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EQUALITY, PROCESS, AND CAMPUS SEXUAL ASSAULT*

JULIE NOVKOV**

By the end of the College Bowl Series playoff game, Heisman-winning quarterback Jameis Winston was having a very bad day. His Florida State Seminoles had been trounced by the Oregon Ducks in a game featuring multiple miscues and turnovers by the offense and by Winston himself. At the end of the game, as Winston was leaving the field, a handful of jubilant Duck players initiated a taunt to the tune of the Seminoles' "tomahawk chop" chant: "No means no!"¹

The chant, which provoked delighted support, predictable outrage, charges of hypocrisy, and threats of punishment from the head coach, referred to a simmering allegation against Winston dating back to December 2012 that he had raped a fellow student.² On the night of December 6, Winston's accuser, a nineteen-year-old female freshman, allegedly shared at least five mixed drinks with him at a bar and departed in a taxi with three Florida State football players. She claimed that her memory then became hazy, but recalls returning to consciousness in an apartment where she was subjected to sexual assault after indicating her lack of consent. Her assailant then dressed her and returned her on his scooter to an intersection near her dormitory. She posted an online plea for help, and two friends intervened. One finally convinced her to contact the police and placed a 911 call on her behalf at 3:22 AM on the night of the alleged assault. Because she called from her dorm room, the call was routed to the campus police, and a campus police officer drove her to the hospital. At the hospital, she indicated her belief that the assault had taken place off campus, so the Tal-

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** University at Albany, SUNY. My profuse thanks to the United Union Professionals' Women's Concerns Committee for raising concerns about changes in rules regarding how to handle sexual assault on campus, and to Patty Strach and Virginia Eubanks for helping me to think through these issues more deeply. Thanks too to Libby Sharrow for her guidance on Title IX issues. They should not be blamed for the conclusions I have reached in this Paper.

1. ABC News via Good Morning America, *Oregon Players Taunt Jameis Winston with 'No Means No' Chant* (Jan. 2, 2015), <http://abcnews.go.com/Sports/oregon-players-taunt-jameis-winston-means-chant/story?id=27957808>.

2. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

lahassee City police interviewed her both at the hospital that night and the following morning when she returned to complete her statement.³

Labeling the course of events afterward “the comedy of errors” would channel Shakespeare’s darker side.⁴ The Tallahassee police officer in charge of the investigation made no serious attempts to identify a man at the apartment whom the victim heard referred to as Chris (he later turned out to be Winston’s roommate), nor did he request footage from the squadron of surveillance cameras scattered throughout the bar.⁵ He made a lackadaisical call to the cab company to try to identify the driver of the cab that the woman had shared with the three football players, but failed to follow up. By the time he filed his first report—more than two months after the alleged assault—memories had faded and evidence, including the videotapes in the bar, was irretrievably lost. The biggest break in the case came from the victim herself, who contacted the police on January 10 to inform them that she had discovered the name of her assailant after recognizing him in a class. The investigation limped along—at one point, Winston successfully evaded an interview with the police because he had to be at baseball practice. Ultimately, the investigation was suspended, allegedly because the victim did not cooperate with the police, despite the fact that she continued to contact the police to inquire about the progress of the investigation.⁶

The following fall, however, the case reappeared when the *Tampa Bay Times* requested documents from the police under open records laws.⁷ State prosecutor Willie Meggs opened an investigation of the case, and as she attempted to reconstruct a narrative of the night, the fall progressed toward winter and the Seminoles marched toward a national championship under Winston’s leadership. Ultimately, Winston would win the Heisman trophy, the Seminoles would win the national title, and the prosecutor would decline to move forward with criminal charges, explaining in a press conference shortly before the Heisman selection that he simply did not have enough evidence to arbitrate between the accuser’s claim that Winston assaulted her and Winston’s response that they engaged in consensual sex.⁸

Had the case not happened at a university and involved two students, it might merely be another exemplar of police misconduct regarding sexual assault, of the prevalence of rape culture, or of women’s propensity to blame men for drunken sex, depending on one’s political orientation. But

3. *Id.*

4. WILLIAM SHAKESPEARE, *THE COMEDY OF ERRORS*.

5. Bogdanich, *supra* note 2.

6. *Id.*

7. *Id.*

8. *Id.*

the university was implicated, and had clearly been drawn in at a fairly early point, as Tallahassee police records indicate that the athletic department had called the Tallahassee police regarding the allegations against their then-freshman hotshot quarterback in January of 2013. Under Title IX, the athletic department was obliged to inform school officials of the allegation; however, no one seems to know whether this obligation was fulfilled. Either way, Florida State did not open an investigation in January of 2013. Officials allegedly approached Winston's accuser in October of 2013 to ask if she wished them to investigate her allegations, but Florida State was, if anything, even less invested in the investigation than the police.⁹ This lack of action ultimately prompted Winston's accuser to complain to the Department of Education's Office for Civil Rights about Florida State, triggering a Title IX investigation against the university.¹⁰ Florida State's investigation led to a student conduct hearing for Winston, over which a former Florida Supreme Court Justice, Major Harding, presided, ultimately clearing Winston of any wrongdoing under a preponderance of the evidence standard.¹¹

The controversy over Winston illustrates much of what can go wrong in the aftermath of a sexual assault on campus – a claim of wrongdoing not adequately investigated, a police department considering the campus status of the accused, and concerns raised by both the complainant and the accused about due process and fairness. Accusations begin as private disputes between students, but if the victim of an assault seeks resolution on campus, the claim enters a maze of layered institutions that are accountable to protect the interests of complainants and accused, and also accountable to the campus community and federal law. Untangling the layers helps to explain why the issue is so controversial, but does not provide a clear path forward to handle such disputes.

In this Paper, I suggest thinking about assault accusations as community wrongs rather than individual wrongs, and I propose developing an approach that focuses on structures rather than on individual-level analysis of consent and intent. Cultural struggles over sexual assault and consent seem primed to continue. So, then, will the controversy over the proper handling

9. Kevin Vaughn, *Documents: Police, FSU Hampered Jameis Winston Investigation*, FOX SPORTS (Oct. 10, 2014), <http://www.foxsports.com/college-football/story/jameis-winston-florida-state-tallahassee-police-hindered-investigation-documents-101014?vid=340426819547>.

10. Rachel Axon, *Florida State Investigating Jameis Winston, Attorney Says*, USA TODAY (Sept. 4, 2014), <http://www.usatoday.com/story/sports/ncaaf/2014/09/04/jameis-winston-florida-state-investigation-sexual-assault-allegations/15080921/>.

11. Tom Spousta, *Jameis Winston Is Cleared in Hearing over Student's Rape Accusation*, N.Y. TIMES (Dec. 21, 2014), <http://www.nytimes.com/2014/12/22/sports/ncaaf/jameis-winston-is-cleared-in-florida-state-hearing.html>.

of sexual assault cases, including concern over the proper framing and assignment of responsibility and the appropriate exercise of due process. The shift to community and structural analysis, however, would be better suited than the current framework to navigate through the conflicts and discontinuities produced by the layering of frameworks of women's equality, the rights of the accused, and university accountability, as well as to protect the rights and interests of individual students. This new analysis also facilitates looking at structures and practices that make assault both more likely to occur and less subject to mitigation through ascribing individual accountability to offenders.

I. THE NEW WORLD OF SEXUAL ASSAULT POLICIES ON CAMPUS

Florida State's failure to proceed against Winston comes in the context of a national furor over a cultural clash. Sexual assault victims and their advocates have advocated strongly for reform in how colleges and universities address private student-on-student crime, seeking to sweep these reforms directly into higher educational institutions' obligation to provide gender equity.

In 1972, President Nixon signed Title IX into law.¹² The law, a small part of the Higher Education Amendments of 1972, was deceptively short, stating simply: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹³ Its primary purpose was to encourage educational institutions to eliminate sex discrimination by denying the expenditure of federal funds that supported it. Like the major anti-discrimination measure covering employment, Title VII, Title IX provided individual citizens with remedies against violations.¹⁴ The statute's bare language has led institutions to seek guidance on compliance from the Department of Education, which has implemented its general command for more than four decades.¹⁵ When Title IX was passed, the fundamental issues it addressed included women's lack of access to higher education and large inequities in the re-

12. 20 U.S.C. §§ 1681–1688 (2012); *see also*, DEP'T OF JUSTICE, *Overview of Title IX of the Education Amendments of 1972*, 20 U.S.C.A. § 1681 *et. seq.*, <http://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq> (last visited Dec.9, 2015).

13. 20 U.S.C. § 1681.

14. *Breaking Down Barriers: A Legal Guide to Title IX and Athletic Opportunities* (May 12, 2007), NATIONAL WOMEN'S LAW CENTER, <http://www.nwlc.org/resource/breaking-down-barriers-chapter-1-introduction>.

15. Lauren Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1202 (2013).

sources provided to women in all levels of education and across multiple areas, including athletics.

Individuals who believe that an institution has violated their right to freedom from discrimination may file a claim with the Office for Civil Rights (“OCR”) within 180 days of the event to seek resolution.¹⁶ The OCR will then seek resolution, often encouraging settlements between institutions and aggrieved individuals.¹⁷ The Department of Education and the OCR are thus the primary federal institutions involved in the administrative interpretation and implementation of Title IX’s mandate. Aggrieved individuals may also opt to pursue independent private litigation directly under Title IX, but the standard for establishing a violation is more difficult to achieve.¹⁸

In 1990 and 1992, Congress passed and amended the Crime Awareness and Campus Security Act, popularly known as the Clery Act, as a supplement to Title IX. This legislation explicitly required campuses to address sexual violence: “schools must inform individuals reporting rape of their options to notify law enforcement, grant both the accuser and accused the same opportunity to have others present at any proceedings, inform both parties of the outcome of any disciplinary proceeding, and notify the individual reporting rape of available counseling services and options to change academic and living situations.”¹⁹ The Clery Act also mandates annual public reporting of crimes and official responses to them on campuses.²⁰ As with Title IX, implementation lies in the Department of Education, and students may bring allegations of violations directly to the Department of Education to seek resolution.

While Title IX and the Clery Act could be understood to work in conjunction to frame campus sexual assault as a remediable form of gender discrimination and provide access to remedies, some advocates for sexual assault victims argued that the two Acts were still insufficient.²¹ Taken together, the two Acts provided for significant monetary penalties for non-

16. *Id.* at 1207.

17. *Id.*

18. 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, 225 (2011). The Supreme Court declined to allow private liability through Title IX under a theory of *respondeat superior* or constructive notice for individual employees’ wrongdoings in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) established a stringent standard beyond deliberate indifference for private Title IX suits seeking liability for student-to-student harassment.

19. Schroeder, *supra* note 15, at 1212.

20. *Id.* at 1213.

21. See, e.g., Bonnie Fisher, et al., *Making Campuses Safer for Students: The Clery Act as Symbolic Legal Reform*, 32 STETSON L. REV. 61 (2003).

compliance, but in the view of at least one commentator, could not effectively address countervailing pressures to maintain institutions' public images and reputations.²² Response to these concerns came in two forms: administrative guidance from the Department of Education in the form of a letter, and statutory reform both passed in Congress in 2013 and proposed for the future.

Advocates for reform achieved a significant victory with the Department of Education, convincing the OCR to produce a policy memorandum in 2011 that has transformed how higher educational institutions address allegations of sexual assault.²³ The "Letter to Colleagues" clarifies the OCR's interest in and intent to increase its enforcement efforts with regard to sexual violence, which it identified as a form of sex discrimination under Title IX. The letter defines sexual violence as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability."²⁴ The letter places responsibility on schools and colleges to take "immediate and effective steps to end sexual violence and sexual harassment."²⁵ The letter makes it clear that campuses may not simply rely on their existing policies or cede responsibility for dealing with sexual violence to local law enforcement. Yet the letter also contemplates local law enforcement continuing to play a role, ideally in concert with campus authorities, though campus proceedings have different burdens of proof and procedural standards.

In addition to the changes initiated by the "Letter to Colleagues," Congress enacted the Campus Sexual Violence Act ("CSVA") in 2013 as Section 304 of the reauthorization of the Violence Against Women Act of 1994.²⁶ Senators Claire McCaskill (D-MO) and Kirsten Gillibrand (D-NY) cosponsored this legislation introduced by Senator Patrick Leahy (D-VT), which sought "to close the gap in current laws by requiring colleges and universities to clearly explain their policies on sexual assault, stalking, dating violence, and domestic violence."²⁷ The provision, which updates re-

22. Cantalupo, *supra* note 18, at 226.

23. See U.S. DEP'T OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

24. *Id.*

25. *Id.*

26. Violence Against Women Act Reauthorization of 2013, tit. III, § 304, 127 Stat. 54, 89–92 (2013) (to be codified at 20 U.S.C. § 1092). This Act, referred to by its congressional proponents as the Campus Sexual Violence Act, incorporated some, but not all, of the provisions recommended by victims' advocates under the umbrella of the Campus SaVE Act. See, e.g., KNOW YOUR IX, *Understanding the Campus SaVE Act*, <http://knowyourix.org/understanding-the-campus-save-act/>.

27. Schroeder, *supra* note 15, at 1225; KNOW YOUR IX, *supra* note 26.

porting requirements contained in the Clery Act, operates by requiring higher educational institutions receiving federal funding to include in their reports additional information about the prevalence of sexual violence on campus and detailed policies the campus has developed to address such violence. The policies must lay out educational programs promoting awareness about sexual violence and explain the procedures that the institutions will follow to address incidences of “domestic violence, dating violence, sexual assault, or stalking . . . including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such a report.”²⁸

CSVA requires schools to inform victims about how to file a claim, but also to lay out the possibilities for pursuing remedies through the criminal justice system and to solicit their institutions’ assistance in doing so.²⁹ It does not establish a prescribed evidentiary standard for adjudicating claims, but does require that policies identify a standard, and demands that both accused and accuser have the same rights to have advisors, including an attorney, accompany them in hearings.³⁰ Under any standard, there is substantial public and federal investment in determining how institutions address these individual private wrongs.

Finally, the measure lays the groundwork for continuing reform by requiring the Secretary of Education to “seek the advice and counsel of the Attorney General of the United States concerning the development, and dissemination to institutions of higher education, of best practices information about campus safety and emergency . . . [and] about preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking.”³¹

The 2011 OCR letter is only administrative policy and could easily be subject to reversal by the next presidential administration, especially if a Republican is elected, and CSVA does not completely codify these policies.³² Senators Claire McCaskill (D-MO) and Kirsten Gillebrand (D-NY)

28. Violence Against Women Act Reauthorization of 2013, tit. III, § 304.

29. *Id.*

30. Michael Stratford, *Standards of Evidence*, INSIDE HIGHER ED (Feb. 25, 2014), <https://www.insidehighered.com/news/2014/02/25/federal-campus-safety-rules-reignite-debate-over-standard-evidence>. A major difference between CSVA and the 2011 letter is in how CSVA addresses internal investigative processes. Some advocates believe that it does not go far enough because it does not mandate that these processes use the lower “preponderance of the evidence” standard rather than the “clear and convincing” standard in order to impose penalties against alleged perpetrators. *See* WHITE HOUSE TASK FORCE *infra* note 36.

31. *Id.*

32. Many Republicans opposed expanding campus sexual assault protections under the Violence Against Women Act. *See, e.g., House Republicans Introduce Partisan VAWA That Fails to*

are seeking further legislative reform through their Campus Accountability and Safety Act (“CASA”).³³ CASA, if passed, would codify more of the changes introduced by the 2011 Letter and make it possible for OCR to fine institutions progressively rather than having only the all-or-nothing (and therefore almost never imposed) sanction of withholding federal funds.³⁴ In addition, CASA would require data sharing and coordination between institutions of higher education and local law enforcement officials in dealing with sexual violence, far more stringent provisions concerning the provision of information about victim services and other available resources, the establishment of uniform processes for handling such cases (including rapid written notice to both accuser and accused of outcomes in investigations), the conduct of biannual climate surveys with public releases of results, public identification of institutions under investigation for poor handling of assaults, and the adoption of uniform and standard systems for handling accusations (primarily intended to strip athletics departments of the ability to maintain jurisdiction over student athletes accused of sexual assault).³⁵ The OCR also recently reminded institutions of their legal obligation under Title IX to hire or identify a full-time Title IX coordinator, who will be responsible for overseeing the implementation of and compliance with Title IX standards, including those regarding adjudication of sexual assault allegations.³⁶

While CSVA and other proposed legislative reforms are ambitious, its effectiveness will depend upon implementation, as Schroeder notes.³⁷ Moreover, while the hope behind the laws and regulations targeting sexual assault on campus is that institutions will prioritize working to eliminate

Protect All Victims, NAT’L TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN (Feb. 26, 2013), <http://4vawa.org/4vawa/house-republicans-introduce-partisan-vawa-tha>.

33. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015). This bill incorporates many of the remaining ideas promoted by advocates for the Campus Sexual Violence Elimination Act (SaVE). See, e.g., CLEARYCENTER.ORG, THE CAMPUS SEXUAL VIOLENCE ELIMINATION ACT (SAVE), <http://clerycenter.org/campus-sexual-violence-elimination-save-act>.

34. See Michael Stratford, *Sex Assault Bill Unveiled*, INSIDE HIGHER ED (July 31, 2014), <https://www.insidehighered.com/news/2014/07/31/us-senators-announce-campus-sexual-assault-legislation>.

35. CONGRESSIONAL RESEARCH SERVICE, S.590—CAMPUS ACCOUNTABILITY AND SAFETY ACT, <https://www.congress.gov/bill/114th-congress/senate-bill/590>. See also S. Daniel Carter, *The Campus Sexual Violence Elimination Act*, JEANNE CLERY ACT INFO, <http://www.cleryact.info/campus-save-act.html>.

36. See U.S. DEP’T OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (Apr. 24, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>. See also WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, OFF. OF VICE PRESIDENT, NOT ALONE, THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 2014), <https://www.notalone.gov/assets/report.pdf>.

37. See text accompanying Schroeder, *supra* note 15, at 1225.

sexual assault and other forms of sexual violence, institutions will necessarily and rationally privilege preventing liability from private suits pursued under these frameworks or loss of federal funding from administrative action triggered by findings of non-compliance. The 2011 letter and recent implementation efforts (which include the adoption of affirmative consent standards) have produced controversy over how sexual assault allegations are handled in campus proceedings. Sexual assault is a criminal act, and perpetrators can be subjected to criminal sanctions by the state. A campus hearing for sexual assault, however, can proceed under a “preponderance of the evidence” standard, which is significantly weaker than the criminal “reasonable doubt” threshold.³⁸ A complainant in a campus hearing need only show that it is more likely than not that a perpetrator committed the alleged act in order for consequences to be imposed.³⁹ This triggers a whole host of due process concerns on the part of those accused of sexual violence. Longstanding doctrine has held that people have tangible interests in their ongoing educational opportunities, and therefore that they are entitled to due process before their opportunities are curtailed or cut off through internal investigative processes.⁴⁰ In these investigations, the state becomes involved in two ways: (1) any college or university accepting federal funding must comply with Title IX standards and practices articulated from the Office for Civil Rights, and (2) if the university involved is itself a state institution, then it acts as a public entity when it establishes and conducts hearing processes.

Nationally, colleges and universities have responded to the 2011 OCR letter by strengthening their commitment to investigating alleged sexual assaults and, in many cases, by changing the standard of proof required if it was more stringent than preponderance of the evidence.⁴¹ Universities’ objective in making these changes is to avoid becoming the target of a Title IX investigation. In May 2014, the OCR turned up the heat by providing for the first time ever a public list of colleges and universities under investigation for violating civil rights laws in their handling of sexual violence

38. The three most commonly used standards are: “preponderance of the evidence,” which means that it is more likely than not that one side’s interpretation is correct; “clear and convincing,” which requires a higher level of certainty on the part of the fact finders; and “beyond a reasonable doubt,” which is the very high standard that is required for criminal convictions.

39. See U.S. DEP’T OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>; Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 53 (2013).

40. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975).

41. Allie Grasgreen, *Rules Shift After Federal Push*, INSIDE HIGHER ED. (May 2, 2011), https://www.insidehighered.com/news/2011/05/02/ocr_title_ix_letter_prompts_universities_to_change_sexual_assault_procedures.

cases.⁴² The fifty-five colleges and universities listed ran the gamut geographically and size-wise, and the list included both public and private institutions. Harvard Law School was named, as was the West Virginia School of Osteopathic Medicine.⁴³ Many seemed concerned about the public relations damage—and the possible impact on student recruitment efforts—of making the list and have scrambled to address the issues by changing standards and procedures.⁴⁴

The changes have generated hostility and criticism from advocates for (mostly) men accused in campus proceedings.⁴⁵ When Harvard Law School settled with OCR, it agreed to a number of changes in its administrative, investigative, and adjudicative processes.⁴⁶ It also agreed to review sexual harassment complaints dating back to 2012 to determine whether the complaints had been investigated and remedied properly.⁴⁷ Twenty-eight members of the faculty responded to the agreement with a highly critical open letter published in the *Boston Globe*, which condemned the new standards as going far beyond what Title IX demands.⁴⁸ Among other concerns, the faculty members criticized the lack of opportunity for discovery, witness confrontation, and open testimony by the accused in hearings; the lodging of investigative, prosecutorial, fact-finding, and appellate reviewing processes in the Title IX compliance office; and the failure to ensure representation for the accused in hearings.⁴⁹ They also scolded the school for expanding the definition of sexual harassment and failing to account for the

42. Press Release, U.S. DEP'T OF EDUC., *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

43. Stacy Teicher Khadaroo, *55 Colleges with Title IX Sexual Violence Cases Pending: Is Yours Listed?*, CHRISTIAN SCI. MONITOR (May 1, 2014), <http://www.csmonitor.com/USA/Education/2014/0501/55-colleges-with-Title-IX-sexual-violence-cases-pending-Is-yours-listed-video>.

44. See, e.g., newly created websites for the University of California (<http://sexualviolence.universityofcalifornia.edu/>) and the State University of New York (<http://system.suny.edu/sexual-violence-prevention-workgroup/policies/>).

45. Emily Matchar, *'Men's Rights' Advocates Are Trying to Redefine the Definition of Rape*, NEW REPUBLIC (Feb. 26, 2014), <http://www.newrepublic.com/article/116768/latest-target-mens-rights-movement-definition-rape>.

46. Press Release, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Harvard Law School Found in Violation of Title IX, Agrees to Remedy Sexual Harassment, Including Sexual Assault of Students* (Dec. 30, 2014), <http://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-incl>.

47. *Id.*

48. Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZn7nU2UwuUuWMnqbM/story.html#>.

49. *Id.*

complexities involved when intoxicated or impaired students engage in sexual contact.⁵⁰ Signatories on the letter, besides feminist professor Elizabeth Bartholet, included Charles Ogletree, Janet Halley, and Lucie White, individuals not generally recognized for their reflexive support for white patriarchy.⁵¹

Colleges and universities are scrambling to change their policies with regard to sexual assault cases and hire new administrative staff both in response to the 2011 OCR letter and to address the new legislation, but states themselves are becoming involved as well. In September, California's legislature adopted a measure mandating an affirmative consent standard for sexual intimacy, which requires individuals accused of sexual assault in campus relationships to show that they had secured active consent from their partners.⁵² In response to pressure from Governor Andrew Cuomo, the State University of New York's ("SUNY") Board of Trustees took the same step in December 2014.⁵³ Hearing systems must now figure out how to incorporate these rules and, for some institutions, new personnel into their extant practices.⁵⁴

II. LAYERED FRAMEWORKS FOR DISPUTE RESOLUTION

Prior to the OCR letter and CSVA, on most campuses the hearing processes used to adjudicate claims of sexual assault were not unique to sexual assault. Rather, until the recent wave of institutional reform, most universities simply swept sexual assault claims into the same system that governs all alleged violations of university codes of conduct. The procedural rules and limitations, the evidentiary guidelines, the students' ability to have a lawyer represent them or not—in general, it works the same way whether a student is accused of forcible rape, ripping off a term paper from the internet, smoking marijuana in the dorms, or stealing from her roommate.

50. *Id.*

51. *Id.*; see, e.g., OGLETREE, CHARLES J. ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004); Janet E. Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELBOURNE J. INT'L L. 78 (2008); Lucie E. White, *On Guarding the Borders*, 33 HARV. C.R.-C.L. L. REV. 183 (1998).

52. Nick Smith, 'Yes Means Yes' California SB 967 Sex Assault Bill Signed by Gov, ABC 7 NEWS (Sept. 29, 2014), <http://abc7chicago.com/news/yes-means-yes-california-sb-967-sex-assault-bill-signed/328741/>.

53. Press Release, SUNY, *Governor Cuomo Announces SUNY Adopts a Comprehensive System-Wide Uniform Sexual Assault Policy for All 64 Campuses* (Dec. 2, 2014), <https://www.suny.edu/suny-news/press-releases/december-2014/12-2-14-sex-assault-policies/>.

54. See *infra* Part II.

The 2011 OCR letter and CSVA establish expectations and guidelines about standards of proof and the conduct of hearings, but they do not specify that a separate dispute resolution system must be established. Thus, as long as the procedural and evidentiary standards are met, these hearings can still take place within the context of the universities' broader, already established systems that handle other accusations of wrongdoing against students. Recently adopted and strongly advanced reforms, however, press for more direct involvement and oversight by universities' offices charged with ensuring Title IX compliance. Over time, this is likely to divert more sexual assault and violence cases to universities' Title IX coordinators for resolution.

These systems are themselves the product of a tension around how to conceive of student wrongdoing. Since the establishment of the modern university, students have been doing things that universities have wanted to thwart or control. At the same time, though, universities until the 1960s viewed their undergraduate charges from a standpoint of *loco parentis*, framing their disciplinary function largely as a teaching one.⁵⁵ This mindset had an impact on how dispute resolution systems were established and evolved.

As shifts in thinking about rights took place in the late 1960s and early 1970s, two important things happened with respect to higher education and dispute resolution. First, students began to think of their interest in a college degree in a more vested, almost property-like sense.⁵⁶ Being kicked out of school was no longer a misfortune but rather a deprivation, requiring at least minimal due process.⁵⁷ Colleges responded by creating clearer and more regularized processes with fact-finding capacity, just as welfare offices responded to the Supreme Court's ruling in *Goldberg v. Kelley*⁵⁸ by creating pre-termination hearing processes.⁵⁹ No longer would it be a simple matter to cut off a student's continued access to education, either temporarily or permanently.

Second, colleges and universities distanced themselves from the *loco parentis* role, at least in formal terms. No longer would they place themselves in the position of parents trying to inculcate moral values and protect vulnerable children from the consequences of mistakes. Rather, students

55. Philip Lee, *The Curious Life of in Loco Parentis at American Universities*, 8 HIGHER ED. IN REV. 65 (2011).

56. Thomas J. Bender, Jr., *Due Process in Academic Dismissals from Post-Secondary Schools*, 26 CATH. U. L. REV. 111, 122–24 (1977).

57. Bender traces the emergence of due process for dismissals back to 1961. *Id.* at 111–12.

58. 397 U.S. 254 (1970).

59. Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

would be viewed as youthful adults who could bear responsibility for their own decisions and the consequences of them—particularly when it came to sexual intimacy. Rules strictly limiting opportunities for intimate heterosexual encounters were relaxed, and students began to engage the university from the standpoint of consumers as much as wards.⁶⁰

However, these developments layered over the pre-existing structure in which universities continued to play a role of facilitating learning and development, a role particularly manifest in dispute resolution. A university may be technically either public or private space, but it has been and continues to be a learning community and wrongdoing and disputes can be understood in part as opportunities for growth on the part of students.

Thus, the flowering of offices of conflict resolution and student hearing boards. The structure and operation of dispute resolution mechanisms exhibits an almost bewildering diversity in the details, but most institutions have some administrative structure that allows either the university or a private individual to raise a claim against a student for wrongdoing that some type of university board will adjudicate. These boards hold the power to impose sanctions ranging up all the way up to dismissal from the university. Many of these boards function a bit like courts—a panel of decisionmakers hears and weighs evidence, determines the facts of a dispute, and decides whether a student will be sanctioned—but the resemblance is superficial. As a general rule, the boards operate in far more informal ways, have broad or not really articulated rules of evidence, have the authority to create equitable solutions to disputes, and often do not allow expert representation for a student accused of wrongdoing.

Nonetheless, their power is real. Disciplinary hearings can result in the deprivation of educational opportunities in which students have vested interests, and thus are subject to legally enforceable due process standards. While public institutions maintain significant latitude in exercising judgment about students' academic standing, a long line of state and lower federal cases culminated in *Goss v. Lopez*⁶¹ in 1975, which held that students subjected to serious disciplinary outcomes at state institutions had the right to a formal hearing prior to the imposition of the sanction.⁶² With disciplinary sanctions, case law generally “provides more procedural protection, such as an administrative hearing, than the academic-sanction cases, although not entitling the student to the full-blown safeguards of adversarial

60. Brian J. Willoughby et al., *The Decline of in Loco Parentis and the Shift to Coed Housing on College Campuses*, 24 J. ADOLESCENT RES. 21 (2009).

61. 419 U.S. 565 (1975).

62. *Id.* at 583–84.

civil proceedings.”⁶³ Perry Zirkel’s study, which collected legal challenges brought by students facing serious sanctions from private colleges and universities, shows that legal resistance to sanctions based on due process claims has risen sharply since the 1970s.⁶⁴ Both on the private and public side, this resistance has encouraged the provision of hearings for all manner of disciplinary violations and academic failings.⁶⁵

However, with respect to some kinds of wrongs, other interests are present. Federal equal opportunity law is a backdrop to educational contexts and provides an additional set of concerns and constraints. Title IX, as explained above, guarantees equal access and opportunity to women, and enables individuals who believe that dispute resolution processes have led to denial of their access or opportunity to challenge the processes and their outcomes.⁶⁶ This presents a countervailing set of incentives for universities to establish investigative and disciplinary systems that will limit their exposure to legal challenges from that angle. While it should be obvious, it is worth noting that a university’s interest in avoiding private liability or censure from the federal government does not necessarily align with the interests of either alleged victims or perpetrators of sexual assault. As Thomas Keck has illustrated with respect to equal opportunity law, the creation of institutional liability for wrongs creates incentives for the shift of administrative agendas toward litigation avoidance. Offices with the stated responsibility for fulfilling legally enforceable commitments to provide equal opportunity in the workplace quickly fall into the practice of primarily ensuring that the institution behaves in ways that will protect it from liability.⁶⁷

Finally, with respect to some wrongs, universities are dealing with allegations of criminal offenses. This has become an increasingly relevant layer in regulation, as most universities of any significant geographic and demographic size have their own police departments, which look and act very much like the police departments that serve the communities that encompass the university. As the Jameis Winston case illustrates, a report of potentially criminal behavior to either the local police or the campus police can entangle both the complainant and the accused in a fluid and Byzantine

63. Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—as Compare with Public—Institutions of Higher Education: A Glaring Gap?*, 83 MISS. L.J. 863, 868 (2014) (footnote omitted).

64. *Id.*

65. *Id.*

66. *See supra* Part I.

67. Thomas Keck, *From Bakke to Grutter: The Rise of Rights-Based Conservatism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 415–16 (Ronald Kahn & Ken Kersch eds., 2006).

network of overlapping investigatory responsibilities and jurisdiction, depending on the student status of the individuals, the circumstances, and the location of alleged incidents.⁶⁸

III. PRIVATE DISPUTES, CULTURAL STRUGGLES, AND QUASI-PUBLIC RESOLUTIONS

Much could be (and has been) written about this network and how it operates across a variety of accusations against students by other students, faculty, or university staff.⁶⁹ Let us set aside the kinds of disputes where the university is in an unproblematic adversarial standpoint with a student—situations where a university seeks to punish or dismiss a student because of academic underperformance (which, as noted above, falls into a different category for legal review anyway) and those where a student is accused of a transgression against the university itself. This would include accusations of academic dishonesty and similar offenses, as well as concerns about damage or theft of university property. My concern is situations where two individual students are involved in a dispute with each other and one claims that the other student should be sanctioned for violating the student code of conduct.

Within this framework, even serious conflicts with potential criminal implications, including claims of sexual assault, begin as private disputes between students. They come into the university's purview when one student seeks a resolution that encompasses the membership of both the aggrieved party and the alleged aggressor within the university community. In presenting a claim against another student to the university, the complainant in effect brings the university in as an aggrieved party by framing the claim as a violation of the university's code of conduct, which articulates community standards for behavior on campus (and at times off campus as well).

Yet the accused student is also a member of the university community and has rights and interests attached to this membership. Of course, it is this membership that confers the university's jurisdiction over the student—but it also presents the university with the dilemma of having to safeguard the accused student against unwarranted or even improper uses of the con-

68. See *supra* notes 1–11.

69. See, e.g., Fernand N. Dutile, *Students and Due Process in Higher Education*, 2 FLA. COASTAL L.J., 243 (2001); Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU Educ. & L.J. 1 (2003); Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487 (2012).

duct code against him or her.⁷⁰ The university is simultaneously responsible for managing the student's discipline and protecting the student against improper uses of disciplinary proceedings against her or him. This is generally a difficult circumstance for an institution, but the difficulty is compounded in sexual assault cases because of the layering of competing rights frameworks—alongside the university's system for dispute resolution and the procedural rights it conveys to the participants within the closed world of the university, complainants can also claim that unsatisfactory resolutions constitute a violation of gender equity rights under Title IX, and the accused have procedural due process avenues that advocates are increasingly pressing them to pursue.⁷¹

These crosscutting pressures reveal the fundamental incompatibility of the university's commitments. To the complainant, the university owes a resolution of her claim and a safe university environment, but also protection of her (or his) rights to gender equality. To the accused, the university also owes an equitable resolution of the complaint, but, in addition, it must respect his (or her) procedural due process rights. And in the background lurks the university's responsibility to its own communal aims. At the same time, once the campus police or local police become involved, a parallel but not necessarily separate process may be launched within the criminal justice system that unfolds with different standards of evidence, procedures for collecting evidence, and legal protections and pitfalls for the complainant and the accused. While universities have no obligation to assist students in navigating legal woes, many maintain offices that offer such legal assistance as a vestige of *loco parentis*—but may rule out providing counsel if a potential case could have students structurally aligned against each other.⁷² Universities must also comply with external investigatory processes, often doing so when criminal activity is alleged, by relying on the relationships between the university police and local police.

70. As a brief aside, university police forces have silently gained significant authority over even wrongs committed by non-university individuals in recent years. A personal anecdote to illustrate: when my wallet and keys were stolen from my office last spring, I was surprised to find as the investigation unfolded that it continued to be managed by the UAlbany Police Department, even after a suspect was identified who had no affiliation with the university whatsoever. She was eventually arrested by the Colonie Police Department on another charge, and the UAlbany police collaborated with the Colonie police in presenting information to the local DA to press charges.

71. See, e.g., Rebecca Everett, *Lawsuit Against Amherst College from Expelled Student Offers Window into Sexual Misconduct Investigation and Hearing Process*, N.H. GAZETTE (Aug. 7, 2015), <http://www.gazettenet.com/news/townbytown/amherst/17179365-95/lawsuit-against-amherst-college-from-expelled-student-offers-window-into-sexual-misconduct-investiga>.

72. See, e.g., UNIVERSITY AT ALBANY, SUNY'S STUDENT LEGAL SERVICES, <http://www.albany.edu/studentassociation/legalservices.shtml> (last visited Nov. 18, 2015); UNIVERSITY OF VERMONT'S STUDENT LEGAL SERVICES, <http://www.uvm.edu/~sls/> (last visited Nov. 18, 2015).

Universities have constructed institutions that can conduct investigations and resolve disputes. At times, the issue is that there are too many institutions rather than too few. Suppose a student accuses another student of assault in a dorm setting. At some institutions, the complainant could conceivably proceed through Residential Life (with its jurisdiction over the dorms); through a peer-to-peer student mediation group; through a formal complaint to the university's disciplinary body (possibly lodged in Academic Affairs or distinct from Residential Life, in an Office for Student Success); through Diversity/Inclusion (if a component of the assault arguably touched on the complainant's membership in a protected class); through the university police; or through the local police (though in some instances they might refer the case to the university police because of the location of the incident in dispute). At many institutions, a student would not be barred from pursuing several of these alternatives simultaneously, and the accused student could seek, in effect, to change venues from one to another of these institutions. This scenario could be even further complicated if the accused student retaliates by launching her or his own set of charges against the complainant.

Added to this complexity can be the active intervention of external interested parties in the currently politicized climate regarding sexual assault. One such individual is attorney and advocate Brett Sokolow, who played a key advisory role in the development of the 2011 OCR Dear Colleague letter and who has a very lucrative consulting business that helps to provide safe harbor defenses for institutions trying to avoid Title IX liability.⁷³ While he was an early supporter of the broader use of Title IX to address sexual assault; of late he has been championing accused assailants' rights.⁷⁴ An article published in *New York Magazine* portrays him and his business in a somewhat favorable light,⁷⁵ but these pieces and others illustrate how

73. Brett A. Sokolow, *About Brett Sokolow*, THE NCHERM GROUP, LLC (June 9, 2015), <https://www.ncher.org/consultants/brett-sokolow/>.

74. Compare Brett A. Sokolow, *A Model Campus Sexual Misconduct Response Protocol*, NAT'L CENTER FOR HIGHER EDUC. RISK MGMT. (2004), https://www.ncher.org/pdfs/MODEL_CAMPUS_SEXUAL_ASSAULT_RESPONSE_PROTOCOL_2004.pdf, with Nick Anderson, *Catholic U. Student Recounts Her Struggles After Reporting a Sexual Assault*, WASH. POST (June 29, 2014), http://www.washingtonpost.com/local/education/catholic-u-student-recounts-her-struggles-after-reporting-a-sex-assault/2014/06/29/9ed3b4f0-e694-11e3-afc6-a1dd9407abcf_story.html; Bob McGovern, *Full Court Press: Sexual Harassment Has Colleges Walking Fine Line*, BOSTON HERALD (May 30, 2015), http://www.bostonherald.com/news_opinion/local_coverage/2015/05/full_court_press_sexual_harassment_has_colleges_walking_fine.

75. Sarah Miller, *Meet the Man Telling Colleges How to Solve Their Rape Problem*, N.Y. MAG. (Oct. 21, 2014), <http://nymag.com/thecut/2014/10/meet-the-man-telling-colleges-how-to-solve-rape.html>.

politically complex and acrimonious the issues are. Likewise, attorney and adjunct law professor Wendy Murphy has participated in or brought numerous Title IX suits against institutions on behalf of victims of sexual assault.⁷⁶ Murphy was the prime mover behind the complaint to the OCR that resulted in the finding that Harvard Law School was in violation of Title IX.⁷⁷

Beyond individuals vested in working with and against institutions, the controversy occurs against the backdrop of feminist attempts to change the cultural framing of sex and consent. Feminists have struggled over the relationship between sexuality and patriarchy, fighting bitterly between and among themselves since the 1980s.⁷⁸ This struggle has reignited, moving on from the largely successful efforts to define “date rape” as a real form of rape. The cultural problem feminists are currently working to address is bridging the tensions between critiques of slut shaming (working to legitimate a stronger sense of women’s agency in sexual appearance and activities) and efforts to reframe non-consensual sex as any sex that takes place when one party has not actively asserted (usually) her willingness to participate. Sexual assault on campus is a good place to open a front in this cultural struggle because the issue is acute there: many campuses have concentrations of invested feminists who want to tackle the problem, and scenarios involving coerced or pressured sex or sex between impaired participants are distressingly common phenomena.

Further complicating matters is increasingly visible anti-feminist concern and activism. The men’s rights movement has taken on the issue, claiming that greater attention to and tougher standards for sexual assault prevention facilitate or encourage female students to lodge false claims against men, either out of vindictiveness or regret for unwise sexual encounters.⁷⁹ Websites such as *A Voice for Men* and *Men Going Their Own Way* highlight cases in which men were found not to be responsible for sexual assault on campus or when women withdrew accusations, further promoting the idea that false accusations of sexual assault are commonplace.⁸⁰

The result is a welter of interests held by the individuals involved, the university, and the State that, particularly in cases of sexual assault, cut

76. See WENDY MURPHY, JD, <http://www.wendymurphylaw.com/> (last visited Nov. 18, 2015).

77. Caroline McKay, *Law School Challenged Under Title IX*, HARV. CRIMSON (Apr. 22, 2011), <http://www.the-crimson.com/article/2011/4/22/Harvard-law-school-title-ix-wendy-murphy/>.

78. ANN BROOKS, POSTFEMINISMS: FEMINISM, CULTURAL THEORY, AND CULTURAL FORMS 205–06 (1997).

79. Matchar, *supra* note 45.

80. *Id.*

across lines dividing public and private; university and community; criminal and noncriminal; and federal, state and local. The 2011 Dear Colleague OCR letter and CSVA were intended to impose more order, logic, and consistency, and to establish clearer standards that protect the rights and interests of private victims of sexual assault.⁸¹ These changes acknowledge that Title IX does not really address sexual assault and seek to reconfigure it so that it can do so. They also seek to transform sexual assault from an individual and personal wrong into a group-oriented form of animus-based violence. However, because these changes are layered on top of an already existing system serving crosscutting and contradictory interests, this institutional innovation seems unlikely to resolve the controversy over how to handle sexual assault on campus. Also, despite the group animus frame that animates Title IX, the investigatory process and remedies also remain highly individual-oriented. While multiple layers of interests exist in other contexts involving campus wrongs, this location has become a hot spot because of the cultural struggle over the broader issues of sexual assault and the meaning of consent.

IV. POLICY AS A DRIVER FOR CULTURAL CHANGE

Along with a host of other law and society and institutional legal scholars, I have written about how cultural change plays out in legal terrain, illustrating how litigation helps to translate cultural shifts into the concepts and language of the State.⁸² Those of us who do this work recognize that legal change can shape the directions that future cultural shifts take, but we have tended to focus on cultural change as the prime mover in this process. This focus then concentrates analysis on how the legal process translates shifting cultural norms to enable their assimilation into and implementation through state practices.

It strikes me that something different is going on here. Activists are pressing for changes in university policies, using Title IX and its system of oversight as the lever, in the hopes that these policy changes will achieve, or at least advance the pace of cultural change. In this regard, the current efforts probably look most like Catharine MacKinnon's ultimately successful struggle to redefine, under law, unwanted sexual advances or the sexualization of the workplace as sexual harassment, which led to a shift cultural-

81. *See supra* Part I.

82. JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND THE NEW DEAL YEARS* (2001); JULIE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865–1954* (2008).

ly redefining such behavior as wrong and condemnable.⁸³ While determining “where culture is” in order to ascertain the level of correspondence between legal standards and cultural norms is an overwhelming empirical task if one does not simply want to use public opinion as a proxy, a few observations may be difficult to contest.

First, while there is cultural conflict over what constitutes rape and under what conditions sex not accompanied by forcible physical restriction can be considered rape, sexual encounters that do not involve clear verbal resistance are less readily framed as rape than those that do. This is a testament, in part, to the significant headway that the frame of “no means no” has made—headway that led, in part, to the reconfiguration of legal understandings of consent to move away from earlier “utmost resistance” standards now widely viewed as sexist.⁸⁴

Second, we mostly agree that sex occurring between impaired parties, or at least when one of the parties is significantly impaired, raises thorny questions about consent. This cultural phenomenon leads to some interesting legal distinctions. Take, for instance, New York’s law governing rape. Third degree rape is defined as “[e]ngag[ing] in sexual intercourse with another person who is incapable of consent by reason of some factor other than . . . incapacity to consent,”⁸⁵ meaning (among other things) forcible compulsion or circumstances under which, at the time of the act of intercourse [or deviate sexual intercourse], the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.⁸⁶

Second degree rape includes individuals who “engage[] in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.”⁸⁷ And first degree rape includes engaging in sexual intercourse with another person “[b]y forcible compulsion; or [w]ho is incapable of consent by reason of being physically

83. MacKinnon worked with feminist lawyers in the 1970s to define the creation of a sexualized hostile environment as a form of sexual harassment; ultimately these activists convinced the Equal Employment Opportunity Commission to add this behavior to its guidelines as a form of sexual harassment, and the Supreme Court validated this interpretation in *Meritor Savings Bank v. Vinson*, 447 U.S. 57 (1986); see Reva Siegel, *Introduction: A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catharine MacKinnon & Reva Siegel eds., 2003).

84. Joshua Mark Fried, *Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape*, 23 PEPP. L. REV. 1277, 1279–83 (1996).

85. N.Y. PENAL LAW § 135.25 (McKinney 2001).

86. N.Y. PENAL LAW § 130.05 (McKinney 2001).

87. N.Y. PENAL LAW § 130.30 (McKinney 2001).

helpless.”⁸⁸ The victim of sexual assault who clearly says no in a way that a reasonable person would understand may thus find his attacker convicted of third-degree rape, while the victim who is mentally incapacitated by alcohol could find an attacker convicted of second-degree rape, and the victim who is so drunk that she is physically helpless might see an attacker convicted of first-degree rape.

Many feminist campus activists are pressing for a unified principle that active consent should be required across the board. The idea appears to have first bubbled up in a policy setting in 1991, in Antioch College’s widely ridiculed sexual consent policy, which required clear verbal consent for all sexual activities and the reiteration of such consent as sexual intimacy escalated.⁸⁹ The policy operated quietly for a few years and then attracted a storm of negative and dismissive media attention, including becoming the butt of a Saturday Night Live sketch.⁹⁰ After its widespread cultural dismissal, it reappeared in the 2011 OCR Dear Colleague letter and burst into national visibility and controversy with California’s adoption of a law imposing affirmative consent as a standard at all publicly funded colleges and universities.⁹¹ California’s action has been followed by other institutions and systems, the most prominent of which is SUNY, following Governor Andrew Cuomo’s instruction to the Board of Trustees to take action on the issue.⁹²

The move to affirmative consent has taken place primarily in the policy sphere and seeks to reframe cultural conceptions of what constitutes consensual sex and how to identify non-consensual sex. It is probably still a bridge too far to claim a cultural toehold on the position that any sex not accompanied by affirmative consent is rape, but the policy change seeks to redefine the game and prepare the ground for these conversations. As cases play out concretely through these new standards, however, the theory is that the questions around instances of alleged sexual assault will shift, which will begin the process of shifting our cultural thinking about what constitutes rape, which could then lead both to different individual outcomes and

88. N.Y. PENAL LAW § 130.35 (McKinney 2001). Two additional situations qualify as first degree rape under § 130.35: when a person engages in sexual intercourse with a person “who is less than eleven years old; or who is less than thirteen years old and the actor is eighteen years old or more.”

89. Arun Rath, *The History Behind Sexual Consent Policies*, NPR (Oct. 5, 2014), <http://www.npr.org/2014/10/05/353922015/the-history-behind-sexual-consent-policies>.

90. *Id.*

91. Jake New, *First Do No Harm*, INSIDE HIGHER ED. (Feb. 19, 2015), <https://www.insidehighered.com/news/2015/02/19/open-letter-calls-legislators-reconsider-campus-sexual-assault-bills>.

92. *See supra* Part I.

to additional policy changes. Advocates for transformation might hope for an outcome similar to that of sexual harassment, for which legal and policy change helped to shift the cultural ground toward more widespread consensus that unwanted sexual advances and the sexualization of the workplace are inappropriate, unacceptable, and worthy of condemnation and punishment.⁹³

V. WORKING THROUGH WHAT TO DO: PRIVATE ACTS, PUBLIC RESPONSIBILITY

Given the layering problem addressed above and the shifting cultural terrain that has not yet caught up with policy (and, it should be noted, may never need to catch up with policy if a future presidential administration backpedals on the 2011 OCR Dear Colleague letter), one suggestion endorsed by some advocates, including state legislators in Virginia, New Jersey, and Rhode Island, is that universities simply get out of the business of trying to adjudicate sexual assault cases.⁹⁴ This path would reformulate policies and practices so that if a crime is alleged, it must go through local law enforcement, or at the least, local authorities must be informed about all such allegations, so that their own mandatory processing policies can spring into operation. The legal process would therefore manage the protection of the rights of the accused and the State's interest in preventing crime can bolster victims' personal interests in seeking justice.

As a practical matter, though, this cannot be the solution. In *DeShaney v. Winnebago County Department of Social Services*,⁹⁵ the Supreme Court ruled that even if a state engaged in negligent neglect of wrongs, it could not be held liable even if its inactions led to serious loss of liberty, like the tragic and permanently disabling beating that Joshua DeShaney suffered at the hands of his father.⁹⁶ Because his assailant was private, the child had no recourse against the state that failed to protect him, even though there was ample evidence that he was in danger.⁹⁷ As a result of this ruling, states cannot be sued if they fail to prevent private insults to life, liberty, or property because their inaction, even if negligent, does not trigger the Four-

93. This is not to say that the advent of sexual harassment law has resulted in the complete abatement of these behaviors, nor has it created full equality for women in the workplace. However, behavior that would have been readily dismissed as merely annoying or barely notable prior to MacKinnon's efforts is now much more likely to trigger negative reporting and active intervention, up to and including dismissal for cause.

94. New, *supra* note 91.

95. 489 U.S. 189 (1989).

96. *Id.* at 191–93.

97. *Id.* at 195–97.

teenth Amendment's protection of citizens against wrongful *action* on the part of the state.

However, Title IX's and now CVSA's standards impose an affirmative obligation upon universities that places them in a very different position than the state. In general, the state cannot be held liable for failures to act, but universities that fail to prevent gender-based wrongs, including sexual assault, can be held accountable under Title IX and CSVA.⁹⁸ State legislators' proposals to slash through the maze by requiring assault claims to go through the criminal justice system has been strongly criticized by NASPA, an organization of student affairs administrators, which argues that universities, even if directed to do so by the state, cannot evade their federally imposed responsibilities.⁹⁹ Universities must work within the Title IX and CSVA framework, which complicates the already entangled lines of responsibility by deeply involving compliance officers in the processes and prioritizing administrative management of these disputes.

No institutional solution can resolve the tension between the interests of individuals experiencing sexual assault and individuals defending themselves against such accusations. The responsible university owes a duty of protection and education to both, and a broader duty to its own community to prevent a culture of sexual violence, to educate its denizens about responsible and healthy sexual relationships if irresponsible or unhealthy relationships are damaging the campus culture, to ensure that campus institutions such as athletic teams and student groups reject sexual assault, and to protect the interests of all students in fair process and equitable dispute resolution.

The result could be institutional paralysis, but universities are pressed by both sides to act and to change. All too often, the universities' responses to these pressures focus on prevention of damage to the university, particularly in the form of liability. One interesting example that reflects this reality is Harvard's new policy, which removes sexual assault cases from the ordinary process of dispute resolution and rehous them entirely within the Title IX compliance office, a shift that the proposed CASA would also endorse. Feminist law professor Nancy Gertner argues that this placement

98. At least one commentator views this tension as problematic, executing an end run around the Supreme Court's ruling in *United States v. Morrison*, 529 U.S. 598 (2000), disallowing direct suits against the state through the Violence Against Women Act for failing to prevent violence against women. See Henrick, *supra* note 39, at 74.

99. An open letter signed by the president and several other members of the organization notes that such legislation would put universities at odds with federal law and policy requirements for campus handling of such allegations. See Kevin Kruger et al., *An Open Letter to the Elected Leaders of the 50 United States*, NASPA (Feb. 19, 2015), http://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf.

creates a structural bias in favor of complainants, because a finding against any wrongdoing could trigger consequences (ironically under Title IX itself) if a complainant can establish that the university process did not resolve the case to protect her equality rights.¹⁰⁰ It also presses the university to take some kind of documentable action in its own protective interests, regardless of whether any action it takes is in the best interest of a complainant or even desired. As concerns have grown from both sides, an industry of consultancy best exemplified by Brett Sokolow's National Center for Higher Education Risk Management ("NCHERM") is reaping the benefits of this anxiety, offering services to review and design policies that will leave the universities off the hook.¹⁰¹

This new industry somewhat resembles the army of diversity consultants who help employers to design policies and practices to prevent Title VII liability, and its representatives have encouraged institutions to reconfigure processes to foreclose liability—but not necessarily to try to resolve underlying cultural issues and practices that contribute to sexual assault on campus, nor to grapple honestly with the conflicting interests of the alleged victims and perpetrators.¹⁰² As Daniel Lipson's work reveals, with respect to affirmative action, university administrators may genuinely embrace the ideological goals that drove legal and policy changes and this investment may reflect more than just the capture of administrative machinery by interested parties.¹⁰³ Yet administrators remain aware that their primary measure of success is in how well they shield the university from controversy and challenge.

What follows is speculative, an uncertain testing out of a path through this treacherous marsh. Policy change and cultural change can build upon each other productively, and this seems to be a potential way to move things forward toward a world in which sexual assault on campus is exceptionally rare, perpetrators are held accountable, and processes ensure that accountability is not based upon false reports. But it should be emphasized that eliminating sexual assault is not even the point of the aspirational hope. Rather, it is eliminating or radically changing the cultural frames that so

100. Nancy Gertner, *Sex, Lies and Justice: Can We Reconcile the Belated Attention to Rape on Campus with Due Process?*, AM. PROSPECT (Winter 2015), <http://prospect.org/article/sex-lies-and-justice>.

101. WELCOME TO THE NCHERM GROUP, LLC, <https://www.ncherm.org/> (last visited Nov. 18, 2015).

102. For but a few examples of such consultants, see THE HUMAN EQUATION, <http://www.thehumanequation.com/> and EMPLOYMENT PRACTICES SOLUTION, <http://www.epspros.com/Home>.

103. Daniel Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985 (2007).

readily produce these incidents, which individuals currently experience and frame as individually violative and damaging sexual acts or alternatively cannot understand as problematic acts at all.¹⁰⁴ These frames are tightly wrapped around the role of individual consent in the inquiry.

Consent alone is an insufficient tool to understand good and bad sexual encounters because it is entirely individualized and subjective on both sides. Further, as Joseph Fischel has argued persuasively, framing the inquiry around consent in many cases focuses the inquiry on the complainant and (usually) her capacity.¹⁰⁵ When a dispute arises regarding sexual encounters between drunk or otherwise impaired participants, the consent inquiry leaves but two possibilities: the complainant was not significantly impaired and therefore the sex was legitimate, or the complainant was so significantly impaired as to have no agency, and therefore the sex was an assault. The complainant in this situation either must have said yes or could not say no, which translates into an externally attributed no. The debate then centers around whether individual lack of consent was communicated or understood, and efforts to achieve cultural shift focus on redefining consent on the individual level. I argue that a broader community perspective is necessary, one that brings into the analysis the context of the situation. What structural elements were present? Was the situation one in which coercive sex was significantly more likely? What kind of damage to the community as well as to individuals does allowing these kinds of situations create?

Changing the rules about burdens of proof and the level of procedural rigor demanded for cases of sexual assault is simply not a strong enough lever to shift something this weighty. Nor is creating new institutions (or empowering existing ones) that have significant responsibility for defending against the potential for university liability. However, reconsidering the way that hearings play out, and the framing of the wrongs they address, may be a means of beginning the work of transforming our thinking about sexual assault.

I observe here that, thus far, we have been thinking of campus sexual assault as a private and individualized criminal or quasi-criminal wrong in which campus authorities become involved because of the need to resolve

104. I must insert a caveat here. I am not endorsing a full blown sex positive perspective. I disagree vehemently with analyses that rely heavily on individual sexual autonomy and choice as the front line means of addressing sexual violence and coercion, because these approaches ignore both the structural reality of patriarchy and the cultural frames it produces and reproduces. Turning a “no” into a “yes” in one’s own head is not an answer, and rape need not be understood as a purely intersubjective crime.

105. Joseph Fischel, *Sex and Harm in the Age of Consent* (2011) (unpublished Ph.D. dissertation, Univ. of Chicago) (on file with author).

disputes between and among students. The focus from beginning to end is on individual agency, responsibility, and culpability. In the criminal justice system, when the state exercises symbolic and/or actual violence against criminal wrongdoers, its primary interest is in redressing wrongs against individuals. It is sometimes difficult for the machinery of the criminal justice system to proceed effectively if a person on the receiving end of a wrong does not want to proceed in that direction, and prosecutors will often respect these preferences, even in cases of fairly serious crimes (in part because of the difficulty of securing a conviction if a key witness is anticipated to be uncooperative). The focus on consent renders sexual assault cases particularly vulnerable to problems, as questions about consent can center around capacity, which focuses the inquiry on the complainant.

But what if an *allegation* of sexual assault is taken not simply as a possible individual wrong being brought to the university for resolution, but rather as a broader *problem* for the university community? The core organizing question in the current regime is whether an individual has committed a wrongful private act against another individual such that the university must offer redress to the aggrieved party by sanctioning the wrongdoer. This raises subsidiary questions about what institution should adjudicate the individual-level dispute between parties, how to implement procedural fairness on both sides, what kinds of sanctions are appropriate if wrongdoing is found to lie, and how a university can situate itself so that it is not vulnerable to legal claims from either individual arising from the handling of the dispute. But we could reconsider how we think about these events: what if allegations of sexual assault are something more or different than complaints that private individual wrongdoing has occurred? When a sexual encounter results in a claim of sexual assault, the damage is most directly to the complainant, but he or she is not the only victim. The alleged perpetrator may experience damage and a diminishing of his (or more rarely, her) self-understanding as a sexually ethical individual, especially if he (or she) did not understand at the time of the encounter that the experience for his or her partner could be one of assault. The university community also suffers an injury as the result of these incidents that cannot easily be encapsulated or resolved in an individualized adversarial framework; the circle of damage may expand to incorporate friends and acquaintances of both parties and highly public or controversial cases may make many in the university environment feel threatened, unwelcome, disrespected, or distrusted. These broader conceptions of wrong and injury shift our attention from the individuals to the context and conditions under which sexual assaults happen.

One model for this shift derives from work by advocates for restorative justice. As Koss, Wilgus, and Williamson note, the current model for

dispute resolution provides only a single option, that of a quasi-criminal justice approach, to deal with the “wide range of behavior that taken as a whole is incapable of being addressed appropriately by a one-size-fits-all resolution process.”¹⁰⁶ The guidelines provided in the 2011 OCR Dear Colleague letter forbid the use of mediation to address claims of sexual assault but do not mention restorative justice, which is premised on the acceptance of responsibility as a precondition for participation.¹⁰⁷ Koss, Wilgus, and Williamson present a restorative justice model that would draw the accuser and accused into a process that would first ask the accuser to select restorative justice and the accused to accept responsibility and forego an adversarial fact-finding process.¹⁰⁸ This model, which they outline in detail and link to core principles of restorative justice, deviates most sharply from a quasi-criminal process in the final stage of repair, which:

includes activities to (a) achieve validation and reparation for the harm caused to direct and indirect victims; (b) initiate counseling for the responsible person to address behavior that raises the risks for perpetrating sexual misconduct such as substance abuse, anger, impulse control, hostility to women, deviant arousal patterns, and unwisely selected peer groups; and (c) activities to reinforce antisexual violence norms in the campus community.¹⁰⁹

While their suggestion is but one example of how this could work, it provides a detailed description of how a broader understanding of harm, accountability, and responsibility can provide opportunities to move forward positively from an incident that is currently open to a more structural form of analysis. While such a system would not displace an independent proceeding in the criminal justice system if warranted, it would provide resolution beyond simply determining individual culpability or lack thereof, helping to turn attention to the circumstances that gave rise to the incident in the first place.

The table below illustrates how the current frame differs from a more community-oriented frame. As the comparison reveals, the shift would re-focus the inquiry around the incident, pressing for a deeper analysis of con-

106. Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 *TRAUMA, VIOLENCE, & ABUSE* 242, 245 (2014). Restorative justice focuses on the broader circle of responsibility and relationships around damaging behavior by individuals. Dispute resolution based in restorative justice focuses on identifying and repairing the harms of wrongful acts and building foundations for future positive community relations. See, e.g., Artika R. Tyner, *A New Addition to the Alternative Dispute Resolution Practitioner's Toolkit: The Exploration of Restorative Justice and Practical Implementation*, 6 *LAW TRENDS & NEWS PRACTICE AREA J.* (2009).

107. *Id.* at 246.

108. *Id.* at 249–51.

109. *Id.* at 252.

text and structures, and promoting a broader process of resolution involving more parties.

Table 1: Current Frame (individual and adversarial) Compared to Community-Based Frame

	CURRENT FRAME	COMMUNITY FRAME
FOCUS	Consent and legibility of state of mind of complainant (either she is capable of consent or infantilized literally). Intentions of the accused.	What structural elements were present? Was the situation one in which coercive sex was significantly more likely? What kind of damage to the community as well as to individuals does allowing these kinds of situations create?
SCOPE OF INJURY	Complainant.	Complainant, community, and alleged perpetrator.
DRIVER OF RESOLUTION PROCESS	Title IX office with its incentives to protect the institution (note that this potentially cuts students out entirely).	Centers on complainant but the larger community and its wellbeing plays a role, and community members should bear a role in resolution.
SCOPE OF WRONGDOING	Focuses on alleged assailant—was s/he the perpetrator and did s/he do wrong?	Focuses on the context and structure—and especially focuses on cultural institutions that promote greater risk of these kinds of harms.
RESPONSIBILITY	Assailant, if found responsible in the institutional process.	Consideration beyond individual responsibility, also addressing dangerous institutions like fraternities and some sports teams.
RESOLUTION	Finding of culpability and individual sanction; finding of non-culpability and determination that no sanction will be applied. As a distant secondary consideration, possible culpability of institutions (i.e., a fraternity or “rogue”	Wide range of possibilities, focusing on restoration for the complainant, responsibility for a culpable assailant, and central consideration of institutions and contextual circumstances in need of reform.

	athletic official).	
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Framing sexual assault as a community problem greatly leverages our capacity to look at the structural factors that contribute to it. Rather than focusing solely on the individuals, their intentions, and their capacity, we might note, for instance, that fraternities are often in the background of these events. As a 2007 article summarized the research on fraternities:

Among men on college campuses, fraternity men are more likely to commit rape than other college men. Thus, rape prevention efforts often target fraternity men. Compared to their peers on college campuses, fraternity men are more likely to believe that women enjoy being physically “roughed up,” that women pretend not to want sex but want to be forced into sex, that men should be controllers of relationships, that sexually liberated women are promiscuous and will probably have sex with anyone, and that women secretly desire to be raped. Beyond the aforementioned quantitative findings, qualitative research suggests that fraternity culture includes group norms that reinforce within-group attitudes perpetuating sexual coercion against women.¹¹⁰

This research certainly has the potential to turn up the temperature on debates over campus assault, but that is not my intent in noting it. Rather, an instance of sexual assault in the context of a fraternity event should trigger conversations about how to intervene—and how to hold national offices accountable, rather than continuing to allow them so easily to sever their relationships with and responsibility for the young men who create communities under their auspices.¹¹¹ Likewise, universities must attend much more closely to how accusations against student athletes are handled and what kinds of formal and informal resources athletes competing in marquee sports receive when something goes wrong.¹¹² If support for student ath-

110. Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 J. STUDENT AFF. RES. & PRAC. 728, 730 (2007) (internal citations omitted).

111. It is beyond the scope of this Paper, but a 2014 article in *The Atlantic* outlines the many ways that fraternities have manipulated the legal system and the charter arrangements with their members to be able to evade legal liability for a whole host of wrongs by stripping members of their associational protections at the first sign of trouble. Caitlin Flanagan, *The Dark Power of Fraternities*, ATLANTIC (Mar. 2014), <http://www.theatlantic.com/features/archive/2014/02/the-dark-power-of-fraternities/357580/>.

112. A recent investigation conducted by ESPN revealed shocking evidence of Florida State’s and other athletic departments’ preferential treatment for, provision of private legal resources to, and inappropriate influencing of police on behalf of the male athletes accused of committing crimes. Paula Lavinge, *Lawyers, Status, Public Backlash Aid College Athletes Accused of Crimes*, ESPN (June 14, 2015), http://espn.go.com/espn/otl/story/_id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges.

letes contributes to lack of accountability and responsibility for wrongdoing, or, as Lavigne reports, the fostering of a culture of intimidation against individuals accusing athletes of wrongdoing, these practices must be reconsidered and reformed.¹¹³

The new legislation, coupled with the federal reinterpretation of Title IX, contemplates shifting dispute resolution to university offices managing Title IX administration rather than maintaining it in more general venues for dispute resolution.¹¹⁴ Universities would be well advised to ensure that this shift does not take things backwards by removing broader community perspectives from the process and diminishing the capacity to incorporate the needs and interests of the community into dispute resolution. Rather, if new processes are contemplated under Title IX jurisdiction, this might be an opportunity to integrate more community perspectives and to think about ways to create more positive sexual cultures.

Nonetheless, as noted above, the real issue is not so much the location of dispute resolution, even though institutional locations may affect the courses that dispute resolution takes. I am not recommending adding yet another layer of institutional structure to dispute resolution mechanisms, but rather bringing the interests of the community more to the fore and stepping back from an individualized quasi-criminal dispute resolution frame in favor of a more justice-oriented analysis. This might also imply working out ways to give students more agency as a community to engage cultural struggle directly and develop standards that can not only right individual wrongs but can create incentives for reconstructing sexual conversations and the contexts in which sex happens. Whether this happens through Title IX or through another institutional structure, it is an essential step toward building a campus environment that will encourage individual development toward healthy and egalitarian sexual relationships and build communities that facilitate this development.

113. *Id.*

114. *See supra* Part II.