lawsuits Database*].

assault, the list of schools under investigation for botching cases continues to grow.”¹⁴ In an effort to demonstrate to the OCR that they take sexual assaults seriously, some colleges and universities are looking for examples especially if they have pending Title IX cases and investigations.¹⁵ This article will examine multiple cases where the Title IX and or due process rights of the accused were violated through egregious actions by school officials.¹⁶

Part II of this paper highlights several horrific examples of sexual assaults that have occurred on college campuses just in the last few years.¹⁷ Disturbingly, for each one of these examples, there are even more that go unreported.¹⁸ Part III examines some of the widely-cited studies on the incidents of sexual assault and specifically questions of policy implications flowing from the often-cited statistic that 1 in 5 college-age women have been victims of

14. Tovia Smith, *To Tackle Sexual Assault Cases, Colleges Enlist Investigators-For-Hire*, NPR: Special Series, A closer look at sexual assaults on college campuses, NPR (Oct. 29, 2014), <http://www.npr.org/2014/10/29/359875452/to-tackle-sexual-assault-cases-colleges-enlist-investigators-for-hire>.

15. *See Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014). The court denied a motion to dismiss the plaintiff's Title IX claim, finding that:

[T]aking all inferences in favor of Plaintiff . . . Plaintiff's erroneous outcome theory survives Defendants' challenge. Plaintiff's Complaint . . . 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. These actions came against Plaintiff, he contends, because he was a male accused of sexual assault.

Id.

16. *See generally Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016); *Doe v. Alger*, 175 F. Supp. 3d 646 (W.D. Va. 2016); *Doe v. Rector and Visitors of George Mason Univ.*, 149 F. Supp. 3d 602 (E.D. Va. 2016); *Doe v. Washington and Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015); *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL., 2015 WL 4394597 (Cal. Super. July 10, 2015); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748 (D. Md. 2015); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).

17. *See infra* Part II.

18. *See The Criminal Justice System: Statistics*, RAINN.ORG, <https://www.rainn.org/statistics/criminal-justice-system> (last visited April 5, 2017) (demonstrating out of 1000 alleged rapes, only 344 are ever reported to the police).

sexual assault.¹⁹ The authors believe these statistics are inflated and have been relied upon to justify more government oversight. Part IV examines the 2011 DCL and highlights the reactions of schools to its threats and intimidation.²⁰ Part V examines the response of schools and examines some of the cases challenging the actions of school officials.²¹ Part VI examines Title IX cases that were dismissed under both the selective enforcement and erroneous outcome prongs.²² Part VII examines cases where the accused has been at least partially successful in defending themselves against school officials who, in their rush to judgment, ignored the rights of the accused.²³ Part VIII examines several cases involving private universities as defendants and breach of contract claims, and Part IX lists some concluding remarks and recommendations.²⁴

The number of studies and cases dealing with sexual assaults on college campuses is voluminous, and the authors of this paper do not attempt to identify and discuss every study and every case. Instead a representative sample of each was selected to support our initial concerns and demonstrate that Title IX investigations on college campuses may be like a snake eating its own tail because Title IX violations are being committed during Title IX investigations.

II. THE PREVALENCE OF SEXUAL ASSAULTS ON COLLEGE CAMPUSES.

Recent events at Baylor University, where a number of sexual assaults were covered up in order to protect athletes, exposed an ugly truth about campus sexual assault.²⁵ According to Emmett

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part VI.

23. *See infra* Part VII.

24. *See infra* Part VIII.

25. *See generally* Joe Cohn, *Baylor's Failure Exposes Flaws in Campus Sexual Assault Adjudication*, FIRE, (June 3, 2016), <https://www.thefire.org/baylors-failure-exposes->

Knowlton, the results of an independent investigation revealed a culture where sexual assaults were ignored, victims were pressured not to bring charges, and were exposed to dangerous environments where threats and retaliation were employed by school officials and classmates in order to silence potential claims.²⁶ The response of university officials to repeated allegations of sexual assault was wholly and legally inadequate under Title IX.²⁷ Eventually, University President, Kenneth Starr, and Head Coach, Art Briles, were fired and the Board Regents issued the following statement:

We were horrified by the extent of these acts of sexual violence on our campus. This investigation revealed the University's mishandling of reports in what should have been a supportive, responsive and caring environment for students.

. . . The depth to which these acts occurred shocked and outraged us. Our students and their families deserve more, and we have committed our full attention to improving our processes, establishing accountability and ensuring appropriate actions are taken to support former, current and future students.²⁸

Robert Soave, an associate editor at Reason.com, opined:

[T]here's just no reason to expect poorly-trained university administrators to handle these things better [than law enforcement], and lots of reasons to expect them to behave even worse. Baylor is an example of this very phenomenon:

flaws-in-campus-sexual-assault-adjudication/; Marcy Tracy & Dan Barry, *The Rise, Then Shame, of Baylor Nation*, THE N.Y. TIMES (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html?_r=0.

26. See Emmett Knowlton, *Damning Report Reveals Horrifying Extent of Baylor's Sexual-Assault Scandal that Led to Football Coach's Ouster*, BUS. INSIDER (May 26, 2016, 1:52 PM), <http://www.businessinsider.com/baylor-sexual-assault-scandal-report-art-briles-2016-5>.

27. *Id.*

28. *Id.*

The school evidently cared more about its football team than about justice for possible victims.²⁹

Baylor is not alone.

Florida State University (FSU) recently settled a Title IX suit with Erica Kinsman for \$950,000 after it was accused of acting with deliberate indifference toward her sexual assault allegations.³⁰ After reporting that the FSU quarterback and Heisman Trophy winner Jameis Winston had drugged and sexually assaulted her in January of 2013, the athletic department dismissed her claims and it took nearly two years for FSU to hold what was described as a sham hearing where Winston refused to answer any questions.³¹ Erica was also subjected to threats and intimidation by other students that were so severe and pervasive that she was forced to leave FSU for her own safety.³² After the settlement was announced, the college president was publicly contemptuous of Kinsman's suit.³³

At the University of Tennessee, six women filed a federal suit claiming that the University created a hostile environment for female students by showing deliberate indifference, by directing accused athletes to high-profile lawyers, and by allowing the

29. Robby Soave, *Baylor University Is a Perfect Example of Why Universities Shouldn't Police Rape*, REASON.COM (June 1, 2016, 12:50 PM), <https://reason.com/blog/2016/06/01/baylor-university-is-a-perfect-example-o>; See also Tovia Smith, *NPR Special Series: A closer look at sexual assaults on college campuses, To Tackle Sexual Assault Cases, Colleges Enlist Investigators-For-Hire*, NPR (Oct. 29, 2014, 5:41 PM), <http://www.npr.org/2014/10/29/359875452/to-tackle-sexual-assault-cases-colleges-enlist-investigators-for-hire>.

30. *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 16 FJVR 3-7, 2016 WL 1105439 (N.D. Fla. Jan. 25, 2016) (verdict and settlement summary).

31. *Kinsman v. Fla. State Univ. Bd. Of Trustees*, No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *2-3 (N.D. Fla. Aug. 12, 2015).

32. *Id.* at *4.

33. Joe Nocera, *After Settlement, Florida State Shows Sympathy for Victim: Itself*, N.Y. TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/01/30/sports/ncaafootball/florida-state-protects-the-brand-but-what-about-the-students.html?_r=0.

accused to have an attorney present at adjudication hearings.³⁴ In July, the University agreed to pay the eight plaintiffs \$2.48 million and to appoint a special investigator to review how it handles sexual assault allegations.³⁵ In exchange, the plaintiffs agreed to withdraw their Title IX complaints,³⁶ which may be somewhat immaterial to whether or not the accused will still be investigated by the OCR because the OCR does not need the permission of the complainant to continue a federal investigation.

In Nebraska, a jury awarded damages of \$2.6 billion in a tragic case where a female college student was abducted, raped, and killed by another student who had a criminal history including robbery, burglary, and fondling an 18-year-old female prior to enrolling at Peru State College.³⁷ According to the verdict and settlement summary, on September 12, 2010, the university became aware of the perpetrator's criminal history and as of September 22, 2010, knew of two complaints from other female students that they had been sexually harassed by the perpetrator.³⁸ The perpetrator admitted to sexually harassing the two female classmates and was asked to perform 10 hours of community service and to complete an educational activity.³⁹ He completed neither, but remained on campus.⁴⁰ One month later, the perpetrator confessed to breaking into a dormitory room and stealing money, but again was allowed to remain on campus.⁴¹ On

34. Anita Wadhvani & Nate Rua, *Sweeping Sex Assault Suit Filed Against University of Tennessee*, THE TENNESSEAN (Feb. 24, 2016, 10:07 AM), <http://www.tennessean.com/story/news/2016/02/09/sweeping-sexual-assault-suit-filed-against-ut/79966450/>.

35. Nate Rua & Anita Wadhvani, *Tennessee Settles Sexual Assault Suit for \$2.48 Million*, THE TENNESSEAN (July 6, 2016, 2:44 PM), <http://www.tennessean.com/story/news/crime/2016/07/05/tennessee-settles-sexual-assault-suit-248-million/86708442/>.

36. *Id.*

37. *Thomas v. State*, 2016 WL 3659788 (Neb. Dist. Ct. May 4, 2016) (verdict and settlement summary).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

December 3, 2010, the perpetrator abducted, raped, and killed Tyler Thomas.⁴²

The examples are just the tip of the iceberg. The authors agree that colleges and universities must take aggressive steps to reduce the occurrence of sexual assault to the greatest extent possible. According to Stacy Teicher Khadaroo, a staff writer for the Christian Science Monitor, the numbers of sexual assault complaints reported by colleges and universities nearly doubled from 2009 to 2013.⁴³ Relying upon the same report,⁴⁴ Tyler Kingkade, a senior editor from the Huffington Post, reported that in 2009 the Department of Education received only 20 complaints alleging sexual violence.⁴⁵ This number increased to 123 in 2014.⁴⁶ As the number of complaints have increased, so have the number of schools under investigation for potential Title IX violations.⁴⁷ As of June 2016, federal officials were conducting 244 investigations

42. *Id.*

43. Stacy Teicher Khadaroo, *Glimmers of Progress in Fight Against College Sexual Assault*, CHRISTIAN SCIENCE MONITOR (May 6, 2015), <http://www.csmonitor.com/USA/Education/2015/0506/Glimmers-of-progress-in-fight-against-college-sex-assault-video>.

44. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights & James W. Runice, COO Federal Student Aid, U.S. Dep't of Educ., to Barbara Boxer, U.S. Sen. (Apr. 28, 2015), <https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20150428-t9-sexual-violence-college-campuses.pdf>.

45. Tyler Kingkade, *The Education Department has a Huge Back-log of Sexual Assault That's Still Growing*, THE HUFFINGTON POST (May 5, 2015), http://www.huffingtonpost.com/2015/05/05/sexual-assault-backlog-education-department_n_7215748.html.

46. *Id.*; see also, Kimberly Hefling, *Campus Sex Crimes Stats Double over 5-year Period, Says Education Department*, U.S. NEWS AND WORLD REPORT (May 6, 2015), <https://www.usnews.com/news/politics/articles/2015/05/06/campus-sex-crime-reporting-increases-says-education-dept>.

47. Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges than Most People Know*, THE HUFFINGTON POST (June 6, 2016), http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d.

at 193 institutions that were accused of mishandling sexual assault complaints.⁴⁸

It is imperative that we as a society work diligently to reduce the occurrence of these types of horrific events, but not at the expense of due process. According to William Thro, general counsel for the University of Kentucky and former President of the Education Law Association, “equality requires the institution to remedy the sex discrimination against the complainants/survivor by disciplining the perpetrator; freedom requires extensive due process protections before the alleged perpetrator can be disciplined.”⁴⁹ Mr. Thro goes on to state that

[a]n institution can utilize preponderance of the evidence and still satisfy due process by providing for: (1) strict separation of the investigatory, prosecutorial, adjudication, and appellate functions; (2) a fair hearing with adequate procedural safeguards, including participation of counsel, full disclosure of evidence, a presumption of innocence with the institution assuming the burden of proof, and some form of cross-examination; and (3) meaningful appellate review.⁵⁰

From a review of recent cases, it is clear that too many institutions are not following Mr. Thro’s advice.

There are some who believe that investigations involving sexual assault should be left to the criminal justice system.⁵¹

48. Teresa Watanabe, *Occidental is Cleared of Most Civil Rights Violations: College Agrees to a Series of Reforms After Sex Assault Complaints*, L.A. TIMES (June 10, 2016), <http://www.pressreader.com/usa/los-angeles-times/20160610/textview>.

49. William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENTS U. L. REV. 197, 198 (2016).

50. *Id.* at 209.

51. See David Lisak, *Understanding the Predatory Nature of Sexual Violence* (2004), <http://www.middlebury.edu/media/view/240951/original>. Further, cases of non-stranger rape are extremely difficult to properly investigate and prosecute – they are in fact far more complex than the majority of stranger rapes. A proper investigation requires skilled and specially-trained investigators working closely with specially-trained prosecutors. Absent a proper investigation, almost every non-stranger rape case quickly devolves into the proverbial “he-said-she-said” conundrum, and judicial board members are left helpless to discern what actually may have occurred. See David M. Ruben, *Police, not colleges, should investigate sexual assaults on campus*, SYRACUSE.COM (May 11, 2014, 7:30 AM),

Historically however, the criminal justice system has a poor track record when it comes to protecting victims of sexual assault.⁵² For centuries, sexual assault charges were not to be believed unless the complainants had corroborating evidence and could show that they put up the utmost resistance during the assault.⁵³ At one point, in the latter half of the 20th century, jurors were more likely to acquit in rape cases than any other criminal prosecution.⁵⁴ In an effort to protect the victims of sexual violence, women's rights organizations in the 1970s lobbied state and federal legislatures to reform archaic rape laws,⁵⁵ and to enact rape shield laws.⁵⁶ Unfortunately, false accusations coupled with a lynch mob mentality, like that seen in some recent cases where there has been a rush to judgment, only serve to reinforce this paradigm making it even more difficult for real victims.

According to an article published in the *Fordham Law Review* by Emily Safko, the federal government has caused a reform movement through Title IX by requiring schools to employ policies and procedures for investigating and adjudicating sexual assault as a condition of receiving federal funds "that are heavily stacked against those accused of sexual assault."⁵⁷

As the number of OCR complaints has increased, so has the number of lawsuits filed by the accused. According to an organization known as Title IX for All, as of March 23, 2017, over 170 lawsuits had been filed since 1992 by young men who claim

http://www.syracuse.com/opinion/index.ssf/2014/05/sexual_assaults_on_college_campuses.html.

52. See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008).

53. *Id.* at 986–87; see also *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906).

54. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 249 (1966).

55. See MICH. COMP. LAWS § 750.520j(1) (2016).

56. See FED. R. EVID. 412.

57. Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protection in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2289 (Apr. 2016).

that university officials violated their rights while investigating and adjudicating allegations of sexual assault.⁵⁸

III. COMMONLY CITED SEXUAL ASSAULT STUDIES

In 2002, David Lisak published the results of a survey of men which attempted to identify the incidence of rape and attempted rape on college campuses. This study, which served as the basis for the controversial campus rape film, *The Hunting Ground*, found that of the 1,882 males who responded, 6.4% admitted to engaging in acts that met the legal definition of rape or attempted rape and a total of 11 respondents could be characterized as serial rapists.⁵⁹ The validity of this study has been called into question by one academic critic.⁶⁰ According to Linda LaFauve, Associate Vice President for Institutional Research at Davidson College, it was not an original study. It was based on the work of four former graduate students, and when asked, Lisak stated that the studies may have been studies about child abuse or about relationships with parents, not campus sexual assault.⁶¹ The instrument Lisak used, the only one he actually constructed, was a seven-page questionnaire that included questions mostly about childhood sexual experiences.⁶² Just five questions asked respondents about sexual violence they may have committed as adults.⁶³ Finally, the respondents ranged in age from 18–71 and most were part-time commuter students.⁶⁴ Many of the respondents may not have even been college students and the violence they admitted to may not have happened on any college campus. Some may have been

58. *Lawsuits Database, TITLE IX FOR ALL*, <https://titleixforall.knack.com/databases#due-process-lawsuits3/due-process-lawsuits> (last visited April 5, 2017) (“This database tracks lawsuits by students against higher education schools which – they allege – have violated their rights in the pursuit of investigating and adjudicating sexual assault.”).

59. Lisak & Miller, *supra* note 2, at 78.

60. See Linda M. LeFauve, *Campus Rape Expert Can't Answer Basic Questions About His Sources*, REASON.COM (July 28, 2015), <http://reason.com/archives/2015/07/28/campus-rape-statistics-lisak-problem>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

domestic violence and may not have been committed against a college student at all. Despite these methodological concerns, politicians cite this study as the moral justification for policies which are proving to be biased against accused, and often times, innocent students.⁶⁵

Robert Soave argued that the “documentary” *The Hunting Ground* was based upon “an amazing lie.”⁶⁶ According to Soave, who is an associate editor for Reason.com and former writer and editor for The Daily Caller, the Student Free Press Association and the Goldwater Institute, there was no evidence that the accused drugged the women depicted in the film. In fact, it was the alleged victims who supplied the cocaine that was consumed the evening of the alleged incident.⁶⁷ The bloody condom that the alleged victims claimed was proof of the assault, had no DNA belonging to the accused, but it did contain the DNA of the alleged victim and that of another unknown male.⁶⁸

According to Ashe Schow, a commentator for the Washington Examiner and former editor and writer for the Heritage Foundation, *The Hunting Ground* “looks less like a documentary and more like a film in search of a problem.”⁶⁹ Schow claims several of the stories highlighted in the controversial film have been called into question including the story of Emma Solkowicz, the Columbia University student who carried a mattress around on her back. After allegedly experiencing a brutal rape, which included being hit, choked, and anally penetrated, Emma continued to send and

65. *Id.*; see also DCL *supra* note 9, at 2.

66. Robby Soave, *How the Hunting Ground Spreads Myths About Campus Rape*, REASON.COM (Nov. 20, 2015), <http://reason.com/blog/2015/11/20/how-the-hunting-ground-spreads-lies-abou> (“Nineteen Harvard professors denounced the film” as misrepresenting the truth about one of the “serial sociopaths” portrayed in the film).

67. *Id.*

68. Ashe Schow, *The Continuing Collapse of the Hunting Ground: A Campus Sexual Assault Propaganda Film*, WASHINGTON EXAMINER (June 3, 2015), <http://www.washingtonexaminer.com/the-continuing-collapse-of-the-hunting-ground-a-campus-sexual-assault-propaganda-film/article/2565464>.

69. *Id.* at ¶ 1.

receive flirtatious and friendly messages including one where Emma told the accused that she loved him.⁷⁰

Lisak claims that every report should be treated as an opportunity to identify a serial rapist.⁷¹ This attitude has created a collective self-fulfilling prophecy where guilt is determined before the accused is even contacted.⁷² Soave claims that

[s]uch thinking has provided cover for federal bureaucrats to endlessly expand their efforts to root out imaginary monsters—to the detriment of due process and academic freedom. It has also duped the media into uncritically accepting the lies of people like Duke University’s Crystal Mangum and UVA’s Jackie, whose nightmarish tails of ritualistic, premeditated violence destroyed the reputations of dozens of innocent people.⁷³

Aya Gruber, a law professor at the University of Colorado agrees that mandated policies arising from the 2011 DCL have swung the pendulum too far in the direction of the complainant:

When you have Vice President Joe Biden and President Barack Obama saying the criminal justice system is failing at punishing rapists and that schools need to step up, this puts enormous pressure on the schools to find in favor of the

70. See Ashe Schow, *Columbia Student Found not Responsible of Rape Finally Tells His Side of the Story*, WASHINGTON EXAMINER ¶ 3–5 (Feb. 4, 2015), <http://www.washingtonexaminer.com/columbia-student-found-not-responsible-of-rape-finally-tells-his-side-of-the-story/article/2559742>.

71. See generally Lisak & Miller, *supra* note 2.

72. See *e.g.*, *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 181–82 (D.R.I. 2016). (The Vice President ordered John Doe’s immediate removal from campus before any school officials even spoke with the accused.) See also, *John Doe v. Brandeis Univ.*, 177 F. Supp. 3d at 561, 575 (D. Mass. 2016). (According to the complaint, on the same day that the two sentence student complaint was filed, John Doe met with school officials who informed him that he was “banned from his residence, classes, paid campus job, community adviser position and high-ranking student-elected position on a University Board . . . without giving him an opportunity to explain his side of the story.”).

73. Robby Soave, *How an Influential Campus Rape Study Skewed the Debate*, REASON.COM (July 28, 2015, 3:00 PM), <http://reason.com/blog/2015/07/28/campus-rape-stats-lisak-study-wrong>.

complainants . . . [a]nd the schools are ill-equipped to make these findings.⁷⁴

A. Other Noted Sexual Assault Studies

There are literally hundreds, maybe thousands of studies which examine some aspect of sexual violence. The Rand Corporation, for example published an article which summarized over 450 studies in their compendium of Sexual Assault Research published in 2009.⁷⁵ An analysis of all of these studies is beyond the scope of this article but an examination of the more commonly cited studies raises additional questions regarding the 1 in 5 widely publicized figure.⁷⁶

A report published by the Massachusetts Institute of Technology (MIT) found that 17% of female undergraduates reported unwanted sexual behaviors while enrolled consisting of force (undefined), physical threat, or incapacitation.⁷⁷ In one part of the study asking students about “labeled’ unwanted sexual experiences,” the terms used were undefined and respondents interpreted words such as stalking, harassment, verbal conduct of a sexual nature, according to their own feelings.⁷⁸ In the portion citing the 17% figure above, behaviors such as “sexual touching

74. Matthew Renda, *Campus Sexual Assault, Who Should Be the Judge and Jury?*, COURTHOUSE NEWS SERVICE (May 20, 2016), <http://www.courthousenews.com/campus-sexual-assaultwho-should-be-the-judge-and-jury/>.

75. Margaret C. Harrell, et al., *A Compendium of Sexual Assault Research*, RAND.ORG (2009), http://www.rand.org/pubs/technical_reports/TR617.html.

76. See, e.g., DCL, *supra* note 9, at 2. (Russlynn Ali specifically references a study by Christopher P. Krebs et al. titled The Campus Sexual Assault Study which put the estimate of college women who were “victims of completed or attempted sexual assault” at 1 in 5.); *Obama Speaks on the “Nightmare” that is Sexual Assault*, THE HUFFINGTON POST (Sept. 19, 2014), http://www.huffingtonpost.com/2014/09/19/obama-sexual-assault_n_5851058.html (President Obama referenced the 1 in 5 statistic repeatedly as if it was settled science as a part of his “start-powered” campaign against sexual violence.).

77. *Survey Results: 2014 Community Attitudes on Sexual Assault*, MIT.EDU 5 (Oct. 27, 2014), <http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf>.

78. *Id.* at 4.

and kissing” were included as unwanted sexual behavior.⁷⁹ This lack of distinction demonstrates the need to operationally define the term sexual assault in order to correctly interpret survey data. Jacob Gersen and Jeannie Suk, both professors at Harvard Law School expressed similar concerns about missing operational definitions and suggest that such an approach produces unreliable results.⁸⁰ It also would allow for important distinctions to be identified and understood so that real acts of sexual violence are not confused with errors in judgment by immature young males with little if any dating experience who have yet to learn the nuances of courtship and dating.

The United States Department of Justice defines sexual assault as “any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the definition of sexual assault are sexual activities as forced sexual intercourse, forcible sodomy, child molestation, incest, fondling, and attempted rape.”⁸¹ According to this definition, an attempted kiss is not considered to be sexual behavior that occurs without the explicit consent of the recipient. However, in many of the surveys used to measure the incidence of sexual violence on college campuses, these less malignant, yet still potentially inappropriate behaviors, (attempted kisses, and sending flirtatious text messages) are included as examples of sexual assault.⁸² It is undeniable that allegations of sexual assault must be taken seriously and investigated thoroughly, but it is also undeniable that not all sexual assaults, *as defined by many noted surveys*, are equally malignant and destructive. Any type of force, threat of

79. *Id.* at 5.

80. Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 920–21 (2016).

81. *Sexual Assault*, U.S. DEPT OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, <https://www.justice.gov/ovw/sexual-assault> (last visited Apr. 5, 2017).

82. See DAVID CANTOR ET AL., AAU.EDU, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, A5-6, <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct?id=16525>. (This survey defines “sexual assault” and “sexual misconduct” as a “range of behaviors that are nonconsensual or unwanted ... or attempts to engage in these behaviors.”); see also *Campus Climate Survey*, RUTGERS UNIV. (Mar. 2013), <https://www.newark.rutgers.edu/campus-climate-survey>. (This survey includes remarks about physical appearance or persistent sexual advances that are undesired even if these advances come from someone with whom the person is involved in an ongoing relationship.).

force, use of intoxicants to produce incapacitation, incapacitation rape or attempted rape is far worse than a situation where an 18-year-old college freshman, who has very limited experience with sexual activity or alcohol, goes beyond a person's comfort zone, or a situation where a young lady loses her inhibitions and voluntarily engages in sexually promiscuous behavior only to regret her indiscretions the following day. Yet under some definitions these less malignant, but still inappropriate, behaviors would constitute a sexual assault and the "perpetrators" would be expelled from school and branded as sexual predators.⁸³

In 2012, the University of New Hampshire found that 15% of its undergraduate women experienced unwanted sexual contact through force, threat, or intoxication.⁸⁴ Unwanted sexual contact included attempted and actual kissing where the victim knew she or he did not want to engage in the contact and either communicated this in some way or was intimidated, forced by someone, or was incapacitated.⁸⁵ The results of the survey showed that the percentage of undergraduate students who experienced unwanted sexual intercourse as the result of force, threat, or intoxication was 4%.⁸⁶

A more recent survey by the Washington Post found that 5% of men and 20% of women claimed to have been sexually assaulted in college based upon the following definition of sexual assault: "forced touching of a sexual nature, oral sex, vaginal sexual intercourse, anal sex and sexual penetration with a finger or

83. See *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014); *Doe v. Univ. of Mass.-Amherst*, No. CV 14-30143-MGM, 2015 WL 4306521, at *2, *9 (D. Mass. 2015) (unpublished); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 189 (D.R.I. 2016); *Doe v. Wash. & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at *2 (W.D. Va. Aug. 5, 2015) (unpublished); *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at *5 (Cal. Super. 2015).

84. See UNIV. OF N.H., UNWANTED SEXUAL EXPERIENCE AT UNH: 2012 STUDY AND CHANGES OVER TIME 2, <https://cola.unh.edu/sites/cola.unh.edu/files/departments/Justiceworks/use/84677USERreport.pdf>. (Figures 1, and 3A.)

85. *Id.*

86. See *id.* at Figure 3A.

object.”⁸⁷ Once again, according to this definition, forced touching of a sexual nature is amorphous, which could arguably include such actions as attempted kissing, which leads to inflated estimates regarding the prevalence of sexual assault on college campuses.⁸⁸ President Obama referenced the 1 in 5 figure to justify heightened oversight, but this request was based upon a 2007 study which surveyed students at only two universities.⁸⁹ In 2014, the Obama administration announced a task force to protect students from sexual assault where he directed the heads of multiple government agencies to devise a plan to ensure that institutions are fully complying with their legal obligations and to maximize the Federal Government’s role in combating campus sexual assaults.⁹⁰

CNN publicized a study from the American Association of Universities (AAU) and reported that 23% of women report sexual assault in college.⁹¹ The survey received over 150,000 responses from students attending, or who had attended, 27 universities, seven of which were from the Ivy League.⁹² The AAU report concluded that 23% of women experienced some form of unwanted sexual contact, a different term than that reported by CNN.⁹³ An

87. Nick Anderson & Scott Clement, *College Sexual Assault: 1 in 5 College Women Say They Were Violated*, THE WASHINGTON POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/> (this article examines the results of a Post-Kaiser Family Foundation poll which included responses from over 1,000 women attending more than 500 colleges and universities in every state in the country).

88. See Gersen & Suk, *supra* note 80, at 892–93.

89. See Christopher P. Krebs et al., *The Campus Sexual Assault Study: Final Report*, NAT’L INST. OF JUSTICE 3-1 (Oct. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

90. Memorandum from President Obama Establishing a White House Task Force to Protect Students from Sexual Assault, THE WHITE HOUSE (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>.

91. Kelly Wallace, *23% of Women Report Sexual Assault in College, study finds*, CNN (Sept. 23, 2015), <http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey/>; see also Cantor et al., *infra* note 94, at xv (“The estimate from the [MIT] study for the prevalence of sexual contact by force and incapacitation for undergraduate females was 17 percent. The comparable estimate from AAU is 23.1 percent, which is significantly higher.”)

92. Wallace, *supra* note 91.

93. *Id.*

examination of the survey instrument reveals that the definition of sexual misconduct included something as simple as telling someone they look nice,⁹⁴ or telling offensive jokes,⁹⁵ or asking someone to go out to dinner on more than one occasion.⁹⁶ Gersen and Suk raised concerns over the introduction of new terminology within the survey instrument and the use of broad definitions. These tactics mold perceptions as to what sexual assault, sexual violence and sexual misconduct are supposed to be which leads to inflated estimates.⁹⁷ The AAU survey asked so many suggestive questions from so many possible perspectives that it took on a evocatory flavor likely leading some respondents to conclude that they must have been victimized at some point.⁹⁸ Survey construction can be manipulated to arrive at pre-conceived outcomes.⁹⁹ Gersen and Suk argue that "these instruments are another part of the sexual education and reform program, altering (not merely measuring) understandings about what sex is ordinary and what sex is misconduct. The surveys push these understandings in a particular direction--toward more expansive definitions of sexual violence."¹⁰⁰

Most recently, in 2016, the Bureau of Justice Statistics (BJS) released the results of the campus climate survey which was designed to collect "school-level data on [the] sexual victimization

94. See David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N OF AM. U. A5-6 (Sept. 21, 2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

95. *Id.* at A5-9.

96. *Id.* at A5-10.

97. Gersen & Suk, *supra* note 80, at 920–21.

98. *Id.* at 922 (The authors note the ability of survey designers to frame the argument and the definitions thereby manipulating some respondents into reaching erroneous conclusions).

99. See Allan Dafoe et al., *Confounding in Survey Experiments: Diagnostics and Solutions* 4–5 (July 23, 2015) (unpublished), <http://www.allandafoe.com/confounding>.

100. Gersen & Suk, *supra* note 80, at 921.

of undergraduate students.”¹⁰¹ This study reported a prevalence rate for sexual assault experienced by undergraduate women at 10.3%.¹⁰² However, the section of the United States Department of Justice website dedicated to protecting students from sexual assault, *Not Alone: Together Against Sexual Assault*, claims that the BJS study found that 21% of undergraduate women who took the survey reported experiencing sexual assault.¹⁰³

Please do not confuse our concern for the misuse of questionable statistics to drive a political agenda with a justification for any form of sexual assault. We simply wish to point out that the statistics being proffered appear to be misrepresentations designed to influence public opinion and garner support for a progressive agenda. In some regards, these misrepresentations could justifiably be characterized as fake news.¹⁰⁴ When government officials use the 20% figure to force colleges and universities to implement new investigatory procedures and lower the standard of proof to be applied in sexual assault investigations, and when news organizations parrot these talking points over and over, we need to understand what that figure represents before we allow the due process rights of the accused to become collateral damage.

IV. THE 2011 DEAR COLLEAGUE LETTER

The catalyst for the reform movement referenced above came in the form of a DCL written by Russlynn Ali in April of 2011.¹⁰⁵ The DCL cited the questionable one in five statistic as justification for unilateral action.¹⁰⁶ It instructed college and university officials

101. CHRISTOPHER KREBS ET AL., U.S. DEP'T OF JUST., BUREAU OF L. STAT., CAMPUS CLIMATE SURVEY VALIDATION STUDY ii (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>.

102. *Id.* at ES-6.

103. *Not Alone: Together Against Sexual Assault*, U.S. DEP'T OF JUST., <https://www.justice.gov/ovw/protecting-students-sexual-assault> (last visited, Apr. 5, 2017).

104. See Tom Basile, *The Real 'Fake News' is the Mainstream Media*, FORBES: OPINION (Dec. 12, 2016), <http://www.forbes.com/sites/thomasbasile/2016/12/12/the-real-fake-news-is-the-mainstream-media/#26eb96a46a5b>.

105. DCL, *supra* note 9.

106. See *id.* at 2.

to take “immediate and effective steps to end sexual harassment and sexual violence[,]”¹⁰⁷ a standard that probably cannot be realized. When school officials have actual or constructive notice regarding student-on-student sexual harassment they must take immediate action to eliminate the harassment, prevent its recurrence and address its effects.¹⁰⁸ Under the 2011 DCL, the non-discrimination policies and grievance procedures must be published,¹⁰⁹ and employees must be trained how to identify and report sexual harassment.¹¹⁰ Schools must designate at least one employee to coordinate its responsibilities under Title IX¹¹¹ to ensure prompt and equitable relief for the complainant.¹¹² Possible victims who file complaints should be protected from retaliation by the accused or his/her associates.¹¹³

107. *Id.*

108. See U.S. DEPT. OF ED. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 12–13 (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

109. DCL, *supra* note 9, at 4. “The notice must state that inquiries concerning the application of Title IX may be referred to the recipient’s Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient’s designated Title IX coordinator. The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school’s services and policies.” *Id.* at 6–7.

110. *Id.* at 4. Funding recipients should also “instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents.” *Id.* at 7.

111. *Id.* at 5. The coordinator’s responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems . . . [and] should be available to meet with students as needed. . . . Title IX coordinators should not have other job responsibilities that may create a conflict of interest. *Id.* at 7.

112. DCL, *supra* note 9, at 8.

113. *Id.* at 15.

The DCL has been widely criticized.¹¹⁴ First, officials in the Department of Education did not follow notice-and-comment rulemaking procedural requirements.¹¹⁵ Second, they unilaterally changed the standard of proof to a preponderance of the evidence standard when investigating and adjudicating allegations of sexual assault.¹¹⁶ Prior to the 2011 DCL, most schools applied the “clear and convincing” standard in disciplinary proceedings.¹¹⁷ This is a higher standard of proof than the “preponderance of the evidence,” or “more likely than not,” standard.¹¹⁸ According to Schwartz and Seaman:

The standard of proof thus attempts to balance the risk between . . . Type I errors (i.e., false positives), such as an erroneous finding of liability in a civil case or the conviction of an innocent person, and Type II errors (i.e., false negatives), such as the denial of a meritorious claim in a civil case or an erroneous acquittal of a criminal defendant.¹¹⁹

In cases of criminal prosecution, where the stakes are high, the beyond a reasonable doubt standard is used because it represents the highest burden of proof where prosecutors must prove every

114. See Christina Hoff Sommers, *In Making Campuses Safe for Women, a Tragedy of Justice for Men*, THE CHRONICLE OF HIGHER EDUCATION (June 5, 2011), <http://www.chronicle.com/article/In-Making-Campuses-Safe-for/127766/>; Tovia Smith, *Push Grows for a ‘Scarlet Letter’ on Transcripts of Campus Sexual Offenders*, NPR (May 11, 2016), <http://www.npr.org/2016/05/11/477656378/push-grows-for-a-scarlet-letter-on-transcripts-of-campus-sexual-offenders>.

115. E.g., Jake New, *Guidance or Rule Making?*, INSIDE HIGHER ED (Jan. 7, 2016), <https://www.insidehighered.com/news/2016/01/07/senators-challenge-legality-us-guidance-campus-sexual-assault>.

116. DCL, *supra* note 9, at 10–11.

117. See Djuna Perkins, *Behind the Headlines: An Insider’s Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults*, BOSTON BAR JOURNAL (July 8, 2015), <https://bostonbarjournal.com/2015/07/08/behind-the-headlines-an-insiders-guide-to-title-ix-and-the-student-discipline-process-for-campus-sexual-assaults/>.

118. *Id.*

119. David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J. LAW & TECH. 429, 435 (2013).

element of the charge beyond a reasonable doubt.¹²⁰ Yet, even under the highest standard of proof, thousands of innocent people every year are convicted of crimes they did not commit.¹²¹ Civil cases typically use one of two standards.¹²² The clear and convincing evidence standard is more of an intermediate standard used when particularly important civil issues are at stake.¹²³ For example, the Supreme Court ruled that a higher standard is needed for involuntary commitment for psychiatric treatment where one's reputation is at stake.¹²⁴

The preponderance of the evidence standard represents the lowest standard of proof where the fact finder only has to believe that there is a 50.1% chance that the allegations are true.¹²⁵ While the use of the preponderance of the evidence standard brings sexual assault investigations under Title IX into alignment with the investigative standard used in Title VII complaints,¹²⁶ such an approach is going to make it much easier for colleges to summarily remove accused students, mostly males, from campus without

120. See *Criminal Cases*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases>. See also *In re Winship*, 397 U.S. 358, 364 (1970). See also *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt).

121. See INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited April 5, 2017) (“We will never know for sure, but the few studies that have been done estimate that between 2.3% and 5% of all prisoners in the U.S. are innocent (for context, if just 1% of all prisoners are innocent, that would mean that more than 20,000 innocent people are in prison).” *Are the innocents in US prison a single digit percentage?*, SKEPTICS STACK EXCHANGE (Dec. 23, 2013), <https://skeptics.stackexchange.com/questions/18759/are-the-innocents-in-us-prison-a-single-digit-percentage>).

122. See Schwartz & Seaman, *supra* note 119.

123. See *Addington v. Texas*, 441 U.S. 418, 424 (1979) (suggesting that the preponderance of the evidence standard should be applied in civil actions unless particularly important individual interests or rights are at stake).

124. *Id.*

125. See Jake New, *The Wrong Standard*, INSIDE HIGHER ED (Nov. 6, 2014), <https://www.insidehighered.com/news/2014/11/06/princeton-title-ix-agreement-higher-standard-proof-sexual-assault-cases-last-legs> (New describes the preponderance of the evidence standard as requiring a 50.1% chance).

126. DCL, *supra* note 9, at 10.

providing due process.¹²⁷ Further, when the potential outcome is an expulsion from school, along with a transcript which labels that student as a sexual predator,¹²⁸ the stakes are not *de minimis*.

With these lower standards in place, Christina Sommers wrote “campus disciplinary committees, once relatively weak and feckless, will be transformed into powerful instruments of gender justice.”¹²⁹ Sommers also expressed concern that college disciplinary committees may be well-suited to determine complaints about academic integrity, but ill-equipped to investigate and adjudicate felonies.¹³⁰ Sommers cited Hans Bader, a former lawyer for the Department of Education, who noted that “nothing in Title IX justifies taking away an accused person's right to a firm presumption of innocence, requiring clear and convincing evidence.”¹³¹ He describes the actions of Ali as “legislating through administrative fiat, in a way that is arbitrary and capricious.”¹³² Despite the fact that the 2011 DCL and its follow up in 2014¹³³ are not considered binding law, colleges and universities risk loss of federal funding and lengthy, punitive OCR investigations if they do not comply.¹³⁴

Ali argues that a single instance of rape is sufficiently severe to produce a hostile environment under Title IX and the authors agree, but many of the cases examined in this paper involved far less culpable behavior than rape, incapacitation rape, or the use of any threats, force or coercion.¹³⁵ In the opinion of the authors, to classify a shunned kiss or a regrettable sexual experience as a

127. Sommers, *supra* note 114.

128. See Smith, *supra* note 114.

129. Sommers, *supra* note 114, at ¶ 4127.

130. *Id.*

131. *Id.* at ¶ 6.

132. *Id.* at ¶ 6.

133. U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

134. DCL, *supra* note 9, at 16.

135. *Id.* at 3.

sexual assault is overly broad and universities are sweeping up far too many innocent students in their efforts to comply with the suggestions included in the 2011 DCL.

V. THE RESPONSE OF COLLEGES AND UNIVERSITIES

In our opinion, some colleges and universities responded to the 2011 DCL out of fear with haste and uncertainty, an ill-advised combination, and in too many cases, the concept of due process became a secondary consideration. Overly broad and vague disciplinary policies were initiated that incorporated the preponderance of the evidence standard and the additional “suggestions” included in the 2011 DCL.¹³⁶ Harvard for example “doubled its staff for its Office of Sexual Assault and Prevention, expanded orientation and training on sexual assault and created an office charged with investigating reports of misconduct.”¹³⁷ These revisions gave school officials the authority to make substantial changes to the academic and living arrangements of the accused upon receipt of any complaint,¹³⁸ precluded any efforts at mediation even on a voluntary basis,¹³⁹ and mandated that schools must also investigate allegations of sexual assault that occur off campus.¹⁴⁰ Students found themselves removed from dormitories, and campus and forced into online programs without any findings of guilt.¹⁴¹ In case after case, the accused has been presumed guilty and forced to protect his name and reputation against biased tribunals. As of March 2017, Title IX for All has tracked over 170 lawsuits since 1992 where the accused have alleged that school officials violated their due process rights, their

136. *See, e.g.*, Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 577 (D. Mass. 2016); Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015).

137. Wallace, *supra* note 91.

138. DCL, *supra* note 9, at 15–16.

139. *Id.* at 8.

140. *Id.* at 4.

141. *See, e.g.*, Doe v. Brown Univ., 166 F. Supp. 3d. 177, 180, 182 (D.R.I. 2016).

rights under Title IX,¹⁴² and in some cases, their rights arising under their contract with the university.¹⁴³

For example, the University of Alaska, Fairbanks refused to confer a bachelor's degree in petroleum engineering to a student who was accused of sexual assault, despite the fact that he was acquitted of sexual assault charges.¹⁴⁴ As of late July 2016, the University had taken 15 months to investigate the allegation, but had yet to even speak with the accused.¹⁴⁵ The investigation was initiated just one month prior to graduation and the Title IX coordinator reportedly said: "[t]he alleged perp graduates in three weeks, we need to get the administrative investigation concluded so we can make a preponderance call and expel prior to graduation."¹⁴⁶ So much for fairness, objectivity and equity.

The University of Southern California (USC) found a male student responsible for sexual assault, suspended him for two years and did not allow him to make any progress toward degree completion because he did not prevent two other males from slapping the complainant, Jane, on the buttocks and touching her during a group sexual encounter involving multiple students.¹⁴⁷ Earlier on the evening of the alleged sexual assault, Jane had consensual sex with the accused while performing fellatio on at least one of his friends.¹⁴⁸ During the second sexual encounter, which, according to John, was instigated by Jane¹⁴⁹ an hour later, Jane never said no, or to stop, but began to cry after some of the males in the orgy began to make degrading remarks and were

142. See *Due Process Lawsuits Database*, *supra* note 13.

143. See *Hemington v. Ariz. Bd. of Regents, et al.*, No. CV-11-00058-TUC-FRZ (D. Ariz. July 1, 2015); See also *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016).

144. Jerzy Shedlock, *Former UAF Hockey player acquitted of rape says the university won't give him his degree*, ADN.COM (July 24, 2016), <http://www.adn.com/alaska-news/crime-courts/2016/07/24/former-uaf-hockey-player-acquitted-of-rape-says-the-university-wont-give-him-his-degree/>.

145. *Id.*

146. *Id.*

147. *Doe v. Univ. of S. Cal.*, 200 Cal. Rptr. 3d 851, 855 (2016).

148. *Id.* at 856–57.

149. *Id.* at 861.

getting a little too rough.¹⁵⁰ As soon as the accused saw Jane crying, he and his two friends stopped, got dressed and left.¹⁵¹ Nine months later, the accused received a letter from USC informing him that he had been accused of violating eleven different sections of the student code of conduct.¹⁵² The court ruled that USC failed to provide the accused fair notice of the factual basis for the charges against him or an adequate hearing; and that there was insufficient evidence to support the university's findings.¹⁵³ The court refused to hold the accused responsible for the actions of other participants and held that his actions were not in violation of any section of the USC student code of conduct.¹⁵⁴

These are just two examples of the frightening way school officials at some universities are dealing with sexual assault complaints. Instead of sweeping them under the rug by putting undue pressure on the complainant, they are sweeping them under the rug by ignoring the rights of the accused. Like most other things in life, the proper approach is a moderated position between two extremes where school officials conduct investigations that are both prompt and thorough, and based upon the specific factual circumstances. If, as the result of a fair and impartial process, there is clear and convincing evidence that a sexual assault was committed, then the accused should be punished accordingly, but only after a fair and impartial hearing.

VI. TITLE IX COMPLAINTS BROUGHT BY THE ACCUSED

The initial wave of post 2011 DCL complaints were brought under Title IX of the Educational Amendments of 1972,¹⁵⁵ and its

150. *Id.* at 857.

151. *Id.*

152. *Id.* at 858.

153. *Id.* at 855.

154. *Univ. of S. Cal.*, 200 Cal. Rptr. 3d at 877.

155. *See* 20 U.S.C. § 1681 (2012).

implementing regulations¹⁵⁶ which prohibit sexual discrimination in all programs receiving federal financial assistance. One interesting side note: as of 2014, only three, out of all the colleges and universities in the country, do not accept federal funds, Hillsdale College in Michigan, Grove City College in Pennsylvania and Patrick Henry College in Virginia.¹⁵⁷ In most cases where the plaintiff is alleging Title IX violations, courts follow a framework developed in *Yusuf v. Vassar College* which articulated two theories of Title IX liability: erroneous outcome and selective enforcement.¹⁵⁸ It appears that most of the post 2011 DCL Title IX complaints, where the accused claimed gender discrimination by school officials, were unsuccessful under both theories of recovery due to the fact that the plaintiffs were unable to show that the actions of school officials were motivated by the gender of the accused.¹⁵⁹ For example, in *Yu v. Vassar College* the federal court for the Southern District of New York held that their role was limited to determining whether gender bias was a motivating factor.¹⁶⁰ The plaintiff, Peter Yu, was unable to establish a genuine issue of fact as to whether gender bias was a motivating factor in Vassar College's decision and the court granted summary judgment.¹⁶¹

A federal district court in Florida similarly dismissed a male student's Title IX claim by noting that the plaintiff was unable to identify a female, or other person outside his protected class, who was in a similar position yet treated more favorably.¹⁶² In light of the fact that well over 90% of those accused of sexual assault are

156. See generally 34 C.F.R. § 106 (2016).

157. Katie Jo Baumgardner, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1814 n.3 (2014).

158. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714–15 (2d Cir. 1994).

159. See *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015).

160. *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 485 (S.D.N.Y. 2015).

161. *Id.*

162. *Doe v. Univ. of South Fla. Bd. of Trs.*, 8:15-cv-682-T-30EAJ, 2015 WL 3453753, at *4 (M.D. Fla. May 29, 2015).

male,¹⁶³ it can be difficult to find examples which can be used as evidence of gender bias. In July of 2016, the federal court for the Central District of California dismissed a student's complaint against the University of California Santa Barbara (UCSB) because the court noted that even if the plaintiff was able to show an erroneous outcome, he was unable to show that it was the result of gender bias.¹⁶⁴ In the UCSB case, the alleged victim bragged about prior sexual escapades with multiple men, was an active participant and even laughed and joked about the sexual experience the following morning.¹⁶⁵ The alleged victim was also no longer a student at the UCSB when the alleged sexual assault took place yet school officials took it upon themselves to discipline the perpetrator.¹⁶⁶ A § 1983 due process claim was also dismissed as the court was unclear as to whether the complaint named the Assistant Dean of Students, Suzanne Perkin, in her individual or official capacity.¹⁶⁷

In 2011, a male student accused of sexual assault brought claims against Holy Cross for violations of Title IX, breach of contract and breach of covenant of good faith.¹⁶⁸ The U.S. District Court in Massachusetts awarded summary judgment to the defendant on all counts because the plaintiff did not plead any facts indicating any form of gender bias in the way Holy Cross investigated allegations of sexual assault.¹⁶⁹ In fact, the hearing, as described by the court, appears to have been prompt and equitable

163. Robin Hattersley Gray, *Sexual Assault Statistics*, CAMPUS SAFETY MAG. (Mar. 5, 2012), <http://www.campus-safety-magazine.com/article/Sexual-Assault-Statistics-and-Myths>.

164. *Doe v. Regents of the Univ. of Cal.*, 2:15-cv-02478-SVW-JEM, 2016 WL 5515711, at *4–5 (C.D. Cal. 2016); See also William A. Jacobson, *Male on leave of absence contests discipline for off-campus conduct with former student*, LEGAL INSURRECTION (Apr. 7, 2015), <http://legalinsurrection.com/2015/04/male-on-leave-of-absence-contests-discipline-for-off-campus-conduct-with-former-student/>.

165. *Regents of the Univ. of Cal.*, 2016 WL 5515711 at *1.

166. *Id.* at *2.

167. *Id.* at *6.

168. *Bleiler v. Coll. of Holy Cross*, 11-11541-DJC, 2013 WL 4714340, *1 (D. Mass. 2013).

169. *Id.*

and may serve as one example of how sexual assault investigations should be conducted.¹⁷⁰

In *Marshall v. Ohio University*, the plaintiff was accused of sexual harassment after he continued to send text messages asking a female to become involved in a romantic relationship despite the fact that she repeatedly declined his invitations.¹⁷¹ The complainant argued that the unwanted messages disrupted her educational environment.¹⁷² The court denied the plaintiff's motion for reinstatement and dismissed his Title IX erroneous outcome, selective enforcement and deliberate indifference claims.¹⁷³ The court cited *Yusuf* and noted that the plaintiff was unable to allege particular "facts sufficient to cast doubts about the accuracy of the outcome of the disciplinary hearing" as well as "a causal connection between the flawed outcome and gender bias."¹⁷⁴ Despite irregularities in the way the investigation was conducted, and what the plaintiff considered to be an unduly harsh penalty, there was no doubt as to the accuracy of the outcome of the investigation.¹⁷⁵ Under the selective enforcement claim, the plaintiff alleged that in 2014, 40% of the student body was male, but that since 2012, 93% of the students investigated for sexual harassment have been male.¹⁷⁶ The court argued that in Title IX cases, it is not enough to demonstrate disparate impact; there must be proof of discriminatory intent, and noted that the plaintiff was unable to show that allegations against female students were

170. *Id.* at *2. ("At the hearing both Bleiler and C.M. made opening statements, were permitted to ask questions of the Board and of each other, were permitted to call witnesses and gave closing statements. Bleiler was permitted to question each witness.").

171. *Marshall v. Ohio University*, 2:15-cv-775, 2015 WL 7254213, at *2-4 (S.D. Ohio 2015).

172. *Id.* at *3.

173. *Id.* at *5-9.

174. *Id.* at *5 (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d. Cir. 1994)).

175. *Id.* at *5-6.

176. *Id.* at *6.

ignored, or that they received more lenient penalties.¹⁷⁷ Therefore, there was no pattern or practice of discriminatory intent.¹⁷⁸

Marshall also brought § 1983 claims alleging procedural and substantive due process violations, but the court found the proceeding to be fundamentally fair.¹⁷⁹ The court ruled that the accused was provided adequate notice, an opportunity to fully respond to the allegations and to participate in the proceedings,¹⁸⁰ and that the actions of officials were not arbitrary or consciously shocking.¹⁸¹ Unfortunately, not all universities conduct their investigations in a similarly equitable manner.

A. Title IX Complaints that Survived Motions to Dismiss

In 2014, the U.S. District Court for the Southern District of Ohio refused to dismiss a Title IX and libel suit against Xavier University where the accused argued that he was made into a scapegoat after several OCR investigations found that the university mishandled previous sexual assault complaints.¹⁸² In what the court described as a close call, it ruled that the accused alleged sufficient facts to support his libel claim in order to survive the defendant's motion to dismiss.¹⁸³ Under the Title IX claim, the accused claimed that school officials reached an erroneous conclusion on the basis of sex and that they were deliberately indifferent to rights of the accused under Title IX.¹⁸⁴ The court, citing *Yusuf*, found that the accused's complaint showed that the

Defendants . . . rushed to judgment, . . . failed to train UCB members, . . . ignored the county Prosecutor, . . . denied

177. *Marshall*, 2015 WL 7254213 at *5.

178. *Id.* at *7–8.

179. *Id.* at *11.

180. *Id.*

181. *Id.* at *10–11.

182. *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 747 (S.D. Ohio 2014).

183. *Id.* at 750.

184. *Id.* at 751.

Plaintiff counsel, and . . . denied Plaintiff witnesses. These actions came against Plaintiff, he contends, because he was a male accused of sexual assault.¹⁸⁵

The alleged victim, who was playing a game of sexual truth or dare which resulted in the removal of all clothing followed by lap dances and a sexual encounter, asked that no charges be filed.¹⁸⁶ The county prosecutor also found no evidence of a sexual assault and encouraged school officials not to pursue charges,¹⁸⁷ but school officials had something to prove to the OCR at the expense of an innocent person.

In *Doe v. Columbia University*, the federal court for the Southern District of New York dismissed the accused student's complaint because he argued legal conclusions and not facts, and as such, was unable to state a plausible erroneous outcome claim under Title IX.¹⁸⁸ Of import, the court stated that disparate impact claims are not available under Title IX,¹⁸⁹ but even if they were, the accused would not be able to show that the actions of school officials were motivated by gender.¹⁹⁰ However, on appeal, this decision was vacated by the Second Circuit which held that the plaintiff pled facts and allegations which supported at least a minimal inference of sexual bias on the part of the university and as such the motion to dismiss should have been denied by the district court.¹⁹¹ The court queried how an aggrieved student was supposed to plead facts which show gender bias sufficient to

185. *Id.*

186. *Id.* at 747–48.

187. *See id.* at 750. (The court takes note of the fact that the university was being investigated by the OCR for two other sexual assault investigations at the time they made the decision to expel Wells.)

188. *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015).

189. *Id.* at 367; *cf. Prescott v. Higgins*, 538 F.3d 32, 41 (1st Cir. 2008) (“Disparate impact claims involve . . . practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified” on a neutral basis.); *Cohen v. Brown Univ.*, 101 F.3d 155, 171 (1st Cir. 1996) (“Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination.”).

190. *Columbia Univ.*, 101 F. Supp. 3d at 371.

191. *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016).

survive a motion to dismiss if the defendant has all the records and discovery has not commenced.¹⁹²

The federal district court in Massachusetts ruled in favor of the University of Massachusetts-Amherst in a case where the victim pursued the plaintiff, agreed to have sex with him, and called her roommate to let her know she was bringing home a guy, but that she was not that drunk anymore.¹⁹³ With her consent, the plaintiff stopped by his room to get a condom and then met the complainant at her dorm room where the two engaged in consensual sex.¹⁹⁴ The next morning she claimed that she did not remember what happened. She then filed a complaint which did not mention harassment, abuse or sexual assault, yet within five days, the accused was “charged with four violations of the” student code of conduct including sexual assault and taking advantage of an intoxicated, defenseless female. Subsequently, he was removed from campus.¹⁹⁵ The district court in this case relied heavily on the holding of the district court in *Doe v. Columbia*.¹⁹⁶ The parties filed an appeal pending settlement efforts which produced an agreement because the case was dismissed based upon a joint motion.¹⁹⁷

In *Doe v. Brown University*, the federal district court in Rhode Island denied Brown’s motion to dismiss noting that “[r]equiring that a male student conclusively demonstrate, at the pleading stage, with statistical evidence and/or data analysis that female students accused of sexual assault were treated differently, is both practically impossible and inconsistent with the standard used in

192. *Id.* at 54–55.

193. *Doe v. Univ. of Mass.-Amherst*, No. CV 14-30143-MGM, 2015 WL 4306521, at *2, *9 (D. Mass. 2015) (unpublished).

194. *Id.* at *2.

195. *Id.*

196. *Id.* at *8–9.

197. *See Doe v. Univ. of Mass.-Amherst*, No. CV 14-30143-MGM, 2015 WL 4306521 (D. Mass. 2015), *appeal docketed*, No. 15-1856 (1st Cir. July 28, 2015).

other discrimination contexts.”¹⁹⁸ According to Doe’s complaint, “[a]fter a party on Brown’s campus . . . Jane Doe . . . went back to John’s room and they engaged in kissing and sexual touching.”¹⁹⁹ “According to John, ‘[t]o confirm Jane Doe’s consent, John Doe asked her ‘Do you like this?’ Jane Doe nodded and responded, ‘Yes,’ guiding his hand with hers and asking him to rub her a certain way. When John Doe complied, Jane Doe moaned in pleasure, telling John Doe she reached orgasm.”²⁰⁰ “When Jane left that evening, John was ‘unaware that Jane Doe considered herself the victim of sexual misconduct.’”²⁰¹

“That evening, John received a phone call from Dean Castillo” who “informed him that Brown had issued a no-contact order . . . with respect to Jane based on an allegation of sexual misconduct.”²⁰² “Dean Castillo also advised John that he could not leave his dorm room until he met with her and Maria E. Suarez, the Associate Dean and Director of Student Support Services, the next morning.”²⁰³ “At that meeting, Deans Castillo and Suarez informed John that Jane had made a ‘serious allegation of sexual misconduct’ supported by ‘evidence of bruising.’”²⁰⁴ “They then informed him that Margaret Klawunn, the University’s Vice President of Student Affairs, who was not present at the meeting, had ordered his immediate removal from campus for the safety of the community, and that they would help him book a flight back home.”²⁰⁵ His guilt had been determined and his consequences decided before he was even contacted.

In *Doe v. Washington and Lee University*, the accused argued that the alleged sexual assault was the result of a rendezvous at a party which ended in consensual sex, where the alleged victim seduced the accused by stripping in front of him, performing oral

198. 166 F. Supp. 3d 177, 189 (D.R.I. 2016).

199. *Id.* at 181.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Brown Univ.*, 166 F. Supp. 3d at 181.

205. *Id.* at 181–82.

sex, and was on top during intercourse.²⁰⁶ The two continued to date and had sex at least once more over the subsequent 6 weeks.²⁰⁷ Then, the alleged victim observed the accused kissing another girl at a fraternity party and the relationship ended.²⁰⁸ Later that summer, after a presentation by the school's Title IX coordinator, who asserted that regret equaled rape, and after doing an internship for a women's clinic that helps victims of sexual assault, the consensual, voluntary acts became sexual assaults.²⁰⁹

According to the plaintiff, during the investigation, strong arm tactics were used by school officials where the accused only had a six hour notice to attend a meeting, the purpose of which was not disclosed.²¹⁰ At the emergency, top secret meeting, the accused repeatedly asked to be represented by counsel and when he refused to answer any further questions, the investigator simply said, that the report would be completed without his side of the story.²¹¹ A therapist testified that the alleged victim had feelings for the accused and that she enjoyed having sex with him, but that these ideas were quashed by the therapist who argued that these acts could still be considered sexual assaults.²¹² In one case at Washington and Lee University, a former relationship which ended due to infidelity made all previous consensual sexual acts sexual assaults.²¹³

School officials did not follow their own procedures as evidenced by the fact that the plaintiff was not provided 48 hours

206. No. 6:14-CV-00052, 2015 WL 4647996, at *2 (W.D. Va. Aug. 5, 2015) (unpublished).

207. *Id.*

208. *See id.*

209. *Id.* at *3.

210. *See id.*

211. *Id.* at *4.

212. *Washington & Lee Univ.*, 2015 WL 4647996, at *5.

213. *Id.*

to contest members of the hearing board.²¹⁴ He was forced to object immediately.²¹⁵ In addition, half of the plaintiff's witnesses were never interviewed as the investigators had all they needed for expulsion.²¹⁶ The list of questions submitted by the plaintiff to be asked of the alleged victim were edited and/or deleted all together.²¹⁷ Inconsistencies in the complainant's initial statements and her testimony at the hearing were ignored.²¹⁸ The U.S. District Court, Lynchburg Division, noted that in light of "these allegations, as well as Plaintiff's charge that W & L was under pressure from the government to convict male students of sexual assault, a reasonable fact finder could plausibly determine that Plaintiff was wrongly found responsible for sexual misconduct and that this erroneous finding was motivated by gender bias."²¹⁹

In *Doe v. Salisbury University* the accused/plaintiffs brought an action against university officials and their female accuser for civil conspiracy, intentional infliction of emotional distress, defamation, negligence and for violations of Title IX.²²⁰ The federal district court in Maryland denied the university's motion to dismiss the negligence and Title IX claims noting that school officials may have been negligent, not as the result of the actions of third parties, but in their direct and personal treatment of the accused/plaintiffs by their failure to adhere to university policies and procedures,²²¹ and that the outcome of the school's investigation may be erroneous and motivated by gender bias.²²² To state a claim for erroneous outcome under Title IX, "a plaintiff must allege (1) 'a procedurally or otherwise flawed proceeding'; (2) 'that has led to an adverse and erroneous outcome'; and (3) 'particular circumstances suggesting that gender bias was a

214. *Id.* at *6.

215. *See generally id.*

216. *Id.* at *4.

217. *Id.* at *6.

218. *Id.* at *7.

219. *Washington & Lee Univ.*, 2015 WL 4647996, at *10.

220. 123 F. Supp. 3d 748, 754 (D. Md. 2015).

221. *Id.* at 763.

222. *Id.* at 765.

motivating factor behind the erroneous finding.”²²³ To plead gender discrimination, the plaintiff could use statements made by members of the disciplinary hearing committee or other relevant university employees,²²⁴ or demonstrate a pattern of decision making indicative of gender bias.²²⁵ “Plaintiff’s alleged numerous procedural defects,” including: not allowing plaintiffs to review witness statements; withholding evidence to be presented at the hearing; and denial of legal representation, which the court felt led to an erroneous outcome.²²⁶ The third factor was narrowly satisfied by showing that evidence, which could contain specific factual allegations, was within the dominion and control of the defendant.²²⁷

VII. ADDITIONAL CASES DEMONSTRATING A RUSH TO JUDGMENT

Several commentators have called for additional due process protections for the accused in sexual assault investigations.²²⁸ Due process serves as an important prophylactic between freedom and tyranny. It provides the best-known avenue by which an accused can save their life, liberty, property, and reputation from false accusations and lies. Due process is not a perfect mechanism for seeking truth and justice, but whether a person is innocent or guilty should not be determined by the media, or by the court of public opinion, or by potentially biased school administrators who are trying to avoid negative publicity and the ire of the OCR. It should be administered in front of an impartial tribunal where the accused has the right to confront and cross examine witnesses and question the veracity of investigative reports. At a minimum, due process requires enough notice and information in order to build a legitimate defense. We ignore it at our own peril, for if we fail to

223. *Id.* at 766.

224. *Id.*

225. *Id.*

226. *Salisbury Univ.*, 123 F.Supp.3d at 766.

227. *Id.* at 768.

228. *See, e.g., Safko, supra* note 57.

speak up when a stranger is falsely accused, then who will speak up for us under similar circumstances?

After *Goss v. Lopez*, it is undeniable that before a student can be expelled or suspended, they must be provided due process.²²⁹ Even the infamous 2011 DCL mentions that the accused must be provided due process and conflicts of interest should be disclosed, but this reminder is largely a side note.²³⁰ “Due process has been described as a flexible concept which requires the balancing of three factors: a) the private interests that will be affected by the [official] private action;” b) the risk of erroneous deprivation under the current procedural policies and practices and the likely value of any additional safeguards; and c) the additional fiscal and administrative burdens that additional procedural safeguards would require.²³¹

As previously discussed, most of the early cases brought by the accused under the hostile environment created by Russlynn Ali’s 2011 DCL argued that the actions of school officials were motivated by gender and therefore in violation of Title IX but many did not survive motions to dismiss. Then, in 2015, a California state court ruled that the University of California San Diego abused its discretion.²³² School officials ignored exculpatory text messages that could be viewed by the reasonable observer as evidence of consent and of an ongoing relationship.²³³ School officials refused to allow the accused to confront and cross examine his complainants by unilaterally limiting the questions asked during the hearing.²³⁴ In making their decision to expel, school officials relied on the conclusions of an investigative report which was not presented as evidence at the hearing and which the accused had

229. *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

230. DCL, *supra* note 9, at 12. (“a school’s investigation and hearing processes cannot be equitable unless they are impartial[,] [t]herefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.”).

231. *See Matthews v. Eldridge*, 424 U.S. 319, 321 (1976).

232. *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL., 2015 WL 4394597, at *5 (Cal. Super. July 10, 2015).

233. *Id.* at *2.

234. *Id.*

no opportunity to refute.²³⁵ Additionally, the accused was not given the names of the 14 witnesses used to complete the investigative report nor was he given the “accuser’s” reports.²³⁶ The court ruled that the hearing committee abused its discretion and stated that “[d]ue process requires that a hearing. . . be a real one, not a sham or a pretense.”²³⁷

The court also ruled that school officials did not have enough evidence to support a finding of non-consensual sexual activity.²³⁸

The only evidence presented in any meaningful way at the hearing was the testimony of Ms. Roe [who] stated that petitioner kept “*trying* to finger [her] and touch [her] down there.”²³⁹ Also, Ms. Roe did not object to sexual contact per se, and only explained that it was not pleasurable for her at that time.²⁴⁰

The alleged victim was so traumatized “that she voluntarily continued consensual sexual activity with Mr. Doe later that very same day.”²⁴¹ Finally, the court stated “the incident on the morning of February 1 cannot be viewed in a vacuum. When viewed as part of the entire narrative, the sequence of events does not demonstrate non-consensual behavior. What the evidence *does* show is Ms. Roe's personal regret for engaging in sexual activity beyond her boundaries.”²⁴² “Jane stated that she physically wanted to have sex with Ryan but mentally wouldn't.” The record reflects this ambivalence on the part of Ms. Roe. But Ms. Roe's own mental reservations alone cannot be imputed to

235. *Id.*

236. *Id.* at *3.

237. *Id.* (quoting *Ciechon v. City of Chicago*, 686 F.2d 511, 517 (7th Cir. 1982)).

238. *Regents of the Univ. of Cal. San Diego*, 2015 WL 4394597, at *4.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

petitioner, particularly if she is indicating physically she wants to have sex.”²⁴³

Former Secretary of Homeland Security,²⁴⁴ Janet Napolitano, who currently serves as the President of the University of California System, stated that schools are now expected to “combat sexual violence, sexual assault, and sexual harassment on [college] campuses; navigate the legal and regulatory challenges inherent to doing so; and, more broadly, foster a culture of respect, inclusion, and civility.”²⁴⁵ What she left out was all while protecting the rights of the accused. The University of California System, which is composed of 10 schools serving almost 250,000 students, empowers Title IX personnel with the authority to impose punitive, interim suspensions without any type of hearing based solely upon an allegation.²⁴⁶ For example, at the University of California Davis, the accused was suspended from the university, evicted from university housing, denied course credit and prevented from taking a final exam just an hour before it was scheduled.²⁴⁷ He was told to stay off campus and to leave the city of Davis all without a hearing.²⁴⁸ In granting the motion to stay the interim suspension,

243. *Id.*

244. Correction: In a draft version of this paper presented at the Education Law Association in 2016, the authors incorrectly identified Janet Napolitano as the Former Secretary of Defense. Ms. Napolitano has never served as the Secretary of Defense. In addition to serving as the Secretary of Homeland Security, Ms. Napolitano has served as the Governor and Attorney General of Arizona. Of the 10 schools comprising the UC system, four (UC Los Angeles, UC Davis, UC Santa Barbara, UC Santa Cruz) have been sued by students who claim that their rights were violated by school officials during sexual assault investigations.

245. See Janet Napolitano, “*Only Yes Means Yes*”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL’Y REV. 387, 388–89 (2015).

246. See generally Transcript of Hearing, *Doe v. Dudley*, No. PT 15-1253 (Cal. Super. Ct., 2015), <http://boysmeneducation.com/wp-content/uploads/2016/04/Hearing-Transcript-University-of-California-Davis-2015-9-22.pdf>.

247. *Id.* at 9–10.

248. *Id.* at 9. The university tried to assert that one meeting where the accused was informed of the accusations and the consequences served as an impartial and fair hearing which satisfied due process. The university initially told the accused that “if you don’t agree to move out, we’ll impose the interim suspension, and you’ll lose all your rights for -- the spring semester.” So, the student agrees, moves out the week before final exams are set to begin, then, the university comes back and says no, we changed our mind, you will not be allowed to take exams and you will lose all credit for your spring courses, in fact, you are no longer allowed within the city limits. The school does not have this authority. *Id.*

the Superior Court stated that the University “completely dropped the ball”²⁴⁹ and that “due process [had] completely been obliterated.”²⁵⁰ According to the hearing transcript in *Doe v. Dudley*, school officials felt confident that they had plenty of evidence to demonstrate culpability.²⁵¹ If that is the case then hold a prompt, legitimate hearing where shared evidence is presented and examined to determine whether or not a sexual assault had taken place and if so, the severity of the consequences that should be imposed. One meeting with the same person who has already decided that you are guilty does not suffice.

In addition to UC San Diego, Santa Barbara and Davis, the Universities of California Los Angeles, and Santa Cruz have also violated the due process rights of students by imposing automatic interim suspensions based only on an allegation of misconduct.²⁵²

In *Doe v. Rector and Visitors of George Mason University*, the court denied the school’s motion for summary judgment holding that the student was not provided adequate process in violation of the Due Process Clause, thereby depriving the student of his protected liberty interest in his name and reputation.²⁵³ The court noted that the student’s transcript was emblazoned with the notation “non-academic expulsion” which would impact the “plaintiff’s future educational and employment endeavors, which routinely require disclosure of academic transcripts.”²⁵⁴ In *Doe v. Alger*, the court ruled that the accused failed to sufficiently plead that his reputation had been damaged, but did sufficiently plead

249. *Id.* at 23.

250. *Id.* at 24. (The university did not even follow its own procedures. Instead it imposed an interim suspension and expected the accused to prove his innocence. This places the burden on the accused and flips due process on its head.)

251. See Transcript of Hearing at 22, *Doe v. Dudley*, No. PT 15-1253 (Cal. Super. Ct., 2015), <http://boysmeneducation.com/wp-content/uploads/2016/04/Hearing-Transcript-University-of-California-Davis-2015-9-22.pdf>.

252. See generally Due Process Lawsuits Database, *supra* note 13.

253. *Doe v. Rector and Visitors of George Mason Univ.*, 149 F.Supp.3d 602 (E.D. Va. 2016).

254. *Id.* at 614.

that the 5 and 1/2 year suspension implemented as the result of an inadequate process did implicate his property interest in continued enrollment, which was protected by the Due Process Clause.²⁵⁵

Finally, in *Doe v. Colgate University*, the court noted “If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.”²⁵⁶ According to the complaint, the accused was expelled within weeks of graduation based upon anonymous complaints about an incident that occurred three years prior.²⁵⁷ The complaints of the alleged victims were filed approximately three years after the incidents in question,²⁵⁸ and the accused was not informed of the exact nature of the allegations against him for five months during which time the university was building its case.²⁵⁹

VIII. SEXUAL ASSAULT INVESTIGATIONS AT PRIVATE UNIVERSITIES

In most cases, private institutions are not required to comply with the due process protections emanating from the Fifth, Sixth, and Fourteenth Amendments to the US Constitution. However, there are exceptions “(1) when there is either a sufficiently close nexus, or joint action between the [government] and the private party; (2) when the [government] has, through extensive regulation, exercised coercive power over, or provided significant encouragement to, the private actor; or (3) when the function performed by the private party has traditionally been an exclusive public function.”²⁶⁰ Given the threatening language of the 2011 DCL and the number of Title IX investigations being conducted by the OCR against hundreds of colleges and universities, it is more than reasonable to conclude that the government is exercising coercive power over private actors. However, in *Doe v. Washington*

255. *Doe v. Alger*, 175 F.Supp.3d 646, 662 (W.D. Va. 2016).

256. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

257. *John Doe v. Colgate Univ.*, No. 5:15 -CV-1069, 2015 U.S. Dist. LEXIS 118105, at *3 (N.D.N.Y. Sept. 4, 2015).

258. *Id.* at *20.

259. *Id.* at *21.

260. *S.P. v. City of Takoma Park*, 134 F.3d 260, 269 (4th Cir. 1998).

and *Lee University*, the court held that despite the obvious coercive tactics by the Department of Education OCR, since the federal government did not actually participate in the proceedings, the nexus was too remote and action by the university was not compelled.²⁶¹ As a result, the actions of the private university could not be considered to be the actions of the government; hence the protections arising out of the Fifth Amendment's Due Process protection did not apply.²⁶²

In several cases involving private universities, plaintiffs have argued that the failure to follow the procedures described in school disciplinary manuals amounted to a breach of contract.²⁶³ In *John Doe v. Brandeis University*, a scorned homosexual male brought sexual assault allegations against his former boyfriend of almost two years after both became attracted to another male student.²⁶⁴ The acts complained of included looking at the alleged victims' genitalia while they showered together, being kissed while wanting to go back to sleep, and having to decline oral sex on one occasion. All of the aforementioned acts occurred while the two were involved in a consensual, exclusive relationship.²⁶⁵ The day after the complaint was filed, before the accused was even contacted, the Dean of Students decided that the accused would be "banned. . . from his residence, classes, paid campus job, community advisor position, and 'high-ranking student-elected position on a University Board,' and 'sequestered . . . in a campus facility.'"²⁶⁶ The record shows that Brandeis University changed their student handbook after the 2011 DCL was published by

261. *Doe v. Washington and Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996 at *9 (W.D. Va. 2015).

262. *Id.* at *12.

263. *See, e.g., Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 561 (D. Mass. 2016).

264. *Id.* at 570.

265. *Id.*

266. *Id.* at 575.

eliminating several procedural requirements thereby making it easier to punish the accused.²⁶⁷ Clearly, they succeeded.

Most jurisdictions recognize that “[a] student's relationship to his university is based in contract [and] [t]he relevant terms of the contractual relationship . . . typically include language found in the university's student handbook”²⁶⁸ Yet courts seem to approach the relationship between students and private universities with the loose application of contractual principles driven by the concepts of good faith and fair dealings.²⁶⁹ Despite this loose application, the court held that the school breached its contractual obligations by failing to provide the accused with a copy of the special examiner's report and that the process used to determine guilt failed to comply with the concepts of basic procedural fairness.²⁷⁰

In *Doe v. Brown*, the accused's complaint was able to withstand a motion to dismiss by stating a plausible erroneous outcome claim under Title IX against Brown University, along with a claim for breach of contract.²⁷¹ The University's student code of conduct specifically stated that students charged with an offense were “to be assumed not responsible [for] any alleged violations unless she/he is so found through the appropriate student conduct hearing.”²⁷² The court ruled that the actions of school officials, in removing a student from campus based solely on accusations without any type of investigation and in contradiction of specific assurances in the university's code of conduct, was sufficient to state a plausible breach of contract claim under state law.²⁷³

IX. CONCLUSION AND RECOMMENDATIONS

Committing a Title IX violation in the process of investigating a possible Title IX violation is somewhat like a snake eating its own tail. This concern has guided our focus while drafting this

267. *Id.* at 575–80.

268. *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34 (1st Cir. 2007).

269. *Id.* at 35.

270. *Brandeis Univ.*, 177 F. Supp. 3d at 599.

271. *See Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016).

272. *Id.* at 193.

273. *Id.* at 196.

article; that school officials were committing Title IX (and due process) violations in their efforts to comply with the threats from the OCR. In an attempt to address the latest media driven crisis, the OCR acted beyond their authority, and in so doing, drafted an overly broad guidance letter that swept up relatively innocent behavior in the wake of social justice. In affirmation of this belief, in October of 2016, the Department of Education announced that school officials at “Wesley College, in Delaware, violated the gender discrimination law Title IX when it disregarded the due process rights of students accused of sexual misconduct.”²⁷⁴ Like many of the cases described above where the rights of the accused were summarily ignored,

[t]he college never interviewed the four accused students, and administrators never provided the men with a copy of the incident report or the college’s investigative findings. The college imposed an interim suspension ahead of the hearing, banning the students from campus and attending class, while not giving them an opportunity to challenge the suspension.²⁷⁵

As the result of the hostile, punitive environment created by the OCR, and evidenced by a growing number of cases,²⁷⁶ the due process rights of students accused of sexual assault on some college campuses are being violated. Even people in positions of power are calling for the Due Process rights of the accused to be ignored, such as Colorado Congressman Jared Polis, who said, “college students accused of sexual assault should be expelled even if they are innocent.”²⁷⁷ U.S. Senator Kirsten Gillibrand referred to Paul

274. Jake New, *A Title IX Win for Accused Students*, INSIDE HIGHER ED (Oct. 13, 2016), https://www.insidehighered.com/news/2016/10/13/us-says-wesley-college-violated-rights-students-punished-over-sexual-misconduct?utm_source=Inside+Higher+Ed&utm_campaign=09f1ceb4ff-DNU20161013&utm_medium=email&utm_term=0_1fbc04421-09f1ceb4ff-198445241&mc_cid=09f1ceb4ff&mc_eid=66665afe67.

275. *Id.*

276. *Due Process Lawsuits Database*, *supra* note 13.

277. Susan Kruth, *Polis Apologizes for ‘Gaffe’ But Doubles Down on Failed Campus Sexual Assault Policies*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Sept. 16, 2015),

Nungesser as a rapist despite the fact that he was cleared of all sexually related charges.²⁷⁸ This mentality is the antithesis of the concept of due process. Ironically, during the 2016 Presidential Campaign, Democratic Candidate Hillary Clinton said, “[t]o every survivor of sexual assault... You have the right to be heard. You have the right to be believed. We’re with you.”²⁷⁹

Based upon the cases examined in preparation for this article, the authors encourage colleges and universities to consider the following recommendations:

- a) School employees can and must be trained to conduct thorough, fair and equitable investigations for both parties, not just the complainant.
- b) Do not determine guilt before you actually contact the accused.
- c) Provide adequate notice of the charges and complete access to all reports and witness statements.
- d) Allow the accused to be accompanied by counsel at all stages of the proceedings. (Virtually every institution of higher education has legal representation)
- e) Do not prevent the accused from asking questions of the complainant or other witnesses about relevant facts.
- f) Keep the investigatory component separate from the decision-making component of the proceedings.
- g) Place some limitations on the immediate removal of the accused from campus.

1. No contact orders should be in place during the investigation.

<https://www.thefire.org/polis-apologizes-for-gaffe-but-doubles-down-on-failed-campus-sexual-assault-policies/>.

278. Schow, *supra* note 70 at ¶ 2.

279. Kelly Riddell, *‘Enabler’ Hillary Clinton Haunted by Efforts to ‘Destroy’ Husband’s Accusers*, THE WASHINGTON TIMES (Jan. 14, 2016), <http://www.washingtontimes.com/news/2016/jan/14/hillary-clinton-haunted-by-efforts-to-destroy-bill/>; Patrick Howley, *Hillary Clinton: All Rape Accusers Deserve to be Believed*, BREITBART (Nov. 23, 2015), <http://www.breitbart.com/big-government/2015/11/23/hillary-clinton-rape-victims-deserve-believed/>.

2. Changing course schedules and living arrangements should be implemented as necessary to keep the complainant and the accused separated.
3. Some limitations may be considered as to where the accused is allowed to go on campus. The accused may be temporarily prohibited from attending campus events or being in common areas of the campus such as the student union, or the recreation center, but
 - h) Complete succession of educational services or total bans from campus should not be automatically applied upon receipt of a complaint.
 - i) Follow school policy. Do not profess to respect individual rights and then lack the conviction and integrity to live up to self-promoting proclamations.

Sexual Assault is one of the most heinous acts of violence that can be inflicted on another human being, and it is imperative that this discourse acknowledges that every accusation of sexual assault, whether on a college campus or elsewhere, should be investigated with due diligence by the proper authorities. But due diligence does not mean making rash decisions prior to a thorough and equitable investigation. Protecting the rights of the accused is not about protecting the guilty from the consequences of their actions, it is about protecting the innocent from spurious allegations. If, after a fair hearing in front of an impartial tribunal, school officials find clear and convincing evidence that a sexual assault has taken place, then the perpetrator deserves to be punished accordingly. In 2013, Congress reauthorized the Violence Against Women Act which amended the Cleary Act, and at that time, had the opportunity to codify the preponderance of evidence standard into campus judicial proceedings; Congress specifically rejected the use of this lower standard of proof.²⁸⁰ The Cleary Act allows schools to decide “the standard of evidence that will be used during any institutional disciplinary proceeding arising from an

280. 34 C.F.R. § 668.46(k)(1)(ii) (2015).; *See also* Violence Against Women Act, 79 Fed. Reg. 62752 (proposed Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668), <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

allegation of dating violence, domestic violence, sexual assault, or stalking.”²⁸¹

The court in *Doe v. Brandeis* stated our concern with clarity.

Whether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.²⁸²

281. 34 C.F.R. § 668.46(k)(1)(ii) (2015).

282. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).