#METOO AND THE PROCESS THAT'S DUE: SEXUAL MISCONDUCT WHERE WE LIVE, WORK, AND LEARN

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The #MeToo movement has been instrumental in bringing attention to the pervasiveness of sexual harassment and sexual assault (collectively, sexual misconduct[1]) in all walks of life and in all environments, including at work, school, home, and out in public. But the movement has also brought with it a great deal of confusion about how we define sexual misconduct and whether and when legal liability attaches. Part of the confusion can be blamed on the fact that at least three discrete areas of law can possibly apply to sexual misconduct—criminal law, Title VII (when the sexual misconduct takes place in the workplace), and Title IX (when the sexual misconduct takes place in schools and universities). Adding to that confusion, there are several inconsistencies between how these three areas of the law address issues surrounding sexual misconduct. The most prominent of these inconsistencies is the varied due process protections that apply depending on where the sexual misconduct takes place. This Article will discuss these inconsistencies and will address the issue of whether these differences can be justified. In the end, this Article concludes that the increased due process protection for Title IX cases (compared to Title VII cases) cannot be justified. Thus, it proposes a compromise response to answer the question—how much process is due?

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1. Especially in the wake of #MeToo, many scholars have begun referring to "sexual misconduct" as an umbrella term to encompass both sexual harassment and sexual assault. *See, e.g.*, Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 40 n.18 (2019); Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1151 n.17 (2019) (describing criminal law, Title IX, and Title VII as the "law of sexual misconduct"). *But see* Nancy Chi Cantalupo, *Title IX Symposium Keynote Speech: Title IX & the Civil Rights Approach to Sexual Harassment in Education*, 25 ROGER WILL. U. L. REV. 225, 226 (2020) (disagreeing with the use of "sexual misconduct" and explaining why "sexual harassment" is and should be the umbrella term).

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I. INTRODUCTION

Sexual misconduct can take place anywhere and can vary widely in its severity. It could involve "cat calls" from an all-male construction crew to a woman walking by on her way into work.[2] It might be a guy at a bar groping a woman's butt as she walks by.[3] A man at work could tell his female coworker the graphic sexual things he would like to do to her.[4] A female college student could walk by a fraternity house party to hear the chant—"No means yes! Yes means anal!"[5] Another female college student dancing at that same fraternity party might be grabbed, groped, and kissed by a male college student she does not know.[6] A woman's male supervisor might suggest to her that she should flirt and use her sex appeal to get a customer to do business with the company.[7] Another supervisor might ask his female subordinate to accompany him to the hotel bar when they are out of town on business together. She might agree because she is worried that he will harm her career if she says no. For that same reason, she might eventually give into his repeated requests that she join him in his room, leading to unwanted (but ultimately consensual) sex.[8] In a dorm room at a college, a female student might be shocked when a male student who she thought was a friend pushes her down, gets on top of her, and has sex with her despite her continually stating "no."[9] Or a young woman might be walking home from her waitressing

2. *See Is Catcalling Sexual Harassment*, MESRIANI L. GRP. (Aug. 29, 2019), https://www.mesrianilaw.com/blog/is-catcalling-sexual-harassment [https://perma.cc/RT6M-JK3K].

3. *See* Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why Is the Restaurant Industry So Terrible for Women?*, WASH. POST (Nov. 19, 2017), https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html [https://perma.cc/EXX3-CCP7].

4. Nicole Buonocore Porter, *Relationships and Retaliation in the #MeToo Era*, 72 FLA. L. REV. 797, 799–801 (2020) (telling the story of this type of harassment).

5. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 212 (2011).

6. Taylor Anne, *I Would Rather Be Anywhere but a Frat Party*, ODYSSEY (Mar. 11, 2018), https://www.theodysseyonline.com/went-frat-party-hated-it [https://perma.cc/S9SA-22KY].

7. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993).

8. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60 (1986).

9. *See, e.g.*, Commonwealth v. Berkowitz, 609 A.2d 1338, 1340 (Pa. Super. Ct. 1992).

shift at a bar when she might be grabbed by a stranger hiding in the alley, who rapes her behind a dumpster.[10]

All of these situations might fall under the umbrella of "sexual misconduct." And all of them have been the subject of the #MeToo movement.

The #MeToo movement is still going strong years after the Harvey Weinstein story broke and Alyssa Milano asked Twitter users to tweet using the hashtag #MeToo if they had been sexually harassed or assaulted.[11] Although this was not the first use of "metoo,"[12] it did dramatically change the way that we talk about sexual harassment and sexual assault.

But from the beginning, there was confusion regarding what exactly we were talking about.[13] For instance, in addition to criminal sexual assault, "[s]ome of the reports tagged with #MeToo included workplace behavior that would not violate criminal or civil laws, workplace conduct that was abusive but not sexual or sexist in nature, and sexually violative or sexist behavior in nonworkplace settings."[14] We are still trying to figure out how to define the scope of this movement. Some of the questions we need to answer: what is the difference between sexual assault and sexual harassment? What laws might possibly apply to instances of sexual misconduct and how are these laws similar and different? Does the location where the misconduct takes place matter? As questioned by other scholars, "[S]hould the #MeToo conversation and attendant reforms include nonworkplace-related sexual or sexist encounters?"[15] Some have also raised questions about whether abusive but nonsexual encounters in the workplace are considered part of the #MeToo movement.[16]

In an attempt to answer these questions (and many others), this Article is the first to take a holistic look at the three main areas of law that address sexual misconduct. In doing so, it provides both a descriptive and normative contribution. Descriptively, this Article explores the differences in how the law addresses sexual misconduct depending on where it takes place, including the varied due process protections provided when there is an accusation of sexual misconduct. The normative contribution explores the question of whether these differences

10. Enjoli Francis, *Victim in Brock Turner Stanford Sexual Assault Case Goes Public with Her Name and Memoir*, ABC NEWS (Sept. 4, 2019, 3:24 PM), https://abcnews.go.com/US/victim-brock-turner-stanford-sexual-assault-case-public/story?id=65385613 [https://perma.cc/A7A8-2JNM].

11. Sophie Gilbert, *The Movement of #MeToo: How a Hashtag Got Its Power*, ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainiment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/9KFA-THP5].

12. Activist Tarana Burke created "me too" in 2007 to help girls and women of color who were sexually assaulted. *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/UG5R-JFR2].

13. *See* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 47 (2019).

14. *Id.* at 50.

15. *Id.* at 56.

16. *Id. See generally* Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227 (2019) (criticizing the New York Times for defining sexual harassment to include only behaviors that are sexual in nature and instead arguing that we need to define harassment more broadly to include all kinds of abusive behaviors at work that occur because of a protected class, even though not explicitly sexual).

can be justified. It ultimately concludes that they cannot and thus proposes a compromise solution which considers the interests of both the accused and victims of sexual misconduct.

This Article proceeds in four additional parts. Part II briefly describes the three discrete areas of the law which most often address sexual misconduct—criminal law, employment discrimination law (through Title VII of the Civil Rights Act of 1964), and higher education law (through Title IX). Part III provides a systematic look at the various differences in how these three areas of law address sexual misconduct, ending with the most significant differences—the varied due process protections which apply depending on where the misconduct took place and therefore which law is at issue. Part IV explores the question of whether the differences in due process protections make sense, *i.e.*, can we justify providing more protection to those accused of sexual misconduct depending on where that misconduct takes place and who the relevant actors are? Answering this question in the negative, this Part then provides a compromise solution to the question: how much process is due? Finally, Part V briefly concludes.

II. THREE AREAS OF LAW WHICH ADDRESS SEXUAL MISCONDUCT

How the law treats various forms of sexual misconduct will depend partly on the severity but mostly on where the misconduct takes place.[17] This Part will provide a brief background into the three primary areas of the law that most often will apply to sexual misconduct—criminal law, Title VII, and Title IX.[18]

A. Criminal Law

When one thinks of sexual assault (or rape, as it is often called), one mostly likely thinks about criminal law as there is a long history of states criminalizing sexual assault and prosecuting offenders.[19] Rape was initially considered unlawful not because of the effect it had on the victim (most often a woman) but because it was considered a property crime against the woman's father or

17. *See* Tuerkheimer, *supra* note 1, at 1152 ("[A]s a practical matter, because sexual assault is widely perceived as less serious when it is perpetrated by a fellow student or by a co-worker, the criminal law tends to become less germane in locations also governed by a separate legal regime.").

18. What might be considered missing from this list is tort law. It is certainly possible for a victim of sexual misconduct to bring a civil suit for assault and battery or perhaps intentional infliction of emotional distress. *See* Nancy Leong, *Them Too*, 96 WASH. U.L. REV. 941, 991 (2019); Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 970 (2016) (stating that tort law is a viable and helpful form of redress for victims of sexual misconduct). *But see* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 818 (1991) (stating that, in theory, relief under tort law for intentional infliction of emotional distress could be available but, in most cases, things like soliciting sexual favors are not extreme and outrageous conduct). For instance, the second example in the opening paragraph—the bar patron grabbing a woman's butt in the bar—could constitute the basis of a civil claim for assault and battery, but the likelihood of that claim being brought (including the difficulty in perhaps even identifying the perpetrator) is very small. Thus, this article will not be addressing tort law.

19. *See* Swan, *supra* note 18, at 968–69 (describing rape as a "quintessential criminal wrong").

husband.[20] As first constituted, rape was defined as: "the carnal knowledge of a woman, forcibly and against her will."[21]

Prosecuting rape was often difficult.[22] For instance, most states required force or the threat of force, and in order to prove there was sufficient force, the victim had to resist the attack. In fact, the victim often had to resist as much as possible to demonstrate that the force was sufficient to overcome her lack of consent.[23] For instance, in *Brown v. State*, a sixteen-year-old girl was walking past the defendant when he attacked her.[24] She testified that she screamed and tried to get away the entire time he raped her.[25] Although there was blood (because she had been a virgin), the court noted that:

> The only evidence of a struggle was a one-inch tear in her underwear; there were no bruises on her body.[26] Overturning the defendant's conviction, the court stated that there "must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. . . . When one pauses to reflect upon the terrific resistance which the determined woman should make, [the allegation here] is well-nigh incredible."[27]

In the 1970s, states began reforming their rape laws.[28] One way of doing so was to explicitly state in the statutes that resistance is not required.[29] Some states also began writing laws which recognized nonconsensual sex (but without force or threat of force) as a lesser form of sexual assault.[30] But in order to be prosecuted for the most penalized form of sexual assault, most states require force or threat of force even today.[31] Accordingly, even though young people in high school and college are often taught that sex without consent is rape, they are unlikely to see a rape conviction from unconsented to sex without another aggravating

20. *Id.* at 969 (noting that rape was initially understood as a violation of a man's property right in a woman rather than a harm to the woman herself); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1141 n.170 (1986).

21. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 11 (1998) (quoting WILLIAM BLACKSTONE, COMMENTARIES * 210).

22. *See id* at 6 (describing the fact that rape as a crime began because all sex outside of marriage was unlawful so the only way women could not be found guilty is to assert that they had not engaged in the actus reus of the crime—that the out-of-wedlock sex was forced upon them).

23. *See, e.g.*, Brown v. State, 106 N.W. 536, 538 (Wis. 1906).

24. *Id.* at 537.

25. *Id.*

26. *Id*.

27. *Id.* at 538–39.

28. *See, e.g.*, New Jersey *In re* M.T.S., 609 A.2d 1266, 1272 (N.J. 1992).

29. *Id.* at 1274.

30. Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 628–32 (2005) (noting that sixteen states criminalize sexual penetration that is nonconsensual without force, but these crimes are often subject to less punishment and more than half of the statutes treat such a crime as a misdemeanor); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO STATE J. CRIM. L. 441, 450 (2016) (stating that some states require affirmative consent but only for crimes that are less serious than the most serious form of rape).

31. *See* Deborah Tuerkheimer, *Rape On & Off Campus*, 65 EMORY L.J. 1, 4, 15 (2015) (noting that the Model Penal Code and more than half of the states still require force for a rape conviction).

factor.[32] Overall, prosecution rates for sexual assault crimes are very low. One study explained that out of every 1,000 sexual assaults, 975 perpetrators will walk free.[33]

B. Title VII

Another major area of law which addresses sexual misconduct is employment discrimination law, specifically Title VII of the Civil Rights Act of 1964.[34] This statute was passed primarily to improve the employment opportunities of racial minorities, specifically, African American individuals.[35] As initially drafted, it prohibited employment discrimination based on race, color, religion, and national origin.[36] In 1964 and on the eve of passage, however, an amendment was proposed on the floor of the House of Representatives to add "sex" as a protected class.[37] This apparently was done because the representative who proposed the amendment was opposed to Title VII and believed that if he was successful in adding "sex" as a protected class, then even those who supported Title VII would feel compelled to vote against it.[38] The strategy backfired, and Title VII (including "sex" as a protected class) was passed and signed into law in 1964, and went into effect on July 2, 1965.[39]

The development of sexual harassment as a form of sex discrimination did not occur until many years after the passage of Title VII.[40] Originally, even in cases where supervisors demanded sexual favors from subordinates, and attached job benefits or detriments to the subordinate's willingness to acquiesce in the demands,[41] courts sometimes held that the harassment was not based on the

32. *See, e.g.*, Commonwealth v. Berkowitz, 609 A.2d 1338, 1342 (Pa. Super. Ct. 1992) (reversing the conviction of the defendant and noting that although resistance is not required, force still is; rejecting argument that any force used to overcome non-consent is force under the statute); *see also* Tuerkheimer, *supra* note 31, at 1 (noting the disconnect between the cultural norms surrounding rape and how most states define rape to require force or threat of force).

33. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Jan. 24, 2022) [https://perma.cc/LQP8-CV3G]; Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 639 (2018) (stating that criminal prosecutions of reported sexual assaults are rare). One problem with criminal law prosecutions is many law enforcement officers believe rape victims are more likely to falsely report than other crimes, despite the lack of empirical support backing this up. Clarke, *supra* note 1, at 42–43.

34. 42 U.S.C. § 2000e–2(a)–(m).

35. *Id.* § 2000e–2(h).

36. *Women's Rights and the Civil Rights Act of 1964*, NAT'L ARCHIVES, https://www.archives.gov/women/1964-civil-rights-act#:~:text=The%20Civil%20Rights%20Act%20of%201964%20prohibited%20discrimination%20based%20on,attempt%20to%20prevent%20its%20passage (May 24, 2021) [https://perma.cc/HCY8-KTSV].

37. 110 CONG. REC. 2577–2584 (1963).

38. *See* Estrich, *supra* note 18, at 816–17 (discussing how sex was added to Title VII as an attempt to defeat the bill).

39. Lynn Ridgeway Zehrt, *Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Educational Employment*, 102 MARQ. L. REV., 701, 706, 731 (2019).

40. *See* Estrich, *supra* note 18, at 823.

41. This is what we now call "quid pro quo" harassment. Although it is no longer a legally meaningful term, it's still used to describe the situation where a supervisor demands sexual favors, explicitly or implicitly

subordinate's sex (so therefore was not sex discrimination) but instead was just "personal."[42] Eventually, courts began to recognize that but for the woman's sex, her supervisor would not be demanding sexual favors, and therefore, this type of harassment *was* sex discrimination under Title VII.[43]

The theory of "hostile work environment harassment"[44] was even slower to develop. The first Court of Appeals case to recognize the theory was not a sexual harassment claim at all, but rather, one based on national origin or ethnicity. In *Rogers v. EEOC*,[45] the Fifth Circuit held that the plaintiff had stated a valid Title VII claim based on an allegation that the dentist the plaintiff worked for segregated patients into different waiting rooms based on their ethnicity: one waiting room for Hispanics and one waiting room for non-Hispanics.[46] The plaintiff, who was Hispanic, brought a Title VII claim, and the court held that an employee's protections under Title VII extend beyond the economic aspects of employment.[47] The court emphasized in this case that Title VII is broad and protects against a working environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[48]

It was not until 1986 that the Supreme Court first decided that hostile work environment claims were actionable even if the plaintiff did not suffer any tangible economic harm.[49] In *Meritor Savings Bank, FSB v. Vinson*,[50] the plaintiff was a teller at a bank who was harassed by Sidney Taylor, a vice president of the bank.[51] The harassment began shortly after she finished her probationary period as a teller-trainee, when Taylor invited her out to dinner and suggested that they go to a motel to have sex.[52] At first, she refused, but because she feared losing her job, she eventually agreed.[53] Subsequently, Taylor made repeated demands for sexual favors—at least forty times—over the next several years.[54] He also fondled her in front of other employees, followed her to the women's restroom, exposed himself to her, and even forcibly raped her on several occasions.[55] Disagreeing with the employer's arguments that "Congress was only concerned with

threatening an adverse employment action if the subordinate does not agree to the demands. *See id.* at 831, 834–35 (describing the prototypical quid pro quo harassment situation). *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32–40 (1979) (discussing quid pro quo harassment).

42. MACKINNON, *supra* note 41, at 59.

43. *Id.* at 60.

44. The EEOC first issued regulations in 1980 referring to two kinds of harassment, quid pro quo and hostile environment. *See* 29 C.F.R. § 1604.11(a) (1985). This terminology was derived from Professor Catharine MacKinnon, who first put a name to sexual harassment and labeled it as discrimination. MACKINNON, *supra* note 41.

45. 454 F.2d 234 (5th Cir. 1971).

46. *Id.* at 240–41.

47. *Id.* at 238.

48. *Id.*

49. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

50. *Id.*

51. *Id.* at 59.

52. *Id.* at 60.

53. *Id.*

54. *Id.*

55. *Id.*

'tangible loss,' of an 'economic character,' and not purely 'psychological aspects of the workplace environment,' the Court stated that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[56] While recognizing the hostile environment claim, the Court noted that in order to be actionable, the harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[57] This case started the rise of harassment claims, which increased even more after Congress amended Title VII to allow for compensatory and punitive damages.[58] There are other important Supreme Court decisions which address the scope of a harassment claim under Title VII; those cases will be discussed below as relevant to some of the differences between how the various laws operate.[59]

C. Title IX

Title IX, which prohibits discrimination based on sex in educational institutions, was passed as part of the Education Amendments of 1972.[60] It was patterned after the Civil Rights Act of 1964; specifically, Title VI of that Act provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[61] Because that title of the Civil Rights Act does not prohibit discrimination based on sex, the legislative history of Title IX made clear its intent was to model Title IX after Title VI of the 1964 Civil Rights Act.[62] As finally enacted in 1972, Title IX states "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[63]

The law prohibits discrimination on the basis of sex in three general areas: (1) "no one can be 'excluded from participation in' any education program or activity"; (2) "no one can be 'denied the benefits of' any education program or activity; and (3) "no one can be 'subjected to discrimination under' any education program or activity."[64] The third one has been interpreted to specifically address sexual harassment in educational institutions.[65]

56. *Id.* at 64 (citations omitted).
57. *Id.* at 67 (citations omitted).
58. Civil Rights Act of 1991, 42 U.S.C. § 1981a (2018).
59. *See generally infra* Part III.
60. Civil Rights Act of 1964, 42 U.S.C. § 2000d (2018).
61. *Id.*
62. Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 326 (2012).
63. 20 U.S.C. § 1681 (2018).
64. Anderson, *supra* note 62, at 328.
65. *Id.*

At the time of Title IX's initial passage, it was unclear whether Title IX would allow a private right of action, as opposed to a finding of noncompliance which could result in the withdrawal of federal financial assistance.[66] The first case allowing a private cause of action was *Cannon v. University of Chicago*,[67] where a student sued the university claiming she was denied admission to medical school based on her sex.[68] The district court dismissed the claim, stating Title IX did not provide a private right of action, and the Seventh Circuit affirmed.[69] The Supreme Court reversed, noting that Title IX was based on Title VI of the Civil Rights Act of 1964 and that the legislative history of Title IX demonstrated that Congress expected that, similar to Title VI, Title IX would be enforced by private action.[70] A few years later, in *North Haven Board of Education v. Bell*,[71] the Court held that Title IX applies to employment discrimination in a case where a woman claimed that she was discriminated against when the school refused to rehire her after she returned from maternity leave.[72] Despite the applicability of Title VII to employment discrimination based on sex, employment discrimination claims based in colleges and universities are often litigated under Title IX.[73]

In 1992, the Supreme Court first addressed whether plaintiffs could collect damages under Title IX. In *Franklin v. Gwinnett County Public Schools*,[74] the plaintiff was a high school student subjected to sexual harassment by a teacher and coach for over two years.[75] The student sued, seeking damages from the school for allowing the harassment to continue.[76] In deciding whether monetary damages were available under Title IX, the Court stated that it would "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."[77] Because Congress did not explicitly limit remedies, the Court found that a "damages remedy is available for an action brought to enforce Title IX."[78]

It wasn't until 1997 that the Office of Civil Rights ("OCR") first issued guidelines ("Guidance") addressing how schools should deal with the burgeoning problem of sexual misconduct in educational institutions.[79] This Guidance explained that "[s]exual harassment of students can be a form of discrimination prohibited by Title IX" and that schools must have policies and procedures in

66. *Id.* at 335.
67. 441 U.S. 677 (1979).
68. *Id.* at 694.
69. *Id.* at 683.
70. *Id.* at 710–11.
71. 456 U.S. 512 (1982).
72. *Id.* at 530.
73. Anderson, *supra* note 62, at 341. *But see* Zehrt, *supra* note 39 (discussing the circuit split on this issue).
74. 503 U.S. 60 (1992).
75. *Id.* at 63–64.
76. *Id.*
77. *Id.* at 66.
78. *Id.* at 76.
79. U.S. DEP'T OF EDUC., OFFICE FOR C.R., SEXUAL HARASSMENT GUIDANCE (1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html [https://perma.cc/3TZ7-E5WG].

place that provide for "a prompt and equitable procedure for resolving sex discrimination complaints."[80]

Relevant to this article, the Guidance also indicated that schools may be liable for student-on-student sexual harassment (*i.e.*, peer harassment) if the school allowed a hostile environment to persist, knew or should have known about the harassment, and failed to take immediate and appropriate actions to correct the situation.[81] The Guidance also stated that schools must "establish grievance procedures, provide for prompt and equitable resolution of sex discrimination complaints, publicize the procedures and full sexual harassment policy, monitor employees to avoid vicarious liability, and, after notice of possible harassing conduct, a school must take immediate and appropriate steps" to remedy it.[82]

In 1998, the Court first addressed the standard for receipt of damages in *Gebser v. Lago Vista Independent School District*.[83] In *Gebser*, the plaintiff, a high school student, participated in a sexual relationship with one of her teachers.[84] Although the relationship was hidden, eventually a police officer discovered the student and teacher having sex, and the school subsequently fired the teacher.[85] The Court refused to support an award of damages for the plaintiff "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[86] Finding that the school district neither had this actual notice nor acted deliberately indifferent, the Court affirmed the appellate court's decision that the student could not recover damages for the teacher's sexual harassment.[87] What constitutes actual notice and "deliberately indifferent" is still hotly debated today.[88]

In the first Supreme Court case of peer-on-peer harassment, *Davis v. Monroe County Board of Education*,[89] a fifth-grade student was subject to prolonged and egregious sexual harassment by a classmate.[90] The student complained to several teachers, but they did nothing to stop the harassment even though the

80. U.S. DEP'T OF EDUC., OFFICE FOR C.R., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html [https://perma.cc/9PAB-Z2TY].

81. *Id*.

82. *Id*.

83. 524 U.S. 274, 277 (1998).

84. *Id.* at 278.

85. *Id.*

86. *Id.* at 277.

87. *Id.* at 292–93.

88. *See, e.g.*, Fatima Goss Graves & Adaku Onyeka-Crawford, *Restoring Students' Protections Against Sexual Harassment in Schools*, ABA (Dec. 31, 2015), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2015--vol--41-/vol-41-no-1-lurking-in-the-shadows-the-supreme-court/restoring--students-protections-against-sexual-harassment-in-sch/ [https://perma.cc/LU5T-D49X]; Emily Suski, *The Title IX Paradox*, 108 U. CALIF. L. REV. 1147, 1148 (2020); Recent Case, Doe No. 55 v. Madison Metropolitan School District, 897 F.3d 819 (7th Cir. 2018), 132 HARV. L. REV. 1550, 1550 (2019).

89. 526 U.S. 629 (1999).

90. *Id.* at 633.

plaintiff's grades suffered and she contemplated suicide.[91] The harassing behavior stopped only because the accused classmate was arrested and pled guilty to sexual battery charges.[92] Mirroring its decision in *Gebser*, the Supreme Court held that the school could be liable for its "deliberate indifference to known acts of peer sexual harassment" when the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[93] The Court found that the school could be liable for damages because the plaintiff's allegations demonstrated that school officials acted with deliberate indifference to harassment that was "severe, pervasive, and objectively offensive," and "had a concrete, negative effect on her . . . ability to receive an education."[94]

In 2001, the OCR issued revised guidelines ("Revised Guidance") intended to provide guidelines for schools to effectively respond to the sexual misconduct of students.[95] The Revised Guidance made clear that in order to comply with Title IX, "[s]trong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it."[96]

Because the standard for getting damages under Title IX is so difficult—the plaintiff has to establish that the university knew of the sexual misconduct and was deliberately indifferent to it—many victims of sexual misconduct prefer to use their university's internal grievance process to remedy the sexual misconduct.[97] But for a long time, universities did not take their responsibilities under Title IX very seriously, and underreporting was (and still is) a significant problem on college campuses.[98]

The Obama Administration sought to ramp up the OCR's role in encouraging universities to better handle sexual misconduct.[99] In 2011, the OCR released what is referred to as the "Dear Colleague Letter"[100] discussed more below.[101] Between 2011 and 2016, OCR increased the pressure on schools to comply with their Title IX obligations.[102] This oversight included the Dear Colleague Letter,

91. *Id.* at 633–34.

92. *Id.* at 634.

93. *Id.* at 633.

94. *Id.* at 653–54.

95. U.S. DEP'T OF EDUC., *supra* note 80.

96. *Id.*

97. *See* Nancy Chi Cantalupo, *The Civil Rights Approach to Campus Sexual Violence*, 28 REGENT U.L. REV. 185, 193 (2015) (noting that Title IX empowers victims to make decisions for themselves about how and when to report sexual misconduct).

98. *See, e.g.,* Tuerkheimer, *supra* note 1, at 1160–61.

99. *See, e.g.*, Tuerkheimer, *supra* note 31, at 7 n.31 (noting there were several complaints about universities handling sexual assaults, which led to OCR investigating dozens of universities); Cantalupo, *supra* note 97, at 186; Alexandra Brodsky, *A Rising Tide: Learning about Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 823–24 (2017).

100. Letter from U.S. Dep't of Educ., Off. for C.R., Dear Colleague Letter, (Apr. 4, 2011) [hereinafter Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html [https://perma.cc/7GXG-KFLJ].

101. *See infra* Section III.A.3.

102. *See, e.g.*, Dear Colleague Letter, *supra* note 100; Mann, *supra* note 33, at 643–44.

but it also included OCR engaging in public shaming by listing schools which, according to OCR, were not complying with Title IX.[103]

More recently, a counter-narrative has emerged by those who are skeptical about the prevalence of sexual assault on campuses. This narrative has argued that universities have gone too far in the direction of protecting alleged victims of sexual misconduct, and in the process, universities are violating the rights of those accused of sexual misconduct.[104] Under the Trump Administration, with Betsy DeVos as the Secretary of Education, the Office for Civil Rights issued proposed regulations at the end of 2018.[105] In May 2020, the Department of Education issued final regulations, which are explored in detail below.[106]

This Article was being drafted before President Biden took office, but even assuming that the Biden Administration decides to dial back some of the accused-friendly provisions in the regulations, it would take at least a couple of years to do so. Hopefully, the ideas explored in this Article can provide a roadmap for future reform.

III. EXPLORING THE DIFFERENCES

Although there are many differences between these three areas of the law, this Part will summarize the main differences, including: defining sexual assault; defining sexual harassment; the difference between nonconsensual and unwelcome behavior; whether and when the location where sexual misconduct takes place matters; whether individuals are liable under the various laws; when institutions can be found liable; the accused person's right to due process; and the standard of proof used under the various laws. As part of summarizing these differences, this Part also explores the significant differences between how Title IX operated on college campuses during the Obama Administration and how Title IX operates under the Trump/DeVos new regulations even though the administration has changed.

A. Definition of Sexual Assault

1. Criminal Law

The criminal definition of sexual assault (or rape) varies quite a bit among the states.[107] Nevertheless, it is possible to draw some generalizations. For the most serious form of rape, states generally require: penetration (however slight), without consent and against the will of the victim, and with force or threat of

103. Mann, *supra* note 33, at 643–44.

104. *See, e.g.*, Brodsky, *supra* note 99, at 823–24.

105. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61, 462 (proposed Nov. 29, 2018) (codified at 34 C.F.R. pt. 106).

106. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2020).

107. For a discussion of a 50-state survey of criminal laws, see David DeMatteo, Meghann Galloway, Shelby Arnold & Unnati Patel, *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCH. PUB. POL'Y & L. 227, 232–36 (2015).

force.[108] Many states have less serious crimes that would include unconsented to sex without force, and some states have less serious sexual misconduct crimes that include nonconsensual touching.[109] Only a few states use the standard that some colleges have implemented—affirmative consent—where a rape prosecution can stand without force and even if the victim did not verbally protest before or during intercourse.[110] Under this standard, only evidence of the victim's affirmative consent to the sex will defeat the rape prosecution.[111] But generally speaking, as many scholars have noted, most states' criminal laws are woefully behind our culture's understanding of nonconsensual sex as rape.[112]

One example that came out during the height of the #MeToo movement highlights the relatively narrow definition of rape under most criminal laws. Readers likely recall the incident with Matt Lauer, where he allegedly called a female employee into his office, locked the door and proceeded to undress her and then have sex with her.[113] He claimed that she never objected and there was no evidence (when the story first surfaced) that he had used force or threat of force to get her to submit to his advances.[114] The media referred to this incident as a sexual assault[115] but under the law of most states, this would not be a rape (at least not the highest degree of rape).[116] It might be a lesser crime if the state allows a prosecution based on intimidation or coercion[117] or in states that require affirmative consent, but it likely would not constitute sexual assault, as most states define it.[118]

2. Title VII

Title VII does not specifically define sexual assault. Certainly, a sexual assault can be part of an actionable sexual harassment claim under Title VII,[119] but it is not defined separately from sexual harassment.

108. *See, e.g.,* Tuerkheimer, *supra* note 31, at 15 (noting that more than half of the states still require force or threat of force).

109. *See* Estrich, *supra* note 20, at 1133.

110. *See* Tuerkheimer, *supra* note 30, at 448–49 (discussing the affirmative consent standard).

111. *See id.*; *see also* New Jersey *In re* M.T.S., 609 A.2d 1266, 1272 (N.J. 1992).

112. Tuerkheimer, *supra* note 31, at 14.

113. Corinne Heller, *Matt Lauer Fired Amid Sexual Misconduct Allegations: Everything We Know*, E! NEWS (Dec. 1, 2017, 11:50 AM), https://www.eonline.com/news/897519/matt-lauer-fired-amid-sexual-misconduct-allegations-everything-we-know [https://perma.cc/39UF-K7KF].

114. *See id*.

115. *Id*.

116. Tuerkheimer, *supra* note 31, at 15.

117. Estrich, *supra* note 20, at 1115 n.76 (discussing a case where the court implied that mental coercion might be enough to overcome a woman's will).

118. To be clear, as will be discussed below, this would likely constitute sexual harassment under Title VII. *See infra* Section III.A.2.

119. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59–60 (1986) (describing the situation where the plaintiff was forcibly raped by her supervisor).

3. Title IX

Prior to the new regulations, the Dear Colleague Letter made clear that sexual harassment, including sexual violence, is a form of sex discrimination.[120] Sexual violence was defined in the Dear Colleague Letter as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability."[121] The Dear Colleague Letter also states that "[a] number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion."[122]

Under the OCR's new regulations, sexual assault should be defined consistently with the definition in the Clery Act,[123] which in turn defines sexual assault as "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation."[124] Sexual assault under that definition is "[a]ny sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent."[125]

Those provisions also include a definition for rape—"[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim,"[126] and for fondling—"touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity."[127]

It is unclear to me why the drafters chose this somewhat circuitous route to defining sexual assault rather than just defining it directly in the new regulations.

B. Defining Sexual Harassment

If harassment is physical, it might meet the definition of sexual assault, discussed above. Accordingly, this Section will focus on purely verbal harassment.

120. Dear Colleague Letter, *supra* note 100, at 1,3.
121. *Id.* at 1.
122. *Id.* at 1–2.
123. Clery Act, 20 U.S.C. § 1092; 34 C.F.R. § 106.30(a) (2020).
124. 20 U.S.C. § 1092(f)(6)(A)(v) (2013).
125. 34 C.F.R. § Pt. 668, Subpart D, App. A.
126. *Id.*
127. *Id.*

1. Criminal Law

Generally speaking, criminal law does not address what we think of as sexual harassment.[128] For instance, imagine a woman is at a bar, and a man makes inappropriate comments about her looks or clothes or wanting to have sex with her. In most states, this "verbal only" harassment will not be a crime.[129] And if there is a crime that addresses this, one would be hard-pressed to get the police to investigate and prosecutors to prosecute it.

2. Title VII

The elements of harassment under Title VII generally require the harassment to be: (1) because of a protected trait (which applies to all traits protected under Title VII, in addition to other anti-discrimination statutes, not just sex), (2) unwelcome; (3) severe or pervasive so as to create an abusive work environment; and (4) some basis for holding the employer liable for the harassment.[130] This last element will be discussed more below.[131]

One important point before proceeding: the #MeToo movement has been obsessed with harassment that is sexual in nature.[132] But it's important to remember that sexual harassment can also include harassment that is because of a person's sex but not sexual in nature.[133] Imagine a mostly male workplace that is unhappy that there is now a woman working among them. They might do things to harass her that are not sexual in nature but are still designed to make her life miserable because she is a woman.[134] For instance, they might put super glue on her stool, urinate in her locker, or steal her lunch. None of these things are sexual in nature but, if designed to push her out of the workplace because of her sex, and if they met the severe or pervasive test, they would nevertheless constitute sexual harassment.[135] As noted by Professors Soucek and Schultz, this type of sex-based harassment is even more common than harassment that is sexual in nature.[136] Having said that, most of the harassment that the #MeToo movement has been focused on is harassment that is sexual in nature; accordingly, most of this article is addressing that type of harassment.

128. *See* Tuerkheimer, *supra* note 31, at 15.

129. *See id.*

130. Porter, *supra* note 4, at 805 (discussing the elements of a harassment claim).

131. *See infra* Section III.F.1.

132. *See* Porter, *supra* note 4, at 801.

133. Soucek & Schultz, *supra* note 16, at 230, 236 (describing harassment as including all intimidating and offensive statements *because of* sex even if not sexual in nature).

134. *Id.* at 230–31.

135. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (noting that harassment does not need to be motivated by sexual desire in order to be actionable).

136. Soucek & Schultz, *supra* note 16, at 236.

3. Title IX

Before the new regulations, the OCR defined harassment differently from how the courts defined it. As noted above, there was one (fairly high) standard for a victim of harassment to get remedies in court,[137] and a lower standard that OCR would use to investigate a university.[138]

For instance, under the 2011 Dear Colleague Letter, the definition of harassment was "unwelcome conduct of a sexual nature,"[139] including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[140] The Dear Colleague Letter also states that sexual violence is a form of sexual harassment prohibited by Title IX.[141] Finally, it states that when a student harasses another student, harassing conduct creates a hostile environment if the

> [c]onduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single . . . incident of sexual harassment may create a hostile environment if the incident is sufficiently severe.[142]

Under the new regulations, the OCR is attempting to make the definition for OCR enforcement comport with the definition used by courts for awarding remedies.[143] Accordingly, the new regulations define sexual harassment as: "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[144]

Note the difference here between Title VII (severe or pervasive)[145] and Title IX under the new regulations ("so severe, pervasive, and objectively offensive that it effectively denies a person" an education).[146]

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137. As noted above, *supra* Section II.C, the courts define harassment as when the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

138. *See supra* Section II.C.

139. Dear Colleague Letter, *supra* note 100, at 3.

140. *Id.* This part of the definition mimics how the Equal Employment Opportunity Commission first defined sexual harassment in the employment context. *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/sexual-harassment (last visited Jan. 24, 2022) [https://perma.cc/6E6F-TYQK].

141. Dear Colleague Letter, *supra* note 100, at 2–3.

142. *Id.* at 3.

143. *See, e.g.*, Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (noting that harassment does not need to be motivated by sexual desire in order to be actionable).

144. 34 C.F.R. § 106.30(a) (2020). The definition of harassment also includes what we would call "quid pro quo" harassment—"[a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct." *Id.* Finally, sexual harassment is also defined to include sexual assault. This is important and helpful because without specifying that, it might be possible someone could determine that a sexual assault does not meet the definition of harassment—"so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." *Id.*

145. Porter, *supra* note 4, at 805 (discussing the elements of a harassment claim).

146. 34 C.F.R. § 106.30(a) (2020).

C. Unwelcome vs. Non-consensual

1. Criminal Law

Under most states' criminal laws, even when rape or sexual assault does not need to be with "force or threat of force," it must be nonconsensual.[147] In most states, this means that the victim must affirmatively express the lack of consent, and silence is usually not enough.[148]

For instance, in the Matt Lauer story mentioned earlier, the victim did not affirmatively object to the sex initiated by Matt Lauer (although, as the story is told, she certainly did not welcome it).[149] Accordingly, it would be difficult to successfully prosecute him for rape. Similarly, some of Harvey Weinstein's victims did not object to his sexual advances because they were afraid he would hurt their careers if they did object[150] or perhaps hoped he would help their careers if they went along with it.[151] These instances would not be criminal sexual assault or rape in most states because they were not nonconsensual under the law. Of course, some of the stories surrounding Harvey Weinstein were in fact rape and he has been convicted of those, but not all of them could be classified as sexual assault, criminally.[152]

2. Title VII

Under Title VII, as the Supreme Court made clear in the earliest harassment case it decided (in 1986), harassment must be unwelcome, but simply because it was consensual does not mean it was welcomed.[153] As a reminder, this case involved the plaintiff's boss in the bank demanding sex and sexual favors from her about forty or fifty times.[154] She agreed because she was afraid for her job if she did not go along with it.[155] Most of the times she had sex with him, she consented according to the criminal legal definition (although she did testify that he also forcibly raped her on a few occasions).[156] In *Meritor*, the Court made clear that

147. *See* Estrich, *supra* note 20, at 1095, 1121, 1168.

148. A couple of states have an affirmative consent standard, which means that the victim must affirmatively say yes or otherwise indicate consent to the sex and silence is generally indicative of lack of consent. *See supra* notes 110–12 and accompanying text.

149. *See* Heller, *supra* note 113 (discussing the Matt Lauer story).

150. *See* Yohana Desta & Hillary Busis, *These Are the Women Who Have Accused Harvey Weinstein of Sexual Harassment and Assault*, VANITY FAIR (Oct. 12, 2017, 7:34 AM), https://www.vanityfair.com/hollywood/2017/10/harvey-weinstein-accusers-sexual-harassment-assault-rose-mcgowan-ashley-judd-gwyneth-paltrow [https://perma.cc/L38L-T9Y3].

151. *Id.*

152. *Full Coverage: Harvey Weinstein Is Found Guilty of Rape*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html [https://perma.cc/Q92V-QKNT]. Interestingly, his lawyer said in an interview that some of his accusers had willingly had sex with him to further their careers and only later claimed it was nonconsensual. She said: "Having voluntary sex with someone even if it is a begrudging act is not a crime after the fact." *Id.*

153. Meritor Savs. Bank v. Vinson, 477 U.S. 57, 68 (1986).

154. *Id.* at 60.

155. *Id.*

156. *Id.*

just because she consented to the sex does not mean that the boss's advances were welcome.[157] The Court stated, "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[158]

Accordingly, in the stories discussed earlier about Matt Lauer and Harvey Weinstein,[159] some of the events that the media called sexual assault might more accurately be described as sexual harassment because the advances were likely unwelcome, even though some of them might have been consensual under a criminal law definition.

3. Title IX

The Obama administration Dear Colleague Letter did not define consent.[160] Furthermore, many colleges and universities do not specifically define consent in their policies regarding Title IX and sexual misconduct.[161] This, however, is changing, with some states trying to get the colleges to define sexual assault on campus according to an affirmative consent standard.[162] The new regulations basically punted on defining consent, stating: "[t]he Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section."[163] Accordingly, each institution will decide for itself how to define consent in its Title IX policy.

D. Location of Sexual Misconduct

1. Criminal Law

Obviously, rape can and will be prosecuted regardless of where it takes place.[164] Having said that, police and prosecutors are less likely to pursue the prosecution of rapes that happen in the bedroom, especially if the parties were in a consensual relationship.[165]

157. *Id.* at 68.

158. *Id.*

159. *See supra* notes 149–52 and accompanying text.

160. Although, despite the lack of consent definition in the Dear Colleague Letter, there is some evidence that the Obama Administration defined consent to require affirmative consent. Tuerkheimer, *supra* note 30, at 442.

161. Tuerkheimer, *supra* note 31, at 7.

162. *See, e.g.*, Tuerkheimer, *supra* note 30, at 442 (noting that 1,400 institutions have adopted affirmative consent rules); Tuerkheimer, *supra* note 31, at 3 (stating that colleges are converging on requiring an affirmative expression of consent).

163. 34 C.F.R. § 106.30(a) (2020). The idea was to leave it up to individual schools, whose definitions might be mandated by state law.

164. Briana Bierschbach, *This Woman Fought to End Minnesota's "Marital Rape" Exception, and Won*, NPR (May 4, 2019, 7:52 AM), https://www.npr.org/2019/05/04/719635969/this-woman-fought-to-end-minnesotas-marital-rape-exception-and-won [https://perma.cc/KJ7Y-9KE9] (noting that marital rape was illegal in all fifty states by 1993, but loopholes still existed).

165. Estrich, *supra* note 20, at 1109, 1142–43, 1172.

2. Title VII

Although Title VII applies to harassment in the workplace, it is possible for a plaintiff to have a valid harassment claim even if the harassment took place outside of the main workplace location.[166] For instance, there have been cases where the parties were traveling for business when the harassment took place.[167] Having said that, the location of the harassment might influence the court's analysis of whether the harassment was "unwelcome."[168]

3. Title IX

Prior to the new regulations, Title IX protected students from sexual harassment "in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."[169] The Dear Colleague Letter elaborated on this by stating that:

> Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. . . . Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.[170]

Under the new regulations, the rule has changed. The regulations now state that universities are responsible for responding to conduct that occurs within its "education program or activity," which includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."[171] As others have opined, this would probably include an assault in a fraternity house but not in an off-campus apartment, even if the effects of that assault are felt by the victim in her education program.[172]

166. MACKINNON, *supra* note 41, at 65–66.

167. *Id.* at 33–34 (describing such a case).

168. Estrich, *supra* note 18, at 830 (nothing that a woman who goes to dinner with her boss during a business trip is likely to be seen as welcoming the conduct).

169. Dear Colleague Letter, *supra* note 100, at 3–4.

170. *Id.* at 4.

171. 34 C.F.R. § 106.44(a) (2020).

172. *9 Things to Know About Betsy Devos' Proposed Title IX Rule*, KNOW YOUR IX, https://actionnetwork.org/user_files/user_files/000/033/151/original/Two_pager_on_proposed_rule_(1).pdf (last visited Jan. 20, 2022) [https://perma.cc/9PT9-6L6U].

E. Individual Liability

1. Criminal Law

Individuals can of course be criminally liable for sexual assault. As discussed earlier, it is highly unlikely that an individual will be prosecuted for verbal harassment, or even offensive touching (such as a guy at a bar groping a woman's butt).[173] Technically, that is simple assault and battery and might even constitute a lower level of sexual assault, but it is highly unlikely to get prosecuted.[174]

Individuals can be sued in tort for assault and battery and possibly for intentional infliction of emotional distress based on verbal harassment, but it is relatively rare, especially if the perpetrator does not have "deep pockets."[175]

2. Title VII

Perpetrators of harassment or assault in the workplace cannot be held individually liable under Title VII.[176] Some state anti-discrimination laws allow individuals to be sued but most do not.[177]

3. Title IX

Similar to Title VII, there is no individual liability under Title IX.[178] Accordingly, a victim of a sexual assault cannot sue the accused under Title IX. Her only claim is against the institution, or she can proceed under the university's grievance procedure.[179]

F. Institutional (Employers and Universities) Liability[180]

1. Title VII

First, in order for an institution to be liable under Title VII, the complainant must be an employee or applicant of an employer who has fifteen or more

173. *See supra* text accompanying notes 128–29.

174. *Cf.* Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 707 (separating out acts of "groping" from "potentially criminal acts such as sexual assault").

175. *Cf.* Estrich, *supra* note 18, at 818 (discussing the difficulty with using tort law for harassment and assault); Clarke, *supra* note 1, at 43 n.37 (stating that tort law is no answer to sexual misconduct and the shortcomings of the law); Swan, *supra* note 18, at 968 (noting that few students use tort claims as a means of addressing sexual assault on campus but arguing in favor of using a tort model to address sexual assault on campus).

176. *See* SUSAN GROVER, ET AL., EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK, 41 (2d ed. 2014) (stating that although the Supreme Court has not yet weighted in on this issue, the majority of circuits have held that there is no individual liability under Title VII).

177. *See id.*

178. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 284 n.14 (2016).

179. Cantalupo, *supra* note 5, at 225–26.

180. This Section is not addressing criminal law because institutions cannot be held criminally liable for sexual harassment or assault.

employees.[181] Accordingly, although people talked about the potential Title VII liability for Harvey Weinstein's actions, it's not clear whether some of his victims would be considered employees or applicants.[182]

The test for liability depends on who is the harasser.[183] If the harasser is a supervisor,[184] unless the supervisor engaged in a "tangible employment action"[185] against his subordinate because she refused his sexual advances, the employer has the opportunity to prove a two-part affirmative defense: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[186]

Referring back to the incident involving Matt Lauer, where he allegedly sexually assaulted a coworker,[187] and assuming that Lauer could be considered the victim's supervisor, the story indicated that after the assault, he took no further actions.[188] Accordingly, if she had sued, the employer would not automatically be liable because there was not a tangible employment action.[189] And the record also reflects that she never complained about Lauer's actions, and she eventually quit; accordingly, it is highly unlikely that the employer would be found liable in this case because the employer would be able to prove both prongs of the affirmative defense.[190]

If the harasser is a coworker, then the employer is liable if it was negligent, which means that it knew or should have known about the harassment and failed to take appropriate steps to remedy it.[191]

2. Title IX

Under Title IX, prior to the new regulations, if a school knew or reasonably should have known about student-on-student harassment that created a hostile environment, "Title IX requires the school to take immediate action to eliminate

181. 42 U.S.C. § 2000e(b) (West 2021).

182. Nicole Buonocore Porter*, Ending Harassment by Starting with Retaliation,* 71 STAN. L. REV. ONLINE 49, 49 (2018) (citing Yohana Desta & Hillary Busis, *These Are the Women Who Have Accused Harvey Weinstein of Sexual Harassment and Assault*, VANITY FAIR (Oct. 12, 2017, 7:34 AM), https://www.vanityfair.com/hollywood/2017/10/harvey-weinstein-accusers-sexual-harassment-assault-rose-mcgowan-ashley-judd-gwyneth-paltrow [https://perma.cc/L38L-T9Y3]).

183. Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998) (discussing the differences between supervisor harassment and coworker harassment).

184. The Supreme Court defined "supervisor" in *Vance v. Ball State University* as someone who is "empowered by the employer to take tangible employment actions against the victim." 570 U.S. 421, 450 (2013).

185. Tangible employment action is described as "discharge, demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 808.

186. *Id.* at 807; *see also* Burlington Ind., Inc. v. Ellerth, 524 U.S. 724, 765 (1998).

187. Heller, *supra* note 113.

188. *Id*.

189. *See id.*

190. *See id.*

191. *Faragher*, 524 U.S. at 800.

the harassment, prevent its recurrence, and address its effects."[192] This is similar to the Title VII negligence standard.[193]

Under the new regulations, a university only has to respond to harassment complaints if the university has "actual knowledge," which is defined as "notice of . . . allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient . . . ."[194] The regulations specifically state that "[i]mputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge."[195] The university's response must not be deliberately indifferent, which is defined as "clearly unreasonable in light of the known circumstances."[196]

It is hard to overstate the significance of this change. Under the Obama-era rules, universities might be responsible if a student told their professor about a sexual assault.[197] Under the new regulations, however, a university would have no obligation to investigate a claim (and therefore no obligation to help the victim) if it was reported to anyone other than the Title IX coordinator or someone designated by the university as having the authority to institute corrective actions.[198]

G. Accused Right to Due Process

1. Criminal Law

Criminal defendants have the most protective due process rights, including the right to a presumption of innocence, right to counsel, right to a jury trial with adversarial cross-examination, and the state has burden of proving every element of the crime beyond a reasonable doubt.[199]

192. Dear Colleague Letter, *supra* note 100, at 4.

193. *Cf. id.* at 13; U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors* (Sept. 18, 1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors [https://perma.cc/H6X3-T99F].

194. 34 C.F.R. § 106.30(a) (2020).

195. *Id.*

196. 34 C.F.R. §106.44(a).

197. *Devos' Proposed Changes to Title IX, Explained*, NAT'L WOMEN'S L. CTR (Nov. 30, 2018), https://nwlc.org/resources/devos-proposed-changes-to-title-ix-explained// [https://perma.cc/ZW63-YUAR] (noting that under the proposed rules, "Michigan State . . . would have no responsibility to stop Larry Nassar . . . just because his victims reported sexual abuse to athletic trainers and coaches instead of employees with the authority to institute corrective measures" (internal quotations omitted)).

198. *Id.* at 1–2.

199. *See* Mann, *supra* note 33, at 639–40 (describing the due process protections available to criminal defendants).

2. Title VII

a. Private Employers

Unless the employer is unionized or there is a written contract of employment (both of which are relatively rare), private employees who are accused of harassment have no right to due process and can be summarily fired.[200] To be clear, this does not always happen, but it is one concern that has been expressed about the #MeToo movement.[201] The concern is that as more complaints are brought to light, employers wanting to avoid bad press will act swiftly to terminate all employees accused of harassment, regardless of the severity.[202]

b. Public Employers

Most public employees have just cause protections either through civil service statutes or collective bargaining agreements, and those statutes or agreements would generally require employers to have a grievance process.[203]

To be clear, not all public employees have a property right in their jobs. As the Supreme Court held in *Board of Regents v. Roth*, an employee who was given a one-year contract as a college professor had no right to a pretermination hearing when he was informed, without reason, that he would not be rehired the following year.[204] His "property" interest in his employment at the university was created and defined by the terms of his appointment, which specifically provided for a set termination date with no provision for renewal, even though other professors routinely were renewed.[205] There was no state statute or university rule that created any legitimate claim or entitlement to his position.[206]

But if the public employee does have a property interest[207] in employment,[208] the question of how much process is due was answered by the Supreme Court in *Cleveland Board of Education v. Loudermill*.[209] In this case, the Court

200. Clarke, *supra* note 1, at 50–52 (noting that procedural protections do not apply to most employment decisions because private actors are not subject to the mandates of the 14th Amendment of the U.S. Constitution).

201. *See, e.g.*, *id.* at 51 (nothing that many low-level employees may find themselves terminated based on mere reports of harassment); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 275 (2018) (stating that some are concerned that "employers are rushing to judgment and failing to adequate investigate harassment complaints"). *But see* Tippett, *supra* note 201, at 277 ("Employers are unlikely to start cutting corners on their investigations in the MeToo era.").

202. *See* Wexler, Robbennolt & Murphy, *supra* note 13, at 67 (arguing that the range of different behaviors deserve a range of different consequences, and that employers should be nuanced in handing out punishments).

203. *See* Clarke *supra* note 1, at 51.

204. 408 U.S. 564, 564 (1972).

205. *Id.* at 578.

206. *Id*.

207. Public employees might also have a liberty interest in their professional reputation, but only if the government falsely accuses them of having engaged in misconduct. Clarke *supra* note 1, at 50–51.

208. At the university level, most tenured faculty members have a property right, and therefore are entitled to procedural due process before the university fires them. Nancy Chi Cantalupo & William C. Kidder, *Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of* Bakke *in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2396 (2019).

209. 470 U.S. 532, 548 (1985).

reiterated its holding in *Roth* that the "legislature may elect not to confer a property interest in public employment," but once it does confer such an interest, the state institution must provide due process before it terminates a public employee.[210] At a minimum, such due process requires notice and the opportunity for a hearing before termination.[211] But the hearing need not be elaborate. Something less than a full evidentiary hearing is sufficient.[212] In fact, in name-clearing hearings for public employees, "some courts have even approved of procedures that did not allow cross-examination," and "some courts have even approved procedures in which the accusers were not named."[213]

Despite the minimal level of required due process for public employees, many higher education institutions have voluntarily adopted more rigorous due process protections for faculty members pursuant to American Association of University Professors ("AAUP") guidelines, which state that the appropriate due process protections before the termination of a faculty member should include access to counsel, cross examination, and a clear and convincing standard.[214]

3. Title IX

a. Before Trump Administration Regulations

The first Title IX guidance to address due process was the 2001 OCR guidance, which stated:

> A public school's employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. . . . Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.[215]

When the Obama administration issued the Dear Colleague Letter in 2011, most of it was focused on the complainant's rights, not the rights of the accused.[216] To be clear, the Dear Colleague Letter calls for an adequate, reliable, and impartial investigation where both parties have the opportunity to present

210. *Id.* at 541.

211. *Id*. at 542; *see also* Cantalupo & Kidder, *supra* note 208, at 2398 (explaining that tenured public employees are entitled to notice of the charges, an explanation of the employer's evidence and "an opportunity to present [their] side of the story").

212. *Loudermill*, 470 U.S. at 545; *see also* Cantalupo & Kidder, *supra* note 208, at 2398 (stating that the due process hearing need not be a comprehensive court like proceeding complete with federal rules of evidence).

213. Clarke, *supra* note 1, at 76.

214. *See* Cantalupo & Kidder, *supra* note 208, at 2399.

215. U.S. DEP'T OF EDUC., *supra* note 80, at vii.

216. Dear Colleague Letter, *supra* note 100, at 5.

witnesses and evidence.[217] But unlike the new regulations (discussed below), the Dear Colleague Letter strongly discouraged cross-examination of witnesses.[218] What was allowed was written questions presented to the complainant or any other witnesses.[219] With respect to due process for the accused, the Dear Colleague Letter states, "[p]ublic and state-supported schools must provide due process to the alleged perpetrator" but that this due process should "not restrict or unnecessarily delay Title IX protections for the complainant."[220]

This eventually led to criticism of universities' Title IX procedures being used during the Obama Administration.[221] In a letter penned by law professors at Pennsylvania Law School, they argued that:

> What is required is fundamental fairness, including (1) the right to the assistance of counsel in preparation for and conduct of the hearing, (2) the right to cross-examine witnesses against the accused student and to present defense witnesses and evidence, and (3) the right to a fair and unbiased hearing panel.[222]

The Dear Colleague Letter procedures were criticized for not requiring cross-examination and for not allowing students to be represented by counsel throughout the proceedings.[223]

Even before the new Trump Administration regulations were issued, there was some case law addressing due process rights of accused students under Title IX. For instance, in *Doe v. Baum*, the Sixth Circuit held that it violated the accused's due process rights to not allow for live cross-examination during the university hearing.[224] This created some confusion for universities in the Sixth Circuit[225] because they were being given conflicting instructions regarding how to structure their grievance procedures under Title IX.[226]

b. Trump Administration Regulations

Due process rights for the accused are a very significant (perhaps the most significant) focus of the new regulations. For instance, when the notice of the proposed regulations was first issued, a search of the document revealed that the

217. *Id.* at 9.

218. *Id.* at 12.

219. *See* Brodsky, *supra* note 99, at 838, 840.

220. Dear Colleague Letter, *supra* note 100, at 12.

221. *But see* Brodsky, *supra* note 99, at 831 (noting that Title IX (even under the Obama Administration) provided more robust procedural protections for the accused than the constitution requires).

222. Letter from David Rudovsky et al., *Sexual Assault Complaints: Protecting Complaints and the Accused Students at Universities* (Feb. 18, 2015), http://onlinewsj.com/public/resources/documents/2015_0218_upenn.pdf [https://perma.cc/VH2A-JZW4] (statement of sixteen members of the University of Pennsylvania Law School faculty).

223. *Id*. at 3.

224. Doe v. Baum, 930 F.3d 575, 578 (6th Cir. 2018).

225. The Sixth Circuit covers Michigan, Ohio, Kentucky, and Tennessee. *About the Court*, U.S. CT. APP. FOR THE SIXTH CIR., https://www.ca6.uscourts.gov/about-court (last visited Jan. 20, 2022) [https://perma.cc/H7SY-2GKJ].

226. *Compare Baum*, 930 F.3d at 578, *with* Dear Colleague Letter, *supra* note 100, at 12.

phrase "due process" appeared more than thirty times.[227] This is in comparison to the 2011 Dear Colleague Letter, which mentions "due process" three times.[228]

Under the new regulations, if the complainant files a formal complaint with the institution's Title IX office, the institution must follow a grievance process that complies with very detailed requirements.[229]

The grievance process must require an objective evaluation of all relevant evidence, both inculpatory and exculpatory evidence.[230] All decisionmakers and investigators must be free from a conflict of interest and must be adequately trained, including being trained to not rely on stereotypes in the decision-making process.[231] The grievance process must include a presumption that the accused is "not responsible" for the alleged conduct.[232]

The grievance process must also include reasonably prompt time frames for conclusion of the process but must also provide for a temporary delay for good cause; reasons that would satisfy the "good cause" standard include absence of a party, a party's advisor, or a witness or concurrent law enforcement activity.[233] The grievance process must describe the range of possible sanctions and remedies that may be implemented,[234] and must include the procedures and permissible bases for an appeal.[235]

When there is a formal complaint, the institution must provide the following notice to the known parties: notice of the grievance process and notice of the allegations that might constitute sexual harassment, including sufficient details known at the time.[236] This notice must inform the parties that they may have an advisor of their choice and that they may inspect and review evidence.[237] Finally, the notice must inform the parties of any provision in the institution's code of conduct that prohibits knowingly making false statements.[238] If, during the investigation it is determined that the conduct alleged in the complaint would not constitute sexual harassment if proven or did not occur within the recipient's program or activity, the complaint must be dismissed.[239]

During any investigation, the institution must ensure that the burden of proof and burden of gathering evidence rests with the university.[240] Furthermore, the institution must allow both parties to present evidence.[241] The institution

227. U.S. Dep't of Educ., Unofficial Title IX Regulations (May 6, 2020), at 1, [hereinafter Unofficial Regulations] https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf [https://perma.cc/BR3K-8DQG].

228. Dear Colleague Letter, *supra* note 100, at 5, 12.

229. 29 C.F.R. § 106.44(b).

230. *Id.* § 106.45(b)(1)(ii).

231. *Id.* § 106.45(b)(1)(iii).

232. *Id.* § 106.45(b)(1)(iv).

233. *Id.* § 106.45(b)(1)(v).

234. *Id.* § 106.45(b)(1)(vi).

235. *Id.* § 106.45(b)(1)(viii).

236. *Id.* § 106.45(b)(2)(i)(A)–(B).

237. *Id.* § 106.45(b)(2)(i)(B).

238. *Id.*

239. *Id.* § 106.45(b)(3)(i).

240. *Id.* § 106.45(b)(5)(i).

241. *Id.* § 106.45(b)(5)(ii).

must also allow both parties to have an advisor of their own choosing present, including, if either of the parties so chooses, an attorney.[242] The institution must also provide advance notice of all meetings, hearings, and interviews.[243]

Institutions of higher education (but not K-12 schools) must provide a live hearing and allow live cross-examination by the other party's advisor, but only relevant questions should be allowed.[244] An institution must provide an advisor to conduct the cross-examination of the other party if either party does not have one.[245] If a party or witness does not submit to cross-examination, the decisionmaker must be instructed to ignore any evidence presented by that witness.[246]

After the live hearing, the decisionmaker, who cannot be the same person as the Title IX coordinator or the investigator(s), must issue a written determination regarding responsibility,[247] which should include: identification of the allegations that potentially constitute sexual harassment,[248] findings of fact supporting the determination,[249] conclusions regarding the application of the institution's code of conduct to the facts,[250] a statement of the result as to each allegation, including a determination regarding responsibility and any disciplinary actions that will be imposed on the accused,[251] and the procedures regarding appeal.[252] With respect to appeals, institutions have to offer an appeal for particular reasons (including procedural irregularity, new evidence, or a conflict of interest)[253] and can offer an appeal for other reasons as long as the appeal is offered to both parties.[254] As should be obvious from the length of this description, the due process rights under the new regulations are significantly more robust than they were during the Obama Administration.

H. Standard of Proof

1. Criminal Law

As most readers know, in a criminal trial, the prosecution bears the burden of proof and must prove every element of the charged crime beyond a reasonable doubt. This highest standard of proof is deemed appropriate because of the

242. *Id.* § 106.45(b)(5)(iv).
243. *Id.* § 106.45(b)(5)(v).
244. *Id.* § 106.45(b)(6)(i). Either party can request that the hearing be conducted with the parties in different rooms using technology that would allow the hearing to take place live. *Id.*
245. *Id.* § 106.45(b)(6)(i).
246. *Id.*
247. *Id.* § 106.45(b)(7)(i).
248. *Id.* § 106.45(b)(7)(ii)(A).
249. *Id.* § 106.45(b)(7)(ii)(C).
250. *Id.* § 106.45(b)(7)(ii)(D).
251. *Id.* § 106.45(b)(7)(ii)(E).
252. *Id.* § 106.45(b)(7)(ii)(F).
253. *Id.* § 106.45(b)(8)(i)(A)–(C).
254. *Id.* § 106.45(b)(8)(ii).

substantial risk that the criminal trial will result in the accused's imprisonment and loss of liberty.[255]

2. Title VII

When Title VII complaints are brought in court against the employer, the jury will use the preponderance of the evidence standard, which is the default standard for all civil cases.[256] For at-will employees in the private sector, the internal investigation (if any) conducted by the employer to determine if the harassment complaint has merit does not have to comply with any particular evidentiary standard.[257] If an employee has a contractual right to due process (perhaps the employee has a right to a hearing in front of an arbitrator by virtue of a collective bargaining agreement),[258] or has a constitutional right to due process, which might involve some kind of hearing,[259] the standard of proof would be preponderance of the evidence.[260]

3. Title IX

If either a complainant or an alleged perpetrator file a lawsuit against a university in court for violating Title IX, the court will apply the preponderance of the evidence standard.[261]

A very vocal debate has taken place over the standard that universities should apply when they conduct investigations and hearings to determine if sexual misconduct occurred in their institutions.[262] During the Obama Administration, the Dear Colleague Letter stated that when OCR is investigating schools under Title IX, it will review a school's procedures to make sure that it is using the preponderance of the evidence standard to evaluate complaints.[263] This statement was based in part on the fact that a preponderance of the evidence standard is used under Title VII, which also prohibits sex discrimination, and is also the standard used when Title IX cases are brought in court.[264]

> Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence

255. Mann, *supra* note 33, at 639 ("Given that the sanction in a criminal case is the potential loss of liberty, the burden of proof is the highest in our legal system . . .").

256. *Id.* at 640.

257. Certainly, private employers rarely if ever apply a heightened standard from the preponderance of the evidence standard. *See* Clarke, *supra* note 1, at 62 (stating that when a corporation conducts an internal investigation into sexual harassment, it is advised to apply a preponderance of the evidence standard).

258. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 200, 424 (1960).

259. *See supra* Section III.G.2.

260. Brodsky, *supra* note 99, at 846.

261. Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 335 (2019).

262. *See, e.g.*, Nancy Chi Cantalupo & John Villasenor, *Room for Debate: Is a Higher Standard Needed for Campus Sexual Assault Cases?*, N.Y. TIMES (Jan. 4, 2017), https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases [https://perma.cc/48SS-MDDY].

263. Dear Colleague Letter, *supra* note 100, at 10.

264. *Id.* at 10–11.

> standard . . . . The "clear and convincing" standard . . . is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.[265]

The new regulations require the institution to state whether it will be using the preponderance of the evidence standard or the clear and convincing standard, but the institution must apply the "same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty . . . ."[266] This alleged choice is mostly a false one, because most universities require the clear and convincing standard for faculty members consistent with AAUP guidelines or collective bargaining agreements.[267] Accordingly, most institutions will now have to use the clear and convincing standard for student sexual misconduct.

IV. MEETING IN THE MIDDLE

This Part asks the following question: can we justify the differences in how the law treats sexual misconduct depending on where it occurs? As was explored above, under the new Title IX regulations, it will be harder to hold institutions liable for sexual misconduct; it will be more difficult to hold perpetrators of sexual misconduct responsible; and all college students accused of sexual misconduct, both public and private,[268] will have significantly more due process and other protections than employees (public or private).[269] Do these differences make sense? And as a preliminary question, does it even matter that the laws are different? After all, law students learn early on that proximate cause is analyzed differently under tort law than it is under criminal law. And if a plaintiff wants to sue for fraud, that means something different for contracts than it does for tort law.

Before proceeding further, one preliminary point is necessary: I am taking criminal law out of the equation. There are some scholars who have argued in favor of "criminalizing" Title IX.[270] These scholars have argued that students accused of sexual misconduct in universities should get similar protection to

265. *Id.* at 11.

266. 29 C.F.R. § 106.45(b)(1)(vii).

267. Cantalupo, *supra* note 261, at 316.

268. It is important to point out that the constitutional right to due process does not even apply for students at *private* universities; in this sense, Title IX has always provided more due process protection to private students than those students would be entitled to under any other law. Brodsky, *supra* note 99, at 836.

269. *See id.* at 831 (noting that Title IX (even under the Obama Administration) provided more robust procedural protections for the accused than the constitution requires); *id.* at 837 (speaking about the Obama era Title IX: "Rather than seeing Title IX as a threat to students' procedural rights, then, advocates should see the law as a model for equitable, sensible disciplinary process."); *id.* at 848 (noting that students accused of other types of misconduct currently have fewer procedural rights under federal law than the classmate accused of rape).

270. *See* Mann, *supra* note 33, at 634.

those accused of sexual misconduct in the criminal justice system.[271] But many more scholars have argued the opposite—that the criminal context is not the right comparison.[272] I agree with these latter scholars. It makes sense for the criminal justice system to offer all of the due process protections that it does because the criminal defendant's liberty is at stake.[273] And if someone is convicted of sexual assault, it is likely that they will have to register as a sex offender, which would have significant consequences for the rest of their life.[274] Under Title IX, even the worst case scenario for a student accused of sexual assault is expulsion, which is not nearly as detrimental or life-changing as a prison sentence or being required to register as a sex offender.[275]

Accordingly, I am only comparing the higher education context (Title IX) with the employment context (Title VII) and asking the question of whether it is problematic for the law to treat sexual misconduct differently depending on where it occurs (the university versus the workplace). And if not, that still does not answer the ultimate question: which law is better? Or to put a finer point on it: when someone is accused of sexual misconduct, what process is due? This part will seek to answer these questions.

A. Does It Matter if the Laws Are Different?

First things first: does it even matter if the law treats sexual misconduct differently depending on where it takes place? One might start with the answer "no, it does not matter." The two Titles are not part of the same statute. Title IX

271. *See id.* ("Critics argue that . . . the procedural due process protections of a criminal trial . . . should be utilized in the education setting."); Swan, *supra* note 18, at 974 (pointing out that some advocates have argued in favor of criminal procedural protections to be used in Title IX adjudications). *Cf.* Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 117 (2015) (expressing concern that the system is slanted too much in favor of women, without enough concern for men's due process rights).

272. *See, e.g.*, Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMPLE L. REV. 701, 717–18 (2017) (distinguishing the criminal context from Title IX); Brodsky, *supra* note 99, at 842 (criticizing attempts to criminalize sexual assault investigations: "Rape exceptionalism finds a powerful bedrock in the dominance of criminal law in conversations about gender violence."); Cantalupo, *supra* note 1, at 228–35 (criticizing attempts to conflate Title IX's civil rights approach with the criminal law approach for handling sexual assault cases); Cantalupo, *supra* note 97, at 188–96 (discussing the differences between the goals of the criminal justice system and Title IX and arguing against an attempt to "criminalize" Title IX); Nancy Chi Cantalupo, *Decriminalizing Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 517–18 (2012) (describing the reasons sexual misconduct investigations on campus should not look like criminal proceedings); Cantalupo, *supra* note 178, at 283–85 (same); Cantalupo, *supra* note 261, at 325–31 (same).

273. *See, e.g.*, Estrich, *supra* note 18, at 848 (stating that in criminal cases, there is a justification for applying different rules of proof because these cases are not between plaintiff and defendant, but between the state and the individual, and the deck is supposed to be stacked on the criminal defendant's side; this justification disappears in a civil suit); Cantalupo, *supra* note 97, at 188.

274. Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality and Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 13 (2019).

275. *See, e.g.*, Kaplan, *supra* note 272, at 710 (stating that an accused having to leave college because of the sexual assault accusation (voluntarily or not) is never as bad as the criminal penalties—no prison and no required sex offender registration); Cantalupo, *supra* note 261, at 345–46 (stating that expulsion from college is nowhere near as serious as a criminal conviction).

is part of the Education Amendments Act of 1972.[276] Title VII is part of the Civil Rights Act of 1964.[277] Title IX is enforced by the Department of Education Office of Civil Rights.[278] Title VII is enforced by the Equal Employment Opportunity Commission.[279]

On the other hand, Title IX is patterned after the Civil Rights Act of 1964; specifically, Title VI of the latter Act provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[280] The legislative history of Title IX is clear that the intent was to model Title IX after Title VI of the Civil Rights Act's prohibition of race discrimination.[281] Moreover, the jurisprudence of Title IX is often modeled after Title VII, the employment discrimination title.[282] Professor Cantalupo uses this fact to argue that we should not treat Title IX cases differently than we do all other civil cases, including Title VII cases.[283]

The other argument that can be made to support the differences in due process protections provided by these laws is that protecting those accused of sexual misconduct in universities is more important than protecting those accused of sexual misconduct in the workplace. Or perhaps, protecting victims of sexual misconduct in universities is less important than protecting victims of sexual misconduct in the workplace. After a fairly thorough analysis, I cannot definitively conclude that either of these is true.

1. Consequences to the Accused

If we assume the worst-case scenario in both cases, termination from employment or expulsion from a university,[284] the question we ask is whether being

276. *See* Education Amendments Act of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 235, 304 (1972); Zehrt, *supra* note 39, at 702.

277. *See* Civil Rights Act of 1964, 4 Pub. L. No. 88-352, Title VII, 86 Stat. 241, 253 (1964); Zehrt, *supra* note 39, at 703.

278. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/BRL8-36VD]; Cantalupo, *supra* note 97, at 186.

279. *What Laws Does EEOC Enforce?*, U.S. EQUAL EMP. OPPORTUNITY COMM'N https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce (last visited Jan. 20, 2021) [https://perma.cc/G59C-GBAY].

280. 42 U.S.C. § 2000d.

281. Anderson, *supra* note 62, at 335–36.

282. Cantalupo, *supra* note 178, at 282; Tiffany Buffkin, Nancy Chi Cantalupo, Mariko Cool & Amanda Orlando, *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, 9 CAL. L. REV. ONLINE 71, 76 (2019); Deborah L. Brake, *Chapter 7. Standards of Proof for Campus Sexual Misconduct Cases*, *in* ADJUDICATING CAMPUS MISCONDUCT AND ASSAULT: CONTROVERSIES AND CHALLENGES, at n.4 (Claire M. Renzetti & Diane R. Follingstad eds., 2020).

283. Cantalupo, *supra* note 261, at 335. Here, she is speaking mostly about the different standard of proof required under the proposed regulations compared to the old standard for Title IX investigations.

284. To be clear, expulsion is not a given even when a student is found responsible for sexual assault. One study found only 30% of students were expelled after being found responsible for sexual misconduct. Brake, *supra* note 282, at *8. And as someone familiar with survivors has noted, although being investigated but *not*

expelled is worse than being terminated? The increased protections and process in the new Title IX regulations presume that the answer is yes—being expelled from college is worse than being terminated. But is that true? And can we even answer that in the abstract? Probably not. For the worker, the significance would depend on how important the job is (*i.e.*, how much status or prestige is associated with the position).[285] For example, losing a high-level professional job where someone has invested a great deal of time and effort might be more devastating than losing a relatively new and/or low-level job. The importance of the job would also play into how difficult it will be to find another comparable job. The employee at McDonald's is likely to find another job at a fast-food restaurant more easily than an executive can find a suitable replacement.[286] But in between those two extremes, consider a decent-paying union job at a manufacturing plant. This would be harder to replace than a job at McDonald's but perhaps easier than the executive position. Moreover, age and family situation also play into the equation. The twenty-year-old fired from McDonald's is likely only supporting himself, and maybe still lives with his parents. But the plant worker might be supporting a family. And the plant worker might need the money more than the executive, who probably has significant savings to draw upon.

On the education side of things, getting expelled for sexual misconduct from law school, medical school, or any other program that leads to a character and fitness inquiry before being licensed might be devastating. That student might have to give up their planned career completely.[287] Of course, although this would be devastating, it would not be as devastating as someone who is already a lawyer or doctor losing their license because of a sexual misconduct incident.[288] Conversely, a student studying for a relatively generic four-year degree who gets expelled will likely have little difficulty getting admitted to another

expelled or significantly punished is undoubtedly stressful, it is not the same thing as the trauma of being assaulted—stress is not trauma. Buffkin, Cantalupo, Cool & Orlando, *supra* note 282, at 101.

285. The Supreme Court recognized the "severity of depriving a person of the means of livelihood." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985). The Court also noted that even though a fired worker might find another job, "doing so will take time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Id.*

286. *See How Long Does it Take to Find a Job*?, INDEED (June 14, 2021), https://www.indeed.com/career-advice/finding-a-job/how-long-does-it-take-to-find-a-job [https://perma.cc/KFQ2-MYEL].

287. Interestingly, in the disability law context, we see significantly more cases involving medical students who have been dismissed because of academic performance than any other type of academic program. *See, e.g.*, Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1042 (9th Cir. 1999); Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 811 (9th Cir. 1999); Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 456 (4th Cir. 2012). This lends credence to the idea that being dismissed from a potential career in medicine might be seen as more devastating than other fields.

288. This might be intuitive but is partly explained by the status quo bias—all things being equal, we value what we have more than something we don't have. This bias also explains why individuals who believe they have been a victim of employment discrimination are much more likely to sue if they've been terminated than if they have applied for a job and not been hired, even if the bias is more obvious in the failure-to-hire situation. Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers,* 34 FLA. ST. U. L. REV. 313, 339–40 (2007) (discussing the status quo bias).

university.[289] Studies have demonstrated that there is no evidence that students expelled for sexual misconduct have a difficult time transferring to a different university.[290] And many times the student is simply suspended until the victim graduates, and then he is allowed to return.[291]

When I presented an earlier draft of this paper, someone came up after my talk and insisted to me that the stigma that would occur from getting expelled from college is much worse than the stigma that would follow getting fired from a job. This might be correct.[292] It might be hard to keep quiet the rumor mill that surrounds an expulsion because of sexual misconduct.[293] Obviously, if there is an accompanying criminal prosecution, it is much more likely that it will be made public, at least in the immediate vicinity of the university or the accused student's hometown. But then it would be the criminal prosecution that is causing the stigma; not the finding of responsibility in the university's grievance procedure.[294] Even considering this greater likelihood for stigma arising from an expulsion for sexual misconduct, I am ultimately not convinced that this alone warrants the heightened protection afforded to the accused by the new Title IX regulations.

Specifically with regard to the standard of proof, when we look at other types of proceedings where the clear and convincing standard is used (the *de facto* standard now required by the new Title IX regulations), both the practical and the stigmatic consequences are much more severe than expulsion from a university.[295] For instance, clear and convincing is used for the following proceedings: termination of parental rights, involuntary civil commitment for an indefinite period of time, deportation, and removing life support from someone in a persistent vegetative state.[296] As noted by one scholar, expulsion from college

289. Cantalupo, *supra* note 261, at 333. Of course, I don't mean to minimize the significance of getting expelled from an institution of higher education. As recognized by one scholar, expulsions from school are "weighty burdens that threaten not only career prospects but also access to the inherently valuable chance to learn." Brodsky, *supra* note 99, at 828.

290. Cantalupo, *supra* note 261, at 333; Swan, *supra* note 18, at 975 (noting that even when a university knows about an applicant's sexual assault and resulting expulsion from a prior university, the university sometimes still admits them, particularly if the student is a gifted athlete).

291. Mann, *supra* note 33, at 652.

292. However, as one scholar has noted, the concern for protecting a young man's future is not universally applied. As stated by Professor Brake, "[p]rivileged men—men who benefit from race and class privilege, as well as men who are institutionally valued as athletes, legacies, and members of certain well-connected fraternities—are the most likely to be able to leverage concerns about ruining a young man's bright future to their own advantage." Brake, *supra* note 282, at *13.

293. *But see* Swan, *supra* note 18, at 975 (stating that a finding of responsibility on campus is not likely to "travel far" on its own—"findings of liability in either context may not be widely broadcast or easily ascertainable.").

294. *See id.* (stating that, while some stigma may attach if others know about the finding of responsibility, often the information will not be widespread).

295. *See, e.g.*, Mann, *supra* note 33, at 652 ("The criminal analogy is not appropriate because the deprivations under educational institution's' disciplinary processes . . . are completely different . . . than the criminal law's . . . loss of liberty . . . .").

296. Brake, *supra* note 282, at *2 ("The clear and convincing . . . standard is used by courts in only a tiny sliver of civil cases in which the stakes . . . have been deemed unusually high"); Brodsky, *supra* note 99, at 845.

does not rival these other types of proceedings.[297] Moreover, as one scholar pointed out in arguing that the stigma of expulsion does not warrant the clear and convincing standard, individuals can be found liable in civil cases for truly heinous crimes (such as O.J. Simpson being found liable for murder), and the standard applied in those proceedings is a preponderance of the evidence.[298]

2. Consequences to the Victim

I noted at the outset of this discussion that, in order to justify the additional protections afforded to students who engaged in sexual misconduct as compared to employees who engaged in such misconduct, we should either be able to conclude that the consequences of getting expelled are worse than the consequences of getting fired, or, looking at it from the victim's perspective, that the harm to the university victim is less than the harm to the employee victim. Thus, this section will turn to analyzing the consequences to the student victim as compared to the employee victim.

One such consideration from the victim's perspective is the additional burden placed on the victims through the procedural requirements of the new regulations. The investigation process and hearing in the Title IX context, which must include live cross-examination, will undoubtedly be much more burdensome on a victim than victims who report harassment in the employment setting.[299] In the employment setting, the victim is likely to be interviewed once or twice and will likely only tell her story to a human resources representative.[300] As noted above, in the Title IX context, the victim will not only have to report to an investigator (and perhaps more than one employee at the university) but she will also have to be subjected to a full hearing with live cross-examination.[301] This is undoubtedly more time-consuming and traumatic for the victim[302] in the university setting.

The second consideration is the backlash and retaliation that the victim might experience. Although the rumor mill in some workplaces is pretty strong, in other workplaces, the victim will likely be able to keep the harassment complaint somewhat private, unless the accused is a beloved employee,[303] in which case she might suffer quite a significant backlash because of her report. If the

297. Brodsky, *supra* note 99, at 845.

298. *Id.*

299. This assumes two things: (1) that the victim does report, even though reporting rates are very low, *see, e.g.*, Tuerkheimer, *supra* note 1, at 1162 (stating that students remain exceedingly reluctant to report harassment; just over a quarter of victims of physically forced penetration reported the incident), and (2) we are discussing internal processes only. Obviously, in either the Title VII or Title IX context, if a victim files a lawsuit, the burdens will be much higher. But for purposes of comparing apples with apples, we are assuming an internal process only.

300. *See generally* Tippett, *supra* note 201, at 276–77 (describing a typical sexual harassment investigation and stating that "[m]any harassment investigations are relatively straightforward").

301. *See supra* Section III.G.3.b.

302. Not only does some empirical research cast doubt on the utility of cross examination as a truth-seeking device, but it "also has the potential to subject victims to trauma and deter reporting." *See* Clarke, *supra* note 1, at 76.

303. *Cf.* Tippett, *supra* note 201, at 278 (noting that an employer might be less likely to punish a harasser if he is perceived as valuable to the business).

accused is a supervisor, she is likely to fear and might be the victim of direct retaliation.[304] This could happen even if the accused is not her supervisor.[305] As I've written about elsewhere, she might also fear the reactions of coworkers if word gets out that she reported sexual misconduct.[306] Many employees, especially women, tend to care quite deeply about their workplace relationships, and thus might find the possible ostracization that would follow a harassment report to be very traumatic.[307]

The backlash at the university level[308] will likely vary greatly, depending on many circumstances: How big is the university? Do the accused and victim run in the same circles, live in the same dorm, have the same classes? Is the accused an athlete or a leader on campus?[309] Even if the university issues a mutual no contact order during the pendency of the investigation, she might be concerned about running into his friends and having them taunt her or retaliate against her in many different ways.[310] Remembering that most college students are barely adults, she might fear juvenile teasing or untrue rumors being spread about her. As others have noted, the mere possibility of retaliation can have a "substantial chilling effect on [a victim's] willingness to complain."[311] Most victims of sexual misconduct conclude that the benefits of reporting are outweighed by the costs, which includes both the traumatic nature of the process as well as the likely backlash.[312] Overall, a victim in a workplace might be more likely to fear tangible economic consequences from reporting (*i.e.*, being fired or demoted), but a college student victim is probably more likely to fear more peer retaliation and backlash.[313] And studies demonstrate that this backlash is quite severe, causing many victims to leave college completely (and often not continue their education at another institution).[314]

A third consideration with respect to victims' interests is what happens if and when the accused is not held responsible for the sexual misconduct? This

304. *See generally* Porter, *supra* note 4, at 801–02 (discussing why women are reluctant to report harassment against a supervisor).

305. *See generally id.* at 803–04 (discussing the very high incidence of retaliation after reports of harassment).

306. *Id.* at 19–21 (discussing cases).

307. *Id.* at 815–24.

308. Retaliation is prohibited under Title IX. In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Court held that "when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX." *Id.* at 174. The *Jackson* Court also recognized the importance of prohibiting retaliation as a means of encouraging enforcement of Title IX's anti-discrimination provisions. Ivan E. Bodensteiner, *The Risk of Complaining—Retaliation*, 38 J. COLL. & U.L. 1, 23 (quoting *Jackson*, 544 U.S. at 181).

309. *See, e.g.*, Brake, *supra* note 282, at *9 ("A university's reluctance to find an accused student responsible for sexual misconduct is especially pronounced when the accused student is highly valued by the institution as" an athlete, leader, or the relative of notable alumni.).

310. *See, e.g.*, Kaplan, *supra* note 272, at 720 (noting that victims of assault are often afraid of being at the same school as the accused and his friends); Brake, *supra* note 282, at *11 (stating that fear of retaliation would be exacerbated by a higher proof standard in sexual misconduct cases).

311. Bodensteiner, *supra* note 308, at 36.

312. *See* Tuerkheimer, *supra* note 1, at 1152–53.

313. *See* Tippett, *supra* note 201, at 238–39; Kaplan, *supra* note 272, at 720.

314. Cantalupo, *supra* note 261, at 333–34.

question assumes the heightened process in the Title IX context will lead to a lower chance that the accused will be found "responsible."[315] Several factors might play into analyzing this question. First, in all likelihood, the harassment at work is less likely to rise to a sexual assault than in the university setting.[316] Of course, there are counter examples: *Meritor*,[317] Matt Lauer,[318] and Harvey Weinstein,[319] among many others. Depending on the severity of the sexual misconduct, the victim might not be expecting or even wishing for the ultimate punishment (termination from work or expulsion from school).[320] But assuming very serious sexual misconduct, and further assuming that the perpetrator is not expelled or terminated, what effect is that going to have on the victim?[321]

In the workplace, whether the victim will have to continue to see the accused is highly dependent on her role, his role, and how big the company is. In a large employer with various shifts and departments, it is quite possible she can keep her distance from him.[322] But if she cannot, or if the backlash described above is severe or even perceived as being severe, she might quit if she can afford to do so, and sometimes, even if she can't.[323] If she is the sole or primary breadwinner, this could have very serious consequences.

In a large university, it would certainly seem possible for the two to avoid each other. One of them can move dorms. One of them can withdraw from joint classes. But those decisions have consequences. And even in a large university, the chance and fear of running into each other is probably greater simply because college is often not just a place students go for forty hours a week.[324] College is

315. Cantalupo, *supra* note 274, at 13; *see also* Kimberly M. Cummings & Madeline Armenta, *Penalties for Peer Sexual Harassment in an Academic Context: The Influence of Harasser Gender, Participant Gender, Severity of Harassment, and the Presence of Bystanders*, 47 SEX ROLES 273, 277 (2002) (discussing the fact that in a study about peer harassment, many student participants did not view the harassment as problematic and often would rarely recommend suspension or expulsion as a penalty for harassment). *But see* Brake, *supra* note 282, at *8 ("[T]here is no way to know how many student conduct cases in which the student was found responsible under a preponderance standard would have come out differently under a clear and convincing standard, nor how many students adjudicated not responsible under a clear and convincing standard would face punishment if a preponderance standard had been applied.").

316. *See* Cantalupo, *supra* note 272, at 483.

317. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

318. *See* Heller, *supra* note 113 (discussing the Matt Lauer story).

319. *See* Desta & Busis, *supra* note 150.

320. Cummings & Armenta, *supra* note 315, at 277 (stating that students in a study were unlikely to recommend expulsion in harassment cases); *id.* at 278 (noting that, even though women perceive harassing behavior as more severe than men do, they are often unwilling to punish severely out of fear that the harasser would lose his job or be expelled); Kaplan, *supra* note 272, at 718–19 (noting that many victims simply want to be heard and listened to; they often don't want the accused arrested or expelled; they want him to know that what he did was wrong so that he won't do it again); Cantalupo, *supra* note 261, at 327 (stating that punishment is not at the top of the list of what most survivors want).

321. One consequence of more due process for the accused might affect the institution as a whole and not just one victim; specifically, victims might be less likely to report misconduct if schools provide more due process (including a clear and convincing standard) to those accused of misconduct. Brake, *supra* note 282, at *10.

322. *See* Tuerkheimer, *supra* note 1, at 1178 (discussing so-called "survivor tips" for women who are harassed in the workplace to help her minimize the time alone with the harasser).

323. *See* Estrich, *supra* note 18, at 833–34.

324. Brodsky, *supra* note 99, at 829 ("A student who truthfully accuses another may nonetheless be forced to share a campus with her abuser if the school" allows the accused to remain on campus).

often a place students live 24/7. That makes the victim's risk and fear of running into the accused fairly high.[325] As noted by one scholar, many survivors feel unable to remain in the same institution after an assault when their claims are disbelieved[326] and those who do remain "experience declining grades, reduced extracurricular involvement, and worsened mental health."[327]

B. Possible Solutions

The above discussion should have made clear that, considering both the interests of those accused of sexual misconduct and those who are victims of such misconduct, there is not a principled reason to justify the differences in how sexual misconduct is treated in the workplace compared to when it occurs in the university setting.[328] But that doesn't necessarily answer the question of which legal regime is best suited to the task—Title VII or Title IX or something else entirely. And specifically, with respect to the most pressing issue in the new Title IX regulations, the question remains: how much due process is appropriate? This section will accomplish two things. First, using lessons drawn from feminist legal theory, this section will argue that the new Title IX regulations are problematic in several respects, including providing too much due process to students accused of sexual misconduct. Second, it will explore a compromise position to the question posed: how much process is due?

1. Problems with the Trump Administration Regulations

Using a lesson drawn from feminist legal theory, this section uncovers the male bias implicit in the new regulations.[329] Before proceeding, one disclaimer is in order. I do not claim to speak for all or even most feminists on these issues. Nor do I think it is even possible to describe what is good for all women. And in fact, part of what made me interested in this topic in the first place was the fact that there appear to be feminists on both sides of the due process debate.[330]

325. Cantalupo & Kidder, *supra* note 208, at 2358 (stating that most sexual harassment victims find encountering the accused harasser on campus to be retraumatizing).

326. *See* Cantalupo, *supra* note 261, at 327–28.

327. Brake, *supra* note 282, at *14.

328. *See supra* Section IV.A.

329. Martha Chamallas refers to five opening "moves" that feminists often use in their scholarship. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, 12, 14–16 (Richard A. Epstein et al. eds., 1990). One of them is "Implicit Male Bias," where feminists seek to uncover male bias and male norms in rules and standards that appear neutral or objective on their face. *Id.* at 14–16.

330. *Compare* Rudovsky et al., *supra* note 222, Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* (Aug. 21, 2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:33789434 [https://perma.cc/TR43-6TK5] (criticizing the Obama Administration's handling of sexual misconduct allegations at universities, and complaining that the accused have not been given enough due process), Brodsky, *supra* note 99, at 823–24 (discussing those powerful advocates pushing for more due process rights for those accused of sexual misconduct), *and* Brake, *supra* note 282, at *3 (discussing the fact that some who have argued in favor of more due process for those accused of assault have appropriated feminist claims to take rape seriously), *with* Cantalupo, *supra* note 261 (this article cites to seven different articles authored or coauthored by Professor Cantalupo, who is the most vocal academic opposing the new regulations), Mann, *supra* note 33, *passim*, Brake, *supra* note 282, at *10, *and* Clarke, *supra* note 1, at 50.

Nevertheless, uncovering the male bias in the new regulations has convinced me that they would (as a whole) be bad for victims of sexual misconduct, most of whom are women.[331]

Certainly, the new regulations appear to be considering victims.[332] For instance, the Department of Education's ("DOE") rationale for using the "actual knowledge" standard is that triggering the duty to investigate only upon a formal report of misconduct will give victims greater control and autonomy over the process, which the DOE believes will actually increase reporting.[333] The regulations purport to be concerned with victims as well as the accused, often stating that they are trying to achieve a standard that is helpful for all parties, and that by requiring a school to investigate only formal complaints of harassment, the regulations will give sexual harassment complainants greater confidence to report and expect their school to respond in a meaningful way.[334]

But the changes to Title IX[335] demonstrate the implicit bias against victims (most of whom will be women) in the new regulations. First, by defining sexual harassment as "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity,"[336] the regulations do not account for and would not require a university to investigate many types of harassment that a reasonable woman would find offensive and intimidating.[337]

Second, several provisions in the proposed regulations send the message that victims (again, mostly women) are not to be believed.[338] In fact, the whole impetus for the new regulations was a concern about victims of sexual misconduct embellishing or even inventing stories of sexual misconduct.[339] One such provision in the new regulations states that universities must include a statement in the notice about the sexual misconduct complaint that warns against false statements.[340] Moreover, as noted above, the regulations require a live hearing with live cross-examination.[341] And if during the hearing, a party or witness does not submit to cross-examination, the decision maker must be instructed to ignore

331. Brodsky, *supra* note 99, at 826 (noting that some of the "loudest voices decrying the treatment of students accused of gender violence appear deeply unconcerned with victims' educations, having rooted their campaign in misogyny and misinformation about sexual assault.").

332. *E.g.*, Unofficial Regulations, *supra* note 227, at 603.

333. *Id.*

334. *Id.* at 597.

335. *See supra* Part III.

336. 34 C.F.R. § 106.30(a)(2) (2020).

337. *See generally* Joan C. Williams, et al., *What's Reasonable Now? Sexual Harassment Law After the Norms Cascade*, 139 MICH. ST. L. REV. 139, 150–51 (2019) (demonstrating that widespread agreement exists that many types of sexual harassing behavior are (or should be) unlawful harassment).

338. *See, e.g.*, Unofficial Regulations, *supra* note 227, at 113–14 (discussing the fact that commenters were worried about false accusations).

339. *See, e.g.*, *id.* at 113–14 (discussing the fact that commenters were worried about false accusations); *see also* Brake, *supra* note 282, at *5. And to be clear, there is no evidence to support the accusations of very high rates of false reporting. Brake, *supra* note 282, at *12.

340. 34 C.F.R. § 106.45(b)(2)(B) (2020).

341. *Id.* § 106.45(b)(6)(i).

any evidence presented by that witness.[342] Finally, allowing schools to use a clear and convincing standard of proof rather than preponderance of the evidence creates a systematic assumption that victims are likely to lie,[343] whereas the preponderance of the evidence standard gives equal truth-telling presumptions to both parties.[344]

Thus, even though feminist legal theory emphasizes the importance of letting women tell their stories,[345] it is not just about letting women tell their stories: it is also about believing women who do.[346]

A third bias apparent in the regulations is the provision regarding supportive measures.[347] Supportive measures are defined in the new regulations as

> non-disciplinary, non-punitive individualized services offered as appropriate . . . . Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.[348]

Although this provision might seem neutral, there are two aspects that demonstrate the hidden bias. First, universities can only take these supportive measures to the extent they don't unreasonably burden the other party.[349] Thus, if the accused and the victim live in the same dorm, it is unlikely the university could force the accused to move out of the dorm because this would likely be seen as burdening the accused.[350] Similarly, the mutual restriction on contact between the parties sends quite a different message than an order which demands that the accused stay away from the victim. The mutual no-contact order sends a message that the victim is as much to blame as the accused.[351]

342. *Id.*

343. Cantalupo, *supra* note 97, at 195. The clear and convincing standard is problematic for other reasons, which will be addressed more below.

344. Cantalupo, *supra* note 261, at 331.

345. CHAMALLAS, *supra* note 329, at 13 (citing Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20 (1991)); *see also* Kaplan, *supra* note 272, at 704 (discussing the importance of allowing an assault victim to tell her story).

346. *See* Lesley Wexler, *2018 Symposium Lecture: #MeToo and Procedural Justice*, 22 RICHMOND PUB. INT. L. REV. 13, 19–20 (2019) (talking about the importance of believing women when they tell stories about sexual misconduct).

347. 34 C.F.R. § 106.30(a)(3) (2020). Prior to the new regulations, OCR allowed schools to take steps to help the victim even before the hearing was completed. These steps might include moving an accused student out of a dorm shared by the alleged victim. Brodsky, *supra* note 99, at 833.

348. 34 C.F.R. § 106.30(a)(3) (2020).

349. *Id.*

350. *Devos' Proposed Changes to Title IX, Explained*, *supra* note 197.

351. *Id.*

The final bias in the regulations is one that I discussed above but deserves elaboration—the standard of proof. As discussed above,[352] the new regulations allow schools to choose between the preponderance of the evidence standard and the clear and convincing standard for deciding issues of sexual misconduct,[353] but the institution must apply the "same standard of evidence of formal complaints against students as for formal complaints against employees, including faculty . . . ."[354] Thus, this alleged choice is mostly a false one because most universities require the clear and convincing standard for faculty members consistent with AAUP guidelines or collective bargaining agreements.[355] Accordingly, most institutions will be required to use the clear and convincing standard for student sexual misconduct.

Professor Cantalupo has been the most prominent academic voice against the clear and convincing standard for sexual misconduct cases.[356] As she explains, the goal of Title IX investigations is to treat parties equally; she calls this "procedural equality."[357] Cantalupo then argues that procedural equality cannot exist without the preponderance of the evidence standard, and those who advocate for a higher standard are not considering the needs of all parties.[358] She also points out that requiring the clear and convincing standard is based on an assumption that victims are going to lie, which is a form of sex stereotyping.[359]

Because of the bias inherent in the new Title IX regulations, I am not in favor of them, and I believe they provide the accused with too much due process and do not provide enough protection to victims of misconduct. But just as I think the new regulations require too much process in the higher education setting, I also think our workplaces (specifically, our private workplaces) provide too little protection to those accused of harassment. I turn to that next.

2. The Problem with How We Treat Private Employees Accused of Harassment

As discussed earlier,[360] the vast majority of private employees are at-will employees, meaning that they can be fired for good reason, bad reason, or no reason at all.[361] Of course, there are exceptions. Unionized employees have just-cause protections,[362] but the union density among private-sector employees is at

352. *Supra* Section III.H.3.
353. 34 C.F.R. § 106.45(b)(1)(vii) (2020).
354. *Id.*
355. Cantalupo, *supra* note 261, at 316.
356. *See id.* at 304.
357. *Id.* at 330.
358. *Id.* at 331.
359. *Id.* at 332.
360. *See supra* Section III.G.2.a.
361. *See* Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 66 (2008) (discussing the history of the at-will presumption); Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 56 (2007).
362. Porter, *supra* note 361, at 64.

an all-time low of about 6%.[363] Some high-level executive employees have individually negotiated contracts which provide some protection against an arbitrary termination.[364] But most private employees who engage in sexual misconduct could be terminated based on an accusation alone, without an investigation.[365] This does not mean most employers handle harassment complaints in this way, but they can, and sometimes they do.[366]

Much ink has been spilt about the problems with at-will employment, and scholars have long advocated for just-cause protections for all workers.[367] I generally agree with those proposals.[368] But my goal here is to specifically address the due process protections of those workers who have been accused of sexual misconduct.

In the wake of the #MeToo movement, scholars have discussed the danger of providing no due process to those who are accused of harassment, especially low-level employees.[369] First of all, overly harsh punishment with little or no due process can lead to increased retaliation against victims of harassment and might also lead to victims refusing to report the harassment.[370] This latter phenomenon happens, in part, because victims might be afraid of getting the harasser fired for what might be a minor infraction.[371]

Professor Arnow-Richman has also criticized the lack of process given to low-level employees accused of harassment.[372] She uses union arbitration decisions to demonstrate how often employers have over-reacted and therefore over-

363. *Union Members Summary*, U.S. BUREAU OF LAB. STAT., (Jan. 22, 2021, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/5EPX-DTE7].

364. Porter, *supra* note 361, at 121; Clarke, *supra* note 1, at 52; Tippett, *supra* note 201, at 284 (noting that high level executives are more likely to have employment agreements with individually negotiated terms).

365. Clarke, *supra* note 1, at 50–51.

366. *See, e.g.*, Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 87 (2018) (stating that in the #MeToo era, employers might have an incentive to take a hard line against the rank-and-file at-will employees who are accused of harassment and do not have to offer any due process protections at all); *id.* at 97 (stating that employees accused of harassment might actually receive more process than employees accused of other misconduct because employers are often incentivized by sexual harassment law to conduct an investigation); Tippett, *supra* note 201, at 274 (noting that employers are proving more willing to terminate documented harassers). *But see* Tippett, *supra* note 201, at 275–77 (arguing that employers are good at investigating harassment complaints and are unlikely to start cutting corners on their investigation in the #MeToo era).

367. *See generally*, Slater, *supra* note 361, at 58; Martin H. Malin, *The Distributive & Corrective Justice Concerns in the Debate over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 146 (1992); Ann C. McGinley, *Rethinking Civil Rights and Employment At Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1509–10 (1996); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988); Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 91–92 (2008).

368. My proposal was a little different than the traditional argument in favor of just-cause protection. Instead, I argued for a compromise position between at-will employment and just cause protections. Porter, *supra* note 361, at 84–116 (outlining my proposed compromise).

369. *See, e.g.*, Porter, *supra* note 4, at 837; Arnow-Richman, *supra* note 366, at 95–99 (discussing the risk of over-punishment of powerless employees).

370. Porter, *supra* note 4, at 837.

371. *Id.*

372. *See* Arnow-Richman, *supra* note 366, at 97.

disciplined employees for very minor sexual harassment related infractions.[373] Unionized employees are entitled to job security and can only be terminated for "just cause."[374] Those employees who are subject to discipline or termination for harassment can challenge the employer's discipline through a grievance process that often culminates in an arbitration hearing.[375] Arnow-Richman reviewed sixty-four reported arbitration decisions involving discipline or termination in part based on alleged sexual harassment.[376] In twenty-eight of those sixty-four decisions, the employee prevailed, meaning that the arbitrator concluded that the employer had punished too severely or acted without sufficient justification or process.[377] If employers are over-punishing unionized employees, who have just cause protections, it seems obvious that they are even more likely to over-punish at-will employees, who have no job security. These overly severe punishments have serious effects on at-will employees, many of whom will suffer the devastating consequences of unemployment for behavior which was not threatening and did not involve an abuse of power.[378]

Professor Elizabeth Tippett points out another problem with employers who over-punish for harassment; specifically, doing so might lead a supervisor to conclude that the best way to avoid inadvertently violating the harassment policy is to avoid contact with those who might accuse the supervisor of harassment.[379] Such supervisors might exclude female subordinates from lunches or networking events to avoid the possibility of being accused of harassment, especially if the harasser fears that termination will result.[380] Accordingly, Tippett recommends that employers provide employees with a transparent and more nuanced discipline system, rather than a one-size-fits-all approach where every infraction is treated equally seriously.[381]

More generally, knee-jerk reactions by employers that lead to terminations without any process contribute to the criticism that the #MeToo movement has gone too far.[382] This ultimately will hurt not just the accused, but also future victims because the call for more process often leads to sexual misconduct being taken less seriously wherever it occurs.

3. Meeting in the Middle

In this Section, I have argued that the new Title IX regulations provide too much due process to accused students and too little protection to victims of sexual misconduct. I have also argued that private employees receive too little due process protection. Accordingly, we need a compromise between these two

373. *Id.* at 97–99.
374. *Id.* at 97.
375. *Id.*
376. *Id.* at 97–98.
377. *Id.* at 98.
378. *Id.* at 99.
379. Tippett, *supra* note 201, at 290.
380. *Id.*
381. *Id.* at 293.
382. *See id.* at 274.

polarized positions.[383] What is the appropriate amount of process for those accused of sexual misconduct in both settings—college and the workplace? The compromise solution is most likely what the due process clause of the 14th Amendment requires for public employees: notice and an opportunity to be heard.[384] What is not required to meet due process requirements is a full evidentiary hearing with a rigid application of the rules of evidence and the opportunity for cross-examination.[385] Unless there are contractual rights to the contrary (such as tenured professors), the applicable evidentiary standard is preponderance of the evidence, which is the appropriate standard to use when investigating and disciplining those accused of sexual misconduct—regardless of whether it takes place in college or in the workplace.

V. CONCLUSION

This Article has attempted to address the confusion that followed the 2017 iteration of the #MeToo movement, explaining how the three primary areas of law that address sexual misconduct (criminal, Title VII, Title IX) will operate depending on where the sexual misconduct takes place. In doing so, this Article revealed several inconsistencies in the law, especially with regard to the vastly different due process protections provided to those accused of sexual misconduct. After answering in the negative the question of whether we can justify providing different levels of protection based on where the sexual misconduct takes place, this Article proposed a compromise solution. Regardless of whether misconduct takes place in the workplace or at institutions of higher education, and regardless of whether those institutions are public or private, the appropriate level of due process is what the due process clause provides to public employees—notice and an opportunity to be heard. Although the Trump Administration regulations are with us for at least a couple of years, it is my hope that the Biden Administration will reverse course and arrive at a compromise similar to that proposed in this article.

383. Other scholars have also discussed the importance of compromise and considering the interests of both parties. *See, e.g.*, Brodsky, *supra* note 99, at 826 (discussing the "necessity of reconceptualizing the relationship between the two interests as deeply interconnected rather than as merely locked in incurable conflict, to diagnose the roots of the 'warring factions' narrative, and to describe what is lost for all students due to this misguided approach.").

384. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547–48 (1985) ("We conclude that all the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures . . . ."). As for the pre-termination proceedings, all that is required is notice and an opportunity to respond. *Id.* at 546; *see also* Raymond v. Bd. of Regents of the Univ. of Minn., 847 F.3d 585, 590 (8th Cir. 2017) ("To satisfy minimal due-process requirements at the pre-termination stage, a public employer must give the public employee oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.").

385. *Raymond*, 847 F.3d at 590–91. To be clear, if the pre-deprivation process was minimal, public employers would be required to provide more process at the post-deprivation (*i.e.*, in the employment context, post-termination) proceeding. *See* Benavidez v. City of Albuquerque, 101 F.3d 620, 626 (10th Cir. 1996). Although some courts have required a full hearing in the post-deprivation proceeding if the pre-deprivation process was minimal, *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 676 F.2d 270, 273 (6th Cir. 1985), not all courts would require the right to cross-examine witnesses even at the post-deprivation hearing. *See* West v. Grand County, 967 F.2d 362, 369 (10th Cir. 1992).