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## FIGHTING THE RAPE CULTURE WARS THROUGH THE PREPONDERANCE OF THE EVIDENCE STANDARD

Deborah L. Brake\*

### I. INTRODUCTION

The framing of this symposium, campus v. courts, captures the heart of the controversy over the federal government's heightened enforcement pressure on colleges and universities to respond more forcefully to campus sexual assault.<sup>1</sup> Critics of the federal intrusion into campus disciplinary processes have challenged the legitimacy of the federal government's actions and the fairness of campus justice systems for handling matters that the critics argue should be handled by courts, presumably in the criminal justice system.<sup>2</sup> The controversy has generated a pitched debate over the procedural requirements of the regime endorsed by the United States Department of Education's Office for Civil Rights (OCR) in its 2011 guidance document styled as a "Dear Colleague" letter (DCL) to educational institutions.<sup>3</sup> The DCL clarified what the agency expected of educational institutions in their grievance procedures for handling allegations of sexual violence, and notified colleges and universities that the agency will apply these requirements in its administrative enforcement actions.<sup>4</sup>

No issue has been more contentious in the debate over OCR's requirements than the agency's directive to schools to use preponderance of the evidence (POE) as the standard of proof for adjudicating sexual violence allegations.<sup>5</sup> Detractors of the 2011 DCL have decried the unfairness of forcing campuses to brand students as sexual offenders based on a mere preponderance of the evidence, with potential long-term consequences to

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1. After this article was written, Donald J. Trump was elected President of the United States. It is not yet clear what this means for federal Title IX enforcement, but it will likely result in the reversal of many Obama Administration education policies, including its position on the subject of this article, the preponderance of the evidence standard. See Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED. (Nov. 10, 2016), <https://perma.cc/EF9B-2C8S>. Notwithstanding the likelihood of imminent changes to Title IX enforcement, the discussion in this article will remain relevant as universities decide how to handle sexual assault, including what standard of proof to apply, even if the constraint of a federal directive is lifted by the new Administration.

2. See, e.g., Christina Hoff Sommers, *In Making Campuses Safe for Women, a Travesty of Justice for Men*, CHRONICLE OF HIGHER EDUC. (June 5, 2011), <https://perma.cc/63DT-MBFK>.

3. Russlynn Ali, *Dear Colleague: Sexual Violence*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (Apr. 4, 2011), <https://perma.cc/BVL3-WVPF>.

4. *Id.* at 1 n.1.

5. *Id.* at 10–11.

their educational and professional opportunities.<sup>6</sup> Supporters of the DCL defend the use of a civil evidentiary standard for a matter with civil, not criminal, legal consequences.<sup>7</sup> While this is an important debate—and this article sides with the DCL’s supporters—the controversy over the POE standard functions as a stalking horse for larger, even more intractable conflicts in the ongoing culture war over “rape culture” on campus. The actual impact of OCR’s endorsement of the POE standard is disproportionate to the pitched debate it has prompted.<sup>8</sup> This article explores the conflicts over the legitimacy of the federal government’s regulation of campus sexual assault that lurk beneath the controversy around the POE standard.

This article traces the conflict to two fault lines in the rape culture wars: the battle for empathy between the survivors of sexual assault and students wrongly accused of committing it, and concerns about the use of a disciplinary framework in responding to sexual assault in a campus setting. These undercurrents, more than the merits of the POE standard itself, are at the heart of the controversy over the Title IX framework in the 2011 DCL. The heated debate over the specifics of the evidentiary standard boils down to a more fundamental conflict over the legitimacy of any federal regulatory framework for addressing campus sexual violence. This article weighs in on the dispute over the POE standard and attempts to grapple with the stark dichotomies at the root of the conflict.

Part II wades into the culture wars now playing out in the popular media and in academic circles over the extent to which “rape culture” pervades college campuses and the legitimacy of the federal government’s enforcement of Title IX in response to it. The central controversy, fueled by competing narratives between student survivors and students accused of sexual assault, is over whether institutional responses to campus sexual assault have gone too far or not far enough. Stories of survivors re-victimized by their institutions in the aftermath of reporting campus sexual assault have sparked a reenergized student activism which found a receptive audience in the Obama Administration. These stories are increasingly being countered by oppositional narratives from men alleging that they have been unfairly accused and too harshly punished for conduct more akin to mis-

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6. See, e.g., Robert Carle, *Assault by the DOE*, 28 *ACADEMIC QUESTIONS* 11, 12–13 (2015); Stuart Taylor Jr. & K.C. Johnson, *The New Standard for Campus Sexual Assault: Guilty Until Proven Innocent*, *NATIONAL REVIEW* (Dec. 30, 2015), <https://perma.cc/D4YH-R2EN>; Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 *KAN. L. REV.* 915, 954–57 (2016).

7. See, e.g., Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, Comment, 2013 *BYU EDUC. & L.J.* 143 (2013) (defending the preponderance standard against due process objections); Lavinia M. Weizel, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 *B.C. L. REV.* 1613 (2012) (same).

8. See *infra* pp. 120–22.

communication than sexual assault. This clash of narratives now frames the debate over the particulars of the Title IX framework endorsed by OCR and calls into question the legitimacy of the federal government's enforcement efforts.

Part III examines the conflict over the POE standard on its merits. At one level, the POE standard is an unlikely flashpoint in the federal campaign to strengthen college responses to sexual violence. Notwithstanding the emphasis OCR's opponents have placed on the POE standard, the agency's 2011 endorsement of the POE standard largely ratified the status quo. Most educational institutions were already using the POE standard for sexual misconduct cases before OCR weighed in.<sup>9</sup> Moreover, it is not clear how much distance there is, substantively, between the POE standard and its closest competitor, the clear and convincing evidence standard. At a deeper level, however, the POE standard is a predictable and natural focal point for the debate over the federal regulatory framework. Calibrating the governing evidentiary standard requires judgments about the relative stakes and likely probabilities in the contest of credibility between the complainant and the accused. This section defends the POE standard as the only standard that holds in equipoise the competing narratives and stakes of survivors and accused students.

Part IV considers a final controversy fanning the flames of debate over the POE standard: the concern that a disciplinary framework for handling sexual assault allegations results in overly harsh and unfair punishment. A more particularized objection to using campus disciplinary proceedings for campus sexual misconduct is that it institutionalizes and gives effect to the racial bias that plagues student disciplinary systems and the criminal justice system alike. These concerns about excessive and unfair discipline animate much of the critique of the POE standard. This perspective stands in stark contrast to the concerns expressed by survivors and their advocates who contend that campus processes often respond too leniently to students found responsible for sexual assault. This section takes up these competing claims over campus discipline and sketches some preliminary thoughts on whether the current disciplinary framework might be improved by incorporating restorative justice principles to supplement a punishment-based model. The article contends that restorative justice holds promise for breaching the divide over campus discipline and disrupting the social norms that make campus sexual assault so prevalent.

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9. See *infra* Part III(B).

## II. THE NEW RAPE CULTURE WARS

The problem of student sexual assault is hardly new to college campuses.<sup>10</sup> Nor is the much-repeated statistic that one in four or five women will experience actual or attempted sexual assault during their college years a novel finding.<sup>11</sup> The general outline of the legal framework requiring colleges and universities to respond to known allegations of sexual assault is also longstanding, dating back at least fifteen years.<sup>12</sup> What is new is the intensity of the federal enforcement effort and the increasing specificity in the federal agency's iteration of how universities must respond to it.<sup>13</sup> These developments are the result of a passionate student-led social movement to require colleges and universities to address sexual assault more seriously and more sensitively. As much as any other political force, the ramped-up federal enforcement effort is the result of the power of the stories of survivors and their struggles with the institutions that betrayed them.<sup>14</sup>

A. *Survivors Speak*

The stories of college student survivors of sexual assault have reached broad popular audiences thanks to works such as Jon Krakauer's *Missoula* and the CNN documentary *The Hunting Ground*.<sup>15</sup> These stories are impor-

10. See Andi Curcio, *Institutional Failure, Campus Sexual Assault & Danger in the Dorms: Regulatory Limits & the Promise of Tort Law*, 78 MONT. L. REV. 31, 32 n.4 (2017).

11. See White House Task Force to Protect Students from Sexual Assault, *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault 2* (Apr. 2014), <https://perma.cc/98CK-WY4S>. For an analysis of the prevalence of sexual assault among college women, see Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000 to 2015*, TRAUMA VIOLENCE ABUSE, Feb. 22, 2016 (advance online publication, doi:10.177/1524838016631129) (reporting findings of systematic review of literature). It is not just age, but being in college that is linked to women's vulnerability, with college students experiencing higher rates of sexual assault than women of the same age not attending college. See Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J. C. & U. L. 481, 483 & n.5 (2012); Heather M. Karjane, Bonnie Fisher & Francis T. Cullen, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It*, NAT'L INST. OF JUSTICE ii (Dec. 2005), <https://perma.cc/6FK9-GRK8>.

12. See *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Jan. 19, 2001), <https://perma.cc/X44V-LN6D>; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653 (1999) (acknowledging that an act that constitutes sexual harassment under Title IX may also be criminal in nature).

13. See Sara Lipka, *An Arc of Outrage*, THE CHRONICLE OF HIGHER EDUC. (Apr. 13, 2015), <https://perma.cc/7HJD-8BLS>; Ali, *supra* note 3.

14. See Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 6-7 (2015) (discussing the role of campus activism in fueling national attention to the problem of campus sexual assault); Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1971-76 (2016) (detailing history of student activism and OCR enforcement efforts surrounding campus sexual assault).

15. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015); *THE HUNTING GROUND* (CNN Films 2015), <https://perma.cc/4PM4-AJZB>.

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tant not just to put a human face on a cold statistic, but to engage the cognitive biases and assumptions that have for so long created emotional distance and drained public empathy for women—and men—who have been sexually assaulted. Hearing survivors tell their stories in their own words and using their own names has powerfully disrupted culturally ingrained tendencies to blame victims and trivialize their experiences. It has also exposed and challenged stereotypes about how “real” victims respond to sexual assault before, during, and after its occurrence—preconceptions that have often served to undermine their credibility.

The stories of survivors that have now reached the public realm are legion, and this article will not attempt to represent them or do them justice.<sup>16</sup> The few stories referenced here, drawn from Title IX case law, are offered only to illustrate their narrative power as a social justice rallying cry.

Engaging empathy for survivors requires understanding the harms inflicted by sexual assault. Historically, this harm has been underappreciated, particularly when it occurs between acquaintances, as it so often does on college campuses. Researchers have found that rape by an acquaintance is just as harmful as stranger rape, and it may generate even greater psychological harm when it involves a betrayal by someone previously trusted.<sup>17</sup> In addition to the harm inflicted by the assault itself, there are harms from the institutional failures of colleges and universities to adequately respond to reports of sexual assault. Many survivors experience such institutional betrayal that they feel they have no choice but to leave their institutions, either by transferring to another school, often with loss of academic credit and money, or dropping out of college entirely.<sup>18</sup> The educational harms make campus sexual assault an issue that implicates not just the interests criminal law is designed to vindicate—deterrence and punishment of transgressions against society—but a civil rights violation that denies survivors of sexual assault equal educational opportunities.<sup>19</sup>

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16. See, e.g., Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, N.Y. TIMES (July 13, 2014), <https://perma.cc/QD4T-ZVTS>; Anonymous, *Dear Harvard: You Win*, HARVARD CRIMSON (Mar. 31, 2014), <https://perma.cc/2REW-8FLC>.

17. See Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 642 (2005) (discussing research findings that victims of acquaintance rape experience greater self-blame and worse psychological damage than victims of stranger-rape).

18. See SUSAN MARINE, *Combating Sexual Violence in the Ivy League: Reflections on Politics, Pain, and Progress*, in THE CRISIS OF CAMPUS SEXUAL ASSAULT 55, 56 (Sara Carrigan Wooten & Roland W. Mitchell eds., 2015).

19. See Carol E. Jordan, *The Safety of Women on College Campuses: Implications of Evolving Paradigms in Postsecondary Education*, 15(3) TRAUMA VIOLENCE ABUSE 143, 144 (2014) (discussing educational impact resulting from sexual assault of college women); Carol E. Jordan, Jessica L. Combs & Gregory T. Smith, *An Exploration of Sexual Victimization and Academic Performance Among Col-*

A recent case brought by a female student, Hayley Moore, against the University of California, Santa Barbara is illustrative of a survivor's story of harm, resulting both from the initial assault and the institutional response that followed.<sup>20</sup> In October of 2014, Moore was sexually assaulted at a student's apartment after attending a party near campus. At the party, she was given a narcotic by a fellow student, rendering her unconscious; this student then dragged Moore to his apartment and sexually assaulted her. She regained consciousness the next morning on the side of a road. Unlike many sexual assault victims, she immediately reported the assault to family members and then to university officials, including campus police.<sup>21</sup>

The university's response was not what Moore had hoped for. She had difficulty obtaining counseling in the immediate aftermath of the assault.<sup>22</sup> Despite reporting her concerns about her class scheduling and requesting academic accommodations, she was not offered any interim measures.<sup>23</sup> Instead, she was told that rearranging her coursework could jeopardize her financial aid and result in the loss of on-campus housing privileges.<sup>24</sup> Instead of offering any accommodations, a university official suggested that Moore withdraw from the university and criticized her when she declined to do so.<sup>25</sup> When Moore expressed frustration at the pace of the criminal investigation, the same university official replied, "I think you need to realize the reality of the situation here. Girls come in here with bruises and bloody faces and even their cases don't get prosecuted."<sup>26</sup> Moore suffered a panic attack after seeing her assailant on campus and feared for her safety.<sup>27</sup> Since the university took no action to restrain her assailant's movements or restrict his presence on campus, Moore avoided those parts of the campus where she feared running into him and avoided on-campus social activities in their entirety. In response to her requests to university officials for remedial measures, she was repeatedly discouraged from pursuing a university investigation. She was told that "the school could conduct an investigation, but it would take a long time, be difficult emotionally, and distract [her]

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*lege Women*, 15(3) TRAUMA VIOLENCE ABUSE 191 (2014) (discussing results of their study finding a decline in academic performance among college women who experienced sexual assault).

20. *Moore v. Regents of the Univ. of Cal.*, No. 15-cv-05779-RS, 2016 U.S. Dist. LEXIS 67548 (N.D. Cal. May 23, 2016). This discussion is based on the facts stated in the complaint, which the court assumed to be true, due to the posture of the decision on the defendant's motion to dismiss the complaint. *Moore*, 2016 U.S. Dist. LEXIS 67548, at \*2 n.1.

21. See, e.g., Sally I. Bowie et al., *Blitz Rape and Confidence Rape: Implications for Clinical Intervention*, 44 AM. J. PSYCHOTHERAPY 180, 185 (1990) (discussing research finding that victims of rape by a trusted acquaintance are slower in seeking resources and intervention than other victims).

22. *Moore*, 2016 U.S. Dist. LEXIS 67548, at \*4-7.

23. *Id.* at \*7.

24. *Id.* at \*6.

25. *Id.* at \*5.

26. *Id.* at \*7.

27. *Id.* at \*7-8.

from her studies.”<sup>28</sup> She was warned that such investigations “often boil down to ‘he said, she said’ scenarios, and rarely resolve in favor of the victim.”<sup>29</sup> Finally, she was told that an investigation by the university “would likely interfere with, and possibly even sabotage, the criminal investigation of [her] assault.”<sup>30</sup> Not surprisingly, Moore ultimately decided not to pursue a university investigation. As a result of continuing concerns about her safety on campus and the university’s unhelpful response, Moore withdrew from the university in January of 2015. The university never did investigate the assault or take any action against the alleged assailant.<sup>31</sup>

Moore’s experience at her institution was not unique. In September of 2014, six other University of California, Santa Barbara students filed a complaint with OCR alleging that the university’s response to their sexual assaults violated Title IX. In April of 2015, students organized protests challenging the university’s policies and practices of handling sexual assault; the university subsequently made changes to its policies for handling sexual assault in an effort to acknowledge and correct deficiencies.<sup>32</sup>

### B. Educational Harm and Institutional Betrayal

Stories like these reveal the educational harms of sexual assault, which often causes survivors to interrupt their education or even leave their universities.<sup>33</sup> Many of the stories told in *Missoula* and *The Hunting Ground* feature women who felt they had no choice but to transfer or drop out of school because they could not remain on the same campus as their assailant or amidst a campus culture that supports him.<sup>34</sup> Similar stories appear throughout the Title IX cases brought by survivors suing their universities for allegedly responding with deliberate indifference to reports of sexual assault.<sup>35</sup> In one such case arising several years before the 2011 DCL, for

28. *Id.* at \*8.

29. *Id.*

30. *Id.*

31. *Id.* at \*17–18.

32. *Id.* at \*9–10.

33. See Jordan, Combs & Smith, *An Exploration of Sexual Victimization and Academic Performance Among College Women*, *supra* note 19.

34. See KRAKAUER, *supra* note 15; THE HUNTING GROUND, *supra* note 15.

35. See, e.g., *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 953 (4th Cir. 1997) (stating that appellant had sought and received a retroactive withdrawal from Virginia Tech for the academic year following her rape); *Moore*, 2016 U.S. Dist. LEXIS 67548, at \*8–9 (stating that plaintiff withdrew from the university following her assault and an ineffective response by the university); *Rouse v. Duke Univ.*, 869 F. Supp. 2d 674 (M.D.N.C. 2012) (stating that plaintiff intended to temporarily withdraw for a semester because the university allowed a hostile environment to continue, but the university treated her withdrawal as permanent); *Simpson v. Univ. of Colo.*, 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005) (stating that one of the plaintiffs has withdrawn from the university following her complaint of sexual assault); *Williams v. Bd. of Regents*, 477 F.3d 1282, 1289 (11th Cir. 2007) (stating that plaintiff withdrew after filing her complaint with campus police).



example, the plaintiff repeatedly encountered her assailant on campus and endured confrontations by his friends, who taunted her as “the rape girl.”<sup>36</sup> The educational consequences to her included having to take a medical leave, dropping a class to avoid seeing her assailant, and losing an academic scholarship.<sup>37</sup>

Not all women experience or respond to sexual assault in the same way, however, and not all campus sexual assault has tangible effects on education. Professor Katharine Baker, defending OCR’s regulatory framework, contends that the core harm the DCL is protecting against is the expropriation of sex in which some persons use others as sexual outlets without regard to their consent.<sup>38</sup> She argues that this harm, while real and a proper subject of Title IX’s anti-discrimination framework, is not necessarily worse than fully consensual sex that leaves women feeling used and disrespected.<sup>39</sup> Baker’s account offers a more nuanced perspective on the range of potential harms and responses to sexual misconduct.<sup>40</sup> However, in calibrating the harm of sexual assault to correspond to women’s self-reported subjective experiences, she accepts at face value an explanation many women give for not reporting rape—they believed it was “not serious enough.”<sup>41</sup>

This explanation for not reporting sexual assault may indeed reflect these women’s authentic feelings, but there are reasons for skepticism. According to research on the phenomenon of women refusing to acknowledge what happened to them as rape, despite having experienced conduct that meets the legal definition of rape, non-acknowledgement is often a coping mechanism that reframes the experience in order to regain a sense of control.<sup>42</sup> It is a tactic that does not necessarily succeed in avoiding long-term

36. *Doe v. Erskine Coll.*, No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at \*22, 39 (D. S.C. May 25, 2006).

37. *Doe*, 2006 U.S. Dist. LEXIS 35780, at \*21–22, 39–40.

38. Katharine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of the DOE*, 64 KAN. L. REV. 861, 862 (2016).

39. *Id.* at 886.

40. Baker, *supra* note 38.

41. *Id.* at 885–86.

42. See VERNON R. WIEHE & ANN L. RICHARDS, INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE 132 (1995) (“The delayed response is, in fact, a symptom of the victim’s effort to deny and control the impact of the assault.”); Zoe D. Peterson & Charlene L. Muehlenhard, *Was It Rape? The Function of Women’s Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences*, 51 SEX ROLES 129, 130, 141 (2004) (suggesting that women may not acknowledge rape because they do not want to view themselves as “rape victims” when the label connotes powerlessness or stigmatization); see also Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 870–71 (2002) (discussing the reasons for the reluctance of college students to identify what happened to them as rape, including that they blame themselves for what happened and because of resistance to viewing themselves as victimized by a trusted friend or acquaintance).

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harm.<sup>43</sup> Professor Baker rightly acknowledges that some women do experience sexual assault as severely harmful, and that the expropriation theory of harm that she asserts, foregrounding objectification and disrespect, does not represent the full spectrum of harm that can arise from campus sexual assault.<sup>44</sup> Most importantly, Baker provides a theoretical justification for using Title IX's remedial framework to address the full range of gender-based harm resulting from sexual misconduct, even when it does not result in trauma or tangible educational harm.<sup>45</sup>

Wherever the consequences of sexual assault fall on the spectrum of severity, whether traumatic or relatively mild, the harm is compounded when educational institutions respond with insufficient sensitivity and inadequate measures. Some of the most egregious stories of institutional failure and the re-victimization of complainants involve reports of sexual assault by male athletes, particularly elite male athletes who are highly valued members of big-time university athletic programs. So many of the Title IX cases brought by women whose reports of sexual assault were ignored, minimized, or covered up involve allegations against male athletes that it would take an unduly long string-cite to contain them all.<sup>46</sup> New reports of male student athletes sexually assaulting female students, followed by allegations of mishandled investigations and university cover-ups, continue to splash

43. See WIEHE & RICHARDS, *supra* note 42, at 124:

The implications of delayed disclosure or lack of disclosure are significant for the recovery process. If the victim avoids or delays disclosure, the benefits of early intervention to relieve traumatic symptoms, provide medical attention, and assist with making legal decisions are lost. This means that victims are not able to move through the recovery phases and are vulnerable to getting stuck in the acute or disorganization phase with symptoms of anxiety and depression that become chronic and persistently debilitating.

See also Melissa J. Layman, Christine A. Gidycz & Steven Jay Lynn, *Unacknowledged Versus Acknowledged Rape Victims: Situational Factors and Posttraumatic Stress*, 105 JOURNAL OF ABNORMAL PSYCHOLOGY 124 (Feb. 1996) (finding unacknowledged victims exhibited more symptoms of posttraumatic stress disorder than non-victims); see also Sapana D. Donde, *College Women's Attributions of Blame for Experiences of Sexual Assault*, J. OF INTERPERSONAL VIOLENCE 1, 11 (2015) (in their study of survivors and self-blame, finding an unexpected relationship between the severity of sexual assault and the tendency toward self-blame, with women who were forcibly raped blaming themselves for what happened more than women who were subjected to sex while incapacitated).

44. Baker, *supra* note 38, at 888 ("Many women do not like or appreciate or want to accept the way many men treat them sexually, but only a few women's lives are being shattered by men's sexual treatment of them.").

45. See *id.* ("The need to restrict such conduct is rooted not so much in the gravity of the injury it inflicts on individual victims, but in the harm to the communal norms of respect, civility, and equality on college campuses."); see also Tuerkheimer, *supra* note 14, at 42 (discussing the harm to agency that results from nonconsensual sex).

46. For one of the earliest such cases, see *Brzonkala*, 132 F.3d 949. For more recent examples, see *Simpson v. Univ. of Colo.*, 500 F.3d 1170 (10th Cir. 2007); *Doe v. Univ. of Pac.*, No. CIV.S-09-764 FCD/FJN, 2010 U.S. Dist. LEXIS 130099 (E.D. Cal. Dec. 8, 2010); *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007); *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855 (D. Ariz. Sept. 29, 2008).

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across the news. Some of the recent high-profile incidents include reports out of Vanderbilt, Baylor, Tennessee, Florida State, and the University of Minnesota, to name just a few.<sup>47</sup> If there is anything new about these stories, it is the ramped-up public condemnation they have provoked of late.<sup>48</sup>

Research has long found a connection between male intercollegiate athletic participation—particularly among elite athletes and in certain sports such as football—and involvement in sexual violence when compared to men in the general student body.<sup>49</sup> The reasons for this correlation are unclear, but it may have something to do with the privileged treatment elite male athletes take for granted in an athletic culture that allows them to act out with impunity.<sup>50</sup> University protection of accused athletes was such a frequent theme in OCR’s enforcement experience that the 2011 DCL includes a specific directive to not allow athletic departments to internally handle allegations of sexual assault brought against athletes.<sup>51</sup> And yet, a government report issued three years later found that twenty percent of the institutions surveyed were still permitting their athletic departments to internally investigate alleged sexual misconduct by athletes, notwithstanding OCR’s instruction to the contrary.<sup>52</sup>

47. See, e.g., Paula Lavigne, *Baylor Faces Accusations of Ignoring Sexual Assault Victims*, ESPN (Feb. 2, 2016), <https://perma.cc/DGP4-L6BS>; Susan Svrluga, *Former Vanderbilt Football Player Found Guilty of Raping a Student Who Had Blacked Out*, WASH. POST (Apr. 9, 2016), <https://perma.cc/NAZ2-V8EQ>; Marie Andruszewicz, *University of Tennessee Settles Sexual Assault Lawsuit*, NPR (July 6, 2016), <https://perma.cc/2SQW-JU9C>; Marc Tracy, *Florida State Settles Suit Over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), <https://perma.cc/6Y99-X74N>; Joe Christensen, *Gophers Players Boycott Football after Suspensions; Holiday Bowl in Jeopardy*, MINNEAPOLIS STAR TRIBUNE (Dec. 16, 2016), <https://perma.cc/L6LC-DLKL>.

48. Earlier this year, for example, Ken Starr lost his job at the helm of Baylor University due to the university’s mishandling of sexual assault allegations against Baylor football players. See Krishnadev Calamur, *Ken Starr Stepping Down as Baylor University’s Chancellor*, THE ATLANTIC (June 1, 2016), <https://perma.cc/4BKZ-LMY5>.

49. See Kristy L. McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA VIOLENCE ABUSE 438, 440–41 (2015); Elizabeth Ann Gage, *Gender Attitudes and Sexual Behaviors*, 14 VIOLENCE AGAINST WOMEN 1014 (2008), available at <https://perma.cc/UC92-KSZC> (“Athletes in center sports (such as football) scored significantly higher on hyper-masculinity scales, had lower attitudes toward women, and displayed more sexual aggression and more sexual activity than men who competed in marginal sports (e.g., track and field) or not at all.”); see also *Student Sexual Assault: Weathering the Perfect Storm*, UNITED EDUCATORS 3 (2014), <https://perma.cc/6QYD-B6FH> (in study of insurance claims by colleges and universities related to campus sexual assault, noting that athletes comprised 25% of the alleged perpetrators but represented only 10–15% of an educational institution’s student body).

50. McCray, *supra* note 49, at 438 (citing research positing “the athletic justice system” and “big man on campus syndrome” as possible reasons for athletes’ higher incidence of sexual violence).

51. Ali, *supra* note 3, at 8 n.22.

52. See *Sexual Violence on Campus: How Too Many Institutions of Higher Education are Failing to Protect Students*, U.S. SENATE SUBCOMM. ON FINANCIAL AND CONTRACTING OVERSIGHT 11 (July 9, 2014), <https://perma.cc/VUM8-RCMU> [hereinafter Senate Subcomm. Report].

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In addition to the institutional privileges conferred on elite athletes, other aspects of athletic culture also contribute to the heightened risk of sexual violence by this population. Recent research suggests that it is not just elite athletes in big-time athletic programs who are at an elevated risk of engaging in sexual misconduct; athletes participating at lower levels of organized college sport are also at higher risk. A 2016 survey of male undergraduate athletes found a higher incidence of self-reported sexual coercion by male athletes than by male students in the general student population—a finding that was not surprising in light of existing research—but surprisingly found no meaningful difference between male recreational athletes and male intercollegiate athletes.<sup>53</sup> The researchers hypothesized that their results were explained by the effect of male athletic participation on traditional gender attitudes and rape myth acceptance, which prior research has shown to predict a greater incidence of sexual violence.<sup>54</sup> While male athletes scored higher on these indices than men in the general student body, there were not significant measurable differences in the gender attitudes held by the male recreational athletes and the male intercollegiate athletes.<sup>55</sup> Changing the culture of athletics on campus remains a trouble spot for addressing the harms of campus sexual assault.

### C. Underreporting and the Culture of Silence

The stories of survivors contain abundant accounts of institutional insensitivity, blunders, and cover-ups protecting accused students—and not just athletes<sup>56</sup>—and showcase a major reason why campus sexual assault is underreported: the fear that institutions will side with the accused student and that nothing will be done. A new survivor discourse has emerged in which women, using their own names, speak publicly about their ordeals.<sup>57</sup> One of the most powerful themes in this new discourse is how difficult it is

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53. Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, VIOLENCE AGAINST WOMEN, May 30, 2016, at 9–10 (54% of the male athletes who completed the survey reported having perpetrated some form of sexual coercion, compared to just under 38% of the non-athletes taking the survey).

54. *Id.* at 11.

55. *Id.* at 11–12.

56. See, e.g., *Doe*, 2006 U.S. Dist. LEXIS 35780, at \*5 (recounting allegation that university official chastised plaintiff for bringing forward sexual misconduct allegation against the accused male student, defending him as “very bright, very intelligent, and ‘going places’”).

57. Nick Anderson, Emma Brown, Steve Hendrix & Susan Svrluga, *Sexual Assault Survivors Tell Their Stories*, WASH. POST, <https://perma.cc/7TQV-QL93> (reporting the sexual assault experiences of a number of students, including many who chose to share their stories publicly with their personal identity); Maia R. Silber, *Pitt ‘Break Out’ Initiative Invites Sexual Assault Victims to Share Their Stories*, PITTSBURGH POST-GAZETTE (July 5, 2016), <https://perma.cc/R58M-KZ8Z>.

to report what happened or seek recourse.<sup>58</sup> Although the complainant in *Moore v. Regents of the University of California*,<sup>59</sup> discussed above, quickly reported her assault to university officials, more often, sexual assault is not reported promptly, if at all. Statistics vary, but research consistently finds that the vast majority of persons who are sexually assaulted do not report what happened to campus officials or to police.<sup>60</sup> Many accounts from the case law include stories of women who did not report what happened right away, and some who confided only to friends and not authority figures.<sup>61</sup> In one case, *Doe v. University of the Pacific*,<sup>62</sup> for example, a female student on the women's basketball team told a friend that she was sexually assaulted by three male basketball players, but left campus to fly home without reporting it to the police or university. The friend tape-recorded her phone call describing the incident and took it upon himself to report the assault to university officials.<sup>63</sup> The student who had been assaulted did not press criminal charges, but did ultimately cooperate in a university investigation and campus disciplinary procedures.<sup>64</sup>

Hearing survivors explain in their own voices how and why they responded as they did in the aftermath of sexual assault is a powerful antidote to the credibility-robbing myths about how “real” victims respond. Perceptions of credibility and the ability to empathize with survivors are influenced by preconceived expectations about how a woman would react if she *really* had been sexually assaulted. These preconceptions are often wrong. Much research refutes the common myths about how women respond and

58. See, e.g., Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME, June 23, 2014, <https://perma.cc/DH8H-GB6E> (reporting reasons why victims find it difficult to report their assaults); Bogdanich, *supra* note 16 (describing a victim's difficulty reporting her assault at a New York college and deciding to reveal her first name and her image in photographs).

59. No. 15-cv-05779-RS, 2016 U.S. Dist. LEXIS 67548 (N.D. Cal. May 23, 2016); see also *Doe*, 2006 U.S. Dist. LEXIS 35780, at \*22, 39.

60. See Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault*, CENTER FOR PUBLIC INTEGRITY, 31, 33 (2010), <https://perma.cc/9FN8-83L5> (discussing a Department of Justice study finding that 95% of student rape victims do not report their rape).

61. See, e.g., *Karasek v. Regents of the Univ. of Cal.*, 2016 U.S. Dist. LEXIS 177639, at \*8–9 (N.D. Cal. Dec. 22, 2016) (stating that student organization president heard of the assault secondhand and reported it to the Title IX Coordinator); *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (stating that plaintiff told her field hockey captain about the possible assault and the captain reported it to the athletic director); *Doe*, 2010 U.S. Dist. LEXIS 130099, at \*9–10 (stating that plaintiff first told several friend about her assault and her friends reported it); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1329 (M.D. Ga. 2007) (stating plaintiff first told her friend about the assault and then her friend took her to the hospital).

62. No. CIV.S-09-764 FCD/FJN, 2010 U.S. Dist. LEXIS 130099, at \*2 (E.D. Cal. Dec. 8, 2010).

63. *Doe*, 2010 U.S. Dist. LEXIS 130099, at \*10; see also *J.K.*, 2008 U.S. Dist. LEXIS 83855, at \*8 (plaintiff told her roommate about the sexual assault and her roommate reported it to the Resident Assistant, who notified campus police).

64. *Doe*, 2010 U.S. Dist. LEXIS 130099, at \*13, 15.

react before, during, and after such an event.<sup>65</sup> Women who are sexually assaulted respond in varied ways, often counter to cultural expectations.<sup>66</sup> During the attack, they often do not scream or cry out.<sup>67</sup> Afterwards, they often continue to have contact with an attacker, in a psychological struggle to deny or “undo” what happened.<sup>68</sup> One of the more depressing research findings is that despite the surge of survivors’ stories and campus activism, women continue to blame themselves when sexual assault happens instead of blaming the person who committed the sexual assault—a psychological defense that attempts to mitigate the scariness of what happened to them by reframing it.<sup>69</sup>

Reactions to claims of sexual assault, including victim-blaming and denying harm, are not just the product of societal and cultural beliefs, but are shaped by the institutional cultures in which sexual misconduct occurs. Participating in campus settings in which sexual assault is prevalent, such as parties hosted by fraternities or athletes, increases the likelihood that persons who have been sexually assaulted will adopt a mitigating, self-blaming response. In one study of college students subjected to nonconsensual sexual conduct, those who regularly attended fraternity and/or athletics parties were *more* likely to deflect blame from the perpetrator of sexual violence and to hold narrow, stereotyped definitions of rape compared to students who did not drink socially *and* compared to students who drank alcohol but did not regularly participate in these party cultures.<sup>70</sup> Women who experienced unwanted sexual conduct in the fraternity and athletic party settings were also less likely to identify themselves as “victims of rape” when they experienced sexual assault compared to women who drank, became incapacitated, and experienced unwanted sexual conduct in other social settings on campus.<sup>71</sup> These findings add to a body of literature documenting the influence of institutional settings and cultural norms on the recognition and reporting of sexual assault. The takeaway from this research is that sexual assault is more likely to be denied, minimized, and neutralized in those campus settings that promote a rape-prone culture.<sup>72</sup> It is not drinking alcohol *per se* that contributes to sexual assault and the refusal to recognize it or

65. See KRAKAUER, *supra* note 15, at 139–40, 254–55 (citing research by David Lisak and others).

66. *Id.* at 253.

67. *Id.* at 140.

68. *Id.* at 139–40, 254–55 (citing research by David Lisak and others).

69. See Donde, *supra* note 43, at 10 (in study of women undergraduates who had been raped, finding that women reported blaming themselves and/or society more often than the man who raped them).

70. Kaitlin M. Boyle & Lisa Slattery Walker, *The Neutralization and Denial of Sexual Violence in College Party Subcultures*, *DEVIANT BEHAVIOR* 1392, 1403–04 (2016) (e.g., party-goers are more likely to agree with the statement that rape must involve a weapon or physical violence).

71. *Id.* at 1403–05.

72. *Id.* at 1405.

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take it seriously; the critical risk factor is the prevalence of cultural norms that are more permissive toward nonconsensual sex.

*D. A Counter-Narrative: Stories from Accused Students*

The influx of stories from survivors has expanded public appreciation of the problem of campus sexual assault and deepened empathy for persons who have experienced it. But increasingly, a competing set of stories has taken hold in the public dialogue. These are stories of men who are accused of sexual assault under ambiguous or sympathetic circumstances, subjected to campus proceedings that find them responsible for sexual assault, and then harshly disciplined with lasting consequences on their future educational and career prospects.<sup>73</sup> These stories push back on the empathy front, painting a picture of miscommunication rather than intentional rape, and of women belatedly regretting “bad” sex. Most powerfully, these stories highlight the harm done to men who are harshly disciplined for conduct that does not match common understandings of sexual assault. These stories are now locked in a contest with survivors’ stories in a battle for public empathy.

These competing narratives have gained traction in both mainstream media and in academic circles, fueling critiques that feminist efforts to expose and eradicate “rape culture” have gone too far.<sup>74</sup> Numerous commentators have weighed in against what they view as an overly zealous anti-rape culture.<sup>75</sup> Legal scholarship has also taken up this theme. Among the prominent legal scholars criticizing Title IX’s regulation of campus sexual assault are Jeannie Suk and Jacob Gersen,<sup>76</sup> Aya Gruber,<sup>77</sup> and Janet Hal-

73. Several complaints challenging the legitimacy of the 2011 DCL tell stories of unfair treatment of men wrongly disciplined for sexual assault. See Complaint and Jury Demand ¶¶ 5–6, 9, 11–13, 15, Neal v. Colo. State Univ.-Pueblo et al., (D. Colo. Apr. 19, 2016) (No. 1:16-cv-00873-WYD); Compl. ¶¶ 42–43, 45–46, Ehrhart v. U.S. Dep’t of Educ., (N.D. Ga. Apr. 21, 2016) (No. 1:16-cv-10301-SCJ); Compl. ¶¶ 55, 58–59, 62, 64, 69–70, Doe v. Lhamon, (D.D.C. June 16, 2016) (No. 1:16-cv-011158-KBJ).

74. The term “rape culture” was coined to capture the power of social/cultural norms that normalize sexual violence and empower perpetrators of sexual violence. See generally Emilie Buchwald, Pamela R. Fletcher & Martha Roth, eds., *TRANSFORMING A RAPE CULTURE* (2005). See also Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. OF SOCIAL ISSUES 5, 7 (1981) (coining the term “rape prone” culture).

75. See, e.g., Christina Hoff Sommers, *Rape Culture is a ‘Panic Where Paranoia, Censorship, and False Accusations Flourish,’* TIME (May 15, 2014), <https://perma.cc/EU6Y-V75W>; Heather MacDonald, *The Campus Rape Myth*, CITY JOURNAL (Winter 2008), <https://perma.cc/L23G-8V26>; Cathy Young, *Feminists Want Us to Define These Ugly Sexual Encounters as Rape. Don’t Let Them*, WASH. POST (May 20, 2015), <https://perma.cc/6RX8-6NEL>; Judith Shulevitz, *The Best Way to Address Campus Rape*, N.Y. TIMES (Feb. 7, 2015), <https://perma.cc/4WYN-DNF7>; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), <https://perma.cc/67SA-7QR5>; Zoe Heller, *Rape on the Campus*, N.Y. REV. OF BOOKS (Feb. 5, 2015), <https://perma.cc/36BH-SFBX>.

76. Jacob E. Gerson & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016).

ley.<sup>78</sup> These scholars warn against a hyper-vigilant war on rape culture that overregulates campus sex, reifies “trauma,” and scapegoats men who transgress overly pristine definitions of consent. Critics of OCR object to the use of more flexible procedures for adjudicating sexual misconduct on campus than are permitted in criminal courts, and single out the POE standard for special disdain.<sup>79</sup>

The result is a contest for empathy between the students (mostly women) claiming sexual assault and the students (virtually all men) disciplined for committing it. Those who side with accused students’ rights engage the battle for empathy on two fronts: first, questioning the level of authentic harm in the survivors’ accounts; and second, showcasing the harm to the students who are accused of and disciplined for sexual misconduct. The first set of arguments include the contention that the discourse of “trauma” itself creates harm, an argument that fosters skepticism of complainants’ credibility by positing a regret thesis, in which women come to terms with a consensual but regrettable sexual experience by subsequently framing it as sexual assault.<sup>80</sup>

Amidst this backlash to the survivors’ movement to crack down on campus sexual assault, a new set of advocacy groups has emerged supporting the rights of men accused of sexual misconduct. Advocacy groups like the Foundation for Individual Rights in Education (FIRE), Stop Abusive and Violent Environments (SAVE), A Voice for Men (AVFM), and the American Council of Trustees and Alumni (ACTA) have organized around the issue of protecting accused students from false sexual misconduct accu-

77. Aya Gruber, *Anti-Rape Culture*, 64 KAN. L. REV. 1027 (2016).

78. Janet Halley, *Trading the Megaphone for a Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103 (2015).

79. See Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://perma.cc/EM9L-R376> (criticizing campuses for treating sexual assault differently than the criminal law); Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://perma.cc/BQ26-9W3A> (open letter from Harvard Law School professors writing to oppose Harvard’s revised sexual harassment policy, issued in the wake of an OCR investigation, for failing to provide accused students with sufficient safeguards); David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty*, WASH. POST (Feb. 18, 2015), <https://perma.cc/XU47-RH7Y> (group of Penn Law professors writing to oppose Penn’s new procedures for adjudication complaints of sexual assault for not affording fundamental fairness criticizing the preponderance-of-evidence standard); Larry Alexander et al., *Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault* (May 16, 2016), <https://perma.cc/J8KT-LA27> (group of law professors responding to OCR letter with criticisms and recommendations, noting the preponderance of evidence standard).

80. See, e.g., Halley, *supra* note 78, at 107, 111 (stating that “. . . morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect” and describing women who later make bad faith denials that they consented); Gerson & Suk, *supra* note 76, at 915, 936, 940 (describing one case in which the complaint alleged that the Title IX officer gave a presentation arguing that “regret equals rape” and another in which the court found the accuser showed personal regret).



sations and/or overly harsh discipline in campus misconduct proceedings.<sup>81</sup> Much of their critique of the 2011 DCL centers on the OCR's directive to use the POE standard.<sup>82</sup> The next section explores the ongoing controversy over the POE standard and argues that the debate over the standard actually reflects and amplifies deeper conflicts in the rape culture wars.

### III. THE CONTROVERSY OVER THE PREPONDERANCE OF THE EVIDENCE STANDARD

The debate over Title IX in the public commentary, legal scholarship, and advocacy community has converged around OCR's directive to universities to use a POE standard in making determinations about responsibility for sexual assault. To be sure, critics of the 2011 DCL challenge other aspects of campus justice systems too, including restrictions on the ability of accused students to cross-examine complainants, limits on the extent of lawyer participation in the campus process, and the permissibility of an investigator model instead of an adversarial adjudicatory model.<sup>83</sup> But no issue is more hard-fought in the rape culture wars than the debate over the POE standard. Before wading further into that controversy, some background is necessary to understand the relationship between university processes for handling sexual assault complaints and Title IX.

#### A. *The Path to a Preponderance: Backgrounder on Title IX's Statutory and Regulatory Framework*

Enacted in 1972, Title IX is a broad ban on sex-based discrimination in federally funded education programs.<sup>84</sup> It says nothing about sexual harassment or sexual assault specifically, nor about any other subcategory or type of discrimination. The understanding that sexual harassment, including extreme forms of it such as rape and sexual assault, is a form of sex discrimi-

81. FIRE: FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *FIRE: Defending Individual Rights in Higher Education*, <https://perma.cc/E3LD-E7EJ>; SAVE: STOP ABUSIVE AND VIOLENT ENVIRONMENTS, *Campus Sexual Assault*, <https://perma.cc/AA97-UWYW>; A VOICE FOR MEN, *A Voice for Men: Changing the Cultural Narrative*, <https://perma.cc/6LGQ-9K5V>; ACTA: AMERICAN COUNCIL OF TRUSTEES AND ALUMNI, *American Council of Trustees and Alumni*, <https://perma.cc/MGB5-TDCG>.

82. See, e.g., Joe Cohn, *Responding in Full to "Preponderance of the Evidence" Advocates*, FIRE (Oct. 18, 2012), <https://perma.cc/VNU8-YZX4>.

83. See, e.g., David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty* (Feb. 18, 2015), <https://perma.cc/7HSD-YQ2J> (criticizing the cross-examination prohibition, limitations on admitting evidence, lack of protection against self-incrimination, as well as the preponderance standard); Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://perma.cc/R67A-UGUY> (criticizing an inadequate opportunity to discover facts, the housing of all agents of review in one office, and the failure to ensure adequate representation for the accused).

84. 20 U.S.C. §§ 1681 to 1688.

nation emerged long after the statute's enactment, largely through judicial interpretation. The U.S. Supreme Court first recognized sexual assault as a form of prohibited sex discrimination under Title IX in 1990, drawing on a 1986 Supreme Court precedent under Title VII that similarly understood sex discrimination to encompass sexual assault and rape.<sup>85</sup> The elaboration of the specific iterations of a statutory ban on discrimination through judicial construction is a common feature of U.S. civil rights law.

As the scope of Title IX's coverage of prohibited conduct took shape, so did the extent of the obligations the statute places on educational institutions to comply with the law. The statute grants authority to the federal government to terminate federal funds for noncompliance and sets up an administrative enforcement mechanism for doing so, but the statute left open many details of the compliance framework, including whether individuals could sue their schools for violations—an issue that the Court answered affirmatively in 1979.<sup>86</sup> Recognizing that the statute's generality would require subsequent elaboration of the particulars, Congress delegated to the federal enforcing agency (formerly, the Department of Health, Education, and Welfare, now the Department of Education) the authority to issue regulations. The agency did so in 1975.<sup>87</sup>

The 1975 regulations require educational institutions to adopt “prompt and equitable” grievance procedures to internally address complaints about conduct that falls within the statute's ban on sex discrimination.<sup>88</sup> Once courts construed the statute to encompass sexual harassment committed by students, educational institutions had to have in place a prompt and equitable grievance procedure for handling complaints about such conduct.<sup>89</sup> The U.S. Supreme Court finally took this step in 1999, affirming a principle that many lower courts had long recognized: a sexually hostile educational environment can be created by students as well as by school employees.<sup>90</sup> It has been clear since at least 1999, then, that universities have a responsibility to promptly and equitably resolve student complaints of sexual harassment by students, including sexual assault, through their internal grievance procedures. It also has been clear for nearly as long that OCR requires schools to promptly respond to sexual harassment allegations, upon actual or constructive notice, with procedures reasonably calculated to end the harassment—

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85. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

86. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704, 717 (1979).

87. Consolidated Procedural Rules for Administration and Enforcement of Certain Civil Rights Laws and Authorities, 40 Fed. Reg. 24, 148 (June 4, 1975).

88. 34 C.F.R. § 106.8(b) (1975).

89. *Davis*, 526 U.S. at 637–38 (detailing circuit split on issue of whether Title IX creates a right of action for student-on-student harassment).

90. *Id.* at 653.

thereby applying a tougher standard to colleges and universities in OCR-administrative-enforcement actions than the courts apply in private lawsuits for damages.<sup>91</sup>

In a series of guidance documents issued by OCR beginning in the 1990s, the agency has articulated with increasing specificity the requirements of fair and equitable grievance procedures for handling sexual harassment. Although OCR did not specify a standard of proof for use in university grievance procedures in its 1997 or 2001 “Dear Colleague” letters on sexual harassment, these documents did emphasize the general principle that such procedures must be equitable and reasonably calculated to prevent and remedy sexual harassment.<sup>92</sup> The OCR 2011 DCL on sexual violence took the additional step of clarifying the proof standard as a POE standard—a move that reflects the poor record colleges and universities have in handling sexual assault allegations.<sup>93</sup> In requiring colleges and universities to act independently of any criminal law enforcement processes, and to use the standard of proof for civil and not criminal cases, OCR recognized that sexual assault causes distinct educational harms that criminal law does not vindicate.<sup>94</sup> Indeed, the utter inadequacy of the criminal law in dealing with acquaintance rape cases is an important piece of the backdrop for the push by survivors for stronger Title IX enforcement.<sup>95</sup>

Neither the Title IX regulations nor any of OCR’s guidance documents require educational institutions to use a separate grievance procedure dedi-

91. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, *supra* note 12, at 12–13.

92. *Id.* ii–iii.

93. See, e.g., Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, in CENTER FOR PUBLIC INTEGRITY, 55, 56–60 (2010), <https://perma.cc/9FN8-83L5> (reporting results of Center for Public Integrity’s investigation of higher educational institutions’ responses to sexual assault and finding that institutions frequently impose only modest sanctions on students found responsible for sexual assault and rarely expel them).

94. See Nancy Chi Cantalupo, *Title IX’s Civil Rights Approach and the Criminal Justice System: Enabling Separate but Coordinated Parallel Proceedings*, in THE CRISIS OF CAMPUS SEXUAL ASSAULT 125 (Sara Carrigan Wooten & Roland W. Mitchell eds., 2015) (defending OCR’s approach in requiring campuses to act independently of any criminal proceeding); Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER L. 205, 227, 231 (2007) (arguing that the criminal justice system is not a substitute for handling campus sexual assaults and should not distort the functioning of campus processes).

95. See Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCI. 206, 210–14 (2006) (discussing the ineffectiveness of the criminal justice system in responding to acquaintance rape); Tuerkheimer, *supra* note 14, at 14–15 (discussing the substantive gap between the criminal law of rape, which requires force, and campus sexual assault, which is nonconsensual but unlikely to meet the force requirement necessary to satisfy the criminal law); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 317–18 (2000) (discussing the consensus among rape law scholars that the criminal law performs very poorly in addressing rape by unarmed acquaintances where the victim suffers no additional injuries, and citing low reporting rates by victims, likely skepticism by police, a reluctance by prosecutors to file charges, and the low likelihood of conviction by a jury).

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cated to Title IX complaints. Most institutions use the same process for resolving allegations of student sexual harassment and sexual assault that they use for other kinds of student misconduct such as theft, simple assault, cheating, and honor code violations.<sup>96</sup> Student misconduct processes typically involve a multi-person hearing board that receives and considers evidence. A recent survey of campus administrators found that the vast majority (eighty-seven percent) of institutions used such a hearing board in their process for handling sexual assault allegations.<sup>97</sup> Increasingly, however, some institutions have shifted to a model relying on trained investigators, either singly or in teams, to interview witnesses, gather evidence, and make factual findings.<sup>98</sup> The same survey of campus administrators found a third of institutions (thirty-three percent) employed some form of an investigator model for fact-finding as part of the student misconduct process.<sup>99</sup> The statistical overlap in the survey reflects the existence of some hybrid models, in which an investigator's findings and recommendations are presented to a hearing panel, which then makes determinations about responsibility. The shift toward using investigators for fact-finding reflects a concern that requiring complainants to appear before a hearing board can function as a deterrent to coming forward and skepticism of the capacity for an adversarial model to discern the truth of what happened in such cases.<sup>100</sup> The 2011 DCL leaves this choice up to each institution, although the White House Task Force report did encourage institutions to consider using an investigator model.<sup>101</sup> Regardless of the type of fact-finding model used, the 2011 DCL informs institutions that OCR considers the use of anything higher than a POE standard for resolving sexual violence allegations to violate the Title IX regulation.<sup>102</sup>

96. See Amanda Konradi, *Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland*, HUMAN. & SOC'Y 1, 15 (2016) (reporting that 64% of the institutions surveyed process sexual assault allegations the same way as other violations of the student conduct code while 36% handle them through the institution's specific protocol for sexual harassment); see also Senate Subcomm. Report, *supra* note 52, at 10 (stating that colleges typically use same the processes for investigating and adjudicating allegations of sexual assault as they use for other forms of student misconduct, such as cheating and honor code violations).

97. Angela F. Amar et al., *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 VIOLENCE AND VICTIMS 579, 584 (2014).

98. Lave, *supra* note 6, at 953, 955.

99. Amar, *supra* note 97, at 584.

100. *Id.* at 589. For an argument in support of the investigator approach, see Brett A. Sokolow et al., *Complying with Title IX by Unifying All Civil Rights-Based Policies and Procedures*, THE CRISIS OF CAMPUS SEXUAL ASSAULT 113 (2016).

101. See White House Task Force to Protect Students from Sexual Assault, *supra* note 11, at 14.

102. Ali, *supra* note 3, at 10–11.

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*B. The Modest Impact of OCR's Directive to Campuses to Use the POE Standard: More Continuity than Change*

Despite the current firestorm over the POE standard, most universities were already using this standard of proof well before OCR's directive to do so in 2011. One study using data from public and private universities collected shortly before OCR issued the 2011 DCL found that sixty-one percent of the institutions surveyed used the POE standard and only thirty percent applied the clear and convincing evidence standard.<sup>103</sup> Other investigations have put the figure for institutions using the POE standard at about seventy percent.<sup>104</sup> Research from the early 2000s found that most institutions did not specify any standard in their written policies covering sexual assault, but of those that did, the vast majority used the POE standard.<sup>105</sup>

The prevalence of the POE standard reflects the view of student conduct professionals that this standard best mediates the competing interests at stake in student disciplinary proceedings. An influential Model Student Code published in 2004 strongly recommends using a POE standard in university disciplinary processes because it best balances the interests of the accused student, the student or students harmed by the alleged misconduct, and the university community.<sup>106</sup> The Model Student Code does not distinguish among offenses on this point and includes student misconduct that is potentially criminal. Explaining their rejection of the criminal beyond a reasonable doubt standard, the authors observed that "criminal law standards were never intended to be standards for student behavior within an academic community."<sup>107</sup> The authors also faulted the clear and convincing evidence standard for "inaccurately treat[ing] the [a]ccused [s]tudent as more important than the student who believes s/he was a victim of misconduct and/or as having more important interests than all other members of

103. Another 5% required proof beyond a shadow of a doubt. Amar, *supra* note 97, at 584–85, 588.

104. See Jake New, *Burden of Proof in the Balance*, INSIDE HIGHER EDUC. (Dec. 16, 2016), <https://perma.cc/YD8T-8U56>.

105. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000 & n.331 (2004) (reviewing 64 college and university sexual assault policies and finding that only 22 specified any evidentiary standard, and that of those that did, most used the preponderance standard); Heather M. Karjane, Bonnie S. Fisher & Francis T. Cullen, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120, 122 tbl.6.12 (2002), <https://perma.cc/9YHC-9KEH> (finding that, of the minority of institutions specifying any evidentiary standard (only one in five), 79% of the publics and 83% of the privates used the preponderance standard; 3% of the publics and 5% of the privates required proof "beyond a reasonable doubt"; and the remaining 19% of publics and 13% of privates used another standard, such as clear and convincing evidence or "substantial" evidence).

106. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Subordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J. C. & U. L. 1, 48–49 (2004).

107. *Id.* at 48.

the academic community have in the maintenance of a calm, peaceful and productive living/learning environment.”<sup>108</sup> The authors specifically approved of applying the POE standard to sexual assault, noting that it is “the most common standard of proof used in campus sexual assault cases.”<sup>109</sup>

OCR’s endorsement of the POE standard in the 2011 DCL hardly came out of the blue. Although the standard of evidence used by schools to resolve sexual assault allegations was rarely in contention in earlier OCR investigations, as far back as 1995 the agency held schools to the POE standard, finding the use of the higher clear and convincing evidence standard for sexual harassment to be inconsistent with Title IX’s requirement of “equitable” grievance procedures.<sup>110</sup> An OCR investigation during President George W. Bush’s administration took a similar stand, faulting the use of a higher evidentiary threshold as incompatible with Title IX.<sup>111</sup> The pre-2011 Title IX case law also contains references to universities making findings of responsibility in sexual assault cases based on a POE standard.<sup>112</sup> This history reflects OCR’s longstanding view that the 1975 regulatory requirement of “equitable” grievance procedures implicitly requires a proof standard that does not reflect a presumption for or against the credibility of either party.

Although OCR’s specification of the POE standard did not directly affect most institutions, it has made a difference at a minority of universities that used a higher proof standard in sexual misconduct cases. The agency has found several institutions out of compliance based in part on their adherence to a clear and convincing evidence standard in making determinations of responsibility in sexual assault cases.<sup>113</sup> Even after the 2011 DCL, a few holdouts continued to resist adopting the POE standard.<sup>114</sup> Now that the

108. *Id.* at 49.

109. *Id.* at 48 n.146.

110. See Letter from Gary D. Jackson, Reg’l Civ. Rts. Dir., Office for Civ. Rts., U.S. Dep’t of Educ., to Jane Jervis, President, The Evergreen St. Coll. (Apr. 4, 1995) (on file with author).

111. See Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, Office for Civ. Rts., U.S. Dep’t of Educ., to Jane Genster, Vice President and General Couns., Georgetown Univ. (Oct. 16, 2003) (on file with author).

112. *J.K.*, 2008 U.S. Dist. LEXIS 83855, at \*9 (describing university response in 2004 in which campus disciplinary process found male football player “had more likely than not sexually assaulted [plaintiff] in violation of the Student Code of Conduct”).

113. See Letter from Timothy C.J. Blanchard, Dir. N.Y. Office, Office for Civ. Rts., U.S. Dep’t of Educ., to Christopher L. Eisgruber, President, Princeton Univ., 16–18 (Nov. 5, 2014), available at <https://perma.cc/5LVY-L424>; Letter from Anurima Bhargava, Chief, Civ. Rts. Div., U.S. Dep’t of Just., and Gary Jackson, Reg’l Dir., Office for Civ. Rts., U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Montana, and Lucy France, Univ. Couns., Univ. of Mont., 17 (May 9, 2013), available at <https://perma.cc/M6S4-7SPB>; Letter from Alice B. Wender, Reg’l Dir., Office for Civ. Rts., U.S. Dep’t of Educ., to Teresa A. Sullivan, President, Univ. of Va., 9 (Sept. 21, 2015), available at <https://perma.cc/C8HL-A73W>.

114. See Senate Subcomm. Report, *supra* note 52, at 12 & appx. F4 (reporting that 85% of schools used a preponderance of the evidence standard and 15% used some other, presumably higher, standard of proof).

POE standard has become a focal point of controversy, it is quite possible that more institutions would adopt a clear and convincing evidence standard for these cases if the agency's directive on the POE standard was lifted.

### C. *Parsing the Substantive Divide Between the Proof Standards*

For all the controversy over the POE standard, it is far from clear what the distance is, substantively, between the POE standard and its main competitor, the clear and convincing evidence standard. The POE standard requires sufficient proof to convince a fact finder that a factual contention is more likely true than not true.<sup>115</sup> That is generally understood to be a more lenient standard than the clear and convincing evidence standard, but the distance between the two is difficult to discern.<sup>116</sup> It is even more difficult to tell how often the choice of proof standards would be outcome-determinative in campus disciplinary proceedings involving sexual misconduct. Accused students have been cleared of sexual assault charges under the POE standard despite substantial evidentiary support for the allegations.<sup>117</sup> The POE standard does not require the fact-finder to resolve credibility disputes in favor of the complainant.<sup>118</sup>

At the same time, accused students have been found responsible for sexual misconduct under the clear and convincing evidence standard. For a case illustrating the slipperiness of the dividing line between the two proof standards, consider *Doe v. University of the Pacific*.<sup>119</sup> The case involved multiple students accused of sexual misconduct and both standards of evidence—with clear and convincing evidence required for expulsion and a POE standard required for other disciplinary measures.<sup>120</sup> In the case, three male basketball players were accused of sexually assaulting a female basketball player in an on-campus apartment.<sup>121</sup> Two of the accused students claimed that the sexual activity was consensual, while the third claimed that

115. See Stoner & Lowery, *supra* note 106, at 48.

116. See Chmielewski, *supra* note 7, at 150 (discussing the difficulty courts have in defining the clear and convincing evidence standard).

117. For example, in the sexual assault allegations against Florida State University quarterback Jameis Winston, the university found Winston not responsible under the preponderance of the evidence standard. A subsequent civil lawsuit brought against the university by the complainant alleged substantial evidence pointing toward a finding of responsibility and charged the university with deliberate indifference in handling the allegations in violation of Title IX. See Tom Spousta, *Winston is Cleared in Hearing Over Student's Rape Accusation*, N.Y. TIMES, Dec. 22, 2014, at D1; *Kinsman v. Fla. St. Univ. Bd. of Trs.*, 2015 U.S. Dist. LEXIS 180599 (D. N. Fla. Aug. 12, 2015).

118. *Cf. Doe v. Univ. of the Pac.*, 2010 WL 5135360, at \*13 (E.D. Cal. Dec. 8, 2010) (rejecting plaintiff's argument that her testimony as a victim before the disciplinary board deserved greater weight than the testimony of the accused students).

119. 2010 WL 5135360 (E.D. Cal. Dec. 8, 2010).

120. *Id.* at \*15.

121. *Id.* at \*3.

he had no involvement in the incident.<sup>122</sup> The Judicial Conduct Board found the first two students responsible for sexual assault under the POE standard, but did not find the clear and convincing evidence necessary under its procedures to recommend expulsion.<sup>123</sup> The same Board found the third student responsible by clear and convincing evidence and recommended dismissal for that student.<sup>124</sup> It is impossible to tell from the court's recounting of the facts why the evidence met the clear and convincing standard for the student who denied any involvement in the incident, but only met the POE standard for the two students who admitted sexual activity while denying that it was nonconsensual. Perhaps the Board was moved by an indeterminate sense that expulsion was too much for the first two students, but just right for the third. Such a split decision may well have been defensible, but the amorphous nature of the clear and convincing standard makes it difficult to discern what proof suffices for a POE standard but falls short of clear and convincing.

The indeterminacy of this amorphous standard leaves decision-makers with a great deal of discretion to smuggle in unrealistic and heightened proof requirements that tap into unfounded assumptions about what kinds of proof should exist in provable cases of sexual assault.<sup>125</sup> Historically—including in recent history—complainants alleging sexual assault were disbelieved without corroborating evidence.<sup>126</sup> Because sexual assault typically occurs in private, without witnesses, it rarely lends itself to such iron-clad proof.<sup>127</sup>

While the substantive difference between the two proof standards, in itself, is unlikely to be outcome-determinative, the clear and convincing standard permits greater room for decision-makers to hold complainants to unrealistic proof expectations. For example, during the OCR investigation into the University of Montana, a University of Montana quarterback was found responsible for sexual misconduct under the POE standard. However, the student prevailed in an appeal to the Commissioner under the clear and convincing evidence standard.<sup>128</sup> The Commissioner used the clear and convincing proof standard, instead of the POE standard, because the Stu-

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122. *Id.* at \*5 nn.10, 11.

123. *Id.* at \*5.

124. *Id.* at \*3–4 & nn.10–12.

125. *Cf. Doe*, 2006 U.S. Dist. LEXIS 35780 (recounting statement by college administrator that “without physical evidence it was impossible to find the male student guilty of sexual assault”).

126. *See* MARINE, *supra* note 18, at 64–65 (discussing OCR complaint against Harvard University in response to the University's 2002 policy requiring corroborating evidence to proceed with a student disciplinary proceeding for sexual assault); *see also* Anderson, *supra* note 105.

127. *See* Baker, *supra* note 38, at 105–06 (discussing the features that make nonconsent difficult to conclusively prove in campus cases).

128. *See* Letter from Bhargava & Jackson, *supra* note 113, at 19; KRAKAUER, *supra* note 15, at 186–87.

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dent Handbook had not been amended to adopt the POE standard at the time of the events in question.<sup>129</sup>

The risk that a clear and convincing evidence standard would impose insurmountable proof requirements is heightened by the incentives for universities to find accused students not responsible. This risk is particularly acute when a high-profile athlete is implicated in a sexual assault complaint.<sup>130</sup> But even when the accused student is not an athlete, the incentives favor findings of non-responsibility. Title IX itself, through its liability standard for damages in civil lawsuits, incentivizes institutions to find against complainants in student misconduct proceedings. If, after a prompt and thorough investigation, the university finds insufficient evidence to conclude that sexual harassment took place, no further action would be required to avoid liability to the complainant; a court would not find the institution deliberately indifferent to a student who complained of sexual assault if the institution fully investigated but ultimately took no disciplinary action because it exonerated the person accused.<sup>131</sup> Moreover, the growing number of lawsuits brought by male plaintiffs challenging their institutions for disciplining them for sexual assault compounds these incentives.<sup>132</sup> Although many courts have been skeptical of such claims, a handful of recent cases have permitted male students disciplined for sexual assault to sue their schools on grounds including due process, breach of contract, and Title IX.<sup>133</sup> If schools face no risk of Title IX liability to complainants for

129. See Letter from Bhargava & Jackson, *supra* note 113, at 19.

130. See Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 232–33 (2009) (describing how the University of Nebraska football coach handled accusations of sexual violence in the mid-1990s, with the coach deciding on “what happened” and possessing full discretion in how to respond).

131. See, e.g., Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1123–24 (10th Cir. 2008) (the school district’s failure to discipline the male students alleged to have sexually assaulted the plaintiff was not deliberately indifferent where the school’s investigation found insufficient evidence that the sexual activity between the boys and the plaintiff, a girl with mental disabilities, was nonconsensual).

132. See, e.g., Yu v. Vassar Coll., 97 F. Supp. 3d 448 (S.D.N.Y. 2015); Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015); Sterrett v. Cowan, 85 F. Supp. 3d 916 (E.D. Mich. 2015), *vacated*, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich., Sept. 30, 2015); Tanyi v. Appalachian St. Univ., 2015 WL 4478853 (W.D.N.C. July 22, 2015); Wells v. Xavier Univ., 7 F. Supp. 3d 746 (S.D. Ohio 2014); King v. DePauw Univ., 2014 WL 4197507 (S.D. Ind. Aug. 22, 2014); Doe v. Wash. and Lee Univ., 2015 WL 4647996 (W.D. Va. Aug. 5, 2015); Doe v. Brown Univ., 166 F. Supp. 3d 177 (D. R.I. 2016); Prasad v. Cornell Univ., 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016); Doe v. Univ. of the S., 687 F. Supp. 2d 744 (E.D. Tenn. 2009); Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016); Doe v. Trs. of Boston Coll., 2016 U.S. Dist. LEXIS 137777 (D. Mass. Oct. 4, 2016); Doe v. Cummins, 2016 U.S. App. LEXIS 21790 (6th Cir. Ohio 2016); Austin v. Univ. of Or., 2016 U.S. Dist. LEXIS 121198 (D. Or. Sept. 8, 2016); Doe v. Lynn Univ., Inc., 2016 U.S. Dist. LEXIS 163157 (S.D. Fla. Nov. 23, 2016).

133. For decisions rejecting male plaintiffs’ claims, see Yu, 97 F. Supp. 3d 448; Tanyi, 2015 WL 4478853; Doe, 687 F. Supp. 2d 744; Doe, 2016 U.S. Dist. LEXIS 137777; Doe, 2016 U.S. App. LEXIS 21790; Austin, 2016 U.S. Dist. LEXIS 121198; Doe, 2016 U.S. Dist. LEXIS 163157; Doe v. Univ. of Mass.-Amherst, 2015 U.S. Dist. LEXIS 91995 (D. Mass. July 14, 2015). For decisions permitting at

finding an accused student not responsible after a prompt investigation, but risk suit by the accused for finding him responsible for sexual assault, the litigation incentives are heavily tilted toward exoneration.

Another incentive that goes against a finding of responsibility is the desire to protect the university's own reputation.<sup>134</sup> The desire to avoid the negative impact on the university's reputation that might result from a finding that sexual assault occurred on campus, combined with implicit skepticism of complainants, especially where the students knew each other before the alleged assault, can tilt the field toward a "not responsible" finding. The clear and convincing evidence standard, while it may not in itself *require* a different outcome than a POE standard would produce, leaves wide latitude for decision-makers to respond to such incentives by finding insufficient evidence to find students responsible.

#### D. *The Real Stakes: Messaging Rape Myths About Credibility and Harm*

More important than the substantive difference between the proof standards is the message that the selection of one or the other standard sends to potential complainants about the level of institutional receptiveness to such claims. Students who have experienced sexual assault read and respond to the signals in their universities' policies about how their institutions treat complainants.<sup>135</sup> The POE standard sets an even baseline for the likely truth of contested claims. Permitting a complainant to prevail upon a POE standard reflects the absence of an empirical judgment favoring either side. Likewise, the POE standard presumes that the stakes of winning and losing are comparable and that both sides have important interests at stake. On the other hand, requiring clear and convincing evidence tips the scales against

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least some of the plaintiff's claims to proceed, see *Wells*, 7 F. Supp. 3d 746 (allowing Title IX claim among others to continue); *King*, 2014 WL 4197507 (granting plaintiff's motion for preliminary injunction); *Doe*, 2015 WL 4647996 (allowing only the Title IX claim to continue); *Doe*, 123 F. Supp. 3d 748 (allowing only the negligence and erroneous outcome claim to proceed); *Doe*, 166 F. Supp. 3d 177 (allowing the erroneous outcome and breach of contract claims to continue while dismissing claims of deliberate indifference, negligence, and injunctive relief); *Prasad*, 2016 WL 3212079 (allowing only the erroneous outcome claim and a state law claim to continue); *Doe*, 831 F.3d 46 (vacating judgment dismissing complaint for failure to state a claim); *Sterrett*, 85 F. Supp. 3d 916 (allowing only the due process claim based on insufficient notice and a lack of a meaningful hearing to continue), *vacated*, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich., Sept. 30, 2015).

134. See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 220–24 (2011).

135. See Konradi, *supra* note 96, at 3 ("Written campus policies that indicate accusing students will or could face abuse during hearings from the violator or her or his representative or face bias from investigators or adjudicators are likely to contribute to victims' silence on campuses.").

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complainants on both points, the likelihood of truth and the balance of interests at stake.

Raising the proof standard for sexual assault complainants to require clear and convincing evidence expresses skepticism of complainants' stories by insisting on extra assurance that the presumptively unexpected outcome is the truthful one. Such skepticism resonates with longstanding fears of false allegations of sexual assault.<sup>136</sup> A similar skepticism of rape accusers was behind the special evidentiary rules for rape trials that long dominated the common law's approach.<sup>137</sup> It took the sustained efforts of the feminist movement to eventually succeed in lifting some of the most onerous requirements, such as the corroborating evidence requirement in criminal rape trials.<sup>138</sup> Even after these reforms, heightened skepticism of rape accusers persists, despite the lack of evidence of any exceptional risk of false accusations.<sup>139</sup> As Michelle Anderson has observed in her parsing of the data, while there is no surefire way to pinpoint precisely the incidence of false claims, there is no reliable evidence that sexual assault allegations are more often false than allegations of other types of wrongdoing.<sup>140</sup>

Despite the lack of evidence for a skeptical stance toward sexual assault complainants, arguments for heightened proof requirements resonate because cultural fears of false accusers run deep. Popular narratives that depict women as unreliable in knowing and expressing their desires—and in particular, changing their minds from no to yes—fuel this skepticism. The best-selling pulp fiction *Fifty Shades of Grey* trilogy exemplifies the cultural traction of this theme, depicting a college-age female protagonist who first resists, but then willingly submits to be dominated in a consensual sexual relationship with a powerful older man.<sup>141</sup> In depicting the couple's relationship as consensual, despite its abusive character and the female lead's periodic attempts to end it or escape it, the books promote the idea

136. See, e.g., Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 594, 612 (2013) (arguing for a clear and convincing evidence standard in campus judicial proceedings on sexual assault in part because false allegations of sexual assault are common and easy to make).

137. See Alletta Brenner, Student Note, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J.L. & GENDER 503, 509–10 (2013).

138. *Id.* at 511–12.

139. See Anderson, *The Legacy of the Prompt Complaint Requirement*, *supra* note 105, at 984–86; David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1319 (2010). R

140. Anderson, *Campus Sexual Assault Adjudication*, *supra* note 17, at 1986; Anderson, *The Legacy of the Prompt Complaint Requirement*, *supra* note 105, at 984–86; see also Lisak et al., *supra* note 139, at 1318 (putting the rate of false allegations between 2% and 10%). R  
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141. E.L. JAMES, *FIFTY SHADES OF GREY* (2011).

that women do not know their own minds when it comes to sex.<sup>142</sup> The trope of female confusion feeds into a regret thesis—that women later claim that consensual sex was rape out of regret or guilt about acting on their own desires.

These fears have been stoked in recent years by high-profile incidents of subsequently debunked rape accusations on college campuses. First, the Duke Lacrosse Case became the poster child for how incendiary rape accusations can lead to an unfair rush to judgment. Several Duke male lacrosse players, who had hired female strippers at an off-campus party, were wrongly accused of rape by one of the women and were treated unfairly and unethically by an over zealous prosecutor who refused to share exculpatory evidence and proceeded with the prosecution despite an unraveling investigation.<sup>143</sup> However, instead of a tale of prosecutorial misconduct and the abuse of state power in the criminal justice system, the takeaway was often framed in terms of the ease with which men's lives can be ruined by false accusations.<sup>144</sup> No sooner had the dust settled from the Duke Lacrosse fiasco than the explosive Rolling Stone story about an alleged gang rape at the University of Virginia took its place on the public stage.<sup>145</sup> Once the shoddy journalism in the Rolling Stone article was exposed, a dominant story line again was the life-destroying risk of false accusations and the haste in a rush to judgment, instead of a tale of journalistic mistakes and trading off careful fact-checking for the sake of sensationalized headlines.<sup>146</sup>

Both stories have played an outsized role in the discourse over campus sexual assault not because they are representative incidents, but because the magnified exposure they received made them salient in the public's thinking about this issue. Those stories that come first to mind shape cognitive responses to problems in irrational ways. A highly salient story, even if atypical and non-representative, is more likely to influence public opinion

142. See, e.g., Amy E. Bonomi, *Is Fifty Shades Triumphant for Women? Or Further Entrapping Them?*, THE HUFFINGTON POST (Oct. 12, 2013), <https://perma.cc/HF3Q-3Q6C>.

143. See ROBERT J. LUCK & MICHAEL L. SEIGEL, RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 3, 4–27 (Michael L. Seigel ed., 2009).

144. See William D. Cohan, *The Duke Lacrosse Player Still Outrunning His Past*, VANITY FAIR (Mar. 24, 2014), <https://perma.cc/VHE2-68YU>; Christina Cauterucci, *A New ESPN Doc Exposes the Real Villains in the Duke Lacrosse Case*, SLATE (Mar. 11, 2016), <https://perma.cc/B2ND-QSJH>.

145. Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), <https://perma.cc/97RN-PERN>.

146. Ben Sisario, Hawes Spencer & Sydney Ember, *Rolling Stone Loses Defamation Case Over Rape Story*, N.Y. TIMES (Nov. 4, 2016), <https://perma.cc/WUA9-HYP8>; Bill Chappell, *3 U.Va. Graduates Sue 'Rolling Stone,' Reporter Over Rape Article*, NATIONAL PUBLIC RADIO (July 30, 2015), <https://perma.cc/2RHZ-GYAF>; Sheila Coronel, Steve Coll & Derek Kravitz, *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), <https://perma.cc/L8HC-EJSD>.

than stories that are more representative but less salient.<sup>147</sup> High-profile, sensationalized accounts like the Duke and University of Virginia scandals fuel fears of false accusations and help support a narrative that accused students need the protection of a higher proof standard lest they be vulnerable to false accusations and a rush to judgment.

In actual cases involving sexual assault allegations, whether in the criminal justice system or in university student conduct proceedings, skepticism of complainants already undermines their credibility. This is especially so when the alleged conduct does not fit preconceptions about “real rape”—that is, where the incident did not involve a weapon or a stranger, and did not result in any verifiable physical injuries. Such skepticism by police and prosecutors is a main reason why rape and sexual assault charges so rarely result in prosecution and even more rarely in conviction.<sup>148</sup> It is also a primary reason why sexual assault is significantly underreported.<sup>149</sup> Only a small percentage, between four and eight percent, of persons who experience sexual assault in college report it to campus authorities, and only about two percent report it to the police.<sup>150</sup> A common reason for not reporting is the fear of not being able to prove what happened and of not being believed.<sup>151</sup> Replacing the POE standard with a clear and convincing evidence standard would add to the mix of reasons that discourage complainants from coming forward.<sup>152</sup>

Not only would a higher proof standard stack the deck against complainants in calibrating the likelihood of truthfulness behind the competing accounts, it would also place a higher value on the potential harm to an accused student, compared to a sexual assault victim, resulting from an erroneous decision. The clear and convincing evidence standard more closely resembles the criminal law’s judgment that it is preferable to exonerate nu-

147. Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 *CARDOZO L. REV.* 391, 411 (2006).

148. Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 *VIOLENCE AGAINST WOMEN* 145, 152 (2012); Lisak et al., *supra* note 139, at 1318.

149. See Chiara Sabina & Lavina Y. Ho, *Campus and College Victim Responses to Sexual Assault and Dating Violence: Disclosure, Service Utilization, and Service Provision*, 15 *TRAUMA VIOLENCE ABUSE* 201, 203 (2014) (reporting findings of systemic review of literature on college students’ reporting of sexual assault and finding low levels of reporting to police and of formal reporting to other sources).

150. Amar, *supra* note 97, at 579–80.

151. *Id.* at 580; Wendy A. Walsh et al., *Disclosure and Service Use on a College Campus After an Unwanted Sexual Experience*, 11 *J. OF TRAUMA & DISASSOCIATION* 134, 137 (2010).

152. Elizabeth Sommer, *Use of Preponderance of Evidence in Campus Adjudication of Sexual Misconduct* 28–29 (Dec. 2015) (Masters Thesis, Northern Michigan University), available at <https://perma.cc/GQ3X-G3V5> (Masters thesis, reporting findings of interviews with student conduct adjudicators at one public university, reporting their belief that a higher standard than the preponderance of the evidence would deter victims/survivors from coming forward).

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merous guilty persons rather than wrongly condemn a single innocent defendant.<sup>153</sup> The criminal law's allocation of harm reflects the exceptionally high stakes of incarceration resulting from criminal proceedings. In civil cases, the POE standard reflects the equivalence of significant stakes on both sides. The increased activism of survivors has had a powerful impact on public appreciation of the harm of sexual assault. The widely shared in-court statement from the woman who was sexually assaulted behind a dumpster by a Stanford swimmer while she was unconscious is just one example of this phenomenon.<sup>154</sup> Raising the standard from a POE standard to a clear and convincing evidence standard would tilt this balance to favor the accused student. The same set of rape myths that casts doubt on the veracity of sexual assault complainants also undermines recognition of the harm of sexual assault when it does not involve weapons, strangers, or physical injuries.

Women of color who are sexually assaulted have the most to lose from a rule that tilts baseline credibility judgments and presumptions about harm away from potential complainants. Survivors of sexual assault come from all racial and class backgrounds.<sup>155</sup> And yet, in the debate over the POE standard, race has entered into the discussion only in terms of the effect on men of color, and African-American men in particular, who are accused of sexual misconduct.<sup>156</sup> This is indeed a pressing concern given the racial bias against black men in law enforcement and in school disciplinary actions—one that will be further addressed below. But the interaction of race and gender and their effect on the treatment of complainants under the competing proof standards also deserves attention.<sup>157</sup> Women of color are often invisible in the analysis even when they are complainants. In the football

153. See Hendrix, *supra* note 136, at 612 (arguing for a clear and convincing evidence standard in campus judicial systems' handling of sexual assault in part because of the exceptional reputational harm to students found responsible for sexual misconduct). R

154. See Lindsey Bever, 'You Took Away My Worth': A Sexual Assault Victim's Powerful Message to Her Stanford Attacker, *THE WASH. POST* (June 4, 2016), <https://perma.cc/59RB-M5MC>. R

155. See, e.g., MARINE, *supra* note 18, at 62 (sharing her observation, while heading Dartmouth's sexual assault response team, of "a troubling pattern in the makeup of students reporting sexual assault—nearly one-third of the reports. . . within a 3-year span of time where made by Asian and Asian American women, primary of East Asian descent"). R

156. See, e.g., Gerson & Suk, *supra* note 76, at 915, 943–45 (2016) ("The lack of transparency in campus investigations and adjudication should cause serious concern that the public does not have a reliable way to see a pattern of accusations, investigations, and discipline that may disproportionately impact minorities."); Halley, *supra* note 78, at 103 (" . . . the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them."). R

157. Cf. Tanya Kateri Hernandez, "What Not to Wear"—Race and Unwelcomeness in Sexual Harassment Law: *The Story of Meritor Savings Bank v. Vinson*, *WOMEN AND THE LAW STORIES* 277, 278–79 (2011) (discussing the prominence of women of color in sexual harassment litigation and the paucity of analysis of the intersection of race and gender in these cases).

gang rape case against the University of Colorado, for example, attention to race focused on the fact that the alleged assailants were African-American men; it went unnoticed that one of the women who was raped was also African-American.<sup>158</sup> Similarly, the foundational case establishing Title IX's applicability to peer sexual harassment presents as a case of sex discrimination, but involved an African-American girl whose complaints that she was being sexually harassed went unheeded for five months.<sup>159</sup> Treating sexual harassment and sexual assault as a "women's" problem that implicates gender but not race, and addressing race only in relation to accused students, pits a racially diverse group of accused students, with black men featured prominently among them, against a race-less (and implicitly white) group of accusers.

The rape myths that undermine survivors' credibility and narratives of harm are not just gendered but also racialized, and they are especially pernicious in delegitimizing the experiences of women of color. The racial and sexual stereotypes that derail black women's claims of sexual assault, in particular, are traceable to the legacy of slavery, in which African-American women were culturally depicted as lascivious and animalistic, and rendered legally unrapable.<sup>160</sup> The power of these cultural filters continues to influence reactions to women of color who assert claims of sexual assault in the modern era. Research on how third-party observers view victims in sexual assault scenarios has found that when women of color are depicted as the subjects of sexual assault by white perpetrators, they are viewed more skeptically and in a more stigmatizing manner than white women in the same scenarios.<sup>161</sup>

Having access to a fair campus process for handling sexual assault is particularly important for women of color. Already, women of color are less likely than white women to report sexual assault out of heightened fears of not being believed.<sup>162</sup> Women of color also have reason not to trust the

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158. Scales, *supra* note 130, at 251 n.175.

159. *Davis*, 526 U.S. at 635 (describing allegation that principal responded by asking her why she "was the only one complaining[?]" The principal responded more seriously when the same boy struck a white girl, disciplining the boy in that instance.); *Aurelia D. v. Monroe Cnty. Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994).

160. Sara Carrigan Wooten, *Heterosexist Discourses: How Feminist Theory Shaped Campus Sexual Violence Policy*, in *CRISIS OF CAMPUS SEXUAL VIOLENCE* 33, 35 (2016) (referencing Angela Davis's description from 1972).

161. Roxanne A. Donovan, *To Blame or Not to Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution*, 22 *J. INTERPERSONAL VIOLENCE* 722, 723 (2007).

162. Sarah E. Ullman et al., *Exploring the Relationships of Women's Sexual Assault Disclosure, Social Reactions, and Problem Drinking*, 23 *J. INTERPERSONAL VIOLENCE* 1235, 1237 (2008); Martie Thompson et al., *Reasons for Not Reporting Victimization to the Police: Do They Vary for Physical and Sexual Incidents?*, 55 *J. OF AM. COLL. HEALTH* 277, 279 (2010) (finding women of color less likely than white women to report sexual violence to the police).

criminal justice system with their stories.<sup>163</sup> Title IX's regulatory framework developed as it did, with increasing particularity, in response to the failures of the criminal justice system and university processes, failures which gave voice to the biases against survivors that have for so long undermined their credibility and trivialized their experiences. Raising the standard of proof in campus sexual assault proceedings would likely have the most negative impact on those complainants with the least social privilege, those who do not match up with cultural stereotypes about "real" (e.g., credible) victims of sexual assault.

*E. The Power of Heuristics in the Clash of Narratives*

In the final analysis, while the choice between proof standards matters—especially because of the messages it sends about credibility and relative harm—the debate is about more than the substantive differences between the POE standard and the clear and convincing evidence standard. The controversy over the POE standard is ground zero in the rape culture wars and a perfect flashpoint for the battle of empathy between student survivors and accused students. It is the litmus test for which set of stories resonates: those of survivors of sexual assault or those of the students challenging the disciplinary actions taken against them. This divide is much bigger than a disagreement over the standard of evidence. It is a more intractable conflict over which set of stories is viewed as more compelling, empathic, and representative.

The clash of narratives in this debate illustrates a phenomenon that law professor Nancy Levit has explored: the influence of heuristics on debates about feminist law reform efforts.<sup>164</sup> As Levit explains, heuristics have the power to distort rational thinking. Whichever story is most salient and comes foremost to mind has an outsized power to shape public policy. The most salient story is viewed as the most representative even if it is aberrational and rarer than less salient opposing stories. Levit gives the example of how anomalous stories of employer overreaction to sexual harassment law were effectively used to argue that the law had gone too far.<sup>165</sup> The power of these incidents was disproportionate compared to their infrequency, but they were memorable and captured the public imagination.<sup>166</sup>

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163. Cf. Rebecca Ropers-Huilman et al., *Afterword: Questioning the Scripts of Sexual Misconduct, THE CRISIS OF CAMPUS SEXUAL VIOLENCE* 185, 187 (2016) ("[T]he criminal justice system's racist, classist, and homophobic history make this path of recourse inaccessible to many victim-survivors.").

164. Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 *CARDOZO L. REV.* 391, 395 (2006).

165. *Id.* at 410–11 nn.108–10.

166. *Id.* at 411–12.



The conflicting accounts of survivors and accused students are now competing for salience in the public discourse. The challenge is to engage both sets of stories and to resist the zero-sum framing of complainants vs. accused, women vs. men, in charting the path for the law's response to this problem.<sup>167</sup> The zero-sum mentality is a cornerstone of the gender culture wars. It is ascendant in the "Boys Left Behind" narrative, which argues that the push for gender equality for women and girls in education has come at the expense of boys and men, and in the "End of Men" discourse on the cost to men of the rise of feminism.<sup>168</sup> In zero-sum gender wars, men are the victims of women's gains.

The heightened Title IX enforcement now pressing universities to take campus sexual assault more seriously need not be a zero-sum game where women's gains come at the expense of men. Both complainants and accused students have a tremendous stake in having fair and balanced campus judicial processes hearing their claims. A process that is fair toward complaining students—one that holds each side's likelihood of truth in equilibrium—need not compromise accused students' due process rights.<sup>169</sup> Men too have something to gain from the regulation of sexual assault on campus. Men are sometimes victims of sexual assault, and perhaps one of the surprises in the recent research on sexuality on campus is how often this happens.<sup>170</sup> Even apart from the interests of male victims, men as a group have something to gain from changing the norms that tolerate sexual aggression on campus.<sup>171</sup>

The challenge is to bring the opposing sets of stories into dialogue while remaining empathetic to both survivors and accused students. By

167. Cf. Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 *AGGRESSION & VIOLENT BEHAVIOR* 396, 402–03 (2008) (discussing research finding that people tend to identify more with the party in a rape case who shares their own identity characteristics).

168. See Juliet A. Williams, *Girls Can Be Anything . . . But Boys Will Be Boys: Discourses of Sex Difference in Education Reform Debates*, 13 *NEV. L.J.* 533, 534; Juliet A. Williams, *Thinking Through the 'Boy Crisis': From Multiple Masculinities to Intersectionality*, in *EXPLORING MASCULINITIES: FEMINIST LEGAL THEORY REFLECTIONS* 163, 169–75 (Martha Albertson Fineman and Michael Thompson eds., 2013); Michael S. Kimmel, *Global Masculinities: Restoration and Resistance*, in *A MAN'S WORLD?: CHANGING MEN'S PRACTICES IN A GLOBALIZED WORLD* 21, 21–37 (Bob Pease & Keith Pringle eds., 2001); MICHAEL S. KIMMEL, *THE POLITICS OF MANHOOD* (1995).

169. See Konradi, *supra* note 96, at 15 (in study of campus sexual assault policies at all institutions of higher education in Maryland, finding that those policies with strong supports for victims also had strong due process protections for the accused, and concluding that these findings "undermin[ed] the argument that these two kinds of protections for students exist in a zero-sum relationship").

170. See Mary E. Larimer et al., *Male and Female Recipients of Unwanted Sexual Contact in a College Student Sample: Prevalence Rates, Alcohol Use, and Depression Symptoms*, 40 *SEX ROLES* 295, 301–06 (1999) (in small study of college students, reporting comparable levels of unwanted sexual activity experienced by undergraduate males as experienced by undergraduate females).

171. Michael Kimmel, *Is It the End of Men, or Are Men Still in Power? Yes!*, 93 *B.U. L. REV.* 689, 696 (2013) (discussing research finding that men are better off in more egalitarian sexual relationships).

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avoiding prejudgments about harm or credibility favoring either side, the POE standard best accomplishes this goal. The advocacy for a higher proof standard trades on heightened empathy toward accused students. In this pushback against the 2011 DCL, the politics of white male privilege are at play. The stories of unjustly accused men resonate so powerfully with the public in part because they showcase relatively privileged college men who do not meet the prototype of a “real rapist.”<sup>172</sup> Their persuasive power is fueled by the narrative that women consent and then regret it, belatedly claiming sexual assault.

Both the stories of survivors and the stories of men punished for ambiguous situations may have truth behind them, polarized though they are. Feminist law reform efforts should seek to resist the pull of dichotomies, allowing empathy for both survivors of sexual assault and persons accused.<sup>173</sup> Particularly because the norms of consent are evolving, there should be room for both responsibility and redemption. The final section of this article considers the challenges of using a campus disciplinary framework to transform social norms on campus. It concludes with a brief discussion of restorative justice as a promising avenue for reconciling the contest of empathy being waged through these competing narratives.

#### IV. CHANGING CAMPUS NORMS: TOO MUCH OR NOT ENOUGH DISCIPLINE?

In the culture wars over campus sexual assault, concerns about overly harsh discipline figure prominently. It is a common refrain from critics of the OCR’s DCL that a student should not be branded a sex offender for life based on a mere POE standard.<sup>174</sup> It bears noting that this description does not fit the many students who are not severely punished despite having been found responsible for sexual misconduct.<sup>175</sup> Title IX does not require schools to impose any particular disciplinary response, leaving institutions

172. See Gerd Bohner et al., *Rape Myth Acceptance: Cognitive, Affective and Behavioral Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator*, RAPE: CHALLENGING CONTEMPORARY THINKING 17, 19 (2009) (discussing the role of rape myths in blaming victims and assessing perpetrator fault).

173. For an inspiring essay on the need for empathy in legal discourses, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

174. See, e.g., Bob Unrah, *College Facing Trial for Branding Innocent Student ‘Rapist,’* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Mar. 14, 2014), <https://perma.cc/MPA8-FSQB> (“But branding someone a rapist without the benefit of meaningful due process protections betrays the fundamental principles of justice.”); Ashe Schow, *Advocates Want Black Mark on College Transcripts for Campus Sexual Assault*, WASHINGTON EXAMINER (Sept. 25, 2015), <https://perma.cc/XU7N-HS4R> (“To brand someone a rapist based on colleges’ preponderance of evidence standard — that is, based on 50.01 percent certainty the assault happened — is a dangerous precedent in itself.”).

175. See Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CENTER FOR PUBLIC INTEGRITY, 55, 56–57 (2010), available at <https://perma.cc/N34B-2RHA> (reporting that, of those persons ac-

discretion to calibrate appropriate discipline.<sup>176</sup> And yet, stories have emerged recently of men being expelled from their institutions, some with permanent notations on their transcripts, for sexual assault in seemingly ambiguous situations (at least according to the men's stories of what happened) and with procedures that raise doubts about fairness. Such scenarios are the subject of a growing body of case law in which men have sued their universities alleging, among other claims, sex discrimination in violation of Title IX.<sup>177</sup> Apart from the merits of their legal claims, their stories feed into a narrative that the tables have turned and men are now being subjected to harsh discipline under procedures that fall short of protecting their due process rights. Their stories may be anomalous rather than representative, and they have not been tested by complainants, who are not parties in these cases. Nevertheless, without granting that these stories are necessarily factually supported, representative, or legally meritorious, they deserve serious consideration. Ignoring these stories—and the risk of overly harsh discipline—risks undermining the law's ability to transform the social norms that facilitate sexual assault and the harmful responses to it.

#### A. *Harnessing Title IX to Change Social Norms*

Reducing the prevalence of sexual assault requires changing the norms of campus culture that make taking sex without consent socially acceptable. Peers have an enormous influence over how sexual actors behave and the degree of respect given to a sexual partner's wishes. A major predictive factor of sexual violence is the perception of high levels of peer support for sexually aggressive acts.<sup>178</sup> As Todd Crosset has noted, "One of the strongest predictors that an individual will engage in sexual assault is expressed support for violence against women by peers."<sup>179</sup> This finding would not

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tually found responsible for sexual misconduct, only 10-15% received a serious sanction such as being required to leave school).

176. See *Davis*, 526 U.S. at 648 (stating that schools need not "engage in particular disciplinary action" to avoid liability); See also *Doe*, 2010 WL 5135360, at \*15 (rejecting plaintiff's Title IX claim challenging the severity of discipline for her 3 attackers and stating that Title IX does not require any particular remedy and the court will not second-guess the severity of the university's punishment).

177. Cases in which one or more claim was allowed to proceed include: *Doe*, 831 F.3d 46; *Wells*, 7 F. Supp. 3d 746; *King*, 2014 WL 4197507; *Sterrett*, 85 F. Supp. 3d 916, *vacated*, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich., Sept. 30, 2015); *Doe*, 2015 WL 4647996; *Doe*, 123 F. Supp. 3d 748; *Doe*, 166 F. Supp. 3d 177; *Prasad*, 2016 WL 3212079; *Doe v. Brandeis Univ.*, 177 F.Supp.3d 561 (D. Mass. 2016); *Doe v. The Rector and Visitors of George Mason Univ.*, 2016 WL 1574045 (E.D. Va. Apr. 14, 2016).

178. See Martin D. Schwartz et al., *Male Peer Support and a Feminist Routing Activities Theory: Understanding Sexual Assault on the College Campus*, 18 JUSTICE QUARTERLY 623, 645 (2006); MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, *SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT* (1997).

179. Todd W. Crosset, *Athletes, Sexual Assault, and Universities' Failure to Address Rape-Prone Subcultures on Campus*, THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE 74, 82 (2016).

surprise masculinities scholars, who have long observed that men's sense of masculinity depends more on how men are perceived by other men and their status in relation to other men, than how women perceive them.<sup>180</sup>

In order to change the norms of sexuality on campus, an idealized masculinity that is predicated on objectifying and sexually exploiting women must be contested, and alternative masculinities that value egalitarian sexual relationships must be supported. Men's sexuality has long played a central role in men's jockeying for masculinity. An imperative of traditional masculinity is that men must have a lot of sex with women to prove their masculinity to other men.<sup>181</sup> Not having a lot of sex—or even worse, being celibate—is a threat to masculinity and the subject of derision. It is also the stuff of comedy, as in the movie *The 40-Year-Old Virgin*. In this version of hegemonic masculinity, it is having sex with a lot of women that proves men's masculinity—not whether their sexual partners wanted to have sex with them. Having sex regardless of women's wishes may even be a bonus in the tussle for hegemonic masculinity. Even the lingo—"to score"—suggests that sex is something that is taken. A score is not willingly given up, it is made.

Changing the norms of masculinity, including the norms of sexuality on campus, is tricky business. If men are punished for sexual assault in a way that is perceived as unfair, overly harsh, and unjust, the sanction will not generate condemnation from peers nor change social norms.<sup>182</sup> As scholars have pointed out in relation to the criminal law of rape, law reforms that harshly punish conduct that is commonplace and within the range of widely shared social norms (including male pursuit of sex in circumstances which many men would perceive as implying consent) risk provoking backlash instead of shifting norms.<sup>183</sup> The "tough on crime" punitive responses to rape such as sex offender registration and other post-sentencing measures perpetuate an image of rapists as aberrational and unusually dangerous actors, making it harder to change widely shared norms of male sexual entitlement.<sup>184</sup> In the educational setting, like the

180. Kimmel, *supra* note 171, at 691.

181. Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 670 (1999).

182. See Konradi, *supra* note 96, at 3 (discussing the importance of fairness and due process toward accused students as well as toward complainants in order for campus processes to be perceived as legitimate and receive community buy-in and serve as effective remedies for sexual assault).

183. See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000) (on difficulty of using "sticks" in law to change widely shared norms).

184. Baker, *supra* note 38, at 868–69; see also Anderson, *Campus Sexual Assault Adjudication*, *supra* note 17, at 1958–59 (explaining that such "tough on crime" punitive measures for sex offenses were not feminist-inspired reforms and do not serve feminist goals); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1553–54 (2014) (arguing that harsh punishments such as sex offender registration and shaming of offenders are

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criminal justice system, there is a risk that heaping punishment and stigma on persons found responsible for sexual assault will backfire. Instead of strengthening norms against sexual coercion, punishment that is perceived as unduly harsh and the result of an unfair process will undermine the norm-shifting work that Title IX seeks to accomplish.

This presents a dilemma because insufficient disciplinary consequences also have normative consequences. Letting sexual assault go unsanctioned does nothing to disrupt the expectation of acceptability for sexually coercive actions.<sup>185</sup> Without a proportionate punishment following a finding of responsibility for sexual assault, the resulting message is one that trivializes the harm. The outpouring of anger from sexual assault survivors and advocates in response to what was perceived as an unjustly light punishment of the Stanford swimmer who sexually assaulted an unconscious woman is a case in point. Calibrating a disciplinary response that will shift norms against sexual coercion, without triggering a backlash that pushes norms in the opposite direction, runs into the thorns of this dilemma.

### B. Race and Campus Discipline

The challenge to hitting the sweet spot for transforming social norms in a campus disciplinary framework is complicated by concerns that the race of the accused student will unfairly bias the disciplinary process, as it often does in the criminal justice system. Critics of the Title IX framework have made this a focal point in their critique, claiming that men of color are more likely than white men to be found responsible for sexual assault in campus proceedings and face harsh penalties.<sup>186</sup> The risk that OCR's Title IX enforcement will over-police men of color is very real given that school discipline overall, like criminal law enforcement, is marred by racial disparities—a problem OCR itself has highlighted in its enforcement efforts under Title VI of the Civil Rights Act of 1964.<sup>187</sup> To date, there is no data on the racial impact of campus discipline for sexual assault, which is itself prob-

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criminogenic, and urging reformers to focus on institutional and cultural change in order to change social norms).

185. See Konradi, *supra* note 96, at 3 (discussing research finding “sexual assault to persist on campus because some men do not fear negative consequences for acts they know to be improper,” and reporting one study’s findings that 32% of the sample of heterosexual college men admitted having “intentions to force a woman to sexual intercourse” if “nobody would ever know and there wouldn’t be any consequences”).

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186. See, e.g., Halley, *supra* note 78, at 107 (“...and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them.”); Gerson & Suk, *supra* note 76, at 945–46 (noting the impact of watered-down procedural protections, including the preponderance of the evidence standard on African American men specifically).

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187. See U.S. Dep’t of Educ., Office for Civ. Rts. & U.S. Dep’t of Just., Civ. Rights Div., *Joint “Dear Colleague” Letter* (Jan. 8, 2014), available at <https://perma.cc/6NU3-FZE7>.

lematic. The risk of racial impact necessitates a broader conversation about the structural and institutional factors that place men of color in a position of vulnerability.

One argument that has been made by critics of OCR's enforcement of Title IX is that some white women will regret their sexual decisions to be intimate with men of color and then cry "rape" to ease their own guilt.<sup>188</sup> No evidence has been marshalled to back up this claim, which may reflect expectations on the part of those asserting it that are out of synch with the beliefs and feelings of young women. All indications are that this generation of college students is less concerned with labels and racial identities than previous generations.<sup>189</sup> More likely, *if* there is a racial impact in campus punishment, it has more to do with the institutional and structural factors responsible for racial disparities in school discipline more broadly. Given the prevalence of implicit racial bias, it would be surprising if race did not affect perceptions of credibility, determinations of fault, and feelings of empathy in institutional fact-finding processes.

In addition to the risk of race bias against accused students generally, there is a dimension to the problem of racial disparities in handling sexual assault that is specific to athletics and its place in the university. As noted earlier in this article, athletics is a trouble spot for the problem of campus sexual assault, for several reasons. First, men who play competitive sports are more likely to engage in sexually aggressive behaviors.<sup>190</sup> As noted above, the reason for this correlation is not exactly clear, but something about male sporting culture, as currently articulated, contributes to a normative environment in which sexual coercion and sexual aggression is supported. Second, men whose athletic positions make them valuable to the university have privilege that shields them from the normal university processes of accountability.<sup>191</sup> A common theme in the Title IX case law is the signal from university administrators that their high-value athletes can get away with more than other students, a message that is internalized by the athletes themselves. Combined with this privilege, however, is the double-edged sword of low expectations for athletes' behaviors and capa-

188. See, e.g., Halley, *supra* note 78, at 106–107 (“some of these accusations will be based on racially exploitative evasions of responsibility by white women who willingly had sex with black men and then disavowed it as rape.”); Gerson & Suk, *supra* note 76, at 945:

[T]he worry is that unfair procedures combined with overly broad definitions of nonconsent may have a disproportionate impact on black men in a way that is consistent with both our country's specific history of false accusations and unfair convictions of black men for rape and the more general racially disproportionate impact of criminal law enforcement.

189. See *Almost All Millennials Accept Interracial Dating and Marriage*, PEW RESEARCH CENTER (Feb. 1, 2010), <https://perma.cc/LH4A-AC3L> (“Compared with older groups, particularly Americans ages 50 or older, Millennials are significantly more likely to be accepting of interracial marriage.”).

190. See *supra*, Part II(B).

191. See *id.*

bilities off the field. With many of the highest-value athletes located in the men's sports in which African-American men have the highest levels of participation, football and basketball, this athletic privilege is fueled by an implicit bias of low expectations for college athletes apart from their athletic performances. These low expectations, which are supported by subtle institutional racism, set up athletes to fail academically, misbehave off the field, and live up (or down) to the low expectations for behavior set by their universities.<sup>192</sup>

When campus sexual assault involves allegations against male athletes, it tends to generate more and different media coverage, in a way that fuels the race versus gender narrative hailed by Title IX's critics. When sexual assault allegations become public, especially where high-profile athletes are involved, news stories about the allegations are often punctuated by photographs or video footage of the athletes.<sup>193</sup> The athletes in these stories, especially when they are from the high-profile sports of football and basketball, are often—though far from always—African-American men. These are the cases that typically get the most media attention—partly because the athletes are already well-known and partly because these are the cases where the universities, highly motivated to protect their athletes, mishandle and cover-up sexual assault allegations the most. As pointed out on the always-insightful Title IX blog authored by Erin Buzuvis and Kristine Newhall, the media coverage of these cases strikes a contrast with that of allegations involving non-athlete college men accused of sexual assault, in which the men are more likely to remain invisible, are not captured in photographs or video footage, leaving them unracialized.<sup>194</sup> In this way, the media coverage itself fuels assumptions about how race and gender intersect for men accused of sexual assault, leaving viewers with images that are particularly memorable because they align with negative stereotypes about men of color.

Notwithstanding the expressed objections to racial bias against men of color by Title IX's critics, the current resistance to Title IX is driven more by the politics of white privilege than an anti-racist agenda. Before the 2011 DCL and the stepped-up enforcement from the White House and OCR, the main impact of Title IX on university responses to campus sexual assault

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192. See Todd Crosset, *Capturing Racism: An Analysis of Racial Projects Within the Lisa Simpson v. Univ. of Colo. Football Rape Case*, 24(2) INT'L J. HIST. OF SPORT 172, 178–89 (2007) (discussing the role of race in the University of Colorado sexual assault case and arguing that ironically, while UC administrators and the media accused the female complainants of perpetuating the myth of the hypersexual black male, the university's own recruiting practices—which relied on partying, alcohol, and supplying attractive and available female escorts—reflected this very assumption).

193. Kristine Newhall, *Huntsville-Alabama Title IX Case and How We Understand Violence and Athletes*, TITLE IX BLOG (Nov. 15, 2014), <https://perma.cc/Y7K8-DZEN>.

194. *Id.*

came from courts rather than administrative enforcement. Unlike OCR, courts apply the deliberate indifference standard, which sets an extremely high bar for faulting a university's response to sexual assault allegations. As a result, Title IX enforcement in the courts creates little pressure on universities to change how they handle sexual assault investigations in all but the most egregious cases of administrative bungling. These most egregious cases, in which universities may be liable for their responses to sexual assault, have typically involved allegations against athletes—specifically athletes in the high-value sports of football and basketball—where universities doubled down to protect their valuable players. Before 2011, these were the kinds of cases in which universities were most likely to feel the pinch of Title IX. For the most part, these cases yielded little anti-Title IX pushback. That is not to say that high-profile athletes, wearing the mantle of athletic privilege, do not garner support from other students and the public when accused of sexual assault; clearly they do.<sup>195</sup> Nevertheless, the groundswell of opposition to Title IX arose *after* OCR issued the 2011 DCL and increased its emphasis on administrative enforcement.

Unlike courts, OCR requires more of institutions than merely avoiding deliberate indifference. With the Obama Administration's greater emphasis on OCR enforcement, universities suddenly faced added pressure to bring their institutional processes into compliance on all areas of campus. The effect was to make Title IX a forceful regulatory presence even in cases that would fall far short of the deliberate indifference courts require. In an OCR-administrative action, an institution may be noncompliant even without an orchestrated university cover-up to protect the accused student. It is when OCR enforcement effectively extended Title IX's impact beyond athletic departments and to the rest of the campus that the pushback against Title IX began in earnest and the opposition gained traction.

In the opposition to Title IX, then, race plays a role, but in a different way than OCR's critics have framed it. Under the Obama Administration's stepped-up administrative enforcement, OCR brought the pressures of Title IX to places of white privilege. Race has long influenced the cultural imagination of the prototype of a rapist, and it is not the average college boy.<sup>196</sup> Many of the non-athlete cases in particular which OCR has investigated and found violations have involved Ivy League schools and/or elite colleges, such as Columbia, Yale, Harvard, Princeton, Duke, the University of Vir-

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195. Cf. Timothy Davis, *The Myth of the SuperSpade: The Persistence of Racism in College Athletics*, 22 *FORDHAM URB. L.J.* 615 (1995) (explaining how the cultural capital of privileged black athletes makes them less vulnerable to the prejudices and stereotypes that drain empathy and support from non-celebrity black men accused of wrongdoing).

196. Cf. Brenner, *supra* note 137, at 550 ("Within the small community of a college campus, where many of those who are accused of rape are 'good guys' who graduate with honors or succeed in athletics, it is hard to identify such persons as rapists.").



ginia, Stanford, and Dartmouth, to name just a few.<sup>197</sup> The elite colleges are also the ones most affected by OCR's directive to use the POE standard, since they were the most likely to use a higher evidentiary standard in student misconduct proceedings.<sup>198</sup> Allegations of sexual assault by male students attending prestigious institutions strike a different chord with the public than the images of accused athletes, and challenge the prototype of a rapist and the accompanying stereotypes about the kinds of environments and communities where sexual assault takes place.<sup>199</sup> Racial scripts and the subtext of white privilege are now amplifying the pitched debate about whether Title IX has gone too far in intruding into campus processes for handling sexual assault. As Title IX has extended beyond athletics and into the rest of the campus in regulating the processes of handling sexual assault, public sympathy for the college men accused of sexual assault has grown, as have concerns about unfounded accusations. Just as racial assumptions have driven the harsh condemnation of paradigmatic rapes, so have they fueled sympathy for men of race and class privilege who are accused of sexual assault but who do not fit the prototype.<sup>200</sup>

None of this is to say that the risk of racial bias against men of color in campus disciplinary processes is not a genuine and pressing concern. In fact, if anything, this discussion of the racial politics behind the backlash to Title IX bolsters this concern. The greater public sympathy for white men accused of sexual assault, and the greater inclination to believe they are wrongly accused, gives cause for concern that men of color will fare more poorly in any disciplinary process. And yet, it does not follow that raising the standard of proof used in campus processes will ameliorate the risk of racial bias. Holding complainants to a higher proof standard than a POE standard is just as likely to magnify rather than reduce the risk of racial bias. Uncertainty over what additional proof is required to meet the clear and convincing standard leaves greater discretionary room for exonerating those accused students who benefit from race privilege, while doing nothing for accused students who lack such privilege. Similarly, leaving processes less standardized and less scripted by OCR would leave them open to manipulation by persons with power and privilege—parents, alumni, donors, and fraternities. A lifting of Title IX's regulatory requirements in the name of racial justice for accused students of color could backfire by increasing

197. See MARINE, *supra* note 18, at 68–69 (noting the explosion of sexual assaults reported at Ivy League schools in the past two years).

198. Jake New, *The Wrong Standard*, INSIDE HIGHER EDUC. (Nov. 6, 2014), <https://perma.cc/Z9JK-CKHA>.

199. MARINE, *supra* note 18, at 57.

200. See N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004) (discussing how culturally deep-seated racial stereotypes about black men affect assumptions of guilt and judgments about appropriate punishment).

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the pressure points where power and influence can be exercised to affect the outcome. There is no reason to believe that replacing the POE standard with a higher proof threshold will ease the problem of racial bias and racial disparities in punishment rather than exacerbate it.

### C. *Opportunities for Restorative Justice*

I will not pretend that there is an easy answer to the disciplinary dilemmas or risks of racial bias in campus disciplinary processes. But a more promising path for addressing these concerns than raising the standard of proof is to construct a campus process that makes room for an alternative approach to the traditional disciplinary process based on restorative justice principles.<sup>201</sup> Restorative justice strives to repair the harm done rather than seek retribution or punishment, and uses a collaborative process that involves all affected persons instead of an adversarial framework to formulate a response to harm. Restorative justice should not displace the student conduct disciplinary framework, but rather should supplement traditional, adversarial campus justice systems in appropriate cases. An appropriate case for restorative justice would require the consent of both the complaining and accused student and should start from the premise of responsibility, either after a finding of responsibility in a formal campus process or because the accused student accepted responsibility without formal adjudication in a student misconduct proceeding.

Leading researchers on campus sexual assault and restorative justice, Mary Koss and her colleagues, have identified four possible points of intervention where restorative justice approaches might be interjected into campus processes.<sup>202</sup> They emphasize that a finding of responsibility—either as an acknowledgment by the accused student before any adjudicatory process or after an adjudicatory process—should be a prerequisite for any restorative justice program.<sup>203</sup> One entry point would be as a resolution process, in which the students involved and select members of their family or friends would hold a conference, or series of conferences, to come up with a resolu-

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201. For an introduction to restorative justice principles, see HOWARD ZEHER, *THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND UPDATED* (2015). For an introduction to the application of restorative justice principles in the educational setting, see LORRAINE STUTZMAN AMSTUTZ & JUDY H. MULLEN, *THE LITTLE BOOK OF RESTORATIVE DISCIPLINE FOR SCHOOLS: TEACHING RESPONSIBILITY, CREATING CARING CLIMATES* (2014).

202. Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15(3) *TRAUMA VIOLENCE ABUSE* 242, 242 (2014).

203. *Id.* at 246. While this requirement presents challenges for applying restorative justice to sexual assault because of the overlap with the criminal justice system, Koss and her colleagues suggest that this can be addressed through confidentiality agreements and memoranda of understandings between colleges and local law enforcement. *Id.* at 253–54.

tion process for addressing the harm. This process may or may not result in disciplinary action.<sup>204</sup> A second approach would be a victim impact process in which the victim speaks directly to the responsible person to reach an understanding about the harm that was caused.<sup>205</sup> A third mechanism would use restorative justice processes to arrive at an agreed-upon sanction for the responsible person. This process would involve all affected persons in the conversations and decisions about appropriate sanctions.<sup>206</sup> In my view, this approach holds the most promise for incorporating restorative justice into campus sexual misconduct processes. Finally, Koss and colleagues suggest that restorative justice might play a role as a reintegration process, after a disciplinary measure resulting in the separation of the responsible person from the educational environment.<sup>207</sup>

One possible objection to a restorative justice process that brings the responsible student and the victim into dialogue is OCR's statement in its 2011 DCL that, while "[g]rievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints. . . , in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis."<sup>208</sup> Koss and her colleagues have pointed out the lack of a scholarly foundation for this blanket ban on mediation in sexual assault cases and the ambiguity in the scope of "mediation" and "sexual assault" in this statement.<sup>209</sup> Whatever OCR's intent, the scope of this blanket ban should not be interpreted so broadly as to encompass restorative justice approaches that seek to involve both sides in repairing harm. Restorative justice, with its focus on accepting responsibility and repairing harm, is fundamentally unlike mediation, which starts from a premise of neutrality and seeks resolution.

Although there is not yet empirical evidence to evaluate restorative justice programs as applied to campus sexual assault, restorative justice methods have been successfully used in sexual assault cases in the criminal justice system.<sup>210</sup> There is also empirical support for using restorative justice in campus disciplinary processes for student misconduct generally.<sup>211</sup>

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204. *Id.* at 248.

205. *Id.* at 247.

206. *Id.*

207. *Id.* at 246–49.

208. Ali, *supra* note 3, at 8.

209. Koss, Wilgus & Williamsen, *supra* note 202, at 245.

210. *Id.* at 247–48, 254; *see also* JUDAH OUDSHOORN, *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR SEXUAL ABUSE: HOPE THROUGH TRAUMA* (2015).

211. Koss, Wilgus & Williamsen, *supra* note 202, at 249; *see also* DAVID R. KARP, *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR COLLEGES AND UNIVERSITIES: REPAIRING HARM AND REBUILDING TRUST IN RESPONSE TO STUDENT MISCONDUCT* (2015) (discussing the case for incorporating restorative justice into student misconduct processes, including empirical support for such approaches).

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These successes bode well for incorporating restorative justice into campus processes for handling sexual assault.

While restorative justice is not a panacea, it holds promise for improving outcomes for students harmed by sexual assault. As Koss and her colleagues point out,

A consensus of published studies is that sexual assault victims need to tell their own stories about their experiences, obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them, receive support that counteracts isolation and self-blame, and above all have the choice and input into the resolution of their violation.<sup>212</sup>

Many survivors experience adversarial campus grievance processes as alienating and disempowering, even when they result in disciplinary action against the persons found responsible.<sup>213</sup> Studies to date have shown better outcomes for victims using restorative justice methods than those resulting from traditional criminal law enforcement, since restorative justice gives victims a more active and empowering role in the resolution process.<sup>214</sup> With the focus on outcomes that best restore the victim and the community, restorative justice processes can accommodate a broader range of sanctions, with an emphasis on repairing the educational harm to the victim instead of cookie-cutter punitive responses.<sup>215</sup> Experience with restorative programs in other settings has found that wrongdoers are more likely to accept responsibility and acknowledge harm, and that both victims and offenders are more satisfied with the process compared to traditional adversarial processes.<sup>216</sup>

At best, however, such practices would supplement, not supplant, campus disciplinary processes. There are many instances of sexual assault that do not match the stories of miscommunication and mistake told in the male plaintiff cases.<sup>217</sup> Although the prevalence of repeat offender sexual assault on campus is hotly disputed, it is uncontested that at least some campus sexual assault is predatory and recidivist.<sup>218</sup> In such cases, severe disciplinary measures are necessary to protect survivors and potential victims. And

212. Koss, Wilgus & Williamsen, *supra* note 202, at 246–47.

213. Alletta Brenner, *Transforming Campus Culture to Prevent Rape: The Possibility and Promise of Restorative Justice as a Response to Campus Sexual Violence*, HARV. J.L. & GENDER ONLINE 1, 8–11 (2013) available at <https://perma.cc/XB73-2QK4>.

214. *Id.* at 15–18.

215. *Id.* at 17, 22.

216. *Id.* at 17–18.

217. See, e.g., Joetta L. Carr & Karen N. VanDeusen, *Risk Factors for Male Sexual Aggression on College Campuses*, 19 J. FAM. VIOLENCE 279, 284 (2004) (reporting that 4% of the college men in their survey stated that they had forced a woman to engage in a sexual act and 15% admitted having engaged in “some form of alcohol-related sexual coercion”).

218. See Baker, *supra* note 38, at 869 n.30 (discussing the controversy over the finding by researcher David Lisak and Paul Miller that most campus sexual assault is committed by repeat offenders). For discussion of the extent of serial rape on campus, see Kevin M. Swartout et al., *Trajectory Analysis of*

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yet, sexual misconduct cases vary widely. For incidents in which a responsible student genuinely (albeit mistakenly) believed that his partner consented to sexual conduct, appropriate measures might prioritize remedying the educational harm to survivors (such as moving the accused student out of the complainant's dormitory and classes), education about consent, and recognition of harm over more punitive responses.<sup>219</sup>

Although concerns about the severity and fairness of disciplinary measures will continue to be a flashpoint of controversy in the debate over campus responses to sexual assault, the integration of restorative justice into student misconduct processes could bring the opposing narratives of survivors and accused students into a constructive dialogue with one another.<sup>220</sup> In cases where the accused student accepts responsibility and both students agree to take this path, a restorative justice approach may offer a better chance than a punitive disciplinary framework of redressing the harm to survivors while reshaping the norms of sexuality away from coercion and toward equality on college campuses.<sup>221</sup> It is a more promising path for navigating the dilemmas of using a disciplinary framework to change campus norms than raising the proof standard in these cases.

## V. CONCLUDING THOUGHTS

Changing the reality of campus sexual assault requires changing the norms that support it. The widespread problem of sexual assault in college is a product of prevailing social norms about gender and sexuality.<sup>222</sup> Despite the new activism by survivors that has sparked a reinvigorated national conversation about campus sexual assault, social norms on campuses remain all too tolerant of sexual coercion.<sup>223</sup> And yet, the past few years have witnessed remarkable change in a relatively short time span. In 2009,

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*the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1151 (2015) (reporting results of their study, in which repeat rapists were a minority of the men who committed rape while in college).

219. Cf. Baker, *supra* note 38, at 884 (recommending moderating discipline to focus on remedying educational harm in “close” cases). R

220. Cf. Keith V. Bletzer & Mary P. Koss, *From Parallel to Intersecting Narratives in Cases of Sexual Assault*, 22(3) QUALITATIVE HEALTH RESEARCH 291, 300–01 (2012).

221. Cf. Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination*, 50 U. RICH. L. REV. 487, 504–05 (2015) (discussing the risks that “zero-tolerance” punitive approaches to sexual harassment in the workplace will create backlash and resistance rather than change workplace norms, and arguing for a restorative justice approach instead).

222. See Antonia Abbey et al., *Risk Factors for Sexual Aggression in Young Men: An Expansion of the Confluence Model*, 37 AGGRESSIVE BEHAVIOR 450, 451–52 (2011) (discussing the finding that holding beliefs in support of male sexual coercion contributes to sexual aggression against women); Carr & VanDeusen, *supra* note 217, at 280–81 (discussing the role of gender stereotypes and gender norms in contributing to male college students' propensity to commit rape). R

223. See Carr & VanDeusen, *supra* note 217, at 286–87 (reporting results of a study finding that over one-third of men on campus “reported their friends approved of getting a woman drunk to have sex with her and 20% acknowledged having friends who have gotten a woman drunk or high to have sex”). R

Aya Gruber critiqued the feminist movement's emphasis on rape law reform as being destined to have only a limited reach, proclaiming that there is no political appeal in being tough on date rape.<sup>224</sup> This may well have been true at the time Gruber was writing that article, but it is striking how differently that sentence resonates today. By the time OCR issued its 2011 DCL, and even more so by the time the White House convened its task force on campus sexual assault in 2014, much had changed. Political hay was indeed being made by taking a tough stance on so-called "date rape."

We are now in the throes of a culture war over whether the country has moved too far and too fast in requiring educational institutions to respond seriously to sexual misconduct allegations. The 2011 DCL and the White House Task Force have spurred a counter-movement asserting the rights of accused students and attacking the 2011 DCL as federal government overreach. The POE standard may be ground zero in that clash, but the real struggle is over the more fundamental issue of whether college campuses should be handling these matters at all. How people feel about that issue largely turns on where their sympathies lie, with survivors or accused students. Until their stories are brought into dialogue and empathy is extended to victims of injustices on all sides of these controversies, there will be little forward movement on designing campus procedures that are fair to all.

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224. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 628 (2009).

