

# TO PROTECT VICTIMS, CROSS-EXAMINE VICTIMS

*Kimbrell Hines\**

## Abstract

#MeToo, #HimToo, #UsToo. Now more than ever before, American colleges and universities are taking a more active role in combatting sexual assault on their campuses. In response to schools' victim-centered approaches, some students have brought lawsuits against their universities questioning the fairness of the adjudication process and specifically, the right to cross-examine their accuser. If schools are to continue to address sexual assault on campus and help victims of sexual assault, schools should ensure their campus adjudication proceedings are not only fair, but also effective in determining whether a sexual assault occurred. Cross-examination, an integral component of the American legal system, ensures the integrity of adjudication proceedings by extrapolating potential witness bias and developing facts essential to an adjudicator's determination. Schools should implement a form of cross-examination available to both parties—the accuser and the accused—to ensure that university adjudication proceedings remain a viable option for student victims of sexual assault.

INTRODUCTION.....

I. TITLE IX .....

    A. *Title IX Developments* .....

    B. *Adjudication Requirements* .....

    C. *Options for Student Victims*.....

II. CROSS-EXAMINATION .....

    A. *Disadvantages of Cross-Examination*.....

    B. *Advantages of Cross-Examination* .....

    C. *Court Requirements Regarding Cross-Examination*.....

III. UNIVERSITY ADJUDICATION SYSTEMS SHOULD  
    ADOPT CROSS-EXAMINATION.....

    A. *University Adjudication Systems Serve Victims* .....

    B. *Cross-Examination Under Trump Administration*  
        *Implementing Cross-Examination* .....

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\* J.D., University of Florida Levin College of Law; M.S., University of Tennessee; B.A. University of Florida. I would like to thank my parents, Vaden and Kristin Hines, for their support and encouragement that gave me the courage to pursue all of my academic pursuits. I would also like to thank Dr. Cappy Archibald Longstreth and Dr. Francis C. Cannon for their unwavering support throughout my time in Gainesville.

### C. Implementing Cross-Examination

CONCLUSION.....

#### INTRODUCTION

Sexual violence, including rape and varying forms of sexual assault, is a widespread problem incurred by college and university campuses across the U.S.<sup>1</sup> Twenty to twenty-five percent of women and fifteen percent of men are sexually assaulted while in college.<sup>2</sup> And more than 90% of victims of sexual assault on college campuses do not report the assault.<sup>3</sup> Some have criticized these often-cited statistics as misleading and over-exaggerated.<sup>4</sup> Even if those criticisms have merit and the number of sexual assault victims has been inflated, the rate of sexual assault is troublingly high.<sup>5</sup> As President Obama astutely noted, “even one assault is one too many.”<sup>6</sup>

Psychological and emotional consequences of sexual assault endure years after the physical injury. Symptoms of Post-Traumatic Stress

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1. See Jessica Valenti, *Sexual Assault is an Epidemic. Only the Most Committed Apologist Can Deny it*, *GUARDIAN* (May 21, 2015, 7:30 AM), <https://www.theguardian.com/commentisfree/2015/may/21/sexual-assault-epidemic-new-research-committed-apologist> [<https://perma.cc/333T-QDXB>]; *Get Statistics*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., <https://www.nsvrc.org/statistics> [<https://perma.cc/ZN2L-27NT>].

2. See *Get Statistics*, *supra* note 1; CHRISTOPHER KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 6–3* (2007).

3. See *Get Statistics*, *supra* note 1.

4. See Lizzie Crocker, *Why the New ‘One in Four’ Campus Rape Statistic Is Misleading*, *DAILY BEAST*, <https://www.thedailybeast.com/why-the-new-one-in-four-campus-rape-statistic-is-misleading> [<https://perma.cc/88C3-LN32>] (last updated Apr. 14, 2017, 9:31 AM) (discussing how AAU researchers acknowledged that their findings could reflect an inflated victimization rate at participating schools due to “non-response bias.” In other words, they determined that the hundreds of thousands of students who did not participate in their electronic survey (only 19% of those asked to take the survey did so) were less likely to have been sexually assaulted); see also Barclay Sutton Hendrix, *A Feather on One Side, a Brick on the Other: Tilting the Scale against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 *GA. L. REV.* 591, 596 (2013) (“A closer look at the studies claiming a crises-level of collegiate sexual assaults reveals their dubiousness. For instance, one study that claims 90% of collegiate rapes go unreported explained that this was partly because the victims did not see the supposed assault as harmful or did not think that a crime had been committed.”).

5. See, e.g., *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 183 (D.R.I. 2016) (“[E]nsuring allegations of sexual assault on college campuses are taken seriously is of critical importance . . . .”); see also Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 *N. KY. L. REV.* 49, 53 (2013) (arguing that OCR provides insufficient due process protections for the respondent in Title IX adjudications).

6. See Tanya Somanader, *President Obama Launches the ‘It’s On Us’ Campaign to End Sexual Assault on Campus*, *WHITEHOUSE.GOV* (Sept. 19, 2014, 2:40 PM), <https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> [<https://perma.cc/XKT6-XF6S>].

Disorder (PTSD) occur for 94% of sexual assault survivors during the first two weeks following an incident, and 50% of survivors experience PTSD long-term.<sup>7</sup> Sexual assault has a long-lasting, negative impact on a victim's educational and economic opportunities.<sup>8</sup> The trauma of an assault can result in poor academic performance and curtail the victim's ability to remain at the institution of one's choice, graduate on time, maintain a scholarship, or continue education at all.<sup>9</sup>

The rise of the *#MeToo* movement has drawn media and public attention to sexual assault on university and college campuses.<sup>10</sup> After a long history of woefully inadequate protections for victims,<sup>11</sup> universities have implemented victim-centered procedures to punish and deter perpetrators.<sup>12</sup> As progressive changes have been made to sexual assault

7. Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. MED. 111, 112 (2006); Lindsay Burgess, *This Is What PTSD Looks Like for Sexual Assault Survivors*, BRIT + CO (Mar. 30, 2018), <https://www.brit.co/what-ptsd-looks-like-for-sexual-assault-survivors/> [<https://perma.cc/CH3G-2S47>].

8. See LYNN LANGTON & JENNIFER TRUMAN, U.S. DEP'T OF JUST., SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME 1 (2014).

9. See Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2108–10 (2016); see also Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE, & ABUSE 191, 196–97 (2014) (finding that women who experience sexual assault during their first semester are increasingly likely to have a GPA lower than 2.5 at the end of that semester); Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST (Aug. 6, 2014, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think> [<https://perma.cc/5UHX-9ERT>] (explaining that it is common to see sexual violence survivors' grades suffer).

10. See Joanna Williams, *When the #MeToo Movement Hits Campuses*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Mar. 21, 2018), <https://www.jamesgmartin.center/2018/03/metoo-movement-hits-campuses/> [<https://perma.cc/3GTY-YBRS>].

11. See Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAG.: THE CUT (Sept. 21, 2014), <https://www.thecut.com/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html> [<https://perma.cc/R5Y3-VLAY>]; see also Kayla Webley Adler, *Big Shame on Campus*, MARIE CLAIRE (Oct. 16, 2013), <http://www.marieclaire.com/politics/news/a8217/big-shame-on-campus/> [<https://perma.cc/Z8VM-XCSW>] (explaining that college women nationwide are being contradicted, discouraged, ignored, and even blamed when they come forward to report a sexual assault); Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (July 14, 2014, 4:50 PM), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [<https://perma.cc/W8DR-KPHD>] (finding that students who are deemed "responsible" for alleged sexual assaults on college campuses face little or no consequence for their actions).

12. See "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/WQ79-SGXC>] [hereinafter Dear Colleague Letter] (mandating that recipients of federal financial assistance adopt and publish grievance procedures providing for prompt and equitable resolution of complaints); see also Adler, *supra* note 11 (discussing the Dear

disciplinary proceedings, and more students have reported sexual assaults, there has been controversy surrounding whether accused students are being provided their constitutional due process rights.<sup>13</sup> If universities are to continue victim-centered adjudication proceedings, a tailored form of cross-examination must be available for both the accuser and the accused. Despite the underlying challenges of victim participation, cross-examination ultimately yields more protections for student victims by enhancing trust and legitimacy of the university adjudication system, thereby ensuring its continuance and availability for student victims.

This Note is divided into three parts. Part I details what universities are legally obligated to do regarding sexual harassment and assault under Title IX. Part II addresses cross-examination in the American legal system, as well as the advantages and disadvantages of using cross-examination. Part III presents specific reasons why cross-examination should be utilized in campus adjudication systems and provides recommendations for tailoring cross-examination for victims of sexual assault and harassment.

## I. TITLE IX

Title IX requires universities to take action to prevent and deter sexual assault on their campuses.<sup>14</sup> Title IX of the Education Amendments to the

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Colleagues letter and how “writing down what should happen doesn’t mean it’s actually happening” on college campuses) (emphasis omitted).

13. See H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the “Greatest Legal Engine Ever Invented,”* 27 CORNELL J. L. & PUB. POL’Y 145, 148 (2017); see also Michael Fein, *Rethink Harvard’s Sexual Harassment Policy*, BOST. GLOBE (Oct. 14, 2014, 9:00 PM), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqBM/story.html> [https://perma.cc/NY77-5J4S] (“As members of the faculty of Harvard Law School, we write to voice our strong objections to the Sexual Harassment Policy and Procedures imposed by the central university administration . . . we believe that this particular sexual harassment policy adopted by Harvard will do more harm than good.”); Larry Alexander et al., *Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault* 8 (May 16, 2016), <https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf> [https://perma.cc/J8KT-LA27] (“OCR has unlawfully expanded the nature and scope of institutions’ responsibility to address sexual harassment, thereby compelling institutions to choose between fundamental fairness for students and their continued acceptance of federal funding.”); Emily Shire, *Penn Law Profs Revolt Over Sex Assault Rules*, DAILY BEAST (April 14, 2017, 12:07 PM), <https://www.thedailybeast.com/penn-law-profs-revolt-over-sex-assault-rules> [https://perma.cc/9FTS-UGQB]; *Supporting and Advocating for Equal Treatment and Due Process for Those Affected by Inequitable Title IX Campus Disciplinary Processes*, FAMILIES ADVOCATING FOR CAMPUS EQUAL., <https://www.facecampusequality.org> [https://perma.cc/5CD5-2QZN] (providing assistance for students and families affected by inequitable Title IX processes).

14. See generally 20 U.S.C. § 1681 (2012).

Civil Rights Act of 1972 states that “[n]o 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 . . . .”<sup>15</sup> Title IX authorizes federal agencies to provide funding to regular recipients and to terminate recipients who do not comply with the agencies’ regulations.<sup>16</sup> Almost all higher education institutions—public or private—fall within the jurisdiction of Title IX because virtually all have students that receive federal financial aid.<sup>17</sup>

### A. Title IX Developments

Title IX is enforced by the U.S. Department of Education’s Office of Civil Rights (DOE OCR).<sup>18</sup> In 1997, the DOE OCR promulgated guidance stating that sexual harassment is a form of sex discrimination, and that schools are required to have grievance procedures through which students can promptly complain of sex discrimination, including sexual harassment.<sup>19</sup> Under this guidance, a school must, upon notice of hostile environment sexual harassment, take immediate and appropriate action to remedy the sexual harassment.<sup>20</sup>

In 2001, the DOE OCR promulgated a revised guidance, reaffirming compliance standards of the 1997 Guidance.<sup>21</sup> The 2001 Guidance required schools to take more proactive measures to ensure early notification and intervention of sexual harassment.<sup>22</sup> The guidance stated

15. *See id.* at § 1681(a).

16. *See* 20 U.S.C. § 1682 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability . . . Compliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . .”); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1989) (describing Title IX as “conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds”).

17. Lavinia M. Weizel, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1615 n.11 (2012).

18. *See* Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC. (Apr. 2015), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [<https://perma.cc/A586-HXGE>].

19. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12034 (Mar. 13, 1997).

20. *See id.*

21. *See* Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T EDUC., at i (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/6RDA-9Y8S>].

22. *See id.* at 14–15, 20–21.

that schools have a responsibility “to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.”<sup>23</sup>

Then, in 2011, the DOE OCR issued its Dear Colleague Letter (DCL), a major policy shift in how schools investigate and adjudicate claims of sexual harassment and assault.<sup>24</sup> The DCL established a victim-centered approach to handling sexual assault claims,<sup>25</sup> and many consider the changes a necessary and effective response to an epidemic of sexual assault.<sup>26</sup> A victim-centered approach is when the victim’s wishes, safety, and well-being take priority during the adjudication proceedings.<sup>27</sup> One component of this victim centered policy was the right of cross-examination.<sup>28</sup> The DCL stated “OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other . . . .”<sup>29</sup> The DCL does not provide any footnotes or citations to authority explaining why the OCR took this position regarding cross-examination, but the likely explanation was a concern that victims would be uncomfortable during cross-examination.

Unlike the 1997 and 2001 Guidances, the 2011 DCL was published without a notice and comment period.<sup>30</sup> Since the 2011 DCL does not technically create new regulations, it is not required to go through the notice and comment process as otherwise required by the Administrative

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23. *Id.* at iii.

24. See Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html) [<https://perma.cc/M9K9-A89C>] (mentioning that the victim-centered approach that was created as part of an overcorrection to sexual assaults is actually harmful); see also Drew Barnhart, *The Office of Civil Rights’ Failing Grade: In the Absence of Adequate Title IX Training, Biased Hearing Panels and Title IX Coordinators Have Harmed Both Accusers and Accused in Campus Sexual Assault Investigations*, 85 UMKC L. REV. 981, 986 (2017) (discussing changes to campus adjudication proceedings set forth in the 2011 Dear Colleague Letter); Dear Colleague Letter, *supra* note 12 (discussing changes to campus sexual assault adjudication proceedings).

25. See Barnhart, *supra* note 24, at 990; see also Yoffe, *supra* note 24 (arguing that the victim-centered approach that was created as part of an overcorrection to sexual assaults is actually harmful); Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [<https://perma.cc/84HM-3NLM>] [hereinafter Yoffe, *The Uncomfortable Truth*]; Dear Colleague Letter, *supra* note 12.

26. See Barnhart, *supra* note 24, at 991–94; see also Yoffe, *The Uncomfortable Truth*, *supra* note 25 (“These and other measures flowed from a genuine—and justified—belief within the administration that college women faced daunting challenges in seeking justice for sexual assault . . . .”).

27. Barnhart, *supra* note 24, at 990.

28. See *id.* at 991 (stating that the accuser does not have to be subjected to a cross-examination).

29. See Dear Colleague Letter, *supra* note 12, at 12.

30. See *id.* at 1.

Procedure Act.<sup>31</sup> Although the DCL is an administrative guidance explaining the Department of Education’s interpretation of existing law and does not carry the force of law,<sup>32</sup> it has the effect of imposing new regulations on schools. Colleges that fail to comply with DOE OCR directives risk losing federal funding.<sup>33</sup> It is this potential loss of funding that causes OCR directives such as the 2011 DCL to carry an effect similar to a change in statutory law. This is evidenced by the large number of schools that quickly moved to comply with the DCL.<sup>34</sup> Following the 2011 DCL, there was a significant increase in OCR investigations at

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31. The Department of Education maintains that its 2011 Dear Colleague Letter and the 2014 Q&A are merely clarifications of existing law and do not represent new policy, and thus neither document needed to go through notice-and-comment rulemaking. *See* Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Francisco M. Negrón, Jr., Gen. Counsel, Nat’l Sch. Bds. Ass’n 1–2 (Mar. 25, 2011), [http://www.edweek.org/media/response\\_to\\_nsba.pdf](http://www.edweek.org/media/response_to_nsba.pdf) [<https://perma.cc/T3P8-52RP>] [hereinafter Letter from Russlynn Ali to Francisco M. Negrón, Jr.] (“[T]he standards articulated in the DCL are not new, and do not expand the standard of liability for administrative enforcement of federal civil rights laws with respect to harassment.”); *see also* Emma Ellman-Golan, Note, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 160 n.30, 168 (2017).

32. Ellman-Golan, *supra* note 31, at 160; *see* Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T EDUC. 34–35 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/H5GJ-393Z>] [hereinafter *Q&A on Title IX*] (“The following questions and answers further clarify the legal requirements and guidance articulated in the DCL . . . .”); Letter from Russlynn Ali to Francisco M. Negrón, Jr., *supra* note 31, at 1–2.

33. *See* 20 U.S.C. § 1682 (2012) (authorizing federal departments and agencies to effect compliance by terminating or refusing assistance but limiting termination or refusal to particular programs or parts of programs in which noncompliance is found); *see also* Dear Colleague Letter, *supra* note 12, at 6 (“Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations.”); Ellman-Golan, *supra* note 31, at 160; *see, e.g.*, Office for Civil Rights, *U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints*, U.S. DEP’T EDUC. (Apr. 28, 2014), <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints> [<http://perma.cc/5KMV-DCWK>] (threatening to “move to initiate proceedings to terminate federal funding” of an allegedly noncompliant school); Tyler Kingkade, *Senators Eye New Penalties For Colleges Mishandling Sexual Assault Cases*, HUFFPOST (June 27, 2014), [https://www.huffpost.com/entry/colleges-mishandling-sexual-assault-penalties\\_n\\_5535458](https://www.huffpost.com/entry/colleges-mishandling-sexual-assault-penalties_n_5535458) [<https://perma.cc/MH3B-YXKZ>] (reporting on a Senate hearing at which several Senators described the possibility that universities could be “cut off from all federal funding” by OCR as a “nuclear option” and DOE’s former Assistant Secretary for Civil Rights, Catherine Lhamon, made public statements suggesting that OCR could bring about a total termination of a school’s federal funds).

34. *See, e.g.*, Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html> [<https://perma.cc/RJ3J-H5YC>] (discussing various schools’ changes and plans to stay compliant with Title IX).

colleges and universities.<sup>35</sup>

In 2014, the DOE OCR again addressed the right to cross-examine.<sup>36</sup> The 2014 guidance provided that cross-examination of witnesses, including the parties, is not required, but if the school allows one party to cross-examine witnesses, it must do so for both parties.<sup>37</sup> The Q&A further stated that the DOE OCR “strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence.”<sup>38</sup> The Q&A reasoned that allowing a perpetrator to question a complainant directly may be traumatic or intimidating, perpetuating a hostile environment.<sup>39</sup> Instead, a school can elect to allow the parties submit questions to a trained third party to ask the questions on their behalf.<sup>40</sup> It was recommended that submitted questions be screened, and that only appropriate and relevant questions be asked.<sup>41</sup>

### B. Adjudication Requirements

Although the DOE OCR provides some uniform guidance for university adjudication proceedings, individual school adjudication policies vary immensely.<sup>42</sup> Schools can adopt policies and procedures specific to their university. Most schools implement procedures resembling one of two models: the disciplinary-hearing model or the investigative model.<sup>43</sup> The disciplinary-hearing model resembles a formal hearing process much like a traditional legal trial.<sup>44</sup> However, despite being similar to a legal trial, schools are not required to implement procedural protections and evidentiary rules that would otherwise be

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35. See Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFPOST (June 16, 2016, 4:49 PM), [https://www.huffpost.com/entry/title-ix-investigations-sexual-harassment\\_n\\_575f4b0ee4b053d433061b3d](https://www.huffpost.com/entry/title-ix-investigations-sexual-harassment_n_575f4b0ee4b053d433061b3d) [https://perma.cc/J6RW-HWS2]; Jake New, *OCR Receives Record Number of Complaints*, INSIDE HIGHER ED (Dec. 9, 2016), <https://www.insidehighered.com/quicktakes/2016/12/09/ocr-receives-record-number-complaints> [https://perma.cc/9N75-HFBD].

36. *Q&A on Title IX*, *supra* note 32, at 31.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See Nicole E. Smith, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 COLUM. L. REV. 953, 955, 960–61 (2017).

43. See *id.* at 954–55; see also Justice Gaines et al., *Potential Campus Sexual Assault Investigating Models for Brown University*, BROWN UNIV., <http://www.brown.edu/web/documents/president/SATF-Final-Report-B.pdf> [https://perma.cc/2TF8-JWT2] (proposing different models that Brown University might adopt to adjudicate sexual misconduct and dividing policies broadly into these categories).

44. Smith, *supra* note 42, at 964.

available in a legal proceeding.<sup>45</sup>

While many educational institutions have maintained this formal disciplinary-hearing process, the investigatory model has become increasingly popular among schools.<sup>46</sup> The investigatory model consists of a trained investigator who interviews the complainant and respondent, gathers physical evidence, interviews available witnesses—and then either renders a finding, presents a recommendation, or even creates an acceptance-of-responsibility agreement with the offender.<sup>47</sup> The investigator, selected by the school, replaces the disciplinary panel as the primary fact-finder and ultimate decision maker, sitting as “judge, jury and executioner” on the respondent student’s case.<sup>48</sup> Despite its use by many schools, the adequacy of the investigatory model has been largely untested by the courts.<sup>49</sup>

### C. Options for Student Victims

There are three potential adjudication systems for student victims of sexual assault or harassment. Student victims can utilize the criminal justice system, the civil legal system, or the university adjudication system. Although each adjudication system offers different remedies to student victims, there are also disadvantages to each. Because of these concerns, the university system should remain an alternative or compliment to the civil and criminal legal systems.

There are several advantages of students utilizing the criminal justice system to adjudicate claims against perpetrators of sexual assault. The criminal justice system already has procedures that safeguard procedural

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45. See *id.* at 975–76; see generally Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281 (2016) (analyzing differences between criminal rape trials and campus sexual-misconduct proceedings).

46. See Michael Stratford, *Aggressive Push on Sex Assault*, INSIDE HIGHER ED (Apr. 30, 2014), <https://www.insidehighered.com/news/2014/04/30/white-house-calls-colleges-do-more-combat-sexual-assault> [<https://perma.cc/8LSZ-5QKV>]; Smith, *supra* note 42, at 955; Djuna Perkins, *Behind the Headlines: An Insider’s Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults*, BOST. BAR J. (July 8, 2015), <https://bostonbarjournal.com/2015/07/08/behind-the-headlines-an-insiders-guide-to-title-ix-and-the-student-discipline-process-for-campus-sexual-assaults/> [<https://perma.cc/3R3H-6HCH>].

47. See *University Implements New Model for Investigating Sexual Assault Cases*, PENN ST. NEWS (Apr. 29, 2015), <https://news.psu.edu/story/355163/2015/04/29/administration/university-implements-new-model-investigating-sexual-assault> [<https://perma.cc/V3CB-562S>]; see also, e.g., Smith, *supra* note 42, at 963–64;

48. See *Prasad v. Cornell Univ.*, No. 5:15-cv-322, 2016 WL 3212079, at \*11 (N.D.N.Y. Feb. 24, 2016) (internal quotation marks omitted) (quoting Amended Complaint at 17, *Prasad v. Cornell Univ.*, No. 5:15-cv-322 (N.D.N.Y. Feb. 24, 2016), ECF No. 11).

49. To date courts have primarily assessed disciplinary-hearing proceedings. See, e.g., *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005) (considering a disciplinary panel); *Nash v. Auburn Univ.*, 812 F.2d 655, 658 (11th Cir. 1987); *Winnick v. Manning*, 460 F.2d 545, 547–48 (2d Cir. 1972); Smith, *supra* note 42, at 956.

protections for accused individuals.<sup>50</sup> The criminal justice system can also completely remove perpetrators from society, eliminating the risk that they will reoffend another victim.

Despite these advantages, the criminal justice system in many ways often fails to serve student victims. The criminal legal system can be difficult to navigate, traumatizing, unresponsive, and untimely. The criminal justice system can be intimidating or difficult for laypersons, such as students, to navigate without the help of an attorney or legal advocate.<sup>51</sup> Student victims rarely seek the protections of criminal courts,<sup>52</sup> often finding police investigations and criminal trials invasive and traumatizing.<sup>53</sup>

Even when students use the criminal justice system, very few sexual assault claims result in convictions.<sup>54</sup> With such a dismal conviction rate, complainants may be hesitant to bring their claims forward in a criminal setting. Even after decades of criminal justice reform, prosecutors are generally reluctant to go after alleged perpetrators aggressively, often due to the fear of not obtaining a conviction.<sup>55</sup> Sexual assault crimes are notoriously difficult to prosecute because of conflicting testimonies and a lack of witnesses.<sup>56</sup> Police officers, investigators, and prosecutors are often inadequately trained on how to work with victims of sexual assault.<sup>57</sup>

Victims relying solely on the criminal justice system lose autonomy and decision-making authority regarding the case because the state brings

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50. See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 890 (2016).

51. Lauren Sudeall Lucas & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer* (Sept. 21, 2017, 8:36 PM), <https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159> [<https://perma.cc/RU7S-MAPU>].

52. See Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T JUST. 3-4 (Dec. 2014) <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<http://perma.cc/EQ5X-YACA>] (“Among student victims, 20% of rape and sexual assault victimizations were reported to police, compared to 32% reported among nonstudent victims ages 18 to 24.”) (internal citation omitted); Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 232 (2015).

53. See Baker, *supra* note 52, at 260–62.

54. See *id.* at 232; Barnhart, *supra* note 24, at 1011; see also Tess Cody, *Should Colleges Handle Sexual Assault Cases?*, FUTURES WITHOUT VIOLENCE (Apr. 7, 2015), <https://www.futureswithoutviolence.org/guest-post-should-colleges-be-responding-to-sexual-assault/> [<https://perma.cc/98TX-XXY8>] (reporting that out of one hundred claims of sexual assaults brought to the police only seven result in a conviction).

55. Sofia Resnick, *Victims of Rape and Sexual Assault, Failed by Criminal Justice System, Increasingly Seeking Civil Remedies*, REWIRE NEWS (Jan. 8, 2015, 9:45 AM), <https://rewire.news/article/2016/01/08/victims-rape-sexual-assault-failed-criminal-justice-system-increasingly-seek-civil-remedies/> [<https://perma.cc/4UUQ-TR6J>].

56. See Baker, *supra* note 52, at 235–36; Resnick, *supra* note 55.

57. See Resnick, *supra* note 55.

forward the charges as opposed to the victim bringing them.<sup>58</sup> Additionally, the criminal courts are overwhelmed and typically faced with significant case backlog.<sup>59</sup> It could take a court months, or even years, to hear a sexual assault case,<sup>60</sup> leaving the student without remedy during the interim period.

The civil legal system is also an alternative for student victims of sexual harassment or assault. Complainants in the civil system benefit from the lower evidentiary standard of proof. Unlike criminal trials, which require the prosecution to prove the defendant's guilt "beyond a reasonable doubt," civil trials have a much lower bar, requiring only that a plaintiff persuade a judge or jury that it is more likely than not that the events occurred.<sup>61</sup>

Complainants can file a civil suit in addition to pursuing criminal charges. The civil system can also be more empowering for victims because unlike in criminal prosecutions where the prosecutor makes decisions regarding the case, civil cases enable victims to decide whether and how to proceed in their case.<sup>62</sup> The civil system can provide monetary damages to victims, which can provide an important recourse to victims.<sup>63</sup> Monetary damages allow victims to seek damages from third parties, like colleges and universities. Such damages incentivize institutions to take preventive and proactive measures to deter sexual assault and harassment.

The university system is an especially important adjudication system for student victims. Universities are in a unique position to help student victims of sexual assault by being able to proscribe a greater range of sexually impermissible conduct,<sup>64</sup> allow a greater rate of offenders to be held responsible due to a lower evidentiary standard, offer more victim-centered remedies than the legal system,<sup>65</sup> and have a unique interest in protecting students.

Compared to the criminal justice system, it is far less difficult to obtain convictions in the campus adjudication system. Criminal prosecutions require extensive procedural protections for defendants and place

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58. *See id.*

59. *See* Barnhart, *supra* note 24, at 1011.

60. *See id.*

61. *See id.* at 986.

62. *See* Barnhart, *supra* note 24, at 1011; Resnick, *supra* note 55.

63. *See* Resnick, *supra* note 55.

64. Dear Colleague Letter, *supra* note 12, at 9–10 ("In some cases, the conduct [at issue] may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.").

65. *See* Barnhart, *supra* note 24, at 1011.

limitations on what conduct can constitutionally be punished.<sup>66</sup> However, in university adjudication proceedings, the state can act without the particular processes mandated by the criminal system.<sup>67</sup>

Before 2011, college campuses were able to decide which burden of proof to use, and many campuses required the clear and convincing evidence standard in deciding whether to find a person guilty of sexual assault.<sup>68</sup> To implement a more aggressive approach in combatting sexual assault on college campuses and correct past significant deficiencies in the process of adjudicating sexual assault, the DOE OCR issued an edict stating that all campuses must adhere to the preponderance of the evidence standard in sexual assault adjudication proceedings.<sup>69</sup> The preponderance of the evidence standard is a lower evidentiary standard than the clear and convincing standard previously used in some schools.<sup>70</sup> The preponderance of the evidence standard asks whether it is more likely than not that sexual violence occurred.<sup>71</sup> The preponderance of evidence standard represents the lowest standard of proof; the fact finder only has to believe that there is a 50.1% chance that the allegations are true.<sup>72</sup> The clear and convincing evidence standard of proof is greater than the preponderance of the evidence standard, but lower than that required in criminal cases, which is beyond a reasonable doubt. The preponderance of the evidence standard provides the most benefit to victims because victims have a lesser burden of proof.

In addition to the greater likelihood that perpetrators will be found responsible in the university system, student victims are often best served by remedies that *only* colleges and universities can provide. Unlike remedies in criminal cases, the remedies provided by universities are tailored to individual harm rather than societal harm.<sup>73</sup> Universities can

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66. See Gersen & Suk, *supra* note 50.

67. See, e.g., *Q&A on Title IX*, *supra* note 32, at 31 (recommending strongly that parties not cross-examine witnesses during hearings).

68. See Yoffe, *The Uncomfortable Truth*, *supra* note 25; see also Maureen Downey, *Opinion: Raise the Standard of Evidence in Campus Sexual Assault Cases*, *AJC* (July 19, 2017), <https://www.ajc.com/blog/get-schooled/opinion-raise-the-standard-evidence-campus-sexual-assault-cases/Kb5SOAefNh69JWPfK5OON/> [<https://perma.cc/GXH7-A5C5>] (quoting J. Tom Morgan, an attorney and professor of criminal law at Western Carolina University).

69. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 *YALE L.J.* 1940, 1973 (2016); Dear Colleague Letter, *supra* note 12, at 10–11.

70. See *Evidentiary Standards and Burdens of Proof*, JUSTIA, <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/> [<https://perma.cc/4LA9-T7DS>] (last updated May 2019).

71. See *id.*

72. See *id.*; see also Jake New, *The Wrong Standard*, *INSIDE HIGHER ED* (Nov. 6, 2014), <https://www.insidehighered.com/news/2014/11/06/princeton-title-ix-agreement-higher-standard-proof-sexual-assault-cases-last-legs> [<https://perma.cc/Z737-5TC8>] (describing the preponderance of the evidence standard as requiring a 50.1% chance).

73. See Resnick, *supra* note 55; Barnhart, *supra* note 24, at 1011.

take more immediate actions to help complainants, such as counseling, education-related accommodations, or requiring that the accused student stay away from the victim.<sup>74</sup> Some victims have no interest in seeing the accused face jail time.<sup>75</sup> Instead, victims might simply want their school to ensure that they will not cross paths with the accused again.<sup>76</sup> This might be made possible by removing one student from a shared dormitory building or changing a class schedule—remedies the police or a court cannot provide. A respondent may be forced, even as an interim measure during the proceedings, to change or move off university housing, to withdraw from certain classes, or to avoid certain areas of campus during certain periods.<sup>77</sup> After the adjudication process concludes, the accused may be suspended or expelled from school,<sup>78</sup> rendered ineligible for certain honors,<sup>79</sup> or receive a record on the student's transcript stating that the student was suspended or expelled for sexual misconduct, thereby significantly curtaining the student's ability to continue comparable education.<sup>80</sup>

There has been significant criticism that universities are not equipped to fairly adjudicate sexual assault proceedings.<sup>81</sup> It is unclear whether universities have the ability to remain sufficiently neutral when the outcomes of sexual-misconduct proceedings impact universities' ability to recruit students and retain donors.<sup>82</sup> There is also concern that schools have an incentive to find students responsible for sexual assault to cultivate a sense of safety on their campuses,<sup>83</sup> and that these institutions

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74. See *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> [https://perma.cc/2H7D-XV9E] (last visited Mar. 29, 2020).

75. See Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 641 (2018).

76. See *id.* at 640.

77. See Ellman-Golan, *supra* note 31, at 175.

78. See *id.*

79. See, e.g., Jenna Wang, *Penn Made Two Major Policy Changes Relating to Sexual Violence over the Summer*, DAILY PENNSYLVANIAN (Aug. 24, 2016, 12:16 AM), <http://www.thedp.com/article/2016/08/sexual-violence-policy> [https://perma.cc/4ENH-S8TY].

80. See Ellman-Golan, *supra* note 31, at 175; Tovia Smith, *Push Grows for a 'Scarlet Letter' on Transcripts of Campus Sexual Offenders*, NPR (May 11, 2016, 4:27 PM), <http://www.npr.org/2016/05/11/477656378/push-grows-for-a-scarlet-letter-on-transcripts-of-campus-sexual-offenders> [https://perma.cc/72XS-WMD8].

81. See, e.g., Nina Bernstein, *College Campuses Hold Court in Shadows of Mixed Loyalties*, N.Y. TIMES (May 5, 1996), <https://www.nytimes.com/1996/05/05/us/college-campuses-hold-court-in-shadows-of-mixed-loyalties.html> [https://perma.cc/94HC-WUHC]; Smith, *supra* note 42, at 969; Henrick, *supra* note 5, at 81–83.

82. See Smith, *supra* note 42, at 969; Henrick, *supra* note 5, at 81–83.

83. See Smith, *supra* note 42, at 969; Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 515 (2012) (contemplating how universities weigh the financial cost of proceedings and the effect that findings of non-responsibility can have on students' perceptions of safety on campus).

will receive negative publicity if they find an accused student *not* responsible for committing sexual misconduct.<sup>84</sup>

Additionally, there are concerns that accused students are not receiving adequate due process in the university adjudication system because many of the procedural protections normally afforded to criminal or civil defendants are absent in the university system.<sup>85</sup> “Colleges severely limit the accused student’s ability to conduct discovery, and the panel bases its decision primarily on evidence gathered by the college itself. Accused students often receive no representation, and colleges heavily restrict what role privately retained counsel can play in these proceedings.”<sup>86</sup> Currently, most schools do not allow the accused the right to cross-examine witnesses, and in many cases the accused can only propose witness questions to the panel, which the panel then has the option of asking the witness.<sup>87</sup>

Despite the significant interests at stake for accused individuals, neither criminal nor civil models are required or appropriate in this context as they significantly curtail the educational institution’s ability to effectively and efficiently regulate sexual misconduct.<sup>88</sup> Requiring schools to adjudicate with all the protections of the legal system would be extremely costly and time consuming for universities.

A university’s choice of how to investigate and adjudicate sexual misconduct has a dramatic effect on how investigations proceed.<sup>89</sup> Given that schools do not have to adopt any particular adjudication model and have an immense amount of control over the process, schools need to ensure that they provide adequate procedural protections for accused students. In response to procedural requirement changes, accused students have brought lawsuits alleging that they did not receive adequate procedural protections because they did not have the right to cross-examine their accuser.<sup>90</sup> As more students have brought forth claims alleging process violations by their universities, critics in both the legal

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84. See Smith, *supra* note 42, at 969; Henrick, *supra* note 5, at 81–83.

85. See Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 602–04 (D. Mass. 2016); Lana Ulrich, *How Colleges Investigate Sexual Assault on Campus*, CONST. DAILY (June 16, 2016), <http://blog.constitutioncenter.org/2016/06/how-colleges-investigate-sexual-assault-on-campus/> [<https://perma.cc/2X47-MYJE>].

86. See Bruton, *supra* note 13, at 149.

87. See Mann, *supra* note 75, at 660–61.

88. See Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005) (“A university is not a court of law, and it is neither practical nor desirable it be one.”); Edward N. Stoner II et al., *Reviewing Your Student Discipline Policy: A Project Worth the Investment*, UNITED EDUCATORS 1, 8–10 (2000), <https://files.eric.ed.gov/fulltext/ED444074.pdf> [<https://perma.cc/8CJW-BSFS>].

89. See Smith, *supra* note 42, at 956.

90. See Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 591–92, 596 (S.D. Ohio 2016).

field and the public at large have cast doubt on the legitimacy of the proceedings and the allegations themselves.<sup>91</sup>

Despite having fewer resources and requirements than the courts, schools still have the responsibility to ensure their proceedings are fair and accurate. Justice can only be secured if the determinative method is fair; and while the protection of victims is crucial, the adjudicatory process must carefully balance both parties' rights to avoid creating a new victim.<sup>92</sup> If complainants, the accused, or the public do not trust the integrity of the process, then the system's continuance is threatened. With a lessened degree of certainty schools and the public cannot hold perpetrators accountable and effectively deter sexual harassment and assault. To ensure trust and continuance of the university adjudication system, universities should implement a form of cross-examination for both the accuser and accused.

## II. CROSS-EXAMINATION

"Few things are as engrained in the American judicial system as cross-examination."<sup>93</sup> Cross-examination is considered "the greatest legal engine ever invented for the discovery of truth."<sup>94</sup> And in various areas of the law, it is understood that individuals who choose to provide testimony will be subject to cross-examination.<sup>95</sup> The right to cross-examine extends beyond the criminal context and plays an important role in civil proceedings as well.<sup>96</sup> In the American legal system, witness testimony plays an integral—if not essential—role in defining the truth.<sup>97</sup> Although cross-examination has its flaws, the legal system continues to consider it the best method for obtaining the truth.

### A. Disadvantages of Cross-Examination

Cross-examination is not a completely accurate method for discerning the truth, but it is certainly a helpful one. Fact-finders observing cross-

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91. See, e.g., Jessica Faaborg, *Title IX and College Rape: A Series of Injustice Part 2*, HUFFPOST (July 1, 2016, 6:14 PM) [https://www.huffpost.com/entry/title-ix-and-college-rape\\_1\\_b\\_10722304](https://www.huffpost.com/entry/title-ix-and-college-rape_1_b_10722304) [<https://perma.cc/FXW3-FUD4>].

92. See Blair A. Baker, Note, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J.L. & PUB. POL'Y 533, 535 (2017).

93. See Bruton, *supra* note 13, at 146.

94. *Id.* (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourn ed., 1974)).

95. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (applying the constitutional right to cross-examine witnesses in criminal trials); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (holding that due process requires the opportunity for cross-examination in civil trials and many administrative hearings).

96. CAL. EVID. CODE §§ 711, 773 (WEST 2018); see also FED. R. EVID. 611(b) (discussing cross-examination without mention of applicability to only criminal trials).

97. See *Perry v. Leeke*, 488 U.S. 272, 283 (1989).

examination take into account what the victim said and also their overall demeanor. Many believe that they can observe behavioral responses to questions and determine witness deception.<sup>98</sup> “Cues” such as avoiding eye contact, restlessness, changes in vocal pitch, or twitching cannot reliably indicate that a person is being dishonest.<sup>99</sup> These responses resemble mere idiosyncrasies rather than indicators that a person is not telling the truth.<sup>100</sup> Research further shows that some of the “cues” that fact-investigators are supposed to look for are inconsistent among individuals.<sup>101</sup> Research demonstrates that only a *majority* of liars exhibit a certain response, resulting in the implicit conclusion that a significant population exhibits the opposite behavior when lying.<sup>102</sup>

Victims of sexual assault are especially vulnerable on cross-examination. Cross-examination is often considered re-traumatizing because victims have to relive the experience while undergoing adversarial questions aimed at discrediting their account. Since the victim’s testimony may be the only evidence in the case, the accused will likely attempt to undermine the victim’s credibility and reliability, and the plausibility and consistency of the account. Due to the often embarrassing, sensitive, and traumatizing nature of the assault, victims may be reluctant to speak about certain details, opening the door for a questioner to ask questions insinuating their lack of truth telling. Victims are often asked questions with excruciating detail, which can recreate the sense of powerlessness and terror that occurred during the original assault.<sup>103</sup> This is often considered a secondary victimization or a second rape, which can have serious mental health and well-being consequences on a victim.<sup>104</sup> Sexual assault victims often suffer from Post-Traumatic

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98. See Bruton, *supra* note 13, at 155; H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 DUKE L.J. 776, 788–89 (1993).

99. See Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74, 97, 105–06 (2003); Bruton, *supra* note 13, at 155–56.

100. See, e.g., Bruton, *supra* note 13, at 156; see also Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1193, 1200 (1993) (citing studies that found cues to deception are more prevalent in auditory rather than visual cues); Samantha Ann Mann et al., *See No Lies, Hear No Lies: Difference in Discrimination Accuracy and Response Bias When Watching or Listening to Police Suspect Interviews*, 22 APPLIED COGNITIVE PSYCHOL. 1062, 1063 (2008) (citing studies with evidence showing that “vocal cues are more reliably associated with deception than visual cues” and that verbal deception has demonstrated several speech-related cues that can be used to distinguish liars from truth tellers).

101. See Bruton, *supra* note 13, at 155–57.

102. See *id.* at 156.

103. See Simon McCarthy-Jones, *Survivors of Sexual Violence are Let Down by the Criminal Justice System – Here’s What Should Happen Next*, CONVERSATION (Mar. 29, 2018 5:28 AM), <http://theconversation.com/survivors-of-sexual-violence-are-let-down-by-the-criminal-justice-system-heres-what-should-happen-next-94138> [https://perma.cc/U89P-H3Y4].

104. See *id.*

Stress Disorder (PTSD).<sup>105</sup> Victims suffering with PTSD often experience exaggerated feelings of blame, overly negative thoughts and assumptions about themselves, and difficulties with memory.<sup>106</sup> Because of the sensitive nature of the events, a victim might appear uncomfortable, nervous, or uncertain. This is problematic because an observer may view these responses as an indicator of dishonesty or deceit on the part of the complainant/accuser and the accused may capitalize on that view. A cross-examiner, whether intentionally or not, can manipulate the psychological consequences of sexual violence as a defense to undermine a victim's claims. It is important to recognize the deficiencies of cross-examination so the legal system can continue to protect victims while ascertaining the truth.

### B. *Advantages of Cross-Examination*

Despite its limitations, cross-examination offers far more advantages than disadvantages for the university adjudication system. Cross-examination enhances procedural fairness, improves victim credibility, and clarifies disputed facts. Cross-examination should be a method available to all parties because a process is “more fair” when each side is provided the same procedural opportunities.<sup>107</sup> Procedural parity between adversaries increases institutional legitimacy in the eyes of the accused and society.<sup>108</sup> In addition to this increased legitimacy, research shows that when people feel decision-making authorities have treated them fairly, they are more likely to accept and comply with decisions, feel satisfied with outcomes, and have greater belief in the legitimacy of the authority.<sup>109</sup> Individuals typically determine their level of participation by how much voice they were given and how many opportunities to be heard they experienced.<sup>110</sup>

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105. *See id.*

106. *See id.*

107. *See* Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH. L. REV. 1, 28 (2012) (“[Fairness means] fair procedure to all as a value separate from the impact on accuracy (or innocence.)”); *see also* Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 FLA. L. REV. 863, 902 (1988) (“[A fair] procedure should allow those affected to participate meaningfully, personally, and on equal footing with their adversary.”).

108. *See* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1904 (2012).

109. *See* David De Cremer & Tom R. Tyler, *The Effect of Trust in Authority and Procedural Fairness on Cooperation*, 92 J. APPLIED PSYCHOL. 639, 646 (2007); Thomas Baker et al., *Shared Race/Ethnicity, Court Procedural Justice, and Self-Regulating Beliefs: A Study of Female Offenders*, 49 L. & SOC’Y REV. 433, 453–54 (2015); Erika K. Penner et al., *Procedural Justice Versus Risk Factors for Offending: Predicting Recidivism in Youth*, 38 L. & HUM. BEHAV. 225 (2014).

110. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 121–22 (2000).

Additionally, cross-examination enhances legitimacy of the proceedings. A common concern in sexual misconduct cases is whether the accuser is making a misstatement.<sup>111</sup> Even though the rate of false allegations of sexual assault is very low,<sup>112</sup> sexual assault allegations still must be analyzed with an appropriate degree of scrutiny. Cross-examination can uncover potential unjustified motivations for reporting.<sup>113</sup> A report of a deceitful complainant calls into question the adequacy of adjudication proceedings and casts doubt on the sincerity of sexual assault claimants.

An additional benefit of cross-examination is the ability to clarify and gain additional facts about the alleged event. In many of the situations where the accused's procedural due process rights are contested, many of the events alleged as a sexual assault occurred. Often, there was a sexual act between the two parties at the time and place reported. Of course, merely engaging in a sexual act is not enough to constitute assault. More facts prompted by critical and thoughtful questioning via cross-examination are necessary to obtain additional and relevant details that may change the perception of the activities surrounding the alleged assault.

Cross-examination can be used to obtain details surrounding the event that might not otherwise be voluntarily provided. In many of these contested accounts, drugs or alcohol were present.<sup>114</sup> Of course, the

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111. See Margot Cleveland, *How Brett Kavanaugh Can Be Innocent Even If Christine Blasey Ford Isn't Lying*, FEDERALIST (Sept. 19, 2018), <http://thefederalist.com/2018/09/19/brett-kavanaugh-can-innocent-even-christine-blasey-ford-isnt-lying/> [<https://perma.cc/XG6Q-C6CN>].

112. See KIMBERLY A. LONSWAY ET AL., END VIOLENCE AGAINST WOMEN INT'L, FALSE REPORTS: MOVING BEYOND THE ISSUES TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 65 (2019) (finding in a multi-site study of eight U.S. communities including 2,059 cases of sexual assault found 7 percent reports were false); NAT'L SEXUAL VIOLENCE RES. CTR., FALSE REPORTING (2012); see also David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1318 (2010) (showing a study of 136 sexual assault cases in Boston that found a 5.9 percent rate of false reports).

113. See *Alford v. United States*, 282 U.S. 687, 690, 693 (1931) (holding that a trial court must allow some cross-examination of a witness to show bias); *United States v. Abel*, 469 U.S. 45, 50 (1984); see also *Olden v. Kentucky*, 488 U.S. 227, 231–33 (1988) (discussing potential bias on part of rape-complainant); *Doe v. Ohio State Univ.*, No. 2:15-cv-2830, 2016 WL 692547, at \*1 (S.D. Ohio 2016) (finding that prior to making complaint, accuser was very close to failing out of school.); Joe Cohn, *NCHERM's Open Letter on Campus Sexual Assault Reveals Common Ground*, FIRE (May 30, 2014), <https://www.thefire.org/ncherms-open-letter-on-campus-sexual-assault-reveals-common-ground/> [<https://perma.cc/9VVG-LERD>] (finding a student falsely reported rape to save a romantic relationship); Yoffe, *The Uncomfortable Truth*, *supra* note 25 (reporting a case where complainant's desire to protect reputation was a concern).

114. See Antonia Abbey & Lydia Guy Ortiz, *Alcohol and Sexual Violence Perpetration*, VAWNET 1–2 (Dec. 2008), <https://www.niwrc.org/sites/default/files/documents/Resources/Alcohol-Sexual-Violence-Perpetration.pdf> [<https://perma.cc/7VEU-5MJC>]; see also Antonia Abbey, *Alcohol-Related*

presence of drugs or alcohol does not change that a person incapable of giving consent cannot give consent.<sup>115</sup> But it is well accepted that the use of drugs and alcohol has an effect on an individual's memory and perception of events.<sup>116</sup> Knowing whether one or both of the parties consumed alcohol or drugs is one of the many factors that should be considered in assessing the validity and accuracy of each party's testimony.

Cross-examination is helpful in clarifying what transpired because the definition of sexual assault varies. Society, academia, and the legal system all lack a common or universally accepted definition of sexual assault.<sup>117</sup>

An additional difficulty of the campus sexual assault adjudication process is defining consent. Universities have a unique opportunity to educate students on consensual sex,<sup>118</sup> and most college students are required to learn about affirmative consent in orientation seminars or from online programs.<sup>119</sup> But it is worth noting that studies have shown that these educational programs teaching students about consensual sex have limited results.<sup>120</sup>

While an affirmative yes or no is an ideal standard to determine consent, universities have to be realistic and recognize that many sexual encounters lack verbal affirmation. People often have sex without such

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*Sexual Assault: A Common Problem among College Students*, 14 J. STUD. ON ALCOHOL SUPPLEMENT, 118, 125 (2002).

115. See MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES § 213.4 (AM. LAW INST., Tentative Draft No. 3, 2017); see also *What is Consent?*, IND. U., <https://stopsexualviolence.iu.edu/policies-terms/consent.html> [<https://perma.cc/M52X-QRKG>] (defining consent according to University of Indiana policies).

116. See Antonia Abbey et al., *Sexual Assault and Alcohol Consumption: What Do We Know About Their Relationship and What Types of Research are Still Needed?*, 9 AGGRESSION AND VIOLENT BEHAV. 271, 17–18 (2004) (discussing how alcohol enhances men's misconception of women's behavior, how alcohol reduces women's ability to assess risk, how alcohol effects men's use of force, and how alcohol alters women's responses); see generally Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, 27 ALCOHOL RES. & HEALTH 186 (2003) (providing information regarding alcohol and memory loss).

117. Ian Urbina, *The Challenge of Defining Rape*, N.Y. TIMES (Oct. 11, 2014), <https://www.nytimes.com/2014/10/12/sunday-review/being-clear-about-rape.html> [<https://perma.cc/3WLF-XW66>] (“[T]here is still little uniformity on how to define rape, which makes counting rapes, and countering and even discussing the issue, difficult.”); see Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 9–11, 14–15 (2015) (describing institutional and legal definitions of consent).

118. See Jia Tolentino, *Is There a Smarter Way to Think About Sexual Assault on Campus?*, NEW YORKER (Feb. 5, 2018) <https://www.newyorker.com/magazine/2018/02/12/is-there-a-smarter-way-to-think-about-sexual-assault-on-campus> [<https://perma.cc/UHD6-9ZS5>] (recapping opinions by Professors Jennifer Hirsch and Claude Ann Mellins after completing their studies looking at the sexual health and behavior of Columbia University undergraduate students).

119. See *id.*

120. See *id.*

verbal response, and neither party questions whether the sex was consensual.<sup>121</sup> No standard of consent, not even verbal affirmative consent, will be the appropriate standard to measure consent in every situation. There are different methods that perpetrators use to coerce sex and “consent”.<sup>122</sup> If a victim is verbally coerced into providing affirmative consent, the incident could be considered within the consent guidelines, but it may have been unwanted by the victim. Since defining sexual assault and consent is incredibly difficult and fact specific, universities should permit cross-examination of both parties to ensure that the adjudication panel, the complainant, and the accused all understand what sexual assault is and whether the circumstances that occurred merit a finding of it.

Furthermore, ambiguities and unexpected decisions are part of many young adult sexual experiences.<sup>123</sup> Many university students are likely to be sexually inexperienced and unknowledgeable about their and their partner’s respective versions of consent. Such inexperience could lead to situations that call into question the issue of consent. To ensure fairness, universities must determine what standard of consent they are holding students responsible for not obtaining. Cross-examination should be used to clarify complainants’, respondents’, adjudicators’, and universities’ perception of consent before a judgment is rendered.

### C. Court Requirements Regarding Cross-Examination

As accused students have sued their respective universities alleging inadequate processes in adjudication proceedings, the courts have begun addressing the right to cross-examination in these proceedings. Given the fact-specific nature of the claims against universities, the resulting jurisprudence has been confusing and piecemeal.<sup>124</sup> Courts have made clear that state universities must afford students minimum due process rights before issuing significant disciplinary decisions.<sup>125</sup> At a minimum, a student facing suspension should be entitled to “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>126</sup> While the process may vary, universities must at the very least provide notice of the

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121. See *What Consent Looks Like*, RAINN, <https://www.rainn.org/articles/what-is-consent> [<https://perma.cc/QSA2-G4RV>] (last visited Mar. 30, 2020).

122. See Claude A. Mellins et al., *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risks*, PLOS ONE 6 (Nov. 8, 2017), available at <https://doi.org/10.1371/journal.pone.0186471> [<https://perma.cc/7U5P-6L8U>] (emphasis added).

123. See Yoffe, *supra* note 24.

124. See Smith, *supra* note 42, at 974.

125. See *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005); see also *Jaksa v. Regents of the Univ. of Mich.*, 597 F. Supp. 1245, 1248 (E.D. Mich. 1984), *aff’d*, 787 F.2d 590 (6th Cir. 1986) (“Whether plaintiff’s interest is a ‘liberty’ interest, ‘property’ interest, or both, it is clear that he is entitled to the protection of the due process clause.”).

126. See *Doe v. Cummins*, 662 F. App’x 437, 446 (6th Cir. 2016).

charges, an explanation of the evidence against the student, and an opportunity to present his or her side of the story before an unbiased decisionmaker.<sup>127</sup>

Although a student must have the opportunity to share his or her version of events at some form of a hearing,<sup>128</sup> the hearing is not required to take on all the formalities of a criminal trial.<sup>129</sup> Generally, when courts assess whether students have the right to cross-examine, the courts are concerned with whether respondent students have the opportunity to meaningfully confront witnesses.<sup>130</sup> The circuit courts have generally considered that the right to cross-examine is not “an essential requirement of due process in school disciplinary proceedings.”<sup>131</sup> To comport with due process’s fact-specific nature, courts typically weigh the impact that the credibility of witnesses would likely have on the outcome of the case to determine whether cross-examination is necessary.<sup>132</sup> Courts have indicated that when a case comes down to a choice between believing an accuser versus the accused, cross-examination is not only beneficial but essential to due process.<sup>133</sup> Although not required in all university sexual assault proceedings, case law suggests that the importance of credibility in sexual-misconduct cases supports the proposition that parties should

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127. See *Heyne v. Metro. Nashville Pub. Schs.*, 655 F.3d 556, 565 (6th Cir. 2011).

128. See *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399–400 (6th Cir. 2017).

129. See *Flaim*, 418 F.3d at 635; *Univ. of Cincinnati*, 872 F.3d at 400.

130. See *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (refusing to extend the right to cross-examine witnesses to students but specifically mentioning cross-examination as an element of disciplinary hearings); see also *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (“[I]n light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff . . . to direct questions to his accuser through the panel.”); Teresa Watanabe, *Ruling in Favor of UC Student Accused of Sex Assault Could Ripple Across U.S.*, L.A. TIMES (July 15, 2015, 4:00 AM), <https://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html> [<https://perma.cc/G74Y-TD38>] (discussing possible changes in case law after a recent ruling that turned, in part, on concerns about cross-examination).

131. See *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); see also *Dixon*, 294 F.2d at 159 (“This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required.”).

132. See *Flaim*, 418 F.3d at 64; *Winnick*, 460 F.2d at 549–50; see also *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 605 (D. Mass. 2016) (“The ability to cross-examine is most critical when the issue is the credibility of the accuser.”).

133. See *Flaim*, 418 F.3d at 64; see also *Johnson v. Collins*, 233 F. Supp. 2d 241, 250 (D.N.H. 2002) (overturning a school board’s decision in part due to the plaintiff’s inability to challenge witnesses’ credibility via cross-examination and reveal that a testifying witness had not actually observed the incident); *Dixon*, 294 F.2d at 158–59 (“[A] charge of misconduct . . . depends upon a collection of the facts . . . easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved.”).

be allowed to cross-examine witnesses.<sup>134</sup> Many of the cases contesting university sexual assault adjudication procedures rest on a credibility determination between the accuser and accused.<sup>135</sup> When such a determination is required, the courts have considered cross-examination essential.<sup>136</sup>

### III. UNIVERSITY ADJUDICATION SYSTEMS SHOULD ADOPT CROSS-EXAMINATION

Although courts have not yet required cross-examination, universities should permit some form of cross-examination for the accuser and the accused to ensure fair adjudications and to avoid contestations about the adjudication procedures.

As discussed in Part II, cross-examination enhances procedural fairness. Procedural fairness is important for all parties engaged in adjudication proceedings. Parties are more accepting of unfavorable outcomes so long as the process leading to those outcomes was fair.<sup>137</sup> A form of cross-examination available to both parties provides the opportunity for parties to engage in the proceedings as an active participant rather than solely as a respondent. Because of the ramifications of being found responsible for sexual misconduct, an accused student deserves an opportunity for a robust presentation of their version of events.

Complainants of sexual assault have an important stake in procedural fairness because its absence exposes the disciplinary outcome to internal and judicial appeals, which delays the process and risk overturning a potentially valid disciplinary outcome that was reached by a flawed process.<sup>138</sup> Moreover, cases in which disciplinary outcomes are overturned because of procedural errors contribute to the misperception

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134. *See Doe v. Baum*, 903 F.3d 575, 585, 588 (6th Cir. 2018) (holding that where the credibility of witnesses is in dispute and material to the outcome, due process requires cross-examination); *see also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406–07 (6th Cir. 2017) (concluding that due process demanded that the accused have the right to cross-examine the accuser by placing significant weight on the fact that credibility was especially important since parties gave differing accounts as to the key factual issues).

135. *See, e.g., Univ. of Cincinnati*, 872 F.3d at 398 (stating how “the [committee] was given the choice of believing either Jane Roe or Plaintiff, and therefore, cross-examination was essential to due process”).

136. *See, e.g., id.* at 401.

137. *See* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC’Y REV. 513, 534–35 (2003); Jenna Calton & Lauren B. Cattaneo, *The Effects of Procedural and Distributive Justice on Intimate Partner Violence Victims’ Mental Health and Likelihood of Future Help-Seeking*, 84 AM. J. ORTHOPSYCHIATRY 329, 339 (2014).

138. *See* Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 107 (2017).

that disciplinary processes are biased, and promotes negative stereotypes about the veracity of complainants.<sup>139</sup> Litigating due process claims requires extensive university resources in the form of time and money that could instead be used for victim advocacy.<sup>140</sup> By legitimizing the process with cross-examination, universities can reduce the number of appeals and lawsuits.

#### A. *University Adjudication Systems Serve Victims*

It is in universities' and victims' best interests to understand how to educate and deter perpetrators from sexual assault since most perpetrators are repeat offenders. About two-thirds of college rapists are repeat offenders, who account for the great majority of rapes (over 90%).<sup>141</sup> Furthermore, 25% of college rapists admit to committing rapes over multiple years of college.<sup>142</sup> Since rapists often reoffend, universities should take a preventive approach with sexual assault prevention programs.

Understanding who is likely a perpetrator or likely to become a perpetrator of sexual assault can help universities develop more effective sexual assault prevention programs. Sexual assault programs are typically victim focused, addressing why victims are selected and what victims can do to minimize the risk of future assault. Research shows that men who rape tend to start such behavior in high school or college.<sup>143</sup> These men likely begin their sexual assaults with crossing a line with someone they know.<sup>144</sup> Additionally, sexual assault perpetrators often have a disconnect with their actions and what constitutes sexual assault. In a study of university self-reported sexual assault, approximately 2% of students self-reported any sexual assault perpetration and 9% reported any ambiguous consent experiences since starting college.<sup>145</sup> If someone is unsure as to whether they had consensual sex, they cannot be sure that they sexually assaulted someone.

Furthermore, perpetrators may be coping with recent victimization experiences. Research suggests that students who are likely to perpetrate

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139. *See id.*

140. *See* Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015, 4:45 AM), <http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights> [<https://perma.cc/KRP8-SNG5>] (discussing how attention is shifting away from victims and focusing on accused students).

141. *See* Jim Hopper, *Repeat Rape by College Men*, <https://www.jimhopper.com/repeat-rape-by-college-men/> [<https://perma.cc/7K2K-23KE>] (last visited Mar. 30, 2020).

142. *See id.*

143. *See* Heather Murphy, *What Experts Know About Men Who Rape*, N.Y. Times (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/health/men-rape-sexual-assault.html> [<https://perma.cc/X9YC-X5H6>].

144. *See id.*

145. *See id.*

assault or report ambiguous consent also may have recent victimization experiences.<sup>146</sup> Typically, perpetrators are not allowed into safe spaces for victims of sexual assault. Those students who are both victims and perpetrators may then not have any devoted space for addressing their concerns and difficulties. If universities cross-examine both victims and perpetrators, they can gain crucial facts and details about perpetrators that may not have been provided in standard questioning. Such an understanding allows universities to more effectively address the crux of the problem, perpetrators, to protect victims.

### B. *Guidance and Expected Changes Following the 2011 Dear Colleague Letter*

As discussed in Part I, the guidelines issued by DOE OCR are only administrative guidelines and thus can be overturned by a new presidential administration.<sup>147</sup>

In 2017, following a change from the Obama Administration to the Trump Administration, the 2011 DCL, which provided guidelines discouraging cross-examination, was rescinded and the DOE OCR released a Q&A. The Q&A allowed schools to choose from either a clear and convincing standard or a preponderance of the evidence standard for sexual assault proceedings.<sup>148</sup> This was a change from the formerly mandated preponderance of the evidence standard articulated in the 2011 DCL.<sup>149</sup> The Q&A also mentioned that any process available to one party must be made equally available to the other party, specifically mentioning the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses.<sup>150</sup>

In November of 2018, the U.S. Secretary of Education proposed regulations titled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, and ultimately published those regulations subject to a public notice and comment period.<sup>151</sup> The proposal shifted from a victim-centered

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146. See Kate Walsh et al., *Prevalence and Correlates of Sexual Assault Perpetration and Ambiguous Consent in a Representative Sample of College Students*, J. INTERPERSONAL VIOLENCE, Jan. 13, 2019, at 2.

147. See Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 596 (2016).

148. See Office for Civil Rights, *Q&A on Campus Sexual Misconduct*, U.S. DEP'T OF EDUC. 5 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/RRT8-3AL6>] [hereinafter *Q&A on Campus Sexual Misconduct*].

149. See Dear Colleague Letter, *supra* note 12, at 11.

150. See *Q&A on Campus Sexual Misconduct*, *supra* note **ERROR! BOOKMARK NOT DEFINED.**.

151. See generally *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 FED. REG. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

approach to focusing on reducing Title IX liability for universities. The most significant changes included: a requirement that universities no longer had to investigate informal complaints or incidents that occurred off campus; a narrower definition of sexual harassment; a higher burden of proof; and the guarantee that accused individuals have the right to cross-examine their accusers.<sup>152</sup>

Because of this shift away from a victim-centered approach, victims of sexual assault will certainly suffer under the new proposals. Under these guidelines, student victims will be deprived of the campus adjudication process in many instances. Many college students live or stay off campuses where sexual assaults are likely to occur.<sup>153</sup> Defining sexual harassment and assault in narrower terms allows fewer complainants to come forward and seek recourse for sexual misconduct that could not be addressed elsewhere. As colleges and universities adopt a higher standard of proof, fewer accused students will be held responsible. Because sexual assault typically occurs in places of seclusion with few, if any, witnesses, there is often little evidentiary proof.<sup>154</sup> High evidentiary standards are often impossible to meet with only witness testimony.<sup>155</sup>

In regard to the ability to cross-examine the accuser, the proposed regulations state that the questioning would have to be done in a live hearing by a lawyer or other adviser, but the parties could be in separate rooms, using technology if needed.<sup>156</sup>

Although cross-examination should be implemented in university adjudication proceedings, cross-examination should also be used to balance the rights of the accused with the victim-centered adjudication process. Instead, the proposed regulations formulated by the Trump Administration eliminate the victim-centered nature of sexual assault proceedings, leaving victims in a precariously vulnerable position. Regardless of where the political tide takes elements of the DOE OCR guidance, universities should allow some form of cross-examination

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152. *See id.* at 61,462–66; Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, CHRON. HIGHER EDUC. (Nov. 16, 2018, 4:40 PM), <https://www.chronicle.com/article/What-You-Need-to-Know-About/245118> [<https://perma.cc/NH4L-YX8L>].

153. *What Percent of College Students Live on Campus?*, REFERENCE, <https://www.reference.com/education/percent-college-students-live-campus-d1d5a0fac8718894> [<https://perma.cc/2PT3-EHC6>] (last visited Mar. 20, 2020).

154. *See Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (noting that the only evidence before the college disciplinary panel was the accuser's and the accused's accounts); Baker, *supra* note 52, at 234–37 (discussing how the victim's testimony is often the only evidence available in sexual assault cases).

155. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 FED. REG. at 61,477.

156. *See id.* at 61,474–76.

because cross-examination improves greater accuracy and trust in university adjudication proceedings. Cross-examination can be tailored in a victim-sensitive manner to prevent or minimize negative impacts on victims.

### C. Implementing Cross-Examination

To protect assault victims, university proceedings should be formulated with the victim in mind. A frequently stated concern of having sexual assault victims testify is that they will not be able to accurately testify when faced in front of their accuser. Tools and techniques such as victim advocacy, setting up screens, and utilizing audiovisual technology are available for universities to ensure that cross-examination is tailored in a way that least negatively impacts victims.<sup>157</sup>

Universities can engage in victim advocacy to develop techniques to provide victims with resources during the process. Higher education institutions are already required to train officials adjudicating disciplinary proceedings on issues related to dating violence, domestic violence, and sexual assault.<sup>158</sup> These officials have the requisite knowledge on how to sensitively approach a victim's experiences and can recognize that survivors of sexual assault may appear more reactive, distracted, or emotional to certain questions than ordinary witnesses do.

Universities can also provide complainants with a victim advocate. Interestingly, rape victims who had the support of a victim advocate during court processes reported less distress and less secondary victimization after their experience with the legal system.<sup>159</sup>

Additionally, universities can inform participants early on about what to expect during the process. A witness susceptible to common cross-examination "techniques," such as leading questions and double negative questions, can be mitigated if the witness is made aware of what to expect during cross-examination.<sup>160</sup>

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157. See *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 725 (1st Cir. 1983); Nat'l Crime Victim Law Inst., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, VIOLENCE AGAINST WOMEN BULL. 4 (Sept. 2011), <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify> [<http://perma.cc/Z4EN-NAPT>]; Lisa Hamilton Thielmeyer, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797, 813 (1992).

158. See Dear Colleague Letter, *supra* note 12, at 4.

159. See Rebecca Campbell, *Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?* 12 VIOLENCE AGAINST WOMEN 30, 44 (2006).

160. See Jacqueline M. Wheatcroft & Louise E. Ellison, *Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy*, 30 BEHAV. SCI. & L. 821, 833-35 (2012) (finding that witness accuracy rose dramatically even when the "preparation" was something as simple as a guidance leaflet detailing what happens during cross-examination).

There are several pieces of equipment and technologies that schools have already implemented in their proceedings in an effort to avoid re-traumatization of victims. Several schools have used screens to block the accused from the accuser's view.<sup>161</sup> Such shielding mitigates the discomfort a victim experiences when encountering the accused directly.<sup>162</sup> The U.S. Supreme Court has held that an adequate opportunity for cross-examination can exist even in the absence of physical confrontation,<sup>163</sup> and lower courts have held in university proceedings that the panel can adequately assess a witness's credibility as long as a the screen does not obscure the witness's face from the panel.<sup>164</sup> Courts have even held that when a screen blocks the respondent's view of the complainant's testimony, the respondent student had the opportunity to cross-examine the complainant student.<sup>165</sup> Schools have also utilized tactics such as allowing the accused student to direct questions to the accuser via the panel.<sup>166</sup> Some institutions have allowed the cross-examination to occur via video so that the accuser was not forced to be in the same building as the accused.<sup>167</sup> These methods of tailoring cross-examination to a victim's needs prevent victims from being directly questioned by the accused assailant, and mitigate the victims' discomfort during the proceedings.

Implementing these methods to protect victims during cross-examination allows the accused individual to fully participate in the proceeding. It is impossible to make a victim of sexual assault completely comfortable in any adjudication proceeding. Sexual assault is an extremely difficult thing for a person to endure and no procedural measure can completely eliminate a victim's discomfort. Accordingly, the best thing a university can do to help victims of sexual assault is to provide a fair, victim-centered adjudication process with enough procedural protections for both parties so that the process remains a viable option to provide victims relief.

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161. *See, e.g.*, *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 27 (D. Me. 2005) (holding that a partition did not deprive the plaintiff-respondent of a meaningful right to determine the credibility of the witness because the panel could see the witness and determine her credibility).

162. *See, e.g.*, Thielmeyer, *supra* note **Error! Bookmark not defined.**

163. *See, e.g.*, *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 725 (1st Cir. 1983) (citing *Douglas v. State of Ala.*, 380 U.S. 415, 418 (1965)).

164. *See id.* at 725 (determining the plaintiff's ability to ask questions and the visibility of the witness to the panel precluded a claim that the school violated its guarantee of cross-examination); *Gomes*, 365 F. Supp. 2d at 27 (determining that because all witnesses were visible to the plaintiffs while testifying no due process violation existed).

165. *See Gomes*, 365 F. Supp. 2d at 26–27.

166. *See, e.g.*, *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997).

167. *See, e.g.*, *Doe v. Univ. of the Pac.*, No. CIV. S-09-764, 2010 WL 5135360, at \*4 (E.D. Cal. Dec. 8, 2010), *aff'd* *Doe v. Univ. of Pac.*, 467 F. App'x 685 (9th Cir. 2012) (“As an accommodation to [the victim], the University arranged for [her] to provide her testimony to the Board in a building across campus from where [the perpetrators] testified.”).

### CONCLUSION

Colleges and universities should continue to adjudicate sexual assault because the schools are in a far more superior position to help students than the criminal or civil legal system. To continue adjudicating claims of sexual assault, schools should implement a robust cross-examination procedure for all the parties and tailor those individual procedures when necessary. Despite the obvious difficulties that cross-examination or any conversation about an alleged sexual assault bring on the complainant, allowing cross-examination ultimately benefits victims. Protecting accused students with procedural processes like cross-examination ultimately protects victims. Cross-examination legitimizes universities' adjudication proceedings, in turn securing greater trust in the system for the parties and society at large. This trust in the proceeding allows for the continuance of campus adjudication systems and resources for victims.