

**Written Testimony**  
**Presented to the Committee on Home Land Security & Governmental Affairs**  
**Subcommittee on Financial and Contracting Oversight for**  
**a Roundtable on “Campus Sexual Assault:**  
**The Administrative Process & the Criminal Justice System”**

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- *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 (2011)
- *Campus Violence: Understanding the Extraordinary through the Ordinary*, 35 J.C. & U.L. 613 (2009)
- “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 483 (2012)
- *Institution-Specific Victimization Surveys: Addressing Legal & Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, TRAUMA, VIOLENCE & ABUSE (in press)
- *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887 (2014).

I submit these comments for the roundtable on “Campus Sexual Assault: The Administrative Process & the Criminal Justice System” from my perspective as a researcher, Research Fellow at the Victim Rights Law Center, and author of seven articles dealing with sexual violence in education and the federal laws that apply to this violence. The federal legal regimes that I have researched and analyzed include Title IX of the Education Amendments Act of 1972 (“Title IX”), the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”), and United States constitutional law precedents governing the administrative due process rights of students who are accused of perpetrating sexual violence. All three of these regimes regulate the handling by educational institutions (“schools”) of sexual violence<sup>1</sup> committed against a school’s students.

None of these three legal regimes is based in criminal law, nor are they enforced by criminal courts. Rather, all are enforced by federal administrative agencies or by civil courts. However, because sexual violence often also violates state criminal laws, members of the general public, including those who serve as school officials, have a tendency to conflate and confuse these federal laws with state criminal laws. As Part I of these comments will review in detail, this tendency to conflate and confuse has serious, negative implications for sexual violence victims and violates their rights under federal law. In order to avoid these negative consequences, Part II suggests several methods for keeping criminal proceedings separate from administrative and civil proceedings but also coordinating such parallel proceedings in the instances where a victim wishes to pursue both options for redress.

## **I. THE NEGATIVE CONSEQUENCES OF CONFLATING/CONFUSING CRIMINAL LAWS WITH TITLE IX, THE CLERY ACT, AND ADMINISTRATIVE DUE PROCESS**

### **a. Eliminating Sexual Violence Victims’ Rights to Equal Educational Opportunity**

The most serious consequence of conflating and confusing the criminal law with the three federal regimes that apply to sexual violence is the elimination of sexual violence victims’ rights to equal educational opportunity. This consequence results from the substitution of the procedural rights given to alleged perpetrators and victims in the criminal system for the rights of alleged perpetrators and victims under civil rights statutes, including Title IX.

Title IX prohibits schools from engaging in sex discrimination that denies the victims of that discrimination rights to an equal education. Schools are considered to have engaged in sex discrimination when they tolerate sexual violence as a form of severe sexual harassment that creates a hostile environment for students. Factors creating this hostile environment include the trauma caused by the violence itself and the exacerbation of that trauma by victims being required to encounter or risk encountering their assailants post-violence.

The trauma that results from sexual victimization makes it very difficult for victims to

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<sup>1</sup> These comments use “sexual violence” instead of terms such as “sexual assault” or “rape” as a broad, descriptive term that is not a term of art, and which includes a wide range of behaviors that may not fit certain legal or readers’ definitions of “sexual assault” or “rape.” The term therefore includes “sexual assault” or “rape,” as well as other actions involving physical contact of a sexual nature.

succeed in school at the same level as they did before the violence, especially in the immediate aftermath of the violence. Particularly if they are not addressed as soon after the victimization as possible, the negative health and educational consequences of sexual violence can have life-altering effects. The documented health consequences of sexual violence include increased risk of substance use, unhealthy weight control behaviors, sexual risk behaviors, pregnancy, and suicidality.<sup>2</sup> Common educational consequences include declines in educational performance, the need to take time off, declines in grades, dropping out of school, and transferring schools,<sup>3</sup> all of which have potentially devastating life-long financial consequences. The cost of rape and sexual assault (excluding child sexual abuse) to the nation has been estimated at \$127 billion annually (in 2012 dollars), \$34 billion more than the next highest cost criminal victimization (all crime-related deaths except drunk driving and arson).<sup>4</sup>

These traumatic effects are often exacerbated when victims are forced to encounter or to risk encountering their assailants repeatedly after being victimized. Many of the educational consequences listed above are at least partially caused by victims' efforts to avoid their assailants in shared classes and campus spaces, including by taking time off, not going to class, transferring or dropping out, all of which are linked to declines in educational performance and grades, which in turn can result in loss of scholarships and financial aid as well as tuition spent on classes the victims are not able to finish.

Therefore, under Title IX, although the initial violation of victims' rights are caused by their assailants, schools that tolerate those initial rights violations and do not seek to end such violations are themselves violating Title IX. The Office for Civil Rights in the Department of Education ("OCR") has developed specific directives for how schools should address discriminatory violence that has already occurred and stop violence from reoccurring. One such directive requires schools to provide "prompt and equitable" grievance procedures to students who report being victimized. "Prompt and equitable" generally means that, although schools have some flexibility in how they construct their procedures, when those procedures give a right to the accused student, the student victim must also get that right. In addition, such procedures must use a preponderance of the evidence standard of proof, the most appropriate standard of proof for a presumption-free proceeding that gives equal procedural rights to all parties because it requires just over 50% evidentiary weight in favor of one side or the other.<sup>5</sup>

In contrast to the equal procedural rights provided to sexual violence victims under Title IX's civil rights approach, the criminal justice system structurally marginalizes all victims of

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<sup>2</sup> See J. G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*. 286 *J. of Am. Med. Assoc.* 572 (2001).

<sup>3</sup> See R. M. Loya, *Economic consequences of sexual violence for survivors: Implications for social policy and social change* (2012) (Doctoral dissertation, Brandeis University), [http://www.academia.edu/2790455/Economic\\_Consequences\\_of\\_Sexual\\_Violence\\_for\\_Survivors\\_Implications\\_for\\_Social\\_Policy\\_and\\_Social\\_Change](http://www.academia.edu/2790455/Economic_Consequences_of_Sexual_Violence_for_Survivors_Implications_for_Social_Policy_and_Social_Change).

<sup>4</sup> See *id.*; T. Miller, M. Cohen & B. Weirsema, *Victim Costs and Consequences: A New Look* (1996), [www.nij.gov/pubs-sum/155282.htm](http://www.nij.gov/pubs-sum/155282.htm).

<sup>5</sup> See *Dear Colleague Letter*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>; Questions and Answers on Title IX and Sexual Violence, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

crime, including sexual violence victims, from its procedures and affords them few if any procedural rights. Criminal cases are structured as contests between the defendant, represented by the defendant's counsel, and the community as a whole, represented by the state and, in the proceeding itself, by the prosecutor. The victim is not a party to the case, s/he is merely a "complaining witness."<sup>6</sup>

Not having party status in a criminal proceeding leads to multiple inequities between the victim and the defendant, including unequal legal representation, unequal access to evidence, unequal privacy protections, unequal rights to be present in the courtroom, and an unequal standard of proof. Because the prosecutor is not the victim's lawyer, the victim has no legal representative dedicated to protecting her/his rights, and no control over the presentation of the victim's case by the prosecution. The prosecutor is likewise restricted from protecting the victim's rights by rules such as the *Brady* rule, which require the prosecutor to disclose any exculpatory evidence (evidence that may support the defendant's innocence), but do not require the defendant to disclose evidence tending to prove the defendant's guilt. Despite law reforms that have diminished these powers to a certain extent, defendants can still often demand disclosure of private information such as medical and counseling records that the victim wishes to keep private on the basis that these are exculpatory evidence relevant to the victim's credibility, a common target of attack by the defendant in the typical "word-on-word" sexual violence case with no third-party witnesses. This inequality even extends to the victim's ability to be in the courtroom because the rule on witness sequestration bars the victim from being present in the courtroom other than when s/he is on the witness stand.<sup>7</sup>

Finally, the "beyond a reasonable doubt" standard of proof used in criminal cases is drastically unequal, requiring 98 or 99 percent likelihood that the victim's story is accurate and credible. Even the lesser standard of "clear and convincing evidence," commonly described as somewhere between "preponderance of the evidence" and "beyond a reasonable doubt," builds significant inequality into a proceeding, since it is a significantly higher standard than the closest-to-equal preponderance standard. Moreover, while there are good reasons for the higher standards of proof in the criminal justice system, these reasons do not exist in a Title IX proceeding. The "beyond a reasonable doubt" and "clear and convincing evidence" standards provide necessary safeguards in systems where the potential penalties for convicted parties include significant jail time and for some offenses even death. Such coercive measures present powerful reasons to set a standard of proof that is most likely to avoid unjust convictions, even if it also risks many wrongful acquittals. Since schools do not have the coercive powers of the criminal system and no Title IX, Clery Act or administrative due process proceedings will result in incarceration or worse, these coercive factors cannot be a reason for abdicating our commitment to equality and civil rights principles.

For all of these reasons, it is downright dangerous to conflate civil rights and criminal justice approaches to sexual violence and allow criminal justice responses to dominate our

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<sup>6</sup> See, generally, Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 483 (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2316533](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316533); Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary through the Ordinary*, 35 J.C. & U.L. 613 (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1457343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457343).

<sup>7</sup> See *id.*

collective imagination regarding how to address this violence. If we did so, we would eliminate sexual violence victims' civil rights to equality, specifically student victims' rights to equal educational opportunity. Moreover, by taking away victims' Title IX equality rights, we would also take away rights that directly address their educational needs and have the best hope of halting the devastating health, educational and financial consequences that flow from sexual victimization. The criminal justice system is not structured to address these needs and therefore survivors are less likely to report to both criminal justice officials and to authority figures in criminal justice-imitative systems, a topic to which the next section will turn.

## **b. Chilling Victim Reporting**

A second serious consequence of conflating the criminal justice system and the administrative/civil regimes of Title IX, the Clery Act and the accused student administrative due process precedents is the likelihood that this conflation will chill victim reporting. This probability is of particular concern given the already extremely low victim-reporting rates among sexual violence victims generally and student survivors especially.

To understand why so few victims report sexual violence, it is helpful to start with Professor Douglass Beloof's analysis that "[t]he individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting."<sup>8</sup> Professor Beloof includes the following reasons among the reasons why a victim might "[e]xercise the veto" on criminal systems: "the victim's desire to retain privacy; the victim's concern about participating in a system that may do [him/her] more harm than good; the inability of the system to effectively solve many crimes...; the inconvenience to the victim; the victim's lack of participation, control, and influence in the process; or the victim's rejection of the model of retributive justice."<sup>9</sup>

This list reiterates many of the reasons why student survivors say they do not report. For instance, in Professor Beloof's category of "the victim's desire to retain privacy," college victims state that they don't report because they do not want family or others to know<sup>10</sup> or to be embarrassed by publicity.<sup>11</sup> In addition, many student victims express concern about "the inability of the system to effectively solve many crimes" when they give reasons for not reporting such as not thinking a crime had been committed,<sup>12</sup> not thinking what had happened was serious enough to involve law enforcement,<sup>13</sup> and lack of proof.<sup>14</sup> Finally, the top reason college victims give for not reporting is fear of hostile treatment or disbelief by legal and medical authorities.<sup>15</sup> They also express a lack of faith in or fear of court proceedings or police ability to

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<sup>8</sup> Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999).

<sup>9</sup> *Id.*

<sup>10</sup> See BONNIE S. FISHER ET AL, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 24 (2000), <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

<sup>11</sup> See ROBIN WARSHAW, I NEVER CALLED IT RAPE 50 (1988); CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 13 (1993).

<sup>12</sup> See FISHER ET AL, *supra* note 10, at 23.

<sup>13</sup> See *id.*

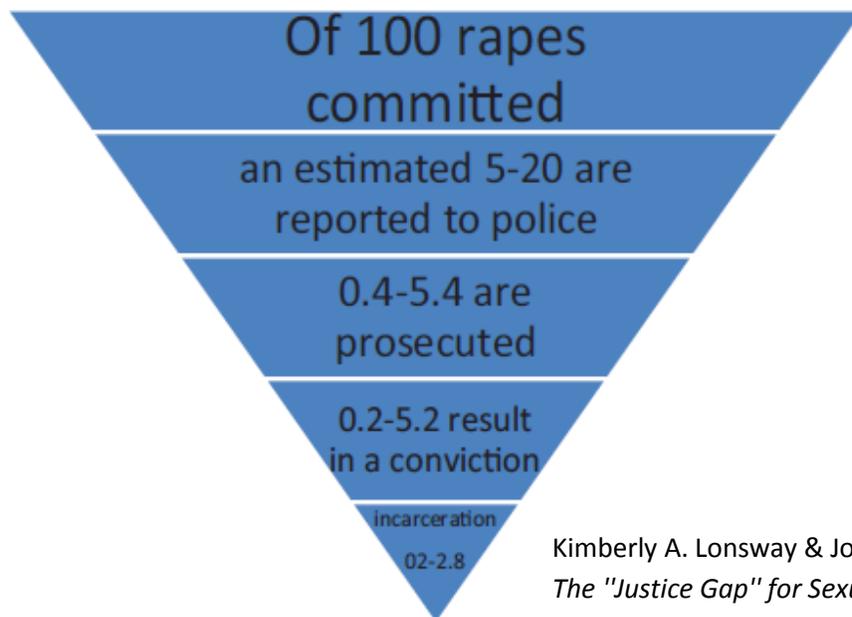
<sup>14</sup> See *id.*

<sup>15</sup> See *id.* BOHMER & PARROT, *supra* note 11, at 13, 63. WARSHAW, *supra* note 11, at 50.

apprehend the perpetrator,<sup>16</sup> fear retribution from the perpetrator,<sup>17</sup> and believe that no one will believe them and nothing will happen to the perpetrator,<sup>18</sup> all of which relate to “the victim's concern about participating in a system that may do [him/her] more harm than good.”

These reasons for not reporting also demonstrate that, like most of the American public, college victims overall think about reporting sexual violence in terms of criminal justice system responses, not in terms of their rights to equal educational opportunity under Title IX. Therefore, if we think back to Professor Beloof’s discussion of the crime victim’s veto, college victims’ general lack of reporting is a commentary showing their collective disbelief in the effectiveness of the criminal system to address their needs.

In making this commentary, college victims join a long history of survivors who have vetoed the criminal justice system’s response to sexual violence and its victims. As the following diagram summarizing Dr. Kim Lonsway’s and Joanne Archambault’s research shows, the vast majority of victims do not report to the criminal justice system and the majority of those who do report do not receive the one form of redress that the criminal justice system is structured to provide: incarceration of the perpetrator.



Kimberly A. Lonsway & Joanne Archambault,  
*The "Justice Gap" for Sexual Assault Cases*

This diagram also shows that college victims’ fears regarding the reactions of law enforcement and the inability of the criminal justice system to “solve” sexual violence crimes and hold the perpetrators accountable are well-justified. Although Lonsway’s and Archambault’s research deals with a national population, not focused on college students, other evidence confirms that college students face the same, if not worse, barriers as all sexual

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<sup>16</sup> See BOHMER & PARROT, *supra* note 11, at 13, 63.

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

<sup>18</sup> See WARSHAW, *supra* note 11, at 50; FISHER ET AL, *supra* note 10, at 23; BOHMER & PARROT, *supra* note 11, at 13, 63.

violence survivors. For instance, a 2011 study conducted by the *Chicago Tribune* found that of 171 sex crimes *investigated* by police involving student victims at six Midwestern universities over a five year period, only 12 arrests (7%) were made and only four convictions (2.3%) resulted.<sup>19</sup> Because these percentages are not based on the total number of sex crimes that occurred, but only the ones that were both reported to and investigated by police, it appears that in Illinois and Indiana at least, the criminal justice system is failing student victims even more than it is failing sexual violence victims generally.

Anecdotal evidence from the cases involving Florida State University and University of Oregon also indicate that police and prosecutors dealing with college cases are hardly free from victim-blaming attitudes. In the Florida State University case involving accusations against Jameis Winston, the most recent Heisman Trophy winner, the police's investigation was so slipshod that critical evidence was lost and the prosecutor determined he could not prosecute.<sup>20</sup> In the University of Oregon case involving three basketball players accused of gang-raping a freshman student, the prosecutor declined to prosecute due to the victim's past sexual history, failure to stop the violence, and lack of obvious incapacitation during the assault.<sup>21</sup>

All-in-all, this evidence shows that victims who exercise their veto on the criminal justice system have made a decision that the criminal system will "do them more harm than good." Such a decision is a rational, logical one not only because of the potential harm that has already been discussed, but also because the criminal justice system does victims relatively little "good" in that it does not help them meet their many trauma-induced needs post-violence. Although the criminal justice system may—for 0.02 - 5.2% of the sexual violence committed—convict and punish the perpetrator (not always with incarceration), it is simply not structured to assist the victim in the myriad areas of life that are disrupted by the violence, including her/his health, education, employment, housing, family responsibilities, and, if s/he is an immigrant, immigration status. Other than the limited compensation for which victims may qualify through state legislation and/or the federal Victims of Crime Act,<sup>22</sup> the criminal justice system provides minimal to no help to victims in avoiding or compensating for the \$127 billion annual estimated cost that U.S. sexual violence victims collectively experience. In contrast, through Title IX's administrative and court enforcement, as well as the Clery Act's administrative enforcement, student victims can get critical educational accommodations that can help them minimize the effects of sexual trauma on their educational trajectories. Moreover, through Title IX private lawsuits, student victims can get access to monetary compensation, often compensation that far surpasses the minimal amounts available through crime victims compensation funds. The federal fund, for instance, states that "[m]aximum awards generally range from \$10,000 to \$25,000,"<sup>23</sup> whereas several of the publicly-disclosed Title IX settlements have been in the six- and seven-figures,<sup>24</sup> and a 2011 United Educators (a major insurer of educational institutions) report indicates that the average amount paid to college victims from 2005-10 by their schools

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<sup>19</sup> [http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617-20110616\\_1\\_convictions-arrests-assault-cases](http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617-20110616_1_convictions-arrests-assault-cases).

<sup>20</sup> <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>

<sup>21</sup> [http://www.huffingtonpost.com/2014/05/09/university-of-oregon-rape\\_n\\_5297928.html](http://www.huffingtonpost.com/2014/05/09/university-of-oregon-rape_n_5297928.html)

<sup>22</sup> [https://www.ncjrs.gov/ovc\\_archives/factsheets/cvfvca.htm](https://www.ncjrs.gov/ovc_archives/factsheets/cvfvca.htm)

<sup>23</sup> [https://www.ncjrs.gov/ovc\\_archives/factsheets/cvfvca.htm](https://www.ncjrs.gov/ovc_archives/factsheets/cvfvca.htm)

<sup>24</sup> See Cantalupo, "Decriminalizing," *supra* note 6, at 494, 517.

for mishandling their cases was about \$77,000.<sup>25</sup>

All of this evidence suggests that conflating the criminal justice system and the administrative/civil systems of Title IX, the Clery Act, and the administrative due process cases will diminish victims' willingness to use the administrative/civil systems. In other words, it will cause them to veto the administrative/civil regimes just as most victims have vetoed the criminal system. This will have the practical effect of eliminating options that help victims stay in school and succeed in their educations, as well as help to compensate them for the trauma that they have experienced.

### **c. Interfering with Schools' Abilities to Adequately Address Student Misconduct and Implement Sound Educational Policy**

Conflating the criminal justice system and the administrative/civil legal regimes will also eliminate options for schools, and do so in a manner contrary to educational principles and policies that have been widely acknowledged as best practices by schools for at least 15 years, if not longer, and prior to the issuance of the current regimes of Department of Education guidance under Title IX and the Clery Act. During this time, schools and the representatives of schools have repeatedly articulated schools' obligations to treat all their students fairly, and schools have sought to achieve those principles in their policies on student misconduct. This commitment to fairness and equality has been supported by courts that have decided cases not only under Title IX but also under the U.S. Constitution's due process provisions.

Both before and after OCR issued its 2011 Dear Colleague Letter ("DCL"), school representatives clearly stated schools' commitment to fairness, equality, and evenhanded treatment of all college students. For instance, in a 2013 article on campus sexual violence, "Ada Meloy, the general counsel with the American Council on Education, which represents presidents of colleges and universities, said that ... the issues "can be very difficult on a campus because of the need to be careful and fair to both the accuser and the accused."<sup>26</sup> Nearly a decade before, well before the 2011 DCL, another attorney for the American Council on Education stated in a *Dateline* show on campus sexual violence that: "They are both [the schools'] students and they have a moral and legal responsibility to both students."<sup>27</sup>

Also well before the DCL, higher education insurers and associations were encouraging schools to adopt "best practice" student conduct policies and procedures that implemented these fairness and equality principles. For instance, in a pamphlet published by United Educators and the National Association of College and University Attorneys ("NACUA"), attorney Edward N. Stoner promotes a "model student code" that explicitly rejects the criminal system as a model for

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<sup>25</sup> [https://www.ue.org/Libraries/Corporate/Student\\_Sexual\\_Assault\\_Weathering\\_the\\_Perfect\\_Storm.sflb.ashx](https://www.ue.org/Libraries/Corporate/Student_Sexual_Assault_Weathering_the_Perfect_Storm.sflb.ashx) states that 72% of \$36 million dollars was paid to 54% of 262 students who sued their schools in sexual assault cases from 2005-10. The 54% was made up of accused students suing for due process violations, with the remainder being student victims. Therefore, 28% of \$36 million dollars was paid to 131 student victims, equally just under \$77,000 each.

<sup>26</sup> <http://www.mcclatchydc.com/2013/08/26/200180/students-press-feds-to-get-tough.html>.

<sup>27</sup> [http://www.nbcnews.com/id/10382613/ns/dateline\\_nbc/t/rape-campus/#.U5kknJdWSo](http://www.nbcnews.com/id/10382613/ns/dateline_nbc/t/rape-campus/#.U5kknJdWSo).

student disciplinary systems.<sup>28</sup> This pamphlet focuses preliminarily on three related points: 1) the goals behind student conduct policies and 2) the differences between those goals and the purposes of the criminal system, which make 3) thinking about student discipline systems in terms of the criminal law inappropriate and counterproductive.<sup>29</sup>

Stoner characterizes the central goal of student disciplinary systems as helping “to create the best environment in which students can live and learn... [a]t the cornerstone [of which] is the obligation of students to treat all other members of the academic community with dignity and respect—including other students, faculty members, neighbors, and employees.”<sup>30</sup> He reminds school administrators and lawyers that this goal means that “*student victims are just as important as the student who allegedly misbehaved*” (emphasis in original),<sup>31</sup> a principle that “is critical” to resolving “[c]ases of student-on-student violence.”<sup>32</sup> In doing so, he points out that this principle of treating all students equally “creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim.”<sup>33</sup> Therefore, he advises that student disciplinary systems use the “‘more likely than not’ standard used in civil situations” and avoid describing student disciplinary matters with language drawn from the criminal system.<sup>34</sup>

Evidence suggests that schools in fact followed the advice of United Educators and NACUA regarding student disciplinary systems, again prior to the DCL. Two studies did national surveys of schools’ choices of standards of proof for their student disciplinary proceedings, one in 2002<sup>35</sup> and one in 2004.<sup>36</sup> In both surveys, while most schools did not specify their standard of proof, of those that did, the majority (80% of just over 1000 schools in 2002<sup>37</sup> and a majority of 64 schools in 2004) used a preponderance standard. Only 3.3% of schools in the 2002 study used a “beyond a reasonable doubt” standard,<sup>38</sup> and the 2004 study does not indicate that a single school used the criminal standard.<sup>39</sup>

Court decisions in accused student administrative due process cases have clearly supported these policy choices. In *Goss v. Lopez*, the U.S. Supreme Court considered a high school suspension, and decided that the students were entitled to due process consisting of “*some kind of notice and [ ] some kind of hearing.*”<sup>40</sup> The *Lopez* Court also cited approvingly to *Dixon v. Alabama State Board of Education*,<sup>41</sup> where for cases involving expulsion the 5<sup>th</sup> Circuit Court

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<sup>28</sup> See EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT 12-13 (2000), available at: <http://www.edstoner.com/uploads/UE.pdf>.

<sup>29</sup> See *id.* at 7-11.

<sup>30</sup> *Id.* at 7.

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

<sup>32</sup> *Id.* at 7-8.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> <https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf>, 120.

<sup>36</sup> See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945 (2004).

<sup>37</sup> <https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf>, 120

<sup>38</sup> <https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf>, 120

<sup>39</sup> See Anderson, *supra* note 36.

<sup>40</sup> See *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

<sup>41</sup> *Id.* at 576.

of Appeals required notice “of the specific charges,”<sup>42</sup> “the names of the witnesses [and] facts to which each witness testifies,”<sup>43</sup> and a hearing, “[t]he nature of [which] should vary depending upon the circumstances of the particular case.”<sup>44</sup> Both courts have specified that these requirements fall short of “a full-dress judicial hearing, with the right to cross-examine witnesses,”<sup>45</sup> nor do they “require opportunit[ies] to secure counsel, to confront and cross-examine witnesses... or to call... witnesses to verify [the accused’s] version of the incident.”<sup>46</sup>

For private institutions, the requirements are even less onerous. While courts have reviewed private institutions for expelling or suspending students in an arbitrary and capricious manner,<sup>47</sup> most courts review private schools’ disciplinary actions under “the well settled rule that the relations between a student and a private university are a matter of contract.”<sup>48</sup> Therefore, private institutions must do what they have promised students in the school’s own policies and procedures, and courts will review disciplinary actions according to the terms of the contract.<sup>49</sup>

Courts have consistently reiterated the distinction between disciplinary hearings and criminal proceedings,<sup>50</sup> and have upheld expulsions for a wide range of student behaviors, from smoking,<sup>51</sup> drinking beer in the school parking lot<sup>52</sup> and engaging in consensual sexual activity on school grounds,<sup>53</sup> to participating in but withdrawing, prior to discovery, from a conspiracy to shoot several students and school officials,<sup>54</sup> and being found by two female students in a dormitory room with two other male students and the female students’ roommate, who was inebriated, unconscious, and naked from the waist down.<sup>55</sup> Courts have explicitly rejected many assertions of criminal due process rights by students accused of sexual violence, including rights to an attorney,<sup>56</sup> discovery,<sup>57</sup> voir dire,<sup>58</sup> appeal,<sup>59</sup> and to know witnesses’ identities and to cross-

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<sup>42</sup> *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (1961).

<sup>43</sup> *Id.* at 159.

<sup>44</sup> *Id.* at 158.

<sup>45</sup> *Id.*

<sup>46</sup> *Lopez*, 419 U.S. at 583.

<sup>47</sup> *See, e.g., Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 100 (La. Ct. App. 1993); *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464, 469 (Minn. Ct. App. 2001).

<sup>48</sup> *Dixon*, 294 F.2d at 157.

<sup>49</sup> *See Centre College v. Trzop*, 127 S.W.3d 562, 567 (Ky. 2004); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000); *Hernandez v. Don Bosco Prep. High*, 730 A.2d 365, 367 (N.J. 1999); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994).

<sup>50</sup> *See Schaer*, 735 N.E.2d at 381 (“A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts”); *Brands*, 671 F. Supp. at 632 (“The Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings”); *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 17 (D. Me. 2005) (“The courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial”).

<sup>51</sup> *See Flint v. St. Augustine High Sch.*, 323 So. 2d 229 (La. 1975).

<sup>52</sup> *See Covington County v. G.W.*, 767 So. 2d 187 (Miss. 2000).

<sup>53</sup> *See B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891 (N.D. Ind. 2003).

<sup>54</sup> *See Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007 (7th Cir. Wis. 2002).

<sup>55</sup> *See Coveney v. President & Trustees of Holy Cross College*, 445 N.E.2d 136, 137 (Mass. 1983).

<sup>56</sup> *See Coveney*, 445 N.E.2d at 140; *Ahlun*, 617 So. 2d at 100.

<sup>57</sup> *See Gomes*, 365 F. Supp. 2d at 19.

<sup>58</sup> *See id.* at 32.

<sup>59</sup> *See id.* at 33.

examine them.<sup>60</sup>

As a result of this permissive legal standard, my research has discovered only three cases where a court found a school to have violated the due process rights of a student accused of sexual violence and in only one case did the court require the institution to pay any damages.<sup>61</sup> This research is corroborated by earlier research conducted by Dean Michelle J. Anderson.<sup>62</sup> When compared to the settlements made public in several Title IX cases, the top three of which have been in the six and seven figures,<sup>63</sup> it is clear that schools also have liability-related reasons to make the policy choices that they have. That is, because schools risk losing much larger amounts of money from violating students' Title IX rights, they actually increase their own liability risks if they obligate themselves to criminal-justice-like procedures that the law does not require them to adopt and that make it harder to protect a student's Title IX rights. For these reasons, obligating schools to use criminal justice procedures could actually increase schools' liability risks through no fault of their own.

Despite all of this evidence that schools long ago decided—separately from enforcement of Title IX and the Clery Act and with the support of the courts—to treat all students equally, some recent cases have suggested that some schools may be tempted to use the criminal process to duck the school's responsibilities under Title IX and the Clery Act. In both the Florida State University and University of Oregon cases mentioned above, the school did not conduct its own separate Title IX investigation,<sup>64</sup> and in a third case involving two Dartmouth College students, where numerous articles about the criminal rape trial do not mention any attempt on Dartmouth College's part to conduct a Title IX investigation.<sup>65</sup> When this happens, conflation of the criminal justice response with the school's obligations under these administrative/civil legal regimes facilitates excuses for why that school cannot (in actuality, *will* not) respond internally and protect the student victims' Title IX and Clery Act rights. In addition, this conflation creates a tendency for many—schools and others—to forget that the standard of proof and the due process requirements for schools governed by these administrative/civil legal regimes are different than those in the criminal process.

For all of these reasons—protecting our commitment to equality and civil rights, encouraging victims to report so they may access services and minimize the damage to their education that trauma can cause, and protecting widely-adopted educational policies and best practices—we need to vigilantly guard against conflation and confusion of the federal administrative/civil legal regimes that govern schools with the criminal justice system, which neither puts extra responsibilities on schools nor expects schools to enforce the criminal law. The following part suggests three very specific ways in which we can keep these legal systems

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<sup>60</sup> See *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).

<sup>61</sup> See *Fellheimer*, 869 F. Supp. at 247. See also *Marshall v. Maguire*, 102 Misc. 2d 697 (N.Y. Sup. Ct. 1980); *Doe v. University of the South*, 2011 U.S. Dist. LEXIS 35166 (E.D. Tenn. 2011).

<sup>62</sup> Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945, 951 (2004).

<sup>63</sup> See Cantalupo, "Decriminalizing," *supra* note 6, at 494.

<sup>64</sup> See <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>; [http://www.huffingtonpost.com/2014/05/09/university-of-oregon-rape\\_n\\_5297928.html](http://www.huffingtonpost.com/2014/05/09/university-of-oregon-rape_n_5297928.html).

<sup>65</sup> See, e.g., <http://thedartmouth.com/2014/03/28/news/parker-gilbert-16-found-not-guilty-of-rape>; <http://www.vnews.com/home/11335496-95/jury-clears-former-dartmouth-student-in-rape-trial>; <http://jezebel.com/dartmouth-wants-to-make-it-clear-theyre-taking-sexual-1553069458>.

separate and avoid this confusion.

## **II. PARALLEL AND COORDINATED ADMINISTRATIVE AND CRIMINAL PROCEEDINGS**

All of the methods of keeping the criminal justice system clearly separate from Title IX, the Clery Act and the accused student administrative due process case law require an acceptance of parallel proceedings. Such proceedings allow a school to protect a student's Title IX and Clery Act rights regardless of whether local, non-campus law enforcement is also investigating the case or the local prosecutor's office is considering prosecuting. Ideally, when a criminal case and a Title IX proceeding are happening at the same time, both processes should be coordinated so one does not interfere with or damage the other, as long as the victim is included in the coordination so that she is fully informed of the range of options available and has an opportunity to choose how to move forward in both proceedings or to drop one or both proceedings.

The current OCR guidance makes clear that parallel proceedings are possible under Title IX and that Title IX proceedings may not be delayed or not pursued due to an ongoing criminal case.<sup>66</sup> In addition, similar parallel proceedings are typical in other legal areas where the same acts violate both the criminal code and a victim's rights under internal policies and/or civil rights statutes. For instance, it is common knowledge that entities such as employers or professional licensing boards need not wait to see what happens with a potential or even active criminal case before handling the case and assigning sanctions if necessary under their own internal policies and procedures. In addition, when there is both a criminal and a civil protection order proceeding occurring simultaneously, typically the counsel for both proceedings will try to coordinate the two cases. Therefore, arguments that have been advanced suggesting that it is unusual and unfair for such parallel proceedings to occur in campus sexual violence cases are not accurate.

Consistently separating criminal justice and administrative/civil processes into parallel proceedings allows each proceeding to fulfill its own purposes. As already discussed, Title IX's purpose is protecting students' equal educational opportunity, whereas the purpose of the criminal justice system is to separate criminal actors from society to protect the community as a whole, usually through incarceration. The Clery Act's original purpose was to inform consumers of higher education about the types and rates of crime on each college campus, although that purpose has expanded over the years to incorporate some of the same rights as those protected in a more comprehensive fashion by Title IX.

Allowing each of these legal regimes to fulfill their own purposes requires following several more specific recommendations, all discussed in the remainder of this Part. First, we must allow each regime to use the most appropriate procedures for its purposes. This means that procedural rules such as the preponderance of the evidence standard, the most appropriate standard for realizing both civil rights, equality principles and educational best practices, should be retained for Title IX and Clery Act proceedings. Second, understanding that victims are a large and diverse group who have many needs and goals that often lead them to pick and choose

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<sup>66</sup> Questions and Answers on Title IX and Sexual Violence, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS 27 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

between the various processes available to them, we should protect a diversity of options for survivors to use, as well as their ability to choose the option(s) best for them. Third, where victims choose to pursue multiple options, resulting in parallel proceedings that may interfere with each other, we should use coordination methods such as Sexual Assault Response Teams (SARTs), staff positions dedicated to serving victims and preventing this violence, and memorandums of understanding (MOUs) with actors outside of a school, including police, prosecutors, and community-based victims' advocacy organizations.

#### **a. Retaining the “Preponderance of the Evidence” Standard of Proof**

Separating administrative/civil and criminal proceedings from each other and allowing each to fulfill its distinct purposes requires that we retain the “preponderance of the evidence” standard of proof. To allow any other standard of proof would essentially substitute concerns such as unjust incarceration, which are relevant only to the criminal system, for the equality and civil rights goals of Title IX. In addition, this would set Title IX proceedings apart from other administrative/civil proceedings without a meaningful justification for doing so.

As mentioned above, the preponderance standard comes closest to procedural equality for all student parties, and this most effectively operationalizes the key civil rights assumption that the basic equality of all people precludes giving presumptions for or against any one person's account. Indeed, the preponderance standard communicates equality in that it does *not* suggest a general societal belief that one side or the other is more likely to lie or that this belief is so strong it needs to be systematically guarded against through the very design of our processes, including our choice of a standard of proof. Because campus sexual violence cases tend to be word-on-word cases which are decided largely based on the parties' credibility, using a standard of proof like “clear and convincing evidence” or “beyond a reasonable doubt” essentially signals that we, as a society, believe that those who report being sexually victimized are so *less* credible and so much *more* likely—*across the board*—to *lie* than the accused students are that we have to build our disbelief into the very *structure* of our process.

In addition, using a preponderance standard is consistent with our approaches to other civil rights claims protecting equality,<sup>67</sup> including under other statutes enforced by OCR and courts, other claims under Title IX itself, and claims under civil rights statutes outside of education, like Title VII of the Civil Rights Act of 1964, which prohibits sexual harassment in employment. Adopting a different standard of proof separates sexual violence victims, the majority of whom are women and girls, from the other populations who are protected from discrimination based on race, disability, age, Boy Scout membership, etc. Such a separation would mean that we as a society are comfortable with giving one group of women and girls at least and arguably women and girls as a whole, never mind many men and boys who are gender-minorities, *unequal* treatment.

Moreover, as already mentioned, the preponderance standard is used in all of the regimes

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<sup>67</sup> See Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU Educ. & L. J. 143 (2013). See also <http://www.nwlc.org/resource/national-womens-law-center-writes-letter-support-department-educations-2011-dear-colleague->

under which a school itself could be sued for mishandling a report of sexual violence,<sup>68</sup> not only in cases brought by student survivors under Title IX, but also through claims brought by accused students themselves, when alleging violations of their administrative due process rights. It is also used in sexual violence civil tort cases under state laws and in civil protection order proceedings often used to protect victims of domestic violence.<sup>69</sup> In those cases and many, many others, courts use the preponderance standard every day in matters that are deeply important to the parties involved and that can change the parties' lives forever, including orders to pay millions of dollars, to take children away from their parents, and in countless other ways.

Finally, requiring schools to use a different standard than a preponderance is unfair to schools. As discussed above, schools have demonstrated their preference for the preponderance standard and recognize it as a best practice. The administrative due process precedents emanating from the U.S. Supreme Court and lower courts clearly allow schools to follow these policy preferences and explicitly state that criminal law standards do not apply to accused student cases. In addition, when schools themselves are sued regarding their handling of sexual violence cases, they must defend claims that must only achieve a preponderance of the evidence themselves to require schools to pay damages up to millions of dollars. Furthermore, because of the greater liability schools face from Title IX lawsuits as opposed to accused students' administrative due process claims, schools' use of other evidence standards for their internal proceedings increases their risks for this potentially debilitating liability.

For all of these reasons, the preponderance standard should be retained as the standard by which schools conduct their administrative proceedings regarding sexual violence. To do otherwise is unfair to both survivors and schools and would communicate a particularly offensive and backward form of gender inequality.

#### **b. Expanding Victims' Reporting Options and Respecting Their Autonomy to Choose the Best Option for Them**

We should also retain the aspects of the current administrative systems that support and expand victims' options to report under circumstances that they judge will best help them meet their many, diverse needs, including recovering their health and minimizing the damage of the violence to their education. We should also avoid adding any requirements that diminish survivors' autonomy and control over their cases, understanding that this will likely chill victim-reporting by increasing the likelihood that victims will get the control they need through exercising their veto on the entire process. In general, we should seek to structure our administrative systems to encourage victims to report, understanding that our first and foremost goal for increasing reporting is helping victims to access services, because such access is critical to recovery from sexual violence and reporting is a prerequisite to such access. While increased reporting may have other goals such as providing data about the violence that can inform prevention efforts, reaching such a goal cannot place more burdens on survivors, who are already suffering.

One way to expand student survivors' options, access to services, and autonomy is by

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<sup>68</sup> *See Id.*

<sup>69</sup> *See Id.*

supporting and solidifying the new, multiple-path reporting structure recently articulated by OCR, with the approval of the White House Task Force to Protect Students from Sexual Assault. Under this system, schools may designate some employees as confidential and some as non-confidential, “responsible” employees. Only the confidential employees may take a report of sexual violence from a student and not pass that report to others at the institution, particularly the school’s Title IX Coordinator.<sup>70</sup> This approach was generally supported by victim advocates and service providers, who work with the largest numbers and greatest diversity of sexual violence survivors. A similar structure has also worked well to empower sexual violence survivors in the military.

We should also be careful not to add requirements that have the effect of diminishing survivors’ options and increasing the likelihood that they will not report in order to avoid that requirement. In light of the historical victim distrust of the criminal justice system discussed above, this means avoiding any requirement that links criminal justice proceedings with administrative/civil proceedings without a survivors’ informed, affirmative choice to seek that involvement and link. For instance, requiring school officials to refer reports of sexual violence to local law enforcement is likely to chill reporting by students who do not want to involve the criminal justice system in their cases. Even an opt-out provision would be insufficient because it would not depend on fully informed, affirmative action on the survivor’s part and would ask victims to make a critical decision in a moment of trauma when they are likely focused on more basic needs than whether they will seek justice through the criminal system (recall that the criminal justice system is not structured to help victims with most of their most immediate needs post-violence). Providing information sufficient for a truly informed decision by a survivor, especially in a moment of trauma, is susceptible to mishandling by schools, many of whose staff currently lack the broad-based, sophisticated understanding of sexual violence and the reactions to trauma that victims often experience. Finally, such a referral conflates criminal justice and administrative/civil processes in precisely the manner that the first ten pages of these comments was devoted to criticizing.

If the mandatory referral is designed in part to increase transparency regarding the sexual violence that is occurring on campuses, the better way to increase transparency is to mandate that all schools receiving federal funds conduct victimization surveys with their students, using the same survey designed by the Department of Education or Department of Justice, administered at the same time and in the same interval with each school’s students, and publishing the results in the school’s campus crime report. Conducting these surveys separates information and data gathering from victim-reporting and encourages all of us to think about reporting as facilitating access to services, not about proving that sexual violence exists or has a particular scope in our society or on a specific campus.

Mandatory surveys also eliminate barriers to innovation, including innovative methods to increase reporting. They would eliminate barriers to innovation because schools currently have incentives, born out of public image concerns, to suppress reporting, which in turn suppress

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<sup>70</sup> Questions and Answers on Title IX and Sexual Violence, U.S. DEP’T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. This confidentiality does not extend to reporting aggregate data for Clery Act purposes. Who reports aggregate data for the Clery Act is determined by the Clery Act’s separate statutory provisions, regulations, and enforcement regime.

innovation (institutions do not tend to create new ways to address problems they are trying to avoid acknowledging). Mandatory surveys would shift these incentives so that schools would not only not suppress victim reporting, but would encourage it. When all schools administer the same survey at the same time and in the same interval, then publish the results of that survey to the public, all are on an equal footing. Because all indications suggest that at least initially most schools will have an incidence rate close to the national average, this survey is unlikely to raise one school significantly above the others in terms of its campus climate.<sup>71</sup> Therefore, there would no longer be a perverse public image incentive to suppress reporting in order to look safer than other schools. In contrast, since a large gap between incidence rates and reporting rates will look suspicious, schools will now have an incentive to bring the two numbers closer together by encouraging victim reporting and/or developing prevention programs that cause victim reports to rise, incidents rates to fall, or both to occur simultaneously. These new incentives will support innovation, as schools seek to develop ever more effective practices for increasing reporting and preventing violence.

**c. Coordinating Parallel Proceedings Where Necessary Through Use of SARTs, Full-time Campus-based Victims' Advocates, and MOUs**

Another potential goal for the mandatory referral requirement rejected above is to encourage coordination between criminal justice and school officials. As with mandated surveys and the goal of collecting data on sexual violence, more effective methods exist for achieving such coordination. They include forming Sexual Assault Response Teams (SARTs), employing full-time victims' advocates on campus, and developing memorandums of understanding both with community-based victims' services organizations and with local law enforcement and prosecutors' offices. All of these methods allow for coordination of parallel criminal and administrative/civil proceedings without linking that coordination to victim-reporting. In addition, they accomplish this coordination before any particular case is active and are therefore in a better position to develop coordination best practices.

It bears repeating that parallel civil and criminal proceedings are quite typical throughout our legal system. As already noted, there are many examples where employers and other entities may and will take administrative or civil actions to address violations of internal policies, civil rights laws, and other civil laws, regardless of whether police have investigated or prosecutors have decided to bring criminal charges arising from the same events. Therefore, there is no reason to suggest that schools cannot investigate and resolve reports of sexual violence against their students according to their Title IX and Clery Act obligations even when police are investigating or a prosecutor has decided to prosecute. However, from the survivor's and prosecution's perspective, coordination between these parallel proceedings will likely increase the effectiveness of both actions. From the accused student/defense perspective, parallel proceedings will require accused students and their counsel to develop a strategy for defending only one or both depending on such factors as the strength of the evidence, the relative importance to the accused student of achieving "not guilty" verdicts or "not-responsible" school

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<sup>71</sup> Nancy Chi Cantalupo, *Institution-Specific Victimization Surveys: Addressing Legal & Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, TRAUMA, VIOLENCE & ABUSE (in press).

disciplinary decisions, and myriad other factors.<sup>72</sup> Like the parallel proceedings themselves, the development of such strategies is typical in many areas of law where parallel proceedings can and do result.

As coordination methods, SARTs, full-time campus-based victim advocates, and MOUs are superior to mandatory referral because all will tend to establish coordination before any specific case becomes active. SARTs generally gather school employees and other campus stakeholders to develop a coordinated response to sexual and related forms of gender-based violence, giving schools an opportunity to involve local law enforcement and community-based victims' advocates in that coordinated response. If a school employs its own full-time dedicated victims' services and advocacy office, that office will inevitably play a similar coordination role, either in addition to or instead of a SART. Victims' advocacy offices often act as the hub of a wheel full of different offices, facilitating victims' access to various services needed by victims, such as health care, housing, counseling, academic affairs, campus police, student conduct/Title IX coordinator, financial aid, etc. This network of relationships also means that victims' advocates are often informally coordinating a *de facto* SART.

Even if a school has a SART and/or a dedicated advocacy office, forming MOUs with local law enforcement and community victims' services organizations can improve coordination even further. In addition, if the school is too small or has other characteristics that make it impractical to hire full-time victims' services staff or form a SART, it can still enable coordination by forming these MOUs. The White House Task force has also suggested that schools develop such MOUs and has provided or is developing models for schools to use.

### III. CONCLUSION

Conflating the criminal justice system with the administrative and civil law regimes of Title IX, the Clery Act, and the accused student administrative due process cases and/or not countering such conflation by others leads to several negative consequences that we want to avoid. These include eliminating sexual violence victims' rights to equal educational opportunity, chilling victim reporting, and interfering with schools' abilities to adequately address student misconduct and implement sound educational policy. We should instead be seeking to keep administrative/civil proceedings clearly separate from the criminal justice system, first by retaining a preponderance of the evidence standard of proof for Title IX and Clery-related administrative/civil proceedings. In addition, we should increase victims' options

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<sup>72</sup> There are also ways to address concerns that might arise regarding accused students' criminal due process rights in the criminal proceeding, particularly regarding the way in which information gathered and disclosed through an administrative or civil proceeding might nullify the right of an accused student who is also a criminal defendant against self-incrimination. First, a statute can grant "use immunity" to evidence gathered in the administrative/civil proceeding. For instance, DC Code Section 16-1002, part of the subchapter setting out the rules for seeking a civil protection order in, for example, a case of domestic violence, states that, "Testimony of the respondent in any civil proceedings under this subchapter shall be inadmissible as evidence in a criminal trial or delinquency proceeding except in a prosecution for perjury or false statement." Second, even if the applicable statute does not provide use immunity, there are ways, in civil cases at least, to request, on a case-by-case basis, a stay of the civil case until the criminal case has concluded. Kimberly J. Winbush, *Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action Involving Facts or Transactions upon which Prosecution Is Predicated -- State Cases*, 37 A.L.R.6th 511.

for reporting and support their autonomy to make the best choices for meeting their diverse needs. Finally, we should find ways for schools and criminal justice officials to coordinate their responses to sexual violence, especially when survivors decide to pursue parallel criminal and administrative/civil proceedings.