

# HOW UNIVERSITY TITLE IX ENFORCEMENT AND OTHER DISCIPLINE PROCESSES (PROBABLY) DISCRIMINATE AGAINST MINORITY STUDENTS

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*This Article argues that university discipline procedures likely discriminate against minority students and that increasingly muscular Title IX enforcement—launched with the best of intentions in response to real problems—almost certainly exacerbates yet another systemic barrier to racial justice and equal access to educational opportunities. Unlike elementary and secondary schools, universities do not keep publicly available data on the demographics of students subjected to institutional discipline, which prevents evaluation of possible disparate racial impact in higher education. Further, several aspects of the university disciplinary apparatus—including broad and vague definitions of offenses, limited access to legal counsel, and irregular procedures—increase the risk that minority students will suffer disproportionate suspensions and other punishment.*

*This Article brings needed attention to an understudied aspect of Title IX enforcement and raises concerns about the potential effects of implicit bias. While many commentators and courts have addressed whether university disciplinary procedures mistreat men—or, instead, even now provide inadequate protection for college women—few observers have discussed possible racial implications, which may explain (and be explained by) the current lack of data. Outside the context of sex-discrimination cases, university discipline procedures for quotidian matters such as plagiarism and alcohol abuse likely exhibit similar racial biases.*

*This Article argues that the U.S. Department of Education should use its authority under Title VI of the Civil Rights Act of 1964 to require that colleges and universities immediately begin collecting and publishing the sort of data already reported by elementary and secondary schools, thereby allowing observers to assess the scope of disparate impact in campus discipline processes.*

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## INTRODUCTION

Given the disproportionate suspensions of black students by elementary and secondary schools,<sup>1</sup> along with what is known about racial bias in the criminal justice system,<sup>2</sup> it would be a miracle if university disciplinary procedures did not produce outcomes that excessively punish black students, along with members of other disadvantaged minority groups. One would expect more university charges per capita to be filed against black students than whites, and one would expect to find more per capita suspensions of black students.<sup>3</sup> But such results have not been observed. Not because unexpected justice is located in the records of student conduct panels. No, university records do not contain evidence that students of all races face campus discipline at similar rates. Instead, one cannot find evidence of disparate impact for the straightforward reason that universities do not bother to collect—much less to publish—data that would allow such an assessment.<sup>4</sup>

For public elementary and secondary schools, rich data exists concerning disciplinary outcomes, allowing analysis of how the school discipline process has a disparate impact on students of different races.<sup>5</sup> The unfairness is so stark—black students are suspended about three times as often as white students<sup>6</sup>—that reform advocates refer to the current system as a “school-to-prison pipeline.”<sup>7</sup> The U.S. Department of Justice and U.S. Department of Education have instructed public schools of “their obligations under Federal law to administer student discipline without discriminating on the basis of race, color, or na-

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<sup>1</sup> See *infra* Section II.A.

<sup>2</sup> See *infra* Section II.B.

<sup>3</sup> For speculation by other scholars to this effect, see Nancy Gertner, *Complicated Process*, 125 YALE L.J. F. 442, 442–43 (2016); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106–08 (2015). For a contrary argument, see Notes: Antuan M. Johnson, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J. L. & MOD. CRIT. RACE PERSP. 57, 59 (2017). For a good overview of this issue published while this Article was in the editing process, see Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, THE ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361> [<https://perma.cc/BPZ4-84XS>].

<sup>4</sup> See *infra* Section III.A.

<sup>5</sup> See DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6 (The Ctr. for Civil Rights Remedies at The Civil Rights Project at UCLA, 2012); Roger McKinney, *Black and Low-Income Students More Frequently Suspended from School*, COLUM. DAILY TRIB. (Dec. 28, 2014), <http://www.columbiatribune.com/e126a57e-da88-5f54-ad51-0e152afd24fc.html> [<https://perma.cc/24ZH-3PML>] (using “data collected by Columbia Public Schools” to evaluate the school district).

<sup>6</sup> See LOSEN & GILLESPIE, *supra* note 5, at 6.

<sup>7</sup> See *id.* at 4; Russell J. Skiba et al., *More than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE EDUC. 546, 546 (2014).

tional origin.”<sup>8</sup> In short, while no magic bullet is available to solve the problem, the problem at least has a name, and efforts are underway in some quarters to attack it. Reformers are using education, advocacy, litigation, and legislation in various ways.<sup>9</sup>

In the criminal justice system—that is, the “real courts,” as opposed to the quasi-judicial proceedings of K-12 schools and universities—researchers find disparate impact by race in arrests, prosecutions, convictions, and sentencing.<sup>10</sup> This is not news. Criminal law and procedure teachers have told students of this for decades, and the evidence is abundant that black Americans are much more likely than whites to spend time in prison.<sup>11</sup>

Meanwhile, in response to recent pressure from the U.S. Department of Education,<sup>12</sup> colleges and universities across the country have hurriedly and vastly expanded the offices dedicated to investigating and punishing sex discrimination and sexual misconduct on campus.<sup>13</sup> At the same time, universities are scrambling to become more welcoming to students of all races.<sup>14</sup> It seems

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<sup>8</sup> See, e.g., Joint Letter from Catherine E. Lhamon, Assistant Sec’y, Office of Civil Rights, U.S. Dep’t of Educ., & Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Colleague (Jan. 8, 2014) (on file at <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201401-title-vi.html> [<https://perma.cc/SCP8-B8QE>]).

<sup>9</sup> See Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 990–95 (2016) (discussing strategies).

<sup>10</sup> See, e.g., MARC MAUER, RACE TO INCARCERATE 131 (2d ed. 2006); THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM I (2013); U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xii (1995).

<sup>11</sup> See, e.g., Marc Mauer, *Racial Disparities in Prison Getting Worse in the 1990s*, 8 OVERCROWDED TIMES 1 (Feb. 1997); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004).

<sup>12</sup> See, e.g., *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 204–06 (D. Mass. 2017) (describing how one college changed its policies in response to DOE guidance); CATHERINE LHAMON, ASSISTANT SEC’Y FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) (documenting various letters and other guidance provided by DOE OCR to postsecondary institutions). On September 22, 2017, DOE rescinded the April 29, 2014 “Questions and Answers” guidance document. See Dear Colleague Letter from Candice Jackson, Acting Assistant Sec’y, U.S. Dep’t Educ. Office for Civil Rights (Sept. 22, 2017). OCR also issued some interim guidance on the same day. See *id.*

<sup>13</sup> See, Risa L. Lierberwitz et al., *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS’N U. PROFESSORS 69, 73 (2016); Juliet Eilperin, *Biden and Obama Rewrite the Rulebook on College Sexual Assaults*, WASH. POST (July 3, 2016), [https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c\\_story.html?utm\\_term=.233c2e5ca670](https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html?utm_term=.233c2e5ca670) [<https://perma.cc/4JRK-WNVN>].

<sup>14</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2206, 2208 (2016) (discussing elaborate efforts by university to gain “the educational benefits that flow from diversity”); LORELLE L. ESPINOSA ET AL., RACE, CLASS, & COLLEGE ACCESS: ACHIEVING DIVERSITY

that little attention has been given to the risk that these two efforts might be in tension. Might it be possible, even likely, that the hammer wielded by beefed up university offices dedicated to prosecuting sex discrimination is falling disproportionately on minority students? Indeed, when one stops to consider the question, isn't it nearly impossible to imagine that Title IX enforcement does not have a disparate impact on the basis of race?<sup>15</sup>

This Article argues that university discipline procedures likely discriminate against minority students and that increasingly muscular Title IX enforcement—launched with the best of intentions in response to real problems—almost certainly exacerbates yet another systemic barrier to racial justice and equal access to educational opportunities. Part I examines evidence from a university that has investigated the impact of its discipline system on students of different races and has then shared its findings. Part II provides a baseline for expectations and analysis by briefly reviewing the well-documented racial biases in discipline imposed upon elementary and secondary school students as well as in the American criminal justice system. Returning to higher education, Part III then examines how several features of campus discipline processes, including the failure to collect demographic data, enhance the risk of racially disparate impacts. Part IV suggests avenues for reform, including a call for the U.S. Department of Education to collect and publish data on the demographics of students disciplined by universities. Part V then addresses broader implications, including the role of “shadow law” in the federal regulation of university discipline systems and campus sex, issues of “intersectionality” that arise from competing claims for justice related to sex and race, and possible fruitful future research.

Among other things, Part VI briefly discusses whether racial biases affect how colleges and universities respond to victims of assault, discrimination, and other misconduct. It is possible, for example, that black women are less likely than other victims of sexual assault to seek help from university authorities, or that universities take their complaints less seriously than those of white women. Disparate treatment of complainants (and of those who could be complainants but never file reports) is worthy of its own article. This Article, however, focuses on respondents—that is, those students accused of misconduct—and on how campus proceedings likely treat accused students differently depending on their race.

In part, this Article addresses the interaction of two narratives concerning modern American higher education. One narrative recounts inadequate reac-

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IN A SHIFTING LEGAL LANDSCAPE 1 (2015); John Eligon, *After Racist Episodes, Blunt Discussions on Campus*, N.Y. TIMES (Feb. 3, 2016), <https://www.nytimes.com/2016/02/07/education/edlife/university-of-missouri-struggles-to-bridge-its-racial-divide.html> [<https://perma.cc/65AJ-456B>].

<sup>15</sup> “Title IX” refers to Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681. The statute prohibits discrimination on the basis of sex at educational programs and activities receiving federal funds. *See* 34 C.F.R. § 106.1.

tions by universities to the harassment and rape of students, particularly women. It also tells of hard-won improvements to the campus environment, as well as the unceasing effort of activists for gender equality and the significant work that remains unfinished. The other narrative recounts the constant struggle for racial equality on campus, beginning in the days of *de jure* segregation and celebrating civil rights milestones. It tells too of stubborn impediments to racial justice and continued campaigns for change. At least occasionally, these narratives conflict with one another. The tension evokes competing claims for justice made during debates in the 1990s about proposed amendments to Federal Rules of Evidence related to rape and child molestation cases, which were aimed at protecting women and children by increasing the odds that sexual predators would be convicted.<sup>16</sup> Critics argued that the new rules, which eventually were enacted, would harm minority men.<sup>17</sup>

This Article examines how certain efforts to win equal access for women to higher education may have inadvertently complicated the quest for racial justice. If my ultimate conclusion gains acceptance—that is, if leaders in higher education agree that the threat of racial bias in campus discipline is real and demands attention—it will be important not to lose sight of the gender equity issues that, after languishing without broad recognition for far too long, have recently inspired important campus reforms.

#### I. DOCUMENTED INSTANCES OF DISPARATE RACIAL IMPACT AT UNIVERSITIES

At the University of Virginia, the Honor System is serious business.<sup>18</sup> The university's handbook for faculty members and teaching assistants refers to the Honor System as “the University's most cherished tradition,” one which “defines the institution and creates the basis for our standard of conduct in the community.”<sup>19</sup> Known as a “single sanction” regime, Virginia's system has one available punishment: “Students found guilty of an Honor offense are perma-

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<sup>16</sup> See 140 CONG. REC. H23,602 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (“The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system's tools for bringing the perpetrators of these atrocious crimes to justice.”).

<sup>17</sup> See, e.g., Katherine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 592 (1997) (“Poor, minority men with an alleged prior record will be much more likely to be falsely identified, improperly tried, and wrongfully convicted for stranger rapes that they did not commit.”). The provisions are codified at FED. R. EVID. 413–415.

<sup>18</sup> See VIRGINIUS DABNEY, MR. JEFFERSON'S UNIVERSITY: A HISTORY 9–10, 196 (1981); Coy Barefoot, *The Evolution of Honor: Enduring Principle, Changing Times*, UVA MAG. (Spring 2008), [http://uvamagazine.org/articles/the\\_evolution\\_of\\_honor/](http://uvamagazine.org/articles/the_evolution_of_honor/) [https://perma.cc/GF4Q-NLA4].

<sup>19</sup> UNIV. OF VA. HONOR SYS., HANDBOOK FOR FACULTY MEMBERS AND TEACHING ASSISTANTS (2014) (introductory letter by Rector George Martin).

nently dismissed from the University.”<sup>20</sup> Although concerns are perennially raised about the single sanction regime—perhaps it is too harsh, perhaps it deters the reporting of violations—the system has endured since 1842.<sup>21</sup>

For much of the Honor System’s history, the university admitted no black students against whom the policy could possibly discriminate.<sup>22</sup> Sometime after the racial integration of the university, UVA began keeping statistics on the demographics of students charged with, and dismissed for, honor offenses.<sup>23</sup> These data indicated that black students were charged and dismissed at vastly higher rates than white students.<sup>24</sup> In the 1980s, students running the Honor System noted that “non-mainstream students had become primary targets for honor investigations.”<sup>25</sup> The *Cavalier Daily* reported in 1988 that “statistics for the last year show that 29.7 percent of honor accusations are made against black students, a number which is disproportionately higher than the approximately eight percent of blacks attending the University.”<sup>26</sup> A study released in 1996 by the honor committee’s diversity task force contained similar results, revealing “that even though black students make up only 12 percent of the student body, they accounted for 35 percent of honor investigations and 23 percent of students dismissed.”<sup>27</sup> A decade later, UVA reacted to statistics telling the same story. When the 2008–09 Honor Committee released demographic data about its cases, it reported that black students accounted for one-third of all accused students.<sup>28</sup>

The current Honor System faculty handbook reports continued disparities. “Over the years, there have been serious concerns that the Honor System disproportionately affects minority students, specifically in the number of reports received by the Honor Committee.”<sup>29</sup> Once students are reported, students from various racial groups are found guilty at similar rates, meaning that the disparate expulsion of black students is attributable almost entirely to disparate re-

<sup>20</sup> *Id.* at 2. In recent years an intermediate sanction (two semesters’ suspension) has been made available to students who admit guilt quickly upon being notified of a charge. *See id.* at 7. But all students found guilty after a hearing are expelled. *See id.* at 11.

<sup>21</sup> *See Barefoot*, *supra* note 18.

<sup>22</sup> *See* James Latimer, *Negro Wins Suit to Enter Law School at University; State Fails to Give Equal Facilities, Judges Point Out*, RICH. TIMES-DISPATCH (Sept. 6, 1950).

<sup>23</sup> *See Barefoot*, *supra* note 18.

<sup>24</sup> *See id.*

<sup>25</sup> *See id.*

<sup>26</sup> *See id.* (quoting CAVALIER DAILY).

<sup>27</sup> *See* Nicola White, *Lawsuit Raises Questions About Honor*, CAVALIER DAILY (Feb. 2, 2000), <http://www.cavalierdaily.com/article/2000/02/lawsuit-raises-questions-about-honor> [<https://perma.cc/5GXJ-CRT7>].

<sup>28</sup> *See* Cameron Feller, *University Community Reacts to Diversity Statistics from Committee*, CAVALIER DAILY (Apr. 14, 2009), <http://www.cavalierdaily.com/article/2009/04/university-community-reacts-to-diversity-statistic> [<https://perma.cc/PE3G-ANJH>] (“I was a little bit surprised at the disproportionate number of minority students reported . . .”).

<sup>29</sup> *See* UNIV. OF VA. HONOR SYS., *supra* note 19, at 14 (section titled “Diversity and the Honor System”).

porting rates.<sup>30</sup> Two primary explanations present themselves for the pattern of disparity observed for decades. Perhaps black students at the University of Virginia are more likely than their white peers to lie, cheat, and steal. Or, perhaps among those students who do commit honor offenses, black students are more likely to be reported. The university seems to find the second explanation more accurate (as do I), noting the phenomena of “spotlighting” and “dimming.”<sup>31</sup> The faculty handbook explains as follows:

Spotlighting occurs when those who naturally stand out from those around them draw more scrutiny than their peers. Conversely, “dimming” refers to the potential for some students to avoid notice as they more readily blend in. Asian students, international students, and student-athletes in particular have seen a disproportionate number of cases reported against them at various times.<sup>32</sup>

A 2001 *Cavalier Daily* editorial provides further evidence for the “spotlighting theory,” drawn from honor charges filed from 2000 to 2001.<sup>33</sup> Of all students against whom charges were filed that year, “44.2 percent of those students were white, although the student body is 71.2 percent white. Black students comprise 23.4 percent of those investigated but only 9.5 percent of the student body.”<sup>34</sup> Most telling is that of the black students accused that year, not a single one was convicted.<sup>35</sup> Unless the Honor Committee was brazenly discriminating in favor of accused black students, one cannot help but conclude that, somehow, black students were over-reported for misconduct.

Virginia deserves credit for collecting and releasing the data that paint such an unflattering picture of the university in the preceding paragraphs. In a sense, Virginia has “spotlighted” itself, causing it to “stand out from those around [it and] draw more scrutiny than [its] peers.”<sup>36</sup> Let us consider now whether Virginia is probably some sort of bizarre outlier or if, instead, it is more likely that data from other institutions—were they only available—would yield similar results. Is Virginia a hotbed of racial bias, substantially more so than the bulk of American universities? I certainly have no evidence to support such a claim. Until other colleges examine the beams in their eyes, they would be wise to avoid suggesting that Virginia deserves special criticism for its mote.<sup>37</sup>

The University of Virginia surely has its problems with race. It did, after all, exclude black students entirely for more than a century,<sup>38</sup> and that sort of

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<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See Cavalier Daily Staff, Lead Editorial: Pinpointing Bias, CAVALIER DAILY* (Apr. 10, 2001), <http://www.cavalierdaily.com/article/2001/04/lead-editorial16276> [<https://perma.cc/746L-5WPH>].

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See supra* text accompanying note 32.

<sup>37</sup> *See Matthew* 7:3–5.

<sup>38</sup> *See Latimer, supra* note 22 (describing decision “which for the first time breached State segregation policies surrounding Thomas Jefferson’s 125-year-old citadel of learning”).



behavior tends to leave a mark on institutional culture. Then again, universities in free states were not beacons of racial equality either during UVA's segregated days. Yale College, for example, opened in 1701 and admitted its first black student in the 1850s.<sup>39</sup> In 1964, it admitted a record number of black freshmen: fourteen.<sup>40</sup> Would it be unreasonable to speculate that vestiges of Old Yale impede the progress of black Elis today?<sup>41</sup>

## II. POINTS OF COMPARISON: ELEMENTARY SCHOOLS, SECONDARY SCHOOLS, AND REAL COURTS

To help decide whether racially disparate impact likely pervades university discipline nationwide—as opposed to infecting just a few institutions here and there—this Part examines contexts beyond higher education in which disciplinary records are far easier to obtain.

The disproportionate exclusion of minority students from the nation's elementary and secondary schools has been amply documented. Similarly, the tremendous racial inequities wrought by America's criminal justice system are well known. But a very brief review of these systems is nonetheless helpful for two reasons. First, it provides context in which observers may evaluate the university discipline system, creating the strong presumption that absent some significant intervention by university officials, disparate impact on the basis of race should be expected. Second, it invites a discussion of certain features of university discipline—particularly Title IX enforcement—that not only fail to rebut the presumption but instead provide further reason to believe that university discipline systems discriminate against minority students.

### A. *Racial Injustice in Elementary and Secondary School Discipline*

Disproportionate suspension and expulsion of black students from American elementary and secondary schools have been observed for more than four decades.<sup>42</sup> As soon as schools began collecting data concerning the demographics of those excluded from schools in the 1970s, educators found racial disparities, raising questions of whether the disparate treatment of black stu-

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<sup>39</sup> See Ariel Kaminer, *Discovery Leads Yale to Revise a Chapter of Its Black History*, N.Y. TIMES (Feb. 28, 2014), <https://www.nytimes.com/2014/03/01/nyregion/discovery-leads-yale-to-revise-a-chapter-of-its-black-history.html> [<https://perma.cc/L2C4-FTKJ>].

<sup>40</sup> See Judith Ann Schiff, *Pioneers*, YALE ALUMNI MAG. (2006).

<sup>41</sup> Probably not. See Victor Wang, *FAS Senate Draft Report Reveals “Lost Decade” for Women, Minority Hiring*, YALE DAILY NEWS (Apr. 27, 2016), <https://yaledailynews.com/blog/2016/04/27/fas-senate-report-reveals-lost-decade-for-women-minority-hiring/> [<https://perma.cc/Y4LD-F9QP>].

<sup>42</sup> See Mark G. Yudof, *Suspension and Expulsion of Black Students from the Public Schools: Academic Capital Punishment and the Constitution*, 39 L. & CONTEMP. PROBS. 374, 374–75 (1975). This article is so old that Professor Yudof, known more recently for his work as a chancellor and president, wrote it years before beginning his career as a university administrator.

dents violated constitutional guarantees or other anti-discrimination law.<sup>43</sup> They still find disparities today.<sup>44</sup> And in jurisdictions allowing schools to impose corporal punishment,<sup>45</sup> scholars have documented racial bias in its use,<sup>46</sup> meaning that minority students suffer literal “disparate impact.”<sup>47</sup>

Closer inspection of school discipline records reveals an important pattern: Schools produce greater disparities among students of different races when they punish ambiguously-defined misconduct—such as “disrespect” and “excessive noise”—than when they punish more clearly-defined wrongdoing like smoking.<sup>48</sup> While black students are far more likely than white students to be sanctioned for “disrespect,” the punishment rates for vandalism are similar.<sup>49</sup> (The greater subjectivity involved in findings of “disrespect” is shown by the need for quotation marks around the name of the offense to signal a term of art.) One can imagine debatable cases of possible school property vandalism, but the concept is straightforward. “Disrespect,” by contrast, truly does depend on the perspective of the beholder. For whatever reason, even though black students and white students are caught smoking and defacing property at similar rates, school teachers and principals deem black students to be substantially more “disrespectful.”<sup>50</sup>

The perception of black students as more culpable—and thus deserving greater school discipline—accords with psychological research showing that black boys are viewed as older and less innocent than whites.<sup>51</sup> (Relatedly,

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<sup>43</sup> See *id.* at 381.

<sup>44</sup> See Rachel M. Cohen, *Rethinking School Discipline*, AM. PROSPECT (Nov. 2, 2016), <http://prospect.org/article/rethinking-school-discipline> [<https://perma.cc/74U3-7U9X>] (reporting that “expulsions and suspensions . . . are doled out disproportionately to minority students”); Scully, *supra* note 9, at 972–73 (“Data from the Department of Education indicates that while Black children comprise sixteen percent of public school enrollment, they constitute between thirty-two and forty-two percent of out-of-school suspensions or expulsions.”).

<sup>45</sup> See Valerie Strauss, *19 States Still Allow Corporal Punishment in School*, WASH. POST (Sept. 18, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school/> [<https://perma.cc/JVH2-VV9T>].

<sup>46</sup> See Stephen S. Owen, *The Relationship Between Social Capital and Corporal Punishment in Schools: A Theoretical Inquiry*, 37 YOUTH & SOC’Y 85, 88–89 (2005) (collecting studies).

<sup>47</sup> It is difficult to decide which is worse, the racial discrimination or the underlying fact that some students suffer corporal punishment at the hands of public school teachers. In any event, for black students, the injury of corporal punishment adds to the insult of knowing that racial bias may well have contributed to their suffering.

<sup>48</sup> See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 317, 332 (2002) (finding that racial disparities are greater for offenses more “subjective in interpretation,” as opposed to more concrete violations like “smoking” and “vandalism”).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* at 332, 334.

<sup>51</sup> See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 526 (2014) (“Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers.”).

black juveniles are far more likely to be tried in the adult court system, where they receive harsher sentences than white juvenile offenders.<sup>52</sup>) For black girls, perceptions that they are “loud, defiant, and precocious” contribute to their disproportionate punishment.<sup>53</sup> Excessive punishment falls particularly harshly on darker-skinned black girls.<sup>54</sup>

Critics have a name for the collection of school policies that punish black children at disproportionate rates and introduce them into the criminal justice system: the “school-to-prison pipeline.”<sup>55</sup> As one scholar put it, “The school-to-prison pipeline is a devastating process through which many of our children—particularly males and students of color—receive an inadequate education and are then pushed out of public schools and into the criminal punishment system.”<sup>56</sup> Because the problem is so serious, it is on the agenda of groups such as the American Civil Liberties Union, the Children’s Defense Fund, the NAACP Legal Defense and Education Fund, and the Southern Poverty Law Center.<sup>57</sup> The U.S. Department of Education, along with the U.S. Department of Justice, has issued guidance to schools on how to reduce racial discrimination in their disciplinary policies and practices.<sup>58</sup>

Disparate treatment of black students is by no means limited to high school students and others who might plausibly fit the profile of a juvenile delinquent. The Department of Education has observed that excessive punishment of black students begins in preschool.<sup>59</sup> According to the Civil Rights Data Collection,

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<sup>52</sup> See, e.g., PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION (2009); Jennifer L. Eberhardt & Aneeta Rattan, *The Race Factor in Trying Juveniles as Adults*, N.Y. TIMES (June 5, 2012), <https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/the-race-factor-in-trying-juveniles-as-adults> [https://perma.cc/MT2C-XKBL].

<sup>53</sup> See MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 11, 13 (2016); Edward W. Morris, “Ladies” or “Loudies”? *Perceptions and Experiences of Black Girls in Classrooms*, 38 YOUTH & SOC. 490, 490 (2007).

<sup>54</sup> See Lance Hannon et al., *The Relationship Between Skin Tone and School Suspension for African Americans*, 5 RACE & SOC. PROBS. 281, 281 (2013) (finding that while dark skin correlates with greater punishment, the results were “disproportionately driven by the experiences of African American females”). For evidence of the same phenomenon in criminal courtrooms, see Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

<sup>55</sup> See generally Skiba et al., *supra* note 7; Scully, *supra* note 9, at 960.

<sup>56</sup> Scully, *supra* note 9, at 959.

<sup>57</sup> See *id.* at 959 n.1.

<sup>58</sup> See U.S. Departments of Education and Justice Release *School Discipline Guidance Package to Enhance School Climate and Improve School Discipline Policies/Practices*, U.S. DEP’T OF EDUC. (Jan. 8, 2014), <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package-enhance-school-climate-and-improve-school-discipline-policiespractices> [https://perma.cc/28WE-2YRU].

<sup>59</sup> U.S. DEP’T EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE, ISSUE BRIEF NO. 1, 1 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crde-discipline-snapshot.pdf> [https://perma.

“Black children represent 18% of preschool enrollment, but 48% of preschool children receiving more than one out-of-school suspension; in comparison, white students represent 43% of preschool enrollment but 26% of preschool children receiving more than one out of school suspension.”<sup>60</sup> These findings accord with research showing that when preschool teachers are told to look out for bad behavior, they tend to focus attention on black boys.<sup>61</sup>

The pattern continues for all of K-12 education.<sup>62</sup> Overall, “Black students are suspended and expelled at a rate three times greater than white students.<sup>63</sup> On average, 5% of white students are suspended, compared to 16% of black students.”<sup>64</sup> Further, just as “school-to-prison pipeline” critics describe, schools refer black students to the criminal justice system at disproportionate rates.<sup>65</sup> “While black students represent 16% of student enrollment, they represent 27% of students referred to law enforcement and 31% of students subjected to a school-related arrest. In comparison, white students represent 51% of enrollment, 41% of students referred to law enforcement, and 39% of those arrested.”<sup>66</sup> Observers have found disparate racial impact in the public school discipline of all fifty states.<sup>67</sup>

While one can debate the cause, the results are stark. For whatever reason, American schools punish black students far more than they punish white students. Whether in preschool, high school, or anything in between, black students more commonly receive suspensions and expulsions, and a higher percentage of black students are delivered by schools to police. Once the police become involved, students experience all of the racial bias observed in the criminal justice system.

### *B. Racial Injustice in the Criminal Justice System*

On December 31, 2015, the United States held 1,476,847 sentenced prisoners under the jurisdiction of state or federal correctional authorities.<sup>68</sup> About 523,000 of them, 35.4 percent of the total, were black.<sup>69</sup> Of the entire United

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cc/LB26-ZNYU] (using 2011-2012 data).

<sup>60</sup> *Id.*

<sup>61</sup> See Walter S. Gilliam et al., *Do Early Educators’ Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?* YALE CHILD STUDY CTR. 2 (2016) (“Findings revealed that when expecting challenging behaviors teachers gazed longer at Black children, especially Black boys.”).

<sup>62</sup> U.S. DEP’T EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 59, at 1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Scully, *supra* note 9, at 960, 960 n.3.

<sup>68</sup> E. ANN CARSON & ELIZABETH ANDERSON, U.S. DEP’T JUST., BUREAU JUST. STAT., NCJ 250229, PRISONERS IN 2015 6 (2016).

<sup>69</sup> *Id.* This figure “excludes persons of Hispanic or Latino origin and persons of two or more races.”

States population in 2015, about 13.3 percent was black.<sup>70</sup> One could reproduce similar statistics for persons held in local jails and on probation, and one could disaggregate the data by state. Regardless of how one slices it, however, the result would not change much. Black Americans are overwhelmingly more likely than whites to find themselves under the control of the penal system.<sup>71</sup> Although the causes are complicated and the subject of much debate,<sup>72</sup> the raw numbers tell a story one cannot deny.

Racial disparities pervade the criminal justice system from investigation to incarceration. At the earliest stages of what might become a criminal case, when police decide what and whom to investigate, race affects the likelihood that police will seize a person going about his daily business and subject him to a search.<sup>73</sup> The stop-and-frisk program in New York City, found unconstitutional in federal court,<sup>74</sup> is perhaps the most prominent example of a nationwide phenomenon. Blacks fare no better in vehicles than on foot. The Missouri Attorney General, for example, found that although police had a higher “contraband hit rate” when pulling over white motorists, black motorists were far more likely to be stopped and to have their vehicles searched.<sup>75</sup> Whether in or out of cars, black suspects are also arrested at higher rates than whites.<sup>76</sup> Racial dis-

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<sup>70</sup> U.S. CENSUS BUREAU, “QUICK FACTS,” <https://www.census.gov/quickfacts/fact/table/US/PST045216> [<https://perma.cc/7SLC-PT52>] (also measuring black Americans reporting “only one race”).

<sup>71</sup> See generally MAUER, *supra* note 10, at 1; THE SENTENCING PROJECT, *supra* note 10.

<sup>72</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 114–15 (2012); CHRIS HAYES, *A COLONY IN A NATION* 113–14 (2017); JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017) (arguing that prosecutorial discretion is the major engine of mass incarceration).

<sup>73</sup> See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660–61 (1994); The Editorial Board, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html> [<https://perma.cc/3PV3-GFH4>] (recounting federal court findings about stop-and-frisk in New York City).

<sup>74</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 664–67 (S.D.N.Y. 2013).

<sup>75</sup> See, e.g., OFFICE OF MO. ATT’Y GEN., *VEHICLE STOPS EXECUTIVE SUMMARY* (2015), <https://www.ago.mo.gov/home/vehicle-stops-report/2015-executive-summary> [<https://perma.cc/XL24-BTJK>]. White “contraband hit rate” was 29.57 percent, and black “contraband hit rate” was 24.44 percent. While accounting for 10.9 percent of the state population, blacks constituted 17.5 percent of motorists stopped by police.

<sup>76</sup> See Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 419 (2005); Paula J. Fite et al., *Explaining Discrepancies in Arrest Rates Between Black and White Male Juveniles*, 77 J. CONSULTING & CLINICAL PSYCHOL. 916, 916 (2009) (“When examining arrest rates, one finds racial discrepancies that cannot be ignored.”); Brad Heath, *Racial Gap in U.S. Arrest Rates: ‘Staggering Disparity’*, USA TODAY (Nov. 18, 2014, 5:13 PM), <https://www.usatoday.com/story/newspaper/2014/11/18/ferguson-black-arrest-rates/19043207> [<https://perma.cc/SF5V-VKUN>] (noting that racial disparity in arrest rates observed in Ferguson, Missouri was exceeded by at least “1,581 other police departments across the USA”).

parities in arrest rates are observed both for juveniles and adults.<sup>77</sup> And police officers use force against black suspects at much higher rates than against white suspects.<sup>78</sup> Police officers, along with witnesses who provide information to police, appear to systemically find black Americans more suspicious than whites, and thereby subject blacks to more intense investigation and policing than whites.<sup>79</sup>

Upon conviction, black defendants receive harsher sentences than those imposed on whites.<sup>80</sup> Although this phenomenon has multiple causes and has inspired much debate,<sup>81</sup> it is nearly impossible to argue that the entire disparity is attributable to differential offense rates and the severity of offenses committed.<sup>82</sup> That is, the harsher sentences cannot be explained as a straightforward consequence of worse behavior. Instead, sentencing judges, along with the probation officials who prepare pre-sentence reports, appear to systemically find black convicts to be more dangerous (or culpable) than whites,<sup>83</sup> and, accordingly, deserving of greater punishment.<sup>84</sup>

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<sup>77</sup> Fite et al., *supra* note 76, at 916; David Huizinga et al., Disproportionate Minority Contact in the Juvenile Justice System: A Study of Differential Minority Arrest/Referral to Court in Three Cities i (July 28, 2007) (unpublished report, Office of Juvenile Justice and Delinquency Prevention).

<sup>78</sup> See PHILLIP ATIBA GOFF ET AL., CTR. FOR POLICING EQUITY, *THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE* 4 (2016) (“[R]acial disparities in police use of force persist even when controlling for racial distribution of local arrest rates”).

<sup>79</sup> Note that no individual officer need be deemed “a racist” for this observation to hold, and I make no accusations about anyone’s intent. Indeed, no analysis whatsoever of police officer character is needed. One simply observes that for whatever reason, blacks are stopped, searched, and arrested at higher rates than can be explained by their behavior alone.

<sup>80</sup> See THE SENTENCING PROJECT, *supra* note 10, at 12; George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 554 (1998).

<sup>81</sup> One study found that convicts with a more “stereotypically Black features” are more likely to receive death sentences. See EBERHARDT *supra* note 54, at 383–84; see also Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1949 (2014).

<sup>82</sup> See, e.g., Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. Q. 231, 236–37 (2013); ASHLEY NELLIS, THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 3, 9 (2016).

<sup>83</sup> This result accords with psychological research finding that people see black men as larger and more threatening than white men of the same size. See John Paul Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCHOL. 59, 59 (2017).

<sup>84</sup> Again, no analysis of the character of judges or probation officers is needed to support this finding, and I make no claim about anyone’s heart. The focus is on what institutional actors do, not the sort of persons they are. See Jay Smooth, *How to Tell Someone They Sound Racist*, YOUTUBE, (July 21, 2008), <https://www.youtube.com/watch?v=b0Ti-gkJiXc> [<https://perma.cc/7473-ECNY>] (discussing difference between a “what[-]they[-]did conversation” and a “what[-]they[-]are conversation,” saying, “When somebody picks my pocket, I’m not going to be chasing him down so I can figure out whether he feels like he’s a thief deep down in his heart”).

In sum, members of racial minorities are more likely than whites to be stopped and frisked by police and are more likely to be pulled over while driving, despite being less likely to possess contraband when searched. Minorities are more likely than whites to be arrested for the same conduct and face more serious charges when prosecuted. And if convicted, minorities receive tougher sentences. At least some of the factors contributing to racial disparities in the criminal justice system—such as implicit bias among witnesses and investigators—exist on campus too.

*C. Common Themes to Examine at the University Level*

In both K–12 school discipline and in real courts, black Americans receive greater punishment than do whites committing the same conduct. This pattern persists in rural, suburban, and urban communities, and no state or region is immune.<sup>85</sup> Diligent efforts by scholars, activists, and government officials may have ameliorated the problem but have not eliminated it. Accordingly, absent compelling evidence that university discipline procedures have somehow evaded the pitfalls that pervade the criminal justice system and elementary and secondary school discipline, one should presume that universities impose discipline more harshly on their black students than on their white students. Predicting otherwise demonstrates either naiveté or willful blindness.

When examining the policies and procedures used in university discipline, observers should pay particular attention to the dangers of implicit bias.<sup>86</sup> The implicit bias exhibited by police officers draws disproportionate numbers of black Americans into the criminal justice system, setting in motion a process that results in vastly greater incarceration rates for them. Similarly, the implicit bias exhibited by elementary and secondary school teachers and administrators causes disproportionate numbers of black students to be suspended for conduct described as “disrespect,” thereby placing far more black students into the school-to-prison pipeline. Even if university officials do not intend to punish black students more harshly, implicit bias may well cause similar harm on campus. Further, the more that university officials concern themselves with conduct about which reasonable persons could disagree (e.g., whether certain text messages constitute harassment, or whether following someone after class to ask for a date constituted stalking) as opposed to less debatable offenses (e.g., vandalism, theft, possession of alcohol in dormitories, invasion of privacy with hidden cameras), the more that implicit bias among witnesses and university officials can yield racially disparate impact.

In addition, because of the strong correlation between race and socioeconomic status, observers should note any aspects of the university discipline process that favor students with greater economic and social capital. In the

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<sup>85</sup> See CARSON & ANDERSON, *supra* note 68, at 29, appx. tbl. 3; Scully, *supra* note 9, at 960 n.3; see also *supra* Section II.A and II.B.

<sup>86</sup> For further explanation of implicit bias, see *infra* Section III.B.

criminal justice system, access to private lawyers (that is, access to sufficient money to pay for private lawyers) provides criminal defendants with large advantages over defendants reliant on indigent defense provided by the state.<sup>87</sup> If university processes provide opportunities for wealthier students to purchase better results—or, to be less crass, to use money to increase their odds of a favorable outcome—then white students will disproportionately avail themselves of these options. Relatedly, in the elementary and secondary school context, parents with lower social capital are more likely to have their children excluded from school.<sup>88</sup> If factors like social connections and parental education levels correlate positively with “good” outcomes (from the perspective of students accused of misconduct),<sup>89</sup> then white students more likely to possess such social capital will disproportionately avoid university discipline.

### III. HOW THE DESIGN AND OPERATION OF UNIVERSITY TITLE IX ENFORCEMENT ENHANCES RISKS OF DISPARATE IMPACT ON THE BASIS OF RACE

Commentators from across the political spectrum have assailed the methods by which universities investigate and punish sexual misconduct and harassment.<sup>90</sup> Critics have highlighted the procedural changes forced upon universities by the Department of Education (DOE) Office for Civil Rights, arguing

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<sup>87</sup> See generally Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 OHIO ST. J. CRIM. L. 223, 249 (2005); Jaeah Lee et al., *Charts: Why You’re in Deep Trouble If You Can’t Afford a Lawyer*, MOTHER JONES (May 6, 2013), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/#> [<https://perma.cc/545C-HTGR>].

<sup>88</sup> See Ann Meier, *Social Capital and School Achievement Among Adolescents* 29 (Ctr. for Demography & Ecology, Univ. of Wis.-Madison, Working Paper No. 99-18, 1999) (“[T]he probability of being suspended from school decreases with family income and parental education.”); JOANNA TAYLOR ET AL., LAW. COMM. FOR CIV. RIGHTS ECON. JUST., NOT MEASURING UP: THE STATE OF SCHOOL DISCIPLINE IN MASSACHUSETTS 1 (2014); see also Aaron Kupchik & Thomas J. Mowen, *Hurting Families*, in THE REAL SCHOOL SAFETY PROBLEM: THE LONG-TERM CONSEQUENCES OF HARSH SCHOOL PUNISHMENT 56–72 (2016) (illustrating consequences on parents of excluded students).

<sup>89</sup> These factors certainly correlate strongly with other good outcomes in the university setting, such as admission to selective programs. See, e.g., Evan J. Mandery, *End College Legacy Preferences*, N.Y. TIMES, (April 24, 2014), <https://www.nytimes.com/2014/04/25/opinion/end-college-legacy-preferences.html> [<https://perma.cc/C3A7-933L>] (“A Princeton team found the advantage to be worth the equivalent of 160 additional points on an applicant’s SAT, nearly as much as being a star athlete. . . .”); T. Rees Shapiro, *At U-Va., a ‘Watch List’ Flags VIP Applicants for Special Handling*, WASH. POST (Apr. 1, 2017), [https://www.washingtonpost.com/local/education/at-u-va-a-watch-list-flags-vip-applicants-for-special-handling/2017/04/01/9482b256-106e-11e7-9d5a-a83e627dc120\\_story.html?utm\\_term=.c1b52dff640a](https://www.washingtonpost.com/local/education/at-u-va-a-watch-list-flags-vip-applicants-for-special-handling/2017/04/01/9482b256-106e-11e7-9d5a-a83e627dc120_story.html?utm_term=.c1b52dff640a) [<https://perma.cc/ZVZ8-3QQZ>].

<sup>90</sup> See, e.g., LAURA KIPNIS, UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS (2017) (“If this is feminism, it’s feminism hijacked by melodrama.”); KC JOHNSON & STUART TAYLOR JR., THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA’S UNIVERSITIES vii (2017) (book by authors previously known for attacks on affirmative action and political correctness).



that university rules deny “respondents”—as the accused are generally known—adequate discovery, access to counsel, and impartial finders of facts.<sup>91</sup> Others have noted shortcomings not directly attributable to DOE guidance, reporting defects that universities have adopted without federal prompting.<sup>92</sup> In response, supporters of invigorated federal anti-discrimination efforts have argued that the Department is simply doing its job and promoting equal access to educational opportunity.<sup>93</sup> I will largely sidestep the larger debate on whether universities have gone astray in response to a combination of federal pressure and genuine desire to combat sexual assault and harassment.

Instead of litigating the general pros and cons of modern Title IX enforcement, this Part focuses on certain attributes of the university discipline apparatus (including, but not limited to, resolution of sexual harassment and misconduct complaints) that increase the risk of racially disparate impact. Among others, the following aspects of university discipline should worry supporters of racial equality: (1) universities collect minimal data concerning the racial impact of their discipline systems, and they keep what they collect secret; (2) implicit bias infects the perceptions of victims, other witnesses, investigators, and hearing examiners and other factfinders; (3) definitions of offenses are broad and vague; (4) the process is conducted in secret; (5) procedures are informal and not uniform; (6) counsel for students have limited roles, and access to counsel is expensive; (7) faculty and administrators who might normally speak up for racial justice are afraid to undermine Title IX enforcement; and (8) investigations of alleged sexual misconduct are affected by collective American attitudes toward race and interracial sex. Each of these items is addressed below.

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<sup>91</sup> See, e.g., Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [https://perma.cc/Y3AJ-UE4W] (letter from 28 Harvard Law School faculty arguing that “[W]e find the new sexual harassment policy inconsistent with many of the most basic principles we teach.”); Jodie Jackson Jr., *Curators Approve New Title IX Policies; Faculty Push for Legal Representation*, COLUM. DAILY TRIB. (last updated Feb. 6, 2015, 1:00 PM), <http://www.columbiatribune.com/f9584490-4ac7-58d2-b260-bcd3700f8968.html> [https://perma.cc/WK5Z-JCC6] (“The changes were adopted despite a letter, signed by some 200 faculty members, pushing to amend the new rules”).

<sup>92</sup> See, e.g., Samuel R. Bagenstos, *What Went Wrong with Title IX?*, WASH. MONTHLY (Sept./Oct. 2015), <http://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix/> [https://perma.cc/RRT6-9UYT] (“[N]othing in Title IX—nor, crucially, in the Department of Education’s recent pronouncements about that statute—required Harvard, Northwestern, or LSU to take the actions that have drawn such criticism”).

<sup>93</sup> See Tyler Kingkade, *Stop Attacking the Education Department for Enforcing Title IX, 80 Advocacy Groups Say*, HUFFINGTON POST (July 13, 2016), [http://www.huffingtonpost.com/entry/education-department-title-ix\\_us\\_57869f24e4b08608d332c880](http://www.huffingtonpost.com/entry/education-department-title-ix_us_57869f24e4b08608d332c880) [https://perma.cc/V5V5-HEW4] (“Unfortunately, the Department is facing unwarranted criticism for doing its job”).

A. *Universities Collect Minimal Data Concerning the Racial Impact of their Discipline Systems, and they Keep what they Collect Secret*

Unlike in real courts, where a diligent researcher could compare indictments and trial transcripts with subsequent sentences imposed by judges, student disciplinary records are not available for public inspection. They are protected as “education records” under the Family Educational Rights and Privacy Act (FERPA).<sup>94</sup> This protection may be quite sensible but nonetheless prevents accused students from evaluating possible comparator cases to see if they have been treated fairly.<sup>95</sup>

Beyond hindering the defense teams of accused students, the sealing of student discipline records under FERPA prevents researchers from independently examining whether any particular university—or universities in general—discipline students of different races at different rates. Unless a university prepares redacted versions of disciplinary records for the convenience of scholars and law reformers, one must take the school’s word on possible racially disparate impact. Further, unless the university compiles its own statistics—calculating, for example, what percentage of suspended students is of which race and how that compares to the broader student body—there is no institutional “word” to take.

In contrast to elementary and secondary schools, which report information about their discipline cases to the Civil Rights Data Collection operated by the U.S. Department of Education,<sup>96</sup> universities are not required to submit such data to the federal government.

The unavailability of demographic data concerning disciplined students—as well as how the missing data prevents outsiders from determining whether universities engage in racial discrimination—is illustrated by recent lawsuits against Amherst College and the University of Pennsylvania.<sup>97</sup> John Doe, an Asian-American student expelled by Amherst after being found guilty at a college hearing of rape, alleged that “only male students of color have been punished with separation from the College in connection with sexual misconduct allegations” since the adoption of new rules designed to accord with DOE guidance.<sup>98</sup> However, despite the perception on campus of past racial dispari-

<sup>94</sup> See 20 U.S.C. § 1232g(4)(A) (2012); 34 C.F.R. § 99 (2017).

<sup>95</sup> See *infra* Section III.D (on proceedings conducted in secret).

<sup>96</sup> For background on the CRDC, see CIVIL RIGHTS DATA COLLECTION (CRDC), U.S. DEP’T. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/data.html> [<https://perma.cc/8WDC-2YL4>] (last updated Nov. 30, 2016).

<sup>97</sup> See *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 218–19 (D. Mass. 2017); *Doe v. Trs. of the Univ. of Pa.*, No. 2:16-CV-05088-JP, at 26 (E.D. Pa. Sept. 23, 2016). In each of these cases, “John Doe” is a pseudonym. *Amherst*, 238 F. Supp. 3d at 202. Many plaintiffs alleging wrongful university discipline procedures proceed as “John Does.” See, e.g., *Doe v. Alger*, 317 F.R.D. 37, 42 (W.D. Va. 2016) (concluding “that Doe’s privacy interest outweighs the presumption of openness in judicial proceedings and that he may thus proceed anonymously”).

<sup>98</sup> *Amherst*, 238 F. Supp. 3d at 224.

ties, the plaintiff could not support his claim because he lacked proof “that other male students have been accused of similar conduct and received less severe punishments.”<sup>99</sup> As a result, although the trial judge denied a motion to dismiss Doe’s claims of breach of contract related to (1) being found guilty despite insufficient evidence, (2) being denied a fair hearing procedure, and (3) gender discrimination, the court dismissed his racial discrimination claim.<sup>100</sup>

Amherst’s lack of data is especially frustrating because the college published a report in 2013 noting a belief on campus that the college treats accused students differently based on their race.<sup>101</sup> The document, entitled “Toward a Culture of Respect: The Problem of Sexual Misconduct at Amherst College,” reported, “Many students of color, both male and female, and some international students, believe that the College takes a more punitive attitude toward non-white perpetrators, especially if the victim is white.”<sup>102</sup> Whatever actions Amherst undertook to combat the perception (and perhaps the reality) of racially-linked unfairness, it did not include the collection and publication of data by which Doe could evaluate the treatment of students of different races by the college’s disciplinary apparatus.<sup>103</sup> Despite this handicap, Doe had no problem convincing the trial court that some of his claims might have merit. For example, the sexual act at issue in Doe’s case occurred while both Doe and the complainant, “Sandra Jones” were intoxicated, and Jones was “far less intoxicated than Doe.”<sup>104</sup> Because the college pursued charges only against Doe—and did not suggest that Jones committed misconduct by engaging in sexual activity with Doe, who “has consistently claimed he was ‘blacked out’ and retains no memory of the night”—Doe claimed that he suffered gender-based discrimination.<sup>105</sup> The trial judge found that Doe stated a claim with respect to gender discrimination by articulating disparate treatment; he was charged, and she was not.<sup>106</sup> To bring a race-discrimination claim, however, Doe would have needed information about other accused students (ideally, white students accused of conduct similar to his yet not expelled), to which he had no access.

As this article was in the editing process, another John Doe—this one an African-American student—had his racial discrimination claim dismissed for

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<sup>99</sup> *See id.* at 219. This data is also unavailable to victims, preventing them from evaluating whether colleges take complaints by certain victims more seriously than those by others.

<sup>100</sup> *Id.* at 203–04. Amherst eventually reached a confidential settlement with Doe. *See* Settlement Order of Dismissal, Civil Action No. 15-30097-MGM (Aug. 2, 2017).

<sup>101</sup> *See* SPECIAL OVERSIGHT COMM. ON SEXUAL MISCONDUCT, AMHERST C., TOWARD A CULTURE OF RESPECT: THE PROBLEM OF SEXUAL MISCONDUCT AT AMHERST COLLEGE 21 (2013).

<sup>102</sup> *Id.*

<sup>103</sup> The report itself noted the unavailability of useful data. *See id.* (“It is impossible at this remove to know if this has ever been true, and the records that would tell us are closed or have been destroyed.”).

<sup>104</sup> *See Amherst*, 238 F. Supp. 3d at 208.

<sup>105</sup> *See id.* at 208, 218.

<sup>106</sup> *See id.* at 224.

want of “facts that give rise to an inference of racial bias or discrimination.”<sup>107</sup> Doe was initially expelled from the University of Pennsylvania (“Penn”) for violating the university’s sexual violence policy during a sexual encounter with another student.<sup>108</sup> He argued that the sex was consensual and appealed the expulsion decision within the university, which reduced his punishment to a two-year suspension.<sup>109</sup> He then sued, alleging breach of contract, gender discrimination (in violation of Title IX), racial discrimination (in violation of Title VI), and other legal wrongs.<sup>110</sup> As in the Amherst case, the judge deciding the Penn case held that while the plaintiff provided sufficient evidence of gender discrimination to survive a motion to dismiss—and thereby to reach discovery—his racial discrimination claim failed.<sup>111</sup> The evidence supporting the gender discrimination claim was somewhat thin. The plaintiff lacked “an allegation of any arguably inculpatory statements by a representative of the University” and offered only “allegations regarding training materials and possible pro-complainant bias on the part of University officials,” which the judge found “set forth sufficient circumstances suggesting inherent and impermissible gender bias to support a plausible claim that Defendant violated Title IX under an erroneous outcome theory.”<sup>112</sup>

To justify his racial discrimination claim, the Penn plaintiff stated that “‘the respondents in [the] comparable matters . . . were not African American[s]’ and ‘the sanctions recommended and imposed at each stage of the disciplinary process were more severe because of [Plaintiff’s] race and gender.’”<sup>113</sup> Lacking either statistical evidence or anecdotes about specific white respondents receiving more lenient treatment, however, Doe’s allegations were based “upon information and belief.”<sup>114</sup> The judge found that plaintiff’s “conclusory allegation that Plaintiff was treated differently in the disciplinary proceedings due to his race” was insufficient to state a claim.<sup>115</sup> Again, a university’s opacity with respect to its disciplinary process had spared administrators from discovery related to possible racial bias.

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<sup>107</sup> See *Doe v. Trs. of the Univ. of Pa.*, No. 16-5088, 2017 WL 4049033, at \*14, \*21–22 (E.D. Pa. Sept. 13, 2017) (finding that the complaint “relies exclusively on conclusory allegations that Plaintiff was treated unfairly because of his race”).

<sup>108</sup> See *id.* at \*1–\*3.

<sup>109</sup> See *id.* at \*2–\*3.

<sup>110</sup> See *id.* at \*4.

<sup>111</sup> See *id.* at \*15–\*18, \*21–\*22.

<sup>112</sup> See *id.* at \*16.

<sup>113</sup> See *id.* at \*21.

<sup>114</sup> See *id.* For an example of the sort of statistical data that would have been useful to Doe, see Yoffe, *supra* note 3 (discussing OCR investigation into possible Title VI violations by Colgate University). “In the 2013–14 academic year, 4.2 percent of Colgate’s students were black. According to the university’s records, in that year black male students were accused of 50 percent of the sexual violations reported to the university, and they made up 40 percent of the students formally adjudicated.”

<sup>115</sup> *Doe v. Trs. of the Univ. of Pa.*, 2017 WL 4049033, at \*22.

The inability of Doe and Doe to support their claims about racially disparate impact at Amherst and Penn will not surprise anyone who has tried to collect similar information from other colleges. With the help of a law student research assistant, I contacted the Title IX offices of several universities, asking if they keep publicly-available data identifying the race of complainants and respondents in Title IX cases, as well as in student discipline cases more generally.<sup>116</sup> The near-universal answer was no.<sup>117</sup> Most institutions indicated that they keep no such data at all.<sup>118</sup> A few said that they have the data but will not share it.<sup>119</sup>

One can understand why universities might not wish to collect and publish data concerning the demographics of students subjected to institutional discipline. Such data could prove embarrassing, and in the case of plaintiffs like Mr. Doe, it could help lawyers build cases against the universities keeping the data. To understand such a desire is not, however, to justify it. All sorts of institutions are required to maintain publicly-available data capable of causing institutional embarrassment and providing grist for the mill of the plaintiff's bar. For example, hospitals keep records of patient outcomes despite knowing that if data indicate an unusually high complication rate, patients may take future business elsewhere.<sup>120</sup> As described above, elementary and secondary schools report discipline demographics to the DOE.<sup>121</sup> The Occupational Safety and Health Administration requires many employers to keep records of serious work-related accidents and illnesses,<sup>122</sup> creating reports that personal injury lawyers may find valuable reading.<sup>123</sup> The Food and Drug Administration (FDA) maintains the Adverse Event Reporting System, a database that tracks adverse event and medication error reports to support the FDA's post-marketing safety surveillance program for drug and therapeutic biologic prod-

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<sup>116</sup> Responses (hereinafter, "University Responses") are on file with author.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.* For public universities taking such a stance, the data may be available under state open records laws, sometimes known as "sunshine laws." For private universities, the data are likely unavailable outside of the litigation discovery process.

<sup>120</sup> Nir Menachemi & Taleah H. Collum, *Benefits and Drawbacks of Electronic Health Record Systems*, 4 RISK MGMT. & HEALTHCARE POL'Y 47, 47 (2011) (discussing impact of Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009, which encouraged widespread use of electronic health records).

<sup>121</sup> *See generally*, CIVIL RIGHTS DATA COLLECTION (CRDC), U.S. DEP'T. OF EDUC., *supra* note 96.

<sup>122</sup> *See* 29 C.F.R. 1904.0 (2017).

<sup>123</sup> James B. Insko II, *Five Issues Employers Should Consider with OSHA's New Workplace Injuries and Illnesses Reporting Rule*, K&L GATES (June 21, 2016) <http://www.klgates.com/five-issues-employers-should-consider-with-oshas-new-workplace-injuries-and-illnesses-reporting-rule-06-21-2016/> [<https://perma.cc/TY7P-AGYB>] (worrying that new publication rule will put information "on the internet for any curious onlooker, competitor, or personal injury lawyer").

ucts,<sup>124</sup> which tort lawyers happen to find useful.<sup>125</sup> The National Transportation Safety Board keeps records of aviation “accidents and incidents,”<sup>126</sup> which might assist in proving that a certain pilot is incompetent.

Universities committed to racial equality—which pretty much every university today purports to be—should immediately begin collecting and publishing demographic data that would allow outside observers to evaluate whether the university discipline process has a disparate impact on the basis of race.<sup>127</sup> If underlying records have not been destroyed, universities should also review prior cases to assemble statistical data for the past several years, thereby providing a baseline for measuring future results. Regardless of whether universities begin collecting data on their own, the U.S. Department of Education should require the submission of such data by universities receiving federal funds, thereby assuring near-universal compliance and uniform collection and reporting methods.<sup>128</sup>

*B. Implicit Bias Infects the Perceptions of Victims, other Witnesses, Investigators, and Hearing Examiners and other Factfinders*

“Implicit bias” is the talk of higher education, with professors scrambling to study it and administrators racing to implement programs intended to reduce its pernicious effects. A wealth of research convincingly demonstrates that even well-meaning persons with no desire to exhibit racial animus nonetheless act under the influence of unconscious biases that systemically affect others on the basis of race.<sup>129</sup> These biases affect access to higher education. In one study, professors receiving unsolicited requests for advice were much more likely to

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<sup>124</sup> *Questions and Answers on FDA’s Adverse Event Reporting System (FAERS)*, FDA, <https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/default.htm> [<https://perma.cc/9H3S-98SV>] (last visited Nov. 24, 2017) (noting that FDA uses data to create “quarterly reports on potential serious side effects identified by FAERS”).

<sup>125</sup> See *In re Accutane Litig.*, Civ. Action No.: 271(MCL), 2015 WL 753674, at 23 (N.J. Super. Law Div. Feb. 20, 2015) (discussing plaintiff’s counsel’s use of FAERS data).

<sup>126</sup> See generally, *Aviation Accident Database & Synopses*, NAT’L TRANSP. SAFETY BOARD, [https://www.nts.gov/\\_layouts/ntsb.aviation/index.aspx](https://www.nts.gov/_layouts/ntsb.aviation/index.aspx) [<https://perma.cc/BX7K-WBCM>] (last visited Nov. 24, 2017). The Federal Aviation Administration keeps an additional database, the Aviation Safety Information Analysis and Sharing (ASIAS) system, that includes incidents not investigated by the NTSB. See <http://www.asias.faa.gov/pls/apex/f?p=100:1> [<https://perma.cc/FG6Q-2L7D>] (last visited Nov. 24, 2017).

<sup>127</sup> For further discussion of the sort of data that would be useful, see *infra* Section IV.A.

<sup>128</sup> For more on what the DOE can require, as well as the laws granting DOE authority to do so, see *infra* Section IV.A. at 42–43.

<sup>129</sup> See, e.g., MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* xii (2016); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); Damian A. Stanley et al., *Implicit Race Attitudes Predict Trustworthiness Judgments and Economic Trust Decisions*, 108 *PROCEEDINGS NAT’L ACAD. SCI. U.S. AM.* 7710, 7710 (2011); Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 *CURRENT DIRECTIONS PSYCHOL. SCI.* 164, 164 (2008).

respond to messages from white students than from students of other races.<sup>130</sup> This basic finding, while frustrating, was, perhaps, not surprising. The researchers also reported two “counterintuitive” findings: First, “representation does not reduce bias,” meaning that adding women and minorities to the faculty did not in itself increase the opportunities available to women and minority students.<sup>131</sup> Second, “there are no benefits to women of contacting female faculty nor to Black or Hispanic students of contacting same-race faculty,” meaning that faculty of all backgrounds exhibit biases that hurt underrepresented student populations.<sup>132</sup> Similar results appear in myriad studies.<sup>133</sup>

While universities loudly proclaim the importance of ethnic and other forms of diversity, the implicit biases of faculty, staff, administrators, and students systemically hinder university efforts to promote diversity and inclusion.<sup>134</sup> For example, implicit bias in the hiring process decreases the likelihood of recruiting a diverse faculty.<sup>135</sup> Student admissions,<sup>136</sup> campus policing,<sup>137</sup> and

<sup>130</sup> The emails were sent by researchers and were identical other than the names of fictitious senders, who were given names that accorded with racial stereotypes (such as “Lamar Washington” and “Brad Anderson”). See Katherine L. Milkman et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, 100 J. APPLIED PSYCHOL. 1678, 1678, 1683 (2015).

<sup>131</sup> *Id.* at 1704.

<sup>132</sup> *Id.* Whether these results truly are “counterintuitive” is a question for another time. Similar phenomena have been observed in other contexts. See, e.g., Rima Abdelkader, *NY Cabbie Rep Defends Racial Profiling: ‘I’m Tired of Going to Funerals,’* THEGRIO (Dec. 8, 2010, 8:10 a.m.), <http://thegrio.com/2010/12/08/ny-taxi-driver-rep-im-tired-of-going-to-funerals/> [<https://perma.cc/S3FP-MXTK>]; Paul LaRosa, *Almost No More White NYC Cab Drivers, but Blacks Still Can’t Catch a Ride?*, HUFFINGTON POST (Jan. 6, 2015), [http://www.huffingtonpost.com/paul-larosa/nyc-cab-drivers-blacks\\_b\\_6116602.html](http://www.huffingtonpost.com/paul-larosa/nyc-cab-drivers-blacks_b_6116602.html) [<https://perma.cc/98HU-ADUM>].

<sup>133</sup> See, e.g., Donna K. Ginther et al., *Race, Ethnicity, and NIH Research Awards*, 333 SCI. 1015 (2011) (reporting that black scholars receive less generous grant funding); Frances Trix & Carolyn Psenka, *Exploring the Color of Glass: Letters of Recommendation for Female and Male Medical Faculty*, 14 DISCOURSE & SOC’Y 191, 191 (2003) (reporting that women receive inferior letters of recommendation).

<sup>134</sup> See, e.g., Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 60 (2000); Derald Wing Sue et al., *Racial Microaggressions and Difficult Dialogues on Race in the Classroom*, 15 CULTURAL DIVERSITY ETHNIC MINORITY PSYCHOL. 183, 183 (2009).

<sup>135</sup> See, e.g., BENJAMIN D. REESE, JR., *IMPLICIT ASSOCIATIONS: THE SEARCH PROCESS* (JULY 2013); *REVIEWING APPLICANTS: RESEARCH ON BIAS AND ASSUMPTIONS*, WOMEN SCI. & ENGINEERING LEADERSHIP INST., U. OF WIS.-MADISON (2012).

<sup>136</sup> See, e.g., Peter Schmidt, *In Admission Decisions, the Deciders’ Own Backgrounds Play a Big Role*, CHRON. HIGHER EDUC., (Apr. 12, 2016), <http://www.chronicle.com/article/In-Admission-Decisions-the/236088> [<https://perma.cc/G7D7-FEAV>] (describing study by Michael N. Bastedo & Nicholas A. Bowman).

<sup>137</sup> See, e.g., Rio Fernandes, *How Bias Training Works in One Campus Police Department*, CHRON. HIGHER EDUC., (May 16, 2016), <http://chronicle.com/article/How-Bias-Training-Works-in-One/236482> [<https://perma.cc/D9JC-FVDB>] (“The adoption of anti-bias training is not unusual among campus police forces across the country. . .”).

selection of campus administrators all are affected by the biases of decision makers. Universities have responded to the dangers of implicit bias on several fronts. Search committee members now receive training on how to identify and resist implicit bias.<sup>138</sup> Colleges give professors resources on how to “disrupt” implicit bias in the classroom.<sup>139</sup> Students attend trainings on “cultural competency.”<sup>140</sup> At Ohio State University, the Kirwan Institute for the Study of Race and Ethnicity publishes *State of the Science: Implicit Bias Review* each year. The institute also conducts trainings designed to lessen the impact of implicit bias across the university (at OSU and elsewhere), with lessons related to admissions, classroom teaching, and broader culture.<sup>141</sup> In short, the effects of implicit bias on campus are pervasive, and thoughtful university leaders have begun responding to well-recognized problems.

Anyone who has diligently ventured this far into this article can probably predict my next query: What are the odds that implicit bias does not infect the university disciplinary process? When examining real courts, scholars have long recognized the effects of unconscious racial bias on witness testimony,<sup>142</sup> and judges are increasingly open to expert testimony on this danger.<sup>143</sup> Chances are, witnesses do not lose their unconscious biases upon entry to university property. Similarly, prosecutors, defense lawyers, and judges—even those outwardly committed to racial equality—exhibit racial biases that exacerbate the

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<sup>138</sup> I received the two pamphlets cited *supra* in note 135 when I joined the search committee seeking a chancellor for the University of Missouri. See also Lucy A. Leske, *How Search Committees Can See Bias in Themselves*, CHRON. HIGHER EDUC., (Nov. 30, 2016), <http://www.chronicle.com/article/How-Search-Committees-Can-See/238532> [<https://perma.cc/EB8K-XVRP>]; *Best Practices: Faculty and Leadership Searches*, YALE U. OFFICE PROVOST, 3 (2015) [http://provost.yale.edu/sites/default/files/best\\_practices\\_for\\_conducting\\_faculty\\_and\\_leadership\\_searches\\_0.pdf](http://provost.yale.edu/sites/default/files/best_practices_for_conducting_faculty_and_leadership_searches_0.pdf) [<https://perma.cc/WH4F-M3AU>] (“Best Practices identifies factors that may interfere with the scholarly assessment of the candidate and provides strategies to address them.”).

<sup>139</sup> See, e.g., *Disrupting Implicit Bias*, DARTMOUTH CTR. ADVANCEMENT LEARNING <https://dcal.dartmouth.edu/resources/teaching-dartmouth/disrupting-implicit-bias> [<https://perma.cc/F3FZ-N9YN>] (last visited Nov. 24, 2017).

<sup>140</sup> See, e.g., Vernita Bediako, *Citizenship@Mizzou Encourages Diversity, Inclusion at Monday Evening Event*, MANEATER (Jan. 31, 2017), <http://www.themaneater.com/stories/2017/1/31/citizenshipmizzou-encourages-diversity-inclusion-m> [<https://perma.cc/RGV4-GE77>]; Kara Guzman, *Cultural Competency Training Aims to Help Foster an Inclusive Culture*, U. C. SANTA CRUZ NEWSCENTER (Sept. 28, 2016), <http://news.ucsc.edu/2016/09/cultural-competency-students.html> [<https://perma.cc/4RB2-VZ6P>].

<sup>141</sup> See generally *About*, OHIO ST. U. KIRWAN INST. STUD. RACE ETHNICITY at <http://kirwaninstitute.osu.edu/about> [<https://perma.cc/SUT5-MHEU>] (last visited Nov. 24, 2017) (describing research and outreach efforts).

<sup>142</sup> See generally Laura Connelly, *Cross-Racial Identifications: Solutions to the “They All Look Alike” Effect*, 21 MICH. J. RACE & L. 125 (2015); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

<sup>143</sup> See *State v. Guilbert*, 49 A.3d 705, 720–21, 723 (Conn. 2012); *State v. Henderson*, 27 A.3d 872, 917, 925 (N.J. 2011).



injustice of the criminal court system.<sup>144</sup> Scholars have documented race and sex biases in sexual harassment and assault proceedings.<sup>145</sup> Chances are, Title IX office staff and other university officials possess similar biases, with similar results.

In particular, when universities police sexual activity near the border of permissible and impermissible conduct, they magnify the dangers of implicit biases held by victims and other witnesses.<sup>146</sup> In the case of a “stranger rape,” there is generally less confusion about whether a crime occurred; the issue is identifying the perpetrator. In the more common case of dorm room sexual activity about which consent is disputed, cross-racial perceptions of dangerousness and innocence on the part of witnesses can bring racial bias into the hearing room. Similarly, for adjudications concerning university rules against behavior like harassment and sexual stalking—in which the subjective perceptions of alleged victims are often elements of the offense—racialized perceptions about whose sexual interest is legitimate and appropriate affect what conduct is reported and how investigators will perceive it.

### C. *Definitions of Offenses Are Broad and Vague*

University definitions of offenses such as sexual harassment are often both broad and vague, giving immense discretion to Title IX officials who decide which students to charge. This parallels offenses for which black students are disproportionately punished in elementary and secondary schools, such as “disrespect,” “excessive noise,” and “defiance.”<sup>147</sup>

Among other terms, “sexual harassment” and “stalking” can have broad definitions that include a great deal of conduct that many students might not expect to be prohibited. Campus definitions of sexual assault, which generally include sexual activity performed without consent, also cover conduct not included in traditional criminal law definitions of rape and sexual assault, causing sexual activity that would be perfectly lawful if performed off campus by non-students to become punishable if performed by students.<sup>148</sup> This discrepancy results from campus definitions of consent that require more robust evidence of assent than is normally required in sex crime prosecutions, or even in civil liti-

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<sup>144</sup> See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 867–69 (2017) (reviewing Nicole Van Cleve, *Crook County: Racism and Injustice in America’s Largest Criminal Court* (2016)).

<sup>145</sup> See Nicole E. Smith, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 COLUM. L. REV. 953, 970–71 (2017); Karl L. Wuensch et al., *Racial Bias in Decisions Made by Mock Jurors Evaluating a Case of Sexual Harassment*, 142 J. SOC. PSYCHOL. 587, 594 (2002).

<sup>146</sup> The danger is further magnified by the language of university codes containing offenses with broad and vague definitions. See *infra* Section III.C.

<sup>147</sup> See Skiba et al., *supra* note 48 (finding that racial disparities are greater for offenses more “subjective in interpretation,” as opposed to more concrete violations like “smoking” and “vandalism”); see also Skiba *supra* notes 48–49 and accompanying text.

<sup>148</sup> See *infra* Section III.C.3.

gation related to nonconsensual sex.<sup>149</sup> This Subpart discusses three examples of campus offenses: sexual harassment, stalking, and sexual assault. It then recounts some lawsuits brought by students who challenged the imposition of campus discipline on the grounds that campus offenses are unduly broad or vague.

### 1. *Sexual Harassment*

Campus definitions of sexual harassment, if given their plain meaning, can cover totally innocuous conduct that could hardly be described as depriving someone of her equal access to educational opportunities.

For example, at the University of Texas, “sexual harassment” includes “[u]nwelcome conduct of a sexual nature . . . intentionally directed towards a specific individual . . . [with the] effect of . . . creating an . . . offensive atmosphere.”<sup>150</sup> By its terms, a single sexual advance that creates such an (undefined) offensive atmosphere could subject a student to discipline.<sup>151</sup>

Clemson University defines “Sexual harassment” as “unwelcome conduct of a sexual nature,” and explains that the definition “includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature including sexual violence.”<sup>152</sup> If taken literally, the definition includes flirtation that is merely unwelcome—even if it causes no harm.

At Syracuse University, sexual harassment until recently was defined as “unwelcome behavior of a sexual nature that relates to the gender or sexual identity of an individual.”<sup>153</sup> University rules provided that “[e]ven without creating an intimidating or hostile environment for study, work, or social living, unwelcome behavior of a sexual nature is a violation.”<sup>154</sup> Syracuse thus went

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<sup>149</sup> *Id.*

<sup>150</sup> See Univ. of Texas at Austin, *Prohibition of Sexual Discrimination, Sexual Harassment, Sexual Assault, Sexual Misconduct, Interpersonal Violence, and Stalking*, <https://policies.utexas.edu/policies/prohibition-sexual-discrimination-sexual-harassment-sexual-assault-sexual-misconduct> [<https://perma.cc/4DNE-4FSU>] (last visited Nov. 24, 2017).

<sup>151</sup> A separate section listing examples of what “sexual harassment may include” suggests that the “frequency and severity” of “verbal conduct” may affect whether speech constitutes sexual harassment. *Id.* But that is far from clear, and neither frequency nor severity is included in the definition of the offense.

<sup>152</sup> See Clemson Univ., *Anti-Harassment and Non-Discrimination Policy*, <http://www.clemson.edu/campus-life/campus-services/access/anti-harassment-policy.html> [<https://perma.cc/34BG-R2PW>] (last visited Nov. 24, 2017).

<sup>153</sup> See *Syracuse University Information Regarding Sexual Misconduct and Other Types of Harassment and Discrimination*, <http://earthsciences.syr.edu/academics/PDFs/SU%20Info%20Sexual%20misconduct%20and%20other.pdf> [<https://perma.cc/V6RB-K446>] (last visited Nov. 24, 2017). Current policy uses different language. See *Sexual Harassment, Abuse, and Assault Prevention*, Syracuse Univ. Policies, [http://supolicies.syr.edu/studs/sexual\\_harass.htm](http://supolicies.syr.edu/studs/sexual_harass.htm) [<https://perma.cc/TU5W-7QL6>] (last visited Nov. 24, 2017).

<sup>154</sup> See *Syracuse University Information*, *supra* note 153.

beyond Texas and Clemson, both of which merely allowed speculation (perhaps unwarranted) that their codes of conduct might subject students to discipline for isolated acts of harmless, unwelcome flirtation.

In disclaiming the need for a hostile environment, Syracuse echoed the language of the U.S. Department of Justice's letter to the University of New Mexico, which chastised the university for saying otherwise.<sup>155</sup> According to the DOJ letter, New Mexico's "policies mistakenly indicate[d] that unwelcome conduct of a sexual nature does not constitute sexual harassment until it causes a hostile environment or unless it is *quid pro quo*."<sup>156</sup> The letter continued, "[u]nwelcome conduct of a sexual nature, however, constitutes sexual harassment *regardless of whether it causes a hostile environment* or is *quid pro quo*."<sup>157</sup> To support this interpretation, the DOJ letter quoted from DOE Office for Civil Rights (OCR) guidance contained in a 2011 "Dear Colleague" letter.

Indeed, federal guidance defines sexual harassment as "unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence."

Hostile environment is not part of the definition of sexual harassment, nor is it required for "unwanted conduct of a sexual nature to be deemed sexual harassment."<sup>158</sup>

Taken together, the DOJ and DOE guidance provide that some "verbal . . . conduct of a sexual nature" can constitute sexual harassment under university regulations even if it does not cause a hostile environment.<sup>159</sup> Indeed, some such conduct *must* constitute sexual harassment if a university wishes to avoid federal sanctions.

Further, in the event that creating a "hostile environment" remains an element of "sexual harassment," the term "hostile environment" must itself be defined. An overbroad definition of "hostile environment" eliminates the benefits that might come from the phrase's retention, and federal regulators have stated that broad definitions are required. In their compliance letter to the University of Montana, the DOJ and DOE OCR demanded expansion of the "sexual har-

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<sup>155</sup> See Letter from U.S. Dep't of Justice Civil Rights Div. to President Robert G. Frank, Univ. of N.M. 2 (Apr. 22, 2016), <https://www.justice.gov/opa/file/843901/download> [<https://perma.cc/WXF7-CEFM>].

<sup>156</sup> See *id.* at 9.

<sup>157</sup> *Id.* (emphasis added).

<sup>158</sup> *Id.* (quoting U.S. Dep't Educ. Office for Civil Rights, "Dear Colleague" Letter (Apr. 4, 2011) <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [<https://perma.cc/9UKC-77LU>]); see also Comm. A on Acad. Freedom & Tenure & Comm. on Women in the Acad. Profession, *supra* note 13, at 77. On September 22, 2017, U.S. Dep't Educ. Rescinded the April 4, 2011 "Dear Colleague" guidance document. See U.S. Dep't Educ. Office for Civil Rights, "Dear Colleague" letter (Sept. 22, 2017). OCR also issued some interim guidance on the same day. See *id.*

<sup>159</sup> See *supra* note 152 and accompanying text.

assment” definition used at that institution.<sup>160</sup> The university had defined “hostile environment” as being “severe and pervasive,” and the federal regulators wrote that the phrase must be replaced with “severe *or* pervasive.”<sup>161</sup> The regulators also stated that the Montana agreement “will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.”<sup>162</sup>

Based on this guidance, it no longer seems far-fetched to suggest that UT Austin or Clemson might punish a single unwanted sexual advance that turns out to be somewhat offensive as sexual harassment.<sup>163</sup> Even if university officials have no intention of doing so, a student could be excused for fearing the worst.

## 2. *Stalking*

The term “stalking,” as commonly used in statutes, generally refers to a course of conduct directed at another person that the perpetrator knows (or should have known) would cause the victim reasonable fear for her safety or the safety of another.<sup>164</sup> State court opinions provide guidance concerning what constitutes a reasonable fear and how much evidence is necessary to establish the required culpable mental state. Campus definitions, however, can cover far less serious conduct.

In Arizona, for example, criminal law defines stalking in a fairly standard way, covering “a course of conduct that is directed toward another person . . . [when] that conduct causes the victim” serious emotional harm or a reasonable fear of physical injury or damage to property.<sup>165</sup>

At the University of Arizona, by contrast, the list of prohibited behavior in the student code of conduct includes, “Stalking or engaging in repeated or significant behavior toward another individual, whether in person, in writing, or through electronic means, after having been asked to stop, or doing so to such a degree that a reasonable person, subject to such contact, would regard the con-

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<sup>160</sup> Letter from U.S. Dep’t Justice Civil Rights Div. & U.S. Dep’t Educ. Office for Civil Rights to President Royce Engstrom, Univ. of Mont. (May 9, 2013), <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> [https://perma.cc/UF53-SC7F]; see also Comm. A on Acad. Freedom & Tenure & Comm. on Women in the Acad. Profession, *supra* note 13, at 77.

<sup>161</sup> See U.S. Dep’t Just. Civil Rights Div. & U.S. Dep’t Ed. Office for Civil Rights, *supra* note 160, at 5 (emphasis added). The compliance letter demanded this change despite U.S. Supreme Court precedent using the “severe and pervasive” language, stating that subsequent agency guidance had superseded the Court’s interpretation of the statute. See *id.* at 5 nn.8, 9.

<sup>162</sup> *Id.*; see Richard Hanley, *Title IX, Sexual Harassment, and Academic Freedom: What No One Seems to Understand*, 6 AAUP J. ACAD. FREEDOM 1, 3 (2015) (decrying the Montana agreement and its use as a “blueprint”).

<sup>163</sup> See *supra* text accompanying notes 150-151.

<sup>164</sup> See, e.g., ARIZ. REV. STAT. § 13-2923 (2016); CAL. PENAL CODE § 646.9 (2008); N.Y. PENAL LAW § 120.45 (2014).

<sup>165</sup> See ARIZ. REV. STAT. § 13-2923 (2016).

tact as unwanted.”<sup>166</sup> Under this definition, even if a student has never been asked to stop or been told his behavior is problematic, the student can violate the university code if a reasonable person would consider the behavior “unwanted.” No objective or subjective fear of harm, much less actual harm, is required before the school may impose discipline for apparently “unwanted” acts.

A more thorough analysis of Missouri law, both in statute and in campus rules, illustrates how a broad university “stalking” definition can encompass conduct well outside the definitions applied by real courts to offenses with the same name.

The University of Missouri defines “Stalking on the Basis of Sex” as “following or engaging in a course of conduct on the basis of sex with no legitimate purpose that makes another person reasonably concerned for their safety or would cause a reasonable person under the circumstances to be frightened, intimidated or emotionally distressed.”<sup>167</sup> Neither “legitimate purpose” nor “emotionally distressed” are defined.<sup>168</sup>

Missouri statutory law uses similar definitions of stalking in other contexts, both to define stalking crimes and to explain when courts may issue orders of protection against stalkers. The criminal offense of stalking in the second degree is defined as follows: “A person commits the offense of stalking in the second degree if he or she purposely, through his or her course of conduct, disturbs, or follows with the intent to disturb another person.”<sup>169</sup> The term “disturb” means “to engage in a course of conduct directed at a specific person that serves no legitimate purpose and that would cause a reasonable person under the circumstances to be frightened, intimidated, or emotionally distressed.”<sup>170</sup>

A person who wonders just what constitutes “stalking” in Missouri but is unsatisfied with the definitions above need not despair. Missouri courts have helped to explain the statutory language through case law. For example, in *State v. Magalif*, the Missouri Court of Appeals noted that the state “General Assembly did not define ‘substantial emotional distress’ in § 565.225,” then proceeded to adopt a definition from another statute, and then quoted approv-

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<sup>166</sup> See STUDENT CODE OF CONDUCT 5-308(F)(20) (UNIV. of ARIZ., 2015), [http://www.titleix.arizona.edu/code\\_of\\_student\\_conduct](http://www.titleix.arizona.edu/code_of_student_conduct) [<https://perma.cc/82WD-N49W>] (last visited Nov. 24, 2017). Confusingly, the code also contains another definition of stalking more similar to the criminal statute. See *id.* at (E)(18). The university quotes the broader offense definition in an online listing of student conduct violations that “may be applicable to Title IX-related concerns.” See *id.*

<sup>167</sup> See COLLECTED RULES & REG. 600.020(B)(4) (UNIV. of MO., 2017), [https://www.umsystem.edu/ums/rules/collected\\_rules/equal\\_employment\\_educational\\_opportunity/ch600/600.020\\_sex\\_discrimination\\_sexual\\_harassment\\_and\\_sexual\\_misconduct](https://www.umsystem.edu/ums/rules/collected_rules/equal_employment_educational_opportunity/ch600/600.020_sex_discrimination_sexual_harassment_and_sexual_misconduct) [<https://perma.cc/5DKD-K972>].

<sup>168</sup> In the university’s defense, the Missouri criminal statutes defining “stalking” use the same language. See MO. REV. STAT. §§ 565.227, 565.225 (effective Aug. 28, 2017).

<sup>169</sup> MO. REV. STAT. §§ 565.227.1. (effective Aug. 28, 2017).

<sup>170</sup> MO. REV. STAT. §§ 565.225.1. (effective Aug. 28, 2017).

ingly from a court decision construing the statute from which it adopted the definition.<sup>171</sup> The court held that to satisfy the statutory definition, the defendant's conduct "must be such as would produce a considerable or significant amount of emotional distress in a reasonable person; something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which are commonly experienced in day to day living."<sup>172</sup> And in *State v. Martin*, the Court of Appeals rejected a defendant's effort to define "substantial emotional distress" in a way that would require "a substantial risk of temporary or permanent medical or psychological damage, manifested by impairment of a behavioral, cognitive or physical condition," holding that the crime of stalking included conduct with less severe effects.<sup>173</sup> With these and other cases,<sup>174</sup> prosecutors, police officers, and ordinary citizens can—with some effort—predict what conduct is covered by the statute and can conform their conduct accordingly. Even without accepting the legal fiction that everyone is aware of the law, including judicial glosses on statutory terms, one can appreciate the benefit that reasoned court opinions provide.

The term "stalking" has importance beyond the criminal court; judges must apply it when deciding whether to issue orders of protection against accused stalkers. For this purpose, Missouri defines "stalking" as "when any person purposely engages in an unwanted course of conduct that causes alarm to another person, or a person who resides together in the same household with the person seeking the order of protection when it is reasonable in that person's situation to have been alarmed by the conduct."<sup>175</sup> Because the distinction between stalking and annoying-yet-lawful behavior is not always obvious, Missouri courts have repeatedly differentiated between stalking and behavior that causes "the level of uneasiness, nervousness, unhappiness or the like which are commonly experienced in day to day living," holding that the second category does not justify issuance of protective orders.<sup>176</sup> For example, "Repeated com-

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<sup>171</sup> See *State v. Magalif*, 131 S.W.3d 431, 435–36 (Mo. Ct. App. 2004). The *Magalif* court was interpreting slightly different language than that in the current statute. See *State v. Joynner*, 458 S.W.3d 875, 883 (Mo. Ct. App. 2015) (noting that "prior to 2008, the State had to prove that a defendant's course of conduct in fact caused a victim to suffer 'substantial emotional distress' [rather than mere "emotional distress"]", after 2008, the State was relieved of this burden). Its reasoning could nonetheless be instructive.

<sup>172</sup> *Magalif*, 131 S.W.3d at 435–36 (quoting *Wallace v. Van Pelt*, 969 S.W.2d 380, 385–86 (Mo. Ct. App. 1998)). This definition has continued to be quoted in Missouri court opinions after the 2008 amendment mentioned *supra* note 171. See, e.g., *Lawyer v. Fino*, 459 S.W.3d 528, 532 (Mo. Ct. App. 2015).

<sup>173</sup> See *State v. Martin*, 940 S.W.2d 6, 8–9 (Mo. Ct. App. 1997).

<sup>174</sup> See, e.g., *Overstreet v. Kixmiller*, 120 S.W.3d 257, 258 (Mo. Ct. App. 2003) (discussing what activity is "legitimate"); *Girard v. Girard*, 54 S.W.3d 203, 204 (Mo. Ct. App. 2001) (same); *State v. Baker*, 40 S.W.3d 392, 395 (Mo. Ct. App. 2001) (discussing "emotional distress").

<sup>175</sup> MO. REV. STAT. § 455.010(14) (effective Aug. 28, 2016).

<sup>176</sup> See, e.g., *Lawyer*, 459 S.W.3d at 532; *Brockert v. Syler*, 95 S.W.3d 187, 193 (Mo. Ct. App. 2003).

munication alone . . . typically does not rise to the level of harassment because, while annoying and boorish, such conduct would not cause substantial emotional distress in a reasonable person.”<sup>177</sup>

The discussion above illustrates that in real Missouri courts, whether criminal court or family court, persons accused of “stalking” have ample case law with which they can compare their conduct to that already reviewed by judges applying state statutes. By contrast, in the university disciplinary system, a student accused of stalking would discover an offense lacking definitions for key terms such as “legitimate purpose.”<sup>178</sup> Then, because the records of prior campus cases are confidential and in any event lack the sort of reasoned statutory analysis useful in defining ambiguous terms, the accused would have no case law available to resolve his confusion. As a result, the practical definition of “stalking” on campus is largely at the discretion of university staff. Further, Missouri is not special in this regard; I chose the example because I live here and have some familiarity with its criminal statutes. If one chooses some other state at random, state courts there are nearly certain to have defined “stalking” at length in a variety of contexts, and university officials are nearly certain not to have done so in any documents accessible to most persons regulated by university codes of conduct.

### 3. *Sexual Misconduct, Sexual Assault, and Rape*

Broad definitions also plague the most serious campus sexual offenses, including sexual misconduct, sexual assault, and rape. In a recent New York case, for example, the issue before a hearing board at SUNY Potsdam was whether a sexual encounter between students was consensual.<sup>179</sup> Because the university’s code of conduct prohibits “[a]ny sexual act that occurs without the consent of the victim or that occurs when the victim is unable to give consent,”<sup>180</sup> and consent was disputed, the hearing board applied the code’s definition of consent. Stating that consent cannot be inferred from silence or mere lack of objection, the code requires that consent be shown with “spoken words or behavior that indicates, without doubt to either party, a mutual agreement to” engage in sexual activity.<sup>181</sup> This definition of consent is quite narrow compared to those traditionally applied by courts in sex crime cases.<sup>182</sup> As a result, a great deal of conduct that could not be punished criminally—even if there were no questions of

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<sup>177</sup> See *Lawyer*, 459 S.W.3d at 532 (collecting cases).

<sup>178</sup> See *supra* notes 167–69 and accompanying text.

<sup>179</sup> See *Haug v. State Univ. of N.Y. at Potsdam*, 149 A.D.3d 1200, 1202 (N.Y. App. Div. 2017).

<sup>180</sup> See SUNY POTSDAM, STUDENT CODE OF CONDUCT 18, 22, 25 (2014).

<sup>181</sup> See *Haug*, 149 A.D.3d at 1201.

<sup>182</sup> See *generally* *State v. Jones*, 299 P.3d 219, 229 (Idaho 2013) (reviewing development of rape law in recent decades, particularly the “resistance requirement”); RICHARD J. BONNIE ET AL., CRIMINAL LAW 725–30 (4th ed. 2015).

proving what occurred—violates the university rules governing sex between students.<sup>183</sup>

Reasonable minds may differ concerning how colleges should regulate sex on campus.<sup>184</sup> It is beyond debate, however, that many campuses prohibit sexual activity that would be perfectly lawful if conducted outside the reach of university rules. This should not cause surprise. Advocates have sought changes to university regulation of campus sex precisely because they disliked existing rules that more closely mirrored criminal law.<sup>185</sup> The resulting broader definitions of prohibited sexual activity then apply on campus to offenses with familiar names like “sexual assault” that upon inspection are quite different from offenses with such names that might be adjudicated in real courts. A brief essay by Brett A. Sokolow and Daniel C. Swinton illustrates the confusion that occasionally results.<sup>186</sup> Sokolow and Swinton are consultants at the NCHERM Group, which travels the country helping universities (at great expense) conform their sex regulations to the suggestions of the Department of Education.<sup>187</sup> The group coordinates with ATIXA, the Association of Title IX Administrators, to advise universities on how to address campus sexual misconduct.<sup>188</sup> In their analysis of a Tennessee case in which a state judge reversed a university’s expulsion decision,<sup>189</sup> Sokolow and Swinton observed that “[a]ffirmative consent (or consent as we call it) in the sexual context is a concept somewhat foreign to legal circles and that foreignness is apparent in the Chancery Court’s decision.”<sup>190</sup> Sokolow and Swinton also noted that the university’s definition of affirmative consent, “words or actions unmistakable in their meaning,” while a

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<sup>183</sup> See N.Y. Penal Law § 130.05 (McKinney 2013) (defining “lack of consent” and stating that even if “not specifically stated, it is an element of every [sexual] offense . . . that the sexual act was committed without consent of the victim.”).

<sup>184</sup> See 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/7SKG-XX47>] (discussing adoption of “yes means yes” standard at public universities in New York and California).

<sup>185</sup> See, e.g., Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 301 (2016) (suggesting that “the victories of the Title IX movement thus far could be leveraged to press for direct changes and reform of consent standards in state criminal codes”).

<sup>186</sup> Brett A. Sokolow & Daniel C. Swinton, *Response to Corey Mock v. Univ. of Tennessee, Chattanooga*, NCHERM GROUP (Aug. 17, 2015), <https://www.ncher.org/wordpress/wp-content/uploads/2013/03/TNG-TOW-08-172015-final.pdf> [<https://perma.cc/8M6Q-2Z22>].

<sup>187</sup> NCHERM stands for National Center for Higher Education Risk Management. See, e.g., Ashley Jost, *UM System Paying Almost \$500,000 for Title IX Consultation, Development*, COLUM. DAILY TRIB. (Sept. 8, 2014, 12:01 AM) <http://www.columbiatribune.com/a45c757c-7e70-50c7-95d6-a8a9657dbba1.html> [<https://perma.cc/8ZUR-LJS5>].

<sup>188</sup> See NCHERM GROUP, <https://www.ncher.org> [<https://perma.cc/R8Q3-ETVJ>] (last visited Nov. 24, 2017) (“The NCHERM Group and ATIXA have developed an approach called the *One Policy, One Process Model* . . .”).

<sup>189</sup> See *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II at 23 (Tenn. Ch. Ct. Aug. 4, 2015).

<sup>190</sup> See Sokolow & Swinton, *supra* note 186.



“formulation . . . popular on some campuses,” is “unwise in a policy context” because little in the sexual context is “unmistakable.”<sup>191</sup> One might observe that higher education consultants have a financial interest in observing that a “popular” definition of campus sexual misconduct exposes universities to liability risks that could shrink with the right sort of help from outside experts. A less cynical takeaway is that even in the eyes of reform advocates who champion “affirmative consent” as campus policy, many universities use overly narrow definitions of consent, which means that they have overly broad definitions of nonconsensual sex, which justifies expulsion when found.<sup>192</sup>

In addition to breadth, definitions of sexual misconduct may also suffer from vagueness similar to that already discussed for the offenses of sexual harassment and stalking. In *Doe v. Western New England University*, the court considered a case brought by a student a university found to have “pressur[ed] [another] for sex in violation” of university rules.<sup>193</sup> The court concluded, “At a minimum, the [university] Handbook’s standards regarding coercion are ambiguous.”<sup>194</sup>

#### 4. *Litigation Related to Offense Definitions*

Some students have brought legal challenges to the language of university behavior codes, thereby exposing them to judicial scrutiny and causing some to be stricken as unenforceable.<sup>195</sup> It appears that despite court rulings dating at least to 1989, many university codes contain offenses with definitions incompatible with the First Amendment and other constitutional guarantees.<sup>196</sup>

In addition, the expansive definitions applied by university officials to ambiguous student conduct provisions makes litigation more likely than would more judicious interpretation. Unlike actual statutes, which, if ambiguous, can occasionally be understood with greater precision after reading court opinions, university codes of conduct lack a body of case law to which a student or his lawyer might turn. Instead, interpretation is vested in university officials, often

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<sup>191</sup> *Id.*

<sup>192</sup> Even an “affirmative consent” standard does not prohibit enough campus sex for some advocates. *See, e.g., Cantalupo, supra* note 185, at 298 (quoting approvingly federal guidance to the effect that “[a]cquiescence in the conduct” is not enough to prove “welcome-ness,” which is described as a better standard for campus sex regulation).

<sup>193</sup> *See Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 174, (D. Mass. 2017).

<sup>194</sup> *Id.* Additional instances of ambiguous conduct offenses appear in the next section.

<sup>195</sup> *DeJohn v. Temple Univ.*, 537 F.3d 301, 305, 317, 320 (3d Cir. 2008); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) (finding university policy overbroad and applicable to protected speech); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 853, 866 (E.D. Mich. 1989) (finding that university’s anti-harassment policy “swept within its scope a significant amount of ‘verbal conduct’ or ‘verbal behavior’ which is unquestionably protected speech under the First Amendment.”).

<sup>196</sup> *See Benjamin Dower, The Scylla of Sexual Harassment and the Charybdis of Free Speech: How Public Universities Can Craft Policies to Avoid Liability*, 31 REV. LITIG. 703, 728 (2012).

without legal training, who make *ad hoc* decisions with no precedential authority. Occasionally, these interpretations receive judicial review during litigation related to a student discipline case.

In *Doe v. Amherst College*, for example, an expelled student questioned whether a student handbook definition of sexual misconduct “include[d] a knowledge requirement,” asking in particular whether a student who was “blacked out” drunk could possess the needed culpable mental state.<sup>197</sup> Doe’s argument was that because he was blacked out, he was not capable of committing sexual misconduct and was, if anything, a victim of the less-intoxicated woman with whom he engaged in sexual activity.<sup>198</sup> At the motion-to-dismiss stage, the court held that Doe’s “proposed reading of the *Policy and Procedures* is not unreasonable” and allowed him to proceed with his breach of contract claim concerning alleged misinterpretation of the Amherst College sexual misconduct definition.<sup>199</sup>

In *Mock v. University of Tennessee at Chattanooga*, a Tennessee court set aside a student’s expulsion in part because, according to the judge, the university misapplied its definition of “consent.”<sup>200</sup> Among other concerns, the judge noted that the university chancellor appeared to rely upon articles promoting the use of a consent definition different from that in the university rules.<sup>201</sup>

An older case, decided before modern Title IX enforcement at universities was underway, illustrates how well-meaning administrators can violate students’ rights while pursuing gender equity.<sup>202</sup> In 1991, a fraternity chapter at George Mason University—a public university in Virginia—performed a skit offensive to women and minority students (as well as to those who appreciate quality skits).<sup>203</sup> The university received student complaints and decided that the fraternity’s “behavior had created a hostile learning environment for women and blacks, incompatible with the University’s mission.”<sup>204</sup> GMU then punished the fraternity by prohibiting most of its social activities and requiring it “to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women.”<sup>205</sup> A United States District Judge and a

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<sup>197</sup> See *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 216 (D. Mass. 2017).

<sup>198</sup> *Id.* at 224. Because the female student was less drunk than Doe, and the college chose to charge him with misconduct while not charging her with taking advantage of Doe’s incapacitation, Doe alleged gender discrimination.

<sup>199</sup> *Id.* at 218.

<sup>200</sup> *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II at 20 (Tenn. Ch. Ct. Aug. 4, 2015).

<sup>201</sup> See *id.* at 19–20.

<sup>202</sup> See *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993) (holding that university engaged in unlawful viewpoint discrimination when punishing student group).

<sup>203</sup> See *id.* at 387–88 (describing skit as well as fraternity’s subsequent admission that it “was sophomoric and offensive”).

<sup>204</sup> *Id.* at 388.

<sup>205</sup> *Id.*

unanimous three-judge panel of the Court of Appeals then agreed that the skit, while “an exercise of teenage campus excess,” was protected by the First Amendment and could not justify punishment by the university.<sup>206</sup> While it is possible that GMU’s decision was motivated by the desire of bluenoses to suppress free expression, I suspect that instead, university officials happened to pursue legitimate goals (such as promoting an inclusive environment and opposing sexism and racism) in an unlawful manner. The Fourth Circuit observed, “The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express.”<sup>207</sup> Now, as then, university officials applying vague and broad campus regulations may well violate student rights.

#### D. *The Process Is Conducted in Secret*

If sunshine is the best disinfectant,<sup>208</sup> university tribunals need substantial doses of hydrogen peroxide. For perfectly sensible reasons—including student privacy rights protected by FERPA—interested parties may not sashay into university disciplinary hearings to assess the acumen of hearing examiners.<sup>209</sup> This restriction comes at a cost, however. If a student is treated unfairly, outside observers will not have the chance to see and object.<sup>210</sup> Opacity compounds at those universities choosing neither to produce word-for-word transcripts of their proceedings nor to make recordings.

After the hearing, when some university official decides whether the accused is “responsible” and, if so, what punishment to impose, no written opinion will announce the result to the public. As a result, one cannot learn what the normal or standard punishment is for various wrongs.<sup>211</sup> This creates particular

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<sup>206</sup> *Id.* at 389, 393; *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792, 795 (E.D. Va. 1991).

<sup>207</sup> *Iota Xi Chapter of Sigma Chi Fraternity*, 993 F.3d at 393.

<sup>208</sup> See Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY. (Dec. 20, 1913) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

<sup>209</sup> See *supra* note 94 and accompanying text.

<sup>210</sup> Cf. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”).

<sup>211</sup> An annual report listing punishments imposed for various offenses is not especially helpful. Because the offenses are defined so broadly and vaguely, one cannot guess from the bare naming of an offense what a particular student did to become guilty of “harassment” or “sexual stalking.” See, e.g., UNIV. OF MO., TITLE IX OFFICE, MU TITLE IX OFFICE ANNUAL REPORT 27 (Sept. 17, 2015) (describing results of cases in general terms and stating, “[w]hen found responsible, Respondents were sanctioned by suspension from the University or other discretionary sanctions.”). Even a more robust report, such as that from Yale, does not allow apples-to-apples comparisons of cases. See, e.g., YALE UNIV., REPORT OF COMPLAINTS OF SEXUAL MISCONDUCT 13 (Dec. 31, 2016) (“A G&P student reported that a faculty member made inappropriate comments and made unwanted physical contact with the complainant . . .

challenges when students found guilty must debate with the Title IX office about what punishment is appropriate. A few examples of university policies setting forth potential sanctions will illustrate the difficulty.

At Clemson, students are informed that those “found to be in violation of [university] policy will be subject to immediate and appropriate disciplinary action, proportional to the seriousness of the offense. . . . Possible sanctions include but are not limited to reprimand, disciplinary probation, suspension, or dismissal.”<sup>212</sup> At Nebraska, “Institutional sanctions that may be imposed against students for sexual misconduct range from warning to expulsion.”<sup>213</sup> Unlike in real courts, where sentences are generally cabined by statutory maximums that vary by offense, university authorities commonly receive little guidance on what punishment fits what offense.<sup>214</sup>

Constraints on discretion exist largely in what could be described as a sort of common law of prior decisions, remembered with varying degrees of accuracy by a small portion of those involved in the process. In my own undergraduate days, I served on the Yale College Executive Committee, which heard student disciplinary cases. It was common for students caught dead to rights to, in effect, “plead guilty” by admitting a violation and then come before the committee only for imposition of sanction. In my experience, the dean’s office secretary who informed the committee what had been done in similar prior cases was among the most powerful persons in the room, despite having no vote.

Because the range of possible punishment is so broad, a student accused of sexual harassment or misconduct might wish to read detailed descriptions of the conduct previously punished by the university. Beyond giving the student a sense of what may be in store for him, this information could help the student articulate arguments about what sanction is appropriate in his case. As described above, however, this information is normally not available. After a sentence is imposed, the lack of comparators will hinder the student’s ability to appeal on the theory that his punishment is outside the norm for similar behavior.<sup>215</sup> Although some university codes explicitly list this potential ground for

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After consulting with the complainant, the Title IX coordinator counseled the respondent on appropriate conduct.”)

<sup>212</sup> See Clemson Univ., *supra* note 152 at 9.

<sup>213</sup> See UNIV. OF NEB., SEXUAL MISCONDUCT POLICY, 3 (2014), [https://nebraska.edu/docs/hr/NU\\_Sexual\\_Misconduct\\_Policy\\_2014\\_0530.pdf](https://nebraska.edu/docs/hr/NU_Sexual_Misconduct_Policy_2014_0530.pdf) [<https://perma.cc/3J83-XRE7>].

<sup>214</sup> See, e.g., UNIV. OF MO. SYS., COLLECTED RULES & REGULATIONS, § 600.030(Q)(1)(b) (Mar. 1, 2017), [https://www.umsystem.edu/ums/rules/collected\\_rules/equal\\_employment\\_educational\\_opportunity/ch600/600.030\\_equity\\_resolution\\_process\\_for\\_resolving\\_complaints\\_of\\_harassment](https://www.umsystem.edu/ums/rules/collected_rules/equal_employment_educational_opportunity/ch600/600.030_equity_resolution_process_for_resolving_complaints_of_harassment) [<https://perma.cc/76M9-LPJM>].

<sup>215</sup> See, e.g., *id.* § (S)(1)(c) (listing as potential ground for appeal that “sanctions fall outside the range typically imposed for this offense, or for the cumulative conduct record of the Respondent”); COLL. OF WESTCHESTER, TITLE IX POLICY PROHIBITING SEXUAL HARASSMENT AND SEXUAL MISCONDUCT, <https://www.cw.edu/prohibition-sexual-discrimination> [<https://perma.cc/XD98-65D2>] (including same ground for appeal); N. ILL. UNIV., TITLE IX/SEXUAL MISCONDUCT POLICY AND COMPLAINT PROCEDURES FOR EMPLOYEES AND STUDENTS (Dec. 1, 2016), <http://niu.edu/sexualmisconduct/overview/TitleIX-Sexual->

appeal, the promise is empty without access to sealed case files or, at a minimum, some redacted version of case files that allows comparisons.

Predictions that discipline records might prove difficult to obtain have proven accurate when activists and litigators have sought access.<sup>216</sup> The University of Kentucky successfully sued its student newspaper to prevent reporters from seeing records related to allegations against James Harwood, a former faculty member accused of sexually assaulting students.<sup>217</sup> The court held that even if records were redacted to remove the names of complainants and other identifying details, release would violate student privacy law.<sup>218</sup> Other universities have similarly refused to release records in high-profile cases—such as the Baylor University investigation that led to the dismissal of its president and head football coach—arguing that student records are exempt from disclosure.<sup>219</sup> Relatedly, male students alleging that student disciplinary processes are biased against men have struggled to prove disparate treatment because they cannot access records of “female comparators” accused of misconduct.<sup>220</sup> Although some courts have allowed such claims to reach discovery,<sup>221</sup> others have deemed “the absence of specific factual allegations from which a factfinder could plausibly infer the influence of gender bias on the outcome of Plaintiff’s disciplinary proceeding” to be a fatal weakness.<sup>222</sup>

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Misconduct-Policy.pdf [<https://perma.cc/TA2X-JLWE>] (“The sanction(s) is/are inappropriate or disproportionate to the determined finding(s)”); BOS. UNIV., STUDENT SEXUAL MISCONDUCT PROCEDURES (Jan. 1, 2015), <http://www.bu.edu/safety/sexual-misconduct/title-ix-bu-policies/student-sexual-misconduct-procedures> [<https://perma.cc/DMN3-PQHF>] (“The sanction imposed is disproportionate to the violation”).

<sup>216</sup> See Jake New, *Protecting Student Privacy, or Reputation?*, INSIDE HIGHER ED (Jan. 25, 2017), <https://www.insidehighered.com/news/2017/01/25/judge-sides-university-kentucky-lawsuit-against-student-newspaper-over-sexual> [<https://perma.cc/4U96-V9ZF>].

<sup>217</sup> See *id.*; Paidin Dermody, *Judge Rules in Favor of UK in Harwood Open Records Case*, KY. KERNEL (Jan. 24, 2017) [http://www.kykernel.com/news/judge-rules-in-favor-of-uk-in-harwood-open-records/article\\_b4a9a306-e25f-11e6-a83c-73ddd751caf.html](http://www.kykernel.com/news/judge-rules-in-favor-of-uk-in-harwood-open-records/article_b4a9a306-e25f-11e6-a83c-73ddd751caf.html) [<https://perma.cc/G3PM-3GCR>].

<sup>218</sup> See *Univ. of Ky. v. Kernel Press, Inc.*, No. 16-CI-3229 at 10 (Fayette Cir. Ct. Jan. 23, 2017).

<sup>219</sup> See New, *supra* note 216.

<sup>220</sup> See, e.g., *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 185, 186 (D. R.I. 2016) (discussing what qualifies as “‘particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding’” and noting that “absent any female comparators at the pleading stage,” courts have sometimes granted motions to dismiss); see also *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994).

<sup>221</sup> See, e.g., *Doe v. Colum. Univ.*, 831 F.3d 46, 57 (2d Cir. 2016) (holding that public criticism of university and pressure for tougher enforcement supports inference of sex discrimination); *Neal v. Colo. State Univ.-Pueblo*, No. 16-CV-873-RM-CBS, 2017 WL 633045, at \*9–\*14 (D. Colo. Feb. 16, 2017) (Mag. recommendation) (recommending against dismissal of plaintiff’s claim and collecting cases addressing this issue).

<sup>222</sup> See *Doe v. Univ. of St. Thomas*, 240 F. Supp. 3d 984, 991–93 (D. Minn. 2017); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143-MGM, 2015 WL 4306521, at \*9 (D. Mass. July 14, 2015); *Doe v. Colum. Univ.*, 101 F. Supp. 3d 356, 374–75 (S.D.N.Y. 2015), *rev’d* 831 F.3d 46 (2d Cir. 2016).

If journalists investigating the Baylor football team have failed to obtain student conduct records of tremendous interest to sports fans, and plaintiffs' lawyers have failed to find "female comparators" to support their client's gender-discrimination claims, one can safely assume that the average college student cannot possibly know what happens at her institution. Nor can faculty who, armed with sufficient data, might participate in "shared governance" related to student discipline.

*E. Procedures Are Informal and Not Uniform*

Although some campus Title IX offices are surely models of professionalism, and some universities run excellent hearings that protect the rights of complainants and accused students alike, not every campus boasts a combination of investigation and adjudication that gives confidence in the likelihood of fair results. For example, some universities have procedures giving accused students minimal time to review discovery before their hearings.<sup>223</sup> Some universities prohibit students from bringing lawyers to their hearings, and others allow lawyers to attend but disallow them from speaking.<sup>224</sup> Hearsay is freely admitted, with university investigators reporting about interviews of absent witnesses whom the accused has never met.<sup>225</sup> Appellate review is spotty, with students who appeal subjected to enhanced punishments.<sup>226</sup>

Because the bulk of student conduct cases are conducted in secret and produce sealed records, one hesitates to draw sweeping conclusions about the nature of the proceedings, which vary in quality from time to time and from place to place. On occasion, however, litigation filed in real courts allows parties to obtain university records through discovery, and judicial opinions describe their contents. The news is not encouraging.

In 2017, a federal judge in Massachusetts denied a motion to dismiss submitted by Amherst College in response to a lawsuit filed by a student expelled from the college.<sup>227</sup> Finding that the student had "alleged facts from which a jury could reasonably infer the College acted in a manner that prevented him from receiving the 'thorough, impartial and fair' investigation promised in the *Student Handbook* and thereby also denied him a fair adjudication of the complaint against him," the judge allowed the case to proceed to discovery.<sup>228</sup>

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<sup>223</sup> See *infra* notes 229, 234, and accompanying text.

<sup>224</sup> See *infra* Section III.F.

<sup>225</sup> See, e.g., *Doe v. Regents of the U.C.*, No. 37-2015-00010549-CU-WM-CTL at 3 (Cal. Super. Ct., July 10, 2015).

<sup>226</sup> See *Haug v. State Univ. N.Y. Potsdam*, 149 A.D.3d 1200, 1203 (N.Y. App. Div. Apr. 6, 2017) ("Upon petitioner's appeal from the decision of the Hearing Board, the Appellate Board, sua sponte and without any explanation, recommended enhancing the penalty to expulsion."); *Regents of the U.C.*, No. 37-2015-00010549-CU-WM-CTL at 5 (finding that "the university abused its discretion in increasing sanctions after appeal without explanation").

<sup>227</sup> See *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017).

<sup>228</sup> *Id.* at 220.

Among the evidence mentioned by the judge was: the college gave Doe less than a week to respond to the initial accusation;<sup>229</sup> led Doe to believe that confidentiality rules prohibited him from conducting his own investigation;<sup>230</sup> allowed its own lawyer to attend the disciplinary hearing while Doe's lawyer could not;<sup>231</sup> and prevented Doe from offering newly-discovered evidence, the existence of which became known during the hearing and soon afterward.<sup>232</sup> The new information included evidence that a campus student activist running a "very public campaign to see a male student expelled for sexual assault" had edited the accuser's complaint against Doe, as well as text messages indicating that the accuser had initiated the sexual activity found by the college to be non-consensual.<sup>233</sup>

The seven-day period granted to Doe to respond to the accusations may seem unusual, but similar windows actually are quite common in Title IX cases.<sup>234</sup> These very tight deadlines likely result from pressure on universities by the DOE OCR to resolve cases quickly, normally within sixty days. Although the OCR stated that it "does not require a school to complete investigations within 60 days" and instead judges promptness on a case-by-case basis, institutions have also been told that sixty days is sufficient "in typical cases" and that the "60-calendar day timeframe refers to the entire investigation process."<sup>235</sup> The OCR has explained further that while "this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX."<sup>236</sup> The incentive for universities to move the Title IX business along is quite strong.

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<sup>229</sup> See *id.* at 210.

<sup>230</sup> See *id.* at 212.

<sup>231</sup> See *id.* at 207.

<sup>232</sup> See *id.* at 212–13.

<sup>233</sup> See *id.* at 213.

<sup>234</sup> See *e.g.*, Prasad v. Cornell Univ., No. 5:15-CV-322, 2016 WL 3212079, at \*7 (N.D.N.Y. Feb. 24, 2016) (noting Cornell's refusal to grant accused student five-day extension of time "to respond to the Investigative Report consisting of information gathered over several months' of investigation," despite deadline falling during final examination period).

<sup>235</sup> See U.S. DEP'T EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 31–32 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/J552-AMZ3>] (noting that the process includes "conducting the fact-finding investigation, holding a hearing . . . to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment . . . including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate"); see also U.S. DEP'T EDUC. OFFICE CIVIL RIGHTS, *supra* note 12 (noting September 2017 withdrawal of the 2014 Q&A guidance).

<sup>236</sup> U.S. DEP'T EDUC. OFFICE CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, *supra* note 235.

In 2015, a University of California, Davis student sought judicial relief after being suspended without a hearing.<sup>237</sup> The university had not only barred the student from campus but also ordered him to stay out of Davis, California entirely.<sup>238</sup> Stating that “due process has completely been obliterated” by the university’s conduct, the judge noted that “‘if anyone has failed the alleged victim in this case [it] is the University.’”<sup>239</sup> The court ordered the plaintiff reinstated as a student.<sup>240</sup>

In *Prasad v. Cornell University*, a 2016 decision in which the court denied a motion to dismiss claims filed against Cornell by a suspended student,<sup>241</sup> the judge recited a variety of odd procedures that contributed to a perception of unfairness and justified allowing Prasad’s gender-discrimination claim to reach discovery.<sup>242</sup> Among other things, the university (1) granted the complainant extensions of time but denied them to the accused; (2) prevented the accused from asking any questions of the complainant, even by submitting them to a hearing examiner for consideration; (3) relied upon a flawed “Investigative Report” that misrepresented the statements of witnesses; and (4) determined the complainant’s blood-alcohol level on the night of the sexual activity at issue “based solely on [her] self-reported weight and alcohol consumption” and the assistance of an online BAC calculator, despite witness testimony suggesting that she could not possibly have been as drunk as the resulting numbers implied.<sup>243</sup>

In another 2016 decision, a federal court in Virginia recounted the slipshod process by which another “John Doe” was suspended from James Madison University.<sup>244</sup> Doe was accused of sexual misconduct.<sup>245</sup> Despite procedural hurdles, such as a prohibition on Doe receiving documents related to the case (he was allowed to read them and take notes, but could not take them with him), Doe convinced a university hearing board that he was “not responsible” (that is, not guilty).<sup>246</sup> The alleged victim appealed the finding,<sup>247</sup> and then the shoddy procedures began in earnest. The university allowed Doe’s accuser to state (in a document filed with the appellate board) that Doe had sexually as-

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<sup>237</sup> See Press Release, Werksman Jackson Hathaway & Quinn, California Judge Issues Stinging Rebuke of UC Davis’ Handling of Title IX Sexual Misconduct Case (Oct. 12, 2015).

<sup>238</sup> See *id.* (describing Sept. 22, 2015 hearing).

<sup>239</sup> See *id.*

<sup>240</sup> See *id.*

<sup>241</sup> *Prasad v. Cornell Univ.*, No. 5:15-CV-322, 2016 WL 3212079, at \*1 (N.D.N.Y. Feb. 24, 2016).

<sup>242</sup> See *id.* at \*14–\*17.

<sup>243</sup> See *id.* at \*8–\*9, \*15–\*16, & \*9 n.18 (noting that university officials decided that the complainant had a BAC of .33 or .43).

<sup>244</sup> See *Doe v. Alger*, 175 F. Supp. 3d 646, 648 (W.D. Va. 2016).

<sup>245</sup> See *id.*

<sup>246</sup> See *id.* at 651–52.

<sup>247</sup> See *id.* at 648.



saulted a different, unnamed student, and Doe had no opportunity to investigate the charge.<sup>248</sup> Also, after the accuser claimed that her roommate had lied to the original hearing panel, the university prevented Doe from contacting the roommate, and the appellate hearing panel never sought evidence from the roommate.<sup>249</sup> The university never informed Doe of the identity of the appellate board members, gave him no prior notice of the board's meeting, and did not permit him to attend the meeting.<sup>250</sup> The appellate board suspended Doe for five-and-one-half years, providing no explanation for its decision.<sup>251</sup> Doe sued. Following discovery, during which Doe produced proof that the university had concealed further evidence from him that had been provided to the hearing board, the court granted summary judgment in Doe's favor on the issue of liability, holding that "the undisputed facts show that Doe did not receive due process" and allowing him to re-enroll.<sup>252</sup>

In 2015, a court ordered the University of California, San Diego to set aside its findings that a student had violated the university's sexual misconduct rules, and the court required the university to set aside the sanction—suspension for one year and a quarter—that it had imposed.<sup>253</sup> The court's opinion listed several reasons that the university hearing was unfair to the accused student. Among other procedural defects, the hearing officer declined to ask the accused students' suggested cross-examination questions of his accuser, including questions the court later found material.<sup>254</sup> The accuser testified from behind a screen that prevented the accused from seeing her.<sup>255</sup> Also, the university prosecutor referred in his closing argument to evidence not in the hearing rec-

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<sup>248</sup> *See id.* at 652, 662.

<sup>249</sup> *See id.* at 651, 653, 662. At the original hearing, the roommate had "testified that she did not believe that Roe was drunk or otherwise incapacitated when she saw her shortly after her sexual encounter with Doe," which contradicted the complainant's version of the events. *See id.* ("she claimed that she was drunk during that encounter.").

<sup>250</sup> *See id.* at 662.

<sup>251</sup> *See id.* at 653.

<sup>252</sup> *See Doe v. Alger*, 228 F. Supp. 3d 713, 716, 729 (W.D. Va. 2016); *Doe v. Alger*, No. 5:15-CV-00035, 2017 WL 1483577, at \*2 (W.D. Va. Apr. 25, 2017) (discussing scope of equitable relief awarded).

<sup>253</sup> *Doe v. Regents of the Univ. of Cal., S.D.*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at \*6 (Cal. Super. Ct. July 10, 2015).

<sup>254</sup> The questions were proposed by the accused to the hearing officer, who chose which questions to ask. *See id.* at \*2. ("The limiting of the questions in this case curtailed the right of confrontation crucial to any definition of a fair hearing.").

<sup>255</sup> *See id.* at \*3. For background on the permissibility of screening vulnerable witnesses in criminal cases, *see generally* *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988) (restricting such use); *Maryland v. Craig*, 497 U.S. 836, 847 (1990) (allowing it in some circumstances). I mention these cases not to suggest that university hearings must mimic criminal courtrooms but instead to flag the screening practice—which I am told is quite common on at least some campuses—as one that will seem jarring to veterans of other venues of adjudication.

ord, which the factfinder then relied upon.<sup>256</sup> Further, the university did not provide the accused student with records of witness interviews, including interviews of the accuser, conducted by university investigators, and it denied the accused the names of several witnesses.<sup>257</sup> The trial court noted that the accused was entitled a fair hearing, “a real one, not a sham or a pretense,”<sup>258</sup> and it held that the UCSD “hearing was unfair.”<sup>259</sup> Later, the California Court of Appeal would overrule the trial court, holding that the UCSD procedures were not so terrible as to violate the constitutional rights of the accused student.<sup>260</sup> After stating, “we are concerned that the procedure employed by UCSD has great potential to be unfair to a student accused of violating the Sex Offense Policy,” the court concluded, “[t]hat said, on the record before us, we cannot say that the procedure used by UCSD violates due process.”<sup>261</sup>

The upshot of decisions like the one in the UCSD case is that, under current law, a great deal of questionable procedures may fall within the range of permissible options available to universities.<sup>262</sup> If universities wish to admit hearsay—including double hearsay, in which the report of an absent investigator contains hearsay uttered by additional absent witnesses—they may.<sup>263</sup> If universities wish to muzzle the lawyers hired by students, they may.<sup>264</sup> If universities wish to deny discovery to students, they may.<sup>265</sup> A university may even deny the accused copies of notes recounting interviews of the accuser, at least sometimes.<sup>266</sup>

Legal, however, is not the same as sound. Justice Antonin Scalia is known for wishing judges would stamp “Stupid but constitutional!” on certain complaints.<sup>267</sup> Observers of the campus discipline world should similarly observe

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<sup>256</sup> See *Doe v. Regents of the Univ. of Cal.*, S.D., 2015 WL 4394597, at \*3 (holding that the factfinder “improperly delegates the panel’s duty to an outside witness that was not present at the hearing”).

<sup>257</sup> See *id.*

<sup>258</sup> See *id.* (quoting *Ciechon v. City of Chi.*, 686 F.2d 511, 517 (7th Cir. 1982)).

<sup>259</sup> See *id.* at \*6.

<sup>260</sup> See *Doe v. Regents of the Univ. of Cal.*, S.D., 210 Cal. Rptr. 3d 479, 523 (Cal. Ct. App. 2016).

<sup>261</sup> *Id.* at 519.

<sup>262</sup> See *Doe v. Skidmore Coll.*, 152 A.D.3d 932, 935 (N.Y. App. Div. 2017) (listing various informal processes that universities may employ and then finding that university failed to follow its own rules).

<sup>263</sup> See *Regents of the Univ. of Cal.*, S.D., 210 Cal. Rptr. 3d at 497.

<sup>264</sup> See *infra* Section III.F (discussing limitations on roles of lawyers at hearings).

<sup>265</sup> See *Regents of the Univ. of Cal.*, S.D., 210 Cal. Rptr. 3d at 513. (“There is no formal right to discovery in student conduct review hearings.”).

<sup>266</sup> See *id.* (noting that “the failure to turn over Dalcourt’s interview notes from her two meetings with Jane gives us pause. . . . [and] we can see, in certain circumstances, the need for such a requirement. In a case like the one before us, there are only two witnesses to the incident” but declining to find a violation in this case).

<sup>267</sup> See *Obituary: Antonin Scalia, Always Right*, *ECONOMIST* (Feb. 20, 2016), <https://www.economist.com/news/obituary/21693161-originalist-chief-devout-and-colourful-end-was-79-obituary-antonin-scalia> [<https://perma.cc/X9KB-999A>].

that many universities' policies concurrently (1) are not so offensive to judges' sense of fair play that they violate constitutional due process guarantees, yet (2) are lousy, risk unfairness, and ought to be changed. And on top of that, some are so bad that they violate the law—and must be changed whether universities want to or not.

It may not be obvious how questionable procedures would exacerbate racial bias. Whatever one's position on the use of hearsay in college hearings, the same evidence is generally admissible against students of all races. It could be that improving university procedures will affect all students in approximately the same way. I would suggest, however, that one purpose of well-crafted procedures is to help factfinders reach fair and accurate results. If implicit bias infects the perceptions of victims, other witnesses, investigators, and factfinders, then the consequences of unfair and inaccurate decisions seem likely to hurt minority students in particular. The greater availability of lawyers to white students—who tend to have more money than minority students—increases the risk that unsound procedures will fuel disparate impact.

*F. Lawyers for Students Have Limited Roles, and Lawyers Are Expensive*

When Shakespeare's character Dick the Butcher suggests, "The first thing we do, let's kill all the lawyers,"<sup>268</sup> the playwright did not expect the audience to deem Dick a proponent of sound social policy.<sup>269</sup> The old saying goes that there can be no liberty without law,<sup>270</sup> and no law without lawyers,<sup>271</sup> making the elimination of lawyers a goal of aspiring tyrants.<sup>272</sup> The history of criminal trials provides further evidence of the importance of legal counsel, and Parliament acted back in the days of King William of Orange to rectify the injustices performed by the courts of King James II, whose "Hanging Judge," George Jef-

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<sup>268</sup> WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* 61; see also Debbie Vogel, 'Kill the Lawyers,' a Line Misinterpreted, N.Y. TIMES (June 17, 1990) ("Shakespeare meant it as a compliment to attorneys and judges who instill justice in society.").

<sup>269</sup> Dick is speaking to the rebel Jack Cade, who has been imagining his future reign as king of England. Cade replies, "[T]hat I mean to do" and laments how a "parchment [*i.e.*, a legal document], being scribbled o'er, should undo a man" SHAKESPEARE, *supra* note 268.

<sup>270</sup> See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 232 (Ronald Hamowy ed., 1960) (chapter on "The Origins of the Rule of Law"); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 149 (Lee Ward ed., 1988) ("[W]here there is no law, there is no freedom").

<sup>271</sup> Bar associations often reiterate this portion of the maxim, repeating it across the centuries worldwide. See, e.g., Joe Dinga Pefok, *Cameroon Bar Protests Exclusion from State Issues*, CAMEROON POSTLINE (May 23, 2016) <http://www.cameroonpostline.com/cameroon-bar-protests-exclusion-from-state-issues> [<https://perma.cc/W3Y2-AKA8>] (quoting bar association leader on lawyers: "They are the ones to ensure that justice reigns for all. In fact, if there are no lawyers, there will be no law."); Robert A. Hunter, 22 LA. BAR ASS'N. REP. 12 (1921).

<sup>272</sup> Speakers at conventions of law professors add, "And there will be no lawyers without law schools." See Barbara Elenbaas, *Microsoft President Brad Smith Looks to the Future of Legal Education in AALS Plenary Address*, ASS'N AM. L. SCH. (2017), <https://www.aals.org/about/publications/newsletters/aals-news-winter-2017/aals-2017-plenary-address> [<https://perma.cc/3T87-HPWZ>].

fries, oversaw the Bloody Assizes.<sup>273</sup> The Treason Trials Act of 1696 provided that treason defendants could be represented by counsel, a right later extended to ordinary felony defendants.<sup>274</sup> One need not analogize Title IX hearings to treason prosecutions—if for no reason other than that expulsion, sometimes called the “academic death penalty,”<sup>275</sup> is only a metaphorical form of capital punishment—to understand that legal counsel might be useful to students accused of misconduct.<sup>276</sup>

A recent case at Indiana University-Purdue University Indianapolis (“IUPUI”) provides facts similar to those at many universities. Jeremiah Marshall, an IUPUI sophomore, was accused of sexual assault and appeared at a university hearing.<sup>277</sup> This is how a federal judge described who did what at the hearing:

Ms. Hinton, a non-practicing attorney and *cum laude* graduate of the University of Notre Dame Law School, presented IUPUI’s case against Marshall, presenting evidence and questioning and cross-examining witnesses. In contrast, Marshall was forced to represent himself at the hearing. IUPUI only allowed one of Marshall’s three attorneys to be present with him at the hearing, and the sole attorney was not permitted to speak on Marshall’s behalf.<sup>278</sup>

IUPUI’s treatment of lawyers representing accused students is not unusual among universities, and the court reviewing Marshall’s due process challenge to the procedure reported accurately that under current law, universities generally have no duty to allow students’ lawyers to speak at hearings.<sup>279</sup>

Some institutions restrict even further the activities of students’ lawyers. At Amherst College, accused students may hire private lawyers, but these lawyers are “required to remain outside of any hearing room,” even though the university’s lawyers “may be present to provide legal counsel to the Chair and to the Hearing Board members.”<sup>280</sup> Similarly, Stephens College allows students to bring a “support person” to hearings, but those persons “may not be external to the college community (i.e. parents or attorneys).”<sup>281</sup>

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<sup>273</sup> See generally JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2005).

<sup>274</sup> *Id.*

<sup>275</sup> See, e.g., Rebecca Moore Howard, *Plagiarisms, Authorships, and the Academic Death Penalty*, 57 C. ENG. 788, 789 (1995).

<sup>276</sup> Counsel would also be useful to complainants seeking to vindicate their claims of victimization. As discussed below, see *infra* Part V, the current system may also be biased against minority victims of campus crime (in addition to accused minority students), and limited access to counsel could exacerbate this problem.

<sup>277</sup> See *Marshall v. Ind. Univ.*, 170 F. Supp. 3d 1201, 1203–04 (S.D. Ind. 2016).

<sup>278</sup> *Id.* at 1204–05. Maria Hinton was Assistant Director of Student Conduct at IUPUI. See *id.* at 1204.

<sup>279</sup> See *id.* at 1207–08.

<sup>280</sup> *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 207 (D. Mass. 2017).

<sup>281</sup> See STEPHENS COLLEGE, *STUDENT HANDBOOK* 53 (discussing “support persons” in other college proceedings); *id.* at 119 (“The accused student is entitled to be assisted by and accompanied to the hearing by one member of the Stephens College faculty or staff as a support person.”).

Credible policy arguments have been advanced to support excluding lawyers from university conduct hearings or limiting their roles in various ways, such as preventing them from questioning witnesses or from speaking at all. For example, advocates caution against “criminaliz[ing]” Title IX and argue that procedural protections appropriate for criminal trials have no place in university hearings.<sup>282</sup> They remind Title IX’s critics that restrictions on lawyers’ behavior are not unique to campus sexual assault allegations, sexual harassment cases, or other claims of discrimination.<sup>283</sup> Instead, campus discipline hearings more generally tend to have limited roles for lawyers, perhaps because universities wish to avoid importing the elaborate procedures of real courts into the less formal hearing rooms at which colleges adjudicate allegations of plagiarism, underage drinking, and vandalism.<sup>284</sup> Such arguments rebut well the contention that campus sexual assault “respondents” should enjoy special procedural protections unavailable to those accused of serious offenses unrelated to sex, such as hazing or even homicide.<sup>285</sup> For purposes of this Article, I need not resolve the policy question of how robustly lawyers should be allowed to participate in campus discipline hearings. Rather, I will make the more limited claim that robust participation by lawyers (whatever the offense at issue) might often prove helpful to accused students, which is why accused students request such active participation and why advocates for greater “due process” protections in campus hearings tend to raise the issue of lawyers for the accused.

In considering this more limited claim—that is, that lawyers are indeed useful to accused students, and those able to obtain them are wise to do so—I would ask readers, whatever their opinion on my Article and on-campus adjudications more generally, to consider a hypothetical. If your child (or the child of a close friend) were accused of sexual assault on campus, and the child asked you whether it would make sense to hire a lawyer to protect the child’s interests, what would you say? If your answer is, “Yes, get a lawyer,” would you prefer that the presentation of evidence and the questioning of witnesses could be delegated to the lawyer, or would you prefer that those tasks be assigned to the youth accused of misconduct? Again, one need not agree that accused students should enjoy such assistance of counsel to understand why it might be helpful. If minority students are disproportionately accused of campus offenses, then any limitations on the role of lawyers for the accused will disproportionately burden minority students.<sup>286</sup>

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<sup>282</sup> See Cantalupo, *supra* note 185, at 283.

<sup>283</sup> See *id.* at 286.

<sup>284</sup> See, e.g., Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1985 (2016).

<sup>285</sup> See *id.* at 1997.

<sup>286</sup> Similarly, if minority students are disproportionately the victims of campus violence, the role of lawyers has additional implications. See *infra* Part V.

Further, other than at the very small number of universities that provide lawyers to accused students at the institution's expense,<sup>287</sup> students seeking legal assistance must turn to private lawyers whom they may not be able to afford.<sup>288</sup> Because income and wealth are not evenly distributed among Americans of all races, minority students are particularly likely to lack the money needed to hire a lawyer.<sup>289</sup> If lawyers are helpful to accused students—even under the constraints imposed by universities upon lawyers—and minority students are less likely to have lawyers, then the university discipline system becomes that much more likely to have a disparate impact.

*G. Faculty and Administrators Who Might Normally Speak Up for Racial Justice Are Afraid to Undermine Title IX Enforcement, or to Appear Soft on Rape*

Given the real possibility that university discipline systems discriminate against minority students, one might wonder why more faculty members and administrators do not demand reform. After all, many faculty members and administrators take racial bias seriously and determinedly seek change on several fronts, such as curricular reform, cultural competence training, campus climate initiatives, and the recruitment of a more diverse faculty and student body.<sup>290</sup> A few answers suggest themselves: Perhaps the secretive and legalistic nature of university discipline processes deter public complaints, or perhaps the heavy-handed intervention of federal officials makes campus resistance seem futile.<sup>291</sup> To me, two other possibilities loom large: First, faculty members and administrators likely are largely unaware of the potential disparate racial impact described in this Article, which exists to promote greater attention to the problem. Second, those academics aware of the issue may fear undermining—or even appearing to undermine—efforts to promote gender equity and combat campus sexual assault. Lack of awareness perhaps can be cured. But awareness

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<sup>287</sup> See Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), <http://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html> [<https://perma.cc/TDD6-GDXX>].

<sup>288</sup> See *id.* (“But success does not come cheaply. Litigating a case through a trial could cost \$100,000. . .”).

<sup>289</sup> See Michal Grinstein-Weiss et al., *Racial Disparities in Education Debt Burden among Low- and Moderate-Income Households*, BROOKINGS INST., (Apr. 29, 2016), <https://www.brookings.edu/research/racial-disparities-in-education-debt-burden-among-low-and-moderate-income-households-2> [<https://perma.cc/96NH-VZ2L>].

<sup>290</sup> See, e.g., Andrew M. Duehren & Daphne C. Thompson, *In Debate Over Names, History and Race Relations Collide*, HARV. CRIMSON (Jan. 19, 2016), <http://www.thecrimson.com/article/2016/1/19/faust-name-title-changes-> [<https://perma.cc/D3QK-8TVL>]; Katherine Mangin, *After Missouri's Leadership Exodus, Hard Questions Loom on Race, Power, and Culture*, CHRON. HIGHER EDUC. (Nov. 11, 2015), <http://www.chronicle.com/article/After-Missouri-s-Leadership/234145> [<https://perma.cc/KKY9-QC9W>]; see also *supra* text accompanying notes 135–141 (describing efforts at universities to promote racial equality).

<sup>291</sup> See *supra* Section III.D; *infra* Section V.

will not suffice if knowledgeable academics avoid difficult conversations about substantive policy decisions.

The experience of Professor Laura Kipnis, who teaches media studies at Northwestern University and objected to certain university rules concerning professor-student dating,<sup>292</sup> has certainly encouraged shyness in the academy. After publishing an article in the *Chronicle of Higher Education* that discussed an ongoing Title IX case at Northwestern, in which a student had accused a professor of sexual harassment and which had been widely reported in the press,<sup>293</sup> Kipnis found herself among the accused.<sup>294</sup> She was cleared of wrongdoing after elaborate proceedings, and she wrote a book about her case and the regulation of campus sex more generally.<sup>295</sup> A graduate student mentioned in the book has sued Kipnis for defamation.<sup>296</sup> On the one hand, Kipnis's story seems like it could have been scripted by opponents of the Title IX status quo seeking to make the whole system look silly, humorless, and dangerous. Her attackers have given Kipnis attention and credibility, and she discusses in her book how, after she was charged with creating a "hostile environment," strangers from all over America contacted her with material for her brief opposing what she describes as a "moral panic" comparable to McCarthyism and the "Satanic ritual abuse preschool trials of the 1980s."<sup>297</sup> On the other hand, who needs that kind of hassle?<sup>298</sup> It is one thing to support free expression on campus in general, and quite another to wish that students will use their free speech rights to protest you in particular.

Not all repercussions arising from opposition to the current university discipline enforcement system are as dramatic as lawsuits and charges of campus misconduct. Critics also face garden-variety accusations of joining the "[b]acklash to progress in the context of sexual assault"<sup>299</sup> and "undermin[ing] Title IX's central purpose: to protect and promote equal educational opportuni-

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<sup>292</sup> See Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), <http://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351> [https://perma.cc/73MU-B29U].

<sup>293</sup> See *id.*

<sup>294</sup> See Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://www.chronicle.com/article/My-Title-IX-Inquisition/230489> [https://perma.cc/K4AN-54P9].

<sup>295</sup> See KIPNIS, *supra* note 90, at 5–6.

<sup>296</sup> See Katherine Mangan, *Laura Kipnis Is Sued over Portrayal of Graduate Student in Book on Campus 'Sexual Paranoia'*, CHRON. HIGHER EDUC. (May 18, 2017), <http://www.chronicle.com/article/Laura-Kipnis-Is-Sued-Over/240105> [https://perma.cc/3KJ C-TKD9].

<sup>297</sup> See KIPNIS, *supra* note 90, at 1.

<sup>298</sup> I will admit some personal concern on this score. Yet, if the tenured faculty won't write articles that annoy people in the service of prompting difficult conversations, who will?

<sup>299</sup> See Anderson, *supra* note 284, at 1981–82 ("In general, the resistance to progressive reform of campus sexual assault has mirrored the backlash to the progressive reform of rape law. . . ."); Johnson, *supra* note 3, at 58 ("In many ways, this response mirrors the wave of criticism levied at progressive reform of rape law in the criminal justice system.").

ty for *all* students.”<sup>300</sup> In response to authors who raise the premise of this Article—that is, that adopting “OCR’s policies . . . will lead to a disparate impact against men of color, particularly black men”—one commentator raised “the question of whether the invocation of race comes from a place of genuine concern or a place of convenience.”<sup>301</sup> I do not mean to overstate the consequences of having one’s racial justice bona fides questioned by a law review author; the distinguished scholars whose “invocation of race” was questioned will do just fine and are not likely to face dismissal from the Harvard Law School faculty. But not everyone has tenure or a judicial pension, and legal scholars desiring tranquility might wish to focus on something other than campus sex regulation. Outside law school walls, faculty in other disciplines—who do speak up from time to time about university governance—might also direct their attention to other topics because of a desire (perhaps conscious, perhaps not) to avoid accusations of supporting rape culture.<sup>302</sup>

Observers of campus culture will note a great overlap among faculty members and administrators who agitate for reforms promoting gender equity and those who agitate for reforms promoting racial equality. As a result, many academics who might otherwise be most sympathetic to a race-based critique of campus policy will be hesitant to choose this particular fight.

#### *H. Investigations of Alleged Sexual Misconduct Are Affected by Collective American Attitudes toward Race and Sex*

In addition to all the factors listed above that contribute to the risk of disparate racial impact in university disciplinary systems, one factor merits increasing attention as universities devote more resources to policing and adjudicating campus sex. American law has stigmatized sexual relations between black men and white women since before American independence.<sup>303</sup> When black male students are accused of sexual misconduct toward white female students,<sup>304</sup> investigators and factfinders will bring to the table centuries of cultural baggage. Professor Halley has listed cultural touchstones familiar to students of American racial history: Emmet Till, the Central Park Five, and *To Kill a*

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<sup>300</sup> See Cantalupo, *supra* note 185, at 284.

<sup>301</sup> See Johnson, *supra* note 3, at 59–60, 59 n.24, 60 n.28. Nancy Gertner is a retired federal judge and a senior lecturer on law at Harvard. Janet Halley is the Royall Professor of Law at Harvard.

<sup>302</sup> See Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1065 (2017) (discussing concept of “rape culture”); Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 54–55 (2016) (discussing use of Title IX to combat rape culture on campus).

<sup>303</sup> See IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 41 (2016) (discussing penalties imposed by colonial legislatures on white women who had sex with black men).

<sup>304</sup> For an example of such a case in which the disciplined student eventually sued the university for racial discrimination, see *supra* notes 107–115 and accompanying text.



*Mockingbird*.<sup>305</sup> I would add *Loving v. Virginia*.<sup>306</sup> Mildred Loving died just a decade ago, and she was only sixty-eight.<sup>307</sup> These days we cheerfully recall that the Supreme Court of the United States decided *Loving* unanimously. One year earlier, however, the Supreme Court of Appeals of Virginia had also acted unanimously. It affirmed the conviction of Mildred and Richard Loving for violating “the Virginia statutes relating to miscegenetic marriages,”<sup>308</sup> supporting the opinion of the trial judge, who stated: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”<sup>309</sup> Yes, half a century has transpired since then. But few will dispute that even fifty-plus years after *Loving*, interracial couples are not treated identically to same-race couples in the United States. Universities understand this truth, which is confirmed by social science research, including studies of college students.<sup>310</sup> This knowledge spurs efforts to train students (and faculty and staff) in greater cultural competency.

University researchers know that Americans perceive sexual relationships differently depending on the races of the participants. Historians know how Americans have treated interracial couples in the past. Law faculty members teach how attitudes toward race affect the criminal justice system today and explain in part how so many black men have been wrongfully convicted of rape. Psychologists know that interracial relationships arouse disproportionate disgust in observers, despite surveys in which respondents claim to approve of interracial marriage. It would be bizarre if administrators in charge of university disciplinary systems expected their results to be untainted by racial bias when they adjudicate accusations of nonconsensual interracial sex, interracial sexual harassment, and similar violations of university rules. That said, the limited data now available do not allow anyone to determine what percentage of campus sexual misconduct cases involve complainants and respondents of different races. Because the race of victims and defendants have proven so important to outcomes in the criminal justice system,<sup>311</sup> this form of racial bias merits further investigation on campus.

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<sup>305</sup> See Halley, *supra* note 3, at 106.

<sup>306</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>307</sup> See Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. TIMES (May 6, 2008), <http://www.nytimes.com/2008/05/06/us/06loving.html> [<https://perma.cc/JWR3-4YD8>].

<sup>308</sup> See *Loving v. Commonwealth*, 147 S.E.2d 78, 80 (Va. 1966).

<sup>309</sup> *Loving*, 388 U.S. at 3.

<sup>310</sup> See, e.g., Allison L. Skinner & Caitlin M. Hudac, “Yuck, You Disgust Me!” *Affective Bias Against Interracial Couples*, 68 J. EXPERIMENTAL SOC. PSYCH. 68, 68 (2016) (“Overall, the current findings provide evidence that interracial couples elicit disgust and are dehumanized relative to same-race couples.”).

<sup>311</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting) (“few of the details of the crime or of McCleskey’s past criminal conduct were more important [to

## IV. SUGGESTIONS FOR REFORM

To begin addressing the likely existence of widespread racially disparate impact in college and university student discipline, I suggest two responses. First, colleges and universities should begin collecting and publishing data similar to that produced by K–12 institutions for inclusion in the Civil Rights Data Collection (CRDC) maintained by the U.S. Department of Education.<sup>312</sup> The Office for Civil Rights should mandate such reporting and should then publish the data. Second, whoever on campus is in charge of combating racial bias and discrimination in general should acknowledge this issue and use whatever measures would be considered appropriate to respond to other manifestations racial injustice.

A. *Collect Data, and Make It Public*

With a few clicks, anyone with internet access can obtain a CRDC “Discipline Report” for a K–12 school district or an individual school. These reports reveal the race and ethnicity of students receiving disciplinary actions such as in-school suspensions, out-of-school suspensions, and expulsions. For example, at David H. Hickman High School, for which my Columbia, Missouri neighborhood is currently zoned, 117 out-of-school suspensions were recorded during the 2013–2014 survey year.<sup>313</sup> The school’s overall population of 1,786 students was 18.5 percent black, and the population of students receiving out-of-school suspensions was 63.2 percent black.<sup>314</sup> Because these figures are easily accessible (I obtained them in less than a minute), the *Columbia Daily Tribune* has been able to report on racial bias in the local school district’s discipline regime with facts, instead of guesswork and opinion.<sup>315</sup> And the newspaper has rich data to review instead of mere anecdotes. These newspaper articles helped to inspire public interest in the reported racial disparities. Further, the mere ex-

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whether he would be executed] than the fact that his victim was white”); see also Hetey & Eberhardt, *supra* note 81 at 1949 (discussing effect of defendant’s appearance on punishment imposed). Note too that if the victim’s race affects enforcement decisions on campus (as it does in the criminal justice system), then minority students may receive inadequate protection. See *infra* Part V.

<sup>312</sup> For background on the CRDC, see Office for Civil Rights, Civil Rights Data Collection (CRDC), <https://www2.ed.gov/about/offices/list/ocr/data.html> [<https://perma.cc/CY88-AD2N>].

<sup>313</sup> See David H. Hickman High, Discipline Report, Office of Civil Rights, Civil Rights Data Collection (2013), <https://ocrdata.ed.gov/Page?t=s&eid=255949&syk=7&pid=2268&sr=1&Report=6> [<https://perma.cc/Q6S2-PP6L>].

<sup>314</sup> *Id.*

<sup>315</sup> See Catherine Martin, *Black Students Still Get Most Suspensions in Columbia Public Schools*, COLUM. DAILY TRIB. (Sept. 9, 2013, 12:01 AM), <http://www.columbiatribune.com/1b6ebf38-197b-11e3-a45d-10604b9f6eda.html> [<https://perma.cc/8ARW-X4LN>]; Roger McKinney, *Black and Low-Income Students More Frequently Suspended from School*, COLUM. DAILY TRIB. (Dec. 28, 2014, 12:01 AM), <http://www.columbiatribune.com/e126a57e-da88-5f54-ad51-0e152afd24fc.html> [<https://perma.cc/NP7A-WGD3>].

istence of the data—even if never reported in the media—allows district administrators and Board of Education members to understand the extent of the problem in their jurisdiction. When I served on the Policy Committee of the Board of Education,<sup>316</sup> I participated in discussions about racial bias that likely would have been impossible absent the CRDC data. At least in part because of the existence of CRDC reports accessible to the community, the school district implemented measures designed to reduce bias.<sup>317</sup> These efforts may work, and they may not. Fortunately, future CRDC surveys will help administrators, Board of Education members, and the public to find out. Also, because every school district in the country collects and reports the same information,<sup>318</sup> one can compare results among jurisdictions and against national trends.

By contrast, during my term as chair of the campus-wide Faculty Council at the University of Missouri,<sup>319</sup> I had no way of evaluating whether Mizzou's student discipline system produced racial bias at greater or lesser rates than peer institutions and national averages. I appointed two committees that examined the equity resolution process at the university and offered suggestions for reform, many of which were adopted.<sup>320</sup> These committees did important work, and their suggestions have made real improvements to a complicated system. I realized at some point while the committees were working that I had no idea whether Mizzou's student discipline system (of which the equity resolution process is only a part),<sup>321</sup> produced racially disparate outcomes. I can easily find data on discipline at Missouri's elementary and secondary schools, as well as in its criminal justice system, that allow me to examine racial disparities. But if I wish to compare the student disciplinary systems at Mizzou to those at Missouri State, Washington University, and other universities, hardly any data are publicly available.

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<sup>316</sup> I served as a community member of the committee from 2013 to 2016. I was not a member of the Board of Education.

<sup>317</sup> See Martin, *supra* note 315 (“This year, the district is also looking to start restorative justice. The practice focuses on alternative disciplinary actions that don’t remove the students from the traditional school setting.”); McKinney, *supra* note 315 (discussing equity training of district personnel and teaching “with poverty in mind”).

<sup>318</sup> The CRDC is a mandatory program for schools receiving federal funds, authorized under the statutes and regulations implementing Title VI of the Civil Rights Act of 1964 (as well as under other law, such as Title IX). See 34 C.F.R. § 100.6(b) (2016); 34 C.F.R. § 106.71 (2016).

<sup>319</sup> I was chair from 2015 to 2017.

<sup>320</sup> See Ad Hoc Committee on Civil Rights and Title IX, Report from the MU Faculty Council on University Policy (Apr. 4, 2017) (on file with author) (reviewing recommendations of previous *ad hoc* committee, acknowledging acceptance of some proposals by university administration, and advocating additional changes).

<sup>321</sup> Offenses unrelated to discrimination are handled separately. Different university officials adjudicate charges of academic dishonesty, as well as misbehavior such as underage drinking.

The U.S. Department of Education should use its authority under Title VI of the Civil Rights Act<sup>322</sup> to require that colleges and universities immediately begin collecting the sort of data already reported by elementary and secondary schools to the CRDC. If public schools across the country can manage this task, higher education institutions—which already prepare all sorts of reports to satisfy requirements associated with federal funding—should be able to manage. At a minimum, colleges and universities should collect demographic data (including race/ethnicity, sex, disability status,<sup>323</sup> and income<sup>324</sup>) for all students receiving suspension and expulsion. It would be helpful if the data could be disaggregated by offense (perhaps with broad categories such as academic dishonesty, equity/discrimination violations, and drug/alcohol abuse), thereby allowing one to examine whether racial bias is more prevalent in discipline for some offenses than for others. Even better would be data that track demographics of both complainants and respondents, including for cases in which no discipline is imposed.

Although I believe that the U.S. Department of Education should require the submission of this information by colleges and universities receiving federal funds,<sup>325</sup> which would necessitate the establishment of uniform metrics, I hope that colleges and university leaders can get ahead of federal demands and begin crafting their own lists of desired data.<sup>326</sup> Administrators might call upon

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<sup>322</sup> Title VI prohibits discrimination on the basis of race, color, and national origin in education programs or activities which receive federal assistance. The DOE OCR enforces Title VI against educational institutions, including universities. See U.S. DEP'T OF EDUC., EDUCATION AND TITLE VI, <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/SBW5-FRXW>].

<sup>323</sup> At the K–12 level, disability status is measured by whether someone is an “IDEA student,” which refers to the Individuals with Disabilities Education Act. At the post-secondary level, one might consider whether a student has received disability-related accommodations for coursework or examinations.

<sup>324</sup> At the K-12 level, income status is tracked by recording which students are eligible for free or reduced-price school lunches. See McKinney, *supra* note 315. At the post-secondary level, one might use eligibility for Pell Grants.

<sup>325</sup> In an earlier draft of this Article, I suggested that “while the Department is considering this issue, it might wish to scrap or amend the ‘60-calendar day timeframe’ mentioned in previous DOE guidance, *see supra* note 235 and accompanying text, that has inspired so much haste on the part of university officials. A bit more time could lead to greater fairness and accuracy.” The DOE OCR subsequently released a guidance document that appears to have effected this change. See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT 3 (2017) (asking “What time frame constitutes a ‘prompt’ investigation?” and answering “There is no fixed time frame under which a school must complete a Title IX investigation.”). Additional guidance, yet to be released, may make more clear how “OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner.” *Id.*

<sup>326</sup> In addition, while DOE leaders are considering whether to require data collection by all colleges and universities receiving federal funds, in the meantime OCR staff could begin including data collection mandates in voluntary resolution agreements that the department reaches with institutions accused of Title IX or Title VI violations. For discussion of such an agreement, *see supra* notes 160–162 and accompanying text.

their diversity and equity officers, who could, in turn, enlist assistance from the National Association of Diversity Officers in Higher Education and from ATIXA, the Association of Title IX Administrators. Presidents and chancellors might also consult their general counsels, who could contact the National Association of College and University Attorneys for guidance. Student affairs professionals, who run most campus discipline systems, could advise about offense categories. Regardless of whether campus leaders offer suggestions, the Department of Education should promulgate reporting requirements and should make the resulting data available online, either in the CRDC or in a similar database.<sup>327</sup> Uniform reporting standards will allow apples-to-apples comparisons across institutions.

*B. Anti-Bias Trainers, Train Thyselves*

Meanwhile, as we wait for data reports to populate the post-secondary student discipline database, colleges and universities can begin attacking the problem. Scholars and administrators across America have devoted themselves to promoting fairness and equity in higher education, publishing research on matters such as reducing campus sexual violence,<sup>328</sup> encouraging intervention against anti-LGBT discrimination,<sup>329</sup> promoting success by black men in STEM fields,<sup>330</sup> and encouraging persistence among students with disabilities enrolled in online graduate programs.<sup>331</sup> I will not presume to instruct these experts on their work but will instead entreat them to consider whether I have raised a real problem related to their bailiwick, and, if so, how they might use their knowledge and campus influence to respond.

Lest I be accused of not offering any potential solutions, however, I will offer a few ideas that can perhaps be added to whatever proposals may be forthcoming from elsewhere. To begin, colleges and universities might review the factors discussed above in Part IV, some of which may be, at least in part, susceptible to intervention by campus leaders. For example, to reduce the effect of implicit bias on those who make decisions related to student discipline, colleges and universities may wish to develop training modules similar to those already offered to hiring committee members and others in the campus com-

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<sup>327</sup> Further discussion of what sort of information should be collected appears in U.S. DEP'T OF EDUC., *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* 17 (2014) (discussing best data-collection practices at the elementary and secondary school level).

<sup>328</sup> See, e.g., Chris Linder et al., *From Margins to Mainstream: Social Media as a Tool for Campus Sexual Violence Activism*, 9 J. DIVERSITY HIGHER EDUC. 231, 231 (2016).

<sup>329</sup> See, e.g., Adrienne B. Dessel et al., *LGBT Discrimination on Campus and Heterosexual Bystanders: Understanding Intentions to Intervene*, 10 J. DIVERSITY HIGHER EDUC. 101, 101 (2017).

<sup>330</sup> See, e.g., Marybeth Gasman et al., *Black Male Success in STEM: A Case Study of Morehouse College*, 10 J. DIVERSITY HIGHER EDUC. 181, 181 (2017).

<sup>331</sup> See, e.g., Susana Verdinelli & Debbi Kutner, *Persistence Factors Among Online Graduate Students with Disabilities*, 9 J. DIVERSITY HIGHER EDUC. 353, 353 (2016).

munity.<sup>332</sup> Those involved in equity resolution processes—who often lead training sessions for others—should be especially open to education concerning their own biases because of their appreciation for the importance of such self-examination.<sup>333</sup> Colleges and universities might also benefit from reviewing their student conduct rules for provisions that are unduly broad and vague, especially rules related to sexual activity and harassment.<sup>334</sup> It is not for me to decide how an institution should define “consent,” “stalking,” and other terms in its rulebook. Whatever the definitions, however, they should be clearly articulated in documents available to students and campus officials who adjudicate cases.<sup>335</sup> Institutions allowing accused students (and complainants, for that matter) to enlist the assistance of counsel should consider providing free legal services to students who cannot otherwise afford lawyers.<sup>336</sup> These advisors will be helpful even at campuses prohibiting lawyers from speaking at hearings.

Finally, simply by acknowledging the likely existence of racial biases in the student discipline system, campus diversity officers and Title IX administrators can reduce the stigma that might otherwise attach to criticisms leveled against university offices dedicated to combating sexual violence.<sup>337</sup> If concerns about racial injustice are derided as subterfuge offered to justify the speaker’s probable disdain for robust responses to campus rape, constructive discussions are unlikely to ensue. If instead we are willing to walk and chew gum concurrently, we can take sexual violence seriously while also accepting our duty to reduce racial injustice.

Further advice is available in guidance the U.S. Department of Education has issued to elementary and secondary schools.<sup>338</sup> In “Guiding Principles: A Resource Guide for Improving School Climate and Discipline,” the Department offers several ways in which schools can “prevent, identify, reduce, and eliminate discriminatory discipline and unintended consequences.”<sup>339</sup> One suggestion is that schools use “proactive, data-driven, and continuous efforts, including gathering feedback from families, students, teachers, and school personnel.”<sup>340</sup> Because of the immense burdens already placed upon campus

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<sup>332</sup> See *supra* Section III.B.

<sup>333</sup> Some useful material may be available from the American Bar Association, which prepares anti-bias curricula for judges and lawyers. See *generally* Implicit Bias Initiative, AM. BAR ASS’N, <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> [<https://perma.cc/VJ8K-S8G2>] (last visited Nov. 24, 2017).

<sup>334</sup> See *supra* Section III.C.

<sup>335</sup> Relatedly, university documents analogous to case reporters—that describe campus discipline cases in some detail but without information that would allow identification of individual students—could help observers see how these rules apply in practice.

<sup>336</sup> See *supra* Section III.F.

<sup>337</sup> See *supra* Section III.G.

<sup>338</sup> See *supra* note 58 and accompanying text.

<sup>339</sup> U.S. DEP’T OF EDUC., *supra* note 327, at 16. These suggestions overlap in part, but not entirely, with ideas mentioned above.

<sup>340</sup> *Id.* at 17–18.

offices charged with enforcing civil rights law, it is not reasonable to expect equity officers to gather all this data and feedback without assistance. Offices already responsible for institutional research should help to gather and maintain the needed data, and university leaders can help establish campus equivalents of the “school discipline team” recommended for K-12 schools.<sup>341</sup> Faculty and student government groups could nominate representatives for a team that

may choose to examine how discipline referrals and sanctions imposed at the school compare to those at other schools, or randomly review a percentage of the disciplinary actions taken at each school on an ongoing basis to ensure that actions taken were non-discriminatory and consistent with the school’s discipline practices.<sup>342</sup>

These are simply suggestions, and they were not written with colleges and universities in mind. Nonetheless, the experience of K-12 administrators seeking to reduce disproportionate disciplinary practices in their schools likely has much to offer campus leaders with the same goals.

#### V. BROADER IMPLICATIONS AND POSSIBLE FUTURE RESEARCH

The main point of this Article—that colleges and universities, as well as the U.S. Department of Education, should act to reduce the disproportionate campus discipline of minority students—suggests a variety of possible further research. Topics worthy of additional scholarly attention include (1) possible effects of campus discipline on already divergent retention rates of students of different races; (2) how the regulation of campus conduct nationwide by federal officials is a form of “shadow law,” in which agency staff regulate outside the formal regulatory process; (3) how federal influence on campus conduct rules and adjudication procedures exemplifies the declining influence of faculty on university governance; (4) whether complainants and other student victims of misconduct receive disparate treatment on the basis of race and, if so, what institutions can do to remedy the problem; and (5) how potentially competing claims for justice by different disadvantaged groups can be better examined through the lens of intersectionality. I will address each of these topics quite briefly here. With luck, other scholars can eventually give them the more robust attention they deserve.

*Retention rates.* Black students already graduate from college at lower rates than white students,<sup>343</sup> and university leaders should look carefully at campus policies that could exacerbate this problem. Not only expulsions but also less severe punishments can prevent graduation. For example, a student suspended for a year or two may never return. Students with fewer financial re-

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<sup>341</sup> See *id.* at 17.

<sup>342</sup> *Id.* at 17–18.

<sup>343</sup> D. SHAPIRO ET AL., SIGNATURE 12 SUPPLEMENT: COMPLETING COLLEGE: A NATIONAL VIEW OF STUDENT ATTAINMENT RATES BY RACE AND ETHNICITY—FALL 2010 COHORT 21 (2017) (“Among students who started in four-year public institutions, black students had the lowest six-year completion rate (45.9 percent).”).

sources are particularly at risk of having a suspension become a permanent departure from school, especially if they forfeit tuition already paid for the semester during which a suspension becomes effective. If scholarships are revoked upon findings of misconduct, that would compound the effect on students with limited means.

*Shadow Law.* Administrative law scholars sometimes use the term “shadow law” to refer to agency use of informal methods to administer federal law.<sup>344</sup> Shadow law tools, such as policy statements and interpretive rules, allow agencies to regulate without engaging in the formal “notice and comment” process generally required for federal regulations.<sup>345</sup> In recent years the U.S. Department of Education has used a great deal of shadow law—including “Dear Colleague” letters and other guidance documents—to regulate how colleges and universities adjudicate student conduct cases. While the guidance concerning burden of proof may have attracted the most attention,<sup>346</sup> DOE has gone well beyond mandating (or even strongly encouraging) the adoption of certain procedures. In enforcing Title IX against universities, DOE OCR officials have required that universities change the definitions of student conduct offenses.<sup>347</sup> Whatever the merits of various university policies created and amended pursuant to DOE diktat, scholars may wish to consider whether federal shadow law should regulate sexual practices—among other behavior—of millions of people.

*Declining faculty influence.* The rapid amendment of student conduct rules and procedures in response to federal agency demands illustrates the waning power of faculty more generally. Scholars of higher education have observed that the prestige and power of university faculty members have declined significantly since the heady decades following World War II.<sup>348</sup> On campuses at which faculty have tried to slow or stop the adoption of rules written in response to DOE guidance, administrators have enacted them anyway. At Harvard Law School, for example, the due process concerns raised by law faculty did not stop the university from agreeing to adopt new rules demanded by

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<sup>344</sup> See, e.g., Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 279 (1998).

<sup>345</sup> See 5 U.S.C. § 553 (2012) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. . .”).

<sup>346</sup> See Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 642 (2016); Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 143–44 (2013).

<sup>347</sup> See *supra* notes 156–59 and accompanying text (documenting how DOE caused the University of New Mexico to change its definition of sexual harassment, relying upon its own Dear Colleague letter as authority).

<sup>348</sup> See generally MARTIN J. FINKELSTEIN ET AL., *THE FACULTY FACTOR: REASSESSING THE AMERICAN ACADEMY IN A TURBULENT ERA* 15–16, 299–306 (2016).



DOE.<sup>349</sup> The DOE press release noted the “strong leadership” of the law dean and university president who adopted policies—such as the “preponderance of the evidence” standard and new rules concerning appeals—over vehement faculty objection.<sup>350</sup> Whatever system one might prefer for campus discipline cases, there was once a day in which faculty members would design it. Those days have departed.

*Possible disparate treatment of victims by race.* As mentioned in the Introduction, this Article focuses on the likely disparate treatment of college and university students accused of misconduct and does not devote much attention to possible disparate treatment of complainants and other victims. The treatment of victims, however, merits serious attention. First, victims who do not receive appropriate responses from colleges and universities are at risk of leaving school or otherwise enjoying lesser access to educational opportunities. Second, if victims of different races are treated differently, institutions send a terrible message about their commitment to racial equality. Because students of different races may have different attitudes toward campus police and other institutional officials, college and university leaders should consider how best to encourage reporting by assault victims from disadvantaged populations. They should also consider how to provide resources that serve students of all backgrounds.

*Intersectionality.* Finally, the issues presented in this Article raise potentially competing claims for justice by disadvantaged groups—that is, minority men concerned about racial bias in campus discipline processes, and women seeking protection from sexual violence. This is an oversimplification of the issue, but the tension is real. Most Title IX respondents are men, and racial bias in the adjudication of student conduct will injure black men most of all. Concurrently, most campus sexual assault complainants are women, and any criticism of Title IX enforcement can be seen as an impediment to long-overdue efforts to protect women from campus predation. Similar tension has been observed during efforts to reform the adjudication of rape in criminal courts, with some critics arguing that new evidentiary rules designed to help prosecutors win cases risked the wrongful conviction of minority men.<sup>351</sup> Another observer, the member of Congress who led the effort to enact the new rules, called them “a triumph for the public—for the women who will not be raped and the chil-

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<sup>349</sup> See Elizabeth Bartholet et al., *supra* note 91 (listing concerns of faculty).

<sup>350</sup> *Harvard Law School Found in Violation of Title IX, Agrees to Remedy Sexual Harassment, Including Sexual Assault of Students*, U.S. DEP'T OF EDUC., (Dec. 30, 2014), <https://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-including-sexual-assault-students> [https://perma.cc/KP8D-AX5M].

<sup>351</sup> See, e.g., Baker, *supra* note 17, at 592 (“Poor, minority men with an alleged prior record will be much more likely to be falsely identified, improperly tried, and wrongfully convicted for stranger rapes that they did not commit.”).

dren who will not be molested.”<sup>352</sup> The rules continue to inspire scholarly debate decades later.<sup>353</sup>

As discussions ensue among campus administrators, faculty, students, and others with an interest in how universities regulate student conduct—particularly sexual misconduct—it may prove wise to consider intersectional analyses.<sup>354</sup> As Professor Crenshaw has discussed, women of color are not simply women who happen to be members of minority groups, nor are they members of minority groups who happen to be women. Instead, their “intersectional identities . . . as women of color” yield oppression not fully addressed by anti-racism and anti-sexism efforts alone.<sup>355</sup>

When campus leaders move to ameliorate racial injustice in college and university discipline systems, they should seek feedback from diverse constituencies, thereby increasing the odds that pursuing justice for one group does not cause harm to another. Robust action against campus sexual assault need not require racial injustice, and colleges and universities should prove able to respond to the problem identified in this Article without hindering appropriate enforcement of well-written campus rules.

#### CONCLUSION

College and university disciplinary procedures almost certainly excessively punish black students, along with members of other disadvantaged minority groups. Campus leaders should act now to collect demographic data that would allow analysis of how their discipline systems affect students of different races. Further, using its authority under the Civil Rights Act, the U.S. Department of Education should mandate the collection of this data and should establish nationwide standards for data reporting so that students, faculty, administrators, and the public can compare one institution with another. Concurrently, colleges and universities should act to reduce the effect of implicit bias on the student discipline process, along with other factors that contribute to disparate impact.

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<sup>352</sup> See 140 CONG. REC. H23,602 (daily ed. Aug. 21, 1994) (statement of Rep. Susan Molinari) (discussing Federal Rules of Evidence 413, 414, and 415).

<sup>353</sup> See, e.g., Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 795 (2013).

<sup>354</sup> See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–42 (1991).

<sup>355</sup> See *id.* at 1243–44. For earlier thoughts on intersectionality—in writings not using that term of art—see BAYARD RUSTIN, *Black Women and Women’s Liberation*, in *TIME ON TWO CROSSES: THE COLLECTED WRITINGS OF BAYARD RUSTIN* 256–57 (Devon W. Carbado & Donald Weise eds., 2003) (discussing, among other topics, the role of gay men such as Rustin in the civil rights movement and the relationship of black women to mainstream feminist activism); see also *id.* at 284, *Black and Gay in the Civil Rights Movement: An Interview with Open Hands* (“Goodness gracious! You’re a socialist, you’re a conscientious objector, you’re gay, you’re black, how many jeopardies can you afford?”).