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ADDRESS: THE CIVIL RIGHTS APPROACH TO CAMPUS SEXUAL VIOLENCE†

*Nancy Chi Cantalupo**

INTRODUCTION

Thank you to the *Regent University Law Review* Editors for inviting me to participate in this conversation. This is a subject that I have spent an extraordinary amount of time discussing and thinking about, and I certainly would not have done that if I did not think it was critically important. I thought that I would talk about my primary area of legal expertise, which concerns Title IX of the United States Education Amendments of 1972,¹ and how it relates to this Symposium's topic of campus sexual violence. Although I have also done significant research on the Clery Act and the administrative due process rights of accused students in sexual violence cases on college campuses, my focus today will be on Title IX.

I will start with some "basics" regarding Title IX. Sexual violence is commonly thought of as a crime in the United States.² However, recent activism has brought to the forefront that sexual violence is also a violation of Title IX (which took the ground-breaking step of prohibiting sex discrimination in education in 1972).³ Sexual violence is considered a severe form of sexual harassment, and sexual harassment has been

† This speech is adapted for publication and was originally presented as an address at the Regent University Law Review Symposium entitled "College Culture, Sexual Violence, and Due Process," on October 3, 2015.

* Assistant Professor of Law, Barry University Dwayne O. Andreas School of Law. I thank the students, faculty, and audience members who attended the 2015 Symposium for their questions and comments, and the students of the *Regent University Law Review* for their tremendous assistance in turning my speech into this annotated transcript.

¹ Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

² See *Rape and Sexual Violence*, NAT'L INST. JUST. (Oct. 26, 2010), <http://www.nij.gov/topics/crime/rape-sexual-violence/pages/welcome.aspx> (explaining that "sexual violence" encompasses crimes such as sexual harassment and rape).

³ See Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence i–ii (Apr. 24, 2014) [hereinafter OCR Questions and Answers], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (explaining that both private and public schools and universities that receive federal funding must promptly investigate and address sexual violence under Title IX); Dana Bolger, *9 Things to Know about Title IX*, KNOW YOUR IX, <http://knowyourix.org/title-ix/title-ix-the-basics/> (last visited Feb. 23, 2016) (discussing the basics of Title IX on the website of an organization designed to empower students to stop sexual violence).

recognized throughout the globe as a form of sex discrimination for many decades.⁴

With regard to enforcement, most of the attention now is on administrative enforcement by the Office for Civil Rights (“OCR”) because survivors have been filing complaints in droves.⁵ For example, the latest count for universities under investigation is around 130—when the list was first published, less than eighteen months ago, the number was 55.⁶ So there is a great deal of activity going on in this area. But, of course, the ability to bring private lawsuits has also gotten some attention,⁷ and the rates of those filings have gone up as well.⁸

OCR’s agreements with schools that settle complaints tend to be very comprehensive and detailed,⁹ which lead several schools to agree to make significant changes to their procedures recently.¹⁰ As you can see,

⁴ Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 356–57 (2006); OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i–ii (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

⁵ See Lyndsey Layton, *Civil Rights Complaints to U.S. Department of Education Reach a Record High*, WASH. POST (Mar. 18, 2015), <https://www.washingtonpost.com/news/local/wp/2015/03/18/civil-rights-complaints-to-u-s-department-of-education-reach-a-record-high/> (noting that the number of complaints soared after the Office for Civil Rights stated that sexual violence is a form of sex discrimination).

⁶ Nick Anderson, *Rutgers: 20 Percent of Undergraduate Women Had Unwanted Sexual Contact*, WASH. POST (Sept. 2, 2015), https://www.washingtonpost.com/local/education/rutgers-20-percent-of-undergraduate-women-had-unwanted-sexual-contact/2015/09/01/33b6d46c-50d4-11e5-933e-7d06c647a395_story.html (noting 130 open Title IX sexual violence investigations); 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-release/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> (listing fifty-five institutions with open Title IX sexual violence investigations).

⁷ See, e.g., *How to Pursue a Title IX Lawsuit*, KNOW YOUR IX, <http://knowyourix.org/title-ix/how-to-pursue-a-title-ix-lawsuit/> (last visited Feb. 23, 2016) (noting the private complaint a victim can file if an institution is not complying with Title IX obligations regardless of a complaint with the OCR).

⁸ See Daniel A. Kaufman, José A. Olivieri, & John G. Long, *Can Colleges and Universities be Sued for Sexual Orientation Discrimination and Run Afoul of Title IX?*, NAT’L L. REV. (Jan. 20, 2016), <http://www.natlawreview.com/article/can-colleges-and-universities-be-sued-sexual-orientation-discrimination-and-run> (observing that Title IX claims have become more prevalent).

⁹ See Sara Lipka, *How 46 Title IX Cases Were Resolved*, CHRON. HIGHER EDUC. (Jan. 15, 2016), <http://chronicle.com/article/How-46-Title-IX-Cases-Were/234912> (explaining that the OCR issues two lengthy documents in resolution agreements with schools: the letter of findings which details the investigation and the resolution agreement which details the process and procedure for the school moving forward).

¹⁰ See, e.g., Press Release, U.S. Dep’t of Educ., Michigan State University Agrees to Change Its Response to Complaints of Sexual Harassment, Sexual Violence (Sept. 1, 2015),

there is a lot of activity on the topic of sexual violence, not just in terms of the problem itself, but also in the legal and administrative responses to it. Indeed, there has been a small explosion of attention to this issue on the national scene,¹¹ especially with the major events that have happened in the last eighteen months.¹²

It is clear now that the fight against campus sexual assault is a civil rights movement.¹³ This movement is being led by survivors of campus sexual violence, and they are using Title IX and other civil rights statutes as the flag for their movement.¹⁴ This is particularly clear from the fact that they have chosen names like “Know Your IX” and the “IX Network.”¹⁵ Because of its reliance on federal civil rights laws, the

<http://www.ed.gov/news/press-releases/michigan-state-university-agrees-change-its-response-complaints-sexual-harassment-sexual-violence> (listing changes that include requiring all students to participate in online training on sexual harassment and developing a monitoring program to evaluate campus efforts); Press Release, U.S. Dep’t of Educ., U.S. Department of Education Reaches Agreement with The Ohio State University to Address and Prevent Sexual Assault and Harassment of Students (Sept. 11, 2014), <http://www.ed.gov/news/press-releases/us-department-education-reaches-agreement-ohio-state-university-address-and-prevent-sexual-assault-and-harassment-students> (noting that changes include forming a group of first responders to address sexual violence complaints and developing student online training sessions on bystander intervention); Press Release, U.S. Dep’t of Educ., U.S. Education Department Reaches Agreement with the University of Virginia to Address and Prevent Sexual Violence and Sexual Harassment (Sept. 21, 2015), <http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-university-virginia-address-and-prevent-sexual-violence-and-sexual-harassment> (documenting changes that include implementing a system for tracking all reports of sexual violence to ensure they are appropriately addressed and providing training on sexual harassment for all students and faculty).

¹¹ See Tovia Smith, *How Campus Sexual Assaults Came to Command New Attention*, NPR (Aug. 13, 2014, 11:27 AM), <http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention> (explaining that, in recent years, talk about sexual assault “has gone from mostly whispers all the way up to the White House,” resulting in widespread policy changes at most colleges).

¹² See, e.g., CQ PRESS, *CAMPUS SEXUAL ASSAULT* 926–31, <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2014103100> (providing a comprehensive account of legal and policy-related events about campus sexual assault, including the White House Task Force to Protect Students from Sexual Assault and recent legislation at both the state and federal levels); Max Lewontin, *In Rules on Campus Sexual Violence Education Dept. Emphasizes Training*, CHRON. HIGHER EDUC. (Oct. 20, 2014), <http://chronicle.com/article/In-Rules-on-Campus-Sexual/149521/> (noting the importance of the changes in the new federal rules promulgated under the Clery Act, which took effect in July 2015).

¹³ Gloria Allred, *Gloria Allred: The Battle Over Sexual Assault is the “Civil Rights Movement of Our Time,”* TIME (May 15, 2014), <http://time.com/100055/campus-sexual-assault-gloria-allred/>.

¹⁴ Emanuella Grinberg, *Ending Rape on Campus: Activism Takes Several Forms*, CNN (Feb. 12, 2014, 11:35 AM), <http://www.cnn.com/2014/02/09/living/campus-sexual-violence-students-schools/>.

¹⁵ *Id.*

movement has gotten a lot of attention from the federal government—particularly those agencies like OCR that deal with civil rights issues.¹⁶

The survivor movement and the federal government have primarily focused on civil rights, but the conversation in the media and among the general public has been quite different. In these conversations, there has been a dominant theme that conflates civil rights laws and the criminal justice system. While this discourse treats the two as if they were similar, civil rights laws and the criminal justice system are, in fact, very different.¹⁷

Therefore, my role today is to explain the ways in which campus sexual violence is not just a crime, but also a violation of our civil rights laws. Considering campus sexual violence as a civil rights issue differs from looking at it as a criminal issue in countless ways, but I am going to focus only on the four that I think are most important.

I. DIFFERING GOALS

The first difference between the criminal justice approach and the civil rights approach has to do with the different goals of each system. The civil rights approach is concerned with equality: equal educational opportunities, equal education environments, and equal support for the learning of all students.¹⁸ In contrast, the criminal justice system is focused on keeping the abstract community as a whole safe from violence, and relies on incarceration of criminal actors to protect that community.¹⁹ Because that incarceration needs to be just, and we cannot deprive citizens of their liberty under the Constitution based on crimes that they did not commit, the focus of the criminal justice system is on the defendant's rights²⁰ not on the victim's needs. Indeed, aside from giving testimony in court, the victim is traditionally not really a part of the criminal proceeding.²¹

¹⁶ See *id.* (observing that the federal government has placed many universities under scrutiny because of potential Title IX violations).

¹⁷ See OCR Questions and Answers, *supra* note 3, at 27 (explaining the differences between a criminal investigation and a Title IX civil rights investigation).

¹⁸ See *id.* at 32–33 (describing the measures schools must undertake after a sexual violence allegation); REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 4, at 3–4 (summarizing the extensive obligations schools undertake under Title IX to avoid sex discrimination).

¹⁹ WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW §§ 1.2(e), 1.3(a) (2d ed. 2010).

²⁰ See *id.* § 1.4 (discussing the high evidentiary and constitutional standards that are designed to protect the innocent even if the guilty may go free).

²¹ See Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 849 (1997) (observing that the victim is sometimes excluded from the courtroom to ensure that the defendant has a fair trial).

In contrast, just incarceration is not the focus of an equality-based regime and, therefore, not the focus of the Title IX approach.²² At the outset, this is because schools cannot incarcerate individuals and are not in a position to enforce the criminal law—they are not criminal justice actors.²³ Instead, the civil rights approach focuses on the victim, because the right to be free from sex discrimination is the *victim's* right—one that the victim holds under the civil rights statutes.²⁴ Thus, the civil rights approach focuses primarily on the victim's, not the accused perpetrator's, legal rights.

II. DIFFERING PRIORITIES FOR ADDRESSING VICTIMS' NEEDS

The second difference between the criminal justice and the civil rights approaches to sexual violence naturally arises from the different goals of each system. These different goals have allowed each system to adopt different structures in response to the rights and needs of the individual at the focal point of those goals (in the criminal system, the accused perpetrator, and in the civil rights system, the victim of discrimination).

This is critically important because victims have an extremely wide range of needs after experiencing sexual violence, and the downward spiral that victims can experience if these needs are not met can seriously derail and even ruin their lives.²⁵ The downward spiral starts with serious health problems triggered by the sexual violence, including an increased risk of substance use and re-victimization, as well as a greater likelihood of developing eating disorders, participating in sexual risk behaviors, engaging in self-harm, and committing or attempting suicide.²⁶ For students, those health problems can require time off from

²² OCR Questions and Answers, *supra* note 3, at 27.

²³ LAFAVE, *supra* note 19, §1.4(c) (describing the many actors of criminal justice, including the victim, police officers, prosecutors, juries, and judges).

²⁴ See 20 U.S.C. § 1681(a) (2012) (prohibiting sex discrimination in education programs or activities that receive federal funding).

²⁵ Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 44–47 (1991) (detailing the possible physical and psychological harms that can affect sexual violence victims long after the initial incident).

²⁶ For in-depth discussions and studies on the consequences of sexual violence on victims see generally, TED R. MILLER, MARK A. COHEN & BRIAN WIERSEMA, U.S. DEP'T OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 17 (1996), <https://www.ncjrs.gov/pdffiles/victcost.pdf> (reporting the monetary cost of crime for victims, including statistics on rape and sexual assault); Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572 (2001) (reporting study results that women who experience dating violence are likely to have other serious health risk behaviors); Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* (June 2012) (unpublished Ph.D. dissertation, Brandeis

school, usually causing a drop in grades and even a decline in overall educational performance.²⁷ The effect on educational performance can then result in economic losses, such as loss of financial aid, tuition dollars, or scholarship money.²⁸ And in the worst cases, the student may drop out or transfer to a less desirable school because of the cumulative effects of the sexual violence.²⁹ The negative impact on future earning potential can be large, diminishing a student's equal employment opportunities as well. Thus, the potential impact on the student's life is great even before they enter the workforce.

Additionally, these dynamics can have a different impact on certain groups of students. For example, first-generation college students are likely to have fewer resources from home than other non-first-generation students, making it more challenging to create the time and space that they need to heal from sexual violence. As a result, these students can unfairly experience an even greater impact on their lives after suffering from sexual violence.

Thus, to halt the downward spiral and re-establish an equal education for the student, the school's focus cannot solely be on punishment for the perpetrator. Under Title IX, the school must provide accommodations for victims whose trauma makes it impossible for them to continue with their education in the same way they did before the violence. These accommodations may include making changes to the victim's housing, working, commuting, and academic arrangements, or obtaining a stay-away order, refunding tuition, as well as providing other types of relief.³⁰ Through providing such accommodations, schools can remedy harms that the victim has experienced by sanctioning the assailant.

Just as this focus on accommodations reflects Title IX's equality goals, the criminal justice system's lack of similar remedies relates back to the goals of the criminal law. Because the criminal law does not seek to re-establish equality for the victim as Title IX does, it is not structured to provide accommodations or assistance comparable to Title

University) (on file with author) (finding sexual violence caused negative economic consequences and altered educational attainment, occupation, and earnings).

²⁷ See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 396 (2005) ("The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure. Simply put, sexual assault is a significant barrier to equal education for young women today.").

²⁸ Anna Kerrick, *Justice is More than Jail: Civil Legal Needs of Sexual Assault Victims*, ADVOCATE, Jan. 2014, at 40.

²⁹ *Id.*

³⁰ OCR Questions and Answers, *supra* note 3, at 32.

IX. The criminal justice system is simply not set up to make a victim whole in the way that civil rights laws can.³¹

III. DIFFERING CONTROLS OVER INVESTIGATORY DECISIONS

The third difference centers on who decides whether an investigation of a victim's report will occur. Almost every case processed by the criminal justice system will involve an investigation, and police and prosecutors will more than likely dictate the course of that investigation.³² Police and prosecutors decide to advance very few sexual violence cases through the full criminal process.³³

It is also clear that few survivors give police or prosecutors the chance to make that decision at all.³⁴ Instead, the vast majority of survivors will use the "victim's veto." This is a phenomenon identified and explained by Professor Douglas Evan Beloof of Lewis and Clark Law School, who says that "[t]he individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through nonreporting."³⁵ Although Professor Beloof discusses crime victims generally, thirty years of social science research on campus sexual violence shows that the reasons provided by Professor Beloof for the prevalence of the victim's veto are highly relevant to campus sexual violence survivors.³⁶ Those reasons include the survivor's desire to maintain privacy, a concern that reporting the incident may do them more harm than good, and a skepticism that the system will be able to solve many of these cases.³⁷ Those same concerns are present with incidents of sexual violence on college campuses.

Equally evident in the victim's veto are victims' concerns about treatment from systems in which they lack the ability to participate or express concern about that participation—to many victims, this is a

³¹ See LAFAVE, *supra* note 19, § 1.3(b) (noting that the purpose of the criminal justice system is to protect the community, not to make the victim whole, as in a tort claim).

³² *Id.* § 1.4(c).

³³ Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. U. L.J. 181, 188–90 (2008).

³⁴ See Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (finding that only five to twenty percent of victims will report a sexual assault to law enforcement).

³⁵ Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999).

³⁶ Lonsway & Archambault, *supra* note 34, at 159 (explaining that factors such as "poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors" result in low sexual assault conviction rates).

³⁷ Beloof, *supra* note 35, at 306.

barrier to reporting sexual violence.³⁸ In addition, some victims may reject involvement with any system based on what they see as the retributive justice model used by the criminal justice system.³⁹

All of these factors lead to the important third difference between the criminal justice system and the civil rights approach. Whereas police and prosecutors dictate the course of the investigation in a criminal case—indeed, they decide whether the case is investigated at all—Title IX allows survivors to decide.

Title IX permits this decision through the two-path reporting system that OCR established last year when it released its *Questions and Answers on Title IX and Sexual Violence*.⁴⁰ This system is similar to the restricted and unrestricted reporting system used in the military for many years with significant success.⁴¹ With two choices of how to report, survivors can essentially make the decision whether to initiate an investigation. If a victim wants to initiate an investigation, he or she can make an official report to a responsible employee or to the Title IX coordinator. The Title IX coordinator would subsequently have to investigate, unless the victim explicitly requests that there be no investigation and the Title IX coordinator grants that request. If the student changes his or her mind, there are multiple factors that the Title IX coordinator should consider when the student requests confidentiality after filing an official report.⁴²

There is also a confidential path, which allows a victim access to the services and accommodations for healing,⁴³ but will not result in an investigation unless the victim later decides to report to a responsible employee or to the Title IX coordinator.⁴⁴ In the military system, this process would be described as turning a restricted report into an

³⁸ *Id.*; see also Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report it*, CHRON. HIGHER EDUC. (June 18, 2015), <http://0-chronicle.com.library.regent.edu/article/Another-Challenge-on-Campus/230977> (noting the white faces of the college sexual assault movement and other factors that create barriers to reporting for minority women).

³⁹ Beloof, *supra* note 35, at 306; LAFAVE, *supra* note 19, § 1.5 (explaining that criminal law has favored a retributive or “just deserts” approach since the 1960s).

⁴⁰ See OCR Questions and Answers, *supra* note 3, at 21–22 (describing the relevant factors in weighing a student’s request for confidentiality versus after an official report has been made to a responsible employee or directly to the Title IX Coordinator).

⁴¹ See *Reporting Options*, MYDUTY.MIL, <http://www.myduty.mil/index.php/reporting-options> (last visited Feb. 24, 2016) (discussing the two reporting options available for sexual assault victims in the military).

⁴² OCR Questions and Answers, *supra* note 3, at 21 (including factors like risk of additional acts of sexual violence, whether a weapon was involved, means of obtaining relevant evidence, and age of the students involved).

⁴³ *Id.* at 24.

⁴⁴ See *id.* at 22 (noting that a student who initially requests confidentiality may later request a full investigation).

unrestricted report,⁴⁵ which is commonly done.⁴⁶ For instance, statistics on restricted and unrestricted reporting in the U.S. military academies from 2014–2015 show that survivors switched their reports from restricted to unrestricted in as many as twenty-seven percent of cases in some years.⁴⁷ Such switches are possible in the Title IX system as well and are likely already occurring since OCR released the FAQs in 2014.

Thus, by providing victims with options, such as whether to initiate an investigation (through choosing a confidential or non-confidential path) and when any investigation will be launched (by switching from a confidential disclosure to a non-confidential report), Title IX places key procedural decisions regarding cases into victims' hands. This empowering approach contrasts sharply with the lack of control most victims experience in the criminal justice system.

IV. DIFFERING PROCEDURAL RIGHTS FOR VICTIMS

The factors that lead to the third difference between the Title IX and criminal approaches are likewise linked to the fourth and final difference. Indeed, the social science research, Professor Beloof's analysis regarding the victim's veto, and the success of the military's dual-path reporting system suggests that victims who use the official Title IX reporting path to initiate an investigation will likely make their decision by considering how the investigation and the relevant procedural rules will operate.

This consideration is significant because the criminal justice system and the civil rights approach provide very different procedural rights for victims. Title IX uses procedures that treat both the complainant and the accused as equal parties to the proceeding.⁴⁸ I have termed this approach "procedural equality" and it is drastically different from how the criminal law treats accused assailants and victims.⁴⁹

The criminal justice system's drastic *inequality* mainly derives from the victim's lack of party status in the criminal proceeding. In a criminal case, the victim is merely a complaining witness. The victim enters the courtroom, gives testimony as to what happened, and then may not be

⁴⁵ *Military Reporting Options FAQ*, DEP'T DEF. SAFE HELPLINE, <https://www.safehelpline.org/reporting-options.cfm> (last visited Feb. 24, 2016).

⁴⁶ DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2014–2015, APPENDIX D: STATISTICAL DATA ON SEXUAL HARASSMENT AND ASSAULT 16 (2015) http://sapr.mil/public/docs/reports/MSA/APY_14-15/Appendix_D_Statistical_Data.pdf.

⁴⁷ *Id.* (showing the percentages of converted reports from 2007–2015).

⁴⁸ See OCR Questions and Answers, *supra* note 3, at 26 (listing the equal procedural requirements provided to both parties).

⁴⁹ See Cellini, *supra* note 21, at 849 (noting the various procedures developed to protect defendants and that no comparable body of law has developed to protect victims).

allowed to remain in the courtroom for the rest of the trial.⁵⁰ The prosecutor does not represent the victim, and therefore the victim does not receive equal procedural rights, such as the access to evidence or privacy protections that the defendant receives.⁵¹ Because the victim has no party status, the victim also no right to appeal.⁵² The prosecutor represents the state, and the state may have (and often does have) very different interests from the victim.⁵³

In stark contrast to the procedures in criminal court, Title IX requires that victims and accused students be treated as equal parties to a grievance proceeding. This requirement is clearly stated in OCR guidance: “While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator.”⁵⁴ Therefore, if a school chooses to provide accused students with rights that the criminal law provides *only to defendants*, it must give student complainants the same rights—at the same level—as those guaranteed to the accused.⁵⁵

⁵⁰ See ARK. CODE ANN. § 16-90-1103(a) (LexisNexis, LEXIS through Reg. Sess. & 1st Extraordinary Sess.) (excluding victim from proceedings when “necessary to protect the defendant’s right to a fair trial”); UTAH R. EVID. 615(d) (LexisNexis, LEXIS through Dec. 1, 2015) (sequestering victim witnesses from proceedings unless the “prosecutor agrees with the victim’s presence”); Cellini, *supra* note 21, at 849. *But see* 18 U.S.C. § 3510 (2012) (prohibiting district courts from sequestering victim witnesses during the trial of the accused); ALASKA STAT. § 12.61.010 (LexisNexis, LEXIS through 2015 1st Reg. Sess. and 1st, 2d, and 3d Spec. Sess. 29th State Leg.) (listing the right of a crime victim to be present during any prosecution).

⁵¹ See *infra* notes 58–59 and accompanying text.

⁵² 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2d. ed. 1991).

⁵³ See RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 5–6 (4th ed. 2012) (noting the policies and authorizations that affect federal and state prosecutors in practice); Cellini, *supra* note 21, at 851 (observing that prosecutors aim to use time and resources efficiently, which closely relates to defense attorneys’ objectives of certainty in the outcome rather than the victim’s desire for justice).

⁵⁴ OCR Questions and Answers, *supra* note 3, at 26; *see also* Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 11 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (noting that the parties must have equal opportunities in the school’s Title IX investigation and hearing).

⁵⁵ Under Supreme Court precedent, schools in fact have a wide range of choices in what procedural rights to give accused students; at most, schools must give the accused student notice and an opportunity for a hearing because campus disciplinary procedures are administrative and not criminal proceedings. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (holding due process in school discipline minimally requires some notice and opportunity for a situation-appropriate hearing); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (repeating that due process is flexible and its procedure depends on each situation); Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 513–14 (2012) (discussing these cases and the sufficiency of procedural rights in detail).

Another stark contrast between the civil rights approach and the criminal approach can be seen in their different standards of proof. Civil rights systems require a preponderance standard,⁵⁶ which gives as equal as possible presumptions of truth telling to both parties. On the other hand, the criminal justice system requires proof “beyond a reasonable doubt”—a standard that gives heavy presumptions in favor of the accused.⁵⁷

Because the criminal law presumption weighs heavily in favor of defendants, the criminal standard can be taken, and many victims do in fact take it, as a widespread societal belief that victims lie. Sexual violence cases are often credibility contests,⁵⁸ so a process that builds a strong presumption in favor of the accused can be seen as a symbol that society believes victims are much more likely to lie than the accused perpetrators. The presumptions in favor of the accused suggest that society must build safeguards against that lying into the very structure of our criminal process.

Such procedural rules are manifestly unequal. First, creating a presumption in favor of one side or the other is, by definition, treating the parties unequally. Additionally, in the context of anti-sex-discrimination civil rights laws, a systematic assumption that victims lie is also a form of gender stereotyping,⁵⁹ which is an additional equal rights violation under all of our civil rights statutes prohibiting sex discrimination.

It is also important to remember that the preponderance standard is used in the vast majority of cases in our legal system.⁶⁰ This includes

Additionally, many criminal due process rights have been rejected repeatedly by courts when judging the fairness of campus disciplinary proceedings. Cantalupo, *supra* at 515 nn. 144–49 (listing cases that have challenged procedures such as discovery, voir dire, appeal, the right to an attorney, and admissibility). Thus, courts have never given accused students *criminal* due process rights in school disciplinary proceedings because it is impossible for schools to incarcerate accused students. Instead, courts have limited the required rights to *administrative* due process rights, and then only in certain cases. Further discussion of this topic, however, is a subject for another day.

⁵⁶ *E.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983).

⁵⁷ *E.g.*, *In re Winship*, 397 U.S. 358, 363 (1970).

⁵⁸ See Wendy Murphy, *Campus “Safety” Bill Endangers Rape Prosecutions*, FORBESWOMAN (May 17, 2012, 12:19 PM), <http://www.forbes.com/sites/womensnews/2012/05/17/campus-safety-bill-endangers-rape-prosecutions/#1d57cb847c5d> (commenting that a higher standard of proof than the preponderance standard creates a presumption that the word of the victim is less credible than the defendant).

⁵⁹ See RANA SAMPSON, U.S. DEP’T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., ACQUAINTANCE RAPE OF COLLEGE STUDENTS 11–12 (2013), http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/AcquaintanceRapeCollegeStudents.pdf (explaining how female stereotypes lead to the belief among college men that “most rapes are false reports”).

⁶⁰ See *Judicial Business 2014*, U.S. COURTS (Sept. 30, 2014), <http://www.uscourts.gov/statistics-reports/judicial-business-2014> (showing that the number

the enforcement of all other civil rights statutes in both lawsuits and administrative proceedings, and in school disciplinary proceedings for all student misconduct, not just misconduct involving sexual violence.⁶¹ And it is the preponderance standard that is used in the vast majority of civil court cases, including those that would be brought by students against their schools for either Title IX violations or for allegations of due process violations on the part of the school.⁶²

Thus, using a different evidentiary standard in campus sexual violence cases under Title IX, would essentially be saying that victims of sexual violence should be treated unequally compared to all other cases and compared to all other students in our system. While this may be justified when an accused individual could be incarcerated, it is not justified in a school context where imprisonment is not possible.

CONCLUSION

For now, I hope that I have sufficiently summarized the reasons why the civil rights approach to addressing campus sexual violence is so different from the criminal law and why those differences are so important. Thank you.

of filings for criminal defendants represented less than a third of all federal case filings in 2014).

⁶¹ Ali, *supra* note 54, at 8, 11.

⁶² See, e.g., *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (describing the preponderance of the evidence standard in a Title IX case); *Williams v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005) (same); *Bernard v. E. Stroudsburg Univ.*, No. 3:09-CV-00525, 2016 WL 755486, at *1, *34 (M.D. Pa. Feb. 24, 2016) (same).