Presumed Guilty: Are Campus Sexual Assault Adjudicatory Procedures Denying Fundamental Rights to Accused Students?

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I. Introduction

Emma Sulkowicz, a sophomore at Columbia University, had just returned to campus after summer break to perform her duties as a committee head for new student orientation.¹ The visual arts major attended a party for orientation leaders, where she ran into Paul Nungesser, a member of Sulkowicz’s co-ed fraternity, and someone with whom she previously engaged in consensual sexual intercourse.² The two students left the party and ended up in Sulkowicz’s dorm room, where they proceeded to have sex.³ According to Sulkowicz, Nungesser pinned Sulkowicz down and choked, slapped, and anally penetrated her while she repeatedly said “no.”⁴ Although Sulkowicz did not immediately report the alleged rape, she later pressed charges with the school’s administration after discovering similarly aggressive encounters that two other women had with Nungesser.⁵ Nungesser denied the charges, and, after a hearing, the university found in his favor.⁶ Sulkowicz claimed the university mishandled the process, and she garnered

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² *Id.*
³ *Id.*
⁴ *Id.*
⁵ *Id.*
⁶ *Id.*
national attention by carrying around the mattress on which the alleged rape occurred in protest of the verdict.\(^7\) Nungesser, cleared of the assault against Sulkowicz, remained at Columbia.\(^8\)

However, Nungesser’s version of events and opinion as to the university’s handling of the ordeal presents a different picture than the one Sulkowicz painted. Nungesser, a full-scholarship student from Germany, acknowledged that he and Sulkowicz engaged in anal intercourse on the night in question, but maintains that it was by mutual agreement.\(^9\) Approximately eight months later, Nungesser was informed by the university’s Office of Gender-Based and Sexual Misconduct that Sulkowicz filed a claim against him, but he was given no specific details until nearly two weeks later, when he met with the school’s Title IX investigator.\(^10\) Before the investigation began, Nungesser was placed on restricted access to university buildings other than his own dorm; moreover, despite confidentiality rules, news of the accusation by Sulkowicz was spreading, and Nungesser says he was “shunned by many fellow students.”\(^11\) Although Nungesser was later cleared of the alleged assault on Sulkowicz by a university disciplinary panel, he, like Sulkowicz, took issue with certain aspects of the hearing.\(^12\)

Nungesser claims he was never allowed to present the Facebook exchanges between himself and Sulkowicz to the panel, because evidence presented in the hearing had to focus exclusively on the facts of the night in question “in an attempt to decide whose version of this event was more credible.”\(^13\) Nungesser also questions the low burden of proof used in the

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7 Grigoriadis, supra note 1.
8 Id.
9 Cathy Young, Columbia Student: I Didn’t Rape Her, DAILY BEAST (Feb. 3, 2015), http://www.thedailybeast.com/articles/2015/02/03/columbia-student-i-didn-t-rape-her.html.
10 Id.
11 Id.
12 Id.
13 Id. The Facebook exchanges between Nungesser and Sulkowicz, which could be construed as extremely platonic and friendly, were provided to The Daily Beast by Nungesser and confirmed to be authentic by Sulkowicz. Id.
Although the university cleared Nungesser, he questions why the university did not attest to the favorable verdict he received or the adequacy of its policies, or why it declined to make any substantive comments about the ordeal when Sulikowitz’s account was so conspicuous throughout campus and in the press. While the university did not find Nungesser responsible for the assault, he has been the target of social media threats, and students at Columbia have even touted him as a “serial rapist.”

Nungesser is just one of many students in recent years who have been accused of sexual assault and felt disillusioned and unprotected by the adjudicatory process at universities. These students allege that the campus disciplinary procedures for handling claims such as Sulikowitz’s are failing the accused by not providing them basic due process rights that criminal defendants are afforded under the Constitution: the right to be represented by counsel; the right to a speedy and public trial by an impartial jury; a burden of proof beyond a reasonable doubt; the right to present witnesses and evidence; and procedural protections against double jeopardy. Because civil law, rather than criminal law, governs universities, universities are not required to comply with these more exacting due process requirements.

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15 Young, supra note 9.
16 Id.
18 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence.”).
19 Id. (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”).
20 U.S. CONST. amend. V; see In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).
21 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .”).
22 U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .”).
23 See infra text accompanying notes 44–70.
This Comment discusses each of these rights in turn, contrasting the campus adjudicatory procedures with those of a criminal trial. In doing so, it explores the processes governing the disciplinary procedures of sexual crimes on college campuses as opposed to what a defendant would receive in a court of law. Part II of this Comment traces the history of campus sexual assaults, explores the laws governing university disciplinary tribunals, and examines how universities react to and handle campus sexual assaults. Part III discusses the contrasting due process rights given to an accuser and an accused in the context of campus sexual assault adjudicatory processes. Part IV considers the arguments as to whether colleges and universities should be involved in adjudicating sexual assault in the first place. Part V addresses recent grassroots action calling attention to these due process issues in the campus sexual assault context. Finally, Part VI concludes with an analysis regarding how universities handle, and are required to handle, sexual violence on campus.

II. History of Campus Sexual Assault and the Governing Body of Law

a. Statistics on Campus Sexual Assault

In 1967, Eugene Kanin, an Associate Professor of Sociology at Purdue University, published a study examining male sexual aggression.24 The purpose of Kanin’s study was “to examine the sexual histories of sexually aggressive25 and nonaggressive men and determine if, in fact, the former are sexually deprived.”26 Kanin found that 25.5% of respondents reported sexual aggression since entering college.27 Additionally, Kanin found that 80.5% of the aggressive men

24 Eugene J. Kanin, An Examination of Sexual Aggression as a Response to Sexual Frustration, 29 J. MARRIAGE & FAM. 428, 428 (1967). The sample used constituted a random selection of 400 full-time, undergraduate, unmarried males. Id. at 429.
25 Sex aggression was defined as a “male’s quest for coital access of a rejecting female during the course of which physical coercion is utilized to the degree that offended responses are elicited from the female.” Id. at 428.
26 Id.
27 Id. at 429 n.7.
reported using exploitative maneuvers. It follows that the same percentage of women during that time experienced those behaviors from men since entering college. Kanin’s study, conducted in an era of surging transition to coeducation in American higher education, suggests that interests and concerns over sexual aggression and manipulation in college-aged men is by no means a new phenomenon.

Fifteen years later, the focus of campus sexual assault studies transitioned from the male perspective to the victim’s. Mary Koss, a research psychologist, conducted a federally funded study of date rape on college campuses. The study surveyed approximately 7,000 students at thirty-five schools and found that one in four college women were victims of rape or attempted rape, while only one in four women whose assault met the legal definition of rape identified their experience as such. In 2000, the “National College Women Sexual Victimization” study surveyed 4,446 female college students. Results showed that 2.8% of the sample experienced either a completed rape or an attempted rape, with a victimization rate of 27.7 rapes per 1,000 female students. However, it is important to note that the period of the study was rather limited, and the data can be extrapolated to estimate that nearly 5% of college women are victimized in a given calendar year.

28 Id. at 431.
29 See Kanin, supra note 24, at 432 (concluding that, in 1967, “sexually aggressive behavior… [is] a possible consequence of sex frustration.”).
31 Id.
33 Id. at 10.
34 Id.
The 2008 Campus Sexual Assault study surveyed 5,446 undergraduate women.\textsuperscript{35} Nineteen percent of those women reported experiencing a completed or attempted sexual assault since entering college.\textsuperscript{36} The study also found that, since entering college, slightly more women experienced completed sexual assault than attempted sexual assault, while 7.2\% of these women experienced both.\textsuperscript{37} The most alarming figure to emerge from this study was the oft-cited “one in five” statistic, claiming that one in five women will be sexually assaulted while in college.\textsuperscript{38} This figure has been a major impetus\textsuperscript{39} for calls to reform campus sexual assault policies and enforcement. Some commentators believe this movement “has begun to take on the characteristics of a panic,”\textsuperscript{40} as this figure has not come without criticism.\textsuperscript{41} In fact, two of the study’s original researchers now state this number is inappropriately used as a baseline.\textsuperscript{42}

b. History of Federal Response to Sexual Assault on College Campuses

In 1972, President Richard Nixon signed Title IX of the Education Amendments\textsuperscript{43} into law.\textsuperscript{44} According to the Department of Justice, “[t]he principal objective of Title IX is to avoid the use

\textsuperscript{35}\textsc{christopher p. krebs et al.}, \textit{u.s. dep’t of justice, the campus sexual assault (csa) study}, at x (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.
\textsuperscript{36}\textit{Id.} at 5-3.
\textsuperscript{37}\textit{Id.} at 5-1.
\textsuperscript{40}Geoffrey R. Stone, \textit{Campus Sexual Assault}, \textsc{huffington post} (Jan. 31, 2015, 4:18 PM), http://www.huffingtonpost.com/geoffrey-r-stone/campus-sexual-assault_b_6586428.html.
\textsuperscript{41}Christopher Krebs & Christine Lindquist, \textit{Setting the Record Straight on ‘1 in 5’}, \textsc{time} (Dec. 15, 2014), http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/.
\textsuperscript{42}\textit{Id.}
\textsuperscript{43}20 U.S.C. § 1681(a) (2012) (“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.”).
\textsuperscript{44}\textit{The living law, titleixinfo.com}, http://www.titleix.info/History/The-Living-Law.aspx (last visited Feb 12, 2016).
of federal money to support sex discrimination in education programs and to provide individual citizens effective protection against those practices.”

Title IX essentially applies to all aspects of federally funded education programs or activities. Under Title IX, sexual harassment is a type of prohibited discrimination. In Franklin v. Gwinnett County Public Schools, the Supreme Court held that Title IX does bar sexual harassment, meaning schools must comply with Title IX’s regulatory guidelines in cases of campus sexual assault.

In 2011, the Office for Civil Rights, part of the U.S. Department of Education, issued a “Dear Colleague” letter reminding institutions of their responsibility to comply with Title IX. The nineteen-page memorandum detailed a school’s obligation to respond to sexual harassment and violence, the procedural requirements in responding to sexual harassment and violence, and steps to mitigate and correct sexual harassment and violence. The “Dear Colleague” letter prompted schools to implement changes to their policies that several schools were already

46 Id.
50 U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE, supra note 47, at 3. Schools have an obligation to ensure that students are not discriminated against on the basis of sex by taking remedial action to overcome the effects of the discrimination, issuing policies against sex discrimination, adopting and publishing grievance procedures providing for prompt and equitable resolution of complaints, designating an employee to coordinate compliance, and by recognizing and responding to sexual harassment. Id. at 4.
52 According to the “Dear Colleague” letter, institutions must disseminate a notice of non-discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints. Id.
53 The “Dear Colleague” letters lists education and prevention, certain remedies, and enforcement mechanisms as recommended steps to prevent and correct sexual harassment and violence. Id. at 14–19.
54 Id. at 3–19.
considering.\textsuperscript{55} For others, it served as a wake-up call to the potential liabilities schools might incur for mismanaging sexual assault on college campuses.\textsuperscript{56}

In 1986, Jeanne Clery, an undergraduate student, was raped and murdered in her dorm room by a fellow student, prompting the enactment of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act\textsuperscript{57} (“Clery Act”) in 1990.\textsuperscript{58} Under the Clery Act, colleges and universities participating in federal student aid programs must disclose campus safety information and adhere to requirements for handling sexual violence and emergencies.\textsuperscript{59} Since 1992, the law has required those college and universities to produce policy summaries addressing sexual assault, focusing on victims’ rights, disciplinary procedures, and educational programming.\textsuperscript{60} The Clery Act added yet another layer of complex compliance for colleges and universities to adhere to when addressing sexual assault on campus.

The federal government’s most recent effort\textsuperscript{61} to address campus sexual assault is the Campus Sexual Violence Elimination Act (“Campus SaVE Act”).\textsuperscript{62} Enacted in March of 2013 as part of the Violence Against Women Reauthorization Act, the Campus SaVE Act amends the Clery Act and complements Title IX by mandating transparency, accountability, education, and collaboration with regards to sexual assault on college campuses.\textsuperscript{63} By October 2014, schools

\textsuperscript{55} Allie Grasgreen, \textit{Tide Shifts on Title IX}, INSIDE HIGHER ED (Apr. 24, 2012), https://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc. For example, at the University of Oklahoma, the letter accelerated plans to extend the time frame for reporting sexual assault. \textit{Id.}
\textsuperscript{56} \textit{See} Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 76 (1992) (holding that a damages remedy is available for an action brought to enforce Title IX).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} According to the Clery Center, the Campus SaVE Act “represents a turning point in our nation’s handling of sexual misconduct on college campuses and universities.” \textit{The Campus Sexual Violence Elimination (SaVE) Act}, CLERY CTR., http://clerycenter.org/campus-sexual-violence-elimination-save-act (last visited Jan. 26, 2016).
\textsuperscript{63} \textit{See id.}
affected by the Campus SaVE Act must report compliance with the Act in their annual security reports. 64

The laws dictating how universities handle accusations of campus sexual assault are a complex and multi-layered structure of compliance mandates. Schools must comply with Title IX, 65 the Clery Act, 66 the “Dear Colleague” Letter, 67 and, most recently, the Campus SaVE Act. 68 These laws govern reporting of crimes on campus, disciplinary procedures with regard to such crimes, sexual assault education and awareness, and a multitude of other issues. 69 Understanding how these federal laws impact the campus sexual assault narrative is integral to providing a framework for the discussion of due process rights in university tribunals handling campus sexual assault. Because the laws governing such tribunals are civil, universities are under no mandate to comply with criminal procedure and can essentially decide, under the current framework, how their institution should handle such claims. However, in allowing universities to conduct tribunals to decide whether an accused committed a criminal act, 70 due process must be considered and should be mandated in campus sexual assault proceedings.

III. Adjudication of Campus Sexual Assault Claims

a. The Right to be Represented by Counsel

One of the most integral facets of constitutional rights is the right to be represented by counsel. 71 The Sixth Amendment of the United States Constitution guarantees the right “to have

67 Dear Colleague Letter, supra note 51, at 1.
70 Under federal law, sex crimes are punishable by imprisonment. 18 U.S.C. § 2241 (2012).
71 U.S. CONST. amend. VI.
the Assistance of Counsel.”

In *Kimmelman v. Morrison*, the United States Supreme Court stated, “[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.” Similarly, the Court in *United States v. Cronic* reasoned that “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”

The right to counsel is also guaranteed by the Federal Rules of Criminal Procedure, and extends to civil cases involving incarceration. Such a right attaches “at or after the time that judicial proceedings have been initiated against him ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” In *Powell v. Alabama*, the Court interpreted the Sixth Amendment to guarantee the right to counsel beginning with arraignment, stating that the time period from arraignment to the beginning of trial is “perhaps the most critical period of the proceedings” and an accused is “as much entitled to such aid during that period as at the trial itself.”

However, Title IX does not require that lawyers be present at campus sexual assault disciplinary hearings. Rather, a school may choose whether to allow lawyers, and that decision must apply to each party. The Campus SaVE Act mimics Title IX in allowing both the accuser

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72 Id. This right is limited only to criminal defendants. See *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).
73 *Kimmelman*, 477 U.S. at 374 (citing *Gideon*, 477 U.S. at 374).
75 *FED. R. CRIM. P.* 44.
76 See *Gideon*, 372 U.S. at 343–45.
80 Id.
and the accused to have advisors or others present during disciplinary hearings. Most colleges that do allow lawyers to be present forbid lawyers from speaking on behalf of their clients, though passing notes is often allowed. For those that do not allow attorneys to be present, one commentator reasons that “[c]ollege campuses are now being asked to serve as defense attorney, prosecutor, judge, jury and court of appeals all in one.”

Despite the fact that the law gives schools the right to choose whether to allow representation at disciplinary proceedings, numerous institutions do not allow them to be present, and many of the accused are calling for schools to permit the use of lawyers. Peter Yu was a student at Vassar College accused of sexual assault by a fellow student. Yu was not allowed to have an attorney present at his hearing and was expelled from the school. Yu later filed a Title IX complaint against the school alleging, among other claims, that he was given inadequate time to consult with counsel.

At Auburn University, Joshua Strange experienced a situation similar to that of Peter Yu. Strange’s ex-girlfriend alleged that Strange sexually assaulted her while she was sleeping. After a disciplinary hearing, Strange was expelled and found responsible by a

85 Id.
86 Id.
89 Id.
Unlike Peter Yu’s experience at Vassar College, Auburn University permitted both Strange and his accuser to have lawyers present. However, besides introducing themselves, the lawyers were not permitted to speak at the hearing. Although the traditional role of a lawyer is that of an advocate, a lawyer is little more than another warm body in the room in these campus tribunals. If lawyers or advisers are not able to speak during campus disciplinary proceedings, then they are, most likely, not offering anything of value to their clients.

However, Dana Scaduto, general counsel at Dickinson College and a past president of the National Association of College and University Attorneys, points out an issue with allowing lawyers at campus disciplinary proceedings, calling it “the single most problematic provision” in the draft of the rules to enact the Campus SaVE Act. Scaduto reasons that while some students may be able to afford an attorney, others may not. Columbia University has already solved this issue by offering to locate free counsel at the request of a student. On the flip side, Gary Pavela, a college consultant, believes that “the benefits of having lawyers involved can outweigh the risks.” Pavela further stated, “[y]ou will have someone in the room from either perspective that will try to articulate the issues as clearly and rationally as possible.”

Although sex crimes are federally recognized as being punishable by imprisonment, campuses are allowed to adjudicate these claims without lawyers present under the civil laws.

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90 Id.
91 Id.
92 Id.
94 Id. It is important to note, however, that criminal defendants who cannot afford an attorney are entitled to have one appointed by the court. FED. R. CRIM. P. 44.
95 Shulevitz, supra note 82.
96 Sander, supra note 93.
97 Id.
governing such processes. While campus tribunals cannot impose imprisonment as a punishment upon finding a student responsible or guilty, they can resort to placing bans on locations on campus in which an accused can go, as in the Nungesser case, suspension, or expulsion, which are arguably the campus versions of imprisonment. Additionally, crimes such as rape and sexual assault are punishable by imprisonment outside of the campus tribunal setting and should be treated as such. Because campuses are essentially trying crimes when adjudicating sexual assault claims and can punish alleged offenders with location bans, suspension, or expulsion, the law should require university disciplinary tribunals to allow both sides to have lawyers or advisers present in sexual assault hearings. Additionally, the lawyers or advisers should be allowed to advocate on behalf of their client. By allowing lawyers or advisers to be present and advocate on behalf of the students, colleges and universities will open themselves up to a more fair, public process that is more likely to afford better rights to both parties.

b. Right to a Speedy and Public Trial

The Sixth Amendment of the United States Constitution articulates the right to a speedy and public trial. The Supreme Court of the United States has held that “the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.” In United States v. MacDonald and Dickey v. Florida, the Court articulated the rationale behind this fundamental right, stating that the right minimizes incarceration prior to trial, ensures the liberty of an accused released on bail, and shortens the disruption of life caused by arrest and unresolved criminal

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99 Id.
100 U.S. CONST. amend. VI.
The right to a speedy trial is reflected in Rule 50 of the Federal Rules of Criminal Procedure ("Prompt Disposition"), which states “preference shall be given to criminal proceedings as far as practicable.”

The criminal justice system guarantees the right to a public trial because “[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.” The Court also notes that the public trial guarantee is “one created for the benefit of the defendant” in order to restrain possible abuse of judicial power.

In federal criminal trials, any information or indictment charging an accused with an offense must be filed within thirty days of the individual’s arrest or summons. If the accused pleads not guilty, trial must commence within seventy days of the filing of the information or the indictment, or from the date of the defendant’s first appearance. Additionally, the trial must not occur less than thirty days from the date of the defendant’s first appearance. These requirements ensure the defendant has adequate time to mount a proper defense against the charges he or she is facing.

The right to a speedy and public trial is meant to prevent prejudice to, rather than burden, the accused, which is arguably what happens with campus sexual assault hearings. Under Title IX, the Office for Civil Rights recommends that the process take approximately sixty calendar days following the receipt of the complaint. Institutions must specify time frames for all major stages of the procedures, which are evaluated by the Office for Civil Rights, considering

103 FED. R. CRIM. P. 50.
106 In re Oliver, 333 U.S. 257, 270 (1948).
108 Id. § 3161(c)(1).
109 Id. § 3161(c)(2).
110 Dear Colleague Letter, supra note 51, at 12.
the complexity of the individual investigations and the severity and extent of the harassment at issue.\textsuperscript{111} Peter Yu, the Vassar student found responsible by a campus panel for sexually assaulting a fellow team member, alleged in his complaint against the college that there was a “rush to convict.”\textsuperscript{112} Yu was informed of his expulsion from Vassar a day after his hearing and only ten days after he had first been informed of the charge against him.\textsuperscript{113} Yu was given only three days before the hearing to review the investigation file against him.\textsuperscript{114} Not only was Yu’s hearing potentially too “speedy,” it also was not public.\textsuperscript{115} While victim’s rights advocates argue that campus sexual assault procedures should be more private in order to prevent prejudice to victims,\textsuperscript{116} the other side of the argument is that the procedures should be made public in order to protect the accused from, and shed light on, the potential constitutional violations discussed in this Comment.

Although the disposition of Vassar’s case against Yu was certainly “speedy,” according to Yu, it occurred too quickly for him to prepare a defense.\textsuperscript{117} In that sense, a speedy trial most likely harmed, rather than helped, Yu. While colleges and universities are required to designate time frames for adjudication of campus sexual assault claims, they should be in keeping with similar federal or state time frames in order to provide defendants with an opportunity to better prepare for hearings. Additionally, university and college procedures adjudicating instances of campus sexual assault should be made more public and easily accessible to the student body.

\textsuperscript{111} Id.
\textsuperscript{112} Memorandum, supra note 87, at 16.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} See Johnson, supra note 84.
\textsuperscript{117} Memorandum, supra note 87, at 16.
However, a sensitive balance must be maintained between allowing an accused offender adequate time to prepare and safeguarding the alleged victims’ rights.

c. Trial by an Impartial Jury

The Sixth Amendment also ensures that the right to trial by an impartial jury is afforded to defendants accused of serious crimes like rape or sexual assault. The United States Supreme Court has stated that “[t]he right to have a jury make the ultimate determination of guilt has an impressive pedigree,” and that the right to an impartial jury “was designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.” The Court has further stated that an impartial jury is one “composed of a fair cross section of the community,” and is “indifferent.”

In composing an impartial jury, a defendant’s counsel has the right to strike prospective jurors. Counsel for each side may ask prospective jurors questions and are entitled to a specified number of peremptory challenges. Such a process “is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice . . . or predisposition about the defendant’s culpability.” Additionally, voir dire “plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored.”

While Title IX does not explicitly state who should adjudicate or decide the outcome of a complaint, it does mandate that all persons involved in the process “must have training or

118 U.S. CONST. amend. VI.
123 Id.
experience in handling complaints of sexual harassment and sexual violence.”

The Campus SaVE Act also requires disciplinary proceedings to be conducted by officials who receive annual training regarding sexual assault and how to conduct attendant investigations. A student’s general peers are unlikely to have the requisite training, experience, or knowledge to handle such sensitive issues. College and university administrators are often the people with the most adequate training under Title IX, but accused students argue that having administrators hear the case and decide the outcome does not necessarily yield impartial and equitable results.

In Peter Yu’s case, the accuser’s father was a professor at the college. The panel that ruled against Yu consisted of three Vassar faculty members, despite Yu’s request to have a student on the hearing panel to help cure a potential conflict of interest. Having students on the disciplinary panel may present its own set of problems, though. Dez Wells was a basketball player at Xavier University when a fellow student accused him of rape. He was found responsible by a university conduct board that consisted of several students. Joseph Deters, a prosecuting attorney in the jurisdiction where Xavier sits, read the transcript of the hearing and found that the students on the conduct board charged with providing Wells a fair trial were looking at rape kits and saying, “I don’t know what I’m looking at.” Anecdotes like these illustrate how untrained students might not be well equipped to weigh important evidence, which may be compounded if parties to these disciplinary proceedings are not afforded the benefit of an attorney to properly articulate or argue over evidentiary and due process issues.

126 Dear Colleague Letter, supra note 51, at 12.
127 Carter, supra note 58.
129 Id.
130 Id.
131 Id.
133 Id.
Yet some of the most integral portions of both the Title IX “Dear Colleague” letter and the Campus SaVE Act are guidelines for educational and training programs directed at campus sexual assault.\textsuperscript{134} The “Dear Colleague” letter recommends such measures to ensure that schools are “proactive” in their efforts to stave off sexual violence on campus in keeping with Title IX requirements and regulations.\textsuperscript{135} The Letter specifically recommends informational programs for new students at orientation, special training for students serving as residence hall advisors, and discussions of what amounts to sexual violence. It also prescribes the remedies available to students who have been victims of sexual violence and the punishment for those found responsible for that sexual violence.\textsuperscript{136} It does not, however, feature any mandates or recommendations regarding the education or training of students who may adjudicate allegations of sexual misconduct.\textsuperscript{137}

Similarly, the Campus SaVE Act instructs colleges and universities to provide educational programming on campus sexual assault in the form of orientation programs, bystander intervention options, information on risk reduction, and ongoing prevention and awareness programs, but the Act leaves specific implementation determinations to the school.\textsuperscript{138} Because federal law does not require colleges and universities to place students on the disciplinary boards that hear sexual assault cases, a panel of school administrators and faculty typically judge the accused. These panel members are not exactly among the accused’s peers; they arguably are not impartial because they do not represent a fair cross section of the university or college community.

\textsuperscript{134} See Dear Colleague Letter, supra note 51, at 14; see 42 U.S.C. § 14045b (2012).
\textsuperscript{135} See Dear Colleague Letter, supra note 51, at 14.
\textsuperscript{136} Id. at 14–15.
\textsuperscript{137} See id. at 17.
Institutions should make sure that the panel is as impartial and indifferent as possible when deciding the fate of a student charged with campus sexual assault. When practicable, disciplinary boards should be made up of students and faculty trained on how to adjudicate such claims in a way that provides sensitivity to the alleged victim and fundamental due process rights to the accused. Neither side necessarily benefits from an untrained disciplinary panel that does not know, as referenced above, how to analyze rape kit evidence. This might be an instance where colleges and universities should collaborate with law enforcement for such training if they are to adequately handle claims with such evidence.

d. Burden of Proof

The burden of proof the prosecution must satisfy when attempting to convict a criminal defendant is based on the Due Process Clause of the Fifth and Fourteenth Amendments. The prosecution must meet every element of the alleged crime beyond a reasonable doubt for the jury to find the defendant guilty. This standard “protects a defendant in a criminal case against conviction ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’”

Under federal law, colleges and universities are not required to use this same standard when adjudicating campus sexual assault claims. The burden of proof college disciplinary boards must use when adjudicating campus sexual assault is stated in Title IX and reinforced by the “Dear Colleague” letter explaining Title IX’s requirements, which unequivocally states that “preponderance of the evidence is the appropriate standard for investigating allegations of sexual

\[139\] U.S. CONST. amends. V, XIV.
\[140\] Id. See In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).
harassment or violence.” This standard asks whether “it is more likely than not that sexual harassment or violence occurred” rather than being highly probable or reasonably certain that it occurred, as is required under the “clear and convincing” standard that has been used by certain schools in the past. The preponderance of the evidence standard is the same standard courts employ in cases alleging civil rights violations. The Campus SaVE Act does not mandate a specific burden of proof, but does require institution to publish the burden of proof used in sexual assault proceedings. Title IX’s lower burden of proof has also been a source of controversy within the campus sexual assault debate.

The Office for Civil Rights has investigated numerous institutions for failing to comply with Title IX’s lower burden of proof. After a four-year investigation, Princeton University was found in violation of Title IX for continuing to use a higher burden of proof than the “preponderance of the evidence” standard. Princeton subsequently agreed to lower the burden of proof used in all disciplinary proceedings and avoided a fine. Harvard Law School was also found to be in violation of Title IX for, among other reasons, failing to use the preponderance of the evidence standard, and, during an investigation, the institution adopted revised procedures mandating the use of the Title IX standard.

142 Dear Colleague Letter, supra note 53, at 11.
143 Id.
144 Id.
147 Id.
However, the accused are fighting back against the use of the preponderance of the evidence standard. At the University of North Dakota, Caleb Warner was convicted of sexual assault and banned from campus by a university tribunal using the “preponderance of the evidence” standard. Warner contested the use of the “preponderance of the evidence” standard, which led to the police and the university finding different results. Eventually, the Grand Forks County District Court charged his accuser with providing false information to law enforcement officers. Additionally, a male student sued the University of Colorado at Boulder after his three-semester suspension over an incident of sexual misconduct that he claims was consensual sex. According to his complaint, the university “has created an environment where an accused male student is fundamentally denied due process by being prosecuted through the conduct process under a presumption of guilt” and that “[s]uch a one-sided process deprived John Doe, as a male student, of educational opportunities at CU-Boulder on the basis of his sex.” Thus, the use of the “preponderance of the evidence” standard in the context of on-campus sexual assault processes has struck many accused parties and commentators as having potentially prejudicial and one-sided effects.

After Warner’s experience with the University of North Dakota, his mother founded Families Advocating for Campus Equality, a non-profit aimed at promoting and ensuring

151 Id.
152 Id.
154 Id.
fairness and justice for those involved in the campus sexual-assault adjudicatory process. According to Warner’s mother, the use of the “preponderance of the evidence” standard “puts a tremendous amount of pressure on universities to show that they are in fact being responsive to accusations of sexual assault.” The media have also been highly critical of such a standard. In a *Wall Street Journal* piece, Peter Berkowitz, a senior fellow at Stanford University’s Hoover Institution, stated that by using the preponderance of the evidence standard, “universities are institutionalizing a presumption of guilt in sexual assault cases.” A *Washington Times* article argued that the required standard of proof “will reduce campus judiciary proceedings to nothing more than show trials.”

By using a preponderance of the evidence standard, university tribunals are essentially shifting the burden to the accused to prove their innocence. Because sexual assault and rape are violent crimes, colleges and universities should adjudicate them as such by using the criminal standard of proof. Compounded by the lack of other basic procedural safeguards, the Title IX burden of proof may undermine otherwise strong and cogent defenses. While the beyond a reasonable doubt standard may be too high for university and college tribunals, institutions should strive for an equitable burden of proof to respect the rights of accused students without frustrating a given victim’s compelling need for adequate protections and disciplinary responses.

d. Right to Present Witnesses and Evidence

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156 Id.
The Sixth Amendment provides the important due process guarantees that a defendant may confront witnesses who testify against him and obtain witnesses of his own.\footnote{U.S. CONST. amend. VI.} In *Maryland v. Craig*, the Court articulated that “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”\footnote{Maryland v. Craig, 497 U.S. 836, 845 (1990).} The ability to physically confront witnesses via cross-examination is a two-tiered protection mechanism for criminal defendants.\footnote{Coy v. Iowa, 487 U.S. 1012, 1019–20 (1988) (citing Kentucky v. Stincer, 482 U.S. 730, 736 (1987)).} The Sixth Amendment’s Confrontation Clause “ensur[es] that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.”\footnote{Lee v. Illinois, 476 U.S. 530, 540 (1986).} Additionally, under the Sixth Amendment, an accused “has the right to present his own witnesses to establish a defense”\footnote{Washington v. Texas, 388 U.S. 14, 19 (1967).} and to present relevant evidence subject to reasonable restrictions.\footnote{United States v. Scheffer, 523 U.S. 303, 308 (1998) (citations omitted).}

Title IX, as stated in the “Dear Colleague” letter, requires that grievance procedures at colleges and universities include the opportunity for both parties to present witnesses and other evidence in a hearing.\footnote{Dear Colleague Letter, supra note 51, at 9.} The Campus SaVE Act also requires schools to ensure that both the accuser and the accused have the same opportunity to have others, such as a witness or witnesses, present at hearings.\footnote{S. Daniel Carter, supra note 58.}

However, in Drew Sterrett’s case, there was never a hearing in which he had the opportunity to present witnesses and evidence.\footnote{John Counts, Lawsuit: U-M Unfairly Kicked Student Out Over Sexual Assault Allegation, MLIVE (July 11, 2014, 5:15 PM), http://www.mlive.com/news/ann-arbor/index.ssf/2014/05/lawsuit_claims_u-m_botched_sex.html.} Sterrett, a student at the University of Michigan, and his accuser had what Sterrett maintained was a consensual sexual encounter in his
dorm room. The accuser, however, claimed that the incident was not consensual. Sterrett never had the chance to meet with university officials regarding the investigation or learn the names of the witnesses the school was interviewing. After an investigation by the university, Sterrett was suspended until May 1, 2016, and will be permitted to come back to the university only if he admits to the wrongdoing. Sterrett has since filed suit against the university alleging numerous constitutional violations.

In the Lewis McLeod case against Duke University, one of the primary claims is that McLeod received an “unfair hearing” because the university did not afford him the opportunity to cross-examine witnesses, and because one of his witnesses was sent home from the hearing without any notice or explanation. McLeod’s conviction arose after witnesses who did not testify at the hearing stated that, for example, they saw him “incapacitated” on the night of the incident, which McLeod’s attorney argued constituted indirect double-hearsay.

Because adjudicating sexual assault crimes either in a court of law or campus tribunal is a sensitive process, both parties should be allowed to produce witnesses with favorable testimony. Both parties, and preferably their counsel, should also be allowed to cross-examine adverse witnesses. While neither party should be required to speak on their own behalf, if a party chooses to do so, the adverse party should have the right to cross-examine them. Such a process would help flesh out underlying facts or inconsistencies not present on the face on the claim. The right to witnesses and cross-examination affords a fairer “trial” and avoids the “he said, she

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168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
said” scenario that campus sexual assault adjudications may devolve into. If colleges and universities want to institute fair disciplinary processes for violations such as sexual assault, both parties should have the right to present witnesses and evidence in their favor. By not allowing this, institutions of higher education are arguably not adjudicating the claims neutrally.

e. Right to Appeal

The Fifth Amendment’s Double Jeopardy Clause prohibits defendants from being prosecuted for the same crime on more than one occasion. While numerous issues could arise from allowing a prosecutor to re-prosecute a defendant after an acquittal, “[t]he primary goal of barring re-prosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant.” Furthermore, “[t]he public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried . . . .” While Title IX does not mandate institutions to have an appeals process, the Office for Civil Rights recommended such a process in the “Dear Colleague” letter. Additionally, if such a process is implemented, it must be available to both parties. Like Title IX, the Campus SaVE Act recognizes the requirement of an appeals process.

The issue with the appeals process for campus sexual assault determinations is that it is unconditionally given to both sides. Those arguing for more due process rights for the accused call for a rewriting of the laws to disallow the accusers to appeal “not guilty” decisions because it

175 U.S. CONST. amend. V.
178 See Dear Colleague Letter, supra note 51, at 12.
179 Id.
amounts to prohibited double jeopardy under criminal law.\textsuperscript{181} At Southern Methodist University, which overhauled its sexual assault policy after being investigated by the Office for Civil Rights, an accuser can appeal a decision in favor of the accused, and if appealed, the accused receives only three days’ notice of the evidence against him or her, plus a list of adverse witnesses.\textsuperscript{182} However, at the University of Michigan, where the Drew Sterrett case took place, Sterrett was allowed to appeal to university conduct boards twice.\textsuperscript{183} The right to appeal came with a price. When the board upheld of the finding that Sterrett had in fact committed sexual misconduct, he was required to leave the university.\textsuperscript{184}

Allowing accusers to appeal acquittals of the accused by disciplinary boards undermines the campus adjudication process because, in doing so, both the parties and campus community may doubt the decision-making process and finality of issued judgments. Like in criminal trials, appeals should be reserved for an accused found responsible for the offense. This prevents unfair retaliation by accusers while maintaining an aura of confidence and finality around the process.

IV. Should Colleges and Universities Even Be Adjudicating Campus Sexual Assault Claims?

It is undisputed that colleges and universities are required by federal law to adjudicate claims like sexual assault.\textsuperscript{185} In fact, Alexandra Brodsky and Elizabeth Deutsch argue that laws such as Title IX are the main reason campuses should be involved in the adjudication of sexual assault:

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\textsuperscript{182} Johnson, supra note 84.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} See supra discussion contained in Part II.
\end{flushright}
to prevent inequality in education. However, with the ongoing dispute about whether campuses are equipped to do so fairly, the question arises of whether campuses should be involved at all.

Victims’ rights are a major factor as to why colleges and universities investigate and adjudicate claims of sexual assault. According to Know Your IX, a grassroots campaign to end campus sexual violence, institutions handle campus sexual assault claims for three main reasons: 1) campus adjudication is the only option for most victims; 2) institutions are able to address the needs of victims that are not addressed by the criminal justice system; and 3) colleges and universities can act quickly to protect students. Each of these reasons will be discussed in turn.

a. Campus Adjudication As The Only Option for Victims

Unlike institutions of higher education, which are required by federal law to investigate every report of sexual violence, law enforcement officials and prosecutors are not bound by such a requirement. Out of every one hundred rapes, seven lead to an arrest and only three are referred to prosecutors. The campus adjudication process may be a victim’s only chance to see her alleged perpetrator brought to justice. Additionally, victims may have skepticism about the capacity and efficiency of the criminal justice system. For example, in response to an Emerson College student’s claims that she was sexually assaulted, the Boston police

186 Alexandra Brodsky & Elizabeth Deutsch, No, We Can’t Just Leave College Sexual Assault to the Police, POLITICO (Dec. 3, 2014), http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294_full.html#.VNg_yMaELLV.
189 See id.
191 Why Schools Handle Sexual Violence Reports, supra note 188.
192 Id.
questioned the student, Sarita Nadkarni, examined the bedroom where the alleged sexual assault took place, left Nadkarni a business card, but failed to follow up on the claim.\textsuperscript{193} Nadkarni felt the school downplayed or failed to complete an investigation of her claims.\textsuperscript{194} In Nadkarni’s opinion, neither the Boston police nor Emerson College handled her sexual assault claims adequately.\textsuperscript{195}

Yet, as discussed above, law enforcement officials and prosecutors are operating under a more exacting standard of proof. In order for authorities to pursue an investigation or conviction, they must have proof beyond a reasonable doubt that the incident occurred. The requirement of proof beyond a reasonable doubt, combined with the difficulty in investigating and proving sexual assault, leads to fewer arrests and prosecutions of sexual assault compared to those tried in campus disciplinary proceedings. While colleges and universities should be as sensitive as possible to those alleging sexual assault, the institutions should also be sensitive to the rights of the accused.

b. Institutions of Higher Education Are More Equipped to Address the Needs of Victims

In the abstract sense, because the government, not the victim, brings criminal charges against a defendant, the state is protecting its own interests as opposed to the interests of the victim.\textsuperscript{196} In a campus investigatory process, a college or university can easily move the accuser or the


\textsuperscript{194} Id.

\textsuperscript{195} See id.

\textsuperscript{196} \textit{Why Schools Handle Sexual Violence Reports}, supra note 188.
accused out of a dorm or switch a victim’s classes to avoid the alleged perpetrator. Additionally, Title IX, through the “Dear Colleague” letter and the Campus SaVE Act, recommends important programs such as counseling to meet the needs of victims. However, an institution of higher education should be able to accommodate a victim’s needs without discriminating against the due process rights of an alleged perpetrator.

c. Colleges and Universities Can Act More Quickly Than Law Enforcement

While rape and sexual assault investigations and trials can stretch over a period of months or even years, institutions are required to have time frames in place for the adjudication of campus sexual assaults. These time frames allow institutions to take actions like suspension or expulsion more quickly than it would take law enforcement to investigate and place a potential offender in jail. It takes approximately sixty days for a college or university to investigate a claim of sexual assault. However, as previously discussed, a speedy adjudication of claims and a low standard of proof do not necessarily afford due process to the accused.

Despite valid arguments for the adjudication of sexual assault by colleges and universities, some are calling for an entirely overhauled system in which colleges and universities play less of a role. One critic, David Rubin, suggested designating a campus liaison to act as a go-between for campuses, law enforcement, and prosecutors, leaving adjudication to the criminal justice system and ensuring the case is resolved effectively for both parties. Further, Rubin

\[\text{Id.}\]

\[\text{Id. Dear Colleague Letter, supra note 51, at 15; 42 U.S.C. § 14045b (2012).}\]

\[\text{Dear Colleague Letter, supra note 51, at 9.}\]

\[\text{Why Schools Handle Sexual Violence Reports, supra note 188.}\]


recommends that, because this extra processing of claims by law enforcement will cost taxpayers money, colleges should pay a fee for the service. 203

Adam Goldstein, an attorney for the Student Press Law Center, calls for the complete handling of campus sexual assault claims by law enforcement and the criminal justice system. 204 Goldstein bases his argument on the fact that the reason the criminal justice system is slower than campus adjudicatory processes is because it provides more evidentiary and procedural safeguards. 205 Goldstein adds that, irrespective of whether the acquittal was a product of the criminal justice system or the campus adjudicatory process, the outcomes of erroneous acquittal are the same: a rapist continues to walk the streets. 206 “Leave justice to the justice system,” Goldstein argues. 207 Although admitting law enforcement’s need for increased sensitivity and thoroughness, one critic suggests that, when allegations of sexual assault arise, the responsibility to investigate should shift to law enforcement agencies rather than educational institutions. 208

It is unlikely that colleges and universities will ever entirely abandon the adjudication of campus sexual assault claims. Not only does federal law require colleges and universities to adjudicate these claims, but institutions would also come under heavy fire for disregarding victims’ rights if institutions left the process to law enforcement alone. However, an overhaul of the system is necessary if disciplinary proceedings at colleges and universities are going to afford fair processes to both parties.

V. A Climate of Change

203 Id.

204 Adam Goldstein, Rape Is a Crime, Treat It as Such, N.Y. TIMES (March 12, 2013), http://www.nytimes.com/roomfordebate/2013/03/12/why-should-colleges-judge-rape-accusations/rape-is-a-crime-treat-it-as-such.

205 Id. It is debatable whether these evidentiary and procedural safeguards are the reasons critics see the criminal justice system as an extremely lengthy process.

206 Id.

207 Id.

In January of 2014, President Obama created the White House Task Force to Protect Students from Sexual Assault.\(^{209}\) In the memorandum, Obama addressed the shortcomings of the campus adjudication process, noting that they are “uneven and, in too many cases, inadequate.”\(^{210}\) The President called for an interagency effort to address the issue of campus sexual assault by ensuring compliance with federal law, increasing transparency of the federal government’s enforcement activities concerning rape and sexual assault, and consulting with external stakeholders, including law enforcement officials.\(^{211}\)

The Rape, Abuse & Incest National Network (“RAINN”) responded to the President’s creation of the White House Task Force with comments and recommendations, urging the federal government to encourage innovation and sponsor rigorous evaluation rather than force the adoption of specific programs.\(^{212}\) The organization recommended a three-tiered approach to ending sexual violence on college campuses: 1) bystander intervention education, 2) risk reduction messaging, and 3) general education to promote understanding of the law.\(^{213}\) The letter argues that the primary, most effective way to prevent sexual violence is to use the criminal justice system to take more rapists off the streets.\(^{214}\) The letter also calls for treatment of sexual assault on the campuses of college and universities as a crime, encouraging reporting and enhancing coordination with law enforcement.\(^{215}\) The letter suggests that internal judicial boards are not equipped to handle crimes such as rape, stating that judicial boards “often offer the worst


\(^{211}\) Id.


\(^{213}\) Id. at 4.

\(^{214}\) Id.

\(^{215}\) Id.
of both worlds: they lack protections for the accused while often tormenting victims.”\textsuperscript{216} The letter further states that it is imperative that colleges and universities partner with local law enforcement from the time of report to resolution and urges the federal government to establish best practices in the area of law enforcement and campus partnerships.\textsuperscript{217}

Also in 2014, legislation taking aim at campus sexual assault was proposed.\textsuperscript{218} The Campus Safety and Accountability Act seeks to protect and empower students and strengthen accountability and transparency for institutions.\textsuperscript{219} Provisions of the legislation include new campus resources and support services for victims, including the designation of Confidential Advisors whose role will consist of coordinating support services and accommodations for survivors and providing information, guidance, and assistance regarding the involvement of law enforcement officials.\textsuperscript{220} The legislation also includes requirements for minimum training of on-campus personnel, including those responsible for investigating and participating in campus adjudication proceedings, transparency requirements in the form of an annual anonymous survey by universities, and enforceable Title IX penalties and stiffer penalties for Clery Act violations.\textsuperscript{221} Under the new legislation, schools face penalties of up to one percent of their operating budget for violating Title IX and up to $150,000 per violation for failure to comply with the Clery Act.\textsuperscript{222} The legislation also requires uniform disciplinary procedures for each school and for schools to enter into a memorandum of understanding with local law enforcement

\footnotesize{\begin{itemize}
\item \textsuperscript{216} Id. at 8–9.
\item \textsuperscript{217} Id. at 10.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id.
\end{itemize}}
officials in order to delineate responsibility. Even lawmakers understand that the process currently in place is not affording the best possible rights to both the accuser and the accused.

Individual states are taking measures to insure the proper handling of campus sexual assault. In California, Governor Jerry Brown signed an affirmative consent bill, making “yes means yes” the standard at California’s colleges and universities. California makes state funding conditional on the requirement that sexual assault investigators determine whether both parties gave “affirmative, conscious and voluntary agreement,” with lack of resistance and silence no longer constituting proof of consent.

Legislatures in both New Jersey and New Hampshire are considering affirmative consent bills, and “New York Gov. Andrew Cuomo said the State University of New York will institute a system-wide definition of consent that adheres to affirmative consent standards.” In Virginia, a panel of delegates has “advanced a bill that would force police to notify the commonwealth’s attorney within 48 hours of the start of an investigation.” Virginia is also considering a bill that “would require colleges to report sexual assaults to police if it is determined that the health and safety of students or others is at risk.” Another “measure [] would require public and private colleges to note the transcripts of students who have been suspended or expelled for—or have withdrawn during the investigation of—violations of a college’s sexual conduct code.”

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223 Id.
225 Id.
228 Id.
229 Id.
This bill was advanced in response to the disappearance of Hannah Graham, a University of Virginia student, who was found murdered in October 2014. Jesse Matthew, Graham’s alleged murderer, faced previous accusations of sexual assault at two separate universities. Such a measure would require the delicate balancing of victims’ rights with the accused’s rights, and would not be possible without changes to due process requirements in campus sexual assault adjudications.

Students have also become disillusioned with the campus adjudication process. At the University of California, Los Angeles, Undergraduate Students Association Council Student Wellness Commissioner, Savannah Badalich, described the way UCLA currently handles campus sexual assault as mere “compliance.” Badalich helped form “7000 in Solidarity,” a student-run campaign that focuses on education, advocacy, and research of campus sexual assault among UCLA students. The group encourages students to take a solidarity pledge to promise to practice consent, intervene in situations of sexual assault, and support survivors of campus sexual assault. UCLA is not the only university with a student-run group whose focus is to bring attention to campus sexual assault. Students at the University of Oregon formed the Sexual Wellness Advocacy Team, which uses creative campaigns to spread the word about rape prevention and offers workshops and other programming related to consent.

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230 Id.
232 Portnoy, supra note 227.
233 Kate Parkinson-Morgan, UCLA, Student Groups Combat College Sexual Assault, DAILY BRUIN (May 1, 2014, 12:54 AM), http://dailybruin.com/2014/05/01/ucla-student-groups-combat-college-sexual-assault/.
234 Id.
236 Id.
University hosts “consent events,” a week-long campaign aimed at preventing sexual violence through consent.  

The most notable organizations are campus organizations run by men that focus on male awareness of sexual assault. At Colby College in Maine, Eric Barthold was horrified when a fellow student presented her thesis research in class regarding sexual assault on Colby’s campus. He and two other students founded Mules Against Violence, a reference to Colby’s mascot, aiming to generate awareness about sexual assault on campus and challenge male athlete stereotypes. The group also began bringing male athletes together for conversations about masculinity to challenge preconceived notions about what it means to “be a man;” Mules Against Violence hopes the conversations will show how those notions translate into male privilege and lead to incidents of campus sexual assault. At Northwestern University, Men Against Rape and Sexual Assault (“MARS”) is an all-male peer education group whose purpose is to engage and educate men about the issues of rape and sexual assault. Indiana University also has a MARS group, which boasts more than three hundred members that seek to educate, engage, and train men on similar issues regarding sexual assault.

Even the President has stepped up with a grassroots effort to end campus sexual assault. In September 2014, President Obama “joined leaders from universities, media companies, the

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237 Id.
239 Id.
240 Id.
sports world, and grassroots organizations to launch the ‘It’s On Us’ campaign.”

The campaign “seeks to reframe the conversation surrounding sexual assault in a way that inspires everyone to see it as their responsibility to do something . . . to prevent it.” “It’s On Us” outlines four main points: “1) to recognize that non-consensual sex is sexual assault; 2) to identify situations in which sexual assault may occur; 3) to intervene in situations where consent has not or cannot be given; and 4) to create an environment in which sexual assault is unacceptable and survivors are supported.”

The campaign provides tools for campuses to start their own student-run “It’s On Us” chapters. By taking the pledge, colleges and universities take back responsibility for campus sexual assault.

With everyone from the President, to state lawmakers, to male undergraduate students involved in the crusade to end campus sexual violence, there is more to learn about the problems surrounding sexual violence and what measures it will take to solve it. The national conversation on sexual violence turned from one of witch-hunt against those suspected of campus sexual assault to one concerned with fairness and due process rights for both sides. This is a fundamental shift in the attitude towards campus sexual assault, and an important step toward resolving the problem.

VI. Conclusion

There is absolutely no doubt that campus sexual assault is a large problem in the United States—a problem that even the most skilled lawmakers cannot seem to solve. It has taken decades of legislation, lawsuits, and the formation of numerous grassroots organizations to call

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244 Id.


attention to an issue that has changed countless lives. People have begun to recognize that what has been done and what is being done is not enough. So what is enough? What would have or could have changed the outcomes for Paul Nungesser, Caleb Warner, Peter Yu, Drew Sterrett, and Lewis McLeod, among others? Although for different reasons, none of the above undergraduate students were satisfied with the way their campuses, law enforcement, or both in some instances, handled their defenses against alleged sexual assault. According to Warner, Yu, Sterrett, and McLeod, all found culpable of sexual misconduct by their universities, the adjudication boards ruling on their cases did them a grave injustice by failing to afford them basic due process rights guaranteed by our Constitution.\textsuperscript{247} However, victims of alleged sexual assault find it to be unjust and a step backwards in the fight for rights of such victims when their universities clear their accused perpetrators of misconduct.

Certainly enforcement of federal laws and more legislation to change those laws to better afford rights to both parties is something that must be done. Colleges and universities must operate under a uniform system to investigate and handle claims of campus sexual assault. The arguments for whether colleges and universities should be handling such adjudications are valid on both sides. Grassroots organizations and awareness groups seem to be of benefit as well, particularly those run by students, for students. However, campus sexual assault is a pervasive, systemic, societal issue stemming from numerous factors such as our culture’s ideal notions of masculinity and femininity; a tendency towards shame and secrecy when such crimes do occur; and other basic college and university issues such as alcohol and drug abuse. There is not one factor, one law, or one organization alone that can end sexual assault on college campuses.

The chatter around the issue of sexual assault on college campuses has grown so loud that lawmakers and university officials seem to have lost sight of the real issue at stake: to protect both victims of sexual assault and those accused of committing sexual assault with the end goal to prevent sexual violence on campuses. The only way to attack this issue is through a multi-faceted approach combining the law, the universities, the local law enforcement officials, and the grassroots organizations to come up with a better, more just system for the processing and adjudication of these claims. By working together, universities, law enforcement, and grassroots organizations can better understand the law governing their duties and provide effective remedies for both the accuser and the accused. By doing so, institutions will more fairly handle such issues, and hopefully, both parties will benefit.

Only time will tell whether the approach in place by colleges and universities will work to curb sexual assault problems on our nation’s campuses. The more challenges to the system, the more change we will likely see—for the better. However, the problem cannot be solved completely until both the accuser and the accused see equal, impartial rights. As portrayed by the students referenced in this Comment, it is currently a back and forth “he said, she said” game in which no one is satisfied. Perhaps when victims’ rights and due process can stand together as the number one priority we will be able to move forward, working together, to end sexual assault on college campuses.