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Campus Sexual Assault: Understanding the Problem and How to Fix It

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Abstract

Colleges often handle rape and sexual assault cases internally through a quasi-administrative process staffed by individuals without the necessary training or experience instead of referring them to local law enforcement. A sounder system that safeguards the due process rights of the accuser and the accused is to mandate referral of sexual assault crimes to local law enforcement for investigation and prosecution. This would also benefit the schools themselves, since adjudicating these cases puts them at risk of civil liability and decreased funding under current Title IX enforcement rules.

I. Introduction

The mission of our colleges and universities is to educate students and prepare them for the global marketplace. But they also must maintain physical buildings and provide housing and cafeterias for students; manage endowments and engage in sophisticated fundraising; maintain accreditation; and manage a workforce that includes professors, groundskeepers, coaches, and management.

American colleges must comply with a host of federal and state laws and regulations governing employment, taxes, zoning, civil rights, and student safety. And although most college students are law-abiding citizens, every year there are some who cheat, commit vandalism, steal, or plagiarize. Schools must remain focused on their educational mission while responding to misconduct that is not necessarily tied to academic performance.

Sometimes far more serious crimes occur on college campuses, including rape and murder. Convictions for these offenses almost

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Key Points

- Colleges often handle rape and sexual assault cases internally through a quasi-administrative process instead of referring them to local law enforcement.
- Campus tribunals should also provide real due process protections to the accused—for the benefit of the university as well as compliance with standards of fairness—as the fallout from the *Rolling Stone* rape hoax has shown.
- Campus tribunals can further harm suspected victims of sexual assault with multiple interviews, inexperienced investigators, and lack of reporting requirements in the event of a guilty finding.
- A sounder system that safeguards the rights of the accuser and the accused is to mandate referral of sexual assault crimes to local law enforcement for investigation and prosecution.
- This would also benefit the schools themselves, since adjudicating these cases puts them at risk of civil liability and decreased funding under current Title IX enforcement rules.

invariably result in significant sentences, and in the case of rape, mandatory sex offender registration after release from prison. Fortunately, there are very few murders on college campuses. Homicide cases are handled by local prosecutors and investigators who have the professional experience and forensic tools to eliminate suspects and develop cases for trial. The criminal justice system is specifically designed to handle such cases.

On the other hand, colleges often handle rape and sexual assault cases internally through a quasi-administrative process instead of referring them to local law enforcement. Indeed, students who have been raped are sometimes discouraged by university administrators from reporting the crime to competent, professional law enforcement officers or local prosecutors.

Colleges and universities have been pushed by the federal government and special interest groups into handling these complex cases through administrative campus tribunals—despite the fact that they have no professional competence to handle rape and felony sexual assault cases. No one would expect a university tribunal to handle a murder on campus; similarly, it makes no sense for a university to handle other serious crimes such as sexual assaults and rapes.

To make matters worse, in April 2011, the Obama Administration's Office of Civil Rights (OCR) at the U.S. Department of Education sent a letter to all colleges and universities[1] that receive federal funding and "exerted improper pressure"[2] on them to change how they handle such cases. This letter urged schools to weaken already minimal due-process protections for those accused of rape and sexual assault and threatened those that refused to do so with the prospect of losing federal funding, negative publicity, and public shaming by the Education Department, which would put the school on a "watch list."

Unfortunately, many schools buckled under the pressure and lowered the standard of proof from clear and convincing evidence to a mere preponderance of the evidence—often described as "50.01 percent sure" or the "simply more likely than not" standard; prohibited an accused individual from reviewing the evidence against him or cross-examining his accuser; either refused to allow an accused to hire an attorney or to allow that attorney to speak on the accused's behalf; and implemented other procedures that "do not afford fundamental fairness"[3] to the accused.

The OCR "guidance" letter has been roundly criticized in liberal and conservative quarters, from law professors to think tank scholars to Members of Congress and many others. Law professors at the University of Pennsylvania wrote that the "OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness," and that "due process of law is not window dressing."[4] Harvard Law professors similarly decried the procedures as "overwhelmingly stacked against the accused" and "in no way required by Title IX law or regulation."[5]

Similarly, the American College of Trial Lawyers (ACTL) issued a white paper criticizing campuses for their lack of due-process protections and pointing out the inherent conflict of interest that Title IX school officials have if they are involved in these tribunals. According to the ACTL, "concerns of withdrawal of federal funding, combined with media attention surrounding campus sexual assault, may cause universities—consciously or not—to err on the side of protecting or validating the complainant at the expense of the accused. These not-so-subtle pressures may contribute to partial and discriminatory investigations and the absence of protection for the accused."[6] Moreover, Title IX officials, who are often put in charge of these investigations, have an inherent conflict of interest since they "owe their position" to the 2011 OCR guidance.

Ironically, the OCR's guidance may well make matters worse for victims of rape. By tipping the scales in favor of an accuser and coercing colleges to keep these cases on campus rather than referring them to law enforcement authorities, the OCR has put other potential victims in jeopardy by literally giving some rapists and other dangerous predators a get-out-of-jail-free card.

An objective overview of the law and policies that have brought colleges and universities to this place demonstrates that current practices harm both accusers and those accused of these heinous crimes. There is no simple solution to addressing the problem. But doing nothing is not an option: The current situation is unfair to everyone involved, including the academic institutions.

The best way forward is to de-politicize the issue and craft solutions based on solid data. Proven methods to reduce rapes and sexual assaults on college campuses include education, prevention, accountability, common sense, and the use of the

local criminal justice system, which promotes fairness for both the accuser and accused.

II. Definitions of Terms Used

There are a variety of terms used by the government, academia, and activists to describe those involved in campus rapes and sexual assaults. Many of these terms reflect predetermined value judgments, as opposed to non-judgmental, objective terms. And while some terms may be appropriate at certain stages, such as post-conviction, those terms are inappropriate at other stages, such as during an investigation.

The Obama Administration's White House Council on Women and Girls, for example, called people who have allegedly been raped or sexually assaulted on campus "survivors" or "victims" because those terms are "empowering."[7] These terms are appropriate when delivering medical treatment to a victim or remedial services to survivors of rape or sexual assault in a post-conviction context. They are not appropriate, however, in legislation dealing with campus disciplinary processes or during the investigatory phase of an anticipated administrative proceeding, where the truth is not yet known and the use of such terms could skew the investigation and the proceedings. In these contexts, the terms "complaining witness" or "accuser" are more appropriate, and will be used throughout this paper.

The accused are entitled to a presumption of innocence, both in criminal and administrative proceedings—something that too many campus administrators and activists would like to deny. Similarly, a "perpetrator" is a person who has committed a crime or other offense.[8] A "defendant" is a person who has been charged with a crime that will be tried in a court of law.[9] For purposes of this paper, we use the term "accused" to describe the person the accuser says committed the act against her or him.

Additionally, in this paper we use a number of terms for certain immoral, and often illegal, actions of a sexual nature. It is important to define these terms because certain terms, such as "sexual violence," have become politically charged and applied in different ways. For example, "sexual violence" sometimes is used in the narrow, colloquial sense, as a synonym for rape. Increasingly, however, it is applied to a wide range of conduct, from boorish catcalls to touching someone without his or her consent to rape, and many other activities in between. While many, if not all, of these actions may be uncouth or immoral, not all of them are illegal, and covering them with a blanket term is inappropriate. Thus, we provide the following definitions:

First, *sex discrimination* refers to treating a person differently because of that person's sex. As a general rule, sex discrimination occurs when a college has a policy or practice that treats men different from women. This could be an affirmative policy—men's sports teams receive special perks that women's teams do not—or it could be the absence of a policy. In the Title IX context, "deliberate indifference" to sexual harassment by an institution is an example of the latter.[10]

Sexual harassment, by contrast, is just one type of sex discrimination.[11] "Harassment," even when not sexual, is always difficult to define. In general, sexual harassment is a pattern of intimidation or bullying relating to one's sex or the sexual act. The Supreme Court of the United States has given some guidance: In the context of Title IX, actionable sexual harassment by an institution occurs when an institution (1) has actual knowledge of sexual harassment; (2) is deliberately indifferent to that sexual harassment; and (3) the sexual harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an education opportunity or benefit."[12]

However, as Justice Anthony Kennedy has noted, "a student's claim that [a] school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment."[13]

In other words, Title IX's goal does not, and cannot, mandate the sanctioning by a college of every offensive comment. "Sexual harassment" must refer only to behavior that could reasonably be expected to actually interfere with a student's equal access to federally subsidized educational programming *and* meets the legal standard promulgated by the Supreme Court.

Sexual violence is another capacious term, but typically refers to a violation of a state criminal statute and involves non-consensual sexual contact with violence by one person against another. Some of this conduct might constitute a misdemeanor; other conduct such as rape and aggravated sexual assault are felonies. This conduct is squarely within the criminal realm. All reasonable people know that sexual violence is illegal; that it harms victims physically and psychologically; and that it threatens the peace and safety of college communities.

Colleges have a moral duty to foster an atmosphere of mutual respect that will help prevent these types of crimes. But they also have a legal duty to publicly disclose these crimes that are reported to their campus police or security department under the federal Clery Act.[14]

Finally, *rape* is the most serious type of criminal sexual assault. Rape is defined by the FBI as "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without consent of the victim."[15] Each state has its own definition of rape, which may vary slightly from the FBI's definition.[16]

In many cases of alleged rape or sexual assault, whether the accuser consented to the activity is the key issue. *Black's Law Dictionary* defines consent as a "concurrence of the wills."[17] Other sources offer similar variations of this definition. Under California law, for example, consent is defined as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."[18] Congress has defined consent in the context of rape and sexual assault generally as "a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from use of force, threat of force, or placing another person in fear does not constitute consent."[19] A person who is asleep, unconscious, or otherwise substantially impaired by any drug, intoxicant, or similar substance is incapable of consenting to sexual acts.

As a matter of law, the mere consumption of alcohol does not render a person incapable of giving valid consent. Many schools assert erroneously that the consumption of any alcohol by an accuser makes her legally incapable of granting knowing and voluntary consent. Although the use of alcohol bears on whether an individual is substantially impaired and capable of consenting to sexual activity, people who are tipsy or "buzzed" can be legally capable of giving consent to sexual activity.

One major problem is that advocates often intentionally mix these terms together. For example, a researcher might ask: "Has anyone ever touched you in a sexual manner without asking explicit permission first?" Such a question would undoubtedly yield many "yes" answers even among married couples who engage in consensual sexual activity without exchanging verbal consent. That answer could be used to "prove" that sexual assaults occur at a very high rate.

Or, one might define sexual harassment to include "unwelcome" verbal conduct. While this may sound reasonable, such a definition could sweep within it the simple act of asking someone out on a date or other acts that a reasonable person would not consider harassment, even if the respondent does. Such answers would artificially inflate the incidence of sexual harassment.[20]

While we should be concerned with even low numbers of campus sexual assaults, when confronted with data on this problem, it is important to scrutinize the definitions and ensure that innocuous or constitutionally protected conduct is not swept in as a part of the problem to be regulated.

III. Federal Interest in Regulating Colleges

Sexual assault is one of the traditional felonies that our legal system has been dealing with for a long time.[21] These crimes fall within the police power of states. Nevertheless, as the federal government has become more involved in regulating education policy by conditioning the receipt of federal monies on compliance with various laws, it has sought to regulate sexual assault on college campuses.

Specifically, Title IX,[22] the federal law dealing with sex discrimination in higher education, provides 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.[23]

The plain language of this statute conveys a proposition that all Americans should find uncontroversial—discrimination on the basis of sex should not be subsidized by the federal government. But what does this have to do with sexual assault? In brief, the Education Department has promulgated regulations and issued informal guidance over the past 20 years that set standards for sexual assault investigation and sanctions. Failure to comply with these standards is deemed interference with the educational opportunities of students, thereby constituting

discrimination on the basis of sex. Furthermore, as a condition of receiving funds, colleges must comply with a host of other anti-discrimination statutes at the federal and state level and must disclose information related to crimes committed on or near their campuses.[24]

Since *Brown v. Board of Education*, federal involvement in higher education has increased dramatically.[25] Congress has passed a slew of federal antidiscrimination statutes that apply to universities, such as Titles VI and VII of the Civil Rights Act of 1964, and Title IX. Many states have passed "affirmative action" policies that raise constitutional concerns.[26] Two practical effects of these laws is to increase the cost of higher education and require universities to maintain numerous lawyers and administrators tasked with limiting liability and implementing regulations.

At the same time, the need for and cost of higher education has increased. Economists have marked the rise of "degree inflation," where many occupations with otherwise low barriers to entry now artificially require a college degree as a prerequisite to employment.[27] The unemployment rate for those with only a high school diploma is over twice that for workers with a bachelor's degree: 8.1 percent versus 3.7 percent.[28]

Further, the cost of higher education has increased 538 percent since 1985.[29] Obtaining a college degree is perceived by students to be a necessity, while at the same time posing a substantial financial burden. Student loan debt has ballooned to $1.2 trillion, with the average repayment for a student currently at $279 per month.[30] Attending college can be a recipe for massive personal costs.

A student expelled in her senior year could have six figures in debt, be foreclosed from various entry-level positions, and have her ability to earn an income permanently damaged. Expulsion is, in every sense of the word, an academic death penalty with many collateral consequences that necessitate giving students accused of wrongdoing the benefit of basic constitutional due-process rights.

Finally, campus culture has changed considerably. Alcohol consumption has increased dramatically in recent years, and open sexual activity is the norm, rather than the exception.[31] Critically, the *Rolling Stone* hoax (discussed below) would not have received the attention it did were it not so believable.

From the public relations damage a university can suffer to the funding threats from the federal and state governments due to a claim of mishandling sexual assault cases, there is a constant incentive for universities as a matter of risk management to scapegoat accused students and impose a *de facto* guilty-unless-proven-innocent standard.

IV. Obama Administration Exerted Improper Pressure Upon Universities

Although the 2011 "Dear Colleague Letter" issued by the Office of Civil Rights is particularly concerning, the increasing involvement of the federal government in dictating policy to universities has been occurring for decades.

When Title IX was passed in 1972, it received broad bipartisan approval. However, since its passage, Title IX has been twisted and corrupted into a tool for weakening civil liberties on college campuses across the country.

In 1980, the OCR—Title IX's enforcement agency—was incorporated into the newly formed Department of Education with a limited mandate to address sexual harassment committed by an employee of the school.[32] In the 1990s, Congress increased the role of the federal government in campus discipline with the passage of the Clery Act. Although the Clery Act involved the government in overseeing campus discipline, it still denied the Education Department the authority to require universities to adopt particular policies.[33]

However, in 1992, the Higher Education Amendments weakened that restriction by requiring universities to develop particular policies to address sexual assault and its adjudication. The amendments marked the first time sexual assault was treated differently from all other felonies, and it forced colleges to shift away from handling sexual assault through law enforcement and the criminal justice system and to create their own processes for handling these crimes.[34]

In 1997, the OCR issued a "Sexual Harassment Guidance" document that pressured colleges to punish students for any speech that could in any way be considered sexist. It also applied Title IX to student-on-student sexual assault.[35] In 1999, in *Davis v. Monroe County Board of Education*, in a majority opinion written by Justice Sandra Day O'Connor, the Court held that colleges can be held liable for sexual harassment claims, but only if they are *deliberately indifferent* to a pattern of *severe* and *pervasive* behavior.[36]

The OCR ignored the limitation that Justice O'Connor articulated and, on January 19, 2001, issued guidance that stated that even an isolated incident of sexual harassment has the possibility to create a sufficiently hostile environment to warrant investigation and sanctions under Title IX.[37] The 2001 guidance did maintain that any rights established under Title IX should be interpreted consistent with any federal due-process rights and the First Amendment, but this was soon to change.

On April 4, 2011, the Office of Civil Rights issued a "Dear Colleague" letter to universities across the country that required those institutions to adopt federally mandated procedures and policies that would severely erode the due-process rights of accused students—or risk losing federal funding. First, the letter required that colleges use a low "preponderance of the evidence standard" to find students guilty of sexual assault. Second, the letter discouraged cross-examination of one's accuser. Additionally, it ordered colleges to speed up investigations, allow accusers to appeal not-guilty verdicts, and implement punishments before the completion of the investigation and a finding of guilt.

The OCR issued this guidance *without* following the Administrative Procedure Act's (APA's) requirement of public notice and comment before issuing new rules—yet another example of the way that federal agencies have in recent years been avoiding the process and procedure requirements of the APA when issuing substantive rules and guidance.

In addition to the flawed 2011 guidance issued by the OCR, in 2014, the White House Task Force to Protect Students from Sexual Assault issued a report framing the issue of sexual assault on college campuses and making various recommendations that repeat some of the same mistakes made by the OCR and other critics, such as erroneous claims that "the criminal process simply does not provide the services and assistance" that victims need.[38]

On May 1, 2014, the Department of Education released the names of 55 colleges and universities that the OCR was investigating for their alleged mishandling of sexual assault and harassment complaints.[39] By July 29, 2015, this had increased to 145 investigations at 128 colleges and universities.[40] On October 20, 2014, the Education Department published final rules to bring universities into compliance with changes to campus crime reporting requirements contained in the Violence Against Women Reauthorization Act of 2013.[41]

These actions are by no means the first time an Administration has tackled the issue of sexual assault on college campuses. However, the Obama Administration was particularly aggressive in trying to use federal law to micromanage state, local, and private institutions in their investigations relating to what have been historically considered state-law crimes. Moreover, the Administration helped feed the media narrative that college campuses were hotbeds of sexual assault that academic institutions simply ignored.[42]

The *Rolling Stone* Rape Hoax. In the public eye, all of this changed in the aftermath of one *Rolling Stone* article. On November 19, 2014, Sabrina Rubin Erdely, a journalist who had been criticized previously for tendentious and possibly falsified reporting relating to sexual assault in the Archdiocese of Philadelphia, published "A Rape on Campus."[43] The article alleged that members of a fraternity at the University of Virginia (UVA) brutally raped a woman, identified as "Jackie," at a frat party. In the aftermath of her rape, Jackie's friends and various university officials allegedly played down the incident, acting callously—perhaps even illegally—toward Jackie's suffering.

This horrific incident was touted by Senator Kirsten Gillibrand (D–NY) as "shocking and outrageous," demonstrating the need to pass her bill dealing with campus sexual assault.[44] In the first days after publication, professors and students at UVA demonstrated, national fraternity organizations condemned the assault, the media jumped on the bandwagon, and the fraternity house mentioned in the story was vandalized.

Yet the story was a complete hoax. It became what the *Columbia Journalism Review* declared "The Worst Journalism of 2014"[45] and *Rolling Stone* eventually retracted the story. After an intensive investigation (in which Jackie refused to cooperate), the Charlottesville Police Department found no evidence that the rape had occurred and that Jackie's story had numerous inconsistencies and discrepancies.[46] In fact, an associate dean of students at the university won a multimillion-dollar libel suit against *Rolling Stone* and Erdely in 2016 and *Rolling Stone* agreed to pay $1.65 million to settle a lawsuit brought by the fraternity whose members were falsely accused.[47]

V. Current Policies Built on Bogus Studies

There is no doubt that some students on college campuses are raped by fellow students. And there is no doubt that students are sexually assaulted on campus. These crimes should not happen, but they do. However, as a policy matter, ascertaining how serious the problem is has been difficult. This task has been made all the more so because of questionable statistics and downright bogus claims.

The current debate has not been served well by misleading studies and claims that sexual assault is overwhelmingly prevalent in college campuses across the country. Three key "facts" used by the Obama Administration in its report *Rape and Sexual Assault: A Renewed Call to Action* have been challenged and in large part disproven. That report claimed that:

1. One in five women have been sexually assaulted while in college;

2. Rapes on campuses are often committed by serial rapists; and

3. False reporting rates are low, namely 2 percent to 10 percent of reported rapes.[48]

According to KC Johnson and Stuart Taylor Jr.'s "The Campus Rape Frenzy," an extensive exposé of the false reporting on this issue that is relied upon by many universities and activists, this is a myth.[49]

According to Johnson and Taylor, the most reliable crime surveys are those conducted by the U.S. Justice Department, which "suggest that roughly one in 40 (not one in five) female college students is sexually assaulted over four years." That data does not indicate how many of the perpetrators were fellow college students, so the number of students committing such crimes is probably even smaller.

Moreover, the one-in-five number would "represent a crime wave unprecedented in civilized history."[50] Heather MacDonald provides an insightful comparison. In the chaotic aftermath of Hurricane Katrina, the 2012 rape rate in New Orleans was 0.0234 percent.[51] Detroit, one of the most violent cities in America, had a combined murder, rape, robbery, and aggravated assault rate of 2 percent in 2012.[52] Are we to believe, asks MacDonald, that the average college campus is exponentially more dangerous than the lawlessness we saw in New Orleans after Katrina, or more violent than Detroit?

As Johnson and Taylor point out, there are approximately 10 million women enrolled as undergraduates in the United States. The one-in-five number "would indicate that two million of them will be sexually assaulted at college." That is 500,000 sexual assaults per year—yet the FBI's Uniform Crime Reports show that "in 2014 there were 116,645 rapes in the entire United States, a nation of 160 million females, one-sixteenth of whom are in college."[53]

In the studies that produce these distorted results, the person conducting the study often makes a determination as to whether the women have been raped depending on their answers to a range of questions about their sexual experiences.[54] Yet when asked directly if they had been raped, the surveyed women overwhelmingly responded "no."[55] Similarly, the original study that came up with the one-in-five figure classified a woman as being sexually assaulted if she had "intimate encounters while even a little bit intoxicated," even if she had consented and was not incapacitated.[56]

In fact, Justice Department crime statistics show that the number of rapes and sexual assaults of female college students have "dropped by more than half between 1997 and 2013" and that women in college are *less likely* to be assaulted than women in the community at large.[57]

There is also no data to support the claim that campuses are dominated by serial rapists; the "so-called scholarship underlying the serial-predator claim has been discredited."[58] The serial rapist claim is derived from a study entitled *Repeat Rape and Multiple Offending Among Undetected Rapists* by David Lisak.[59] However, this study and the conclusions that follow are dubious at best. The surveys that provided the data for Lisak's study were not identified.[60] In fact, the data were "repurposed from academic papers that never intended to survey campus violence in the first place" and made up of responses from men from a non-traditional college campus—the University of Massachusetts-Boston, which is "a commuter school with a significant number of older, non-traditional students."[61] In addition, the surveys did not discourage non-student participation.[62]

A rigorous multi-year study published in July 2015 completely refutes Lisak's "serial rapist" theory.[63] This new study, taken in two sample sets at two different universities, approximately 15 years apart, annually surveyed incoming classes of men for four years.[64] The authors of the study concluded that their

findings "do not support the campus serial rapist assumption—most men who committed rape did not do so consistently across time."[65]

The third "fact," that the rates of false reporting are 2 percent to 10 percent, is based on a single U.S. study and other, non-U.S., data[66] and was also produced by David Lisak, utilizing the same questionable methodology. Even Lisak admitted that "in reality, no one knows—and in fact no one can possibly know—exactly how many sexual assault reports are false."[67] If the author of a study admits that the numbers are unknowable, these numbers cannot possibly be taken as facts upon which to base an effective policy. In the various studies cited by Johnson and Taylor, the rate of false allegations has ranged from 17 percent to 41 percent.[68]

There is no question that even a single sexual assault on campus is one too many. That is all the more reason to use accurate data to effectively target the problem. Bad data are skewing the current discussion and are being used to justify restricting the rights of the accused.

VI. Differing Incentives

Universities and educational bureaucracies are ill equipped to handle sexual assault cases. Perverse incentives permeate the adjudication of sexual assault on campus, and investigations and trials are carried out by administrators or professors who are not lawyers or experts in sexual assault investigations. On the other hand, the criminal justice system employs people with years of training and experience in investigating and trying rape and sexual assault cases.

Additionally, in the criminal justice system, both the accuser (through a public prosecutor) and the accused are represented by counsel. And while the efficacy of the adversarial system is often the subject of debate, it does offer major protections for both the accuser and the accused.

By contrast, in college disciplinary proceedings, there are three parties or more. Not only are there the accuser and the accused, but there is the university itself. And the administration is anything but neutral. While prosecutors are protected by qualified or absolute immunity for the decisions they make, universities have no such protection. In fact, under Title IX and the way it has been interpreted by the Department of Education, non-"prosecution" of an alleged sexual assault can open the door to the university losing all of its federal funding. It can also be the grounds for a civil lawsuit by the alleged victim.[69]

Conversely, while a university has legal obligations to disclose crimes on campus under the Clery Act, one can expect that pressure by university boards, donors, and prospective students would all encourage universities to sweep problems under the rug to avoid any negative publicity. On the other hand, the highly publicized Duke Lacrosse rape hoax disserved the accused in part because public pressure, led by special interest groups, demanded immediate condemnation of the innocent students. Traditional prosecutors, by contrast, are at least partially insulated from these matters of public choice, and when they engage in misbehavior—as the county prosecutor did in the Duke case—they can be disciplined or disbarred.[70]

Universities also must deal with the pressures of special interest groups and the whims of state legislatures, both of which have resulted in widely varying due-process safeguards (and lack of safeguards) afforded to students. For example, despite the potentially serious consequences of a guilty verdict against a student, many colleges, such as the University of Cincinnati, prohibit students from being represented by a lawyer during disciplinary proceedings.[71]

The student conduct code of American University, for instance, specifies that any "advisor" to a student in a disciplinary hearing "may not address hearing bodies, speak in disciplinary proceedings, or question witnesses." They cannot "act" on behalf of the student "or contact any participant in the conduct." The "participation of persons acting as legal counsel is not permitted." The student code makes a point of saying that this ban on legal representation particularly applies to "cases of dating violence, domestic violence, rape, sexual assault, sexual exploitation, or stalking."[72] Thus, in cases with the most severe potential consequences to an accused student, that student is prohibited from having anyone present who can protect his most fundamental legal rights and act on his behalf. Fortunately, some of this is changing: For example, North Carolina passed a law in 2013 providing students and student organizations accused of misconduct the right to be represented by an attorney or non-attorney.[73]

The bottom line, however, is that while constitutional norms set a baseline for due process in criminal

prosecutions, there is a much broader patchwork of approaches to due process for student disciplinary proceedings, many of which do not meet those minimum standards. In the 1975 case *Goss v. Lopez*, the U.S. Supreme Court applied the due process clause of the Fourteenth Amendment to students in public schools, noting that the "authority possessed by the State to prescribe and enforce standards of conduct in schools, although concededly very broad, must be exercised consistently with constitutional safeguards."[74]

However, these protections are limited in scope and generally do not apply to private universities.[75] Thus, it is important to ensure that federal laws safeguard students and do not preempt state laws and university policies providing additional due process to students accused of misconduct, including sexual assault.

VII. Criminal Justice System Is Superior to Campus Tribunals at Finding the Truth

The criminal justice system and campus tribunals serve different purposes. The former exists to enforce criminal law and punish those who are convicted of crimes. The latter exists to enforce standards of academic conduct on college campuses.

Naturally, there are different rules for the two systems. Defendants in criminal trials have constitutional rights that protect them from government overreach, including the presumption of innocence, procedural and evidentiary safeguards, and ample appellate rights. The criminal justice system is designed to allow the parties to develop facts that would otherwise be difficult to uncover without the tools of the criminal justice system.

In contrast, campus tribunals are not organized or equipped to get to the truth of matters. Rather, they are designed to resolve violations of the school code of conduct quickly and impose sanctions, if merited. Accused students do not enjoy the constitutional presumption of innocence, nor do they have other procedural protections and safeguards, such as the ability to subpoena witnesses and obtain evidence that are built into the criminal justice system.

This inequity between the two systems is less pronounced in cases where the alleged college infraction is minor, clear-cut, and can only result in a slap on the wrist. Colleges enjoy—as they should—wide latitude in the enforcement of their codes of academic conduct. But when there is an allegation of rape or violent sexual assault, the search for the truth matters. Those found responsible for rape can be expelled—the academic equivalent of the death penalty. Expulsion from college is a life-changing sanction that can damage or destroy a student's entire future career and employment prospects.

Those in favor of using campus tribunals to adjudicate college rapes and other violent sexual assaults give short shrift to the ability of the criminal justice system to effectively resolve such matters by punishing the guilty and protecting the innocent. Their preferences are misplaced and often uninformed.

What critics do not understand or fail to recognize is that the practice of law has become highly specialized, requiring increased proficiency and specialization by practitioners. Large prosecutor's offices are typically staffed with career prosecutors who specialize in gang violence, homicide, fraud, narcotics, juveniles, elder abuse, insurance fraud, appellate advocacy, domestic violence, child abuse, stalking, Internet crimes against children, sex crimes, and family violence, among others. In the largest, most sophisticated district attorney offices, it takes years of prosecuting misdemeanor cases before a career prosecutor is selected to join a specialized unit. It takes even more time and hundreds of more cases, before that prosecutor handles the most complex crimes, such as rape or murder. Medium-sized and smaller offices also include prosecutors who specialize in rape and sex offense investigations and prosecutions.

Career prosecutors accumulate knowledge in subjects not taught in law school, such as forensic evidence exploitation, forensic odontology and entomology, DNA and fingerprint analysis, voice recognition, wiretaps, crime scene reconstruction, the use of subpoenas, the use of cell phone and text evidence, cell tower evidence, and much more. Each of these tools can be invaluable in building a proper rape or sexual assault case against an accused. These tools are in addition to an understanding of the fundamental concepts embedded in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; state evidentiary rules; U.S. Supreme Court and other relevant state and federal appellate opinions; and the local rules of practice.

A prosecutor's duty is to do justice.[76] The National District Attorneys Association states that the primary responsibility of the prosecutor is to "seek justice, which can only be achieved by the representation and presentation of the truth."[77] Supreme Court

Justice George Sutherland wrote in 1935 that "while (the prosecutor) may strike hard blows, he is not at liberty to strike foul ones."[78]

Today's career sex crimes prosecutor builds her case methodically based on direct and circumstantial evidence. All 50 states have either implemented specific victim's rights legislation or have instituted victim's rights protocols in all cases, especially sex crimes. Prosecutors' offices work closely with specially trained detectives and police on sex crimes cases, who in turn utilize a multi-disciplinary team approach to assist the victim through the investigative process. Specially trained forensic interviewers, working with the multi-disciplinary team, aim to conduct as few interviews as possible with the victim. This minimizes the trauma of having to retell and relive the crime, but also eliminates the number of potential inconsistent statements by the accuser for purposes of discovery and cross-examination at trial.

All states and the federal government have passed rape shield evidence laws, which protect an accuser from provocative, irrelevant, and embarrassing questions about a victim's sexual past.[79] Additionally, many states have passed laws that make it unnecessary for accusers to testify at preliminary hearings or in a grand jury proceeding. Instead, the police officer or detective who investigated the case is allowed to testify to what the accuser said, which, before the change in the law, would have been considered inadmissible hearsay.[80]

There is, unfortunately, a cottage industry of activists who purposefully criticize the use of the criminal justice system for campus rape cases. Many of them offer naïve and uninformed opinions unmoored from the reality of today's criminal justice system and the increased specialization and sensitivity of professionals who work these cases. For example, the founder of Sun Devils Against Sexual Assault at Arizona State University claimed that "police are often hostile to survivors of sexual violence" and that they have "historically re-traumatized and mistreated survivors."[81] Another activist claimed that "the criminal justice system has had a bad history with sexual assault violence; not believing survivors, not even writing down their reports, requiring evidence of physical resistance, and even punishing some survivors who they believe are lying."[82]

One opponent of criminal prosecutions calls it "expensive, timely, and traumatizing, often requiring that the survivor repeat their story multiple times to people who don't understand even the basics of how trauma affects memory."[83] Another, the Vice President for Campus Life at Wake Forest University, recently testified that "our experience teaches us cops look for violence, for signs of struggle, for weapon—they usually don't understand the nuances."[84]

Most of these criticisms have no merit whatsoever and evince a gross lack of knowledge of today's criminal justice system. Professional prosecutors and sex crimes detectives seek the truth and attempt to handle these cases with the utmost care and sensitivity. By the time they work on these cases, they often have years or decades of experience and have received countless hours of sex crimes training before working with sex crimes victims. They work to minimize the number of interviews of the accuser, often conducting only one formal interview after the initial police report. In fact, it is these interviews with specific details of the crime via the discovery process, including corroborating evidence, that lead defense attorneys routinely to advise their clients to accept responsibility and take a plea. Thus, a thorough, sensitive interview of the accuser helps her case in the long run and may avert a trial.

It is true that an accuser will be subject to cross-examination by a defense attorney. But fundamental due process for an accused requires that an accuser be subject to cross-examination whether it is in a criminal proceeding or an administrative disciplinary hearing at a university. Case files are kept confidential throughout the pendency of preliminary and grand jury proceedings. Taking a case to criminal court does not cost the accuser anything, except her time and attention. These strengths of the criminal justice system, and the professionalism and experience of personnel who work in it, stand in sharp contrast to the ad hoc, amateurish, non-professional procedures and protections utilized in campus tribunals.

Some of the most common complaints from campus activists concerned about law enforcement involvement in campus sexual assaults center around multiple victim interviews and/or insensitive and incompetent investigations.

Multiple Victim Interviews. In rape and sexual assault cases adjudicated on campus, it is common for the accuser to be interviewed multiple times. For example, the University of Pennsylvania procedures require an accuser to provide at least three statements about a potential rape, or more. First, the accuser has to report the crime to someone. Second,

under the new protocol, an investigating officer reviews the complaint to decide if there is cause to launch a full investigation. If there is cause, then the investigative team conducts a full investigation, including potentially yet *another* interview of the accuser. The full report is then given to the campus tribunal, who also has a duty to hear again from the witnesses, including the accuser.

The University of Pennsylvania's protocol is not uncommon for colleges that have adopted the single investigator model. The single investigator model was "suggested" by the OCR in the 2011 "Dear Colleague" letter to all colleges and universities.

Insensitive and Incompetent Investigations. Faculty members and other college employees staff campus tribunals. In many cases, they act as investigators, prosecutors, defense attorneys, judges, and juries—a system that provides none of the checks on unilateral and biased decision making of an adversarial system that has separate entities performing all of these functions.

There is also no substitute for real experience in handling the investigation, prosecution, and defense of rape and sexual assault cases. Colleges, under pressure from the Office of Civil Rights, have attempted to "educate" tribunal members about the intricacies and nuances of rape cases. While such training is laudatory in theory, it has failed in application. Academics and administrators are not trained criminal investigators, have little to no knowledge of forensic evidence, and have no experience asking relevant and material questions of witnesses competently. They are not bound by rape shield laws and thus may ask questions of the accuser that would never be allowed in a court of law.

For example, *The New York Times* reported on a rape case on the campus of Hobart and William Smith College.[85] The transcript of the hearing shows the insensitivity and utter incompetence of the campus tribunal members. According to *The New York Times*, Anna, a freshman, went to a campus fraternity party, drank heavily, and then disappeared. A football player had escorted Anna upstairs to a bedroom, although a friend tried to stop her, to no avail.

Around midnight, a fraternity member who used his key to enter his locked bedroom found a naked football player sitting on a bed with Anna "with her top off, covering her breasts." The fraternity member left. Her friends became worried and texted her. Anna replied that she didn't "know what to do" and that she was "scared." Her friends eventually found her bent over a pool table as a "football player appeared to be sexually assaulting her from behind in a darkened dance hall, called the barn, with six or seven people watching and laughing."

Her friends rescued her and called campus security, who took her to a local hospital for a sexual assault examination. Anna's blood alcohol level was determined to be about twice the legal limit and the physical examination indicated "intercourse with either multiple partners, multiple times or that the intercourse was very forceful." Tests confirmed the presence of sperm or semen in her vagina, her rectum, and on her underwear.

Anna did not report the event to the police, nor did anyone from the college. A college administrator told Anna that reporting the case to the police would result in a long, drawn out process. In 12 days, the college investigated the incident, held a hearing, and cleared the football players of any wrongdoing. Six months after the tribunal cleared the football players, Anna changed her mind and reported it to the police. The district attorney closed the case saying there was "virtually nothing to work with." The long delay had made it too difficult to collect the evidence needed for a prosecution.

The three panel members who decided the case asked Anna insensitive, illogical, compound questions during the hearing. Two of the three members did not examine the medical records. They asked Anna what she drank, whom she may have kissed, and how she was dancing. They asked Anna questions about the incident in the barn, despite the fact that she stated she did not remember being in the barn previously. And they went so far as to ask Anna whether her friend who found her in the barn "might have misconstrued her dancing as sex."

This case, and others like it on college campuses, should have been referred to the local authorities immediately. With DNA evidence, text messages, other evidence, and witness statements, the prosecutor would have had a lot to work with in developing cases against the various accused.

But instead, the outcome was far different.

The other side of such cases is shown by a lawsuit that was filed by a male student who had been expelled by Washington & Lee University in Virginia for sexual assault in a university proceeding that resembled Kafka's *The Trial*. The university used oppressive tactics that violated the accused student's due-process

rights and expelled him despite overwhelming evidence showing the sex was consensual and that the accuser was exacting revenge for the student dating another woman. This process included rules that did not allow him to consult an attorney, to speak to anyone about the case, or to question witnesses or the accuser. The tribunal ignored exculpatory evidence[86] and comprised an investigator and deciding members who were clearly and obviously biased against him. The investigator (who refused to talk to some of the witnesses provided by the accused student) had actually written an article in which she claimed that even if a woman engages in consensual sex, it becomes rape if she later changes her mind—"regrets equals rape."[87] Given how thoroughly it mishandled this case, Washington & Lee settled the federal lawsuit the unidentified male student filed in 2016.[88]

College rape accusers can, as the Hobart and William Smith cases demonstrate, actually suffer unnecessary harm—psychological or otherwise—by the current policies at universities. Instead of being encouraged to report the crime to competent professionals in the criminal justice system, they are unfortunately told that the criminal justice system is incompetent, uncaring, harsh, and cruel, and that the campus tribunal system is fairer to them. The opposite is true.

If the accused is expelled, with no criminal punishment, the accuser lives with the knowledge that the accused could rape other women. Rapists are criminals, not just college students who violate a school's honor code. They deserve to be prosecuted in criminal court, and if found guilty, punished accordingly, including having to register as convicted sex offenders. Fortunately, more and more academics, politicians, policy experts, and others—from every political viewpoint—are coming to the conclusion that campus rape cases should go to criminal court.[89]

Colleges should establish close working relationships with their local police departments and prosecutor's offices. They should advise students to report sexual assaults to the police and explain that rape is a crime best adjudicated through the criminal justice system.

VIII. Recommended Solutions

Repeal the 2011 OCR Letter. The 2011 "guidance" is not guidance at all, but rather an unjustified and inappropriate demand to implement Star Chamber-type procedures. In issuing the letter to all colleges and universities with the threat of loss of federal funding for failure to comply, the letter violated the standard process mandated under the federal Administrative Procedure Act for the issuance of new regulations. As the Open Letter from the University of Pennsylvania Law Professors aptly states, "the federal government has sidestepped the usual procedures for making law. Congress has passed no statute requiring universities to reform their campus disciplinary procedures. OCR has not gone through the notice-and-comment rulemaking required to promulgate a new regulation."

Congress should consider reducing funding for OCR unless and until it rescinds the 2011 "Dear Colleague" letter or making it clear in legislation that OCR overstepped its bounds and acted outside its authority. It is unfair and unworkable—and OCR stepped on Congress' prerogative by enacting virtual legislation without the authority to do so. Additionally, OCR should review the colleges and universities that the prior Administration listed as supposedly violating the 2011 guidance letter and remove those schools that are in compliance with pre-Obama Administration standards.

If OCR refuses to act, Congress should also consider using the Congressional Review Act to void the guidance letter. The Congressional Review Act of 1996 allows Congress to overturn any rule—which includes any guidance an agency promulgates providing its interpretation of the law—through a joint resolution of disapproval that is signed by the President. The clock does not start to run on the congressional review period until the "later of the date on which" the rule in published in the *Federal Register* or it is submitted to Congress.[90] There is no indication that either of these events occurred.

Require Mandatory Referral of Sex Crimes to Law Enforcement. Requiring mandatory referral of sex crimes reported to college officials to law enforcement as a condition of federal or state funding is a legislative proposal that should be seriously considered. This would be the next step beyond the Clery Act, which only requires public disclosure in an annual report of all crimes reported to their campus police or security departments.

Such a system is already in place at the state level in the context of child and elder abuse. These laws typically require certain listed professionals, such as teachers, administrators, school nurses, and coaches, to report suspected abuse to appropriate law enforcement agencies. Failure to report can

trigger civil and criminal penalties against the individual and penalties against the institution. Some states even have "universal" reporting requirements, which require any person to report suspected child abuse or neglect.[91] More importantly, 10 states have required those employed at higher education institutions to report instances of child sexual assault.[92] Such a system could be expanded to include campus sexual assaults.

Perhaps the most persistent criticism of law enforcement handling of sexual assault cases comes from those who say that alleged victims should be able to remain anonymous, should not be confronted in a hearing, and should be able to change their mind about pursuing "charges." These concerns are not foreign to the criminal justice system, which provides a variety of protections for victims. However, these concerns butt up against the constitutional rights of the accused. While many critics consistently push the idea that the rights of the accused should be limited, that is fundamentally unfair: The rights of both accusers and the accused must be protected and balanced to achieve justice, including at private universities, even if constitutional due-process rights do not apply in that setting. Schools should also craft Memoranda of Understanding with local law enforcement and prosecutors that lay out procedures that they will follow in cooperating with each other and assisting authorities in the investigation and possible prosecution of rape and other sex offenses by students of students on campus.

A second benefit of mandatory referral is that it will provide a legal safe harbor to universities under Title IX. Right now, universities spend millions of dollars each year to comply with the vague and ever-changing requirements of the Education Department. Yet none of this can safeguard a university from a civil lawsuit—even if it somehow manages to comply with all of the directives coming out of Washington. The only time the Supreme Court has specifically addressed what Title IX requires in the private right-of-action context, it read a "deliberate indifference" standard into the law.[93] This suggests an important benefit to mandatory referral: When schools are statutorily required to refer sexual assault cases to law enforcement, it will be impossible, as a matter of law, to claim deliberate indifference if the school complied with mandatory reporting requirements. In other words, such a requirement would insulate universities from Title IX liability.

A third benefit of mandatory referral is that federal and state statutes provide many resources to victims of alleged crimes. Furthermore, there are victims' rights divisions of various prosecutors' offices that assist victims, and there are numerous civic and volunteer organizations that work with victims of crimes. Victims also often have specific rights of access to case materials that the general public cannot access. Finally, there are post-conviction rights of victims that universities cannot provide—statutory protections against harassment, for example, and information on the whereabouts of their assailant. Mandatory reporting to law enforcement would open the door to these victims' rights.

Finally, mandatory referral will provide better data on the actual extent of this problem. Certainly, the Clery Act requires that universities provide information related to crime on and around their campuses that is reported to their police or security departments, although those data are often criticized as being inaccurate. Further, Title IX has been interpreted to require publication of disciplinary procedures. However, other federal laws, such as the Federal Educational Rights and Privacy Act, have been used by universities to prevent disclosure of information in an ad hoc manner. Mandatory reporting to law enforcement, by contrast, would bring with it the application of state sunshine laws that require the disclosure of government records, including those relating to criminal prosecutions. This would bring campus sexual assault information in line with all other information processed by law enforcement.

Provide Real Due Process in Campus Tribunals. Campus tribunals should exist to enforce academic infractions such as lying, cheating, plagiarism, and other misbehavior that are generally misdemeanors, such as underage drinking, drug use, and other activity that is illegal or immoral. Colleges that fail to do so allow the conditions for their abuse to fester. But victims of rape or violent sexual assault should be encouraged to report the crime to the local police. If such referrals are not made mandatory by the federal or state governments and universities insist on handling such serious crimes themselves, then the Office of Civil Rights, in full compliance with the rulemaking process outlined in the Administrative Procedure Act, should issue a regulation requiring campus tribunals to offer the following minimum due-process rights:

- The right to notice of a complaint and full details of the accusation, with adequate time to prepare a defense;
- The right to assistance of counsel who may participate fully throughout the proceedings;
- The right to examine all evidence against the accused and for the accuser, with the university and the accuser providing all exculpatory evidence;
- The right to know the identity of the accuser;
- The right to cross-examine all witnesses against the accused, including the accuser, and the right to call expert witnesses when questions arise, such as whether alcohol or drugs substantially impaired the ability of parties to give consent; and
- The right to object to members of the tribunal because of bias or conflicts of interest.[94]

An accused person should also have the right not to provide a statement to college investigators or the campus tribunal, leaving it up to the school to decide whether it is permissible, as it is in civil cases, to draw an adverse inference from a student's refusal to provide such a statement.[95]

Given the serious consequences, any accusation should be proven by clear and convincing evidence. Further, campus tribunals, which usually seem to consist of three members, should consider requiring a unanimous decision before a student can be suspended, expelled, or otherwise disciplined. As several members of the faculty of the University of Pennsylvania School of Law said in regard to that university's three-member tribunal, implementing "scrupulously fair proceedings" requires "a unanimous decision before a student can be expelled from the University and be stigmatized as a sexual offender. To require anything less than unanimity for the imposition of serious sanctions is unacceptable."[96]

The U.S. Supreme Court does not require unanimous verdicts by jurors in criminal cases. It has upheld convictions by a 10-to-two vote and even a nine-to-three vote.[97] Unanimity does not become a requirement in the criminal sphere until you reduce the number of jurors to six.[98] As the Supreme Court explained, a jury has to be of a sufficient size "to promote group deliberation" and when that size is reduced to only six members of the community, then unanimity is required to ensure fairness.[99] Following that Supreme Court precedent seems the wisest and fairest course for universities.

Extreme care must be taken to avoid having either investigators or members of a tribunal with preconceived biases or conflicts of interest on these issues, including Title IX "coordinators" or others with an incentive to find problems that justify their employment. Campus tribunals should be required to provide a detailed, written finding of facts that support their conclusions of law or violations of campus rules and procedures. It is true that juries need not make findings of fact under federal law, and that even in a bench trial (where there is no jury), judges are not required to provide an opinion outlining the facts that support their legal judgment even if requested to do so by a defendant.[100]

However, students have a fundamental right to know how and why a campus tribunal came to the conclusions (and verdict) that it did, a verdict that may ruin a student's educational prospects or throw out another student's accusations as false. Thus, students should have the right to request a written finding in their cases. As the American College of Trial Lawyers points out, "substantially detailed" written findings are necessary to "permit meaningful appellate review."[101]

This is also important from a liability standpoint. More and more students are filing civil rights and defamation lawsuits against universities for the actions they have taken in these types of campus tribunals, particularly students found guilty of wrongdoing who claim they were innocent.[102] Having a written record of the facts, the evidence submitted, and the findings by the tribunal will not only help the federal and state court judges hearing such cases, but it may protect universities from accusations of misbehavior and wrongdoing.

While nobody questions an accused's right to appeal an adverse ruling by a campus tribunal, in its April 4, 2011, "Dear Colleague" letter, the Department of Education's Office of Civil Rights under the Obama Administration ordered colleges to provide accusers with a right to appeal "not guilty" findings. Because campus tribunals are administrative proceedings, the constitutional bar against double jeopardy does not apply.[103] Nonetheless, as Stuart Taylor and KC Johnson point out, giving an accuser the

right to appeal a finding of not guilty would expose accused "students to a form of double jeopardy that would be unconstitutional in the criminal justice system."[104]

The wiser and fairer university policy is to not allow accusers to appeal a finding of innocence by a tribunal. The same reasons that undergird the constitutional rule against double jeopardy support applying the same rule in the administrative tribunal process. Just like the government in a criminal case, universities generally have greater power and resources than an accused student, and such a rule prevents the university from forcing students to defend themselves multiple times in multiple proceedings in what could become an even more expensive and psychologically harmful and stigmatizing process. Fundamental concepts of fairness and justice militate in favor of a policy that applies an administrative double jeopardy rule to campus tribunals.

IX. Conclusion

Sexual assault investigation and adjudication are serious issues that involve complicated procedures designed to get at the truth and prevent further harm to victims and those falsely accused. Compound this complexity with a massive federal bureaucracy and various interest groups with their own agendas, and it is little wonder that alleged victims, alleged perpetrators, and universities themselves are often left with no clear idea of their rights and responsibilities under the law.

It is time to cut this Gordian knot by instituting a tiered system of mandatory referral designed to give the best options to victims of rape, while protecting the rights of the accused. This system, modeled after successful systems in other areas of the law, will benefit alleged victims by extending to them the full protection and help of the criminal justice system. It benefits alleged perpetrators by giving them the full panoply of due process and basic constitutional rights afforded to defendants in criminal cases. Finally, it benefits schools by taking them out of the expensive and extremely risky task of adjudicating these cases in the first place.

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Endnotes

1. *See* Dear Colleague Letter by Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education (April 4, 2011*), available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; *see also* Office for Civil Rights, U.S. Department of Education, Questions and Answers about Title IX and Sexual Violence (April 29, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
2. *See* Open Letter from Members of The Penn Law School Faculty regarding Sexual Assault Complaints: Protecting Complainants and The Accused Students at Universities 1 (Feb. 18, 2015), *available at* http://media.philly.com/documents/OpenLetter.pdf.
3. *Id.*
4. *Id.*
5. *See Rethink Harvard's Sexual Harassment Policy*, Boston Globe (Oct. 15, 2014), *available at* https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.
6. *White Paper on Campus Sexual Assault Investigations*, Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence, American College of Trial Lawyers (March 2017), page 13, *available at* https://www.actl.com/library/white-paper-campus-sexual-assault-investigations.
7. *See* White House Council on Women and Girls, Rape and Sexual Assault: A Renewed Call To Action, Jan. 22, 2014, *available at* https://obamawhitehouse.archives.gov/blog/2014/01/22/renewed-call-action-end-rape-and-sexual-assault.
8. *See* Black's Law Dictionary (5th ed. 1979).
9. *Id.*
10. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (construing the private right of action in Title IX to require that an institution (1) have actual notice of sexual harassment and (2) be deliberately indifferent to that harassment before liability attach).
11. *See* Davis v. Monroe Cty. Bd. Of Educ., 526 U.S. 629 (1999).
12. *Id.* at 633.
13. *Id.* at 682 (dissenting).
14. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, codified at 20 U.S.C. §1092 (f). The Clery Act requires all colleges and universities that participate in federal student financial aid programs to disclose and report information on crimes committed on their campuses as well as the policies and procedures they have in place for the investigation and prosecution of sex offenses.
15. *See* Federal Bureau of Investigation, Frequently Asked Questions about the Change in the UCR Definition of Rape of December 11, 2014, *available at* https://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions.
16. For example, under California law, there are several theories of liability for rape. Under Cal. Penal Code § 261(a), rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator under any one of seven theories of liability. Maryland, on the other hand, divides rape into two categories: first degree rape and second degree rape. *See* Maryland Annotated Code §§ 3–303 and 3–304, respectively. Maryland also has four degrees of sexual offenses: first degree through fourth degree, each of which penalizes a variety of behavior. *See* Maryland Annotated Code §§ 3–305 through 3–308.
17. *See* Black's Law Dictionary (5th ed. 1979).
18. *See* California Penal Code § 261.6.
19. *See* Manual for Courts-Martial, Article 120(g)(8)(A) (2012 edition).
20. *See* Heather MacDonald, *The Campus Rape Myth*, City Journal, Winter 2008, *available at* http://www.city-journal.org/2008/18_1_campus_rape.html; *see also* U.S. Dep't of Justice & U.S. Dep't Of Educ., Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, May 9, 2013*, available at* http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf.
21. The nine traditional common law felonies are murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary. Sexual assault may include rape, sodomy, or both.
22. 20 U.S.C. §§ 1681-88 (2006).
23. 20 U.S.C. § 1681. There are, of course, major exceptions, such as a carve-out for educational institutions controlled by religious organizations, but these exceptions are beyond the scope of this report.
24. 20 U.S.C. § 1092(f) (the "Clery Act").
25. 347 U.S. 483 (1954).
26. *See, e.g.* Fisher v. University of Texas at Austin, 136 S.Ct 2198 (2016).
27. *See* Catherine Rampell, *It Takes a B.A. to Find a Job as a File Clerk*, N.Y. Times, Feb. 19, 2013, *available at* http://www.nytimes.com/2013/02/20/business/college-degree-required-by-increasing-number-of-companies.html?_r=0.
28. *Id.*

29. Michelle Jamrisko & Ilan Kolet, *College Costs Surge 500% in U.S. Since 1985: Chart of the Day*, BloombergBusiness, *available at* http://www.philstockworld.com/2013/08/27/college-costs-surge-500-in-u-s-since-1985-chart-of-the-day/.
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31. *See* Mona Charen, *What the Left and Right Don't Get About Campus Rape*, The Federalist, Aug. 31, 2015, *available at* http://thefederalist.com/2015/08/31/what-the-left-and-right-dont-get-about-campus-rape/; *see also* Camille Paglia, *The Modern Campus Cannot Comprehend Evil*, TIME, Sep. 29, 2014, *available at* http://time.com/3444749/camille-paglia-the-modern-campus-cannot-comprehend-evil/.
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34. S.1150 – Higher Education Amendments of 1992, 102nd Congress (1991-1992); *available at* https://www.congress.gov/bill/102nd-congress/senate-bill/1150/actions.
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36. Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).
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72. "American University Student Conduct Code 2016–2017," Section IX, page 12; *available at* https://www.american.edu/ocl/sccrs/upload/AU-Student-Conduct-Code.pdf.
73. *See* House Bill 74, Session 2013, adding Sec. 116-40.11 to Part 3 of Article 1 of Chapter 116 of the North Carolina General Statutes, *available at* https://www.thefire.org/relevant-section-of-north-carolina-house-bill-74/.
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76. *See* American Bar Association, General Standards for the Prosecution Function, Standard 3-1.2(c).
77. *See* National District Attorneys Association National Prosecution Standards (3rd Ed), Section 1-1.1, *available at* http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.
78. Berger v. United States, 295 U.S. 78, 89 (1935).
79. *See e.g.* Federal Rule of Evidence 412, which, in relevant part, states: "(a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c): (1) Evidence offered to prove that any alleged victim engaged in any other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual predisposition."
80. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *See* Federal Rule of Evidence 801.
81. *See* Tyler Kingkade, *27 Groups That Work With Rape Victims Think The Safe Campus Act Is Terrible,* The Huffington Post, Sep. 13, 2015, *available at* http://www.huffingtonpost.com/entry/rape-victims-safe-campus-act_55f300cce4b063ecbfa4150b.
82. *Id.*
83. *Id.*

84. *See* Statement of Penny Rue, *in* Tyler Kingkade, *Activists, College Officials Protest Controversial Campus Rape Bill*, The Huffington Post, Sep. 10, 2015, *available at* http://www.huffingtonpost.com/entry/safe-campus-act-opposition_55f1d303e4b03784e2787013.
85. Walt Bogdanich, *Reporting Rape and Wishing She Hadn't*, New York Times (July 12, 2014), *available at* https://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r=0.
86. The supposed victim told her friends what a good time she had after having sex with the accused student; they exchanged very suggestive messages on Facebook that made it clear that Jane was a willing participant who did not regret what happened; and they had sex again a month later. What triggered the "rape" accusation was apparently the accuser's anger over the accused student taking up with another woman. Hans von Spakovsky, *Why Any Male Student Should Think Twice Before Applying to Washington & Lee University*," PJ Media (August 12, 2015), *available at* https://pjmedia.com/blog/why-any-male-student-should-think-twice-before-applying-to-washington-lee-university/.
87. *Id.*
88. Ashe Schow, *Washington and Lee Settles Lawsuit by Student Expelled for Sexual Assault*, Washington Examiner (Feb. 8, 2016), *available at* http://www.washingtonexaminer.com/washington-and-lee-settles-lawsuit-by-student-expelled-for-sexual-assault/article/2582749.
89. *See* Open Letter. *See also* Christina Hoff Sommers, *In Making Campuses Safe for Women, A Travesty of Justice For Men*, The Chron. of Higher Educ. (June 5, 2011), *available at* http://chronicle.com/article/In-Making-Campuses-Safe-for/127766/. *See also* Letter from Rape, Abuse & Incest National Network to White House (March 6, 2014), *available at* https://rainn.org/news-room/rainn-urges-white-house-task-force-to-overhaul-colleges-treatment-of-rape.
90. Paul Larkin, Jr., "The Reach of the Congressional Review Act," *Legal Memorandum* No. 201, The Heritage Foundation (Feb. 8, 2017), *available at* http://www.heritage.org/government-regulation/report/the-reach-the-congressional-review-act.
91. The states that have universal reporting include DE, FL, ID, IN, KY, MD, MS, NC, NE, NH, NJ, NM, OK, RI, TN, TX, UT, and WY, as well as Puerto Rico. The states and U.S. territories that require social workers, teachers, physicians, nurses, counselors, therapists, child care providers, medical examiners, law enforcement personnel, and other like professionals to report include AL, AK, AR, AZ, CA, CO, D.C., GA, GU, HI, IA, IL, KS, LA, MA, ME, MI, MN, MO, MT, ND, NV, NY, OH, OR, PA, SD, SC, VA, VI, VT, WA, WI, and WV. In addition the following states have codified guidelines for mandatory institutional reporting: AK, AR, CA, CT, D.C., FL, GA, HI, IA, ID, IL, IN, KS, KY, MA, ME, MD, MI, MN, MO, ND, NY, OK, OR, PA, SD, TN, TX, VA, VI, VT, WI, and WY.
92. AL, AR, CA, GA, IA, IL, LA, OR, VA, and WA.
93. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).
94. If the university official in charge of choosing the original members of the tribunal has the procedural ability to overrule such an objection by the accused or the accuser, that official should be required to explain in writing why the objection was overruled and the member was allowed to remain on the tribunal.
95. In a criminal prosecution, the Fifth Amendment provides a right against self-incrimination, and that refusal to testify cannot be used against the defendant. But it can be used against the accused in civil proceedings according to the U.S. Supreme Court. Baxter v. Palmigiano, 425 U.S. 308 (1976). Universities should consider whether to apply the criminal or civil rule in their administrative tribunals.
96. *See* Open Letter from Members of The Penn Law School Faculty Regarding Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities (Feb. 18, 2015), *available at* http://media.philly.com/documents/OpenLetter.pdf.
97. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).
98. Burch v. Louisiana, 441 U.S. 130 (1979; Brown v. Louisiana, 447 U.S. 323 (1980).
99. Burch v. Louisiana.
100. Federal Rules of Criminal Procedures, Rule 31; Rule 23(c).
101. *White Paper on Campus Sexual Assault Investigations*, Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence, American College of Trial Lawyers (March 2017), page 12, *available at* https://www.actl.com/library/white-paper-campus-sexual-assault-investigations.
102. Michael Gordon, "More men named in college sex assault cases are taking their accusers to court," Charlotte Observer (June 9, 2017).
103. The constitutional bar against double jeopardy in the Fifth Amendment only applies in criminal cases and does not apply to an administrative campus tribunal. See *The Heritage Guide to the Constitution* (The Heritage Foundation, 2nd Ed., 2014), page 438.
104. Johnson and Taylor, page 37.