
ENSURING CHOICE AND VOICE FOR CAMPUS SEXUAL ASSAULT VICTIMS: A CALL FOR VICTIMS' ATTORNEYS

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ABSTRACT

There is a national conversation about the role and responsibility of colleges in addressing campus sexual assault, including a debate about the definition of consent, reporting requirements, interim measures, adjudicatory processes, appropriate standard of proof, accused students' legal rights, and judicial oversight. As colleges increase internal reporting requirements and form information-sharing agreements with local law enforcement agencies, student victims begin to lose their choice and agency in reporting decisions and investigations. And as college adjudicatory proceedings become more complicated and extend past adjudicatory findings into appeals and lawsuits, student victims lose their voice and ability to fully enforce their rights. The purpose of this Article is to bring victims back into the discussion by emphasizing their legal rights to safety, privacy, and education, and by suggesting the need for victims' attorneys to promote victims' choice and voice throughout overlapping legal processes.

Survivors of sexual assault generally report negative experiences with the criminal justice system, civil law system, and college adjudicatory system—all sources of secondary trauma. This Article suggests that access to victim-centered, comprehensive legal advice at all stages of sexual assault investigations and the adjudication process has the potential to diminish secondary trauma by providing student victims with two vital tools: a choice to initiate and participate in a criminal or campus investigation by providing sufficient information for informed consent and a voice throughout the investigation and legal proceedings. Specifically, the Article argues that student victims would benefit from access to victims' attorneys at four distinct stages following a sexual assault: (1) the pre-reporting stage—to provide sufficient information and legal advice to ensure reports to law enforcement and colleges are intentional and provided with victims' informed consent; (2) the investigation stage—to ensure that student victims maintain agency throughout the investigation, help prevent unprofessional investigation

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techniques, and promote access to interim measures necessary to meet safety, privacy, and educational needs; (3) the hearing stage—to enforce victims’ safety rights, amplify victims’ voices in the proceedings, and reduce secondary trauma from victim-blaming questions and arguments; and (4) the post-hearing stage, including appeals and civil lawsuits—to provide representation in internal college appeals, lawsuits filed by the respondent or victim against the college, and retaliatory complaints or lawsuits filed against the victim, including defamation and harassment.

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I. INTRODUCTION

This Article suggests that providing access to client-centered legal assistance may help mitigate the secondary trauma experienced by student victims¹ who participate in one or more legal systems post-assault and increase their autonomy and agency in post-assault processes. Part II employs storytelling to illustrate the experience of many survivors of campus sexual assault following their disclosure or report of the assault. Part III provides an overview of campus sexual assault. Part IV provides a brief summary of Title IX, the civil rights law addressing sex discrimination in education. Part V discusses the theories of secondary trauma (i.e., “second rape”) and victim justice. Part VI proposes the stages in which student victims of sexual assault could benefit from access to victims’ attorneys: pre-reporting, investigations, campus hearing, and post-hearings (appeals and lawsuits).

1. In this Article, *victim*, *complainant*, and *survivor* are used interchangeably, while recognizing that “survivor” is the more common term used by the anti-rape movement and “victim” is the more common term used by the criminal justice system. My use of the term “victim” is not intended to discount the empowering use of the word “survivor,” but rather to reflect the language used in the legal systems discussed in this Article. For discussion about terminology, see Diane L. Rosenfeld, Commentary, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 359 n.2 (2014–2015) [hereinafter Rosenfeld, *Uncomfortable Conversations*]; Dana Bolger, “*Hurry Up and Heal*”: *Pain, Productivity, and the Inadequacy of ‘Victim vs. Survivor,’* FEMINISTING (Dec. 10, 2014), <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacy-of-victim-vs-survivor/>.

II. A NARRATIVE ILLUSTRATING A VICTIM'S POST-ASSAULT INTERACTION WITH CAMPUS, CRIMINAL, AND CIVIL LEGAL SYSTEMS²

A young college³ student sits in her dorm room. Her roommate notices that she seems distracted and asks her what is wrong. The student discloses that she thinks she may have been sexually assaulted the night before and proceeds to describe a rape.⁴ She says she was at a party with friends when she ran into a guy she had seen a few times in class. She says they talked a little and flirted some, then he asked her to go to his room to hang out. She says she told him she did not want to have sex that night, but after a few minutes of making out on his bed, he held her down and vaginally penetrated her over her objections. She says she tried to put it out of her mind, but that her assailant had texted her an hour earlier asking her how she was. Confused, she texted back “fine.” She wonders aloud if she could have stopped him if she had tried harder and questions her decision to go with him to his room.⁵ She does not think she wants to press criminal charges, but

2. This narrative is a compilation of experiences shared by student victims I spoke with on several campuses and victim experiences repeated in victim and assailant lawsuits and media interviews. It does not include the particularly egregious examples of a student victim's post-assault experiences with a college (of which many exist), but rather more common experiences. The Author uses the narrative here to illustrate the experiences that lead to student feelings of institutional betrayal or second rape, even when the outcome may appear positive to outsiders. For other narratives of institutional betrayal or negative outcomes, see *Breaking the Silence: Addressing Sexual Assault on Campus*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/breaking-the-silence/> (last visited Feb. 25, 2017) (providing a compilation of articles about campus sexual assault, including narratives of student victims from different colleges).

3. In this Article, *college*, *school*, and *university* are used interchangeably to refer to four-year colleges and universities in the United States.

4. See, e.g., Complaint at 5, *Doherty v. Emerson Coll.*, No. 1:14-cv-13281 (D. Mass. Aug. 8, 2014), 2014 WL 3943694, ¶ 23 [hereinafter Complaint, *Doherty v. Emerson Coll.*] (“Doherty confided in her roommates . . . about the assault, because she was confused and conflicted about what happened to her, and what she should do. Doherty then confided in her best friend . . . who explained to Doherty that she was indeed raped, and that she should report the incident.”); see also Erin Alberty, *BYU Students Who Reported Sex Assaults Say They Faced Presumption of Guilt*, SALT LAKE TRIB. (May 19, 2016), <http://www.sltrib.com/home/3897390-155/byu-students-who-report-sex-assaults> (reporting that “nearly all of the victims who spoke with The Tribune recalled clearly communicating their refusals to their assailants—but many of them also said they did not know then that the forced sexual contact amounted to assault” because “[m]ultiple students invoked an image of ‘a stranger in the bushes’ to describe rape as they envisioned it before they were assaulted”).

5. Victims commonly blame themselves for a rape for either actions they believe increased their risk of sexual assault or for not fighting. See KIMBERLY A. LONSWAY &

she is scared about how she will feel when she runs into him in class or in the dining hall.⁶

A. The Report

The roommate, unsure of how to respond, calls their student resident advisor for advice.⁷ The resident adviser asks the student to repeat the story and then explains that she is required to contact her supervisor.⁸ A director of student housing appears 30 minutes later and again asks the student to tell her about the sexual assault before explaining that she has to contact the Title IX office and law enforcement.⁹ While they wait for the police to arrive,

JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L, VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND 7 (2017), <http://www.evawintl.org/library/DocumentLibraryHandler.aspx?id=656> (“[V]ictims all too often blame themselves for the sexual assault . . .”); *see also, e.g.*, Alberty, *supra* note 4 (quoting a student victim of sexual assault who described “taking frantic inventory of ‘what ifs’” and thinking “I could have done something to stop that, or I should have said ‘no’ louder, or I shouldn’t have been there”).

6. *See, e.g.*, Exhibit N at 20, King v. DePauw Univ., No. 2:14-cv-00070 (S.D. Ind. Mar. 17, 2014) [hereinafter Exhibit N, King v. DePauw Univ.], https://www.bloomberg.com/document/X1Q6NM1GP3O2/download?blaw_go=false&bulk_ordering=true&display_context=http&doc_container=content_document&document_type=DOCKET&image=7616.pdf&rails=yes&root_url=https%3A%2F%2Fwww.bloomberglaw.com%2F&show_entries_filter=true&summary=yes&web_base_url=%2Fdocument (reporting a complainant’s testimony in a college administrative hearing: “I got the rape kit done because I really seriously felt violated. And I didn’t report initially because I didn’t want to ruin somebody’s life or I thought this was my issue, I can handle it.”).

7. *See, e.g.*, Complaint at 6, Doe v. Emerson Coll., 153 F. Supp. 3d 506 (D. Mass. 2015) (No. 1:14-cv-14752-FDS) [hereinafter Complaint, Doe v. Emerson Coll.] (complaint filed Dec. 31, 2014) (stating that the student disclosed the assault to a friend who contacted the resident assistant, who then disclosed to the roommate by bringing sexual assault pamphlets and speaking to her in the hallway where others could hear).

8. *See, e.g.*, First Amended Complaint for Damages at 10, Moore v. Regents of the Univ. of Cal., No. 3:15-cv-05779-RS (N.D. Cal. Dec. 5, 2016), *appeal filed*, No. 16-17369 (9th Cir. Dec. 30, 2016) [hereinafter First Amended Complaint, Moore v. Regents of the Univ. of Cal.] (amended complaint filed Feb. 10, 2016) (describing how a student victim initially reported a sexual assault to her cousin, who contacted the police, then the student reported to her resident hall advisor, who reported to the assistant resident director and campus CARE advocate).

9. Colleges and universities often require staff and faculty to report sexual assaults to their Title IX coordinator, and some also require reports to law enforcement. *See* Jill C. Engle, *Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to a Victim-Centric Protocol that Comports with Federal Law*, 24 TEMP. POL. & C.R. L. REV. 401, 413–14 (2015) (describing and critiquing the growing number of colleges that require all staff and faculty to internally report sexual assaults). For victim

the director mentions to the student that she has met the young man the student is accusing of sexual assault and that it is hard for her to believe he was capable of something like that.¹⁰

B. *The Investigations*

The responding police officers arrive at the dorm and walk past several rooms before arriving at the student's room. They again ask the student to describe the sexual assault. On their incident report, they note that the student's demeanor strikes them as abnormally calm, that she waited more than 12 hours before disclosing, and that she seemed uncertain as to whether or not she had actually been raped.¹¹ The officers advise the student that she should get a sexual assault forensic examination (i.e., a "rape kit") done immediately, but warn her that if she is lying, she may face criminal charges.¹²

narratives, see, e.g., Complaint, Doe v. Emerson Coll., *supra* note 7, at 8 ("Doe did not want the police to be called, but against her wishes, the Boston Police came in and two male officers interviewed Doe again."). Other schools have been accused of persuading student victims who wish to contact the police not to file reports. See, e.g., Complaint for Damages at 2–3, Doe v. Roe, No. 37-2015-00014239-CU-PO-CTL (Cal. Super. Ct. San Diego Cty. Apr. 24, 2015) [hereinafter Complaint for Damages, Doe v. Roe] (describing how both campus security and school administrators persuaded a student victim not to report a sexual assault to the local police department).

10. E.g., Richard Pérez-Peña & Ian Lovett, *2 More Colleges Accused of Mishandling Assaults*, N.Y. TIMES (Apr. 18, 2013), <http://www.nytimes.com/2013/04/19/education/swarthmore-and-occidental-colleges-are-accused-of-mishandling-sexual-assault-cases.html> (quoting a student who reported, "[w]hen I told an administrator that I did not feel safe, I was told that I had nothing to worry about, that she had met with my rapist, and that he didn't seem like the type of person who would do something like that").

11. It is common for rape victims to demonstrate a flat or calm demeanor following the traumatic experience and for law enforcement to misinterpret this response as a sign of dishonesty. See LONSWAY & ARCHAMBAULT, *supra* note 5, at 16 ("When victims respond by exhibiting calm or denial, this can sometimes raise doubt in the minds of professionals and other support people that the sexual assault actually took place. Yet it is important to remember that we all respond to trauma in unique ways, and it is not uncommon for victims of sexual assault to exhibit this type of response."); see also, e.g., Ken Armstrong & T. Christian Miller, *An Unbelievable Story of Rape*, MARSHALL PROJECT (Dec. 16, 2015), <https://www.themarshallproject.org/2015/12/16/an-unbelievable-story-of-rape#.2VDnj6fHA> (reporting on a case in which an early victim of a serial rapist was charged and convicted of filing a false report of sexual assault because the police and her friends questioned her calm demeanor and inconsistencies in her timeline).

12. See HUMAN RIGHTS WATCH, *CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA* 10 (2013) [hereinafter *POLICE*

The officers contact a sexual assault advocate through the university, and the advocate arrives to drive the student to the medical facility. The sexual assault nurse examiner (SANE) on call arrives at the medical facility 30 minutes later. The advocate remains with the student throughout the examination.

The SANE at the medical facility asks the student to again describe the sexual assault in detail so that she knows what evidence to collect, including a description of any and all penetration of the vagina or anus, any oral contact with genitals, any kissing or licking, all locations of ejaculation, and the use of contraception or lubricants.¹³ The SANE also asks about any recent consensual sexual activity and recent use of alcohol or drugs.¹⁴ She checks the student's vital signs and draws blood.¹⁵ She places a sheet on the floor and asks the student to stand on it and remove all of her clothes.¹⁶ She takes pictures of her face and of red marks on her neck, wrists, and thighs, then takes a swab of her cheek and plucks hairs from her head before using a black light to sweep over her body to identify possible saliva, semen, blood, and sweat to swab.¹⁷

She asks the student to lie down and uses a colposcope for an external genital exam and takes swabs.¹⁸ She combs the student's pubic hair for debris, then pulls pubic hairs for collection.¹⁹ She inserts a speculum into the student's vagina, searches for foreign objects and injuries, photographs tears

MISHANDLING IN D.C.], https://www.hrw.org/sites/default/files/reports/us0113ForUpload_2.pdf (reporting that police had threatened victims of sexual assault with prosecution for false reporting); *see also* Armstrong & Miller, *supra* note 11 (describing how a rape victim was not only threatened with, but actually criminally charged with, filing a false report); Katie J.M. Baker, "They Told Me It Never Happened," BUZZFEED NEWS (Sept. 27, 2015), http://www.buzzfeed.com/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for?utm_term=.he64V0kzA (reporting on teenager Lara McLeod's arrest and prosecution for filing a false report of sexual assault against a brother-in-law, who was later accused of murdering a child and suspected of killing an ex-girlfriend and his mother).

13. OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DOJ, NCJ 228119, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS: ADULTS/ADOLESCENTS 89–90 (2d ed. 2013) [hereinafter NATIONAL PROTOCOL], <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>.

14. *Id.* at 89.

15. *Id.* at 97, 104.

16. *Id.* at 99.

17. *Id.* at 91–92, 100–01.

18. *Id.* at 98.

19. *Id.* at 101.

and redness with a colposcope, then swabs the vaginal area.²⁰ She examines the cervical area for injuries with the colposcope, then swabs the cervical area.²¹ Last, the SANE speaks with the student about the availability of emergency contraception, pregnancy testing, and sexually-transmitted disease (STD) prophylaxis. The advocate adds that while the state will pay for the evidence collection, the student will have to pay for everything else and warns that if she uses her health insurance, her parents will likely see the specific charges.²² The SANE explains to the student that they must keep her clothes and underwear for the evidence kit, and provides her with some hospital scrubs to wear home.²³ The advocate drives the student back to her dorm, where she arrives almost eight hours after making her initial disclosure to her roommate. She missed a study group.

The next morning, the student receives a call from the school's Title IX office directing her to meet with the school administrator acting as the Title IX investigator later that morning. The administrator brings the student into her office and asks her to describe the sexual assault yet again while she takes notes. When the student mentions offhand that she had heard of similar assaults from other members of the assailant's fraternity, the administrator asks her why that information did not stop her from going to a party there.²⁴ The administrator asks her about her behavior that night: whether or not she

20. *Id.* at 102, 103.

21. *Id.* at 98, 102. If the student had indicated any contact or penetration with her anus, the SANE would examine and swab that area as well. *Id.* at 103–04.

22. As of 2012, only 15 states cover the cost of STD prophylaxis medications, 13 states cover the cost of a pregnancy test, 6 states cover the cost of emergency contraception, and 4 states cover the costs of “medical care related to the sexual assault” administered as part of a sexual assault forensic examination (SAFE). CHARLENE WHITMAN ET AL., *AEQUITAS: THE PROSECUTORS’ RES. ON VIOLENCE AGAINST WOMEN, SUMMARY OF LAWS & GUIDELINES: PAYMENT OF SEXUAL ASSAULT FORENSIC EXAMINATIONS 6* (2012), http://www.aequitasresource.org/Summary_of_Laws_and_Guidelines-Payment_of_Sexual_Assault_Forensic_Examinations_2.6.12.pdf.

23. NATIONAL PROTOCOL, *supra* note 13, at 99. SANEs generally only collect clothing worn during or immediately following a sexual assault but may collect underwear worn to the exam as well. *Id.*

24. *E.g.*, Annie E. Clark, *Rape Is Like a Football Game: Why Survivors of Sexual Assault Do Not Report*, HUFFINGTON POST: THE BLOG (Feb. 28, 2013, 2:44 PM), http://www.huffingtonpost.com/annie-e-clark/rape-is-like-a-football-g_b_2769576.html (reporting that a student victim of sexual assault at University of North Carolina (UNC) stated that when she attempted to file a report with a school administrator, she was told: “Rape is like football, if you look back on the game, and you’re the quarterback . . . is there anything you would have done differently?”).

had been drinking alcohol, whether or not she flirted with the assailant, and whether or not she kissed or engaged in any intimate behavior with the assailant. The administrator points out that the student is under 21 and should not have been drinking, and tells her that although the school will not file a student code violation against her for the drinking this time, she will face sanctions if she does it again.²⁵ The administrator asks the student if she understands how serious the allegations are and that they could potentially ruin the young man's life. The administrator invites the student to provide her with any evidence she has and a list of witnesses who might corroborate her story. The administrator explains that she will send the assailant an email informing him of the student's allegations, then schedule a meeting with him to hear his side of the story. The administrator states that if there is enough information, they may schedule a hearing.²⁶ As she is leaving, the administrator reminds the student that the purpose of the student disciplinary process is to create an educational opportunity for students to learn from their mistakes, not to punish students.

The detective assigned to the case contacts the student a few hours later. He asks her to come to the police station, where he interviews her in a small conference room.²⁷ He asks her to again describe the sexual assault for the seventh time in less than 24 hours. The detective interrogates her about

25. Student victims of sexual assault attending schools with moral codes have also reported that schools investigated or disciplined them for student code violations related to the disclosure of the assault, including violations of curfews, dress codes, housing codes, chastity codes, and prohibitions against homosexual relationships. *See, e.g.,* Alberty, *supra* note 4.

26. Some schools failed to investigate complaints of sexual assault or failed to provide hearings in adjudicatory models requiring hearings. For example, an audit of 2012–2015 complaints of sexual assault and harassment at Baylor University found “[t]he overwhelming majority of cases did not move forward to an adjudicative hearing, with only an extremely limited of cases resulting in a finding of responsibility or significant sanction.” BAYLOR UNIV. BD. OF REGENTS, FINDINGS OF FACT 6 (2016), <https://www.baylor.edu/rtsv/doc.php/266596.pdf>. The report further described how university personnel discouraged student participation in the Title IX process, failed to pursue even those cases where a complainant chose to move forward, often based on an inadequate or uninformed investigation, and engaged in actions that constituted retaliation against at least one complainant. *Id.* at 6–7.

27. *See* Complaint, *Doe v. Emerson Coll.*, *supra* note 7, at 7 (reporting details of a student victim of sexual assault describing her interaction with the police after reporting a rape, including that she was placed in a small room, her requests for a female police officer and to have her friend stay with her were ignored, and she was told “in an intimidating and threatening manner, that she had ‘better be sure’ that she was raped, because rape is a ‘serious accusation’”).

the details of her story in order to test her credibility. He explains that during his years as a detective, he has heard a lot of false allegations of sexual assault.²⁸ He asks the student if she consented to sexual intercourse but now regretted it, or if she possibly gave the assailant signals he misunderstood.²⁹ He advises the student that she may not want to proceed with the criminal investigation because college date rape cases are very difficult to prove. The student considers his advice and agrees to end the police investigation.³⁰

Two weeks later, the college administrator investigating the case contacts the student again and lets her know that she has spoken with the assailant and scheduled meetings with his witnesses. The administrator explains that she will need to interview the student again. She also asks the student to bring her cell phone to her office so she can see the text messages,

28. See CIVIL RIGHTS DIV., U.S. DOJ, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 122 (2016) [hereinafter INVESTIGATION OF BALTIMORE POLICE DEPARTMENT], <https://www.justice.gov/opa/file/883366/download> (reporting that investigators were “troubled by statements of [Baltimore Police Department] detectives suggesting an undue skepticism of reports of sexual assault” and describing an advocate’s account of a sex offense detective stating, “[A]ll of our cases are bullshit Ok, 90 percent.”); see also Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 8–9 (2016).

29. See REBECCA CAMPBELL ET AL., THE DETROIT SEXUAL ASSAULT KIT ACTION RESEARCH PROJECT, FINAL REPORT—CORRECTED 115 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf> (reporting that police often disbelieved victims who were even minimally acquainted with the assailant and believed that victims made false reports because they regretted their actions or wanted revenge against a friend or partner); see also POLICE MISHANDLING IN D.C., *supra* note 12, at 2 (“[P]olice revictimized survivors by treating them callously and skeptically, discouraged sexual assault survivors from reporting their assault”); Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010), <http://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html> (“Interviews with advocates and victims, and a review of reports requested under a Public Information Act request, reveal an attitude of distrust by police toward victims and a reflex to dismiss rape reports both in the field and after investigating.”).

30. Less than 5 percent of sexual assault rape victims attending college choose to report the assault to law enforcement. See MAJORITY STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS 1 (2014), <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>. Reporting rates of student sexual assault victims in the general population are also low. See DEAN G. KILPATRICK ET AL., NAT’L CRIME VICTIMS RESEARCH & TREATMENT CTR., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 2 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> (finding 16 percent of all rapes are reported to law enforcement).

since the assailant claims there are text messages proving his innocence. The student complies, and the administrator downloads all of her texts onto a computer. The student explains her concern that the assailant will be able to see all of her personal communications from the past year. The administrator says she is sympathetic but that the assailant has the right to view all of the evidence used in the investigation. The student later learns the assailant and his attorney were allowed to view and make hand copies of all of her text messages.³¹

C. Interim Measures

During the second meeting with the college administrator investigating the case, the student mentions that after the school informed the assailant about her allegations, she began seeing tweets posted to her account calling her a “slut” and a “lying whore.” The student indicates that she feels scared and embarrassed, but the administrator says the school cannot do anything about the messages.³² The Title IX investigator assures her that the assailant was advised not to contact her directly on campus during the investigation but that is all her office can do. When the student asks if that protection extends to her job off campus, the administrator says that she does not think so and fails to offer information about other possible campus interim measures or off-campus resources. When the student asks how long the investigation will take, the administrator estimates one month. The student asks if there is someone she can speak with about her stress, and the administrator refers her to campus counseling. The student tries to make an appointment, but there is a waiting list.³³ The student receives no

31. *E.g.*, Verified Complaint & Jury Demand at 9, *Doe v. W. New Eng. Univ.*, No. 15-30192-MAP, 2017 WL 113059 (D. Mass. Nov. 2, 2015) [hereinafter Verified Complaint & Jury Demand, *Doe v. W. New Eng. Univ.*] (complaining that the respondent and his lawyer only had a few hours to review and hand copy hundreds of paper documents created by thousands of text messages sent and received by the victim).

32. Other examples of interim measures denied to student victims include a school's refusal to provide an escort, timely access to counseling, and academic assistance. *See, e.g.*, Complaint & Demand for Jury Trial at 4–5, *Doe v. Vincennes Univ.*, No. 2:15-cv-00241-JMS-DKL (S.D. Ind. Aug. 5, 2015).

33. *E.g.*, Complaint & Jury Demand at 7, *Hernandez v. Baylor Univ. Bd. of Regents*, No. 6:16-cv-00069 (W.D. Tex. Mar. 30, 2016) [hereinafter Complaint & Jury Demand, *Hernandez v. Baylor Univ. Bd. of Regents*] (stating that after a Baylor student disclosed she was raped, she was denied services by the Baylor Counseling Center); First Amended Complaint, *Moore v. Regents of the Univ. of Cal.*, *supra* note 8 (stating that after a University of California, Santa Barbara student was raped, she was assigned to see an intern at the counseling center, rather than a certified counselor, and not until 7

information about possible academic accommodations.³⁴

Over the next few weeks, the student tries to avoid the assailant and his friends, but runs into them on campus several times.³⁵ Although they made no direct threats, she is fearful about seeing her assailant again somewhere on campus.³⁶ She stops leaving her dorm altogether at night and stops participating in campus activities.³⁷ She misses several classes.³⁸ She

to 10 days later).

34. *E.g.*, Complaint & Jury Demand, *Hernandez v. Baylor Univ. Bd. of Regents*, *supra* note 33 (stating that after a Baylor student disclosed she was raped, the academic services department refused to provide academic accommodations); *see also, e.g.*, First Amended Complaint, *Moore v. Regents of the Univ. of Cal.*, *supra* note 8, at 10–12 (claiming that a student victim who requested academic accommodations that would allow her to remain on campus and keep her financial aid was not provided with assistance and was placed on academic probation due to poor academic performance, and eventually withdrew).

35. *E.g.*, Katherine Lamb, *U. Mishandled Sexual Assault Case, Victim Says*, BROWN DAILY HERALD (Apr. 23, 2014), <http://www.browndailyherald.com/2014/04/23/u-mishandled-sexual-assault-case-victim-says/> (describing how after a student victim reported the assault to the university, she was “constantly worried about [his] presence on campus, unable to forget that he was ‘still living in that dorm—right over there’” and how she “had to see him in the campus center, in the library, in the dining hall”); *see also, e.g.*, Tyler Kingkade, *UC-Berkeley Faces New Complaints That It Failed Sexual Assault Survivors*, HUFFINGTON POST (Feb. 26, 2014), http://www.huffingtonpost.com/2014/02/26/uc-berkeley-rape-students-complaint_n_4855816.html [hereinafter Kingkade, *UC-Berkeley Faces New Complaints*] (reporting that during the four months between her report of a sexual assault and a campus hearing, a student was harassed by her assailant and his fraternity brothers).

36. *E.g.*, Complaint & Jury Demand, *Hernandez v. Baylor Univ. Board of Regents*, *supra* note 33, at 7–8 (explaining how her assailant’s “mere presence on campus” subjected a victim to “additional harassment, by making her vulnerable to an encounter with . . . the man that raped her, at any time and at any place on campus”); *see, e.g.*, First Amended Complaint, *Moore v. Regents of the Univ. of Cal.*, *supra* note 8, at 13–14 (describing how a student victim “greatly feared running into her assailant on campus” and that her one “sighting induced [her] to suffer a panic attack”).

37. *See, e.g.*, Complaint & Demand for Jury Trial at 14, *Doe v. Fla. State Univ. Bd. of Trs.*, No. 6:15-cv-00016-GAP-KRS (M.D. Fla. Jan. 7, 2015), *transferred and closed sub nom. Kinsman v. Fla. State Univ. Bd. of Trs.*, No. 4:15-cv-00235 (N.D. Fla. Feb. 18, 2016) [hereinafter Complaint & Demand for Jury Trial, *Doe v. Fla. State Univ. Bd. of Trs.*] (describing how a student victim “stopped going out at night for the rest of the . . . semester[,] . . . did not go to any parties or bars and did not go out on dates[,] . . . [and] was constantly on guard and afraid that her attacker might reappear at any time”).

38. *E.g.*, Complaint, *Doe v. Emerson Coll.*, *supra* note 7, at 15; *see also, e.g.*, First Amended Complaint, *Moore v. Regents of the Univ. of Cal.*, *supra* note 8, at 14 (describing how a student victim’s fear and anxiety of running into her assailant caused

emails a professor to request an extension on a paper for “personal reasons,” and the professor writes back denying the extension and lecturing the student about meeting adult responsibilities.³⁹ She stops attending that class altogether. Her parents call her to tell her that an investigator working for the assailant’s attorney contacted them about her rape allegation.⁴⁰ They are disappointed with her for not telling them, and she is upset that they now know. She has trouble sleeping and experiences both anxiety and depression.⁴¹ She is worried about how difficult the upcoming campus hearing will be for her and hopes she will be able to start moving on with her life once she gets through it.

D. The Campus Hearing

One month later, the student contacts the Title IX office and is told the investigation is still ongoing and that the office cannot provide her with an updated timeframe. A few weeks later, the Title IX office emails her a notice

her to avoid various parts of campus and avoid all social activities).

39. See, e.g., Complaint, *Doherty v. Emerson Coll.*, *supra* note 4, at 12, 2014 WL 3943694, ¶ 59 (describing how the grades of a student victim declined following her rape and then again following the campus hearing, and how the school declined to provide her with the academic accommodations she requested); Kingkade, *UC-Berkeley Faces New Complaints*, *supra* note 35 (reporting about a student who said Berkeley first discouraged her from filing a formal complaint of sexual misconduct against her assailant, then a professor denied her requested academic accommodations because he believed “students make things like this up” to avoid tests and assignment deadlines); Tyler Kingkade, *University of North Carolina Routinely Violates Sexual Assault Survivor Rights, Students Claim*, HUFFINGTON POST (Jan. 16, 2013), http://www.huffingtonpost.com/2013/01/16/unc-sexual-assault_n_2488383.html [hereinafter Kingkade, *UNC Routinely Violates Survivor Rights*] (reporting how a UNC student victim of sexual assault claimed that after she requested a medical withdrawal from classes for depression and posttraumatic stress disorder caused by the assault, UNC denied her request and an academic advisor told her she was “being lazy”).

40. Students who did not wish to disclose an assault to their parents reported that their parents found out about the sexual assault from the school—a clear violation of the Family Educational Rights and Privacy Act—the police, or by word-of-mouth. See, e.g., Kingkade, *UNC Routinely Violates Survivor Rights*, *supra* note 39 (describing a UNC student victim’s outrage when she learned that a student representative sent her parents a copy of a confidential document she had written as evidence for honor court without her permission).

41. E.g., Complaint, *Doe v. Emerson Coll.*, *supra* note 7, at 9 (“Doe was hospitalized for two days at Tufts Medical center due to her suicide attempt, PTSD, and depression.”); Complaint, *Doherty v. Emerson Coll.*, *supra* note 4, at 12, 2014 WL 3943694, ¶ 60 (“Shortly after the second hearing, Doherty began an outpatient treatment . . . to address the post traumatic stress and emotional distress . . .”).

of a hearing scheduled in two weeks.⁴² She is anxious to get through the hearing and feels sick the next week. A few days before the scheduled hearing, the Title IX office contacts her and tells her the hearing will be postponed another week at the request of the assailant's attorney.⁴³ The student explains that she needs to study for finals during that time period, but the Title IX office declines to move the hearing.

The student appears at the hearing with a campus advocate who warns her that the advocate's role is limited to providing emotional support and that the advocate is prohibited from participating in the hearing or advising the student during the hearing. The assailant appears at the hearing with his attorney.⁴⁴ The school places a screen between the student and the assailant, but the student expresses her discomfort to her advocate that the assailant is sitting less than 10 feet away from her. The hearing panel explains its role as neutral and reads out the alleged violations of the college's conduct code. The assailant's attorney states that he wants to renew his objection that in spite of repeated requests, he was not allowed to take the student's cell phone to a forensic specialist nor provided with access to her laptop or cloud account.⁴⁵

The college administrator who investigated the case presents a summary of her interviews of the student, the assailant, the student's roommate, and several of the assailant's friends. The investigator's report indicates that the assailant provided evidence that the assault did not occur in the form of witnesses to the student flirting with the assailant at the party

42. *See, e.g.*, Complaint for Damages, *Doe v. Roe*, *supra* note 9, at 4 (describing how more than three months after reporting a sexual assault to her school, a student victim received a notice that a university hearing would be held in one week and how her request to postpone the hearing in order to allow her to travel back to campus from the school she transferred to after the rape was denied, and the respondent was ultimately found not responsible).

43. *See, e.g.*, Complaint at 16, *Doe v. The Univ. of Tenn.*, No. 3:16-cv-00199 (M.D. Tenn. Feb. 9, 2016) [hereinafter Complaint, *Doe I v. Univ. of Tenn.*] (noting respondent's attorney requesting a week-long postponement for a campus hearing).

44. Rules for college disciplinary hearings vary widely. Some colleges ban attorneys altogether, some allow attorneys to fully represent their clients, and some allow attorneys but restrict their role to one of consultation. *See, e.g.*, Kingkade, *UC-Berkeley Faces New Complaints*, *supra* note 35 (reporting a student's description of a campus adjudicatory hearing where the assailant's attorney was allowed to question her and assist the assailant, while she was not provided with a reciprocal right).

45. *E.g.*, Verified Complaint & Jury Demand, *Doe v. W. New Eng. Univ.*, *supra* note 31, at 32 (stating that the respondent's counsel repeatedly asked for access to the victim's cell phone so that they could have it examined by a forensic expert).

and the text message exchanges from the following morning. The student believes that some of the facts in the timeline presented by the investigator are inaccurate, but is unsure how to address the issue.

The student is asked to describe the sexual assault to the hearing panel. No one has helped her prepare for the process of providing direct testimony or responding to questions. She does not offer the notes from the SANE nor the pictures collected during the medical examination, because she does not know she can or should obtain that evidence. She testifies for 20 minutes and does her best to describe the sexual assault in a linear, coherent manner, but jumps around within her narrative because she is anxious. She thinks she hears the respondent laugh and loudly sigh several times, and loses her concentration. Her advocate passes her a note of encouragement but is not allowed to consult with the student nor remind her of facts she forgot to relay during her testimony.

The assailant's attorney then cross-examines her for more than three hours.⁴⁶ He questions her about inconsistencies in her testimony, the Title IX summary, and the police report.⁴⁷ He questions her about pictures of her and the assailant prior to the rape posted on a witness's social media account.⁴⁸ He questions her about previous sexual partners and whether or

46. Although the Department of Education's Office for Civil Rights (OCR) strongly discourages colleges from allowing respondents to directly cross-examine victims (and establishes best practices as allowing both parties to submit questions in writing to a neutral party to ask instead), it is silent on whether or not respondent's attorneys or advisors may directly cross-examine victims. RUSSLYNN ALI, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 12 (2011) [hereinafter DEAR COLLEAGUE LETTER], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 31 (2014) [hereinafter OCR, Q&A ON TITLE IX AND SEXUAL VIOLENCE], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. As such, colleges vary on whether or not they permit this practice.

47. See, e.g., Complaint at 9, *Doe v. Brown Univ.*, No. 1:15-cv-00144-S-LDA (D.R.I. Apr. 13, 2015) [hereinafter Complaint, *Doe v. Brown Univ.*] (detailing inconsistencies between a detective's interview notes of the victim and the victim's written complaint to the school); Verified Complaint at 16, *Doe v. Washington & Lee Univ.*, No. 6:14-cv-00052-NKM (W.D. Va. Dec. 13, 2014) [hereinafter Verified Complaint, *Doe v. Washington & Lee Univ.*] (detailing perceived inconsistencies between a Title IX investigator's accounts of a victim's statements and her statements at a hearing).

48. See, e.g., Amended Complaint at 9, *Doe v. Univ. of Colo. Boulder*, No. 1:14-cv-03027-MEH (D. Colo. Nov. 21, 2014), 2014 WL 7328442, at ¶ 26 [hereinafter Amended Complaint, *Doe v. Univ. of Colo. Boulder*] (stating that on the night of the assault, a

not she is on birth control or carries condoms.⁴⁹ He questions her about how much alcohol she drank the night of the rape, how often she drinks, and whether or not she is facing campus charges for drinking while under age.⁵⁰ He questions her about whether or not she was attracted to the assailant and flirted with the assailant.⁵¹ He questions her about the intimate activities she did consent to with the assailant. He questions her about the exact words she used to express her resistance after she told him she did not want to have sexual intercourse. He asks her how she can be so sure she said “no” if some of her other recollections from the night are blurry.⁵² He questions why she did not scream loudly enough to bring help from the party. He questions her about why she did not fight harder. He questions why she never told anyone at the house about the rape and why she did not call 911 immediately following the rape.⁵³ He questions how she could have fallen asleep in his

witness took a picture of the complainant straddling the respondent and making out with him).

49. *E.g.*, Complaint at 9, *Doe v. Regents of the Univ. of Cal.*, No. 2:15-cv-02478 (C.D. Cal. Apr. 3, 2015) [hereinafter Complaint, *Doe v. Regents of the Univ. of Cal.*] (“Throughout the weekend, Jane Doe repeatedly bragged about a previous sexual encounter in which she and a model allegedly engaged in a threesome, with a photographer in New York.”); Complaint for Damages at 3, *Doe v. Univ. of San Diego*, No. 37-2-15-00006142-CU-PO-CTL (Cal. Super. Ct. Feb. 13, 2015) [hereinafter Complaint for Damages, *Doe v. Univ. of San Diego*] (stating that the hearing officer in a sexual misconduct case allowed respondents to enter evidence of the victim’s alleged sexual history and “weird” sexual interests).

50. *See, e.g.*, Complaint, *Doe v. Brown Univ.*, *supra* note 47, at 12 (“During the course of the student conduct process, Jane Doe admitted she consumed alcohol that night as a minor; however, upon information and belief, Brown saw fit *not* to charge her with this University offense . . .”).

51. *See, e.g.*, Complaint at 16, *Doe v. George Mason Univ.*, No. 1:15-cv-00209-TSE-TRJ, (E.D. Va. Feb. 18, 2015) [hereinafter Complaint, *Doe v. George Mason Univ.*] (describing a campus hearing in which the respondent cross-examined the complainant, his previous intimate partner, about who initiated the sexual relationship between them).

52. *See, e.g.*, Verified Complaint, *Doe v. Washington & Lee Univ.*, *supra* note 47, at 16 (stating that a hearing panelist “questioned [the victim] about how it was she could recall her statements purporting to object to sexual intercourse so clearly, but could not recall other parts of the evening clearly”).

53. *See, e.g.*, Amended Complaint, *Doe v. Univ. of Colo. Boulder*, *supra* note 48, at 10–11, 2014 WL 7328442, at ¶¶ 36–37 (D. Colo. Nov. 21, 2014) (“At all times, Jane Doe’s cellular phone was on the nightstand and available for her to make phone calls if she needed help. . . . At all times, Jane Doe was free to leave John Doe’s apartment since John Doe walked in and out of his room several times during the evening.”). It is common for victims of sexual assault to report experiencing feelings of paralysis or disassociation during and immediately following an assault, preventing them from accessing help. *See LONSWAY & ARCHAMBAULT*, *supra* note 5, at 6. Nonetheless,

client's room if she had really been raped. He questions her about how she could text his client that she was "fine" the next morning if she had really been raped.⁵⁴ He asks her whether or not it was possible that her decision to report was motivated in any small way by a desire to be vindictive or get even.⁵⁵

The student's only witness, her roommate, testifies about what the student told her when she disclosed the assault and that the student has been depressed and anxious since. Upon cross-examination, the roommate admits she cannot remember the exact words the student used when she disclosed and that the student was not initially sure if she was describing a sexual assault. The roommate also acknowledges that she had never heard anything bad about the assailant before the student's allegations.

The assailant's attorney produces several witnesses who say they saw the student dancing with the assailant and kissing him earlier in the night.⁵⁶ One witness states that she saw the student enthusiastically walk upstairs with the assailant towards his room. Another states that he saw the student leave the house later and that she looked fine. An ex-girlfriend of the respondent testifies that he never raped her and that she does not believe he is a rapist.⁵⁷ The assailant's attorney provides a copy of the police report

respondents in campus sexual assault cases frequently argue or imply that "real" rape victims would fight or flee from a sexual assault.

54. See, e.g., Verified Complaint & Jury Demand, *Doe v. W. New Eng. Univ.*, *supra* note 31, at 30 (describing the victim's smiling presence in a group photograph including the respondent at a party a month after the assault); Verified Complaint, *Doe v. Washington & Lee Univ.*, *supra* note 47, at 18 (stating that "[o]ne month following the incident, [the victim] sent an upbeat Facebook message to [the respondent] and also engaged in consensual sexual intercourse" with him).

55. See, e.g., Complaint, *Doe I v. Univ. of Tenn.*, *supra* note 43, at 17 (describing a default campus sexual misconduct disciplinary hearing in which an administrative law judge questioned a victim about whether or not she was "being vindictive in any way").

56. See, e.g., Complaint, *Doe v. Brown Univ.*, *supra* note 47, at 3 (stating that the night the parties met, "[t]he couple continued their intimate conversation and public displays of affection among a group of mutual friends"); *Ex Parte* Application for Stay of Administrative Sanctions at 3–4, *Doe v. Occidental Coll.*, No. BS147275 (Cal. Super. Ct. Feb. 13, 2014) [hereinafter *Ex Parte* Application for Stay of Admin. Sanctions, *Doe v. Occidental Coll.*] (describing witnesses who said that Jane Doe "has always loved dancing, particularly when she is drunk" and that on the night in question, Jane Doe "was drunk again" and "acting flirtatious with male students").

57. See, e.g., Complaint, *Doe v. Brown Univ.*, *supra* note 47, at 15 (mentioning a statement submitted to Brown University by a witness describing her prior physical experience with the respondent in order to bolster his credibility).

noting that the student seemed too calm to be a rape victim⁵⁸ and indicating that she declined to press charges. The attorney explains that he advised his client against testifying.

In an informal closing, the attorney argues that if anything, the assailant was the real victim because he was too drunk to consent⁵⁹ and the alleged victim was the actual aggressor.⁶⁰ He argues that if this was a “real” rape, the victim would not have stopped the criminal investigation and the police would have arrested his client.⁶¹ He argues that his client is a good student, an athlete, and a student leader who regularly volunteers.⁶² He

58. See, e.g., Amended Complaint, *Doe v. Univ. of Colo. Boulder*, *supra* note 48, at 11, 2014 WL 7328442, at ¶ 40 (alleging as support that the student filed a false allegation that “Officer Beth McNalley interviewed Jane Doe and noted that Jane Doe’s ‘behavior was unusual in the sense that [she] was very casual about the incident’ and that she ‘appeared more concerned about being on time for class than reporting this incident’” (alterations in original)).

59. See, e.g., *Ex Parte* Application for Stay of Administrative Sanctions at 7–8, *Doe v. Univ. of S. Cal.*, No. BS152306 (Cal. Super. Ct. Nov. 19, 2014) [hereinafter *Ex Parte* Application for Stay of Admin. Sanctions, *Doe v. USC*] (asking a state court to overturn a college’s finding that the plaintiff was responsible for sexual misconduct “[s]ince both students were obviously inebriated yet voluntarily participating in sexual contact, either both students violated the USC’s sexual misconduct policy, or neither did”).

60. See, e.g., Verified Complaint, *Doe v. Washington & Lee Univ.*, *supra* note 47, at 4 (stating that “Jane Doe initiated kissing with [the respondent] while in his chair . . . took off all of her clothes except her underwear . . . [and] got into bed”); *Ex Parte* Application for Stay of Admin. Sanctions, *Doe v. Occidental College*, *supra* note 56, at 4 (stating that “Jane Doe was grabbing John Doe and trying to kiss him while John Doe was ‘somewhat responsive to [Jane Doe] but ‘also seemed pretty indifferent to [Jane Doe’s] advances’” (alterations in original)).

61. E.g., Amended Complaint, *Doe v. Univ. of Colo. Boulder*, *supra* note 48, at 3, 2014 WL 7328442, at ¶ 9 (“[A]fter a diligent, in-depth investigation, the Boulder Police Department made the informed decision not to pursue Jane Doe’s report of non-consensual sexual intercourse.”); *Ex Parte* Application of Stay of Admin. Sanctions, *Doe v. USC*, *supra* note 59, at 6 (“Jane Doe refused to give a statement to USC Public Safety Officers, saying she did not want to make a report . . . [and] also refused to speak with LAPD Officers about the incident”); see *Ex Parte* Application for Stay of Admin. Sanctions, *Doe v. Occidental Coll.*, *supra* note 56, at 16 (arguing that if the district attorney’s office decided there was insufficient evidence to prosecute a criminal act of sexual assault, then the college should not have been able to find respondent responsible for a student conduct violation using a preponderance standard).

62. Attorneys describe students found responsible for sexual misconduct by their academic accomplishments, athletic ability, and community and school service. See, e.g., Complaint, *Doe v. Regents of the Univ. of Cal.*, *supra* note 49, at 4 (“John Doe worked diligently for four years at an esteemed public high school . . . where he earned a cumulative GPA of 4.06 and took 10 Advanced Placement courses worth 45 credits[.] . . .

warns the panel that the taint of sexual assault charges will destroy his client's promising future.⁶³ He suggests the student fabricated the assault because she was upset at his client for failing to pursue a relationship.⁶⁴ He argues that the only people who can know what happened on the night in question are the two parties involved and that the panel cannot find his client responsible with so much "reasonable doubt."⁶⁵ He argues that the panel should discount the testimony of the victim because she was so clearly coached by her advocate.⁶⁶ He argues that young men like his client have become scapegoats in a national witch-hunt led by the Department of Education forcing colleges to treat men unfairly, and that "the pendulum has

was nominated Class President . . . , acted as Captain of the Mock Trial team, was . . . Managing Editor of the Yearbook . . . , and was a member of the basketball, volleyball, swimming and football teams."); Complaint at 6, *Doe v. Wesleyan Univ.*, No. 3:14-cv-01735-SRU (D. Conn. Nov. 20, 2014) [hereinafter Complaint, *Doe v. Wesleyan Univ.*] ("John Doe . . . earned 10 AP credits towards college and graduated with a 98.6 GPA[,] . . . was an active leader in Student Government, Model United Nations, his School Newspaper, and various extracurricular activities, as well as an AP scholar with distinction[,] . . . [and] scored in the 97th percentile in the SAT standardized college entrance examination."); Plaintiff's First Amended Complaint at 3, *Henry v. Del. State Univ.*, No. 1:13-cv-02005-SLR (D. Del. Dec. 27, 2013) [hereinafter Plaintiff's First Amended Complaint, *Henry v. Del. State Univ.*] ("Plaintiff is a double major . . . in Accounting and Finance[,] . . . a NCAA Division 1 athlete . . . representing DSU's Track and Field team as Spring Captain[,] . . . [and] volunteered with the Senior Olympics . . .").

63. See, e.g., Complaint at 8, *Doe v. Colgate Univ.*, No. 5:15-cv-01069-LEK-DEP (N.D.N.Y. Aug. 31, 2015) (noting John Doe "planned to attend medical school").

64. See, e.g., Exhibit N, *King v. DePauw Univ.*, *supra* note 6, at 3 (suggesting that the victim filed the complaint of sexual assault and underwent a medical examination because she was upset with him for "being rude and not talking to her a lot the next morning"); Complaint at ¶¶ 8, 83, *Doe v. Reed Inst.*, No. 3:15-cv-00617-MO, 2015 WL 1669634, at ¶¶ 8, 83 (D. Or. Apr. 14, 2015) [hereinafter Complaint, *Doe v. Reed Inst.*] (stating that the allegations of sexual assault "were . . . intended to retaliate against [the respondent] for dating her friend" or made because he may have shown a video of the respondent and victim having sex to a friend); Verified Complaint, *Doe v. Washington & Lee Univ.*, *supra* note 47, at 6 (suggesting that the victim's motive for filing a false allegation of sexual assault was jealousy caused by the respondent's public kissing of another woman at a party with whom he eventually entered a romantic relationship).

65. The applicable standard of proof is by a preponderance of the evidence, not beyond a reasonable doubt. See DEAR COLLEAGUE LETTER, *supra* note 46, at 10; see also *infra* note 106 and accompanying text.

66. See, e.g., Complaint, *Doe v. Brown Univ.*, *supra* note 47, at 19 ("It was also clear from her use of 'buzz words' in her testimony that she was well prepared by the University Advocate and her advisor.").

swung too far,” creating a presumption of guilt for male students.⁶⁷ The student, unsure if she is allowed to respond, remains quiet.

The hearing panel decides the assailant is responsible for violating the student code prohibiting nonconsensual sex, but explains that the student also needs to accept responsibility for her role in the lack of communication and poor judgment she demonstrated by engaging in underage drinking.⁶⁸ They sanction the assailant to a suspension for one academic year and order him to write a reflection paper over the summer before he is reinstated.⁶⁹

67. See Amended Petition for Writ of Administrative Mandate at 5–6, *Doe v. Univ. of Cal., San Diego*, No. 37-2015-00010549-CU-WM-CTL (Cal. Super. Ct. Apr. 2, 2015) (“The Federal government has created a significant amount of pressure on colleges and universities to treat all those accused of sexual misconduct with a presumption of guilt. . . . The pendulum has now swung too far in the other direction against accused male students.”); *accord* Complaint, *Doe v. Wesleyan Univ.*, *supra* note 62, at 26 (accusing the school of finding the respondent responsible for sexual misconduct “in order to protect a false, anti-male biased narrative”); Petition for Writ of Administrative Mandate at 9–10, *Doe v. Carry*, No. BS159332 (Cal. Super. Ct. Nov. 9, 2015) (listing national cases that respondent purports to be examples of false allegations of sexual assault against male college students, as well as men’s rights groups and law professors who have expressed concerns that college procedures for sexual assault cases violate accused students’ due process rights).

68. See, e.g., *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II, slip op. at 17–18 (Tenn. Ch. Ct. Aug. 4, 2015) (reciting a college administrative law judge’s statement regarding a sexual misconduct case, “it is clear that both parties in this case have exercised poor judgment to their own detriment’ and ‘[i]t is clear that [the victim] should not have engaged in underage drinking, nor should she have been drinking beverages that were not under her control the entire evening” (alteration in original)).

69. E.g., Tyler Kingkade, *CU Boulder Faces Federal Investigation for Suspending Campus Sexual Assault Offender*, HUFFINGTON POST (July 18, 2013), http://www.huffingtonpost.com/2013/07/18/cu-boulder-sexual-assault-investigation_n_3614277.html (sanctioning a student found responsible for nonconsensual sexual intercourse to an eight-month suspension (with a deferral), a \$75 code of conduct fee, and a five-to-seven page paper reflecting on the experience); Tyler Kingkade, *James Madison University Punished Sexual Assault with ‘Expulsion After Graduation,’* HUFFINGTON POST (June 18, 2014), http://www.huffingtonpost.com/2014/06/18/james-madison-university-sexual-assault_n_5509163.html (sanctioning three students found responsible for sexual assault and sexual harassment to “expulsion after graduation”); Kingkade, *UC-Berkeley Faces New Complaints*, *supra* note 35 (sanctioning a student found responsible for sexual misconduct with probation and mandatory counseling); Tyler Kingkade, *UCSB, University of Toledo Accused of Handing Out Flimsy Punishments for Rape*, HUFFINGTON POST (Sept. 3, 2014), http://www.huffingtonpost.com/2014/09/03/uc-santa-barbara-rape_n_5754302.html (sanctioning a student found responsible for a sexual assault with probation, 10 hours of sexual assault education, and a \$25 fine); Tyler Kingkade, *University of Kansas Considered Community*

The student victim fails several finals the following week. Her doctor diagnoses her with posttraumatic stress disorder (PTSD).⁷⁰ She considers withdrawing from school but worries about the impact on her scholarships and financial aid.⁷¹

E. The Appeals and Lawsuits

The assailant, through counsel, files an internal appeal with the school based on procedural violations and disproportionate sanctions.⁷² The sanction is deferred during the appellate process and the assailant remains on campus pending a decision.⁷³ The student also learns that the assailant filed a student conduct complaint against her with the school, claiming that

Service Too 'Punitive' for Rape Punishment, HUFFINGTON POST (Sept. 2, 2014), http://www.huffingtonpost.com/2014/09/02/university-of-kansas-rape_n_5731668.html [hereinafter Kingkade, *KU Considered Community Service*] (sanctioning a student found responsible for “nonconsensual sex” with probation, counseling, a ban from university housing, and a mandatory reflection paper); *see also infra* note 97 (describing national survey on campus sanctions).

70. *E.g.*, Complaint for Damages, *Doe v. Univ. of San Diego*, *supra* note 49, at 2, 3 (reporting how student was diagnosed with PTSD following the sexual assault, causing her to withdraw from law school for a semester); Andrea Pino, *The Second Rape: Battling PTSD and Betrayal*, HUFFINGTON POST (Sept. 5, 2013, 1:10 PM), http://www.huffingtonpost.com/andrea-pino/the-second-rape_b_3655062.html.

71. *E.g.*, Complaint & Jury Demand, *Hernandez v. Baylor Univ. Bd. of Regents*, *supra* note 33, at 9 (stating that the rape and the school’s inadequate response to the rape caused “[a] significant drop in [the student’s] grades,” her “[b]eing placed on academic probation as a result of her drop in grades,” her “[a]voidance of social activities on campus,” her “[a]voidance of certain areas of campus,” “[a] loss of her academic scholarship that she had earned to attend Baylor,” and her “[w]ithdrawal from Baylor altogether”); First Amended Complaint, *Moore v. Regents of the Univ. of Cal.*, *supra* note 8, at 10, 12–13 (describing how a student victim, unable to concentrate on coursework following her sexual assault and fearful she would encounter her assailant, ultimately withdrew from college); Complaint, *Doe I v. Univ. of Tenn.*, *supra* note 43, at 24 (describing a victim who withdrew from school after seeing her assailant at her dorm several times despite reporting the sexual assault and the school issuing a “no contact” directive to the assailant, with the withdrawal negatively impacting her eligibility for scholarship and financial aid).

72. *See, e.g.*, Complaint, *Doe v. Brown Univ.*, *supra* note 47, at 24 (explaining that the respondent filed an appeal of the college decision, “citing disproportionate sanctions, procedural errors, and an utter disregard for due process”).

73. *See, e.g.*, *King v. DePauw Univ.*, No. 2:14-cv-70-WTL-DKL, slip op. at 16 (S.D. Ind. Aug. 22, 2014) (mentioning that a respondent who was expelled after a college found him responsible for nonconsensual sexual contact and sexual harassment was allowed to remain on campus pending his internal appeal).

she filed a false complaint against him and lied in a hearing.⁷⁴ A few weeks later, she learns the college decides not to bring charges of student conduct code violations against her, but only after she lost sleep worrying about it. A month later, the administrator upholds the hearing panel's findings of responsibility on appeal but decides the sanctions are disproportionate in light of the assailant's good record and reduces the suspension from two semesters to one semester.⁷⁵

A few months later, the assailant sues the school citing due process, breach of contract, negligence, intentional infliction of emotional distress, and Title IX causes of action.⁷⁶ A redacted copy of the transcript from the campus hearing is attached as an exhibit.⁷⁷ The assailant's complaint indicates that the sexual contact was consensual and initiated by the student and states that the student maliciously filed false allegations against the respondent. The assailant's attorney warns the student that they are still considering filing a lawsuit directly against her for defamation.⁷⁸

74. See, e.g., Complaint, Doe I v. Univ. of Tenn., *supra* note 43, at 22 (describing how a respondent in a sexual misconduct case filed two retaliatory complaints against the victim with the college: first for stealing the sweater she said she used to cover herself up after her clothes were torn during the assault, and second for filing a false report).

75. E.g., *King*, slip op. at 16 (describing how the respondent's internal university appeal was granted and his sanction for nonconsensual sexual contact and sexual harassment was reduced from expulsion to suspension for the remainder of the spring semester and the following fall semester).

76. E.g., Verified Complaint, Doe v. Washington & Lee Univ., *supra* note 47, at 22, 27, 30, 31, 32, 33 (noting the plaintiff sued his college for violation of Title IX, breach of contract, breach of covenant of good faith and fair dealing, estoppel and reliance, negligence, and for a declaratory judgment).

77. E.g., Exhibit 30 at 1, Doe v. Occidental Coll., No. BS147275 (Cal. Super. Ct. Sept. 14, 2015) [hereinafter Exhibit 30, Doe v. Occidental Coll.] (including the transcript of a campus disciplinary hearing to be filed under seal as an exhibit); see Complaint at 3, Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015) (No. JKB-15-517) [hereinafter Complaint, Doe v. Salisbury Univ.] (complaint originally filed as Morales v. Rogers, No. 1:15-cv-00517-MJG (Md. Cir. Ct. Feb. 23, 2015)) (including a college's investigative report as an exhibit).

78. In some cases, respondents not only threaten to sue their accusers for defamation, but actually do so either by including the accuser as an additional defendant in a lawsuit against the college or by filing a separate lawsuit. E.g., Complaint at 1, Doe v. Doe, No. 1:15-cv-00427-S-LDA (D.R.I. Oct. 9, 2015) (suing an accuser after Brown University found him responsible for sexual misconduct against her and sanctioned him to a suspension); Civil Action Complaint at 1, Harris v. Saint Joseph's Univ., No. 2:13-cv-03937-LFR (E.D. Pa. July 8, 2013) (including the complainant as a separate defendant in a lawsuit against a college); Complaint, Doe v. Salisbury Univ., *supra* note 77, at 1 (including the complainant and two witnesses as separate defendants in a lawsuit

A newspaper reports on the lawsuit, publicizing the assailant's claim that he was falsely accused of sexual assault by a female student who he purports actually initiated the sexual activity.⁷⁹ In describing the assailant, the article mentions his impressive academic record, athletic skills, and future plans.⁸⁰ The article quotes his attorney arguing that colleges have gone too far in disciplining innocent men⁸¹ and stating that colleges are

respondents filed against a college that suspended them for two semesters for sexual misconduct); Carmen Forman, *Roanoke College Student Acquitted of Rape Re-enrolls, Sues Accuser*, THE ROANOKE TIMES (Jan. 19, 2016), http://www.roanoke.com/news/local/salem/roanoke-college-student-acquitted-of-rape-re-enrolls-sues-accuser/article_fed17181-c2ef-5206-a5f8-38f270e34984.html (discussing a case in which the alleged assailant sued an accuser for defamation in a state court after a criminal jury found him not guilty for sexual assault); Tyler Kingkade, *Charged with Rape, He Pleaded No Contest to an Assault Charge. Now He's Suing His Victim.*, HUFFINGTON POST (Aug. 3, 2016), http://www.huffingtonpost.com/entry/lang-her-defamation-rape-lawsuit_us_579fac32e4b08a8e8b5efed7 (detailing how a college student who pled "no contest" to the sexual assault of another college student in a criminal proceeding filed a civil lawsuit against the victim and her family for \$4 million dollars for defamation based on her Facebook posts that claimed he is a rapist).

79. E.g., Edmund DeMarche, *Texas College Student Sues over Possible Expulsion for Alleged Sex Assault*, FOX NEWS (Mar. 1, 2016), <http://www.foxnews.com/us/2016/03/01/texas-college-student-sues-over-possible-expulsion-for-alleged-sex-assault.html> ("A physics major one semester away from graduation is suing to stop University of Texas-Austin from expelling him based on the unproven accusation he sexually assaulted a woman in a drunken, off-campus encounter."); Teresa Watanabe, *Ruling in Favor of UC Student Accused of Sex Assault Could Ripple Across U.S.*, L.A. TIMES (July 15, 2015), <http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html> (reporting about a ruling in a lawsuit filed by a man found responsible for sexual misconduct by stating, "It began as a typical college hookup: two students at UC San Diego met at a party last year, began drinking and ended up in bed. The encounter snowballed into a sexual assault complaint, university investigation and a finding that the male student should be suspended.").

80. E.g., Katie Mulvaney, *Judge Rules Gender-Bias Lawsuit Can Continue Against Brown University*, PROVIDENCE J. (Feb. 23, 2016), <http://www.providencejournal.com/article/20160223/NEWS/160229753?template=printart> (describing a man suspended from Brown University for sexual misconduct as a student who "earned straight A's his freshman year, and hoped to pursue a career in neuroscience").

81. E.g., Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014), <http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them> [hereinafter Smith, *Some Accused of Sexual Assault*] (quoting an attorney representing a student disciplined for sexual misconduct in a lawsuit against the college, "I think 'witch hunt' is a dramatic phrase, but I would tell a group of young men right now, 'woe is to you if someone makes an allegation,' . . . 'This young man was in the wrong place at the wrong time, in the sense that there was an attempt by the university officials to say, Oh, yeah?")

unqualified to address sexual assault and should defer to the police.⁸² The article is quickly shared on campus, and although it does not mention her by name,⁸³ it includes identifying details, causing the student additional stress and trauma.⁸⁴ In addition, the lawsuit complaint is posted on several national websites.⁸⁵ The assailant's civil case is still pending—more than a year after the student first reported the sexual assault.⁸⁶

III. CAMPUS SEXUAL ASSAULT

An estimated one in five female U.S. college students will experience a sexual assault during her time as an undergraduate student,⁸⁷ making it more likely at some colleges that a woman will be sexually assaulted than make it onto the dean's list.⁸⁸ Most student victims will be sexually assaulted

Well, watch how we do this one!”).

82. *E.g.*, FIRE Statement on California “Affirmative Consent” Bill, FOUND. FOR INDIVIDUAL RTS. EDUC. (Feb. 13, 2014), <http://www.thefire.org/fire-statement-on-california-affirmative-consent-bill/> (“[C]ampus administrators are . . . neither qualified nor equipped to respond properly to sexual assault allegations. [They] simply lack the investigative ability, impartiality, professional training, and legal knowledge required to reliably adjudicate sexual assault cases.”).

83. Some lawsuits do, in fact, disclose the accuser's name, placing it onto a public record. *E.g.*, Plaintiff's First Amended Complaint, *Henry v. Del. State Univ.*, *supra* note 62, at 1.

84. *Cf.*, Tyler Kingkade, *Sexual Assault Witnesses at Occidental College Subjected to Vile Harassment Emails*, HUFFINGTON POST (July 22, 2014), http://www.huffingtonpost.com/entry/occidental-harassment-sexual-assault-report_n_5609909 [hereinafter Kingkade, *Sexual Assault Witnesses Subjected to Harassment*] (discussing that witnesses to an alleged sexual assault were harassed after FIRE, a civil liberties nonprofit, posted an investigator's report online with the victim's name redacted).

85. *E.g.*, *Complaint in John Doe v. Occidental College, Los Angeles County Superior Court, February 13, 2014*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Feb. 13, 2014), <https://www.thefire.org/complaint-in-john-doe-v-occidental-college-los-angeles-county-superior-court-february-13-2014/>.

86. *E.g.*, *Doe v. Brown Univ.*, No. 1:15-cv-00144-S-LDA, slip op. at 4, 47 (D.R.I. Feb. 22, 2016) (noting that the sexual assault was initially reported on October 17, 2014—16 months earlier).

87. CHRISTOPHER P. KREBS ET AL., RESEARCH TRIANGLE INST. INT'L, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT 2–1 (2007) [hereinafter CSA STUDY], <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. *But see* DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at v (2015) [hereinafter AAU CAMPUS SURVEY], http://civilrights.missouri.edu/data/Westat_University_of_Missouri_final_report.pdf.

88. *See, e.g.*, *Grades: Dean's List*, DUKE UNIV. (last updated July 7, 2016), <https://trinity.duke.edu/undergraduate/academic-policies/deans-lists> (discussing the

standard to make dean's list as the top 10 percent). *But see, e.g., College Distinctions*, UNIV. OF ILL. (last visited Apr. 14, 2017), <http://www.las.illinois.edu/students/honors/distinctions/> (noting the standard to make dean's list as the top 20 percent). Although definitions of rape, sexual assault, and sexual misconduct vary between studies, research generally finds around 20 percent of women report having experienced a sexual assault as an undergraduate student. A 2015 campus climate survey of 27 universities by the Association of American Universities found that 23.1 percent of female undergraduate students experienced sexual assault and sexual misconduct due to physical force, threats of physical force, or incapacitation since they enrolled in the school, including 10.8 percent who experienced sexual assault that included penetration. AAU CAMPUS SURVEY, *supra* note 87, at 13–14. A 2006 survey of undergraduate students at two large public universities found that 19 percent of the 5,446 female students reported experiencing completed or attempted sexual assault since starting college, and that the figure rises to 26.3 percent when the data was limited to responses from women in their final year of college. CSA STUDY, *supra* note 87, at 5–3. Moreover, 28.5 percent of the undergraduate women surveyed disclosed that they had experienced attempted or completed sexual assault either before or since entering college. *Id.* at xii. A 2000 study found that 15.5 percent of college women were sexually victimized during the current academic year. BONNIE FISHER ET AL., NCJ 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 15 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>. A 2015 survey by journalists revealed similar rates of sexual violence on college campuses. Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated> (reporting on a poll of more than 1,000 people across the country who attended college in the past four years that found “25 percent of young women and 7 percent of young men say they suffered unwanted sexual incidents in college”). Individual campus climate surveys reveal similar prevalence of sexual assault. *See, e.g.,* Nick Anderson, *Princeton: 22 Percent of Undergraduate Women Say They Were Victims of Non-Consensual Sexual Contact*, WASH. POST (Sept. 29, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/09/29/princeton-22-percent-of-undergraduate-women-say-they-were-victims-of-non-consensual-sexual-contact/?utm_term=.5889ff3dad4e. For a discussion of research on campus sexual assault rates and critiques of findings, see Katharine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of the DOE*, 64 U. KAN. L. REV. 861, 861 n.1 (2016).

It is important to note that an estimated 1 in 20 male U.S. college students experiences a sexual assault, and researchers suspect that reporting rates are even lower for male victims. *See* Anderson & Clement, *supra* (finding 5 percent of men say they were violated); *see also* AAU CAMPUS SURVEY, *supra* note 87, at 110 (finding reporting rates for men lower than women). Although this Article focuses on the typical heterosexual male-against-female sexual assaults constituting the basis of sex discrimination complaints under Title IX, the Author does not lose sight of the reality that male students also experience sexual assaults on campus. *See* Rosenfeld, *Uncomfortable Conversations*, *supra* note 1, at 360 n.4 (explaining that the use of gendered sexual assault as male-against-female-assault “is not to deny the reality of same-sex assaults, or female-against-male sexual assaults, but is rather a shorthand way

by someone they know.⁸⁹ Many will be sexually assaulted during their first or second year in college, when most are still teenagers.⁹⁰ Student victims of sexual assault frequently experience PTSD, depression, and anxiety, negatively impacting their education.⁹¹

Most student victims will not report the sexual assault to law enforcement or their colleges.⁹² Of those student victims who do report, few

to describe the vast majority of rapes”). Similarly, it is important to note that students identifying as transgender, genderqueer, nonconforming, and questioning report rates of campus sexual assault as high or higher than rates reported by students identifying as heterosexual female. AAU CAMPUS SURVEY, *supra* note 87, at ix, xiv.

89. See CSA STUDY, *supra* note 87, at 2–3 (“In the vast majority of sexual assaults experienced by university women, the perpetrator and victim knew each other in some way.”); see also FISHER ET AL, *supra* note 88, at 17 (reporting that 90 percent of student victims of sexual assault know their perpetrator); SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DOJ, NCJ 248471, SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (reporting that 80 percent of college students between 18 and 25 years old knew the offender).

90. See JACQUELYN W. WHITE & PAIGE HALL SMITH, NCJ 199708, A LONGITUDINAL PERSPECTIVE ON PHYSICAL AND SEXUAL INTIMATE PARTNER VIOLENCE AGAINST WOMEN, at II-2-5 to II-2-6 (2004), <https://www.ncjrs.gov/pdf/files1/nij/199708.pdf> (finding that rates of both sexual and intimate partner physical violence are greater during the first two years of college than in the last two years of college).

It is important to note that college students are not necessarily at a higher risk of sexual assault than other women in their same age group. See SINOZICH & LANGTON, *supra* note 89, at 1 (finding that 20 percent of women ages 18–24 and enrolled in a college, university, trade school, or vocational school experienced a sexual assault, while 32 percent of women in the same age group not enrolled in school experienced a sexual assault).

91. See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims’ Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 398 (2005).

92. KILPATRICK ET AL., *supra* note 30 (finding 16 percent of all rapes are reported to law enforcement); see also CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DOJ, NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000, at 2 (2002), <https://www.bjs.gov/content/pub/pdf/rsarp00.pdf> (reporting that of sexual assaults of female victims age 12 or older that occurred between 1992 and 2000, 63 percent of completed rapes, 65 percent of attempted rapes, and 74 percent of completed and attempted sexual assaults were not reported to the police).

For information about college reports of sexual misconduct, see CHRISTOPHER KREBS ET. AL., RESEARCH TRIANGLE INST. INT’L, NCJ 249545, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 107 (2016), <https://www.bjs.gov>.

will see the assailants held accountable. Law enforcement has a well-documented history of doubting allegations of sexual assault and failing to complete investigations.⁹³ Prosecutors are often hesitant to prosecute sexual assaults where the victim knew the perpetrator.⁹⁴ And even in cases in which a prosecutor does move forward, most perpetrators will not serve time in prison.⁹⁵ Similarly, student victims who report sexual assaults to their colleges are unlikely to see their assailants held accountable.⁹⁶ Although the precise percentage of cases in which students are found responsible for sexual misconduct is unknown, a recent survey found that one-third of colleges and universities have never expelled a student for sexual misconduct.⁹⁷ Colleges' responses to reports of sexual assault directly impact

gov/content/pub/pdf/ccsvsfr.pdf ("About 2.7 [percent] of sexual battery incidents and 7.0 [percent] of rape incidents were reported by the victim to any school official."); Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL'Y & L. 1, 7 (2015) (concluding that ordinary practice of universities is to undercount incidents of sexual assault—even after they are fined for Clery Act violations—based on an analysis of Clery audits and a comparison to reports on other campus crimes); Amy Becker, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, AM. ASS'N U. WOMEN (Nov. 23, 2015) <http://www.aauw.org/article/clery-act-data-analysis/>.

93. *E.g.*, INVESTIGATION OF BALTIMORE POLICE DEPARTMENT, *supra* note 28, at 122–24 (finding detectives were skeptical of reports of sexual assault and failed to adequately investigate them); POLICE MISHANDLING IN D.C., *supra* note 12, at 15 (reporting that police had threatened victims of sexual assault with prosecution for false reporting).

94. *E.g.*, Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., Civil Rights Div., U.S. DOJ, & Michael W. Cotter, U.S. Att'y, Dist. of Mont., to Fred Van Valkenburg, Missoula Cty. Att'y 2 (Feb. 14, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula_ltr_2-14-14.pdf (reporting that a prosecutor's office's poor response to allegations of sexual assault and rape "is fueled, at least in part, by gender bias," and finding that "[a]dult women victims, particularly victims of non-stranger sexual assault and rape, are often treated with disrespect, not informed of the status of their case, and re-victimized by the process").

95. *See The Criminal Justice System: Statistics, Rape Abuse & Incest Nat'l Network*, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Feb. 28, 2017) [hereinafter RAINN, *Criminal Justice System Statistics*] (using data from the Department of Justice to estimate that only 5.7 percent of rapes lead to an arrest, 1.1 percent are referred to prosecutors, 0.7 percent end with a felony conviction, and 0.6 percent will be incarcerated).

96. *See, e.g.*, BAYLOR UNIV. BD. OF REGENTS, *supra* note 26, *passim* (discussing a university's failure to adequately address sexual assault victims' complaints).

97. Based on data collected from nearly three dozen colleges and universities, the Huffington Post reported that "[s]tudents found responsible for sexual assault were expelled in 30 percent of cases and suspended in 47 percent of cases," received

a victim's mental health and educational trajectory. Victims who experience institutional betrayal when colleges fail to respond effectively to their abuse suffer increased posttraumatic symptomology when compared to other victims of sexual assault.⁹⁸

It is important to note that this Article is not describing a new problem. Sexual assault has long been an epidemic on U.S. college campuses, but recent media attention, student activism, and complaints to the Department of Education, as well as lawsuits under Title IX, have brought the issue to the national forefront.⁹⁹ Similarly, the ability and responsibility of campuses to respond to sexual assault is not a new concept. College student codes of

educational sanctions in at least 17 percent of cases, and were put on probation in 13 percent of cases. Tyler Kingkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014) [hereinafter Kingkade, *Fewer than One-Third of Cases Result in Expulsion*], http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html. The Huffington Post also reviewed cases from fiscal years 2011 to 2013 from more than 125 schools who received federal grants to combat rape on campus and found that between 13 and 30 percent of students found responsible for sexual assault were expelled. *Id.*; see also MAJORITY STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, 113TH CONG., *SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 10–12* (2014) [hereinafter *SEXUAL VIOLENCE ON CAMPUS*], <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>; Kingkade, *KU Considered Community Service*, *supra* note 69 (including media reports providing anecdotal evidence of sanctions for sexual misconduct).

98. See Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122 (2013).

99. Student activism in the past five years critiquing their school's response to campus sexual assault ranged widely on diverse campuses. They included a student at Columbia University who carried a mattress, students who organized protests at Brigham Young University, and students at Spelman and Morehouse who sent their administrators a list of demands. Janel Davis, *Atlanta Students Demand that Colleges Fight Campus Rape Culture*, ATLANTA J.-CONST., <http://www.ajc.com/news/local-education/atlanta-students-demand-that-colleges-fight-campus-rape-culture/QVyTODAoUb7EwD1r4SVBnN/> (last updated Nov. 19, 2015); Roberta Smith, *In a Mattress, a Lever for Art and Protest*, N.Y. TIMES (Sept. 21, 2014), http://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html?_r=0; Daniel White, *BYU Students Protest 'Honor Code' Charges for Rape Victim*, TIME (Apr. 20, 2016), <http://time.com/4302460/byu-students-protest-honor-code-charges-for-rape-victim/>; see also Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 281 (2016) [hereinafter Cantalupo, *For the Title IX Civil Rights Movement*] (mentioning the leaders of this new civil rights movement as "smart, courageous survivors of gender-based violence—virtually all of whom are current undergraduates or recent college graduates").

conduct do not simply ban academic misconduct but have explicitly forbidden sexual assaults and other crimes for decades.¹⁰⁰ Colleges have always had the ability to act both outside the criminal justice system and in coordination with the criminal justice system for student code infractions.¹⁰¹ College disciplinary investigations and hearings have always varied greatly, but the majority of colleges used a preponderance of the evidence standard for their hearings prior to the increased scrutiny on sexual misconduct cases.¹⁰²

What is new is the number of students demanding their colleges address rape culture on campus and respond appropriately to reports of sexual assault.¹⁰³ An increased number of student victims of sexual assault now expect to have a choice when deciding whether or not to report an assault.¹⁰⁴ They expect their colleges to investigate reports of sexual misconduct without the insertion of victim-blaming questions or rape myths.¹⁰⁵ They expect their colleges to engage in a neutral and fair process to determine the outcome of the report and to order appropriate sanctions.¹⁰⁶ When student victims' experiences with their colleges fall short of their expectations, they feel a sense of betrayal, causing some to share their stories with the media or organize protests.¹⁰⁷ Student victims also have utilized a

100. See, e.g., *Student Conduct Code - Community Expectations*, MARQU. U., http://www.marquette.edu/osd/policies/conduct/community_expectations.shtml#Standards_of_Conduct (last visited Mar. 12, 2017) (subjecting acts of sexual misconduct to discipline).

101. See, e.g., *id.* (reserving the right to hold disciplinary proceedings before, after, or during civil or criminal actions).

102. See KATHARINE K. BAKER ET AL., *TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 7* (2016) [hereinafter BAKER ET AL., *TITLE IX & PREPONDERANCE OF THE EVIDENCE*], <https://assets.documentcloud.org/documents/3006873/Title-IX-Preponderance-White-Paper-Signed-8-7-16.pdf> (summarizing research showing that the majority of colleges with an articulated standard of proof used the preponderance of the evidence standard, even prior to the 2011 Dear Colleague Letter).

103. See Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Sexual Assault*, N.Y. MAG. (Sept. 21, 2014), <http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html> (describing some of the young activists leading a campus anti-rape movement).

104. See *id.* (arguing victims are more focused at getting the university to take action).

105. See, e.g., *id.*

106. See, e.g., *id.*

107. See Andrea Pino, *Rape, Betrayal, and Reclaiming Title IX*, HUFFINGTON POST: THE BLOG (Apr. 29, 2013, 2:05 PM) [hereinafter Pino, *Rape, Betrayal, and Reclaiming Title IX*], http://www.huffingtonpost.com/andrea-pino/more-that-a-teal-ribbon_b_3165

civil rights law, Title IX, to push colleges to comply with federal guidelines and reduce hostile or discriminatory learning environments.¹⁰⁸

IV. TITLE IX

Title IX of the Educational Amendments of 1972 prohibits discrimination on the basis of sex in any federally funded education program or activity, including primary, secondary, and higher education programs.¹⁰⁹ In 1999, the U.S. Supreme Court recognized a private cause of action under Title IX for peer-to-peer sexual harassment.¹¹⁰ Unlike Title VII, the civil rights law protecting employees from sex discrimination in the workplace that uses both an actual knowledge and constructive knowledge standard,¹¹¹ Title IX limits liability from private causes of action to an actual notice and deliberate indifference standard.¹¹²

Professor Nancy Cantalupo suggests that the Department of Education should move beyond the actual knowledge standard to address sex discrimination perpetuated through constructive knowledge of sexual violence aimed at women.¹¹³ This would transition the current limited focus on fixing how a school responds to complaints of sexual violence to awareness of the need for broad-based sexual assault prevention and education programming.¹¹⁴ The ultimate goal should be to end sexual assault

293.html.

108. *See id.*

109. Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (codified at 20 U.S.C. §§ 1681–1688 (2012)).

110. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (“We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may . . .”).

111. 42 U.S.C. §§ 2000e to 2000e-17 (2012 & Supp. II 2015).

112. *See* Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1059, 1062–63 (2015) (suggesting that the standard established for colleges and universities under Title IX should reflect the standard used for employers under Title VII under OCR compliance in order to encourage colleges and universities to engage in a comprehensive public health approach to reducing sexual assault on campuses).

113. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 252–53 (2011) [hereinafter Cantalupo, *Burying Our Heads*]; *see also* Reardon, *supra* note 91, at 411.

114. *See* Cantalupo, *Burying Our Heads*, *supra* note 113, at 265; *see also* Silbaugh, *supra* note 112, at 1049 (proposing that OCR spends more resources in adopting a public health perspective to sexual assault).

on campus rather than address it in a less-traumatizing manner for student victims. Although the Author agrees, this Article focuses on the types of cases that fall within the actual knowledge standard: those where student victims report and subject themselves to the campus investigation and adjudicatory processes.

Title IX provides a tool for legal mobilization increasingly used by student victims of sexual assault.¹¹⁵ Students who believe their school violated Title IX may sue in a private cause of action or file a complaint with the Office for Civil Rights (OCR), the Department of Education office with the authority to investigate and sanction schools for sex discrimination.¹¹⁶ In 2011, OCR issued new guidance to colleges in a “Dear Colleague Letter,” detailing colleges’ obligations under Title IX to respond to sex discrimination in the form of sexual harassment, including sexual violence.¹¹⁷ As of 2015, there were more than 100 OCR complaints and many private lawsuits filed by student victims of sexual assault, alleging that their colleges committed sex discrimination in their response (or lack of response) to their reports of campus sexual assault.¹¹⁸ Student victim efforts have not been limited to OCR and the courts. They have also shared their negative experiences with their colleges through the media, organized and engaged in campus protests, and formed non-profits to support and educate each other and work on reform efforts.¹¹⁹

There is a growing movement to ignore the civil rights nature of Title IX and either push campus cases into the criminal justice system or transform the campus system into a criminal justice system.¹²⁰ This includes

115. CELENE REYNOLDS, *THE MOBILIZATION OF TITLE IX IN COLLEGE AND UNIVERSITIES, 1994–2014*, at 3 (2016), <http://ssrn.com/abstract=2767797> (follow the link to either “Download this Paper” or “Open PDF in Browser”).

116. *See id.* at 10.

117. DEAR COLLEAGUE LETTER, *supra* note 46, *passim*.

118. Jake New, *Justice Delayed*, *INSIDE HIGHER ED* (May 6, 2015), <https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasting-more-4-years>.

119. *See* SAFER, *STUDENTS SPEAK OUT! A NATIONWIDE TALK BACK ABOUT SEXUAL VIOLENCE ON CAMPUS 3* (2015), <http://www.safercampus.org/application/files/4814/4598/5219/SAFER-Students-Speak-Out-Report.pdf>; sources cited *supra* note 99.

120. *See* BAKER ET AL., *TITLE IX & PREPONDERANCE OF THE EVIDENCE*, *supra* note 102, at 5–6 (advocating for the continued use of the preponderance of the evidence standard of proof in campus adjudicatory hearings). *See generally* Cantalupo, *For the Title IX Civil Rights Movement*, *supra* note 99, at 284–85 (describing national and state efforts to “criminalize” the Title IX process).

calls to mandate reports to law enforcement (or even defer all cases to law enforcement) and to transform campus disciplinary processes into traditional criminal trials, with a higher burden of persuasion, criminal due process protections for respondents, and the full participation of criminal defense attorneys. Such a transformation undermines the central purpose of Title IX: to protect students from sex discrimination and protect equal educational opportunities.¹²¹ Conversely, the criminal justice system does not purport to protect equality, nor does it provide many protections or rights to victims—particularly victims of sexual violence.¹²² This Article does not support the “criminalization” of Title IX, but it does reluctantly acknowledge and respond to the growing trend by offering a proposal to mitigate some of the harm caused to victims—a victims’ attorney.

V. SECONDARY VICTIMIZATION (I.E., SECOND RAPE)

*“Indeed, if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.”*¹²³

Most victims of sexual assault will never speak with law enforcement, and those who choose to engage with the criminal justice system generally report negative experiences with the legal process.¹²⁴ Victims who sought redress from the criminal justice system reported their surprise at how marginal their role was in the legal process, and shared their experiences of being treated with “casual indifference and disrespect.”¹²⁵ Victims were unable to obtain help and felt doubted or blamed by police, prosecutors, and judges.¹²⁶ Even those with access to a victim advocate often reported that

121. See Cantalupo, *For the Title IX Civil Rights Movement*, *supra* note 99, at 284.

122. *Id.* at 284–85. For a detailed critique of the criminal justice system’s interaction with victims of sexual violence, see Avalos, *supra* note 28, *passim*.

123. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159 (2003).

124. See *id.* at 164 (citing Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW & HUM. BEHAV. 607, 607–28 (1996)).

125. Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 582 (2005) [hereinafter Herman, *Justice from the Victim’s Perspective*].

126. *Id.* (describing a student victim’s conversation with a district attorney in which the district attorney said she did not believe her, which the victim said “hurt more than the rape”); Rebecca Campbell et al., *Preventing the “Second Rape”: Rape Survivors’ Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239,

their criminal cases were dismissed against their wishes.¹²⁷ Studies show that victims whose cases do proceed through prosecution often experience more distress than those whose cases were dismissed, and even those victims who reported positive interaction with law enforcement still reported overall frustration with the criminal justice system.¹²⁸ These negative interactions with community resources cause “second rape” or “secondary victimization” for sexual assault survivors.¹²⁹

The “second rape” of rape survivors is not limited to the criminal justice system.¹³⁰ Victims are revictimized when organizations and individuals engage in victim-blaming attitudes, behaviors, and practices.¹³¹ In one study, almost one-third of victims rated their post-assault interactions with medical professionals as hurtful, and one-quarter of victims rated their post-assault interactions with mental health providers as hurtful.¹³² Post-assault exposure to victim-blaming attitudes, rape myths, and sexist practices—particularly from professionals whose job is to help victims—exacerbates victim trauma.¹³³

Student victims of sexual assault who choose to report (or unintentionally trigger a report) to their colleges may experience a “second rape” if the school administrators engage in victim-blaming attitudes or otherwise fail to respond effectively to a sexual assault. Personal stories shared by student victims with the media, articulating their regret for reporting to their schools, illustrate this betrayal and trauma.¹³⁴ Through

1240 (2001) [hereinafter Campbell et al., *Preventing the Second Rape*] (citations omitted).

127. Campbell et al., *Preventing the Second Rape*, *supra* note 126, at 1241.

128. *Id.* (citations omitted).

129. *See id.* at 1240, 1241.

130. *See* LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM passim* (1991). For further discussion on the second rape of sexual assault victims by medical and mental health workers, as well as the criminal justice system, *see id.* at 82–118.

131. *See* BAYLOR UNIV. BD. OF REGENTS, *supra* note 26 (noting university administration's tendency to focus on campus policies regarding alcohol and extra-marital sex rather than the investigation of sexual assault claims generally).

132. Campbell et al., *Preventing the Second Rape*, *supra* note 126, at 1251.

133. *See id.* at 1253 (noting their study of rape victim survivors “suggest[s] that negative community contacts are associated with poorer health outcomes” and “many survivors reported that their contact with system personnel during the provision of services (or lack of provision) was hurtful in its own right”).

134. A student victim at the University of North Carolina accused universities of

their responses to student reports of sexual assault, colleges not only affect a student victim's educational trajectory but also have a direct impact on a student victim's recovery.¹³⁵

Victims of sexual assault often do not define justice in a way that aligns with the criminal justice system.¹³⁶ Through her interviews of survivors of domestic and sexual violence, Judith Herman identified the unanimous goals of validation and vindication.¹³⁷ The survivors shared a goal of gaining validation from their communities, including an acknowledgment of the basic facts of the assault and the harm it caused them.¹³⁸ Although many expressed a wish that the assailant would confess, the validation of others in the community was of equal or greater importance.¹³⁹ Second, victims wanted vindication in the form of community denunciation of the crime,

betraying students by protecting their rapists and stated, "What's worse than rape is betrayal. Students are attending schools that betray them, campuses in which violence has become a part of the experience, and in which, despite popular belief, there is no punishment for rape, rather a punishment for coming forward." Pino, *Rape, Betrayal, and Reclaiming Title IX*, *supra* note 107. Two students at Hobart and William Smith Colleges told reporters they wished that they had never reported sexual assaults to the college and explained why one of the student victims dropped out of college after the disciplinary hearing, in order to escape the toxic environment. Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html>.

135. See Diane L. Rosenfeld, *Schools Must Prevent the "Second Rape,"* HARV. CRIMSON (Apr. 4, 2014), <http://www.thecrimson.com/article/2014/4/4/Harvard-sexual-assault/>.

136. Herman, *Justice from the Victim's Perspective*, *supra* note 125, at 574 ("The wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings. Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience. Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation between a complaining witness and the accused.").

137. *Id.* at 586. Some informants interviewed in the study also identified the goals of apology and perpetrator accountability (mostly through public exposure). *Id.* at 586–89.

138. *Id.* at 585.

139. *Id.*

moving the stigma of shame from them to the perpetrator.¹⁴⁰

Neither the criminal justice system nor the college adjudicatory system set forth validation or vindication as a primary goal, but both have the potential to bring about such an outcome in some cases.¹⁴¹ Victims should be encouraged to assess their personal goals of justice, as well as their goals of safety and continuity, in evaluating whether or not to engage in either legal system. Victims' attorneys can provide students with sufficient information to conduct a risk assessment, weighing the possibility of receiving a desired benefit from the process (such as validation, vindication, safety, or continuity) with the potential harms from second rape or retaliation.

VI. THE NEED FOR COMPREHENSIVE LEGAL ASSISTANCE

The institutional betrayal and second rape experienced by student victims of sexual assault result from a combination of a school's inadequate response to a student's report of sexual assault and a student's lack of agency and voice in the process.¹⁴² Access to qualified attorneys may serve to mitigate the post-assault trauma experienced by student victims by providing them with confidential, individualized legal counseling, advocacy, and representation. Victims' attorneys can provide students with information about their rights and an analysis of their legal options necessary to promote informed consent before students engage in the school disciplinary process. Attorneys can help student victims identify their goals and address available legal relief and non-legal resources that may bring victims closer to their goals. For those student victims who do choose to report to colleges, attorneys can provide them with a voice in that process and serve as deterrence to victim-blaming behavior by the college.

The idea that victims of sexual assault need access to trained civil legal attorneys is not novel, and yet it still falls outside the national conversation about campus sexual assault. In 2005, Ilene Seidman and Susan Vickers described the need for lawyers to protect privacy rights and educational rights of survivors of sexual assault,¹⁴³ Lois Kantor addressed why so few civil

140. *Id.*

141. *See id.* at 597–99.

142. *See supra* Part V.

143. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 471–72, 473–75, 478–79 (2005) (arguing that victims need access to civil counsel to protect privacy and educational needs).

legal service organizations served rape victims,¹⁴⁴ and Kathryn Reardon wrote about student victims' educational and civil rights at private colleges and universities.¹⁴⁵ Others have echoed this call.¹⁴⁶ Merle Weiner suggests that schools may actually have a legal obligation to provide victims with access to legal counsel.¹⁴⁷ There are now a handful of organizations focused on providing direct legal services to victims of sexual assault,¹⁴⁸ but most student victims continue to lack access to private counsel. Even those that have access to campus-based, community-based, or prosecution-based advocates rarely receive referrals to lawyers.¹⁴⁹ It is time to recognize the need for trained victims' lawyers to advise and represent student victims of sexual assault both on and off campus. In order to reduce institutional trauma, student victims of sexual assault should have access to attorneys prior to the post-assault decision to report to the college or law enforcement and continuing through the end of any legal proceedings related to the sexual assault. The stages when students need access to attorneys include: (1) reporting decisions, (2) investigations and interim measures, (3) hearings,

144. Lois H. Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 266–82 (2005).

145. Reardon, *supra* note 91, at 395–96.

146. Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 *passim* (2015) (advocating for the appointment of independent attorneys for sexual assault victims within the criminal system similar to the special victim counsel (SVC) in the military justice system); Reardon, *supra* note 91, at 411 (stating that when assailants obtain legal counsel, “representation [of victims] helps ensure a fair process, minimizes the possibility for further harassment, and helps academic institutions avoid liability for gender discrimination”).

The CPI study simply confirms what many lawyers, faculty, and administrators involved in cases of campus peer sexual violence, both within and outside of schools, say: that school adjudications of campus peer sexual violence cases are “kangaroo courts” with the deck stacked in favor of the alleged perpetrator, and that a survivor of campus peer sexual violence needs independent representation because she cannot rely on her school to protect her rights.

Cantalupo, *Burying Our Heads*, *supra* note 113, at 208.

147. Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEMINISM (forthcoming 2017) (manuscript at 101, 112–22) (arguing not only that student survivors need access to legal counsel, but that colleges should provide legal resources in some situations).

148. *E.g.*, MD. COALITION AGAINST SEXUAL ASSAULT, <http://www.mcasa.org> (last visited Mar. 2, 2017); SURVJUSTICE, <http://survjustice.org> (last visited Mar. 2, 2017); VICTIM RTS. L. CTR., <http://www.victimrights.org> (last visited Mar. 2, 2017).

149. *See* Weiner, *supra* note 147, at 123–24.

and (4) campus appeals and civil lawsuits.

A. Stage One: The Decision Whether or Not to Report a Sexual Assault to a College or Law Enforcement

Reporting rates for student victims to both law enforcement and colleges remain low.¹⁵⁰ Victims are hesitant to report to law enforcement for many reasons. They do not expect police to believe them or investigate their complaints, or they fear retaliation.¹⁵¹ Others do not share the goals of the criminal justice system or believe that the potential sanctions imposed by the legal systems will bring them satisfaction.¹⁵² Similarly, student victims may not report a sexual assault to their college because they lack faith that the college will take them seriously or conduct a fair investigation, they are concerned that their safety will not be protected or that they will not be supported by their college or other students, and they believe that their college will not hold the perpetrator accountable or address factors that may have led to the assault.¹⁵³ Students also choose not to report sexual assaults because they are embarrassed, ashamed, think an investigation would be too difficult emotionally, or because they believe the incident is not serious enough to report.¹⁵⁴ We must respect victims' decisions regarding reporting. Our goal should not be to force all student victims of sexual assault to report to law enforcement or colleges, but rather to provide a transparent and trauma-informed process for those victims who chose to engage in the criminal justice system, the campus student disciplinary process, or both.

College campuses, law enforcement agencies, health care providers, and community service providers currently form a complicated system with varying levels of confidentiality, mandatory reporting, and memorandums of agreement outlining agreements to share information.¹⁵⁵ Consequently, student victims attempting to access resources following a sexual assault or make a report with one specific agency or college may inadvertently open an investigation in another. A student who goes to a hospital requesting a

150. See *supra* note 92 and accompanying text.

151. See *supra* note 28 and accompanying text.

152. See Herman, *Justice from the Victim's Perspective*, *supra* note 125, at 575.

153. See AAU CAMPUS SURVEY, *supra* note 87, at xxi, xxii (reporting on the rates of students who failed to report for reasons indicating a distrust of their school to adequately respond to a complaint of sexual assault).

154. See *id.* at xxi; see also LONSWAY & ARCHAMBAULT, *supra* note 5, at 18 (“Victims can also react to sexual assault by exhibiting extreme calm or denial.”).

155. See *infra* notes 156–61 and accompanying text.

medical examination and STD prophylaxis after a rape may not realize that she has triggered a report to law enforcement,¹⁵⁶ who, after interviewing her, may share their incident report with her college,¹⁵⁷ which may then open a student disciplinary investigation. When student disclosures of sexual assault unintentionally result in college or police investigations, student trauma is exacerbated by legal systems that rob victims of their agency.¹⁵⁸ Adult victims of sexual assault should be afforded the autonomy to decide if and when they report a sexual assault and to whom, which requires access to sufficient information about the intersecting legal systems and reporting requirements.¹⁵⁹

Similarly, a student who discloses a sexual assault to a college professor in order to discuss safety concerns may not realize the professor—following internal college guidelines¹⁶⁰—will have to contact the appropriate administrator, who may then open a student disciplinary investigation and contact the alleged perpetrator about the allegations. A college's attempt to comply with federal law requiring it to accurately count reported sexual

156. *E.g.*, CAL. PENAL CODE § 11160(a)(2) (West 2017) (requiring health providers to report to local law enforcement the names and whereabouts of patients and any injuries sustained from specific crimes, including sexual battery, rape, spousal rape, statutory rape, etc.).

157. Many law enforcement agencies have created agreements with colleges stating that they will provide copies of police incidence reports involving students to the college. *See, e.g.*, Memorandum of Understanding Between State Univ. of N.Y. at Oneonta and Otsego Cty. Sheriff's Dep't (Mar. 2009), <http://www.oneonta.edu/admin/police/emergency/erp/16.pdf>. Most college campuses have their own police departments. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DOJ, NCJ 248-28, CAMPUS LAW ENFORCEMENT, 2011-12, at 2 (2015), <https://www.bjs.gov/content/pub/pdf/cle1112.pdf> (noting “[a]bout 95 [percent] of 4-year schools with 2,500 or more students operated their own campus law enforcement agency”).

158. *See, e.g.*, *Trauma-Informed Sexual Assault Investigation and Adjudication Institute*, NAT'L CTR. FOR CAMPUS PUB. SAFETY, http://www.nccpsafety.org/assets/files/misc/T-I_Institute_Modules.pdf (last visited Mar. 2, 2017).

159. *See, e.g.*, WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 12 (2014), <https://www.justice.gov/ovw/page/file/905942/download>.

160. Colleges attempting to comply with the Clery Act and avoid possible liability and accusations of cover-ups have developed broad internal reporting requirements for their employees with any knowledge of a student sexual assault, regardless of the victim's choice. *See Engle, supra* note 9, at 408-12 (describing and critiquing the growing number of colleges that require all staff and faculty to internally report sexual assaults).

assaults¹⁶¹ and make the reporting process easier for students to access¹⁶² should not come at the cost of victim autonomy and agency. While colleges have the right to expand the categories of employees they require to report knowledge of sexual assaults to the college employer, as well as determine the level of required detail in that report,¹⁶³ victims' attorneys can help enhance transparency by ensuring that victims fully understand who is and who is not a confidential resource before disclosing. Student victims must have meaningful access to sufficient information to enable them affirmatively to choose whether or not to engage in a legal process and to determine the extent of their participation, and they should be fully informed about what actions each disclosure will trigger and what rights they retain to control the outcome.¹⁶⁴

Consultation with victims' attorneys at the pre-reporting stage will provide student victims with access to accurate information and candid legal advice about the different reporting options and limitations on privacy within each system, enabling students to provide informed consent for investigations and avoid unintentional reports.¹⁶⁵ Victims' attorneys can further provide information about available interim measures at the college designed to protect student safety, stability, and educational rights and can assist student victims in weighing their interests of obtaining help against the possible concerns of opening an investigation.¹⁶⁶ Student victims could also benefit from a victim-centered, comprehensive legal screening assessing their legal needs, not only in the college setting and criminal justice system, but also in civil protective orders, privacy (including social media), housing, educational, employment, family, immigration, financial, and torts law, as

161. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) requires colleges to report specific crimes that occur on their campuses, including sexual assault. 20 U.S.C. § 1092(f)(1)(F)(ii)(II) (2012 & Supp. II 2015).

162. The SaVE Act requires a school ensure that students “[h]ave a clear description of their institution’s disciplinary process and know the range of possible sanctions.” *Campus SaVE Act*, C.S. NEV., <https://www.csn.edu/campus-save-act> (last visited Mar. 2, 2017); accord 20 U.S.C. § 1092(f)(8)(A)–(B).

163. See Engle, *supra* note 9, at 408 (noting “the SaVE Act does not specify how reporting should be done, aside from an ‘in writing’ requirement”).

164. See Garvin & Beloof, *supra* note 146, at 77 (advocating for the appointment of independent attorneys for sexual assault victims within the criminal system to promote crime victim agency).

165. See *id.*

166. See *id.* at 77–85.

their legal rights may be implicated by their decision of whether or not to report.¹⁶⁷ Access to victims' attorneys at the pre-reporting stage will enhance a victim's "choice" in the legal systems she or he engages post-assault for assistance with goals including safety, justice, privacy, healing, and education, and potentially diminish some of the institutional trauma experienced post-assault.

B. Stage Two: Legal Assistance and Representation During Investigations

The second stage in which student victims will benefit from access to victims' attorneys is during campus and police investigations and the determination of interim measures. Colleges create their own procedures for investigating and adjudicating student disciplinary cases involving sexual assault.¹⁶⁸ Although OCR now provides some guidelines, the processes continue to vary widely.¹⁶⁹ All colleges should conduct an investigation independent of law enforcement, provide interim measures, and offer some kind of adjudicatory process with minimum due process safeguards for respondents.¹⁷⁰

1. Recognizing Different Interests

Within any sexual assault investigation, there are three different parties with distinct interests: the government or college, the suspect (or "respondent" or "defendant"), and the victim (or "complainant").¹⁷¹ Even when colleges utilize victim-centered and trauma-informed investigation techniques, their interests will sometimes differ from a victim's interests. For example, if a victim reports a sexual assault by a student the college believes has assaulted other students, but the victim does not want to proceed with a hearing, a victim's interest in safety and privacy will not be aligned with the college's interest in holding the respondent responsible and keeping the

167. *See id.* at 85–86 (noting independent lawyers can look out for all of the interests of the victim in ways a prosecutor cannot).

168. AM. ASS'N OF UNIV. PROFESSORS, *CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES* 366 (2012), https://www.aaup.org/file/Sexual_Assault_Policies.pdf.

169. *See* DEAR COLLEAGUE LETTER, *supra* note 46, at 15.

170. *Id.* at 10, 15.

171. *See* Engle, *supra* note 9, at 413 (noting sometimes the school must override the victim's desire for confidentiality to "pursue disciplinary action against the alleged perpetrator").

campus safe.¹⁷² Even when a college and victim share the same goal, their interests may diverge. A college may err on the side of caution in anticipation of a respondent's lawsuit by allowing the respondent to delay the investigation and request irrelevant or sensitive information from the victim, prioritizing the creation of a stronger record to withstand judicial review over the victim's interests in a prompt outcome and privacy. This is perhaps even more of a concern in criminal cases. Although only a small percentage of cases proceed to trial, there have been incidents in which prosecutors not only subpoenaed sexual assault victims reluctant to testify, but actually jailed them.¹⁷³ Victims' attorneys are necessary during investigations in order to advocate for student victims' interests and amplify student victims' voices during the process.

2. *Sexual Assault Forensic Examinations (SAFEs)*

Victims of sexual assault are routinely advised to undergo a SAFE by both law enforcement and college administrators.¹⁷⁴ Although timing is crucial to the collection of evidence and SAFEs should be completed within a few days of an assault,¹⁷⁵ it is still important that victims be provided with sufficient information to make informed decisions about whether or not they want to undergo a SAFE.¹⁷⁶ Victims should be informed that they have the option to seek medical treatment, including a general physical exam, emergency contraception, pregnancy testing, and STD prophylaxis without also having to undergo an evidentiary examination.¹⁷⁷ Victims considering a SAFE should be provided with enough detail to understand fully what the process involves, how invasive it is, and the typical amount of time involved.¹⁷⁸ They should also be informed of the potential evidentiary value and limitations of an examination, as well as the likelihood that their SAFE kit will ever be tested.¹⁷⁹ Last, student victims need to be warned about the

172. *Id.*

173. *E.g.*, Daniel Victor, *Texas Rape Victim Was Jailed for Fear She Would Not Testify, Lawsuit Says*, N.Y. TIMES (July 22, 2016), http://www.nytimes.com/2016/07/23/us/texas-rape-victim-was-jailed-for-fear-she-would-not-testify-lawsuit-says.html?_r=0.

174. *See* NATIONAL PROTOCOL, *supra* note 13, at 12.

175. *Id.* at 7–8.

176. *Id.* at 41.

177. *Id.* at 43.

178. *See supra* text accompanying notes 13–23.

179. *See What's Being Done to Address the Country's Backlog of Untested Rape Kits*, NPR (Jan. 17, 2016), www.npr.org/2016/01/17/463358406/whats-being-done-to-address-

potential financial and privacy implications caused by a SAFE. While all states reimburse hospitals for the cost of the actual SAFE kit collection, most do not pay for emergency contraception, STD prophylaxis, or general medical examinations required by some hospitals.¹⁸⁰ Students covered by a parent's insurance risk the possibility that an insurance statement sent home will disclose an examination for rape or STD testing.¹⁸¹ Victims' attorneys can help provide unfiltered information about SAFEs, enabling victims to make an informed choice.

3. Law Enforcement Investigations

In cases when student victims wish to engage the criminal justice system, victims' attorneys can play an essential role in advocating for their clients and ensuring that they retain their choice and voice during the process. Recent reports looking at police investigations of sexual assaults reveal a shocking degree of systematic failure and lack of trauma-informed practices.¹⁸² Law enforcement skepticism about sexual assault victims led them to overestimate significantly the percentage of false allegations and focus investigations on disproving a victim's report rather than investigating her or his sexual assault.¹⁸³ Victims' attorneys may be able to help protect victims who want to work with law enforcement from inappropriate or harmful interviewing techniques, such as placing victims in small rooms, refusing to allow a support person, asking victim-blaming questions, requesting polygraphs, or threatening criminal charges for false reports.¹⁸⁴ Moreover, victims' attorneys can help promote sexual assault investigation best practices by advocating for their clients to postpone detailed interviews for two sleep cycles and picking a comfortable location for interviews, reminding officers how trauma impacts memory and demeanor, and promoting victim choice in the decision of whether or not to make pretext

the-countrys-backlog-of-unttested-rape-kits ("Across the country, tens of thousands of rape kits are sitting in police evidence rooms—waiting to be tested.").

180. CHARLENE WHITMAN ET AL., *AEQUITAS, SUMMARY OF LAWS & GUIDELINES: PAYMENT OF SEXUAL ASSAULT FORENSIC EXAMINATIONS* 6 (2012), http://www.aequitasresource.org/Summary_of_Laws_and_Guidelines-Payment_of_Sexual_Assault_Forensic_Examinations_2.6.12.pdf.

181. *See id.* at 3 (noting that in some circumstances the victim's insurance will be billed for services rendered during a SAFE kit collection).

182. *See Avalos, supra* note 28, at 8–10.

183. *See id.*; *supra* note 93 and accompanying text.

184. *See Avalos, supra* note 28, at 24–38.

calls.¹⁸⁵ Victims' attorneys can also work to ensure that victims receive timely updates about criminal investigations. In cases that proceed to an arrest and prosecution, victims' attorneys can ensure that prosecutors maintain communication with victims and help enforce their rights as crime victims, which generally include the right to information about upcoming hearings and plea bargains, as well as the right to address the court through a victim impact statement.¹⁸⁶

4. *College Investigations*

During the campus investigation process, victims' attorneys can serve to ensure that student victims are aware of their rights under Title IX, applicable state law, and the specific college's written procedures, and assist students in enforcing those rights. Student victims have the right to a timely investigation, generally within 60 days, and have the right to provide evidence to the investigator.¹⁸⁷ Particularly on campuses that essentially place the obligation on student victims to provide evidence proving their allegations of sexual assault, victims' attorneys can assist students in developing the type of evidence that might further their case, such as text messages, social media posts, witnesses, and medical records, while advising them about weighing their privacy interests against their interests in forwarding the campus investigation before submitting specific evidence. In cases in which a student victim has chosen to report to both law enforcement and the college, an attorney can also help coordinate the investigations, reducing the number of victim interviews and redundant requests for

185. See INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY: INVESTIGATING SEXUAL ASSAULTS 3-5 (2005), <http://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=93>; LONSWAY & ARCHAMBAULT, *supra* note 5, at 8-10. Pretext calls (or texts) are an investigation tool used in some jurisdictions by law enforcement in which they record a conversation between the victim and assailant discussing the sexual assault in order to obtain incriminating statements. *Pretext Communications in Sexual Assault Investigations: A Brief Guidance for Campus Law Enforcement*, CAMPUS TECHNICAL ASSISTANCE & RESOURCE PROJECT 1, www.changingourcampus.org/resources/law-enforcement/Pretext-Communications-in-Sexual-Assault-Investigations-Final.pdf (last visited Mar. 12, 2017).

186. Bureau of Justice Statistics, *What Is the Sequence of Events in the Criminal Justice System?*, OFF. JUST. PROGRAMS (1997), <https://www.victimlaw.org/victimlaw/resources/include/BJScjsflowco.pdf> (noting victims are involved throughout the process of prosecution).

187. DEAR COLLEAGUE LETTER, *supra* note 46, at 9, 12.

information or evidence.¹⁸⁸

Victims' attorneys participating in the investigatory process may also assist students in enforcing their right not to answer irrelevant or offensive questions based on rape myths or victim-blaming attitudes, and their presence may serve to remind investigators of their obligation to obtain training on trauma-informed interview techniques.¹⁸⁹ Similarly, as more respondents retain criminal defense attorneys to represent them in college disciplinary investigations,¹⁹⁰ victims face requests for discovery, including their personal cell phones and laptops. Victims' attorneys can help advocate for a victim's right to privacy and remind both colleges and respondents that the investigation should be focused on whether or not a respondent violated a student conduct code, rather than enable a fishing expedition for material to attack a victim's character. Victims' attorneys are especially important in cases in which there is a parallel criminal investigation in order to prevent a respondent from using the college investigation process to intimidate or coerce a victim.¹⁹¹

Title IX complaints and lawsuits filed by student victims against their colleges usually point to a nonexistent, inadequate, irresponsible, or offensive investigation by their college.¹⁹² Access to victims' attorneys may help student victims enforce their rights during the investigation when the colleges can still take corrective actions to fulfill their responsibilities and comply with federal law, rather than wait to respond to a complaint after the mistakes occurred and after they exacerbated a student victim's trauma.

5. *Interim Remedies On and Off Campus*

OCR requires colleges to promptly provide student victims of sexual assault with access to remedies necessary to protect them and their well-being during and after the investigation.¹⁹³ Possible protective remedies

188. See OCR, Q&A ON TITLE IX AND SEXUAL VIOLENCE, *supra* note 46, at 28 (noting a school and a police agency may share information and conduct contemporaneous investigations).

189. *Id.* at 40.

190. See Jessica Roy, *The Man Who Defends Men Accused of Campus Rape*, N.Y. MAG. (Oct. 22, 2015), <http://nymag.com/thecut/2015/09/man-who-defends-campus-rapists.html>.

191. See BAKER ET AL., TITLE IX & PREPONDERANCE OF THE EVIDENCE, *supra* note 102, at 8.

192. See *supra* notes 24–27.

193. See DEAR COLLEAGUE LETTER, *supra* note 46, at 15.

outlined in the OCR Dear Colleague Letter include: changing campus housing or classes for the complainant or respondent;¹⁹⁴ providing complainants with safe escorts on campus, counseling and medical services, and academic support services; and ensuring that complainants' education is not adversely impacted by the assault by allowing them to retake or withdraw from a course without penalty and review any disciplinary action taken against the complainant related to the assault.¹⁹⁵ The Campus Sexual Violence Elimination (SaVE) Act reinforces the OCR Dear Colleague Letter by explicitly requiring schools to provide students reporting victimization with their written rights to “[c]hange academic, living, transportation, or working situations to avoid a hostile environment,” “[o]btain or enforce a no contact directive or restraining order,” and “[r]ecieve contact information about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available both on-campus and in the community.”¹⁹⁶ In spite of this mandate, student victims report a lack of information about interim remedies or an inability to access them.¹⁹⁷

Victims' attorneys can inform victims of their rights to interim remedies and advocate for appropriate measures through the college as soon as possible to mitigate further trauma to a student victim during the investigation and help promote stability for the student. Attorneys may also assist the school in keeping the victim's physical and emotional safety in mind throughout the investigation.¹⁹⁸ Student needs for interim measures must be assessed not only at the time of the initial disclosure, but throughout

194. *Id.* at 15–16. “When taking steps to separate the complainant and the alleged perpetrator, a [college] should minimize the burden on the complainant,” by not requiring the complainant to move or leave classes when allowing the alleged perpetrator to stay. *Id.*

195. *Id.* at 16–17.

196. *The Campus SaVE Act*, SAFECOLLEGES, <http://www.safecolleges.com/hot-topics/save-act-training-students> (last visited Mar. 2, 2017); see 20 U.S.C. § 1092(f)(8)(A)–(B) (2012 & Supp. II 2015).

197. See *supra* notes 32–34.

198. For example, a student victim of sexual assault and strangulation described how Brown University asked her to pick up a copy of the charging letter, failing to mention that they had also contacted the respondent to pick up his copy of the letter from the same building and failing to demonstrate any sensitivity to the trauma she experienced when she found herself in the same building as her rapist and his father. Lamb, *supra* note 35. In addition, she said that the school failed to notify her when her rapist was asked to leave campus, causing her “another week of ‘living in fear.’” *Id.*

their enrollment.¹⁹⁹ A student victim's housing, classes, and extra-curricular activities may all change every semester, possibly impacting a student's needs for stay-away orders, security escorts, or other relief from the campus.²⁰⁰ It is not uncommon for students to do well in classes immediately following an assault, only to miss classes and assignments at a later time because of depression or PTSD, or to make the decision to transfer.²⁰¹ Victims' attorneys can help a student victim coordinate with the college to address ongoing educational needs impacted by the assault, including dropping a class after the deadline, withdrawals, transfers, and financial aid.²⁰² Students may be able to utilize legal counsel to enforce their educational rights in requesting reasonable academic accommodations, both through Title IX and through the Americans with Disabilities Act (ADA), before a student's educational trajectory is irreparably harmed.²⁰³ Victims' attorneys may also be able to assist students facing possible discipline from a college for violations of the student code incident to the assault, such as underage drinking or curfew violations.²⁰⁴

In addition to potential interim measures offered by colleges, student victims may qualify for other civil and criminal remedies. For example, student victims in states offering sexual assault protection orders and civil harassment orders, as well as student victims who were in a relationship with an assailant that qualify for a domestic violence restraining order in their state, may want to consider applying for a restraining order during the investigation.²⁰⁵ Victims' attorneys can provide holistic legal counseling by

199. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, SAMPLE LANGUAGE FOR INTERIM AND SUPPORTIVE MEASURES TO PROTECT STUDENTS FOLLOWING AN ALLEGATION OF SEXUAL MISCONDUCT 2 (2014), <http://www.justice.gov/ovw/page/file/910296/download>.

200. See Reardon, *supra* note 91, at 410.

201. See *PTSD: National Center for PTSD*, U.S. DEP'T VETERANS AFF., www.ptsd.va.gov/public/PTSD-overview/women/sexual-assault-females.asp (last updated Aug. 13, 2015) (noting many women have a delayed reaction to sexual assault).

202. See Reardon, *supra* note 91, at 396 (stating that the end result of an academic institution's reluctance to deal with rape for victims is "falling grades, prolonged school absence, and for many, eventual school drop out or failure").

203. See *id.* at 405.

204. See DEAR COLLEAGUE LETTER, *supra* note 46, at 15.

205. See, e.g., Suzanne M. Beck, Opinion, *Sexual Assault Victims to Get More Protection from New Law*, MORNING CALL (June 5, 2015), <http://www.mcall.com/opinion/mc-protection-victims-of-sexual-violence-beck-yv-0606-20150603-story.html>; *Domestic Violence*, CAL. CTS., <http://www.courts.ca.gov/selfhelp-domesticviolence.htm> (last visited Feb. 22, 2017) (discussing the requirements to obtain a domestic violence

providing information about the pros and cons of the civil protection order process, helping a victim weigh the potential benefits of legal protection beyond the campus with the potential harm caused by participating in a hearing and being subjected to cross-examination so soon after a sexual assault and during ongoing investigations. Similarly, a student victim who chooses to participate in the criminal justice process and whose case proceeds to an arrest may be able to request a criminal “no contact” order through the criminal case.²⁰⁶

6. Addressing Retaliatory Behavior

Colleges have a specific obligation not only to refrain from engaging in retaliatory behavior against a victim reporting sexual misconduct, but also to take immediate and appropriate steps to respond to retaliatory behavior by the respondent or third parties.²⁰⁷ Student victims may experience retaliatory behavior from the respondent or respondent’s friends through direct threats or harassment in person, by text, or on social media.²⁰⁸ They may also face retaliation in the form of student disciplinary complaints filed against them by their assailants for anything ranging from harassment to sexual assault.²⁰⁹ Colleges are often either unaware of the retaliatory harassment because they do not follow up with victims or are dismissive of

restraining order).

206. See *Sexual Assault Protection Order*, WASH. COALITION SEXUAL ASSAULT PROGRAMS, <http://www.wcsap.org/sexual-assault-protection-order> (last reviewed Dec. 6, 2016).

207. DEAR COLLEAGUE LETTER, *supra* note 46, at 16 (“As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment.”); OCR, Q&A ON TITLE IX AND SEXUAL VIOLENCE, *supra* note 46, at 43 (“A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.”).

208. E.g., Kingkade, *UC-Berkeley Faces New Complaints*, *supra* note 35.

209. E.g., *Doe v. Univ. of S. Fla. Bd. of Trs.*, No. 8:15-cv-682-T-30EAJ, 2015 WL 3453753, at *2 (M.D. Fla. May 29, 2015) (mentioning that after an assailant was investigated for sexual misconduct, he filed a complaint of sexual misconduct against his accuser); Tyler Kingkade, *UNC Suspends Honor Court Proceeding Against Landen Gambill*, HUFFINGTON POST (Mar. 26, 2013), http://www.huffingtonpost.com/2013/03/26/unc-honor-court-landen-gambill_n_2956659.html (reporting about a UNC honor code case filed by a student’s ex-boyfriend against her for “creat[ing] an ‘intimidating’ environment” after she reported his stalking of her and filed a Title IX complaint against the college).

the seriousness of the harassment or their ability to address it.²¹⁰ A college's failure to protect a student victim from further abuse by the respondent or retaliatory harassment by other students after a student reports a sexual assault only increases institutional betrayal and discourages other students from reporting sexual misconduct to the college.²¹¹ Victims' attorneys can assist students in reporting retaliatory behavior to the college and advocate for further investigation, accountability, and protective measures, as well as defend against retaliatory complaints.

By informing student victims of their rights and helping them enforce their rights throughout investigations, victims' attorneys can help a student victim maintain both choice and voice in the process. Victims' attorneys can advocate for student victims' safety, stability, and privacy in criminal and college investigations and push investigators to utilize best practices in order to reduce second rape.²¹² Victims' attorneys can also help address Title IX violations with colleges during the investigation when the college has an opportunity to take corrective action rather than wait for the victim to file a lawsuit after the student adjudicatory process is over.²¹³

C. Stage Three: Legal Representation and Counsel During Student Disciplinary Hearings²¹⁴

Student victims report poor experiences and increased trauma during college disciplinary hearings.²¹⁵ Although not every college utilizes a hearing

210. See, e.g., Bogdanich, *supra* note 134.

211. See DEAR COLLEAGUE LETTER, *supra* note 46, at 16 (noting schools should be aware of harassment and retaliation).

212. Reardon, *supra* note 91, at 411.

213. See *id.*

214. Cases where sexual assault victims report to law enforcement and the assailant is charged with a crime are very rare, and cases that then proceed to a criminal trial (rather than a plea agreement), are even more of an oddity. See Erica Goode, *Stronger Hands for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html> (reporting that 97 percent of federal criminal cases and 94 percent of state criminal cases end in plea bargains); RAINN, *Criminal Justice System Statistics*, *supra* note 95 (estimating the percentage of sexual assault cases that move through the criminal system). As such, this Article does not include a section about the representation of student victims of sexual assault in criminal trials, but the Author notes the importance of access to an attorney to protect privacy rights and amplify a victim's voice in those rare circumstances.

215. See Complaint, *Doe I v. Univ. of Tenn.*, *supra* note 43; Complaint, *Doe v. George Mason Univ.*, *supra* note 51; Verified Complaint, *Doe v. Washington & Lee*

model, most offer a hearing as either the initial adjudication of student responsibility or as an appeal from an investigator's findings.²¹⁶ Some hearings resemble a civil court adversarial system,²¹⁷ where the complainant has to provide evidence and testimony in support of her or his complaint and the respondent then does the same. Others use a prosecutorial model,²¹⁸ with a university representative presenting the case to a single hearing officer or hearing panel and the respondent providing a defense.

There is currently no recognized constitutional right to representation by counsel in college disciplinary proceedings, but many colleges allow private counsel either to represent or to advise students accused of sexual assault during campus hearings.²¹⁹ With increased national attention on campus sexual assault, more attorneys are expanding their practices or developing expertise in defending students against accusations of sexual misconduct.²²⁰ When respondents are represented by lawyers, their lawyers

Univ., *supra* note 47.

216. See, e.g., *Student Conduct & Conflict Resolution: Preparing for Your Disciplinary Hearing*, AM. U., <http://www.american.edu/ocl/sccrs/Preparing-for-a-Disciplinary-Hearing.cfm> (last visited Mar. 2, 2017).

217. *Adversary proceeding*, BLACK'S LAW DICTIONARY (9th ed. 2009).

218. *Prosecutor*, BLACK'S LAW DICTIONARY, *supra* note 217.

219. For example, at West Virginia University, any student facing possible suspension or expulsion has the opportunity to be represented by counsel licensed to practice in West Virginia in the adjudicatory hearing. OFFICE OF THE VICE PRESIDENT OF STUDENT LIFE, W. VA. UNIV., STUDENT CONDUCT CODE AND DISCIPLINE PROCEDURE FOR THE MAIN CAMPUS OF WEST VIRGINIA UNIVERSITY § 9.10 (2015) [hereinafter W. VA. UNIV., STUDENT CONDUCT CODE AND DISCIPLINE PROCEDURE], <http://eberly.wvu.edu/files/d/6fb93b3a-e81c-4aee-9b56-ab92fc88356f/student-code-of-conduct.pdf>. At the University of North Carolina, a respondent may be fully represented by an attorney or non-attorney advocate at any stage of the investigation or hearing. See *FAQs*, UNC EQUAL OPPORTUNITY & COMPLIANCE OFF., <http://eoc.unc.edu/resources/faqs/> (last visited Mar. 2, 2017). But at the University of California campuses, respondents may appear with both an advisor (who may be private counsel) and a support person at a hearing appealing an investigation finding, but counsel cannot actively participate in the hearing. See UNIV. OF CAL., PROCEDURES FOR IMPLEMENTATION OF THE STUDENT ADJUDICATION MODEL 2 (2015) [hereinafter UNIV. OF CAL. PROCEDURES FOR IMPLEMENTATION], http://sexualviolence.universityofcalifornia.edu/files/documents/UC-Student-Adjudication-Model-with-flow-chart_011216.pdf.

220. See *Campus Sexual Assault and Sexual Harassment*, ZALKIND DUNCAN & BERNSTEIN LLP, <http://www.zalkindlaw.com/campus-sexual-assault-and-sexual-harassment.html> (last visited Mar. 2, 2017) (advertising representation of students accused of sexual assault); Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), <http://www.nytimes.com/2014/>

are often the only lawyers participating in the process, because colleges often do not use lawyers as investigators or hearing officers and victims rarely have legal representation.²²¹ The increased use of private counsel by respondents and the pressure they place on colleges through both actual lawsuits and threats of lawsuits leaves student victims without a voice.²²² Victims' attorneys can help fill this void. The OCR Dear Colleague Letter advised colleges to provide reciprocal rights and protections for students filing complaints of sexual misconduct, including the right to be represented or advised by counsel.²²³ So as states and colleges increase the due process rights of respondents in sexual misconduct cases, they must also provide parallel rights to student victims to be represented by counsel.²²⁴

The OCR Dear Colleague Letter specifies that victims and respondents "must have an equal opportunity to present relevant witnesses and other evidence."²²⁵ Regardless of their role as an attorney or advocate, victims' attorneys can help student victims plan for a hearing by providing

11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html?_r=1 (describing a growing group of attorneys representing students accused of sexual assault in campus disciplinary hearings).

221. See Reardon, *supra* note 91, at 407–08.

222. See Kaminer, *supra* note 220.

223. "While the OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally." DEAR COLLEAGUE LETTER, *supra* note 46.

224. Even in cases in which a respondent is not represented by an attorney, the power dynamic between sexual assault victims and their assailants leaves victims at a significant disadvantage under systems in which victims are expected to present their own cases, question respondents directly, and respond to questioning from respondents. See Reardon, *supra* note 91, at 411–12 (describing a common campus practice requiring a victim to both question and respond to questions by her assailant and questioning whether this practice comports with the "basic fairness" requirement set forth by the court for how colleges should treat students).

225. DEAR COLLEAGUE LETTER, *supra* note 46, at 11–12 ("The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement.").

them with information about their college's specific process and assisting them with the preparation of testimony and evidence.²²⁶ Victims' attorneys can brainstorm with victims about possible exhibits and witnesses, including "experts" who can explain the impact of trauma on victim behavior.²²⁷ Victims' attorneys can also aid victims in preparing responses to questioning by respondent's counsel, the respondent (through written submissions), and the hearing panel in a forum that generally uses no rules of evidence nor formal objections.²²⁸ Victims' attorneys can inform student victims about the type of questions they can expect and can remind them that they do not have to answer every question (the same advice generally provided to respondents by their attorneys).²²⁹ Victims' attorneys can further advocate for safety provisions to reduce the trauma experienced by the student victim during the hearing, such as the use of video-conferencing or a screen to separate the victim from the respondent.²³⁰ They can also make a clear statement opposing the inclusion of irrelevant or victim-blaming testimony and advocate for a rule against direct cross-examination by the respondent.²³¹

226. See ABA, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 29 (2007), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/20110419_aba_standards_of_practice_dv.authcheckdam.pdf ("It is important for the lawyer to take adequate time to communicate effectively with the client . . . , and also to ensure that the client has a complete understanding of the legal process, remedies, and consequences.").

227. See *id.* at 25–26 (explaining that lawyers should explain the client's choices, including benefits and risks, but that it is ultimately the client's choice regarding what action to take); *id.* at 33 ("The lawyer should consider whether using an expert witness would be beneficial to the client's case in order to provide the court with more information regarding specific topics such as . . . sexual assault or stalking, . . . [and] the effects of trauma . . .").

228. See *id.* at 39 ("The lawyer should prepare for and attend all hearings with the client . . .").

229. See *id.* at 33 ("Witnesses should be thoroughly prepared for cross-examination.").

230. See *id.* at 39 ("The lawyer should seek to ensure that the courtroom is safe for the client and lawyer . . .").

231. "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment." DEAR COLLEAGUE LETTER, *supra* note 46; see also Reardon, *supra* note 91, at 412 ("[A]llowing an alleged rapist to question the victim raises additional problems" and "effectively creates an ongoing hostile environment . . .").

1. Clarifying the Standard and Violation of Student Conduct Code

Victims' attorneys, through direct participation or through hearing preparation for victims, can help amplify the victim's voice in the proceeding by focusing the hearing panel's attention on the correct standard to be applied and responding to narratives relying on rape myths. Although campus hearings on sexual misconduct are supposed to decide student responsibility using a preponderance of the evidence standard, hearing panelists who instinctively associate sexual assault with the criminal legal system often mistakenly employ a higher standard and participating defense attorneys use this mistake to their advantage by discussing reasonable doubt.²³² Similarly, in cases in which victims reported to law enforcement, respondents and their attorneys may point to a prosecutor's decision not to proceed with charges as having some bearing on the campus administrative hearing.²³³ Respondents and their attorneys also argue that campus sexual assault cases are all really "he said, she said"²³⁴ conflicts too difficult for anyone other than the two parties involved to determine the truth, essentially encouraging hearing panels to abdicate their job of considering the evidence before them and making a decision.²³⁵ On behalf of victims, victims' attorneys can emphasize the accurate standard of proof.²³⁶

Similarly, respondents and their attorneys may try to employ a criminal

232. For a discussion defending the preponderance of the proof standard in sexual assault campus disciplinary hearings, see BAKER ET AL., TITLE IX & PREPONDERANCE OF THE EVIDENCE, *supra* note 102, *passim* (defending the use of the preponderance standard in campus adjudicatory proceedings); Rosenfeld, *Uncomfortable Conversations*, *supra* note 1, at 367 (addressing critics of the preponderance standard by stating that "we must weigh these potentialities against the harms to the student reporting that she had been raped—and the consequent costs of systematic underenforcement"); Amy Chmielewski, Comment, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 144, 151 (explaining how Title IX jurisprudence and interpretation developed to be consistent with Title VII, which prevents sex discrimination in employment).

233. See cases cited *supra* note 61 (discussing cases in which prosecutors did not proceed with charges).

234. Although this is the common saying, it is important to again note that not all of the sexual misconduct cases involve a woman as a victim and a man as a perpetrator, and that research indicates that male victims of sexual misconduct have even lower rates of reporting than female victims. See sources cited *supra* note 88.

235. See, e.g., *Ex Parte* Application for Stay of Admin. Sanctions, *Doe v. Occidental Coll.*, *supra* note 56, at 1.

236. The preponderance of evidence standard is also utilized in civil cases involving sexual assault. DEAR COLLEAGUE LETTER, *supra* note 46, at 10.

definition of sexual misconduct that may not accurately reflect the specific student code violation alleged in the complaint at issue in the hearing.²³⁷ College student handbooks defining sexual misconduct (or “nonconsensual sex”) vary greatly.²³⁸ Some use a standard similar to criminal law, with an objective inquiry into whether or not the assailant utilized force and whether the victim indicated her or his lack of consent through resistance or incapacity.²³⁹ Yet, an estimated 1,400 colleges and universities, including all of those within the California and New York state systems, utilize an “affirmative consent” standard (i.e., “yes means yes”) in which neither a lack of protest or resistance nor silence means consent.²⁴⁰ Affirmative consent standards are particularly challenging to adjudicators socialized with a criminal definition of sexual assault, and respondents may exploit that confusion.²⁴¹ As such, victims’ attorneys fill a crucial role in explaining and insisting on the use of the actual definition of sexual misconduct found in the student code the respondent is accused of violating.

Even when a college has a clear definition of consent outlined within its code of student conduct, respondents and respondents’ counsel (and even college hearing officers or investigators) often confuse the definition. One example of this manifestation is the theory of transferred consent, in which the respondent implies that a victim’s consent to one activity, such as a kiss

237. See, e.g., *Ex Parte* Application of Stay of Admin. Sanctions, *Doe v. USC*, *supra* note 59, at 2 (inaccurately stating that the University of Southern California made a finding of “responsibility for the *criminal* acts of rape and sexual assault, and of sexual misconduct” (emphasis added), when the university actually made a finding that the respondent violated a student conduct code section on sexual misconduct).

238. See Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (July 28, 2015), <http://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html> (“Colleges and universities have been scurrying to amend codes of conduct to refine definitions of consent.”).

239. See Rosenfeld, *Uncomfortable Conversations*, *supra* note 1, at 363.

240. Keenan, *supra* note 238. For a discussion of the affirmative consent standard, see Rosenfeld, *Uncomfortable Conversations*, *supra* note 1, at 363 (criticizing the current standard used in criminal codes because it “treats women as always wanting sex unless otherwise clearly and unmistakably indicated” and explaining that while the most sensible approach is the “affirmative consent” principle, “[b]etter still would be a standard of wanted sex in the context of a world in which the threat of male sexual violence does not constrain women’s sexual choices”); see also CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 242–47 (2005).

241. See Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?_r=0.

or entering a respondent's room, should be considered consent to another, such as sexual intercourse.²⁴² It points to flirtatious texts exchanged prior to the assault as evidence that a victim pre-consented to sexual activity, rather than as evidence of only her intent or desire at the time of the text.²⁴³ It further suggests that once a victim consents to any sexual activity she loses her right not to consent to any and all further sexual acts, completely ignoring the victim's sexual autonomy and purposely obscuring the reason for the hearing and the actual question to be determined: Did the respondent violate the student conduct code by committing a specific sexual act without the other party's consent?²⁴⁴

Another example occurs when respondents and respondents' attorneys blur the issue of consent by discussing victims' behavior with other parties (i.e., "slut-shaming").²⁴⁵ With no rules of evidence, there is no official rape shield law to block colleges from considering irrelevant information about a victim's sexual history.²⁴⁶ In this victim-blaming narrative, respondents and their attorneys are allowed to imply that the existence of other sexual partners or even flirtation with other parties makes it more likely that a

242. See Complaint, *Doe v. Brown Univ.*, *supra* note 47, at 3 (implying that public displays of affection prior to the sexual assault were evidence that the accuser consented to later sexual activity).

243. See, e.g., Second Amended Civil Action Complaint at 3–13, *Harris v. Saint Joseph's Univ.*, No. 2:13-cv-03937-LFR (E.D. Pa. May 27, 2014) [hereinafter Second Amended Civil Action Complaint, *Harris v. St. Joseph's Univ.*] (arguing that "plain meaning of the text messages" exchanged between the victim and respondent about visiting a dorm room to "cuddle" several hours before assault was definitive evidence of consent).

244. See, e.g., Complaint, *Doe v. Brown Univ.*, *supra* note 47, at 2 (implying that Jane Doe's text to her friends, stating that she might be about to "hook up" with John Doe, constitutes consent). For example, an Associate Dean of Students at UNC reported that sexual assault victims were routinely asked inappropriate questions by members of an honor board, and that the board judged that "because [students] had past consensual sex with that individual, there was consent and therefore no assault." Kingkade, *UNC Routinely Violates Survivor Rights*, *supra* note 39.

245. See Sabrina Nelson, *Slut-Shaming and Rape Culture*, HUFFINGTON POST: THE BLOG (May 15, 2013, 1:12 PM), http://www.huffingtonpost.com/sabrina-nelson/rape-culture_b_3279668.html.

246. BRETT A. SOKOLOW, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT., *THE RULES OF EVIDENCE IN CAMPUS JUDICIAL HEARINGS* 6 (2000), <http://www.ncherm.org/pdfs/rulesofevid.pdf>; Allie Grasgreen, *Wrong People on Trial?*, INSIDE HIGHER ED (June 7, 2011), http://www.insidehighered.com/news/2011/06/07/women_raise_questions_about_university_judicial_hearings_under_title_ix (noting rape shield laws often apply to colleges and universities but are not followed in disciplinary hearings).

victim consented to the particular sexual activity detailed in the complaint with the respondent. The narrative suggests that if a student consented to have sex with one or more partners at any point in the past, then she would clearly consent to having sex with any and all partners at any time, ignoring all common sense to the contrary. A derivative of this narrative suggests that if a student contemplated sexual activity by taking birth control or carrying condoms, that was a sign of consent for any and all sexual activity with anyone.²⁴⁷

Respondents and respondents' attorneys also employ the torts concept of assumption of risk to obscure the actual question at issue in sexual misconduct hearings.²⁴⁸ This subtle narrative implies that if a victim engaged in behavior society deems to be risky, she should accept the repercussions of said behavior.²⁴⁹ Continuing a long history of victim-blaming, this narrative focuses on the victim's behavior, rather than the respondent's behavior, and implies that some activities (e.g., consuming alcohol, attending fraternity parties, visiting bars, wearing particular clothing, etc.) carry an inherent risk of sexual assault.²⁵⁰ So, just as a BASE jumper should accept a reasonable risk of injury by participating in a risky activity, women on college campuses should assume a similar responsibility of risk for participating in the basic activities many associate with college social life. And just as students should learn that a hangover may be a natural result of consuming alcohol, female students should learn that sexual assaults are another natural and expected result of consuming alcohol, casting the role of college men as animals or natural disasters without agency or culpability. This narrative twists information about sexual assault risk reduction education on college

247. See Kingkade, *KU Considered Community Service*, *supra* note 69 (stating respondent argued through an appeal that the complainant's "decision to bring and subsequently take her birth control pill provides at least some indication that she intended to have consensual sex that night").

248. See Emily Yoffe, *College Women: Stop Getting Drunk*, SLATE (Oct. 15, 2013), http://www.slate.com/articles/double_x/doublex/2013/10/sexual_assault_and_drinking_teach_women_the_connection.html (noting men often justify their behavior by the fact that they were drinking).

249. See *id.*

250. This narrative attempts to confuse discussions of risk reduction with culpability. Most student victims of sexual assault were intoxicated at the time they were sexually assaulted, whether the victim was incapacitated by alcohol or drugs or more vulnerable to a forcible rape (or both). See Christopher P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639, 647 (2009).

campuses into another reason to blame victims.²⁵¹

Another narrative used in campus hearings attempts to diminish the responsibility of the respondent, or even claim the respondent is the real victim, by stating that both parties were drinking alcohol or that both parties are equally responsible for participating in nonconsensual sex.²⁵² This misdirection purportedly calls for gender equality and implies that the sexual assault was a mere lack of communication, ignoring current research on campus serial rapists (or “target rapists”)²⁵³ who deliberately use alcohol as a tool to incapacitate victims to sexually assault them as part of a continuum of instrumental violence.²⁵⁴ Further, they mistakenly label a campus Greek scene, sports culture, or bar scene as an alcohol-infused, sexualized culture while ignoring or dismissing an underlying misogynistic or hypermasculine culture in which men teach each other that they are entitled to women’s bodies.²⁵⁵ They also seek to confuse rates of consensual sex with rates of

251. For example, Emily Yoffe wrote that “in one awful high-profile case after another . . . we read about a young woman, sometimes only a girl, who goes to a party and ends up being raped,” insinuating that “being raped” is something that women do to themselves. Yoffe, *supra* note 248. She further complained that “we are failing to let women know that when they render themselves defenseless, terrible things can be done to them,” again using a passive voice to omit rapists from the sentence and absolve any agency or responsibility for their actions. *Id.*

252. *E.g.*, Complaint & Jury Demand at 7, *Doe v. Amherst Coll.*, No. 3:15-cv-30097 (D. Mass. May 29, 2015) [hereinafter Complaint & Jury Demand, *Doe v. Amherst Coll.*] (“John Doe had a sexual encounter with a female classmate . . . after he had been drinking to the point of incapacitation. . . . [The complainant] led (and virtually carried) the plaintiff back to their room late that evening.”). James Taranto, a *Wall Street Journal* editor, also trumpeted this theory that men and women should be equally responsible for sexual assault if they are both intoxicated. Philip Bump, *James Taranto Will Tell You When You’ve Been Raped, Ladies*, ATLANTIC (Feb. 11, 2014), <https://www.theatlantic.com/politics/archive/2014/02/james-taranto-will-tell-you-when-youve-been-raped-ladies/357953/>.

253. Rosenfeld, *Uncomfortable Conversations*, *supra* note 1, *passim* (coining the term *target rape* to describe campus rapists who target new students and use alcohol or drugs to accomplish their crime).

254. *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78, 81 (2002) (finding that most of the self-reported student rapists in their sample, 63.3 percent, admitted to committing more than one rape—an average of 5.8 rapes per repeat rapist); *see also* David Lisak, *Understanding the Predatory Nature of Sexual Violence*, SEXUAL ASSAULT REPORT, Mar./Apr. 2011, at 49, 56 (explaining that campus rapists employ “instrumental” violence such as intoxication, coercion, or just enough physical force to overwhelming a victim without causing substantial physical injury).

255. *See* Rosenfeld, *Uncomfortable Conversations*, *supra* note 1, at 378.

sexual violence, incorrectly assuming they must coexist on college campuses in an ambiguous “hookup culture,”²⁵⁶ or they lament that requiring young men to obtain consent prior to sexual activity is an intolerable breach of their rights as college students, making it too difficult for them to engage in sexual activity.²⁵⁷

A newer narrative employed by respondents and their attorneys paints the respondent as a scapegoat or a victim of sexism. This narrative seeks to move the hearing about an individual accused of sexual misconduct to a broader discussion of campus sexual assault. It points to a college’s negative press about its response to campus sexual assault or a current investigation by OCR to suggest that a disciplinary decision against the individual respondent would be the result of pressure on the college rather than a fair decision.²⁵⁸ It suggests that schools are implementing a gender bias mandate against men.²⁵⁹ It seeks to change the discussion of whether or not a respondent is responsible for a student code violation to a broader discussion about why college sexual assault cases should be decided in criminal court,

256. George F. Will, Opinion, *Colleges Become the Victims of Progressivism*, WASH. POST (June 6, 2014), https://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a_story.html (connecting high reporting rates of campus sexual assault with “ambiguities of the hookup culture, this cocktail of hormones, alcohol and the faux sophistication of today’s prolonged adolescence of especially privileged young adults”).

257. See Bill Chappell, *California Enacts ‘Yes Means Yes’ Law, Defining Sexual Consent*, NPR (Sept. 29, 2015), <http://www.npr.org/sections/thetwo-way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent>.

258. *E.g.*, Complaint & Jury Demand, *Doe v. Amherst Coll.*, *supra* note 252, at 1 (“The disciplinary action was undertaken during a period of relentless and well-publicized accusations against Amherst for failing to protect female students from sexual assault, and while the College was under intense pressure to demonstrate that it was now willing and capable of prosecuting sexual assailants.”); Complaint, *Doe v. Reed Inst.*, *supra* note 64, ¶ 9, 2015 WL 1669634, at ¶ 9 (“Reed—concerned by years of reports criticizing the school for its permissive culture and purportedly weak sexual assault policies—responded to Jane’s accusations with a series of arbitrary, discriminatory, and illegal actions directed toward a predetermined outcome: John’s expulsion from Reed.”); Verified Complaint, *Doe v. Washington & Lee Univ.*, *supra* note 47, at 20 (suggesting that a *Rolling Stones* article about sexual assault at the University of Virginia, published the day before a campus disciplinary hearing, pressured another college in the state to punish a male student for sexual misconduct).

259. See, *e.g.*, Complaint, *Doe v. Reed Inst.*, *supra* note 64, ¶ 20, 2015 WL 1669634, at ¶ 20 (“Reed applies its policies and procedures in a discriminatory manner to male students because of gender.”); Second Amended Civil Action Complaint, *Harris v. St. Joseph’s Univ.*, *supra* note 243, at 13, 14.

how the campus is ill-equipped to make such decisions, or why respondents should be entitled to more due process safeguards.²⁶⁰ These arguments serve to distract the hearing officers from their task at hand: to determine whether or not a student violated the student code of conduct by committing sexual misconduct.²⁶¹

Victims' attorneys participating in hearings as attorneys or advocates can help hearing panels focus on the precise violation of the student conduct code and the applicable standard of persuasion, thus reducing the experience of second rape for students participating in the hearing.²⁶² They can respond to narratives seeking to quiet the victims' voices and attempting to deflect from the sexual assault by refocusing the hearing and reminding the hearing officers of their obligations under Title IX.²⁶³

2. Combatting Rape Myths

A recent survey conducted by the U.S. Senate found that more than 30 percent of four-year institutions "failed to provide training regarding 'rape myths' to the [adjudicators of] sexual assault claims."²⁶⁴ This means that in

260. *E.g.*, Complaint, *Doe v. Reed Inst.*, *supra* note 64, ¶ 19, 2015 WL 1669634, at ¶ 19 ("Reed's policies and procedures do not permit students accused of sexual misconduct to obtain fair hearings before competent or impartial tribunal . . ."); *see supra* text accompanying note 82.

It is important to note that the criminal justice system takes a lot longer, uses a different standard, and has a different goal—as it is not a civil rights statute meant to protect women from hostile education environments that impact their ability to receive an education from a school that utilizes federal government funds. *See, e.g.*, BAKER ET AL., TITLE IX & PREPONDERANCE OF THE EVIDENCE, *supra* note 102, at 5, 6 (discussing the differences between criminal law and utilizing Title IX in the education context). In addition, there are well-documented critiques of the criminal justice system's response to victims of sexual assault, particularly victims raped by non-strangers. *See supra* notes 27–29.

261. *See, e.g.*, BAKER ET AL., TITLE IX & PREPONDERANCE OF THE EVIDENCE, *supra* note 102 (discussing the goal of campus disciplinary systems and how that goal gets complicated with thinking of other standards).

262. *See, e.g.*, Garvin & Beloof, *supra* note 146, at 85–86 (discussing need for independent victims' attorneys).

263. *See* BAKER ET AL., TITLE IX & PREPONDERANCE OF THE EVIDENCE, *supra* note 102, at 8 (discussing potential for victims' voices to be drowned out).

264. SEXUAL VIOLENCE ON CAMPUS, *supra* note 97, at 2 ("More than 30 [percent] of institutions in the national sample failed to provide training regarding 'rape myths' to the persons who adjudicate sexual assault claims. More than 40 [percent] of the nation's largest public schools allow students to help adjudicate sexual assault cases. More than 20 [percent] of institutions in the national sample give the athletic department oversight

addition to providing statements, evidence, and witnesses, student victims may need to combat rape myths during campus adjudicatory hearings. Attorneys experienced in the role of representing victims will be able to assist in this endeavor, or at least help prepare student victims at the colleges in which attorneys are barred from participation.

Rape myths are common in campus disciplinary hearings, and the lack of formal rules of evidence may provide respondents with an opportunity to ask irrelevant questions or make arguments based largely on rape myths.²⁶⁵ The inclusion of rape myths in campus disciplinary hearings is particularly damaging to student victims and exacerbates their trauma. Victims' attorneys can prepare student victims for these lines of questioning, explain students' rights to refrain from answering irrelevant or offensive questions, provide evidence and witnesses to counter rape myths, and make arguments or assist student victims in preparing their own arguments to respond to rape myths during hearings.

Myths focused on motivations of women to lie about being raped include the narrative that women are vengeful by nature and make false accusations of rape when they regret consensual sex, when a man does not reciprocate an interest in beginning a romantic relationship after consensual sex, or as a vindictive act following a breakup.²⁶⁶ It ignores research on the low rates of false reports²⁶⁷ and relies instead on sexist tropes (e.g., "hell hath no fury"). A related trope capitalizing on not just the victim's gender, but young age as well, is that of the melodramatic or "attention-seeking" victim who lies about a sexual assault in order to obtain support from advocates or to seek the spotlight. This rape myth was recently promoted by George Will in a column in which he suggested that colleges confer privilege to victims, making victimhood "a coveted status."²⁶⁸ Another common narrative

of sexual violence cases involving student athletes.").

265. From working with student victims of sexual assault, the Author has witnessed or heard from victims about the types of rape myths that were used in hearings against their perpetrators. These same myths can be located in complaints filed in federal and state courts by students found responsible for sexual misconduct against their schools. *See supra* notes 48–56. They can also be located within the national debate about campus sexual assault.

266. *See* cases cited *supra* note 64.

267. *False Reporting*, NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2012), http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf.

268. Will, *supra* note 256. The column suggested that the Obama Administration was teaching colleges and universities "that when they make victimhood a coveted status that

attacking the motivation of women accusing students of sexual assault is the idea that they file complaints in an attempt to avoid college charges against them for infractions of the student conduct code, such as underage drinking.²⁶⁹

A harmful rape myth that often appears in college disciplinary hearings is that of the “perfect victim,” promoting the idea that real victims of sexual assault respond to trauma in one uniform manner.²⁷⁰ Victims’ attorneys can be especially helpful in providing updated science that contradicts common misunderstandings about the various ways victims respond to the trauma of rape. More specifically, victims’ attorneys can explain why most victims delay reporting or decide against reporting to law enforcement, initially question whether or not they were sexually assaulted or blame themselves, present a demeanor that seems contrary to traditional notions about how victims should act following a sexual assault, communicate with a perpetrator following an assault, fail to fight or escape a sexual assault, or initially present an incomplete timeline.²⁷¹ Sharing current research on the neurobiology of trauma may help educate hearing panels and reduce the trauma experienced by student victims by validating their experiences.²⁷²

Respondents and their attorneys may diminish the seriousness of campus sexual assaults, as well as the culpability of respondents, by arguing that “real” rape is perpetrated by strangers and results in significant injury to victims.²⁷³ They inaccurately imply rape kits are like pregnancy tests, offering a positive or negative result.²⁷⁴ Respondents and their attorneys

confers privileges, victims proliferate.” *Id.*

269. See DEAR COLLEAGUE LETTER, *supra* note 46, at 15 (“Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved. As a result, schools should consider whether their disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses.”).

270. See Alanna Vagianos, *Judge Dispels the Myth of the ‘Perfect’ Rape Victim in Powerful Verdict*, HUFFINGTON POST (July 25, 2016), http://www.huffingtonpost.com/entry/marvin-zuker-dispels-myth-of-perfect-rape-victim-in-verdict_us_579612f1e4b02d5d5ed22235 (noting defendant’s attempts to tear apart the victim’s story and victim-blame only perpetuated the problem).

271. See LONSWAY & ARCHAMBAULT, *supra* note 5, at 4, 6, 7–8, 10–11, 14, 33 (discussing common victims responses to sexual assault).

272. See *id.* at 32 (noting responses of doubt by first responders is associated with higher level of trauma for victims).

273. See *id.* at 14–15.

274. See, e.g., Plaintiff’s First Amended Complaint, *Henry v. Del. State Univ.*, *supra*

employ new terms, such as “grape” (i.e., “gray rape”) to suggest that college students sexually assaulted by other college students do not suffer trauma because they knew their perpetrator or because he is a good student or otherwise upstanding member of the campus community.²⁷⁵ They ignore research suggesting that most perpetrators know their victims and employ only as much force as is necessary to accomplish the sexual assault, as well as voluminous research indicating that student victims of sexual assault experience trauma and harm from the assault.²⁷⁶

Even when narratives attempting to diminish the seriousness of an assault are not successful in swaying a hearing panel away from finding a respondent responsible, they may impact sanctions. Less than one-third of respondents found responsible for sexual misconduct are expelled.²⁷⁷ Media reports provide anecdotal evidence detailing cases in which respondents found responsible for sexual misconduct were sanctioned with reflection papers, community service, counseling, short suspensions, and even suspension after graduation.²⁷⁸

Student victims should not be expected to educate campus adjudicators about sexual assault nor explain common responses to trauma. They should not be responsible for dismantling rape myths and destructive narratives developed over decades. The inclusion of defense counsel for respondents in campus adjudicatory investigations and hearings is becoming increasingly common, and those attorneys will continue to represent and counsel their clients to the best of their abilities.²⁷⁹ Student victims need access to quality victims' attorneys to ensure that their voice is heard and to enforce their rights throughout the adjudicatory process, whether through direct

note 62, at 2 (“Upon information and belief, a ‘rape kit’ performed on Tucker recorded negative results.”). It is important to note that many sexual assaults do not cause physical injuries identified in SAFEs because perpetrators tend to use the least amount of force necessary to complete a sexual assault. *See* Lisak, *supra* note 254, at 49–50.

275. Sewell Chan, ‘Gray Rape’: A New Form of Date Rape?, N.Y. TIMES: BLOG (Oct. 15, 2007, 4:00 PM), <https://cityroom.blogs.nytimes.com/2007/10/15/gray-rape-a-new-form-of-date-rape/>.

276. *See* Lisak & Miller, *supra* note 254, at 81; *see also* Smith & Freyd, *supra* note 98, at 122–23 (discussing trauma experienced by student victims).

277. *See* Kingkade, *Fewer than One-Third of Cases Result in Expulsion*, *supra* note 97; SEXUAL VIOLENCE ON CAMPUS, *supra* note 97, at 1–2 (discussing universities’ failures “to comply with the law and best practices in how they handle sexual violence among students”).

278. *See* sources cited *supra* note 69.

279. *See* sources cited *supra* note 220.

representation or ongoing legal counseling.

D. Stage Four: Legal Representation for Campus Appeals and Civil Lawsuits

With increasing regularity, college investigation findings or hearing decisions do not end the campus adjudicatory process. Respondents file appeals, and college administrators may overturn findings, modify sanctions, or order new hearings.²⁸⁰ Respondents file civil lawsuits in state or federal court, seeking injunctions against school sanctions or asking the court to reinstate the respondent.²⁸¹ Respondents also engage in retaliatory behavior through litigation that impacts victim privacy and safety.²⁸² In all of these events, victims would benefit from access to legal counsel.

1. Responding to Appeals

After participating in a campus investigation or hearing that results in a finding that a respondent is responsible for at least one violation of a student conduct code, victims are often led to believe that the campus process is over. Nonetheless, colleges generally offer some kind of appellate process which respondents often utilize.²⁸³ Depending on the school procedures, victims may or may not have an opportunity to respond to a respondent's appeal.²⁸⁴ Compounding the challenges faced by student victims when responding to an appeal is the short time frame often established by their colleges. At some schools, student victims only have a

280. See *Student Sexual Misconduct Procedures*, BOS. U. (2015), <http://www.bu.edu/safety/sexual-misconduct/title-ix-bu-policies/student-sexual-misconduct-procedures/>.

281. See, e.g., Plaintiff's First Amended Complaint, *Henry v. Del. State Univ.*, *supra* note 62, at 19–20.

282. The use of the legal system to retaliate against victims who report sexual assaults or acts of domestic violence is not limited to college students. See Herman, *Justice from the Victim's Perspective*, *supra* note 125, at 574.

283. See, e.g., Declaration of Donald Dudley in Support of Respondents' Opposition to Petitioner's Ex Parte Application for Stay of Dismissal at 5, *Doe v. Blandizzi*, No. BS159744 (Super. Ct. Cal. Jan. 12, 2016) [hereinafter Declaration of Donald Dudley, *Doe v. Blandizzi*] (detailing respondent's appeal of a college finding of sexual misconduct that resulted in a modification of his sanction, followed by the complainant's appeal of the modification resulting in the return to the original sanction).

284. See *Misconduct Review Process*, GRAND VALLEY ST. U. <http://www.gvsu.edu/rsobook/misconduct-review-process-5.htm> (last modified Jan. 9, 2017) (noting the other party does not have the right to respond to the appeal); *Student Sexual Misconduct Procedures*, *supra* note 280 (allowing both parties to be heard on appeal).

week or two to respond to an appeal.²⁸⁵ When respondents' appeals are successful, victims may be forced to endure a second hearing,²⁸⁶ and sanctions may be deferred pending the new hearing, placing the respondent back on campus with the victim in the interim.²⁸⁷ Respondent appeals, particularly those drafted by lawyers, often set the grounds for future litigation. Student victims without access to counsel are placed at a significant disadvantage, not just in the college appellate process but in any future litigation, if they lose the opportunity to supplement the record and file a response to the internal appeal.

2. *Filing Appeals*

Victims and respondents have reciprocal rights to utilize the appellate process established at their colleges.²⁸⁸ Although some appellate procedures are simple and allow broad grounds, others require specific grounds for appeals and references to the hearing record.²⁸⁹ Some colleges specifically

285. For example, under the new procedures implemented by the University of California system, complainants and respondents must submit an appeal, in writing, within 10 business days of the notice of decision and disciplinary sanctions in order to request a hearing. UNIV. OF CAL. PROCEDURES FOR IMPLEMENTATION, *supra* note 219, at 6. If the decision or sanctions are changed following the hearing, the complainant or respondent must submit a written appeal within five business days. *Id.* at 12. Complainants and respondents at Marquette University must submit an appeal within five working days of written notification. *Student Conduct Code - Student Conduct Procedures*, MARQ. U., http://www.marquette.edu/osd/policies/conduct/conduct_procedures.shtml (last visited Mar. 12, 2017). Students have five days at West Virginia University. W. VA. UNIV., STUDENT CONDUCT CODE AND DISCIPLINE PROCEDURE, *supra* note 219, § 10.1. Students have 14 days to file an appeal at University of New Mexico. *Student Complaints and Grievances*, U.N.M., <http://online.unm.edu/student/complaint.html> (last visited Mar. 3, 2017). Students have five days at Trinity University. *Appeal Process for Conduct and Title IX Cases*, TRINITY U., <https://inside.trinity.edu/dean-students/student-conduct/appeals> (last reviewed Aug. 2016).

286. *E.g.*, *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 595 (S.D. Ohio 2016) (describing two students at the University of Cincinnati found responsible for sexual misconduct whose internal appeals were sustained and new campus hearings were granted).

287. Second Amended Civil Action Complaint, *Harris v. St. Joseph's Univ.*, *supra* note 243, at 12; *Lamb*, *supra* note 35 (describing how the respondent was allowed to remain on campus while the appeal was being considered following his sanction of a one-year suspension).

288. "If a school provides for appeal of the findings or remedy, it must do so for both parties." DEAR COLLEAGUE LETTER, *supra* note 46.

289. Compare UNIV. OF CAL. PROCEDURES FOR IMPLEMENTATION, *supra* note 219, at 8 (listing four options as grounds for appeal), with *Appeal Criteria & Submissions*,

limit the scope of any new hearing to the grounds listed in the appeal.²⁹⁰ When victims choose to appeal a hearing decision or sanctions, victims' attorneys can assist them with their review of the administrative records and translate their concerns and objections into applicable grounds to increase their chances of a successful appeal.

3. Respondent Lawsuits

Students found responsible for sexual misconduct are increasingly turning to state and federal courts, and a handful of attorneys now specialize in filing such lawsuits.²⁹¹ There can be very serious repercussions for student victims stemming from civil lawsuits. When courts issue emergency stays or injunctions preventing a college from implementing interim measures for victims or sanctions against respondents,²⁹² or reverse a college finding or sanction,²⁹³ student victims who already survived the campus investigation and adjudicatory process find themselves back at the beginning.²⁹⁴ Even

GEO. WASH. U., <https://studentconduct.gwu.edu/appeal-criteria-submissions> (last visited Mar. 31, 2017) (allowing only new evidence to be a ground for an appeal).

290. See UNIV. OF CAL. PROCEDURES FOR IMPLEMENTATION, *supra* note 219, at 8–9.

291. See Kaminer, *supra* note 220.

292. *E.g.*, Doe v. Penn. State Univ., No. 4:15-cv-02072-MWB, slip op. at 3 (M.D. Pa. Oct. 28, 2015) (granting plaintiff's motion for an emergency temporary restraining order enjoining Penn State from enforcing its suspension of a student it found responsible for sexual misconduct); Doe v. Middlebury Coll., No. 1:15-cv-192-jgm, slip op. at 9 (D. Vt. Sept. 16, 2015) (granting plaintiff's request for an emergency injunction against Middlebury College, ordering the school not to expel plaintiff following its determination that he committed sexual misconduct, and ordering the school to reinstate him pending the outcome of the federal case); King v. DePauw Univ., No. 2:14-cv-70-WTL-DEL, slip op. at 27 (S.D. Ind. Aug. 22, 2014) (granting an injunction ordering DePauw University to reinstate a student suspended for two semesters during the pendency of his federal lawsuit against the university).

293. *E.g.*, Doe v. Regents of the Univ. of Cal. San Diego, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at *5 (Cal. Super. Ct. July 10, 2015) (granting the petitioner's writ of mandamus and ordering University of California, San Diego to set aside its findings and sanctions issued against petitioner when it found him responsible for sexual misconduct); see also Janel Davis & Shannon McCaffrey, *Wrongly Accused of Rape? Students Question Their Expulsions from Tech*, ATLANTA J.-CONST. (Jan. 16, 2016), <http://www.myajc.com/news/local/wrongly-accused-rape-students-question-their-expulsions-from-tech/BBvnT55EBWtaCHbhunSxON/> (reporting that Georgia Tech was recently ordered by its board of regents to reinstate a student following the school's decision to expel him for nonconsensual sexual intercourse).

294. See *King*, slip op. at 17 (quoting *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013)) (noting the district court must determine if the

unsuccessful lawsuits can drag out for well over a year, prolonging a traumatic process for victims.²⁹⁵

Lawsuits often create local or national media attention, usually reporting the facts found in the respondent's complaint, even when a campus adjudicatory panel made contradictory findings.²⁹⁶ This means a victim of sexual assault may see news accounts referring to her as a liar and listing the purported motive for her false allegations.²⁹⁷ Perhaps even more harmful, a

accused is likely to succeed on the merits).

295. See, e.g., Declaration of Donald Dudley, *Doe v. Blandizzi*, *supra* note 283, 1, 2, 4–5 (detailing how a sexual assault reported on April 22, 2010—to which the respondent pled no contest in criminal court to felony sexual battery and felony dissuading a witness on April 19, 2011—was the subject of college hearings on January 27, 2015, March 4, 2015, and May 8, 2015; another appeal on July 20, 2015; and a state lawsuit filed against the University of California in 2016—more than five years after the sexual assault).

296. Compare Defendant Jane Doe's Answer to Plaintiff's First Amendment Complaint and Affirmative Defenses at 2, *Doe v. Reed Inst.*, No. 3:15-cv-00617-MO (D. Or. May 15, 2015) [hereinafter *Dendant Jane Doe's Answer, Doe v. Reed Inst.*] (“Despite John’s allegations to the contrary, John’s expulsion was based not only on John’s sexual misconduct, but was also based on . . . Reed’s findings that he disseminated a sexually explicit video of Jane without her consent or permission[.] . . . was a drug distributor . . . [.] . . . [and] engaged in a pattern of emotional and verbal abuse, which included threatening Jane in a series of vulgar and deplorable messages.”), with *Federal Lawsuit Accused Reed College of Gender Discrimination*, WILLAMETTE WK. (Apr. 15, 2015), <http://www.wweek.com/portland/blog-33078-federal-lawsuit-accuses-reed-college-of-gender-discrimination.html> (reporting on a respondent lawsuit that “centers on an episode of group sex in 2013 involving the plaintiff and two women . . . one of [whom], the male student’s ex-girlfriend, later claimed the sex was not consensual,” and including the respondent’s claim that “[d]espite the clear evidence that the events . . . were fully consensual, Reed expelled [Doe] anyway, and vowed to label him a rapist to anyone who might ask or to whom his transcript was released”). Compare Defendant Jane Doe’s Memorandum of Law in Support Brief in Support of Her Motion To Dismiss Plaintiff’s Amended Complaint under FED. R. CIV. P. 12(B)(6) at 1, 2, *Harris v. Saint Joseph’s Univ.*, No. 2:13-cv-03937 (E.D. Pa. Sept. 19, 2013) [hereinafter *Defendant Jane Doe’s Memorandum of Law, Harris v. St. Joseph’s Univ.*] (describing how the respondent “became more aggressive” and how she “continued to try to stop his advances,” later leaving the room and crying in the hall bathroom “because of the traumatic sexual assault she had just experienced” and how the school hearing board twice found him responsible for sexual misconduct), with *Sophia Pearson & John Lauerman, Saint Joseph’s University Sued for Bias by Accused Rapist*, BLOOMBERG (July 9, 2013), <http://www.bloomberg.com/news/articles/2013-07-09/saint-joseph-s-university-sued-for-bias-by-accused-rapist> (“Harris claims that he had consensual sex with a member of the Saint Joseph’s girls’ soccer team Texts between the two led to a late-night tryst in the girl’s dormitory on campus, where he spent the night.”).

297. E.g., Laurence Hammack, *W&L Settles Lawsuit by Student Expelled for Alleged*

victim may see media accounts describing her as a willing, even aggressive participant in her own sexual assault.²⁹⁸ Media accounts also tend to paint a sympathetic picture of respondents, highlighting their academic and athletic honors²⁹⁹ or portraying them as the real victims.³⁰⁰ The focus on the

Sexual Assault, ROANOKE TIMES (Feb. 5, 2016), http://www.roanoke.com/news/virginia/w-l-settles-lawsuit-by-student-expelled-for-alleged-sexual/article_8274f3ce-7163-5f56-a149-907807f08686.html (“[John Doe’s] lawsuit states that she never complained . . . until after he began dating another woman later in the school year.”); Ashe Schow, *Brown University Student Sues His Accuser for Defamation*, WASH. EXAMINER (Oct. 19, 2015), <http://www.washingtonexaminer.com/brown-university-student-sues-his-accuser-for-defamation/article/2574442> (“John’s lawsuit suggests that Jane made the accusation against him after he didn’t talk to her at her birthday party the next day.”).

298. E.g., Brian Maass, *CSU-Pueblo Student Sues After Suspension over ‘Consensual Sex,’* CBS DENVER (Apr. 19, 2016), <http://denver.cbslocal.com/2016/04/19/csu-pueblo-grant-neal-suspension-consensual-sex> (reporting on a lawsuit filed by a student indefinitely suspended for sexual misconduct describing the complainant “very adamant in pulling [him] close and wanting [him] to have intercourse with her”); Luanne Rife, *Student Claims He Was Expelled from W&L for Consensual Sex*, ROANOKE TIMES (Dec. 16, 2014), http://www.roanoke.com/news/education/higher_education/student-claims-he-was-expelled-from-w-l-for-consensual/article_5c28779e-a237-5e8d-b958-a1a2dad-d83f1.html (“Jane Doe . . . said that while she doesn’t usually have sex with a man when she first meets him, she found him very interesting. . . . [S]he . . . initiated kissing, took off her clothes except for her underwear and got into bed with him. . . . [S]ince Jane Doe initiated sex, she, not he, would need to obtain consent.”); Schow, *supra* note 297 (“John says Jane was an active, willing participant who ‘passionately’ kissed John’s neck, leaving a hickey. John’s lawsuit claims Jane ‘expressed her consent and pleasure’ with the sexual activity [When] John escalated the sexual touching and asked Jane: ‘Do you like this?’ . . . [she] nodded her head and said ‘yes.’”); Smith, *Some Accused of Sexual Assault*, *supra* note 81 (reporting that “a classmate invited him to her room, asked him to bring a condom, texted her girlfriends about it, gave no signs of being drunk and repeatedly indicated that she wanted to have sex” and that after they had sex she said “she had a lot of fun”).

299. See, e.g., Maass, *supra* note 298 (describing a student indefinitely suspended from Colorado State University for sexual misconduct as a “promising student-athlete” and reporting that he “was a champion high school wrestler and outstanding football player at Regis Jesuit High School before deciding to attend CSU-Pueblo” who “planned to obtain a medical degree” in order to become an orthopedic surgeon); sources cited *supra* note 79.

300. See, e.g., Kathleen Megan, *Attorney’s Tactic in Yale Sexual Misconduct Case Raises Questions*, HARTFORD COURANT (May 16, 2016), <http://www.courant.com/education/hc-montague-legal-tactics-20160516-story.html> (quoting the respondent’s attorney as claiming that his client has been “pilloried as a ‘whipping boy’ for a campus problem that has galvanized national attention” and quoting a Washington D.C. attorney as stating that the case “perfectly captures the hysterical campus climate these

respondent's life and empathy for his experiences often leave victims feeling invisible or unvalued.³⁰¹ Respondents file lawsuits not only to vindicate their own records but also to punish victims for speaking out.³⁰²

Respondent lawsuits against colleges often create privacy issues for student victims. Lawsuit filings that include confidential exhibits, such as a campus investigation report or a transcript from a campus adjudicatory hearing, may identify victims or witnesses by name or provide other identifying details.³⁰³ As a non-party to lawsuits filed against colleges, victims may not even be aware that their names or identifying information has

days[] [involving] [h]ighly ambiguous situations . . . put through an incredibly one-sided process in which the accused are presumed guilty from the start, and the results are sadly predictable"); Smith, *Some Accused of Sexual Assault*, *supra* note 81 (quoting anonymously a student suing UMass Amherst after the school found him responsible for sexual misconduct as stating, "I had some dark days . . . It's hard, you know? It hurts down to your bones," and "[r]ight from the start, they treated me like I was the scum of the earth").

301. *See, e.g., Victim Impact Statement*, OFF. DISTRICT ATT'Y, SANTA CLARA COUNTY, 2–3, 8, <https://www.sccgov.org/sites/da/newsroom/newsreleases/Documents/B-Turner%20VIS.pdf> (last visited Mar. 12, 2017) (describing in a victim impact statement for a criminal case following a campus hearing how reading the media surrounding her case made her feel: "When I read about me like this, I said, this can't be me. This can't be me. I could not digest or accept any of this information. I could not imagine my family having to read about this online. I kept reading. In the next paragraph, I read something that I will never forgive; I read that according to him, I liked it. I liked it. Again, I do not have words for these feelings. At the bottom of the article, after I learned about the graphic details of my own sexual assault, the article listed his swimming times. She was found breathing, unresponsive with her underwear six inches away from her bare stomach curled in fetal position. By the way, he's really good at swimming. Throw in my mile time if that's what we're doing. I'm good at cooking, put that in there, I think the end is where you list your extra-curricular to cancel out all of the sickening things that've happened. . . . You made me a victim. In newspapers my name was 'unconscious intoxicated woman', ten syllables, and nothing more than that. For a while, I believed that that was all I was. I had to force myself to relearn my real name, my identity. To relearn that this is not all that I am.").

302. *See, e.g., Megan*, *supra* note 300 (quoting an attorney with the Victim Rights Law Center who represents survivors of sexual assault as stating, "Perpetrators are fighting back as a way to kind of punish survivors, [and are] . . . saying you were better off when you were silent because now I'm going to go out there and just give one side of the story.").

303. *E.g., Plaintiff's Verified Complaint* at 1, *Henry v. Del. State Univ.*, No. 1:13-cv-02005-SLR (D. Del. Dec. 6, 2013) (naming the complainant in his lawsuit); *see also* Exhibit 30, *Doe v. Occidental Coll.*, *supra* note 77, at 2 (providing a confidential report including the complainant's dormitory and listing the complainant's close friends as witnesses).

become public record until the details are covered by the media or posted on a website.³⁰⁴ In other cases, respondents' attorneys have purposely released a victim's name or identifying information to the media or public.³⁰⁵ Student victims have reported experiencing harassment and threats from strangers when their stories were covered by the media.³⁰⁶ Access to private counsel is imperative for student victims during respondent appeals and civil lawsuits.³⁰⁷ Victims' attorneys can monitor all court filings by respondents and enforce a victims' privacy rights through motions for protection orders and motions to seal records, ensuring that their voices continue to be heard in the legal proceedings.³⁰⁸

Although student victims are not usually parties to respondents' lawsuits against colleges, respondents are increasingly suing victims for defamation and intentional infliction of emotional distress, often placing their names and details of their assault into the public record.³⁰⁹ Respondents sometimes sue their victims to punish them, regardless of the outcome of their campus adjudicatory process or criminal case.³¹⁰ Respondent lawsuits

304. See, e.g., Kingkade, *Sexual Assault Witnesses Subjected to Harassment*, *supra* note 84 (reporting that after a respondent filed a lawsuit against Occidental University attaching a confidential university investigation report and the lawsuit was reposted and distributed through an email blast by the Foundation for Individual Rights in Education, at least four witnesses named in the document received threatening or harassing emails and one witness planned to transfer schools as a result of threats).

305. See, e.g., Megan, *supra* note 300 (reporting how a respondent's attorney released details of the university's confidential investigation after his client was dismissed from Yale); John Talty, *Jameis Winston's Attorney Says He Tweeted Accuser's Name on Purpose*, AL.COM (Nov. 5, 2014), http://www.al.com/sports/index.ssf/2014/11/jameis_winstons_attorney_says_1.html.

306. Harassment directed at victims following a media story about an assault is increased when the assailant is a well-known student athlete. For example, following a story about rape allegations against Florida State University football player Jameis Winston, the first victim who reported to the police stated that she received death threats, her sorority received threats to burn it down, a sorority sister's car tires were slashed, personal information about her was leaked and spread online, photoshopped pictures of her were disseminated online, her parents' and brother's phone numbers and addresses were broadcast, and "[s]he was called a slut, whore, cleatchaser, and other obscenities." Complaint & Demand for Jury Trial, *Doe v. Fla. State Univ. Bd. of Trs.*, *supra* note 37, at 25.

307. See Kanter, *supra* note 144, at 284–85 (discussing the needs of victims that could be satisfied with legal assistance).

308. See *id.* at 286, 286 nn. 134–35.

309. See *supra* note 78.

310. E.g., Koran Addo, *SLU Case Highlights the Gray Areas of Campus Sex Assault*

against victims prolong victims' trauma and force them to hire their own legal counsel to defend against civil lawsuits and protect their privacy interests.³¹¹

4. *Victim Lawsuits*

Last, students may need access to victims' attorneys to enforce their rights by filing a Title IX complaint with OCR or a lawsuit against a school or the respondent.³¹² As respondents increasingly move campus sexual assault cases into federal and state courts, student victims who want to utilize the campus adjudicatory system may need to prepare to do the same to enforce their rights.³¹³ In those circumstances, they may also need to prepare to respond to potential retaliation or privacy violations by their colleges. Student victims who filed lawsuits against colleges found themselves attacked in unexpected ways, such as colleges obtaining their private

Investigation, ST. LOUIS POST-DISPATCH (Oct. 12, 2015), http://www.stltoday.com/news/local/education/slu-case-highlights-the-gray-areas-of-campus-sex-assault/article_160c1a40-03c7-5db7-bb9d-ab23b1ca858e.html (describing a federal case filed by a student accused of sexual assault where St. Louis University initially found him responsible for sexual misconduct, but reversed its own decision through an internal appeal); Marcos Breton, *Is This Sex Offender Really Suing His Victim Because She Called Him a Rapist on Facebook?*, SACRAMENTO BEE (Oct. 1, 2016, 7:11 PM), http://www.sacbee.com/news/local/news-columns-blogs/marcos-breton/article_105429431.html (describing a \$4 million defamation lawsuit filed by a man who had pled no contest to a criminal sexual assault charge and was found responsible for a campus violation against the student he sexually assaulted and her family).

311. See, e.g., Brief in Support of Moving Defendant's Motion to Proceed in Pseudonym and for Protective Order, 5, 7, *Harris v. Saint Joseph's Univ.*, No. 2:13-cv-03937 (E.D. Pa. July 18, 2013) (stating that prior to the respondent's lawsuit, she had "taken steps to keep the sexual assault perpetrated by the plaintiff confidential from all but her closest family members and friends" and warned that "[a]llowing her name and the details of her sexual assault to be disclosed in open proceedings may discourage other victims from even reporting assaults for fear that if they are subject to litigation, their identity will be released to the public as well"); Defendant Jane Doe's Memorandum of Law, *Harris v. St. Joseph's Univ.*, *supra* note 296, at 1 ("Despite twice being found to have committed this heinous act, [the plaintiff] now attempts to further traumatize and further victimize Jane Doe by filing a lawsuit attempting improperly to relitigate SJU's findings."); Defendant Jane Doe's Answer, *Doe v. Reed Inst.*, *supra* note 296, at 6–7.

312. See REYNOLDS, *supra* note 115, at 9.

313. See *id.* at 10 (noting the different ways a victim can file a Title IX grievance).

counseling records³¹⁴ and requesting their sexual histories.³¹⁵ Others who wrote about their ordeals or participated in campus protests faced possible sanctions by their colleges.³¹⁶ They would benefit from access to legal counsel both before and after deciding to engage in activism.

VII. CONCLUSION

The legal systems currently in place to respond to student sexual assault, including both the criminal justice system and the college adjudicatory system, all too often exacerbate student trauma.³¹⁷ Access to victims' attorneys may increase victim agency and reduce trauma by providing sufficient information to enable a student to provide informed consent before opening an investigation. Victims' attorneys can also provide victim-centered, comprehensive legal screenings to assess student victims' legal and non-legal needs both on and off campus. Victims' attorneys can further assist students maintain their choice and voice throughout investigations and hearings and provide legal representation in appeals and lawsuits. For student victims to fully enforce their safety, privacy, and educational rights and make informed, autonomous decisions regarding their participation in legal systems, they must have access to legal counsel and representation throughout the campus process.

314. *E.g.*, Complaint at 10, *Doe v. Univ. of Oregon*, No. 6:15-cv-00042 (D. Or. Jan. 8, 2015) (describing how university administrators obtained campus counseling records of victim of sexual assault suing the university under Title IX).

315. *E.g.*, Tyler Kingkade, *Virginia Wesleyan College Demands Rape Victim's Entire Sexual History*, HUFFINGTON POST (Aug. 9, 2015), http://www.huffingtonpost.com/entry/virginia-wesleyan-rape-victim_us_55c7a759e4b0923c12bd3241.

316. *See, e.g.*, *Alleged Assault Victim Sues UNC for Expulsion Threat*, USA TODAY (Mar. 25, 2013), <http://www.usatoday.com/story/news/nation/2013/03/25/victim-sues-unc-expulsion/2018261/> (reporting about a UNC student facing honor code violations for identifying herself as a rape survivor on social media after an honor court failed to find the assailant responsible); Tyler Kingkade, *Dartmouth Students in Clery Act Complaint Charged with Violating Code of Conduct*, HUFFINGTON POST (May 29, 2013), http://www.huffingtonpost.com/2013/05/29/dartmouth-clery-act-code-of-conduct_n_3353969.html.

317. *See supra* Part V.