Journal of Dispute Resolution

Volume 2024 | Issue 1 Article 10

2024

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INTRODUCTION

University students have often voiced concern that their institution did not do enough in addressing sexual assaults on campus. There is a perception among students and potential victims that there is a culture of ignoring and underreacting to sexual violence on campus. As many as one in five female[1] undergraduate students experience sexual violence during college, but few feel confident enough to report it.[2]

In 1972, Congress passed Title IX of the Education Amendments, aiming to prohibit discrimination on the basis of sex at all federally funded institutions.[3] To receive financial aid, universities have to implement educational programing and codify policies that aim to prevent and protect against sexual violence.[4] However, even despite new amendments in 2020 that aimed to address sexual violence, Title IX does not dictate any remedies or disciplinary sanctions for campus sexual violence, suggesting that each institution is "free to make disciplinary and remedial decisions that it 'believes are in the best interest of [its] educational environment.'"[5] This freedom leaves room for serious disregard of campus sexual violence. A 2019 study indicated that many major universities were not even fully compliant with the

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[*] B.A., Knox College, 2021; J.D. Candidate, University of Missouri School of Law, 2024; Associate Member, *Journal of Dispute Resolution*, 2022-2023. I am grateful to Professor Rachel Wechsler for her insight, guidance, and support during the writing of this Comment, as well as the *Journal of Dispute Resolution* for its help in the editing process. I would also like to thank my friends and family for their encouragement throughout the writing process. I truly could not have written this piece without such an amazing support system.

1. *Poll: One in 5 women say they have been sexually assaulted in college,* WASH. POST (June 12, 2015), https://www.washingtonpost.com/graphics/local/sexual-assault-poll/.

2. Catherine J. Vladutiu, Sandra L. Martin & Rebecca J. Macy, *College- or University-Based Sexual Assault Prevention Programs: A Review of Program Outcomes, Characteristics, and Recommendations*, 12 TRAUMA, VIOLENCE, & ABUSE 67 (2011); Tara K. Streng & Akiko Kamimura, *Sexual Assault Prevention and Reporting on College Campuses in the US: A Review of Policies and Recommendations,* 6 J. EDUC. & PRAC. 65 (2015).

3. 20 U.S.C. § 1681(a).

4. 20 U.S.C. § 1681.

5. U.S. DEP'T. OF EDUC., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT 14 (2022).

demands of Title IX with several lacking a specific sexual misconduct policy, leaving victims with no chance for recourse.[6]

This paper will examine how Title IX's requirements do not adequately address victim needs. In doing so, it will be looking into the relationship between victim, abuser, institution, and other stakeholders—a complex conflict-based relationship found at every university—with the aim of advocating for increased emphasis on concrete implementation of Alternative Dispute Resolution ("ADR") practices. Currently, only discretionary guidance exists concerning the implementation of ADR processes in on-campus sexual assault adjudications.[7] By removing institutional discretion, victims can take advantage of restorative justice as applied through an ADR method that would improve the implementation of Title IX at universities to better address the needs of victims and the impact of sexual assault on campus culture at large. This is not to say that individual institutions do not have their own policies concerning ADR process in grievance procedures. Rather, by removing the discretion of implementing such policies in the first place, universities will be better suited to address the needs of their student-victims and adapt informal resolution policies as needed.

Section I of this paper addresses the prevalence of campus sexual assault and victim disempowerment by examining university reporting systems and attempts at campus system reform, examining how a pro-ADR lens may better serves both victims and the campus community at large.[8] Section II addresses the development of Title IX, including its statutory implementation and intended effects, from the modern women's movement through the Violence Against Women Act ("VAWA") and the 2011 Dear Colleague Letter, as well as modern amendments university application of Title IX. Section II will further provide a case study of university sexual assault prevention programming.[9] Section III addresses and examines different ADR processes—mediation, arbitration, and negotiation—and restorative justice to determine the fit and feasibility of applying an ADR process to Title IX reform and improving victim empowerment while also addressing the critiques of using an ADR process.[10] Finally, in Section IV, I analyze the needs and interest of universities, the interests of victims and the accused, and the promises of ADR processes to advocate for concrete, not discretionary, implementation of mediation within future Title IX requirements.[11]

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6. Nick Anderson, Susan Svrluga & Scott Clement, *Survey finds evidence of widespread sexual violence at 33 universities*, WASH. POST (Oct. 15, 2019, 12:01am), https://www.washingtonpost.com/local/education/survey-finds-evidence-of-widespread-sexual-violence-at-33-universities/2019/10/14/bd75dcde-ee82-11e9-b648-76bcf86eb67e_story.html; *See also* Streng & Kamimura, *supra* note 2 (noting similar patterns of sexual violence, suggesting not much change has been made in more recent years).

7. Adrienne Publicover, *The New Provisions in Title IX Regulations – Taking the Right Steps for a Successful Informal Resolution,* JDSUPRA (July 17, 2020), https://www.jdsupra.com/legalnews/the-new-provisions-in-title-ix-51028/.

8. *See infra* § II.

9. *See infra* § I.

10. *See infra* § III.

11. See *infra* § IV.

I. PREVALENCE OF CAMPUS SEXUAL ASSAULT

Despite increased scrutiny and educational training, the campus sexual assault rate has not seen any meaningful decrease, with more than 25% of women and 5% of men reporting nonconsensual sexual contact that involved physical force, inability to consent, or inability to stop the assault from occurring.[12] Those who chose to report their assaults only made significant contact with their school's victim assistance and Title IX programs 29.5% of the time.[13] For those choosing not to report, 20% felt that they could better handle the situation themselves without university assistance, 16.8% felt that their assault was not serious enough to merit help, and 15.9% felt that they would be too ashamed to seek assistance.[14] Data also indicates that the period between the first day of fall term and Thanksgiving break is when students are at the greatest risk for sexual violence; a worrying trend with many first-year undergraduate women often left unaware of the danger.[15] At least 50% of sexual assault incidents take place during those short eight to ten weeks, with many calling the period the "red zone."[16]

The meaning of "sex" and "discrimination" have also begun to shift as younger generations, specifically Generation Z ("Gen-Z"), attend university, pushing a newfound urgency for Title IX amendment.[17] More than 70% of Gen-Z are reported to want a more activist government, and greater access to technology has increased educational diversity, leading younger generations to more quickly latch onto issues that would have taken years of recognition prior.[18] The overall lack of reporting by sexual assault victims (estimates of reports range from 1% to 13% of those assaulted) indicates a serious problem with the school-student relationship.[19] Often, only large-scale lawsuits and resignations are the only window into the world of on-campus Title IX adjudication. However, some students have taken it upon themselves to share their own experiences with the Title IX process.

In 2011, Yale found itself at the center of a Title IX inquiry when sixteen students noted Yale's "inadequate response" to chanting by the Delta Kappa Epsilon fraternity; arguing that Yale failed to adequately address the "hostile sexual environment on campus."[20] More recently, in October of 2022, Samuel Stanley, the former President of Michigan State University resigned amid board pressure for his

12. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ASS'N AM. UNIV. at x, https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf (Jan. 17, 2020).

13. *Id.*

14. *Id.*

15. Ashley Sharp, *Expert: College students at higher risk of sexual assault during fall 'red zone',* CBS SACRAMENTO (Oct. 11, 2022, 10:46 PM), https://www.cbsnews.com/sacramento/news/expert-college-students-at-higher-risk-of-sexual-assault-during-fall-red-zone/.

16. *Id.*

17. Alvin Powell, *How Title IX transformed college, universities over past 50 years,* HARV. GAZETTE (June 22, 2022), https://news.harvard.edu/gazette/story/2022/06/how-title-ix-transformed-colleges-universities-over-past-50-years/.

18. Alyssa Biederman, Melina Walling & Sarah Siock, *Meet Gen Z activists: Called to action in an unsettled world*, ASSOC. PRESS (Sep. 29, 2020, 9:58 AM), https://apnews.com/article/climate-race-and-ethnicity-shootings-climate-change-school-violence-01673bd21da246ce942d1e98a08fc96f.

19. Zara Abrams, *Title IX: 50 years later,* AM. PSYCH. ASS'N (June 28, 2022), https://www.apa.org/news/apa/2022/title-ix-landmark; s*ee also* Cantor et al., *supra* note 12.

20. *Yale Is Subject of Title IX Inquiry,* N.Y. TIMES (Mar. 31, 2011), https://www.nytimes.com/2011/04/01/us/01yale.html?searchResultPosition=17.

failure to follow Title IX protocol.[21] This scandal, involving the dean of the business school, comes only a few years after Larry Nassar's scandal rocked the university.[22]

In a more personal account, an Emory student shared that after two years of attempting to push her case through the university's Title IX system, she eventually had to drop her complaint as a result of the school's inaction, unable to face continued litigation without a sense of imminent recourse.[23] Another Emory student reported the school merely taking her statement, never contacting her again.[24] Students reported that even contacting Emory's Title IX office "require[d] a stroke of good luck."[25] A 2019 compliance review by the Department of Education revealed concerns, including that Emory displayed "ambiguity concerning the handling of allegations of sexual misconduct," and further "confusion as to whether students should submit complaints."[26]

At the University of Nebraska-Lincoln, student Hannah Johnson detailed her school's failure to address her on-campus rape, with the Title IX committee ultimately deciding that the perpetrator was "not responsible," and that Johnson was a "main actor" in her assault even though she could not remember the night.[27] This came after her perpetrator deliberately missed two pre-hearing meetings, showed up with a lawyer well known for helping students in Title IX cases, and repeatedly brought in new witnesses without giving notice.[28] Notably, a Title IX employee fought Johnson's requests for even five minutes of preparation time before questioning these witnesses.[29]

From the time of the *Alexander v. Yale* case to now, Yale still fights to keep any disciplinary actions strictly in-house. In an effort to keep statistics favorable, Yale only reports those assaults which occur in buildings where *only* Yale students live, citing that fraternity houses and apartment buildings—both heavily populated, if not entirely populated by students—as exempt from Cleary Act requirements.[30] The school has faced increasing backlash following student complaints that Yale has inadequately responded to groups of men chanting "No means yes, and yes means anal" among other disparaging comments.[31] Pushing for private resolution certainly saves the University from public ridicule, but is often advantageous for assailants, who are unlikely to be punished heavily, if at all.[32]

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21. Eliza Fawcett, *After Board Pressure, the President of Michigan State University Resigns,* N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2022/10/13/us/michigan-state-president-resigns.html?searchResultPosition=.

22. *Id.*; *see also* Ed White, *Larry Nasser loses last appeal in sexual assault scandal,* PBS (June 17, 2022, 9:46 AM), https://www.pbs.org/newshour/nation/larry-nassar-loses-last-appeal-in-sexual-assault-scandal.

23. Sophia Peyser & Sophia Ling, *Good luck getting in touch with Title IX,* THE EMORY WHEEL (Oct. 14, 2022), https://emorywheel.com/good-luck-getting-in-touch-with-title-ix/.

24. *Id.*

25. *Id.*

26. *Id.*

27. Molly Longman, *She Reported Her Rape To Her College. What Happened Next Left Her Devastated,* REFINERY29, https://www.refinery29.com/en-us/2022/01/10666176/title-ix-9-college-campus-sexual-assault-cases (Jan. 5, 2022, 10:21 AM).

28. *Id.*

29. *Id.*

30. Ann Olivarius, *Title IX: Taking Yale to Court*, THE NEW J. (Apr. 18, 2011), https://thenewjournalatyale.com/2011/04/title-ix-taking-yale-to-court/.

31. *Id.*

32. *Id.*

Though students who choose to use the extra-university legal system, generally through civil processes, to seek recourse may find more success, litigated outcomes have little pervasive impact on Title IX administration as whole. However, in the case of *J.K. v. Arizona Board of Regents*, a federal district court rejected Arizona State University's (ASU) claim that the school was not responsible under Title IX when an athlete raped another student.[33] The case eventually settled, with ASU paying $850,000 in damages and agreeing to appoint a statewide Student Safety Coordinator who would review future sexual violence policies.[34] Similarly, in *Simpson v. Univ. of Colo. Boulder*, a court found that the University of Colorado had acted with "deliberate indifference" regarding two students, Lisa Simpson and Anne Gilmore, who had been sexually assaulted by university football players.[35] The University of Colorado settled and agreed to pay $2.5 million in damages, appoint an independent Title IX advisor, and hire a new counselor in the Office of Victim's Assistance.[36] Yet one case, *Fitzgerald v. Barnstable School Committee*, did manage to have a national pervasive effect on the manner in which all Title IX cases could be viewed legally.[37]

In *Fitzgerald*, decided in 2009, concerned the possible preclusive effect of Title IX on the Equal Protection Clause of the Fourteenth Amendment, often used in sexual assault cases.[38] Lisa and Robert Fitzgerald, on behalf of their daughter, brought a § 1983 suit against their local school district's governing board, arguing that they failed to take allegations of sexual harassment seriously, and claiming that in failing to adequately comply with Title IX requirements, the school district violated the Equal Protection Clause.[39] On appeal, the Supreme Court held that Title IX was not preclusive, and that Congress intentionally wrote Title IX to work *with* the Equal Protection clause, not *separately* from it.[40] While this decision does not necessarily serve as a protection for victims or prevent any future hostilities, it shows that our highest national institutions recognize the problem of sexual violence in the public education system, paving the way for future change.

In more recent lawsuits, student-victims are facing increased hostility from universities, with many colleges challenging student anonymity, a common protection.[41] A former student a Florida A&M University was raped three times before she withdrew from the institution and filed a lawsuit, arguing that Florida A&M officials failed to investigate her reported claims and protect her from following assaults.[42] Only identifying herself as S.B., Florida A&M demanded the Court reveal her full name or toss out the suit.[43] In a similar case, nine students from

33. J.K. v. Ariz. Bd. of Regents, No. CV 06–916–PHX–MHM, 2008 U.S. Dist. LEXIS 83855, at *16–17 (D. Ariz. Sept. 29, 2008).

34. Lester Munson, *Landmark settlement in ASU rape case*, ESPN (Jan. 30, 2009, 3:00 AM), https://www.espn.com/espn/otl/news/story?id=3871666.

35. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

36. *Simpson v. University of Colorado,* ACLU, https://www.aclu.org/cases/simpson-v-university-colorado?redirect=cpredirect/34545 (Aug. 24, 2006).

37. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

38. *Id.*

39. *Id.*

40. *Id.*

41. Anemona Hartocollis, *Colleges Challenge a Common Protection in Sexual Assault Lawsuits: Anonymity,* N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/us/college-sexual-assault-anonymous.html?searchResultPosition=1.

42. *Id.*

43. *Id.*

Dartmouth College, electing to be identified as "Jane Doe", were also demanded to reveal their identities publicly.[44]

Facing pressures both internally and externally, many victims feel powerless to report their campus sexual assault; fearing that their university will not believe them.[45] Victim believability serves as a major barrier to student-victim recourse not addressed by Title IX or its related regulations.[46]

II. DEVELOPMENT OF TITLE IX

As originally written, the preamble to Title IX reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational programs or activity receiving federal financial assistance."[47] Today, Title IX applies to nearly 17,600 school districts, over 5,000 colleges and universities, vocational schools, charter schools, libraries, for-profit schools, and museums.[48] To determine the adequacy of institutional response to campus sexual violence, the U.S Department of Education Office for Civil Rights ("OCR") requires that institutions address (1) whether the sexual violence prohibited or impaired any access to educational opportunity, (2) whether the institution had notice of the sexual violence, and (3) whether the institution took effective action to provide a remedy for the violence and prevent any recurrence.[49] This section will address the creation and development of Title IX—from its roots in the modern women's movement to the proposed amendments for 2022—and examine whether universities have met the intentions and expectations of Title IX.

A. Creation of Title IX and its Intended Effects

Despite the prevalence of Title IX today, it began as the 1965 Executive Order 11246 which merely prohibited federal contractors from discrimination based on race, ethnicity, national origin, or religion, but strikingly not based on sex.[50] That distinction would not be added until President Johnson amended the order in 1968 to include sex-based discrimination.[51]

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44. *Id.*

45. *See generally id.*; *see also* WASHINGTON POST, *supra* note 1.

46. Office of Civil Rights, *Sex Discrimination: Overview of the Law*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html (Apr. 13, 2023) (noting the focus on types of discrimination rather than victim impact).

47. 20 U.S.C. § 1681(a).

48. Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (Aug. 2021).

49. Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 102 (2010).

50. Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J.L. & PUB. POL'Y 123, 124 (1997); s*ee also Legislative Path to Title IX*, LIBR. OF CONG., https://guides.loc.gov/title-IX-law-library-resources/legislative-path (last visited Sept. 22, 2023) (covering the legislative history of Title IX from March of 1970, beginning with Representative Martha Griffith's speech concerning federal funding to educational institutions which discriminated against women, to July of 1972 when President Nixon signed into law the Education Amendments of 1972, containing Title IX).

51. Valentin, *supra* note 50.

During the 1960s and 1970s, the modern women's movement, also called the women's liberation movement, pushed for equal rights and greater freedom.[52] While the first-wave feminism of the 19th and early 20th century was characterized by a push for legal rights, second-wave feminism focused instead on a woman's experience in politics, the workplace, the family unit, and with sexuality.[53] The movement achieved much rather quickly, but it was not until Bernice Sandler, a professor at the University of Maryland, made the connection between universities and federal contracting that a real push against institutional discrimination ignited.[54] In the summer of 1970, Representative Edith Green (D- OR) held the first congressional hearings concerning the employment and education of women in higher education.[55] This first legislative step, proposing to amend Title VI and VII of the Civil Rights Act of 1964, was initially disputed by minority communities, particularly African Americans, who feared that amending Title VI would weaken its scope.[56] Representative Green instead proposed a new title, which would become Title IX.[57] In 1972, Congress passed Title IX, signed into law by President Nixon, and it would not take much longer for the first sexual harassment lawsuits under Title IX to start appearing.[58]

In 1977, a group of Yale students sued the university in *Alexander v. Yale* after it refused to institute a centralized grievance procedure for sexual violence.[59] While the suit was thrown out on technical grounds, their legal argument: "Failure to combat sexual harassment of female students and its refusal to institute mechanisms and procedures to address complaints and make investigations of such harassment interferes with the educational process and denies equal opportunity in education," was upheld.[60] In the following five years, hundreds of universities instituted centralized grievance procedures, cementing protections against sexual violence within Title IX's coverage.[61]

In 1980, the OCR took charge of Title IX oversight, and the following year released a policy memorandum detailing Title IX's jurisdiction over complaints of sexual harassment.[62] In 1987, Congress passed the Civil Rights Restoration Act which amended Title IX to define "program or activity" to include:

> (1) a department, agency, special purpose district, or other instrumentality of a State or local government; (2) a State or local government entity which distributes such assistance and the agency or department to which such assistance is extended; (3) a college, university, or other postsecondary

52. Elinor Burkett, *women's rights movement*, BRITANNICA, https://www.britannica.com/event/womens-movement (Oct. 27, 2023).
53. *Id.*
54. Valentin, *supra* note 50.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Title IX timeline: 50 years of halting progress across U.S.*, ASSOC. PRESS (June 13, 2022, 4:08 PM) https://apnews.com/article/title-ix-timeline-5fc023ca41d7d8c2489de24a23413938.
59. Olivarius, *supra* note 30.
60. Note that the reason the lawsuit was thrown out was because all of the plaintiffs had graduated and were therefore found ineligible to bring a a claim. *Id.*
61. *Id.*
62. ASSOCIATED PRESS, *supra* note 58; Office for Civil Rights, *Sexual Harassment: It's Not Academic*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html (Sept. 2008).

> institution, or public system of higher education; (4) a local educational agency, system of vocational education, or other school system; and (5) a corporation, partnership, or other private organization or certain sole proprietorships. States that such terms do not include any operation of an entity which is controlled by a religious organization.[63]

This made Title IX and its accompanying regulations mandatory for any university that received federal funding, much to the chagrin of President Reagan, who unsuccessfully attempted to veto the legislation.[64] In 1988, the OCR released guidance detailing that universities had to swiftly investigate claims of sexual harassment, encouraging institutions to develop new procedures for sexual harassment complaints.[65] However, much of the sexual violence language we associate with Title IX came in the following years, with regulations such as the Clery Act, the Violence Against Women Act, the OCR Dear Colleague Letter, and the Campus SaVE Act leading the way.[66]

In April 1986, Jeanne Clery was found dead and mutilated in her dorm room at Lehigh University.[67] While she slept, another student entered her room, tortured, raped, and eventually murdered Clery after overcoming her defenses.[68] Though the student-perpetrator did face criminal conviction, the Clery's sought answers from Lehigh, and after filing suit, learned that, in the previous three years, more than thirty violent offenses occurred on Lehigh's campus without any transparency.[69] The Clery's used their settlement money to found Security on Campus (SOC), which successfully lobbied for the Campus Security Act in 1990, now known as the Clery Act.[70] The 1991 Clery Act requires universities to publicly disclose incidents of sexual violence and crime that occur on campus and further publish their specific policies relating to (1) prevention programs, (2) procedures when a sexual offense occurs, and (3) any sanctions or punishments for those responsible.[71] The Act covers relevant criminal offenses such as sexual assault (including rape, fondling, incest, and statutory rape where applicable), aggravated assault, and criminal homicide among others.[72] Furthermore, the Act's coverage is not limited to purely on-campus incidents, but requires institutions to report crime that occurs (1) on-campus, (2) in on-campus student housing, (3) on any public property within the campus boundary, (4) on any public property directly adjacent to campus, and (5) within any non-campus buildings that are controlled by the university and frequently used by students.[73]

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63. Civil Rights Restoration Act, S. 557, 100th Cong. (1987–88).

64. ASSOCIATED PRESS, *supra* note 58.

65. Shannon Harper et. al., *Enhancing Title IX Due Process Standard in Campus Sexual Assault Adjudication: Considering the Roles of Distributive, Procedural, and Restorative Justice*, 16 J. SCH. VIOLENCE 302, 304 tbl.1 (2017).

66. *Id.*

67. Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX, and VAWA*, 15 GEO. J. GENDER & L. 563, 565 (2014).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*; *see also* Harper et al., *supra* note 65.

72. *The Jeanne Clery Act*, CLERY CTR., https://www.clerycenter.org/the-clery-act (last visited Sept. 23, 2023).

73. *Id.*

Following an increasing number of sexual assault reports across the country, Congress passed an amendment to the Clery Act, the 1992 Campus Sexual Assault Victim's Bill of Rights which detailed a set of rights to protect victims of campus sexual violence, including in part:

> (1) Survivors shall be notified of their options to notify law enforcement.
>
> (2) Accuser and accused must have the same opportunity to have others present.
>
> (3) Both parties shall be informed of the outcome of any disciplinary proceeding.
>
> (4) Survivors shall be notified of counseling services.
>
> (5) Survivors shall be notified of options for changing academic and living situations.[74]

The Clery Act and its subsequent amendment were ahead of their time as despite increased reporting from survivors, the nation had yet to realize the pervasiveness of campus sexual violence.[75]

In 2013, the Clery Act was amended to include the Campus Sexual Violence Elimination Act ("Campus SaVE") which required institutions to (1) increase their transparency about on-campus sexual violence; (2) guarantee rights for victims, including obtaining orders of protection; (3) implement campus-wide educational programing specific to sexual violence; and (4) publish and standardize their disciplinary proceedings, including listing all possible sanctions an accused may face.[76] Notably, prior to Campus SaVE, institutions only had to measure statistics on forcible and non-forcible sex offenses (in addition to other major crimes).[77] However, Campus SaVE requires institutions to recognize and track dating violence, domestic violence, sexual assaults, and stalking, expanding the coverage of criminal action under the Clery Act.[78]

In 1994, Congress passed the Violence Against Women Act ("VAWA"), the first federal legislation aimed at ending gender-based violence.[79] VAWA specifically targets violent crimes such as sexual assault, intimate partner violence, dating violence, and stalking, through grant programs to governments, nonprofit organizations, and universities. [80] In addition to grant programs and criminal justice reform,

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74. Dunn, *supra* note 67; *Title IX: The Federal Campus Sexual Assault Vicitms' Billl of Rights*, ALLEGHENY COLL., https://sites.allegheny.edu/titleix/the-federal-campus-sexual-assault-victims-bill-of-rights/ (last visited Sept. 16, 2023); s*ee also* Campus Sexual Assault Victims' Bill of Rights Act, S. 1289, 102d Cong. (1991-92).

75. Dunn, *supra* note 67.

76. Campus SaVE Act, H.R. 2016, 112th Cong. (2011-12); s*ee also* Campus SaVE Act, RAINN, https://www.rainn.org/articles/campus-save-act (last visited Dec. 2, 2023).

77. RAINN, *supra* note 76.

78. *Id.*

79. *History of VAWA*, LEGAL MOMENTUM, https://www.legalmomentum.org/history-vawa (last visited Sept. 23, 2023).

80. LISA N. SACCO, CONG. RSCH. SERV, R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING (2015).

VAWA also provides for ongoing research studies tailored to on-campus sexual assault and battered woman syndrome.[81] In 2013, President Obama reauthorized VAWA and implemented changes made to the Clery Act.[82] The Office of Postsecondary Education then amended 34 C.F.R. § 668.46 to reflect these new provisions, which most notably provides in part that the regulation:

> Require[s] institutions to provide for a prompt, fair, and impartial disciplinary proceeding in which: (1) Officials are appropriately trained and do not have a conflict of interest or bias for or against the accuser or the accused; (2) the accuser and the accused have equal opportunities to have others present, including an advisor of their choice; (3) the accuser and the accused receive simultaneous notification, in writing, of the result of the proceeding and any available appeal procedures; (4) the proceeding is completed in a reasonably prompt timeframe; (5) the accuser and accused are given timely notice of meetings at which one or the other or both may be present; and (6) the accuser, the accused, and appropriate officials are given timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings.[83]

However, despite the perceived benefits to institutional handling of campus sexual violence, certain changes, such as revising the definitions of rape, fondling, incest, sex offense, and statutory rape to those used in the FBI guidelines may do more harm than good.[84] In large part, the FBI definitions focus purely on criminal action, and do not adequately cover the variety of on-campus sexual misconduct, including harassment, videotaping, revenge porn, and coerced sexual action without bodily harm.[85] While many cases on university campuses require traditional criminal justice action, the institutional process is largely distinct from criminal prosecution.[86] In essence, though VAWA takes steps to address on-campus sexual violence through proper disciplinary action, its focus on criminal justice misses the point. Not every victim will want to press charges or talk to police, and not every victim will feel that their assault warrants criminal prosecution.

In 2011, OCR Assistant Secretary authored a "Dear Colleague Letter" ("DCL") discussing Title IX's on-campus sexual violence requirements.[87] As stated in 34 C.F.R. § 106.9, Title IX requires institutions to (a) publish a notice of nondiscrimination including sexual harassment, (b) designate an employee Title IX coordinator, and (c) codify and publish centralized grievance procedures for resolution of any discrimination or sexual harassment cases.[88] In addition, institutions must use a preponderance of the evidence standard when evaluating sexual violence cases;

81. *Id.* at 4.

82. Violence Against Women Act, 79 Fed. Reg., 62752 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

83. *Id.*

84. *Id.*; see also Mary P. Koss & Elise C. Lopez, VAWA after the Party: Implementing Prosed Guidelines on Campus Sexual Assault Resolution, 18 CUNY L. REV. FOOTNOTE F. 4, 6 (2014).

85. Koss & Lopez, *supra* note 84.

86. *Id.* at 7.

87. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civ. Rts., Office for Civil Rights, U.S. Dep't of Educ., on Sexual Violence 1, 6 (Apr. 4, 2011) (on file with U.S. Dep't of Educ.).

88. *Id.*

looking at whether it was more likely than not that such action occurred.[89] As many universities were using a "clear and convincing" standard—reasonably certain—this clarification (preponderance) reflected favorably upon victims.[90] However, aside from reiterating the minimal standards required by Title IX, the DCL is a mere encouragement for schools to implement better programming.[91]

The DCL encourages that all institutions create preventative education programming and make victim resources available but does not require it in any capacity.[92] It also suggests that institutions should encourage victims to report sexual violence, but then notes that existing school disciplinary policy, such as forcing the victim to attempt to resolve the dispute directly with their offender, might discourage victim reporting.[93] In sum, the DCL hints at victim dissatisfaction with the requirements of Title IX—of which their impact is minute on actual institutional policy—but doesn't suggest that Title IX needs to go further at regulating institutional programming.

Compiling the above, Title IX requires very little with institutions only to (a) publish a notice of nondiscrimination including sexual harassment, (b) designate an employee Title IX coordinator, and (c) codify and publish centralized grievance procedures for resolution of any discrimination or sexual harassment cases.[94] Building upon this, the Clery Act increased transparency, requiring institutions to keep track of and publish statistics relating to major criminal offenses including forcible and non-forcible sex offenses.[95] The 2013 Campus SaVE amendment to Clery added the crimes of dating violence, sexual assault, domestic violence, and stalking to the list of tracked crimes, further required institutions to implement specific sexual violence educational programing, and guaranteed victims certain rights throughout their on-campus proceeding.[96] While VAWA and its 2013 amendment do take steps to address sexual violence on campuses—specifically targeting dating violence, domestic violence, and sexual violence among other crimes—its criminal justice lens may do more harm than good.[97] However, VAWA does require that institutions conduct prompt, fair, and impartial disciplinary proceedings in an effort to give victims a greater voice.[98] Finally, the DCL recognizes that institutions are left with much leeway despite the requirements of Title IX and the related regulations but can only encourage schools to do better without taking any substantive steps.[99]

B. Modern University Application of Title IX

While it is easy to diminish Title IX's effectiveness when looking strictly at its trail of development, the Act has had a profound impact on women's opportunities in higher education. A Pew research survey indicated that 63% of those that have

89. *Id.* at 11.
90. *Id.*
91. *Id.* at 2.
92. *Id.* at 19.
93. Ali, *supra* note 87, at 12.
94. *Id.* at 6.
95. CLERY CENTER, *supra* note 72.
96. RAINN, supra note 76.
97. U.S. DEPARTMENT OF EDUCATION, *supra* note 82.
98. *Id.*
99. *See generally* Ali, *supra* note 87.

heard about Title IX indicated that it has had a positive impact over the last 50 years in increasing gender equality.[100] In the wake of increased pressures from students to better address the issue of on-campus sexual assault, many universities have established first-year education programs in attempt to curb sexual assault before it even happens.[101]

As part of the University of Illinois "We Care" program, all first-year incoming undergraduate students are required to attend the First Year Campus Acquaintance Rape Education ("FYCARE") workshop.[102] Established in 1996, FYCARE aims to address dating and domestic violence, and stalking in addition to sexual assault, with curriculum revisions each year to better address student needs.[103] The program focuses on understanding consent, ways to support sexual assault victims and survivors, and campus resources for students seeking help.[104]

Despite this tailored education programming, the University of Illinois still sees a sexual assault rate of one in five women and one in 24 men, reflecting the national average and shedding doubt on the effectiveness of campus education in preventing on-campus sexual assaults.[105] After more than 20 years of education, FYCARE is praised more for its impact on increasing campus inclusivity rather than decreasing sexual assault rates.[106] In a 2019 Campus Climate Report, most students, despite receiving information from the university about Title IX resources, reportedly still choose not to tell others about their assault, or at most, only choose to disclose such information to a close friend.[107] This same study also indicated that 87.2% of students believed that the University of Illinois "would likely take a report of sexual violence seriously," posing an interesting dichotomy between student belief and student action.[108]

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100. Ruth Igielnik, *Most Americans who are familiar with Title IX say it's had a positive impact on gender equality,* PEW RSCH. CTR. (Apr. 21, 2022), https://www.pewresearch.org/fact-tank/2022/04/21/most-americans-who-are-familiar-with-title-ix-say-its-had-a-positive-impact-on-gender-equality/ (identifying a partisan balance, with those identifying as Dem/Lean Dem viewing Title IX as more effective than those identifying as Rep/Lean Rep).

101. *See generally* UNIVERSITY OF ILLINOIS, *infra* note 102; UNIVERSITY OF MISSOURI, *infra* note 112; UCLA TITLE IX OFFICE/SEXUAL HARASSMENT PREVENTION, *infra* note 115 for examples from the University of Illinois, University of Missouri, and University of California Los Angeles, respectively.

102. *FYCARE: First Year Campus Acquaintance Rape Education*, UNIV. ILL., https://wecare.illinois.edu/prevention/students/fycare/ (last visited Sept. 20, 2023).

103. *Id.*

104. *Id.*

105. Jon Bystrynski & Nicole E. Allen, *Campus Climate Report,* UNIV. ILL., https://wecare.illinois.edu/docs/Campus-Climate-Survey-fact-sheet-2019.pdf (2019) (reflecting results from an in-house survey conducted by the University of Illinois).

106. Mara Shapiro, *FYCARE celebrates 20 years on campus*, THE DAILY ILLINI (Nov. 10, 2016), https://dailyillini.com/life_and_culture-stories/2016/11/10/fycare-celebrates-20-years-campus/ (praising FYCARE for increasing campus inclusivity, but doesn't seem to indicate any impact on overall sexual violence).

107. Bystrynski & Allen, *supra* note 105. A member of the Journal of Dispute Resolution (JDR) and an alumni of the University of Illinois recounted an illustration that may explain the reason many students make this choice: "During my undergraduate years, a friend was sexually assaulted by her then boyfriend and engaged in the Title IX process. Despite being found liable (or whatever term is used), the boyfriend did not get suspended from the University. The ex-girlfriend was asked to suggest a punishment while in front of the ex-boyfriend. She only asked for him to routinely attend therapy and be enrolled at the University. She indicated to me that she only asked for such a nominal punishment because he was sitting right in front of her, and she feared retaliation." Wednesdai Brooks et al., *Legislative Update*, 2023 J. DISP. RESOL. 162, 165 n.29 (2023). If other students report inaction by their Title IX office, new victims are less empowered to speak to campus authorities.

108. Bystrynski & Allen, *supra* note 105.

A 2021 lawsuit against the University of Illinois highlighted the school's inadequacy in handling Title IX adjudication, with the plaintiff reporting that administrators "tried to keep things quiet, they tried to hush things up."[109] They dropped reports, multiple times, in order to keep the funding stream going."[110] While the University is working to change is policies in the wake of public attention, cases like these still illustrate that educational programing may not be enough to effectively protect students on its own, and that policies need to be more than "just words on paper."[111]

At the University of Missouri, all incoming students are required to complete "U Got This!", an online video-based education program that discusses sexual assault, consent, dating and domestic violence, stalking, and more.[112] Unlike the program at University of Illinois, which used small-group, in-person workshops in FYCARE, U Got This! Takes only 40 minutes to complete and allows students to leave the program and return at any later, often resulting in only passive focus from participating students.[113] Notably, the University of Missouri 2022 Annual Fire Safety and Security Report indicated an increase in on-campus rapes and assaults between 2019 and 2021, suggesting that the U Got This! Education program is doing nothing to curb or prevent sexual assault on campus.[114] This is not to say that educational programing has no place on campus, but that such programing itself is not enough to address the pervasive issue of sexual violence.

In comparison to the previous two universities, the University of California-Los Angeles ("UCLA") requires all incoming students to complete both an online-based training through Everfi and an in-person training their first year, with continuing students also required to complete a yearly online training.[115] But annual training still proved ineffective on-campus, with UCLA reporting a near 40% increase in reports of sexual assault in 2018, with a 38% increase between 2016 and 2017 alone.[116] UCLA students report the university "dragging its feet" in handling sexual assault cases and the Dean of Students not even able to offer specifics in high profile cases, such as the case of the Phi Kappa Psi who went on probation after a sexual assault investigation, suggesting the administration is not going far enough in acknowledging and condemning sexual violence on campus.[117] After a mere 10 weeks of self-inflicted probation, the fraternity subsequently lifted its own probation with no recourse or guidance from the university.[118] As with many other

109. Rachel Otwell, *U of I Sued Over Handling Of Sexual Misconduct Claims,* NPR ILL. (Feb. 25, 2021, 5:00 AM), https://www.nprillinois.org/education-desk/2021-02-25/u-of-i-sued-over-handling-of-sexual-misconduct-claims.

110. *Id.*

111. *Id.*

112. Office of Institutional Equity, *U Got This! Sexual Violence Prevention,* UNIV. MO., https://equity.missouri.edu/education-prevention-and-outreach/student-training-sexual-violence-prevention/ (last visited Sept. 22, 2022).

113. *Id.; see also* UNIVERSITY OF ILLINOIS, *supra* note 102.

114. Leila Mitchell, *MU safety and security report shows increase in rape, assault,* ABC 17 NEWS (Sept. 29, 2022, 8:10 PM), https://abc17news.com/news/2022/09/29/mu-safety-and-security-report-shows-increase-in-rape-assault/.

115. *Training Overview,* UCLA TITLE IX OFF./SEXUAL HARASSMENT PREVENTION, https://sexualharassment.ucla.edu/education-training/training-overview (last visited Dec. 2, 2023).

116. Lucy Carroll, *UCLA's reluctant response to ruse of reported sexual assaults requires reform,* DAILY BRUIN (Oct. 8, 2019, 11:31 PM), https://dailybruin.com/2019/10/08/uclas-reluctant-response-to-rise-of-reported-sexual-assaults-requires-reform.

117. *Id.*

118. *Id.*

universities, UCLA seems "stuck between sexual assault scandals, a morally ambiguous attachment to donations and an unfulfilled responsibility to its students."[119]

Under current regulation, Title IX requires that applicable institutions (1) provide written notice of allegations, (2) grant the right to an advocate who may cross-examine, and (3) allow victims and the accused to submit and challenge evidence.[120] In addition, students have the right to a live hearing and an impartial finding based on either preponderance or clear and convincing evidentiary standards.[121] Finally, both parties must have an equal opportunity to appeal the finding.[122] Each step is overseen by a school's Title IX Coordinator, who manages university compliance with the requisite policy.[123] However, under current regulations, institutions are only required to designate one employee to serve as a Title IX coordinator, regardless of campus population.[124] So a school such as Arizona State University, reporting about 64,716 undergraduates in the Fall of 2021, only requires one coordinator for the entire student body.[125] Cornell College, which reported having 1,045 undergraduates for the same term, is also only required to install one coordinator, though this seems much more manageable in comparison.[126] Noting this, Title IX seems to require only the minimum in terms of both adjudicatory procedures and compliance oversight.

Regarding the actual grievance procedure, Title IX does not require schools to tailor grievance procedures to the issue, such as sexual harassment.[127] Universities may instead use existing standardized grievance procedures to address the problem, even if they do not pertain to the type of discrimination at hand.[128] Furthermore, Title IX regulations do not require a specific format for grievance procedures.[129] Department of Education guidance indicates that grievance procedures may include informal resolution such as mediation for resolving certain types of harassment, but also suggests that mediation is not appropriate for sexual assault adjudication.[130] Interestingly, no reason was given for this distinction.[131] This lack of reasoning may potentially reflect OCR guidance during the Obama Administration in the Dear Colleague Letter, noting that "OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints,"[132] and the Bush Administration, "[i]n some cases, such as alleged sexual

119. *Id.*
120. *Title IX: Policy*, U.S. DEP'T OF EDUC., https://sites.ed.gov/titleix/policy/ (last visited Sept. 22, 2023).
121. *Id.*
122. *Id.*
123. *Federal Coordination and Compliance Section,* U.S. DEP'T OF JUST., https://www.justice.gov/crt/federal-coordination-and-compliance-section-152 (Apr. 27, 2022).
124. *Id.*
125. Sarah Wood, *10 Colleges With the Most Undergraduate* Students, U.S. NEWS (Nov. 15, 2022, 3:43 PM), https://www.usnews.com/education/best-colleges/the-short-list-college/articles/colleges-with-the-most-undergraduates.
126. *Cornell College*, U.S. NEWS, https://www.usnews.com/best-colleges/cornell-college-1856, (last visited Sept. 22, 2023).
127. U.S. Department of Justice, *supra* note 123.
128. *Id.*
129. *Id.*
130. *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html (Dec. 4, 2020).
131. *Id.*
132. Ali, *supra* note 87, at 8.

assaults, mediation will not be appropriate even on a voluntary basis."[133] This may also be due to a negative perception of the privacy of mediation or a sense of pressured forgiveness that may accompany the process.[134]

Other information differs, noting the extremely personal nature of sexual harassment and assault cases which "cut to the core of an individual's identity," making mediation an appropriate resolution process.[135] A mediator can be instrumental in helping the victim navigate their emotions and focus on resolution of the issue at hand, shifting the dispute in a more positive manner.[136] Essentially, mediation does not need to be a one-sided affair nor a cover-up process for a university to take advantage of.

Universities and other institutions develop their own procedures subject only to the requirement that they "effectively provide for prompt and equitable resolution of complaints."[137] These in-house procedures do not prevent aggrieved individuals from filing federal complaints without using the institution's grievance procedures or from filing a federal complaint while concurrently participating in an institution's grievance procedure.[138] As such, any implementation of ADR should not take away from this private right of litigation still present under current Title IX regulations.

Recent government handling of Title IX has provided no recourse for students. The Trump administration's 2020 Amendments, championed by then-Secretary of Education, Betsy DeVos, removed the mandatory reporting requirement, significantly hindering the ability of victims and survivors to come forward.[139] The new rule severely limits the types of sexual violence universities are required to investigate, narrowing investigation to only those actions that are "severe, pervasive, and objectively offensive."[140] However, under the Trump administration rule, sexual violence is almost never considered an "objectively offensive" crime, meaning that many victims no longer have a valid complaint in the eyes of the university or government.[141] And even for those who choose to report, the process of reporting, particularly that of allowing those accused of sexual assault the opportunity to cross-examine the victim, a direct contradiction from Obama-era guidance, only serves to re-victimize and encourage victims to drop their cases.[142]

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133. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, DEP'T OF EDUC. 1, 21 (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

134. Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME (Oct. 2, 2017, 2:19 PM), https://time.com/4957837/campus-sexual-assault-mediation/.

135. Felicia T. Farber, *Mediating Sexual Harassment and Discrimination Disputes*, N.J. LAW., Apr. 2020 at 22, 23.

136. *Id.* at 24.

137. U.S. DEPARTMENT OF JUSTICE, *supra* note 123.

138. *Id.*

139. *See* Nicole Bedera, *Trump's New Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point*, TIME (May 14, 2020, 1:32 PM), https://time.com/5836774/trump-new-title-ix-rules/.

140. *Id.*; s*ee also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* DEP'T OF EDUC. OFF. FOR CIV. RTS 1, 507–17, https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf (last visited Dec. 2, 2023).

141. Bedera, *supra* note 139.

142. Lauren Camera, *New Title IX Rules Bolster the Rights of Those Accused of Sexual Assault,* U.S. NEWS (May 6, 2020, 3:42 PM), https://www.usnews.com/news/education-news/articles/2020-05-06/trump-administration-publishes-final-title-ix-campus-sexual-assault-regulations; s*ee also* Jeannie Suk Gersen, *How Concerning Are The Trump Administration's New Title IX Regulations?,* THE NEW

In response, the University of California System President, Janet Napolitano, issued a statement noting that it was "deeply troubling" that the Education Department disregarded student input and weakened sexual violence police that took decades to establish.[143] Others, such as Catherine Lhamon, chair of the U.S. Commission on Civil Rights, suggested that the Amendments were "taking us back to the bad old days . . . when it was permissible to rape and sexually harass students with impunity."[144] Speaker Nancy Pelosi argued that the Amendments only served to "threat[en] to silence survivors and endanger vulnerable students."[145]

However, following President Biden's election in 2020, the outlook for Title IX appears to be back on its victim-based track, with proposed 2022 Amendments aiming to roll back the Trump-era regulations, reinstate Obama-era rules, and further expand victim protections.[146] Not only will the Amendments remove the narrow definitions supported by the Trump Administration, but will expand to include all "unwelcome sex-based conduct" which creates a hostile environment for students.[147] Furthermore, parents, guardians, and authorized legal representatives will also be able to seek assistance through a university's Title IX process on behalf of their student, helping those victims who otherwise would not come forward on their own.[148] However, this broad assistance could prove dangerous, taking control out of victim hands and placing it into those of any aggrieved party, even if they are not the direct victim.[149] This could lead to re-traumatization and further disempowerment should victims have to move under the guidance of another party, not under their own means.

Senator Tim Kaine (D-VA) is also aiming to support victims of on-campus sexual assault through the Survivor Outreach and Support on Campus Act, which would require all universities who receive federal funding to add an independent advocate for student victims.[150] The advocate will serve as a directory for on-campus resources and help victims to access emergency medical care and forensic examinations when needed.[151] For those victims who choose to seek legal recourse, the advocate can attend any institution-based adjudication proceedings, decreasing the pressure on the victim to act as their own counsel.[152]

Regarding implementation of ADR in Title IX regulation, in May 2020, the Department of Education released new regulation concerning sexual harassment specifically, noting that a presumed 25% of all Title IX grievances would be

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YORKER (May 16, 2020), https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations.

143. Press Release, Janet Napolitano, University of California President, UC undeterred despite harmful federal sexual harassment rules (May 6, 2020), https://www.universityofcalifornia.edu/press-room/uc-undeterred-despite-harmful-federal-sexual-harassment-rules-0.

144. Gersen, *supra* note 142.

145. *Id.*

146. Dustin Jones, *Biden's Title IX reforms would roll back Trump-era rules, expand victim protection,* NPR, https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination (June 23, 2022, 2:40 PM).

147. *Id.*

148. *Id.*

149. *See generally id.* (noting that non-victims are able to pursue adjudicatory processes).

150. Isabel Cleary, *Sen. Tim Kaine introduces bill to support survivors of sexual assault on college campuses,* NBC 12 (Sept. 27, 2022, 4:08 PM), https://www.nbc12.com/2022/09/27/sen-tim-kaine-introduces-bill-support-survivors-sexual-assault-college-campuses/.

151. SOS Campus Act, S. 1483, 116th Cong. (2019–20).

152. *Id*.

resolved by "informal resolution" through the use of ADR techniques.[153] Section 106.45(b)(9) of the regulations gives the "recipient" institutions the discretion to utilize ADR in their grievance procedures, even mentioning that restorative justice and mediation would prove particularly appropriate, but does not require an institution to adopt ADR procedures.[154] These procedures would be seen as a proposed alternative to the more adversarial investigations that typically accompany a Section 106.45 grievance process.[155] Should an institution wish to implement informal resolution procedures, the choice to participate must be purely voluntary on the part of the aggrieved student(s).[156] Finally, Section 106.45(b)(1)(iii) requires any institutions who seek to use informal resolution to provide facilitator training on: (1) "the definition of sexual harassment under § 106.30(a)"; (2) "the scope of the institution's education program or activity"; (3) "how to conduct informal resolution processes"; and (4) "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias."[157]

It is important to note that even if an institution chose to adopt informal resolution procedures, a student is still required to make a formal complaint that must be both investigated and adjudicated by the institution.[158] This may still prove to be a barrier for many student-victims who lack faith in their Title IX office or fear public knowledge of their victimization. It may also prove difficult to get the accused individual to participate in informal resolution absent an acknowledged formal complaint to the university. More work needs to be done to improve the connection between the Title IX office and students. However, through regulatory guidance from the Department of Education itself, Title IX progression could be more efficient than congressional amendment, which must survive the formal legislative process. Though, as noted previously, the Department of Education does

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153. Michael J. Davis, *Informal Resolution of Title IX Cases in Higher Education: An Analysis of ADR Opportunities Under the New Regulations,* OKLA. BAR J. (Nov. 2022), https://www.okbar.org/barjournal/november-2020/obj9109daivs/; s*ee also* 34 C.F.R. § 106.45(b)(9):

> A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient – (i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and Obtains the parties' voluntary, written consent to the informal resolution process; and (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

154. *Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45(b)(9): Informal Resolutions*, SUNY 2 (June 4, 2020), https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/Informal-Resolutions.pdf#.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

not see mediation as appropriate for resolving sexual assault disputes.[159] As it stands, there is still only discretionary guidance concerning the implementation of ADR processes in on-campus sexual assault adjudication.[160]

As an example, under the University of Missouri System's Section 600.030 concerning resolution of sexual harassment complaints under Title IX, (C)(3) reads, "Administrative Resolution. A voluntary informal resolution process where a decision-maker makes a finding on each of the alleged policy violations in a Formal Complain and a finding on sanctions without a hearing."[161] Further, (O) details that the "informal resolution" option "includes mediation or facilitated dialogue," and that "[p]arties will abide by the terms of the agreed-upon resolution."[162] Each party's participation in such informal resolution must be voluntary, informed, and in writing."[163] Each party also has the right to also refuse informal resolution and proceed to the Hearing Panel Resolution Process.[164] The University of Missouri also seems to offer administrative resolution which appears similar to arbitration.[165] This option seems particularly apt for parties who do not want to meet face to face as "[t]he decision maker will attempt to meet separately with the Complainant and the Respondent…" allowing the parties to avoid direct confrontation.[166] Either party is allowed to appeal a decision made under administrative resolution.[167]

Similarly, at the University of North Carolina-Greensboro, mediation is offered as an informal resolution process which either party may request after a formal complaint is filed.[168] Interestingly, only the complainant, respondent, and mediator are allowed to attend and participate in the university mediations, though either party may consult with an attorney or advisor at any time though the recess process.[169] If no agreement is reached, the dispute then proceeds through the formal grievance process with a full investigation.[170]

III. EXAMINATION OF ADR PROCESSES

This section will examine alternative dispute resolution processes—mediation, arbitration, and negotiation— to develop an understanding of how ADR processes can potentially not only be preferential to traditional litigation in efficiency under certain circumstances, but also increase victim empowerment and satisfaction. I

159. U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, *supra* note 130.
160. Publicover, *supra* note 7.
161. UNIV. OF MO. SYS., 600.030, RESOLUTION PROCESS FOR RESOLVING COMPLAINTS OF SEXUAL HARASSMENT UNDER TITLE IX – FOR MATTERS INVOLVING CONDUCT ALLEGED TO HAVE OCCURRED ON OR AFTER AUGUST 14, 2020 (2021).
162. *Id.*
163. *Guide to Understanding the Title IX Process,* UNIV. MO. SYS. 11, https://equity.missouri.edu/wp-content/uploads/2023/03/Title-IX-Process-Guide.pdf (last visited Sept. 27, 2023).
164. *Id.* at 15.
165. *Id.* at 11.
166. *Id.*
167. *Id.* This report in totality is particularly useful for understanding what resolution processes can look like at a university using both formal and informal means. While only some of the report is disscused here, I recommend that readers particularly interested in this subject check out the report in its entirety.
168. *Title IX: Informal Resolution Process*, UNC GREENSBORO, https://titleix.uncg.edu/informal-resolution-process/ (last visited Dec. 2, 2023) (noting the flowchart, which provides ease of understanding for students attempting to grapple with their options under the Title IX adjudication system).
169. *Id.*
170. *Id.*

will be analyzing the merits and detriments to each ADR process to determine which process is more preferential for victims in the campus sexual violence context.

A. ADR, Restorative Justice, and Victim Empowerment

ADR and restorative justice practices, used both separately and together, aim to directly address victim needs in adjudicatory situations. Restorative justice fundamentally focuses on (1) the harmful action and (2) the victim of that action and their needs, and (3) the party whose obligation it is to address those needs and ameliorate the harm.[171] Informal resolution, through ADR, can focus on repairing harm rather than issuing punishment, providing a greater sense of equity.[172]

Before implementing ADR processes at universities, administrators need to understand both the breadth of ADR, noting the multitude of approaches, and the specificity, noting that each dispute is different, and a one-size-fits-all approach does not adequately tackle the intricate nature of disputes.[173] However, ADR is more than a substitute for trial, so should not be evaluated as a means to avoid litigation, but rather as an opportunity to resolve a dispute privately and efficiently.[174] The use of ADR requires willingness from both parties to provide a satisfactory settlement. If one party prefers litigation, requiring ADR may inhibit the potential benefits.[175] This notion is reflected in current Title IX provisions, encouraging "informal resolution" but acknowledging that student-victims in sexual violence cases must be allowed to decide for themselves whether to engage in any level of resolution process.[176] The rest of this subsection will analyze each of the three most common ADR processes—Mediation, Arbitration, and Negotiation—and examine their effects on victim empowerment and well-being.

1. Mediation and Restorative Justice Practices

Conflict is not always a contest. Winning and losing may not be the purpose of a dispute, but instead regaining a sense of control.[177] Transgressions, particularly of a sexual offense, cause not only physical harm, but remove or greatly diminish a victim's sense of personal power. When grappling with how to best account for both appropriate adjudication and maximum victim empowerment, the concepts of revenge and forgiveness can seem at odds with each other. However, when adjudication processes account for both forgiveness and transgressor accountability, these responses may instead serve to empower the victim, restoring their sense of personal

171. Amy B. Cyphert, *The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX*, 96 DENVER L. REV. 51, 66 (2018) (citing Donna Coker et al., Transcript, *Plenary 3—Harms of Criminalization and Promising Alternatives*, 5 U. MIA. RACE & SOC. JUST. L. REV. 369, 375–76 (2015)).

172. Publicover, *supra* note 7.

173. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution",* 1 J. OF EMPIRICAL LEGAL STUD. 843, 849 (2004).

174. *Id.* at 847.

175. *See generally* Stephan Landsman, *ADR and the Cost of Compulsion,* 57 STAN. L. REV. 1593 (2005).

176. Publicover, *supra* note 7.

177. KATHY ISAACSON, HEIDI RICCI & STEPHEN W. LITTLEJON, MEDIATION: EMPOWERMENT IN CONFLICT MANAGEMENT 2 (Waveland Press Inc., 3d. ed. 2020).

power and achieving retributive success.[178] This sense of self-determination distinguishes mediation from other third-party processes, such as court adjudication or arbitration, which places a neutral, non-affiliated party at the head of decision making.[179] Trained practitioners often aim to promote understanding, connection, and empathy in their mediations, intending forgiveness and reconciliation, placing emphasis on recognition and mutual resolution.[180] A successful mediation aims to *help* the parties make informed choices about how to proceed at each decision point, even those that may disfavor mediation entirely.[181]

In the Title IX context, mediation could prove to ameliorate campus disempowerment. With 45% of student victims reporting belief that their university is unlikely to take report of a sexual assault seriously, schools need to address the instituted lack of trust to make strides in Title IX adjudication.[182] Furthermore, survivors of sexual violence often find themselves facing complex psychological and emotional needs that directly relate to their merits of their case, and can be well addressed through mediation which incorporates restorative justice practices.[183]

a. Incorporating a Restorative Justice Lens

Restorative justice, itself distinct from mediation, focuses on four major values: (1) repair, (2) restore, (3) reconcile, and (4) reintegration.[184] Restorative justice comprises various different practices, including apology, restitution, and acknowledgement in addition to the healing and reintegration of offenders back into society.[185] These practices often include direct communication between victims and offenders, often with a facilitator, such as a mediator, present who oversees the process.[186] At its base, restorative justice is a social practice that combines with other processes to apply a restorative lens to a proceeding.[187] In addition, through involving representatives of the community, restorative justice serves to foster cultural change along with addressing the disputed issue.

For universities, restorative justice processes focus on not only the institution's responsibility to the student-victim, but to the campus at large, holding the offender accountable as a member of the community, not just as an individual.[188] Though mediation itself is confidential, should universities advertise mediation and restorative justice practices as an integral part of the Title IX dispute resolution process, students may feel more comfortable seeking help from their school, which in turn fosters deterrence against future sexual violence while normalizing empowering

178. Peter Strelan et al., *When transgressors intend to cause harm: The empowering effects of revenge and forgiveness on victim well-being,* 59 BRIT. J. SOC. PSYCH. 1, 447 (2019).
179. Robert A. Baruch Bush & Peter F. Miller, *Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency*, 35 OHIO ST. J. ON DISP. RESOL. 591, 593 (2020).
180. *Id.* at 594.
181. *Id.* at 599–600 (citing principles from *The Promise of Mediation*).
182. Cantor et al., *supra* note 12, at 79.
183. Cyphert, *supra* note 171, at 73.
184. Carrie Menkel-Meadow, *Restorative Justice, What Is It and Does It Work?,* 3 ANNU. REV. L. SOC. SCI. 161, 162 (2007).
185. *Id.* at 164.
186. *Id.* at 162.
187. *Id.* at 163.
188. Cyphert, *supra* note 171, at 73.

future victims to seek justice and have faith in their university's adjudicatory process.[189]

Mediation can also prove procedurally beneficial as well. Caucusing, a critical process in effective mediation, could prove exceedingly useful in Title IX sexual assault cases where the nature of the dispute is particularly sensitive. In traditional mediations, caucusing serves three main functions: (1) it provides mediators with a tool to overcome impediments to settlement by avoiding mutual exploitation and adverse selection; (2) it helps the mediator overcome communication barriers and unrealistic expectations; and (3) it provides a private setting in which the mediator can develop a better, and more personal, understanding of party interests.[190]

When applied to a sexual violence context, caucusing allows mediators to create physical separation between the victim and offender if the victim feels overwhelmed by reliving their assault, giving victims a greater level of control over the proceeding than they would have otherwise had.[191] In addition, private meetings can allow the mediator to develop a personal connection with the victim, increasing the victim's sense of empowerment through feeling heard by the neutral overseeing party.[192] Finally, noting that the risk of revictimization can be particularly high in victim/offender confrontations, caucusing can minimize this risk through limiting contact between the parties while still allowing for mutual agreement and acknowledgement of harm.[193]

2. Arbitration and Binding Decisions

Arbitration results in a binding resolution promoted by a third-party neutral decision maker much like formal adjudication.[194] Given that arbitration is not bound by state or federal rules of evidence[195], arbitration allows plaintiffs to bring in a wide variety of evidence that would otherwise be barred in a court proceeding, subject only to the discretion of the arbitrator.[196] This factor, combined with binding settlement agreements, results in arbitration proceedings resolving much faster than court litigation.[197] In addition, arbitration proceedings more often resolve in favor of the plaintiff than in traditional litigation, proving a potential benefit to plaintiffs in sensitive cases, such as sexual assault.[198] The binding agreement can also serve as a boon to universities, who can avoid any potential post-mediation litigation by requiring the use of arbitration instead. Courts will only review arbitration agreements in limited circumstances relating to the conduct of the actual arbitrator (when they "manifestly disregard" the law), not the substance of the

189. *Id.* at 74.
190. David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263 (2011).
191. *See generally* Cyphert, *supra* note 171, at 73–74.
192. Hoffman, *supra* note 190, at 305.
193. *See generally* Cyphert, *supra* note 171, at 68.
194. *See* Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 633–34 (2001).
195. Alternative Dispute Resolution Committee, *Best Practices Regarding Evidence in Arbitrations,* AM. COLL. OF TRIAL LAWS. 1–2 (Feb. 2018) https://www.actl.com/docs/default-source/alternative-dispute-resolution-committee/adr_best_practices_regarding_evidence_in_arbitrations.pdf?sfvrsn=2.
196. Rogers, *supra* note 194, at 637.
197. *Id.*
198. *Id.*

agreement.[199] However, the dispute over forced arbitration agreements, particularly in workplace sexual violence cases, has sparked widespread public antipathy for mandatory arbitration.[200]

Concerning Title IX administration, student-victims may feel denied a choice if their only option is to pursue a binding decision through arbitration. Prior to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA), presiding caselaw indicated that statutory rights, such as those found in Titles, could be subject to arbitration agreements under the Federal Arbitration Act.[201] Yet empirical studies indicated that only around 5% of arbitrations meaningfully analyzed legal issues, performed appropriate legal analysis, and adequately addressed plaintiff's statutory rights under congressional titles.[202]

In the employment context specifically, less than a third of employees "won" in an arbitrated agreement, fewer than those who opted to pursue litigation when available.[203] This is exacerbated by the "repeat player" problem, where larger companies and institutions are able to either preselect arbitrators or control the selection process in their favor due to their frequent use of arbitration procedures to resolve disputes.[204] These selected arbitrators reported feeling "beholden to companies" and admitted that were unlikely to "cater to a person they [would] never see again.," leaving plaintiff's inherently disadvantaged.[205] This preemptive action also leaves employees with no recourse to pursue their complaints through litigation, resulting in a form of forced silence that makes the initial complaint seemingly worthless.[206] Much like companies, universities could find themselves "repeat players" should they choose to adjudicate Title IX cases in this manner; failing to address the issue of victim empowerment entirely.

3. Negotiation: The Party-on-Party Dilemma

Negotiation is arguably the easiest ADR process an institution can implement, only asking the two parties (victim and perpetrator) to come together and form an agreement on their own. However, the lack of third-party neutral can result in an imbalance of power favoring the abuser, and trending towards the re-traumatization of the victim.[207] In a negotiation, power refers to a party's ability to alter other parties' outcomes.[208] Generally, this takes the form of a strong best alternative to a negotiated agreement ("BATNA"), which gives a party more breathing room to set

199. Matthew DeLange, *Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not be Subjected to Arbitration Proceedings*, 23 J. GENDER, RACE & JUST. 228, 232 (2020).
200. *See generally* Jonathan Ence, *"I Like You When You Are Silent": The Future of NDAs and Mandatory Arbitration in the Era of #MeToo*, 2019 J. DISP. RESOL. (2019).
201. DeLange, *supra* note 199, at 247.
202. *Id.* at 252.
203. *Id.* at 253.
204. *Id.* at 255.
205. *Id.*
206. *See generally id.*
207. *See generally,* Elizabeth A. Armstrong, Miriam Gleckman-Krut & Lanora Johnson, *Silence, Power, and Inequality: An Intersectional Approach to Sexual Violence,* 44 ANNU. REV. SOCIO. 99, 101 (2018).
208. Leigh L. Thompson, Jinuwen Wang & Brian C. Gunia, *Negotiation*, 61 ANNU. REV. PYCH. 491, 494 (2010).

the terms of the settlement.[209] These power dynamics also have implications beyond the terms of the settlement agreement.

In the sexual violence context, negotiation with their abuser can impact a victim's healing process, potentially exacerbating psychological harms stemming from the initial assault.[210] When applied to a sexual violence case, the perpetrator has a much greater BATNA than the victim due to issues of victim believability in courtroom settings.[211] The idea of "rape myth" acceptance, or false beliefs that blame the victim for their sexual assault, is heightened when litigators scrutinize each and every fact surrounding a sexual assault.[212] For example, the fact that the victim was drinking prior to the assault can lead some to discredit their credibility concerning the assault.[213] The scrutiny of these facts, as well as the need to retell the details of their assault, is why most victims choose to forego pursuing retributive justice in court.[214] For every 100 cases of rape and sexual assault reported to the police, only eighteen result in arrests.[215] 42% of reported cases lay untouched as "inactive" cases while nearly a third are closed by "exceptional clearance" for lack of evidence.[216] Even when arrested, prosecutors may still decline to pursue formal charges, and ultimately fewer than 7% of reported sexual assaults resulted in conviction.[217] The perpetrator may have less to lose if the victim chooses to pursue legal action, and more to gain by negotiating an agreement that can push for a binding non-disclosure agreement, though accusation in itself can still cause major reputational damage.

4. Benefits to the Accused

While victims are directly harmed by sexual assault and risk re-victimization through public adjudicatory processes, a false accusation can also prove to have lasting consequences on the innocently accused, even if proven innocent. One notable example lies in the 2006 Duke Lacrosse Scandal, in which three team

209. *Id*.
210. Armstrong, Gleckman-Krut & Johnson, *supra* note 207 ("Survivors often experience anxiety, depression, alcohol and drug dependencies, post-traumatic stress, elevated risk of chronic health conditions...").
211. *See* Thompson, Wang & Gunia, *supra* note 208. When applying the notion of "BATNA" to a sexual violence case, the "rape myth" effect uniquely impacts victim perception in the courtroom. As such, a perpetrator may feel comfortable moving forward with litigation while a victim may feel their case weakens if the case progresses past ADR.
212. *Rape Myths and Facts*, WASH. UNIV. ST. LOUIS, https://students.wustl.edu/rape-myths-facts/ (last visited Sept. 28, 2023); *see also* Erica E. Nason et al., *Prior Sexual Relationship, Gender and Sexual Attitudes Affect the Believability of a Hypothetical Sexual Assault Vignette*, GENDER ISSUES (2018), found at https://drive.google.com/file/d/187AaBgM4mLFWsG6mD-I7ZXoBtKOU6cCJ/view (illustrating that victim believability decreases as more rape myths are introduced).
213. *Id.*; *see also* WASHINGTON POST, *supra* note 1 (stating other common myths include: "when women go to parties wearing revealing clothes, they are asking for trouble," "if both people are drunk, it can't be sexual assault," and "sexual assault accusations are often used by women as a way of getting back at men").
214. Katharine Webster, *Why Do So Few Rape Cases End in Arrest?,* UMASS LOWELL (Apr. 17, 2019), https://www.uml.edu/news/stories/2019/sexual_assault_research.aspx.
215. *Id.*
216. *Id.*
217. *Id.*

members were wrongly accused of raping a stripper at a house party.[218] While this case did not concern on-campus adjudication, it illustrates the lasting impacts of a wrongful accusation and public scrutiny. Base evidence seemed to overwhelmingly point towards the guilt of the three young men, sparking nationwide outrage and broader debate on the intersection of class and race issues.[219] But what was once a slam-dunk case quickly fell apart when the accuser was found to have falsified her claims and the lead prosecutor, who acted largely on his political aspirations, mishandled key exculpatory evidence.[220] Ultimately, the charges were dropped, but the three young men—David Evans, Collin Finnerty, and Reade Seligmann—will forever be remembered for the false accusation and remain publicly persecuted by some despite being found innocent.[221]

Concerning on-campus adjudication specifically, ADR can provide key benefits to those accused of sexual assault who may be innocent. Under current OCR guidance, Title IX adjudication of campus sexual assault is predicated on the assumption that all accusations are brought in good faith, and as such, the OCR offers no real protections for the innocently accused, no matter how egregious and damaging the accusation.[222] The Dear Colleague Letter illustrates this best, pushing universities to minimize the burden on the victim/complainant and requiring the accused to bear the consequences before any adjudication purely on the basis that "they are likely guilty."[223] As such, while failing to properly address a claim of campus sexual assault can constitute actionable sex discrimination under Title IX, indifference to an accused's innocence does not.[224]

With no ADR adjudicatory process in place, the accused has no choice but to resort to litigation on a claim of "systematic bias" rather than gender discrimination to dispute their punishment, potentially worsening the impact of the initial accusation on their reputation.[225] Under the *Yusuf* standard, an accused student who brings a claim of erroneous punishment under Title IX must prove: "(1) his or her discipline was erroneous, and (2) 'particular circumstances suggesting gender bias was a motivating factor behind the erroneous finding,'" in order to survive a motion to dismiss.[226] Since the *Yusuf* decision in 1993, only once case survived this strict standard: *Vaughan v. Vermont Law School*.[227]

As noted in the previous sections, a key benefit of ADR is privacy. This benefits not only the victim but the accused themselves. For one, public accusation—

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218. Casey Sullivant, *Shaped by False Rape Case, Former Duke Lacrosse Player Becomes Lawyer*, BLOOMBERG L. (Mar. 13, 2018, 11:00 PM), https://news.bloomberglaw.com/business-and-practice/shaped-by-false-rape-case-former-duke-lacrosse-player-becomes-lawyer.

219. *Id.*

220. *Id.*

221. *Id.*

222. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 56 (2013).

223. *Id.* at 62.

224. *Id.* at 75.

225. *Id.*

226. *Id.;* s*ee also* Yusuf v. Vassar Coll., 827 F. Supp. 952 (S.D.N.Y. 1993).

227. Henrick, *supra* note 222, at 76. For the purposes of Vaughan v. Vermont Law School, the true court decision concerned a motion to amend the Title IX complaint to add additional facts to the Title IX claim. Vaughan alleged that "he has suffered adverse educational actions and that female students…were treated more favorably than him." The Court found that Vaughan's claim, as it stood, would not be futile and so granted the motion to amend. Vaughan v. Vt. L. Sch., Inc., No. 2:10-cv-276 (D. Vt. Aug. 4, 2011).

providing negative information about a specific target—can result in increasingly negative evaluation of the accused, regardless of their true culpability.[228] In addition, under current adjudicatory processes, or the lack thereof, the innocently accused seemingly cannot find recourse until after they are found innocent, a stark deviation from the presumption of innocence that is supposed to serve as a guiding principle for the justice system.[229] In applying an ADR process, such as mediation, both the victim and the accused can come to an agreement without the need for formal justice procedures or case law standards. Unfortunately, this does not stop any false accusations through gossip, but it can at least keep any actual adjudication private to the benefit of both parties.

5. Effect of Apology in Settlement

When analyzing the efficacy of applying ADR to Title IX adjudication, it is worth discussing the impact of apology on settlement outcomes. Given the adversarial nature of the U.S. justice system, our legal culture seemingly discourages apologies as one could perceive an apology as an admission of guilt.[230] However, an apology can promote settlement and avoid costly litigation.[231] Research has shown that the course of a legal dispute is in part determined by how the dispute is perceived by the opposing parties, and apology may reflect the dispute in a more facilitative, positive light.[232] Furthermore, even where apology may not avoid lawsuit altogether, it may still reduce inter-party tensions, anger, and antagonism, allowing for more collaborative and productive negotiation.[233] Apologies in the legal process typically take one of two forms: (1) an expression of sympathy but not guilt (partial apology), or (2) an expression of genuine regret or remorse, acknowledging guilt and harm done (full apology).[234]

Partial apologies stem from the theory that an apology "is the right thing to do", and that it can help increase settlement efficiency, even if the apology is merely symbolic and does not express the true sentiment of the apologizing party.[235] Most judges and juries can discern the difference between a partial apology—merely expressing sympathy for the harm done—and an admission of guilt, making partial apology a key tool for mitigating damaging outcomes.[236] However, partial apologies can prove less satisfying for the receiver, suggesting that a full apology serves to be most effective for a defendant facing their victim.[237]

As for the psychological impact of receiving an apology, in non-legal contexts, apologies have been shown to positively impact the perception of the character of

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228. Derek D. Rucker & Richard E. Petty, *Effect of Accusations on the Accuser: The Moderating Role of Accuser Culpability,* PERSONALITY & SOC, PYSCH. BULL. 1259 (2003).
229. U.S. DIST. CT. FOR THE DIST. OF MASS., INSTRUCTION 3.02 PRESUMPTION OF INNOCENCE, PROOF BEYOND A REASONABLE DOUBT, found at https://www.mad.uscourts.gov/resources/pattern2003/html/patt4cfo.htm (last visited Dec. 2, 2023).
230. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 461 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*].
231. *Id.*
232. *Id.* at 477.
233. *Id.* at 463.
234. *Id.* at 469.
235. *Id.*
236. Robbennolt, *Apologies and Legal Settlement*, *supra* note 230, at 470.
237. *Id.* at 473.

the apologizing party and the expectations of a future relationship between the parties and increase forgiveness of wrongdoing.[238] Similarly, studies of criminal defendants show that remorseful defendants are often given more lenient punishments and perceived positively when they acknowledge the harm they caused to their victims.[239] Notably, an apology may serve to set the victim and the perpetrator on equal footing, aiding to repair the party imbalance initially caused by the perpetrator's harm.[240] In sum, apologies can increase victim validation and increase victim empathy for and perceptive evaluation of their transgressor.[241]

In the ADR context, sexual assault transgressors do not need to worry about the guilt-implication of their apology on a public level as ADR processes offer a private means of dispute resolution. As such, any level of apology, whether partial or full, only serves to benefit the accused party. Research indicates that the most effective apologies "include a commitment to change, an offer of repair, and an expression of remorse, as well as exclud[ing] minimizations, excuses, and justifications."[242] Importantly, the impact of a "negotiated" apology seems minimal, as any apology positively increases the perception of the transgressor as compared to those who opted not to apologize at all.[243] Furthermore, since ADR adjudication focuses solely on the scrutiny of the disputing parties (apart from arbitration, which uses a third-party decisionmaker), the transgressor only needs to address their victim and their victim's perception of their character. In fact, during settlement negotiations, mediators often encourage apologies.[244] Those who offer full apologies are perceived to have "accepted more responsibility and experienced more regret, would be more careful in the future, were more moral, and displayed more respect for the injured party."[245] Given this, it is to the transgressor's benefit to make a full apology in hope of receiving the most favorable settlement outcome.

Concerning restorative justice, apology and forgiveness is an integral part of understanding and ameliorating the harm suffered. Forgiveness itself can be complicated as both victims and their offenders can blame themselves for the resulting offense, or the transgressor may believe that they have caused no harm in the first place.[246] However, forgiveness is not limited only to the opposing party, but rather victims may seek to forgive themselves through the restorative justice process.[247] It is important to note, though, that forgiveness as a sentiment is generally incompatible with a want of retaliation.[248] In more serious offenses, such as sexual assault, conferencing through restorative justice can lead to victims feeling less want

238. *Id.* at 475–76.
239. *Id.*
240. *Id.* at 478.
241. Karina Schumann & Anna Dragotta, *Is moral redemption possible? The effectiveness of public apologies for sexual misconduct*, 90 J. EXPERIMENTAL SOC. PSYCH. 1, (2020).
242. *Id.* at 22.
243. Jennifer K. Robbennolt, *The Effects of Negotiated and Delegated Apologies in Settlement Negotiation*, 37 L. & HUM. BEHAV. 128, 133 (2013).
244. *Id.* at 129.
245. *Id.* at 133.
246. Johanna Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, 5 OXFORD J.L. & RELIGION 94, 96 (2016). It is not uncommon for an apology that suggests "I'm sorry *you* feel this way" instead of "I'm sorry *I caused you to feel this way*" to hinder negotiation.
247. *Id.* at 97.
248. *Id.* at 106.

to retaliate because victims feel more secure since they have a better chance to communicate their feelings.[249]

When included within ADR processes, addressing apology and forgiveness not only helps a victim feel more secure in having their voice heard, but can also help to reach a negotiated settlement and avoid the need for a formal grievance procedure or potential litigation. And, while analyzed most closely regarding mediation, an apology can play a similarly significant role in arbitration.[250] If the offender takes responsibility for their actions, that showing of remorse can lead an arbitrator to be more lenient in their decision-making.[251] As such, should any ADR process include apology and forgiveness, the benefit impacts all parties on both a personal and settlement level.

B. Anti-ADR Focuses

Though ADR's private nature can often provide a more tailored, satisfying resolution, its application to sexual violence must address the presence of societal and hierarchical inequity, and focus on fostering victim empowerment to prove effective.[252] Those traditionally facing prejudice, such as women and minorities[253] may repress their true concerns, attempt to rationalize them, or compromise their interests, potentially hindering the effectiveness of ADR procedures as applied generally.[254] This sentiment stems from the heightened level of violence faced by those individuals, and illustrates the difficulty an already disadvantaged victim may face when entering a more personal adjudicatory process such as ADR.[255] Essentially, the actions of others, either personally or systematically, impact the effectiveness of ADR for marginalized communities. Furthermore, many women can find themselves more apprehensive in the negotiating room, potentially less likely to seek a competitive outcome for fear that a competitive success will result in societal alienation.[256] In formal litigation, our judicial system attempts to put both parties on equal footing with incorporated norms of fairness and rules of procedure, requirements which are not inherently baked into the ADR system.[257] Restorative justice processes can help mitigate this societal imbalance with victim-centered processes, but in doing so often bypass the traditional criminal justice system.[258]

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249. *Id.*
250. Daniel J. Kaspar & Lamont E. Stallworth, *The Impact of a Grievant's Offer of Apology and the Decision-Making Process of Labor Arbitrators: A Case Analysis*, 17 HARV. NEGOT. L. REV. 1, 22 (2012).
251. *Id.*
252. Shirley Jûlich & John Buttle, *Beyond conflict resolution: Towards a restorative process for sexual violence*, 8 TE AWATEA REV. 21, 22 (2010).
253. CHRIS LINDER, SEXUAL VIOLENCE ON CAMPUS: POWER-CONSCIOUS APPROACHES TO AWARENESS 10 (Emerald Publishing, 2018) ("Perpetrators of sexual violence target women of color, gay and bisexual people, transgender people, and people with disabilities at higher rates than their white, straight, cisgender, and nondisabled peers.").
254. Charles Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?*, 70 SMU L. REV. 891, 894 (2017).
255. LINDER, *supra* note 253.
256. Craver, *supra* note 254, at 901.
257. *Id.* at 895
258. Jûlich & Buttle, *supra* note 252.

1. Why Not Let Them Litigate?

In many cases, any formal charges are dropped or dismissed before a victim has a chance to pursue ADR, leaving victims with no recourse if their negotiated outcome is ignored or does not address the situation adequately.[259] The Manhattan District Attorney's Office reported dropping 49% of sexual assault cases in 2019 alone, an increase from 37% in 2017.[260] And, of course, victims may be re-traumatized in pursuit of an ADR-assisted negotiated outcome through confrontation with their transgressor, potentially limiting any perceived benefits.

There are four significant differences between ADR and traditional court-based litigation. First, court proceedings impose a formal structure based on the Rules of Civil and Criminal Procedure in the applicable jurisdiction, requiring legal justification of claims and prescribing steps for collecting and presenting evidence.[261] Second, information and evidence presented in court typically become public knowledge while ADR allows both presented information and the resulting decision to remain private if desired by the parties.[262] Third, courts are less specialized than ADR, where neutral parties such as the mediator can bring their specific expertise to resolve a case.[263] Finally, litigation is typically seen as the "fallback position" in which ADR is first sought, and if the parties cannot reach a decision through an ADR process, they resort to pursuing a resolution in court.[264] It is important to note that parties analyze the choice between ADR and litigation not through procedural efficiency but rather expected utility.[265] As such, litigation may still be an attractive option for dispute resolution even if the cost is higher than ADR.[266]

A key benefit to litigation is the notion of seeing a dispute through to its fullest end, that being through trial and judicial determination. Mediation and other negotiation-based ADR processes exert pressure to achieve settlement and consequently dilute the value of self-determination.[267] In some cases, mediators can rise to almost coercive levels of pressure to push the parties to settle a case, and few lawyers argue that this practice is rare in mediation.[268] Restorative justice also falls victim to diluting self-determination by focusing on promoting inter-party understanding and empathy to heal the relationship rather than paving the way to a 'winning' outcome.[269]

In the Title IX context, private dispute resolution through ADR methods may lean into already present critiques concerning the lack of institutional transparency, particularly where a failure to disseminate information causes students to ignorantly

259. *See* Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Advserse Impact of Informal Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).
260. Jan Ransom, '*Nobody Believed Me': How Rape Cases Get Dropped*, N.Y. TIMES, https://www.nytimes.com/2021/07/18/nyregion/manhattan-da-rape-cases-dropped.html (Sept. 28, 2021).
261. Bruno Deffans, Domonique Demougin & Claudine Desrieux, *Choosing ADR or Litigation,* 49 INT'L REV. L. ECON. 33, 33–34 (2017).
262. *Id.* at 34.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. Bush & Miller*, supra* note 179, at 593–94.
268. *Id.* at 594.
269. *Id.*

assess their level of safety in the campus community.[270] Litigation, particularly publicity arising from litigation, may be a powerful tool in addressing institutional issues and acknowledging the need for reform.[271] Particularly, publicity stemming from Title IX litigation has exposed institutional failures, including coverups of sexual assaults.[272] Given this, publicity generated through civil litigation requires universities to take notice of their responsibility to address campus sexual assault and to better address it in the future to avoid further lawsuits.[273] In essence, bad press for universities can prove to be good press for students and Title IX reform. Noting this, in determining which ADR process best fits with Title IX regulation, it is important to still give students the option to pursue litigation should they not see a path through ADR—no student should be forced to pursue a dispute resolution process that they believe is directly at odds with their legal strategy—but institutions should still implement ADR as part of their Title IX grievance procedures at the very least as a starting point for addressing disputes.

Concerning criminal law, in applying an ADR framework, institutions do not need to rely on criminal codes or statutory definitions to determine the merits of a case. By avoiding litigation, the decision is left to the parties themselves, not the legislature in enacting the codes. A third party neutral, such as a mediator, can counsel the parties on paths moving forward, even if a negotiated agreement is off the table. As such, ADR can allow for more victim-centered, affirmative consent-based adjudication, focusing on the conduct and actions of each participant rather than needing to find a requirement of force for consent to come into play. This is especially important since nearly 50% of victims report knowing their transgressor either very or fairly well.[274] In addition, in a poll of college students, 85% reported that "harsher punishments for those found guilty of sexual assault" would be either somewhat or very effective in preventing future sexual assault.[275] In using ADR, an institution can tailor the punishment not only to the actual conduct of the transgressor but also to account for victim needs and community impact.

IV. RECOMMENDATION FOR TITLE IX ADJUDICATION

Considering the findings and analysis from the previous sections, I recommend the implementation of mediation for Title IX sexual assault grievance adjudication in a non-discretionary manner for the institution, while retaining choice for the victim. More specifically, I recommend applying a mediation base process that incorporates the values of restorative justice. I believe this strategy will prove effective for two main reasons: (1) mediation allows for a more personal dispute resolution, accounting for the varying interests of a sexual assault victim and allowing the procedure to be strategically tailored to address those needs[276]; (2) by adding a

270. *See* Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 MONT. L. REV. 31, 32–33 (2017).
271. *Id.* at 33–34.
272. *Id.* at 53.
273. *Id.* at 34.
274. WASHINGTON POST, *supra* note 1.
275. *Id.*
276. *See generally* Cyphert, *supra* note 171.

restorative justice flavoring, we focus not only on the victim but the offender and the offender's impact on larger campus society.[277]

It is noteworthy that the reason for the flavoring rather than an entire adoption stems from an ease of implementation for Title IX institutions. Mediation is a more uniform practice even though personal in nature,[278] and finding and training mediators to work on campus is likely easier. Mediation also more easily allows for the negotiated agreement that serves both the victim and the transgressor following the informal resolution process. As such, not only can the victim seek proper recourse, but the offender can acknowledge and learn from their actions in a private setting, allowing for better rehabilitation and reintegration when returning to the general campus population.[279] Here, the flavoring would take the form of increased emphasis on transgressor apology, forgiveness, and a push for cultural change. This approach also proves fitting for victims who may not seek harsh punishments but rather seek acknowledgement and apology for the harm caused. Furthermore, the caucusing ability of a mediator and their presence during the negotiation as a counselling neutral helps reduce the effect of power imbalance as the mediator can help facilitate the confrontation.[280]

As to sexual assault adjudication specifically, that is sexual assault distinct from sexual harassment, mediation may still prove exceedingly useful in helping to counsel the victim even if a negotiated agreement does not result from the process. Not every mediation needs to focus on forced forgiveness of the transgressor, and by applying a more victim-oriented restorative justice flavor, the campus resolution can focus more on the interests of the parties themselves rather than using mediation as a means to force quiet and quick resolution.[281] Again, the emphasis should be on victim choice. A victim does not need to seek informal resolution if they would prefer a more traditional manner of investigation and adjudication.

Mediation also balances the interests of seeking an efficient ADR process while avoiding the potential negatives of a binding decision through arbitration. While mediation aims to secure a negotiated agreement, or settlement, between the parties, a secondary purpose is to allow parties to make an informed decision about the merits of their case—whether to settle then, pursue further mediation, or perhaps even take the case to court.[282] Absent a signed contract, the decisions made in mediation do not bind the parties, and as such, both victims and transgressors can still seek private litigation should they wish.[283] Of course, it is still recommended that students try on-campus mediation prior to seeking litigation, but this should only be a recommendation, not a requirement.[284]

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277. *See generally* Menkel-Meadow, *supra* note 184.

278. *See generally* Ruth A. Raisfeld, *How Mediation Works: A Guide to Effective Use of ADR*, 33 EMP. RELS. L.J. 1 (2007). While there is no step-by-step guide for conducting a mediation, the role of the third-party neutral, the availability of caucusing, and the general format of the mediation process are similar in each mediation.

279. *See generally* Menkel-Meadow, *supra* note 184.

280. *See* Hoffman, *supra* note 190.

281. *See generally* Menkel-Meadow, *supra* note 184.

282. *See generally* Bush & Miller, *supra* note 179.

283. *See generally* Raisfeld, *supra* note 278, at 3 ("The mediator has no power to render a binding opinion or impose a settlement.").

284. *See generally* U.S. DEPARTMENT OF EDUCATION, *supra* note 120; *see also* Ali, *supra* note 887 (essentially keeping with non-required dispute adjudication, but exploring the possibility of mediation rather than dismissing it as a viable dispute resolution process for on-campus sexual violence grievances).

The lack of requirement also allows students seeking full transparency to pursue traditional litigation and seek not only court determination but public determination. Mediators themselves bring special expertise to dispute resolution that is not always present in other resolution processes.[285] Not only does this increase the efficiency of adjudication—allowing the parties to get right to the heart of the issue and the mediator to facilitate appropriate discussion—but it increases victim voice in the proceeding since an experienced sexual assault mediator is familiar with the barriers that may impede victim participation and are able to avoid re-victimization. In sum, mediators have more empathy for the parties involved.[286]

Finally, though Title IX grievance regulation currently recommends informal resolution process,[287] such as mediation, by removing the discretionary component, the mediation itself can take over any additional protections that Congress or the Department of Education would seek to implement by providing a means of tailored outcome though more a uniform dispute resolution process that address the needs of all involved parties, especially when incorporating elements of restorative justice.[288] This is not only more efficient, but also avoids any issues that could arise in the legislative process, allowing for a personal approach rather than piece-by-piece, one-size-fits-all regulation.

CONCLUSION

University students have often voiced concern that their institution has not done enough to address campus sexual assaults.[289] Under current Title IX guidance, institutions are only required to have a grievance procedure in place, but there is no requirement that the procedure be tailored to address specific adjudications, such as sexual assault.[290] This paper has examined the development of Title IX, from its statutory implementation and intended effects to modern amendments and university application. In acknowledging the prevalence of campus sexual assault and victim disempowerment through examining university report systems and attempts at campus system reform, this paper has highlighted the need for more than just discretionary change in the current adjudicatory system. Through addressing various ADR processes and restorative justice and examining the impacts on the victim, the offender, and the university, I determined that concretely implementing mediation will prove most useful, and I recommend that future Title IX regulations require institutions to have an informal resolution process in place that implements mediation with restorative justice elements.

285. *See generally* Raisfeld, *supra* note 278, at 6. Parties are able to choose mediators who have experience in their area of dispute.
286. *See generally* Bush & Miller, *supra* note 179.
287. Publicover, *supra* note 7.
288. *See generally* Cyphert, *supra* note 171.
289. *See* WASHINGTON POST, *supra* note 1.
290. *See generally* U.S. DEPARTMENT OF EDUCATION *supra* note 120; s*ee also* Davis, *supra* note 153; *see also* Publicover, *supra* note 7.