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Witch Hunts and the Sexual Assault Enterprise on the Modern Campus

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I. Introduction

On December 13, 2013, Amherst College expelled a student for violating its disciplinary code, concerning *Sexual Misconduct Policy: Sexual Assault*.¹ This decision may seem innocuous, but in reality it effectively proclaimed the student guilty of rape and demolished his professional and academic career. Furthermore, while punishing a rapist is commendable, the facts of the situation present an entirely different interpretation. On February 4-5, 2012, the accused student (known as John Doe) and the accuser (known as Sandra Jones) returned to Jones' room, where Doe's girlfriend also lived. Sometime during the night, Jones engaged in sexual activities with Doe. After one year and nine months, Jones filed an official complaint with Amherst, alleging Doe raped her.²

In merely six weeks between the filing of the complaint and the disciplinary ruling, the college's investigator conducted interviews that constituted all the evidence gathered for the case. The investigator found that: Jones changed her story concerning whether she ever consented to the act; one of Jones' witnesses blatantly lied about the encounter; evidence showed that Jones lied about sending texts to another student concerning the encounter (though the investigator never interviewed that student).³ Despite knowing of a witness who had evidence that called the accusations into question, the investigator never pursued contacting that witness.⁴ Interestingly, the investigator made no conclusions as to whether Doe sexually assaulted Jones, but did determine that Doe blacked out from alcohol intoxication and could not recall anything.⁵ Despite having no clear findings, Amherst expelled Doe approximately one month after the

¹ Complaint and Jury Demand at 15, Doe v. Amherst College, No. 3:15-cv-30097 (D. Mass. May 29, 2015), ECF No. 1.

² *Id.* at 7.

³ *Id.* at 9.

⁴ *Id.* at 10.

⁵ *Id.*

investigator's interviews, placing a "Disciplinary Expulsion" notation on his transcript and forcing him to leave campus in one hour.⁶

The details of the hearing and subsequent punishment present serious problems with respect to the sexual assault claim procedure. The college prohibited Doe from obtaining legal representation throughout these proceedings,⁷ which would be a constitutional right in criminal proceedings for rape.⁸ The college denied Doe the opportunity to cross-examine Jones,⁹ removing the right to cross-examination that would be present in a criminal proceeding for rape.¹⁰ The panel applied a mere preponderance of the evidence burden of proof, despite the fact that Doe's academic and professional career depended on the decision,¹¹ rather than the beyond a reasonable doubt standard that would apply in a criminal proceeding for rape.¹² Despite the fact that the college essentially found Doe guilty of rape, the college applied few of the due process protections that are essential for an individual accused of a crime.

Perhaps the most crucial pieces of evidence for Doe's defense consisted of two series of text messages sent by Jones. Doe had to rely on the investigator's findings, however, as he could not present his own evidence or have his own representative or investigator,¹³ though he would have a right to counsel and to present his own witnesses in a criminal proceeding.¹⁴ The investigator never found this crucial evidence, despite knowledge of its possible existence, and

⁶ *Id.* at 15-16.

⁷ K.C. Johnson, *Amherst's Version of Kafka's 'The Trial,'* MINDING THE CAMPUS, (June 9, 2015), <http://www.mindingthecampus.org/2015/06/amhersts-version-of-kafkas-the-trial/>.

⁸ U.S. CONST. amend. VI.

⁹ Johnson, *supra* note 7.

¹⁰ U.S. CONST. amend. VI.

¹¹ Johnson, *supra* note 7.

¹² *See In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Miles v. United States*, 103 U.S. 304, 312 (1880) ("The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.").

¹³ Johnson, *supra* note 7.

¹⁴ U.S. CONST. amend. VI.

thus never submitted it to the disciplinary board. In one series, Jones invited another male student to her room for the night, during which he recalled her being “friendly, flirtatious, and spirited.”¹⁵ In the other series, Jones texted a friend about the sexual encounter with Doe, noting that she regretted it, because Doe’s girlfriend was her roommate. When Jones’ friend suggested that Jones inform Doe’s girlfriend and blame Doe for the interaction, Jones responded that “it’s pretty obvi [sic] I wasn’t an innocent bystander.”¹⁶

Because Jones claimed that she withdrew consent for the act and Doe was blacked out and could not remember the interaction, the panel found that it was at least 50.01% likely that Doe sexually assaulted Jones. Even when Doe’s attorney later presented the text message evidence to Amherst, the college refused to reopen the case.¹⁷ In the current campus sexual assault climate, a blacked out student can be accused of and punished for sexual assault, despite his inability to recall the event (or possible inability to have consented to the act) and the existence of strong contradicting evidence. The fact that Doe, or others, are likely innocent is irrelevant to the anti-rape witch hunt, however.¹⁸

This article examines the current state of campus sexual assault adjudications under Title IX, including the sexual assault enterprise’s proliferation on college campuses, the bureaucracy created by the federal government, and the rape witch hunts propagated by the new anti-rape movement.¹⁹ Part II discusses the present-day procedures used by many colleges and universities

¹⁵ Johnson, *supra* note 7.

¹⁶ Complaint and Jury Demand, *supra* note 1, Exhibit 6, at 18.

¹⁷ Johnson, *supra* note 7.

¹⁸ The title of “anti-rape witch hunt” refers to the hysteria of the anti-rape movement on college campuses and the regularity of which rape accusations are made and instantly believed, even to the extent of punishing the accused without a fair trial, similar to the Salem witch trials of the 17th century. See Cathy Young, *The Crucible, Now at a Campus Near You*, REASON (Oct. 24, 2015), <https://reason.com/archives/2015/10/24/the-crucible-now-at-a-campus-near-you>.

¹⁹ The sexual assault enterprise means the large bureaucracy of new employees on college campuses, anti-rape movement advocates, and any of the other individuals that have joined together in support of Title IX’s application to campus sexual assault, the growth of the bureaucracy, and the demolition of due process rights for the accused.

in adjudicating campus sexual assault claims, including how this process differs from the criminal adjudication process with its due process protections. Part III describes the history of sexual assault under the Title IX regime, as Title IX developed from a law regarding sex equality in educational programs to a law controlling colleges and universities in their handling of campus sexual assault, resulting in the sexual assault enterprise. Part IV of this article analyzes the bureaucracy that the Title IX sexual assault regime has created with its host of new laws and requirements for colleges and universities, which are ultimately incapable of solving the campus sexual assault problem. The bureaucracy has aided the development of the sexual assault enterprise, along with the witch hunts of accused students and faculty arising from this enterprise. The sexual assault enterprise and bureaucracy at college campuses has led to the demolition of due process rights for accused students under the Title IX sexual assault regime, with educational institutions removing many of the due process protections that would apply in a criminal proceeding for rape. Ultimately, the new rules and policies, bureaucracy, and restriction of due process rights have not brought about the best administration of justice, for either the accused or victims of sexual assault.

This article attempts to distinguish the sexual assault enterprise from alternatives that may actually reduce or eliminate campus sexual assault. Rape is a vicious crime that often has long-term effects on the victim, making its elimination a proper goal to pursue. This article does not argue that rapists should be protected, rape victims should be disbelieved, or that rape is only a minor crime. Rather, this article argues that the new anti-rape movement and sexual assault enterprise do little or nothing to eliminate the horrible crime of rape from college campuses. In fact, the sexual assault enterprise and its bureaucracy often distract from aiding victims of rape, unnecessarily burden universities and colleges, punish innocent men, remove important due

process protections, and create a general hysteria on campuses with witch hunts against anyone accused of rape or rape-denying. Unfortunately, sexual assault does occur on college campuses, as well as elsewhere. The sexual assault enterprise does not solve this problem, however, and creates a host of detrimental repercussions, which affect both accused students as well as victims of sexual assault. Rape claims should be adjudicated in criminal proceedings instead of by college disciplinary boards, not because women make up rape claims, but because rapists should be criminally punished and non-rapists should not be punished. The criminal justice system is properly prepared to handle these claims and adjudicate them justly, while college disciplinary boards are not.

II. Present-Day Procedures for Adjudicating Campus Sexual Assault

The current procedures regularly employed by colleges and universities in campus sexual assault cases began to develop around 2001, transitioning from the past when women who made sexual assault claims were often ignored to the present when the accused are regularly slighted. Once a student files a complaint alleging that another student (or professor, staff member, etc.) committed a sexual assault, then the institution must undertake an “adequate, reliable, impartial, and prompt” investigation.²⁰ The Office for Civil Rights (OCR) suggests that the investigation take no longer than 60 days, meaning that the entire process moves rapidly, giving the accused little time to prepare for the proceedings.²¹ Before the institution even makes a determination on the complaint, the complainant may obtain an order to change the class

²⁰ OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1, 25 (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (describing the requirements for an institution’s Title IX investigation of campus sexual assaults).

²¹ *Id.* at 31.

schedule and dorm accommodations of the accused, requiring a potentially innocent student to find new lodging and stop attending classes that the complainant also attends.²²

The college commonly assigns an investigator trained in Title IX sexual assault rules. The investigator determines the facts of the case by interviewing any witnesses, including both parties. The investigator reports findings to the college disciplinary board, based on the investigations. Generally, the accused student cannot provide any evidence besides that given by the investigator. While the accused student can provide the names of witnesses and questions to ask in the investigation, the investigator often has unilateral discretion in whom to interview and the questions to ask.²³

The disciplinary hearing generally consists of the investigator presenting the evidence, though a hearing is not required. While the OCR does not require that the institution allow cross-examination of witnesses, the OCR's guidance insists that the accused not have the ability to cross-examine the complainant.²⁴ Most colleges prohibit an accused student from having legal counsel, providing only an advisor who may not advocate for the student.²⁵ The disciplinary board may be made up of faculty,²⁶ but also may include students from the college.²⁷ While these students and faculty are supposed to be trained in Title IX sexual assault rules, the disciplinary board members often lack the knowledge to understand the law concerning sexual assault and

²² Not Alone, *Checklist for Campus Sexual Misconduct Policies*, <https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf>, at 4.

²³ See, e.g., Dean of the College, *Investigation and Adjudication Process for Sexual Assault, Sexual Exploitation, Stalking, Dating Violence and Domestic Violence*, WILLIAMS COLLEGE, <http://dean.williams.edu/policies/disciplinary-process-2/>; Office of the Provost, *UWC Procedures*, YALE UNIVERSITY, (Oct. 26, 2015), <http://provost.yale.edu/uwc/procedures>.

²⁴ Not Alone, *supra* note 22, at 7.

²⁵ David Russcol, *So You've Been Accused of Sexual Assault or Misconduct on Campus. Here's What You Need to Know*, BOSTON LAWYER BLOG (Oct. 27, 2014), <http://www.bostonlawyerblog.com/2014/10/27/youve-accused-sexual-assault-misconduct-campus-heres-need-know/>.

²⁶ See, e.g., Dean of the College, *supra* note 23.

²⁷ See, e.g., Office of the Provost, *supra* note 23.

how to analyze the evidence that is given to them by the investigator.²⁸ After the board makes its decision, both parties have an equal right to appeal, which must be filed in a short time period, often around one week.²⁹ The board generally must decide on the appeal within two weeks after its filing, giving the parties little time to provide any additional evidence.³⁰

Several aspects of the modern campus sexual assault adjudication process differ greatly from a criminal prosecution for rape. Campus sexual assault proceedings fail to provide the rights for the accused that are present in criminal proceedings, such as the rights to an attorney, against self-incrimination, and to confront the accuser and opposing witnesses.³¹ The accused may only receive a summary of the charges and evidence, with the institution using the confidentiality of the accuser as justification for this procedure. The institution also has less discretion than a criminal prosecutor in deciding when a claim is sufficiently supported by evidence before adjudicating the accused.³² Unlike the impartial judge in a criminal proceeding, the disciplinary board is beholden to the institution, which must answer to the Department of Education for any violations.³³ The required burden of proof applied by the board is merely the preponderance of the evidence standard, rather than beyond a reasonable doubt.³⁴ While a criminal defendant has a right to appeal and double jeopardy protection against a prosecutor's appeal, the accused in any given sexual assault proceeding lacks one of these rights. In a campus

²⁸ Russcol, *supra* note 25.

²⁹ See, e.g., Amherst College, *Amherst College Sexual Misconduct Policy*, AMHERST COLLEGE, https://www.amherst.edu/aboutamherst/sexual_respect/sexual-misconduct-and-harassment-policy/node/497976#InvestigationPhase (providing a seven day period for each party to appeal); Dean of the College, *supra* note 23 (providing a fifteen day period for each party to appeal); Office of the Provost, *supra* note 23 (providing a five day period for each party to appeal)

³⁰ See, e.g., Amherst College, *supra* note 29; Office of the Provost, *supra* note 23.

³¹ Russcol, *supra* note 25.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

sexual assault proceeding, if the accused can appeal, then the complainant has the same right to appeal.³⁵

III. The History of Sexual Assault Under Title IX

A. Title IX

The United States Government enacted the Education Amendments of 1972, which included legislation to end discrimination on the basis of sex in any educational setting, called Title IX for short.³⁶ Title IX states that, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁷ The law makes no mention of sexual violence, nor was applied in relation to sexual violence for several years after its passage.³⁸ The purpose of the law, according to one of its leading proponents, was to “provide equal access for women and men students to the educational process and the extracurricular activities in a school.”³⁹ Title IX’s application to schools and postsecondary institutions commonly involved requiring equal opportunities for men and women in athletic programs.⁴⁰ Later Supreme Court cases expanded Title IX into the realm of sexual harassment, which began the path toward Title IX’s current application in campus sexual assault cases.

³⁵ *Id.*

³⁶ 20 U.S.C. § 1681 (2015).

³⁷ *Id.*

³⁸ Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. Ky. L. Rev. 49, 51 (2013).

³⁹ Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 327 (2012), available at <http://scholarship.law.marquette.edu/sportslaw/vol22/iss2/2> (quoting 117 CONG. REC. 30,407).

⁴⁰ *Id.*

B. The Development of Title IX's Application to Sexual Assault

In *Franklin v. Gwinnett County Public Schools*, a coach/teacher sexually harassed and assaulted a tenth-grade student.⁴¹ The school became aware of the harassment and investigated the teacher, but ultimately took no action to prevent the harassment and encouraged the student not to press charges. When the teacher resigned, the school ended the investigation.⁴² The student brought a cause of action against the school under Title IX. The Court held that the school had a “duty not to discriminate on the basis of sex.”⁴³ The Court added that, just as it is discrimination when a supervisor sexually harasses a subordinate, “the same rule should apply when a teacher sexually harasses and abuses a student.”⁴⁴ This case laid the groundwork for Title IX’s application in the area of sexual harassment and assault, rather than merely providing equal educational programs and opportunities.

In *Gebser v. Lago Vista Independent School District*, the Court clarified the circumstances in which a sexually harassed student could recover money damages from a school under Title IX. The Court held that the student in this case could not recover from the school for sexual harassment by a teacher. In order for the school to be liable under Title IX, the Court determined that a school official who has authority to respond to sex discrimination must have actual knowledge of the harassment and act with deliberate indifference to the sex discrimination involved in the harassment.⁴⁵

In *Davis v. Monroe County Board of Education*, the Court crucially expanded the interpretation of Title IX to apply to student-on-student sexual harassment in schools. The Court

⁴¹ 503 U.S. 60, 63 (1992).

⁴² *Id.* at 64.

⁴³ *Id.* at 75.

⁴⁴ *Id.* The court also held that money damages could be recovered under a private cause of action under Title IX. *Id.* at 76.

⁴⁵ *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290-91 (1998).

held that student-on-student harassment could result in liability for the school in a private cause of action by the student when the school has actual knowledge of the harassment and acts with deliberate indifference to it, just as with teacher-student harassment. The Court added that, for student-on-student sexual harassment, the harassment must be “so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”⁴⁶

C. The Department of Education’s Revised Sexual Harassment Guidance

In 2001, the Department of Education released a “Revised Sexual Harassment Guidance,” which incorporated the three major Supreme Court opinions on Title IX’s application in this area and clarified the OCR’s position on the issue. Not only may teacher-student sexual harassment lead to a Title IX violation, but a college or university would also violate Title IX if an institution official had notice, or should have known, of student-on-student sexual harassment and “fail[ed] to take prompt and effective corrective action.”⁴⁷ The guidance also required institutions to enact and publish procedures for receiving and resolving sexual harassment complaints. The OCR demanded that colleges and universities publish a strong policy against sexual harassment, to enable reporting of sexual harassment, or else they would be in violation of Title IX. An institution could prevent a formal violation of Title IX by taking corrective action to end the harassment and prevent its recurrence, as well as remedying its effects. Before a full investigation of the complaint, the institution could change the housing or class schedule of the

⁴⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Interestingly, the court of appeals in this case believed that recognition of this cause of action against a school would force the school to “immediately suspend or expel a student accused of sexual harassment.” *Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390, 1402 (11th Cir. 1997). At the Supreme Court, Justice Kennedy’s dissent also noted the probability that this interpretation of Title IX would result in the federal government’s control of day-to-day decisions within the schools. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 686 (1999) (Kennedy, J., dissenting).

⁴⁷ OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (January 19, 2001), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#VB2>.

involved students to accommodate the complainant. The guidance document noted that confidentiality was required to protect both the accused and the accuser, but only so far as the due process rights of the accused were preserved. The institution could not satisfy its duty by reporting the harassment to police and a police investigation would not decide whether harassment occurred, requiring institutions to carry out a separate investigation with a lowered standard of proof. In one of the shortest sections, the guidance document described the due process rights of accused students, which would not be allowed to “restrict or unnecessarily delay the protections provided by Title IX to the complainant.”⁴⁸

D. The Office of Civil Rights’ “Dear Colleague Letter”

The current Title IX framework for handling campus sexual assault and harassment began to fully develop with the Assistant Secretary of the OCR’s “Dear Colleague Letter,” on April 4, 2011. The letter clarified that sexual harassment, which may violate Title IX, includes any coercive sexual act, such as rape or sexual assault.⁴⁹ The letter stated that institutions must train their employees on how to report and address sexual harassment and violence, regardless of whether it occurs on- or off-campus.⁵⁰ The letter also clarified the required procedure for handling sexual violence, including: distributing a notice that the institution does not discriminate on the basis of sex;⁵¹ creating an employee position for a Title IX coordinator to ensure compliance (and requiring notification to all students and employees of this person’s contact information);⁵² creating and publishing a clear procedure for resolving complaints.⁵³ The

⁴⁸ *Id.*

⁴⁹ OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 1, 1-2 (April 4, 2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 6.

⁵² *Id.* at 7. The letter also requires the coordinator and all law enforcement units to be trained in handling sexual harassment and violence complaints under Title IX’s defined grievance procedures. *Id.*

⁵³ *Id.* at 8. The letter reaffirms that colleges and universities must conduct a separate investigation from any police investigation and that a finding of not guilty in any criminal proceeding or any similar decision in the criminal

OCR required that institutions apply a mere preponderance of the evidence burden of proof, rather than the reasonable doubt standard normally used in criminal sexual violence proceedings or even the clear and convincing evidence standard formerly applied by many institutions.⁵⁴

The letter reaffirmed that while the accused person does have due process rights, these should “not restrict or unnecessarily delay the Title IX protections for the complainant.”⁵⁵ This means that an institution may prohibit the accused person from using an attorney during the proceedings. The letter “*strongly discourage[d]*” institutions from allowing the accused to personally question or cross-examine the accuser.⁵⁶

The OCR advocated for training and education, including preventive education training and victim resources, as the key to preventing sexual harassment. The education should involve definitions of sexual harassment and assault, the institution’s policy and procedures on this issue, and the remedies and punishment for sexual harassment and assault. The OCR expected this education would improve reporting of incidents, by making victims and others aware of the procedures and informing them that the use of drugs or alcohol in relation to the incident will not result in blame on the victim.⁵⁷

Once the complainant files a complaint, the OCR suggested that the institution adjust the accused student’s housing and class schedule, in order to provide the most comfortable situation for the complainant. This means a college or university should require the accused student to move or drop classes, before a ruling on the allegation. If the institution fails to make such accommodations, thus violating Title IX, then the OCR would seek for the institution to come

context does not relieve the institution of its duty in handling the complaint. The institution may also take action to protect the complainant from the accused individual, even before investigating the complaint. *Id.* at 10.

⁵⁴ *Id.* at 11.

⁵⁵ *Id.* at 12.

⁵⁶ *Id.*

⁵⁷ *Id.* at 14-15.

into compliance voluntarily, or else lose federal funding. Failure to comply would mean that the institution has violated the Title IX rights of both the complainant and the “broader student population.”⁵⁸ The OCR has subsequently created numerous education, training, counseling, policy development, and notification requirements for colleges and universities.⁵⁹

E. The Violence Against Women Reauthorization Act

Congress began dictating how colleges and universities should handle sexual assault when it passed the Violence Against Women Reauthorization Act, which included new rules for colleges and universities under the Campus Sexual Violence Elimination [SaVE] Act in Section 304.⁶⁰ The SaVE Act codified and mandated many of the rules suggested in the Dear Colleague Letter. The Act required that colleges and universities report any incidents of sexual assault, dating violence, domestic violence, or stalking, under the Clery Act.⁶¹ Institutions are now required to inform complainants of their rights to report the incident to law enforcement and campus officials, as well as to demand a protective or restraining order against the accused. The institutions must publish a policy concerning the burden of proof required and the sanctions and punishment for any sexual violence incident. The institutions must train officials to carry out investigations and hearings.⁶² Colleges and universities are also required to expand education and training for students and faculty regarding sexual violence. This training must include: a statement of the college’s prohibition on sexual violence; definitions of the offenses; the definition of consent with respect to sexual violence; options to aid intervention by bystanders;

⁵⁸ *Id.* at 16.

⁵⁹ *Id.* at 16-18.

⁶⁰ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013).

⁶¹ Hogan Lovells US LLP, *New Requirements Imposed by the Violence Against Women Reauthorization Act*, AM. COUNCIL ON EDUC. 1, 1 (April 1, 2014), available at <http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf>.

⁶² *Id.* at 2-3.

the signs of sexual violence and preventive measures; coverage of the aforementioned issues in prevention and awareness programs.⁶³

F. The White House Task Force to Protect Students from Sexual Assault

The White House took a clear stand on the issue with its memorandum “Establishing a White House Task Force to Protect Students from Sexual Assault.”⁶⁴ The memo noted that colleges had improved in handling sexual assault and that federal laws and programs already existed to handle the issue. The memo stated that colleges’ adherence to the rules was inadequate, however, particularly considering that “one in five women is a survivor of attempted or completed sexual violence while in college.”⁶⁵ The memo created the White House Task Force to Protect Students from Sexual Assault (Task Force) to ensure full compliance with the federal government’s other campus sexual assault policies and rules. The Task Force’s, mainly advisory, purpose was to eliminate campus sexual assault by promulgating best practice policies, adding transparency to enforcement, expanding the public’s awareness of colleges’ compliance, and coordinating the agencies involved. The memo ostensibly combats campus sexual assault by coordinating the existing programs and clarifying the White House’s position in support of the sexual assault enterprise.⁶⁶

G. The Sexual Assault Enterprise’s Use of Statistical Studies

The new anti-rape movement’s impetus largely comes from multiple studies that suggest that college campuses are overrun by rapists, particularly repeat offenders who will each rape several college women. The truth of these surveys and studies, as well as their methodology and

⁶³ *Id.* at 3.

⁶⁴ THE WHITE HOUSE, ESTABLISHING A WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (2014), available at <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>

⁶⁵ *Id.*

⁶⁶ *Id.*

applicability to college campuses, is rarely questioned, however. The accuracy of the statistics and the interpretations of these studies are crucial in determining how to properly approach the handling of campus sexual assaults. The new anti-rape movement justifies its advocacy for many of these changes to the campus sexual assault adjudication process by pointing to these studies and the belief that campuses are overrun by serial rapists.

1. Are One-in-Five College Women Victims of Sexual Assault?

The new anti-rape movement regularly touts the statistic that one-in-five women are sexually assaulted at college. Naturally, such a horrific statistic would produce strong reactions, such as those seen in modern campus sexual assault procedures. These studies often have multiple problems, however, particularly regarding sample size, sexual assault definitions, and survey participation.

The researchers of the initial 2007 study that put forth the one-in-five statistic, Christopher Krebs and Christine Lindquist, have even questioned the manner in which this number has been applied. They state that this statistic should not be considered the baseline for campus sexual assault. The sample size for the study does not represent a scientific study, with the statistic coming from only two colleges. The one-in-five number does not include just rape, but also counts “forced kissing or unwanted groping” and other lesser acts, compared to the horrors often imagined when the one-in-five number is asserted.⁶⁷ The participation levels in the survey were also problematically low, at only 42%. While these facts may not be devastating to

⁶⁷ Christopher Krebs and Christine Lindquist, *Setting the Record Straight on ‘1 in 5,’* TIME, Dec. 15, 2014, available at <http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/>.

the study, they show that the study does not present the full story.⁶⁸ Of course, the full story may be irrelevant to the new anti-rape movement.⁶⁹

Many of the other studies on this topic commit similar errors, often in greater magnitude. For example, one Rutgers University study found that one-in-four college women have been sexually assaulted.⁷⁰ This study contained the common problems of having a single college as a source, low participation rates (28%), and a lack of clarity on the location of the sexual assaults. However, the biggest problem with this study involved the definition it used for sexual assault. In this particular study, sexual assault ranged from forcible rape to ““remarks about physical appearance”” and ““persistent sexual advances that are unwanted.””⁷¹ Interestingly, the study did not show whether the victims suffered the sexual assaults on campus or elsewhere (or even while home over the summer, etc.). In fact, 24% of the women in the survey experienced sexual assault *before* coming to Rutgers.⁷² The one-in-five statistic has become so prevalent, with some adopting the one-in-four number, that many in the new anti-rape movement just assume its truth.

2. Are College Sexual Assaults Committed by Serial Rapists?

Similar to these sexual assault statistics, one major study, propagating the idea that campus sexual assault is perpetrated by serial rapists, has significant weaknesses. The study is assumed to be true by the new anti-rape movement, however, with even the White House citing

⁶⁸ *Id.*

⁶⁹ Note that the problems with these studies do not discount the fact that sexual assaults occur on college campuses and that justice should be served in those cases. A crucial distinction exists, however, between justice in those cases and the results that the new anti-rape movement desires, particularly in relation to the due process issues discussed later in this article.

⁷⁰ This study was conducted at the request of a White House task force on this issue.

⁷¹ Nick Anderson, *Rutgers: 20 percent of undergraduate women had unwanted sexual contact*, WASHINGTON POST, Sept. 2, 2015, available at https://www.washingtonpost.com/local/education/rutgers-20-percent-of-undergraduate-women-had-unwanted-sexual-contact/2015/09/01/33b6d46c-50d4-11e5-933e-7d06c647a395_story.html. This definitional problem is common among the new anti-rape movement; apparently, a catcall is equivalent to forcible rape.

⁷² *Id.* Considering the high rates of sexual assault for women before they come to college, the new anti-rape movement’s focus on college campuses alone seems unusual.

the study.⁷³ Lisak's study comes from a survey that asked 1,882 men on a college campus a series of questions on sexual violence related to childhood, with five questions concerning adult sexual violence. The study determined that 6.4% of the men surveyed had committed or attempted rape. Lisak focused on the finding that 63.3% of the men considered to be rapists had committed multiple rapes. Regarding these men, Lisak determined that they committed a mean of 5.8 rapes each.⁷⁴ Lisak depicts the sexual assault climate on college campuses as one where more than one in twenty men are rapists, with most of them committing several rapes each. Of course, the study has major problems concerning its usual application to campus sexual assault.

The danger of adopting Lisak's thesis is that it creates a presumption that every individual accused of campus sexual assault is a potential serial rapist. Therefore, the institution must expel the accused student to prevent him from potentially committing several more sexual assaults. This approach promotes an effective witch hunt of serial rapists, who might not even exist, while not necessarily aiding victims or administering justice. Lisak has actively created the depiction of campus sexual assault perpetrators as sociopaths who "groom their victims for attack . . . and terrify and coerce [them] into submission."⁷⁵ This depiction has fueled the new anti-rape movement, but the data and survey supporting the hypothesis are suspect. Lisak never personally conducted the surveys and no survey he used focused on campus sexual assault.

Lisak's survey consisted of seven pages of questions, but only five questions related to adults

⁷³ Linda M. LeFauve, *Campus Rape Expert Can't Answer Basic Questions About His Sources*, REASON (July 28, 2015), <https://reason.com/archives/2015/07/28/campus-rape-statistics-lisak-problem>; see THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (2014), available at https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf (citing Lisak's serial rapist article as a source regarding campus sexual assault).

⁷⁴ David Lisak and Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002). Lisak's study also found that the group of repeat rapists committed approximately 13 violent crimes each, on average. This is significantly higher than the just over one violent crime committed by the group of non-rapists.

⁷⁵ David Lisak, *Understanding the Predatory Nature of Sexual Violence*, MIDDLEBURY COLLEGE 7, <http://www.middlebury.edu/media/view/240951> (last visited Sept. 26, 2015).

committing sexual violence against adults. Interestingly, the men surveyed ranged from 18 to 71 in age and commuted to college, with most employed off-campus.⁷⁶

Ultimately, Lisak's study likely does not properly apply to campus sexual assault. The survey was conducted on a non-traditional college campus. It surveyed merely 76 serial rapists (though it is considered as proof that serial rapists commit most campus sexual assaults). The survey did not differentiate between sexual assaults on-campus, off-campus, with non-student victims, or that occurred before the students came to college. In fact, Lisak himself stated that the most severe serial rapists in this study were likely actually perpetrators of domestic violence in ongoing relationships. Lisak assumed that these men prowled on college campuses and used alcohol to intoxicate women who they intended to rape. Lisak provided no evidence that the surveyed men attended the college, let alone whether they used alcohol at college parties to rape women there.⁷⁷ To rectify this alleged serial rapist problem, colleges and the government have enacted policies based on the misguided assumptions of these studies, which have likely been detrimental to justice in campus sexual assault cases, both for victims and the wrongly accused.⁷⁸

IV. The Bureaucracy of the Sexual Assault Enterprise

The monstrous bureaucracy created by the host of new laws, programs, and groups has resulted in a great burden on colleges and universities, which are forced to come into compliance with Title IX and its spawn.⁷⁹ Though this burden might be worthwhile if it eliminated sexual violence, the reality is far from that result. The bureaucracy is not merely governmental, but the

⁷⁶ Lefauve, *supra* note 73.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Jill Castellano, *Campus Sexual Assault Can Cost Universities Millions*, FORBES (June 18, 2015, 10:06 AM), <http://www.forbes.com/sites/jillcastellano/2015/06/18/campus-sexual-assault-can-cost-universities-millions/4/>.

federal government has extended it into the colleges and universities by the requirements under Title IX and the SaVE Act.

A. The Burdens and Failures of Bureaucracy

Penn State University, for example, has been required to hire four new employees to meet the Title IX requirements, including a “Title IX Coordinator, an investigator, a Prevention and Education Coordinator and a Deputy Coordinator,” as well as other staff.⁸⁰ The total salary required for these new positions would total, at least, \$250,000. Beyond hiring employees whose sole job is to handle campus sexual assaults, the colleges must also train the entire faculty.⁸¹ For example, at the University of Pittsburgh, 10,800 faculty and other staff (including adjunct professors) were trained in recognizing and reporting sexual assault. The university also required every student to attend training related to sexual assault and bystander intervention.⁸² The colleges must ensure sufficient faculty are employed to handle these training programs as well. Many colleges have introduced a host of other programs beyond this basic sexual assault training. The University of Virginia, for example, provides several different programs on awareness,⁸³ bystander intervention,⁸⁴ ongoing prevention/awareness,⁸⁵ primary prevention,⁸⁶

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Officer of the Chancellor, *Sexual Violence on Campus*, U. PITT., (Sept. 21, 2015), available at <http://www.chancellor.pitt.edu/news-story/sexual-violence-campus>.

⁸³ University of Virginia, *Training Education and Prevention Programs: Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, U. VA., (2015), available at <http://vpsa.virginia.edu/sites/vpsa.virginia.edu/files/Appendix%20C%20Training%20Education%20Prevention.pdf>. This category of programming includes the following programs: “Alcohol-wise and Sexual Consent”; “Domestic Violence Awareness Month”; “Halloween Safety”; “National Hazing Prevention Week/National Gordie Day”; “Take Back the Night Week”; “Advisory Committees on Sexual Assault, Hazing, and Alcohol & Substance Abuse”; “Substance Abuse Prevention Week.” *Id.* at 4-5.

⁸⁴ *Id.* at 5-6 (providing “Bystander Intervention Presentation & Facilitation for First Year Students,” “Step UP!” and “Green Dot at U. Va.”).

⁸⁵ *Id.* at 6 (providing “Greek Member Education Programming,” “#HoosGotYourBack,” “Stall Seat Journal,” and “The Women’s Center: Gender Violence & Social Change.”).

⁸⁶ *Id.* at 7-8 (providing “Sexual Violence Prevention Coalition,” “Alcohol & Drug Abuse Prevention Team,” “One Less,” “One in Four,” “Peer Health Educators,” “Student-Athlete Mentors.”).

and education on risk.⁸⁷ These new college staff positions, programs, and mandatory training sessions have essentially created an entire enterprise for campus sexual assault prevention. This enterprise includes a bureaucracy of new officials, from Title IX Coordinators to sexual assault program directors to additional campus security. This places a massive burden on colleges, but, in the traditional fashion of any bureaucracy, does not clearly provide any benefit.

This bureaucracy has begun to entrench itself in the form of the campus sexual assault enterprise, with the federal government propagating the idea that if colleges just have more employees, training, programs, and committees, the problem can be eradicated.⁸⁸ While many advocates of the new anti-rape movement have attacked the bureaucracy that exists surrounding colleges, one of the primary results of the governmental policies they have supported has been the expansion of that very bureaucracy. They have entrenched the handling of campus sexual assault at the colleges, which are incapable of properly adjudicating them, even with programs, training, and more employees.⁸⁹ College disciplinary boards are prepared for adjudicating educational issues, such as plagiarism, but not for investigating or adjudicating claims of sexual assault.⁹⁰ Even Title IX Coordinators, whose job is to ensure compliance and prevent sexual violence, often do not understand their roles and how they are supposed to aid victims.⁹¹ The

⁸⁷ *Id.* at 8. These programs include “UPD Self-Defense” and many of the other programs also address this issue. *Id.*

⁸⁸ See THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, *supra* note 73; THE WHITE HOUSE, *supra* note 64. All these actions have done is expand the bureaucracy which already existed in relation to campuses handling sexual assault.

⁸⁹ New Boston Post, *Police, not Bureaucrats, Should Handle Charges of Campus Sex Assault*, NEW BOSTON POST (Aug. 25, 2015), available at <http://newbostonpost.com/2015/08/25/police-not-bureaucrats-should-handle-charges-of-campus-sex-assault/>.

⁹⁰ Mark Joseph Stern, *Colleges Aren’t Equipped to Investigate Rape*, SLATE (Feb. 24, 2015, 3:29 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/campus_rape_investigations_state_legislatures_debate_laws_to_bring_in_criminal.html; see also Adam Liptak, *Should Students Sit on Sexual Assault Panels?*, New York Times (Apr. 10, 2015), http://www.nytimes.com/2015/04/12/education/edlife/12edl-12forum.html?_r=0 (quoting Joe Cohn, of the Foundation for Individual Rights in Education, as noting that “[w]hen you have an 18-year-old student and a librarian deciding whether to end an 18-year-old’s career, you have to wonder about that”).

⁹¹ Anthony Walesby, *Title IX Coordinators: Five Things You MUST Know*, HIGHER ED JOBS (Jan. 9, 2013), <https://www.higheredjobs.com/articles/articleDisplay.cfm?ID=399>.

campus sexual assault enterprise typifies bureaucracy and its usual results, including its failure to achieve its initial purpose.⁹²

B. Witch Hunts and Hysteria as the Sexual Assault Enterprise Spreads

1. The Enterprise Entrenches with the Expansion of Title IX

The bureaucracy of the campus sexual assault enterprise has further extended its control over colleges, as well as indirectly over students, by conflating Title VII's standard for workplace harassment with Title IX's standard for harassment in education. The Title VII standard for establishing hostile environment is conduct that is "sufficiently severe *or* pervasive," while Title IX's standard, under *Davis*, is conduct that is "sufficiently severe *and* pervasive, as well as objectively offensive."⁹³ If courts apply the Title VII standard, then colleges will be responsible for a significantly larger amount of sexual violence and harassment, expanding the campus sexual assault enterprise's influence. In fact, many colleges may make policies with a standard closer to Title VII's to ensure they will not be held liable under Title IX for a hostile environment. The consequences of this policy include equating a one-time or minor case of harassment with a severe incident of sexual violence, such as rape. Under the Title VII standard, they are effectively the same.⁹⁴ This issue has resulted in a gross expansion of Title IX's impact, the role of the campus sexual assault enterprise, and the ability, or even requirement, of colleges to punish violators of any sort.

⁹² The fact that bureaucracy tends toward failure of achieving its goal and subsequent expansion of the bureaucracy itself may be seen by application of Harry Teasley's "Seven Rules of Bureaucracy," which include controlling the release of information, creating vested interests, using a crisis to perpetuate the power of the bureaucracy, and *maintaining* that crisis. See Loyd S. Pettegrew and Carol A. Vance, *The Seven Rules of Bureaucracy*, MISES DAILY (March 23, 2012), available at <https://mises.org/library/seven-rules-bureaucracy>.

⁹³ Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 436 (2009).

⁹⁴ *Id.* at 447.

2. Perverse Incentives to Punish the Accused Under Title IX

The expansion of Title IX has created perverse incentives for colleges that worsen the bias against students accused of sexual assault. When a student accuses another student or professor of sexual assault, the complaint places the institution's federal funding at stake. The OCR may revoke an institution's federal funding if it finds that the college or university violated Title IX, including a violation related to sexual assault. The OCR has made its position clear; it places the rights of sexual assault accusers above all others. This perspective on campus sexual assault means that any institution that wishes to keep its federal funding would be incentivized to find students accused of sexual assault culpable for the act.⁹⁵ This incentive perpetuates the witch hunt nature surrounding campus sexual assault cases, as college administrators are influenced, by federal rules and campus activists, to find accused students culpable.⁹⁶ Even if the accused students' rights were violated, which is unlikely,⁹⁷ they would probably not provide a large enough incentive compared to the massive incentive of federal funding, which OCR may revoke for Title IX violations related to sexual assault.⁹⁸

3. The Witch Hunt of Laura Kipnis

The expansion of colleges' ability, or requirement, to punish anyone accused of sexual harassment has created a situation which often devolves into, essentially, a witch hunt, as exemplified by the case of Laura Kipnis. Kipnis, a Northwestern University professor, decried the state of sexual harassment and assault rules on college campuses, particularly related to professor-student relationships. She criticized a sexual harassment test, which is similar to the

⁹⁵ Henrick, *supra* note 38, at 53.

⁹⁶ Michael S. Greve, *Sexual Harassment: Telling the Other Victims' Story*, 23 N. Ky. L. Rev. 523, 537 (1996).

⁹⁷ No court has held a college or university liable, under Title IX, for discriminating against an accused student on the basis of sex. In a pending case, however, the court denied a university's motion to dismiss a student's Title IX sex discrimination claim based on his expulsion for sexual assault. *See Doe v. Washington & Lee University*, No. 6:14-cv-00052 (W.D. Va. Aug. 5, 2015), ECF No. 54 at 20.

⁹⁸ Henrick, *supra* note 38, at 77, 79.

true-false quizzes commonly included in sexual assault programs, noting the “painful dumbness” of its questions.⁹⁹ She noted the absurdity of considering ““unwanted sexual advances”” to be sexual harassment, when one cannot know if the advances are unwanted without first making the advances. Kipnis also stated that a student’s allegations that a professor got her drunk and fondled her when she returned to his home were “melodrama,” which improperly made the professor an “alleged fondler [turned] rapist.”¹⁰⁰ She suggested that the parties in these cases were “in a predetermined story.”¹⁰¹ She even criticized the popular language surrounding campus sexual assault cases, questioning how the victim of alleged groping could be considered a “survivor,” a term often used in relation to the Holocaust’s concentration camps. In Kipnis’s view, these sexual assault policies have made students into children incapable of consenting to sexual activity, have interfered with the rights of the accused, and allowed sexual paranoia to overcome intelligent policy.¹⁰²

Kipnis’s article resulted in student protests and, ultimately, two Title IX violations filed against her by students. The students charged Kipnis with retaliation, based on her discussion of sexual assault claims at the university. Kipnis experienced difficulty in receiving information on the charges against her, with investigators merely sending her information on Title IX and campus sexual assault. She described the experience as a “kangaroo court.”¹⁰³ The university hired outside investigators to investigate the claims, interrogate the parties, and make a judgment. Kipnis recounted that the only information concerning the charges she could receive was merely “more [internet] links to more Title IX websites, each of which contained more links

⁹⁹ Laura Kipnis, *Sexual Paranoia Strike Academe*, CHRON. OF HIGHER EDUC. (Feb. 27, 2015), <http://chronicle.com/article/Sexual-Paranoia/190351>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Laura Kipnis, *My Title IX Inquisition*, CHRON. OF HIGHER EDUC. (May 29, 2015), <http://chronicle.com/article/My-Title-IX-Inquisition/230489/>.

. . . an informational rabbit hole.”¹⁰⁴ The confidentiality requirements surrounding the case prevented her from receiving aid or discovering the evidence and claims against her. Kipnis eventually learned some information about the charges and complainants, largely from information released by the complainants, including the fact that the charges concerned the article as well as a tweet she sent regarding the same issues. Kipnis noted that, because every Title IX complaint must be investigated by the institution, a student can make a complaint for any reason and that will result in a lengthy and intrusive investigation. This system allows “[a]nyone with a grudge, a political agenda, or a desire for attention” to use Title IX to punish and chill opposing speech or actions, by threatening an investigation.¹⁰⁵ Kipnis noted that professors across the country emailed her, stating their fear of students filing Title IX complaints against them. Kipnis also recognized the problem created by the Title IX bureaucracy’s rapid expansion.¹⁰⁶ Kipnis eventually settled the claims, but not before she experienced the Kafkaesque nature of the modern campus sexual assault and harassment adjudication process.¹⁰⁷

C. The Enterprise’s Demolition of Due Process Rights for the Accused

While seemingly innocuous types of activity or speech can give rise to a Title IX investigation, the rights of the accused are often seriously abridged, causing any allegation ranging from harassment to rape to likely result in punishment. This abridgement of rights has developed based on the law and policy positions of the OCR, White House, and Congress. This policy concerning the rights of the accused regularly involves a lowered standard of proof, a lack

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (noting that this bureaucracy naturally takes away “intellectual real estate,” as “[i]t’s a truism that the mission of bureaucracies is, above all, to perpetuate themselves”).

¹⁰⁷ *Id.*

of opportunity for cross-examination, double jeopardy issues, and a presumption of guilt based on the requirement of affirmative consent.

1. Lowered Burden of Proof

The OCR insists that colleges implement a policy of using the preponderance of the evidence standard in sexual assault cases.¹⁰⁸ This burden of proof is the lowest standard, requiring the complainant to prove the case by a greater than 50% likelihood. This standard is common in cases concerning mere monetary disputes. The beyond a reasonable doubt standard requires the highest burden of proof, which is used in criminal cases because the potential harm to the defendant is highest. Between these standards, the clear and convincing standard is commonly used when the stakes are higher than just money, such as the defendant's reputation.¹⁰⁹ The potential harm to a student accused of sexual assault necessitates application of the clear and convincing standard, rather than the preponderance of the evidence standard promulgated by the OCR.¹¹⁰

For example, in John Doe's case, Amherst College issued a ruling the day after his hearing and, without explaining its reasoning, expelled Doe for committing sexual assault as determined by a preponderance of the evidence. Doe's expulsion was effective immediately and resulted in a transcript notation for his "Disciplinary Expulsion."¹¹¹ Doe was required not to return to campus, without written permission from the college, and to avoid even incidental contact with his accuser.¹¹² With no family in the area and without money, he moved into an off-

¹⁰⁸ OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1, 13 (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁰⁹ Barclay Sutton Hendrix, *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, 611-12 (2013) (applying the due process factors described in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), arguing that a higher standard of proof is necessary in campus sexual assault proceedings).

¹¹⁰ *Id.* at 612.

¹¹¹ Complaint and Jury Demand, *supra* note 1, at Exhibit 4, at 1.

¹¹² *Id.*

campus fraternity house, before campus activists expressed outrage that he could even remain near campus.¹¹³ Expulsion, a devastated academic transcript, and public revilement are common results for students accused of sexual assault. The stakes are high for accused students and the probability of finding an innocent student to be culpable are too likely, making the preponderance of the evidence standard inappropriate in campus sexual assault cases.¹¹⁴

2. Lack of Representation and Cross-Examination of Witnesses

Given the low standard of proof, the lack of proper legal representation and cross-examination of witnesses causes a terrible misadministration of justice. Although the due process rights to an attorney and to cross-examine witnesses and the accuser are fundamental in criminal law cases, these rights often are ignored in college disciplinary hearings for campus sexual assault allegations.¹¹⁵ In Doe's case, Amherst College told him that he could not be assisted by legal counsel, but instead he would be assigned a faculty advisor who could not advocate for him.¹¹⁶ This is common procedure in campus sexual assault cases, with many disciplinary panels including other students. Accused students are also commonly unable to access relevant evidence.¹¹⁷ The OCR has advised against cross-examination of the accuser, because of the potential "traumatic and intimidating" effect.¹¹⁸ Due process requires that an accused person be able to cross-examine adverse witnesses, particularly the accuser, which is especially crucial in campus sexual assault cases, due to their inherent "he said, she said" nature.¹¹⁹ Allowing accused students to cross-examine and retain legal counsel would safeguard a proper

¹¹³ *Id.* at 16.

¹¹⁴ Hendrix, *supra* note 109, at 613-14.

¹¹⁵ David DeMatteo, et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y & L. 227, 229-30 (2015).

¹¹⁶ Complaint and Jury Demand, *supra* note 1, at 11.

¹¹⁷ K.C. Johnson, *The Strange Justice of Campus Rape Trials*, MINDING THE CAMPUS (Dec. 15, 2013), http://www.mindingthecampus.org/2013/12/the_strange_justice_of_rape_tr/.

¹¹⁸ OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, *supra* note 49, at 12.

¹¹⁹ Hendrix, *supra* note 109, at 615-16.

administration of justice, by ensuring that witnesses and accusers present honest testimony.

These procedures would add little expense for colleges, while still allowing guilty students to be properly punished.¹²⁰

3. Double Jeopardy: The Accuser's Right to Appeal

The possible issue of double jeopardy arises in campus sexual assault adjudications, as accusers are able to appeal an adverse ruling, based on the Dear Colleague Letter's requirement of an equal opportunity to appeal.¹²¹ The interests at stake for an accused student justify the protection against such an appeal, for the same reasons supporting protection against double jeopardy in criminal proceedings. Disciplinary board proceedings determine whether students are responsible for violating the student conduct policy; in reality, however, the board determines whether the student is guilty of the crime of rape, so the student should receive the same, or similar, due process protections.¹²² While the Fifth and Sixth Amendments' protections only apply in actual criminal proceedings, "[you would] have to regard the protection against double jeopardy as a mere constitutional technicality to believe that schools should dispense with it."¹²³

4. Guilty Until Proven Innocent

The new anti-rape movement has now begun advocating for removal of one of the most fundamental protections against a false finding of guilt, the presumption of innocence. While the presumption of innocence in this context has been weakening for years based on the erosion of due process protections and the propagation of the belief that accused men are sexual

¹²⁰ *Id.* at 617.

¹²¹ OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, *supra* note 49, at 12.

¹²² Hendrix, *supra* note 109, at 618-19.

¹²³ Wendy Kaminer, *What's Wrong with the Violence Against Women Act*, THE ATLANTIC (Mar. 19, 2012), <http://www.theatlantic.com/national/archive/2012/03/whats-wrong-with-the-violence-against-women-act/254678/>.

predators,¹²⁴ recent laws and policy positions attempt to reverse that presumption.¹²⁵ In the perspective of the new “yes means yes” movement, consent can never be presumed. An affirmative form of consent, a “yes,” must be given for each sexual encounter and act, regardless of whether the parties are long-time partners or one of the parties never voices opposition.¹²⁶ For example, Yale’s affirmative consent policy states that if there is no evidence of “unambiguous ongoing agreement,” then there was no consent to the sexual encounter, even if the encounter initially occurred “without coercion.”¹²⁷ In other words, an accused student must affirmatively prove that the accuser gave explicit consent to every sexual act. If the accused student cannot prove affirmative consent, then lack of consent is presumed, making the accused student a rapist. This improperly shifts the burden of proof onto the accused student.¹²⁸

Real problems arise with the issue of consent when both parties involved in a sexual encounter are intoxicated by alcohol, a relatively common situation in campus sexual assaults as well as campus sex more generally. Having sex with an intoxicated person is considered rape, based on the inability of the intoxicated person to consent. However, the OCR and White House have been unclear on what colleges should do when both students who have engaged in sexual acts were intoxicated.¹²⁹ Many institutions have decided that “sex while drunk” is sexual

¹²⁴ Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), <http://www.wsj.com/articles/SB10001424053111903596904576516232905230642>.

¹²⁵ Gail Sullivan, *California Bill Defines What it Means to Say “Yes” to Sex*, THE WASHINGTON POST (Aug. 29, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/08/29/california-bill-defines-what-it-means-to-say-yes-to-sex/> (discussing how California’s passage of a bill requiring affirmative consent for sex to be considered consensual, “reverses the presumption of innocence for the accused,” and noting Yale’s and Dartmouth’s affirmative consent policies).

¹²⁶ Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_proble_m_but_the_efforts.html.

¹²⁷ *Id.*

¹²⁸ Foundation for Individual Rights in Education, *FIRE Statement on California “Affirmative Consent” Bill*, FIRE (Feb. 13, 2014), <https://www.thefire.org/fire-statement-on-california-affirmative-consent-bill/>.

¹²⁹ OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, *supra* note 49, at 1.

assault and have effectively created “a double standard for men.”¹³⁰ While it would seem that this should mean both parties have committed sexual assault when both are intoxicated, many colleges take the position that “it is the responsibility in the case of the male to gain consent before proceeding with sex.”¹³¹ This position harkens to sexual stereotyping, such as the belief that men are initiators of sex and women are incapable of stopping them, which the Supreme Court has generally derided.¹³² Problematically, many of these colleges do not define when a student becomes intoxicated, meaning that a student could be found culpable of sexual assault if the other student drank any alcohol.¹³³ In other words, not only must a student accused of sexual assault prove that the other student consented to the act; if the other student was intoxicated at the time, the accused student cannot possibly prove affirmative consent, because it would have been impossible for the other student to consent. Drunk sex would give one student complete license to accuse the other of sexual assault and the accused could do nothing.

D. Conclusion

Desiring to prevent and punish sexual assault on college campuses constitutes a worthy goal. The efforts sought by the new anti-rape movement, established at all levels of government, and resulting in the sexual assault enterprise do not achieve that goal though. Instead, they violate the rights of the accused, burden colleges, and create a witch hunt against an enemy who may not even exist in the form imagined. The campus rape studies, which create the idea of serial rapists on college campuses who rape up to 25% of college women, distort the reality of

¹³⁰ Amanda Hess, *How Drunk is Too Drunk to Have Sex?*, SLATE (Feb. 11, 2015, 3:29 PM), http://www.slate.com/articles/double_x/doublex/2015/02/drunken_sex_on_campus_universities_are_struggling_to_determine_when_intoxicated.html.

¹³¹ K.C. Johnson, *If She Had Drinks, You May Be a Rapist*, MINDING THE CAMPUS (June 18, 2014), <http://www.mindingthecampus.com/2014/06/if-she-had-drinks-you-may-be-a-rapist/> (quoting Duke University’s Dean of Students, Sue Wasiolek).

¹³² See *United States v. Virginia*, 518 U.S. 515, 541 (1996) (questioning any “generalizations or tendencies . . . based on ‘fixed notions concerning the roles and abilities of males and females’”).

¹³³ *Id.*

campus sexual assault. This distortion provides problems for the accused and for real victims of sexual assault, whose experience may differ from the one portrayed and whose claims are diluted by being equated with relatively minor rudeness or compliments on appearance. The insistence, by the new anti-rape movement, that unwanted advances are equivalent to sexual assault denigrates real victims and their claims. This belief exaggerates the problem on college campuses, equating groped students to rape victims or even suggesting that groped students are “survivors” on the same level as those of the Holocaust.¹³⁴

The hysteria surrounding sexual assault has erected a massive bureaucracy, including programs, training, and employment positions, with a Title IX enterprise growing across the nation’s colleges. This bureaucracy survives, not by eliminating sexual assault, but only by increasing the hysteria, propagating the sexual assault witch hunt. This incentive results in the destruction of due process for the accused and often ignores whether the accused actually committed an assault. This result is not justice or fairness, regardless of how many sexual assault victims exist, because punishing the innocent does not make atonement for those crimes. While the anti-rape movement and government had a worthy goal in trying to end campus sexual assault, that goal has grown into a leviathan that succeeds only in injustice in campus sexual assault proceedings and the chilling of speech by students and professors who fear to speak out. The new Title IX enterprise does little to nothing to help rape victims, as Kipnis noted the absurdity and uselessness of its programs and training.¹³⁵ The best route forward is to open discussion on campus sexual assault from all perspectives – not just one position to chill all others – and then to provide secure avenues for real victims to report their experiences to

¹³⁴ See Kipnis, *supra* note 99.

¹³⁵ Kipnis, *supra* note 103; Kipnis *supra* note 99.

university staff, who will report to police and others who can properly adjudicate these heinous crimes in open criminal proceedings under proper due process.