Oklahoma Law Review

Volume 73 | Number 1
Symposium: Drawing the Line: Modern Sexual Conflicts and the Law

2020

Standing In Between Sexual Violence Victims and Access to Justice: The Limits of Title IX

Hannah Brenner Johnson

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

 Part of the Law and Gender Commons, and the Sexuality and the Law Commons

Recommended Citation

Hannah Brenner Johnson, *Standing In Between Sexual Violence Victims and Access to Justice: The Limits of Title IX*, 73 OKLA. L. REV. 15 (2020),
https://digitalcommons.law.ou.edu/olr/vol73/iss1/3

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

STANDING IN BETWEEN SEXUAL VIOLENCE VICTIMS AND ACCESS TO JUSTICE: THE LIMITS OF TITLE IX

HANNAH BRENNER JOHNSON*

Abstract

Sexual violence proliferates across communities, generally, and is especially prevalent in places like colleges and universities. As quasi-closed systems, colleges and universities are governed by their own internal norms, policies, and federal laws, like Title IX of the Education Amendments of 1972, which address how sex discrimination must be handled in institutions of higher education that are in receipt of federal funds. Title IX focuses on all facets of sex discrimination including reporting, investigation, adjudication, and prevention. When schools are accused of failing to adequately respond to reports of sexual misconduct on their campuses, Title IX has been interpreted by the Supreme Court to provide a private right of action by which victims can hold institutions accountable.

In the most typical cases, one enrolled student accuses another enrolled student of sexual assault. The university investigates, perhaps holds a hearing panel, issues a determination after applying the relevant evidentiary standard, and, where warranted, imposes appropriate sanctions. If a student victim is dissatisfied with the institutional response, they have the right to sue the school in federal court. Not all cases follow this typical example, however, raising the question of who, specifically, is entitled to avail themselves of the protections of Title IX. Sometimes victims are visitors or "outsiders" who have been raped or assaulted on campus by enrolled students. Their right to sue educational institutions has been called into question by courts that have denied them standing to sue the schools in federal court.

Historically, some judges have used the standing doctrine to deny access to the courts to certain minority groups. Victims of sexual violence

* Vice Dean for Academic & Student Affairs and Associate Professor of Law, California Western School of Law. JD, University of Iowa. I am grateful to Professors Erin Sheley and Melissa Mortazavi, and the *Oklahoma Law Review,* for bringing attention to these important issues and for hosting the symposium, *Drawing the Line: Modern Sexual Conflicts and the Law*. My fellow panelists and participants offered invaluable insights. Sasha Jamshidi provided excellent research assistance.

Published by University of Oklahoma College of Law Digital Commons, 2020

represent a new addition to this cohort of excluded parties. A growing number of federal district courts have barred this class of victims from pursuing their grievances against colleges and universities based ostensibly on their "outsider" or "non-student" status, and federal appellate courts have, to date, been reluctant to take a stand either way. A new case that has emerged along these same trend lines is currently percolating in the Sixth Circuit, brought by a woman who was sexually assaulted in a dormitory at the University of Kentucky (UK). The plaintiff in this case was not actually enrolled at UK but resided in campus housing while attending a community college per a formal agreement between institutions. When she sued UK under Title IX for its deliberate indifference in responding to her reported rape, the trial court dismissed her case without reaching the merits. Instead, the court used a narrow interpretation of standing, finding that in order to sue a school under Title IX, an individual must be formally enrolled as a student or enrolled in a program or activity of that institution.

This distinction between insider and outsider rape victims is wholly problematic. Colleges and universities, while reliant on the presence of and tuition generated by their enrolled students, cannot entirely depend on insiders to succeed. They actively solicit, depend on, and profit from engagement with outsiders every single day as a means to fulfill their educational mission. This Article will use Doe v. University of Kentucky *as a point of contemporary illustration (filled in by the decisions of other similar cases) to argue that individuals who are sexually assaulted on college campuses should be afforded equal access to Title IX protections and, specifically, should be granted standing to sue regardless of their enrollment status.*

Introduction

On October 2, 2014, a female college student (Jane Doe) called the campus police to report that she had just been raped in her dorm room at the University of Kentucky (UK).[1] The law enforcement officer who responded to the call and investigated the case notified the Director of the Office of Student Conduct, who was also the acting Dean of Students at the university, about the incident.[2] Doe filed a complaint under the university's Title IX policy, and the university conducted an investigation and

1. Doe v. Univ. of Ky., 357 F. Supp. 3d 620, 621 (E.D. Ky. 2019).
2. *Id.*

https://digitalcommons.law.ou.edu/olr/vol73/iss1/3

subsequently held multiple hearings that spanned several years.[3] In total, the case took nearly two and a half years to make it through the campus adjudication process.[4] During that time, the university rendered multiple decisions followed by subsequent appeals, and Doe alleged that the entire process was characterized by unnecessary delays and procedural missteps.[5] Eventually, the final university hearing panel found in favor of the alleged perpetrator.[6]

This set of facts formed the basis for Doe's pursuit of injunctive relief and monetary damages in the Title IX case *Doe v. University of Kentucky*.[7] Doe alleged that the school was "deliberately indifferent" in its response to her report that she was raped.[8] Specifically, Doe argued that "UK's unreasonably disorganized and protracted process, its lack of support for her while she coped with the rape, and its police department's deliberate indifference toward her rights in the hearing process deprived her of the educational benefits and opportunities UK offered to her."[9]

Given the prevalence of sexual violence[10] on college campuses, student victims routinely report incidents just like the one described above, and their cases are often investigated and adjudicated promptly and efficiently by their schools. In the most typical cases, one enrolled student accuses another enrolled student of sexual assault.[11] The university investigates, perhaps holds a hearing panel, issues a determination after applying the relevant evidentiary standard,[12] and, where warranted, imposes appropriate

3. *See id.* at 621–23. Amid the hearings, criminal charges were filed against the perpetrator. *Id.* at 623.

4. *See id.* at 621–23.

5. *See id.*

6. *See id.* at 623.

7. *Id.*

8. *Id.*

9. Brief of Plaintiff-Appellant at 8, Doe v. Univ. of Ky., 357 F. Supp. 3d 620 (6th Cir. May 1, 2019) (No. 19-5126), 2019 WL 2029708, at *8.

10. In this Article, I use the term sexual violence to describe many forms of sexual misconduct that occur along a continuum. I also use the terms sexual violence, sexual assault, and rape somewhat interchangeably throughout the Article.

11. *See, e.g.*, Doe 1 v. Baylor Univ., 240 F. Supp. 3d 646, 652 (W.D. Tex. 2017); Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1231 (D. Colo. 2005), *rev'd and remanded sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

12. The evidentiary standard used in Title IX cases is a subject of significant debate. New regulations promulgated in 2020 by the Department of Education depart from prior practice by allowing college officials to use either a "preponderance of the evidence or 'clear and convincing' standard, which sets a higher burden of proof." Greta Anderson, *U.S.*

Published by University of Oklahoma College of Law Digital Commons, 2020

sanctions.[13] The legal standard required by Title IX, under which such cases are evaluated on campuses, is currently in flux given changes in leadership and departmental policies at the Department of Education.[14] But at the time of Doe's case, it was well-settled that a school's hearings process should use a preponderance of the evidence standard to evaluate claims of sexual assault.[15] If the outcome of the investigatory process and related hearing panels is in favor of the complainant, the school may impose a myriad of sanctions on the perpetrator up to and including expulsion.[16] If a victim is ultimately dissatisfied with the institution's response, like Doe was, she can file a lawsuit against the institution for injunctive or monetary relief, invoking Title IX's implied private right of action.[17]

Not all cases follow this typical example, however, resulting in a conundrum as to who is entitled to avail themselves of the protections of Title IX. Visitors or "outsiders" who have been raped on campus by enrolled students and who are similarly dissatisfied with the way their cases have been handled have routinely been denied standing to sue the schools in federal court. As illustrated in this case, the plaintiff, who was dissatisfied with UK's handling of her reported rape, was denied access to justice not based on the district court's determination that her case was without merit—indeed, the court never reached that conclusion—but on her lack of standing to sue the school in the first place because she was not an enrolled student.[18] *Doe* is a recent addition to a small but steadily increasing group of cases that are brought by individuals who are sexually assaulted on

---

Publishes New Regulations on Campus Sexual Assault, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

13. *See generally* Emily Yoffe, *Reining in the Excesses of Title IX*, ATLANTIC (Sept. 4, 2018), https://www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/ (explaining Title IX hearings and the commonly used preponderance of the evidence standard); TEX. TECH UNIV., SEXUAL MISCONDUCT & TITLE IX VIOLATIONS: SANCTION MATRIX (n.d.), https://www.depts.ttu.edu/studentconduct/PDF-WordFiles/Sexual_Misconduct_Sanction_Matrix.pdf (describing applicable sanctions for sexual misconduct).

14. *See What Betsy DeVos's New Title IX Changes Get Right — and Wrong*, WASH. POST (Dec. 14, 2018, 5:20 PM CST), https://www.washingtonpost.com/opinions/what-betsy-devoss-new-title-ix-changes-get-right--and-wrong/2018/12/14/a8d485e2-feea-11e8-ad40-cdfd0e0dd65a_story.html.

15. *See* Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 148.

16. *See* TEX. TECH UNIV., *supra* note 13.

17. Cannon v. Univ. of Chi., 441 U.S. 677, 702–03, 717 (1979).

18. *See* Doe v. Univ. of Ky., 357 F. Supp. 3d 620, 631–34 (E.D. Ky. 2019).

college campuses but are not formally enrolled students of that campus. Courts have been reluctant to extend standing to this class of students.[19]

There is historical precedent—dating at least as far back as the *Dredd Scott* case—for excluding certain groups from accessing the justice system.[20] Indeed, the standing doctrine has often functioned as a roadblock to access the legal system for historically disadvantaged groups, resulting in a "pattern of injustice."[21] One scholar notes:

> Whether it provides a false pretense for politically or prejudicially derived judicial decisions or prohibits precedent-bound judges from deciding on the merits, the standing doctrine is an enemy to the federal judge's primary purpose: upholding justice and the Constitution.[22]

Although the standing doctrine had not yet been formally developed at the time *Dredd Scott* was decided, the Supreme Court relied on a similar conceptual framework, finding that "there was no judicially cognizable interest because Scott and his family were not a category of persons protected by the Constitution."[23] Over time, it evolved to become a legal tool that has performed a gatekeeping function. According to one scholar, "[s]tanding jurisprudence can keep all manner of plaintiffs from seeking relief."[24]

Using *Doe v. University of Kentucky* as a case study against the backdrop of other similar opinions involving non-enrolled students who were raped on campus, this Article continues the exploration of this growing legal controversy involving the outer boundaries of Title IX.[25] In my earlier research, I analyzed two of the earliest cases that considered the question of

---

19. *See, e.g.*, K.T. v. Culver-Stockton Coll., No. 4:16-CV-165 CAS, 2016 WL 4243965, at *6 (E.D. Mo. Aug. 11, 2016).

20. *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

21. Douglas Coonfield, *Standing in the Way of Justice: How the Standing Doctrine Perpetuates Injustice in Civil Rights Cases*, 37 REV. LITIG. 99, 122 (2018).

22. *Id.*

23. *Id.* at 108.

24. *Id.* at 101.

25. *See generally* Hannah Brenner, *A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault*, 104 IOWA L. REV. 93 (2018) (advocating to extend Title IX rights to those who participate in campus life, regardless of official connection to the university).

Published by University of Oklahoma College of Law Digital Commons, 2020

whether campus visitors (non-students) are protected by Title IX.[26] This Article builds on that research and relies on the recent *Doe* case to illustrate how courts are increasingly using the standing doctrine to avoid engagement with the difficult issue of sexual assault. In effect, the denial of standing silences victims' voices and forecloses an important avenue of justice by precluding access to even argue their cases. It also allows for a legal loophole through which schools, and even perpetrators of sexual assault, can avoid liability.

Creating a distinction between insider and outsider rape victims is wholly problematic. Colleges and universities, while reliant on the presence of and tuition generated by their enrolled students, cannot entirely depend on insiders to succeed. These educational institutions actively solicit, depend on, and profit from engagement with outsiders every single day to fulfill their educational mission. This Article will use *Doe v. University of Kentucky* as a point of contemporary illustration—complemented by the decisions of other similar cases—to argue that individuals who are sexually assaulted on college campuses when they are engaged in a school's broadly defined programs and activities should be afforded equal access to Title IX regardless of their enrollment status.

Instead, courts should look closely at whether a victim was engaged in the school's programs and activities. This inquiry should be a holistic one that includes more than just students who are formally enrolled in classes. This approach is grounded in the reality that colleges and universities, while somewhat insular entities, derive a significant benefit from their openness to and engagement with individuals not formally affiliated with the institution. Drawing distinctions between outsiders and formally enrolled students for Title IX purposes does not further the goals of making campuses safer, incentivizing schools to respond appropriately to reports of sexual violence, or protecting equal access to education. Part One explores the overwhelming problem of sexual assault on college campuses. Part Two considers the ways that courts have excluded outsiders from the protections of Title IX, and finally the Conclusion argues that attaining safer campus communities demands the dismantling of these arbitrary categories or classes of victims.

---

26. *See id.* at 120–28 (discussing K.T. v. Culver–Stockton Coll., No. 4:16-CV-165 CAS, 2016 WL 4243965 (E.D. Mo. Aug. 11, 2016); Doe v. Brown Univ., 270 F. Supp. 3d 556 (D.R.I. 2017)).

https://digitalcommons.law.ou.edu/olr/vol73/iss1/3

I. Sexual Assault on College Campuses

Sexual violence has proliferated across communities. The National Intimate Partner and Sexual Violence Survey found that more than one out of three women experienced sexual violence involving physical contact at some point in their lives.[27] Additionally, nearly one in four men experienced the same.[28] Perhaps more striking, nearly one in five women and one in thirty-eight men have experienced completed or attempted rape in their lifetimes.[29] The context in which sexual violence occurs, however, is important to note. Often, sexual violence is perpetrated within the broader community as captured by the statistics above, but sometimes it takes place within more insular spaces or systems like prisons, immigration detention centers, the military, or institutions of higher education.[30] A research study published in 2000 formed the basis for the well-known statistic that between "20%-25% of college women and 15% of college men are victims of forced sex during their time in college."[31] More recently, a Washington Post-Kaiser Family Foundation study confirmed this: "Twenty percent of young women who attended college during the past four years say they were sexually assaulted."[32] Despite these staggering statistics, it is widely thought that "the circle of victims on the nation's campuses is

27. SHARON G. SMITH ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF-UPDATED RELEASE 2 (Nov. 2018), https://www.cdc.gov/violence prevention/pdf/2015data-brief508.pdf.

28. *Id.* at 3.

29. *Id.* at 1, 3.

30. Hannah Brenner & Kathleen Darcy, *Toward a Civilized System of Justice: Re-Conceptualizing the Response to Sexual Violence in Higher Education*, 102 CORNELL L. REV. ONLINE 127, 139–40 (2016-2017).

31. *Statistics*, NSVRC, https://www.nsvrc.org/node/4737 (last visited May 27, 2020); *see also* BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN, https://www.ncjrs.gov/ pdffiles1/nij/182369.pdf (explaining that the rate of completed or attempted rape of college women might be between one-fifth and one-quarter).

32. Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/?utm_term=.eb788b427d74. "In all, the poll found, 25 percent of young women and 7 percent of young men say they suffered unwanted sexual incidents in college." *Id.* Additionally, "[m]any others endured attempted attacks, the poll found, or suspect that someone violated them while they were unable to consent. Some say they were coerced into sex through verbal threats or promises." *Id.*

Published by University of Oklahoma College of Law Digital Commons, 2020

probably even larger."[33] To this end, another study found that more than ninety percent of sexual assault victims on college campuses do not report the assault.[34]

I have long argued that the context in which sexual violence occurs matters.[35] Many of the dynamics inherent in the perpetration of sexual violence, like power and control, are the same regardless of the place in which it occurs, but the related reporting of such violence and the response of the institutions related to investigation, prosecution, and punishment vary widely and are shaped largely by the specific setting. Sociologists and others draw distinctions among systems (identifying such systems as "closed") based on factors such as how insulated they are from the broader community.[36] Colleges and universities are similar to *traditional* closed systems like prisons, immigration detention centers, and the military because they are set apart to some degree from the broader community and are subject to their own rules, laws, and norms. A traditional closed system is characterized by significant independence from the outside world, such as a place where people live or work, where most issues are resolved internally.[37]

Like traditional closed systems, colleges and universities are governed by their own norms, internal policies, and by special federal laws like Title IX. Despite these similarities, colleges and universities also differ from traditional closed systems in important ways. They are better described as *quasi-closed* institutional systems[38] because while they do in fact embody a certain insularity, they also rely in large part on the free flow of people into

33. *Id.*

34. *See* FISHER, CULLEN & TURNER, *supra* note 31, at 23.

35. *See generally* Hannah Brenner, *A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault*, 104 IOWA L. REV. 93 (2018); Hannah Brenner, Kathleen Darcy & Sheryl Kubiak, *Sexual Violence as an Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of the Military and Detention*, 44 PEPP. L. REV. 881 (2017); Hannah Brenner, *Transcending the Criminal Law's One Size Fits All Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301 (2013); Hannah Brenner, *Beyond Seduction: Lessons Learned About Rape, Politics, and Power from Dominique Strauss-Kahn and Moshe Katsav*, 20 MICH. J. GENDER & L. 225 (2013).

36. Brenner, Darcy & Kubiak, *supra* note 35, at 889. This term is one created by Erving Goffman and refers to places of isolation, where people live and work, like prisons. *Id.* (citing Erving Goffman, *The Characteristics of Total Institutions*, *in* ORGANIZATION AND SOCIETY 312, 314 (1961)).

37. Daniel Katz & Robert L. Kahn, *Organizations and the System Concept*, *in* CLASSICS OF ORGANIZATION THEORY 347, 356 (Jay M. Shafritz et al. eds., 8th ed. 2016).

38. Brenner & Darcy, *supra* note 30, at 140–41.

https://digitalcommons.law.ou.edu/olr/vol73/iss1/3

their space. However, they are not entirely closed off from the outside world like prisons or other traditional closed systems.

Instead, colleges and universities both actively solicit and depend on engagement with visitors and other "outsiders" as a way to fulfill their educational mission. Such outsiders might include: fans attending sporting events, members of the public attending guest lectures, high school students being recruited into athletic programs, visiting scholars, youth attending summer camps, patients seeking medical treatment from university physicians, and much more. Consequently, the distinction between insider and outsider has taken on a new significance in recent years as it relates to Title IX's extension of protections. This Article argues for an extension of the same protections to all who engage in campus life—regardless of student status.

II. The Exclusion of Campus Visitors from the Protections of Title IX

Congress passed Title IX of the Education Amendments of 1972 as a way to address discrimination based on sex within higher education programs that receive federal funds.[39] When Title IX was originally enacted, its primary focus was on ensuring access to education for women. According to Title IX: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[40]

Since its inception almost fifty years ago, Title IX has been interpreted through caselaw to include a private right of action for individuals who have experienced sex discrimination. In *Cannon v. University of Chicago*, the Supreme Court recognized an implied private right of action under Title IX.[41] Later, in *Franklin v. Gwinnett County Schools*, the Court held that money damages are available upon a showing of an intentional Title IX violation.[42]

---

39. For a comprehensive overview of Title IX Supreme Court Jurisprudence, see generally Gabrielle Fromer, Brittany Mosi & Allison Nelson, *Sexual Harassment in Education*, 17 GEO. J. GENDER & L. 451 (2016).

40. 20 U.S.C. § 1681(a) (2018).

41. *See* 441 U.S. 677, 702 (1979).

42. 503 U.S. 60, 76 (1992).

Published by University of Oklahoma College of Law Digital Commons, 2020

Today, liability can be imposed when an institution is found to be deliberately indifferent to reports of sexual violence.[43] The Supreme Court further evolved the standard for pursuing a private cause of action through its decision in *Gebser v. Lago Vista Independent School District*.[44] In *Gebser*, the Court held that a school can be liable when an official "has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[45] Additionally, *Davis v. Monroe County Board of Education* extended the *Gebser* holding to include peer-based harassment.[46] The *Davis* Court reached this decision because of the school's deliberate indifference to student-on-student sexual harassment which was "so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit."[47] This standard still applies in Title IX cases today. "[A] school and its offending program can both be punished financially under Title IX for violating a student's right to an education without sexual harassment and be subjected to an individual's private suit for money damages under Title IX."[48]

Although the standard governing Title IX cases brought by victims of sexual assault is fairly clear as illustrated by recent case law,[49] the question of whether a non-enrolled student has standing to bring a lawsuit is not so well-settled. To be sure, most of the Title IX cases brought by individuals who were dissatisfied with how the school responded to their experience as a victim of sexual violence involve enrolled students of those institutions. It has only been in recent years, and in relatively small numbers, that non-student victims of sexual assault have filed lawsuits.

---

43. *See, e.g.*, Erin Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law's Potential to Hold Education Institutions Accountable for Their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 40 (2020).

44. 524 U.S. 274, 292–93 (1998) (holding that students may bring private causes of action against schools if they experience sexual harassment by teachers and the schools have actual notice of and are deliberately indifferent to the misconduct).

45. *Id.* at 277.

46. 526 U.S. 629, 633 (1999).

47. *Id.* at 633.

48. Doe v. Brown Univ., 270 F. Supp. 3d 556, 560 (D.R.I. 2017).

49. *See, e.g.*, Doe v. Univ. of Ky., 357 F. Supp. 3d 620, 626 (E.D. Ky. 2019). There are three prima facie elements for a Title IX claim arising from "student-on-student sexual harassment": (1) the harassment is "so severe, pervasive, and objectively offensive" that it deprives the Plaintiff access to "educational opportunities or benefits provided by the school," "(2) the funding recipient had actual knowledge of the sexual harassment, and (3) the funding recipient was deliberately indifferent to the harassment." *Id.* (citation omitted).

A. Non-Student Victims

One of the most recent cases in this subset, *Doe v. University of Kentucky*, mentioned earlier in this Article, is currently on appeal to the Sixth Circuit and is illustrative of the conundrum of who is actually entitled to protection.[50] The case was initiated by a woman who was sexually assaulted in a dormitory at UK.[51] The plaintiff in *Doe* was not actually a student attending UK, but she was a part of the campus community, residing in the dormitory while attending a community college, per a formal agreement between institutions.[52] Jane Doe was raped in her dorm room[53] and followed campus protocols by reporting and filing a grievance with the university.[54] Her case took almost two and a half years to make its way through the university judicial process.[55] A total of four hearings were held; the first three resulted in a finding for Doe, and the alleged perpetrator appealed each of those decisions.[56] Doe was dissatisfied with the way the case was handled by UK and, therefore, sued the university under Title IX for its deliberate indifference to her report of sexual assault.[57] The trial court, however, dismissed her case without reaching the merits because it applied a narrow interpretation of standing. The court held that a plaintiff must be enrolled as a student or enrolled in a university program or activity (narrowly defined) for purposes of pursuing a Title IX cause of action.[58]

The individual who allegedly assaulted Doe was a UK student.[59] Though Doe lived on campus and was involved in campus life, she was not technically a student at the university.[60] Doe was not enrolled in an official UK degree program, but she did reside in the school's dormitory and had

50. *See generally* Brenner, *supra* note 25.
51. *Doe*, 357 F. Supp. 3d at 621.
52. *See id.*
53. *Id.* Residence halls are the most common place on college campuses where sexual assaults take place. For a comprehensive discussion of the existing research surrounding residence hall rapes, 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, 33, 37 (2017) (arguing for greater transparency about the prevalence of assaults in dormitories to assist in prevention).
54. *See Doe*, 357 F. Supp. 3d at 621.
55. *See id.* at 621–24.
56. *Id.* at 622–23.
57. *See id.* at 623.
58. *Id.* at 634.
59. *See id.* at 621–22.
60. *Id.* at 621.

Published by University of Oklahoma College of Law Digital Commons, 2020

access to the campus community in the same way as students who were enrolled did.[61] Pursuant to a cooperative agreement, Bluegrass Community and Technical College students, like Doe, could live in the dormitories at the University of Kentucky, access the university's athletics, dining, and health center facilities, and participate in many aspects of campus life, like student government.[62] The agreement also provided a pathway through which students who began their studies at the community college could eventually earn a degree from UK.[63] Further, plaintiff's brief submitted to the Sixth Circuit noted that Doe's dorm room rental agreement required her to follow "the University Student Code of Conduct" and "UK's Policy on Sexual Assault, Stalking, Dating Violence, and Domestic Violence" because Doe was a "member of the University community."[64]

Doe's status as an outsider created a real conundrum for the trial court, which ultimately held that she could not sue the university for its flawed response following her assault. The Eastern District of Kentucky granted the defendant's motion for summary judgment on the grounds that Doe lacked standing to sue[65] but at least appeared to take this question seriously. In fact, the court recognized the importance of this question by holding the case in abeyance and granting the parties the opportunity to conduct limited discovery and submit supplemental briefs.[66] Despite the extra time devoted to this all-important question, the court ultimately did not find for Doe: "Since Plaintiff has failed to show she was either a UK student or enrolled in a UK education program or activity, Plaintiff lacks standing to bring the present action under Title IX, and the Court need not consider Defendant's arguments regarding the first three disciplinary hearings."[67]

Moreover, the district court cited the First Circuit's position in *Doe v. Brown University* as part of its discussion to establish *who* is protected by Title IX but rather than relying on it, quickly dismissed that opinion without much explanation. The court acknowledged that the First Circuit found that "members of the public who avail themselves of university services and participate in university activities, such as libraries, computer labs, campus

61. *See id.*

62. *Id.* at 631–32.

63. *Id.* at 630.

64. Brief of Plaintiff-Appellant, *supra* note 9, at 4–5, 2019 WL 2029708, at *4–5 (internal quotation omitted).

65. *Doe*, 357 F. Supp. 3d at 634.

66. *Id.* at 625.

67. *Id.* at 634.

tours, public lectures, and sporting events, 'are either taking part or trying to take part of a funding recipient institution's educational program or activity.'"[68] But the district court in Kentucky disagreed. The court reasoned that "while some students may utilize the services and participate in the activities described above, the foregoing services and activities are 'not synonymous with "education" as contemplated by Title IX.'"[69]

A handful of federal district courts have similarly denied standing to non-student victims of sexual violence. In *K.T. v. Culver-Stockton College*, a high school soccer recruit sued the school for its handling of her complaint after she was raped on campus.[70] K.T. had been invited to visit the school's campus as part of an "athletic activity" that was "sponsored and promoted by Culver-Stockton College."[71] During her visit to the school, K.T. was sexually assaulted at the Lambda Chi Alpha fraternity house.[72] Although K.T. was not enrolled at the university, she reported the incident to law enforcement and tried to file a complaint under the school's Title IX policy.[73] Despite her report, Culver-Stockton College never commenced an investigation.[74] As a result, K.T. filed a lawsuit against the school predicated on a theory of deliberate indifference under Title IX for its "response to the alleged assault" and its "failure to investigate and provide guidance, counseling and treatment."[75]

The district court found for Culver-Stockton College, holding that K.T. lacked standing to sue the school because she was not enrolled there as a student.[76] In doing so, the court rejected the plaintiff's position that "any person invited to visit a college campus [has] standing to sue for student-on-student harassment under Title IX."[77] The court reasoned that accepting the plaintiff's position "would impermissibly expand the law's scope beyond the limited right of action recognized by the Supreme Court."[78] The

68. *Id.* at 632 (quoting Doe v. Brown Univ., 896 F.3d 127, 132 n.6 (1st Cir. 2018)).

69. *Id.* at 632–33 (quoting Roubideaux v. N.D. Dep't of Corr. & Rehab., 523 F. Supp. 2d 952, 973 (D.N.D. 2007)).

70. K.T. v. Culver-Stockton Coll., No. 4:16-CV-165 CAS, 2016 WL 4243965, at *1 (E.D. Mo. Aug. 11, 2016).

71. *Id.*

72. *Id.*

73. *Id.* at *1–2.

74. *Id.*

75. *Id.* (internal quotation omitted).

76. *Id.* at *6.

77. *Id.*

78. *Id.*

Published by University of Oklahoma College of Law Digital Commons, 2020

case was appealed to the Eighth Circuit Court of Appeals, which affirmed the lower court's opinion and refused to engage the question of standing for a non-student to sue under Title IX.[79]

Though differing factually, another case similarly looked to the language of Title IX to refuse a non-student visitor standing. In *Doe v. Brown University*, a woman who was a student enrolled at another school filed suit against Brown after she was sexually assaulted by three student football players.[80] After meeting at an off-campus bar, the football players allegedly drugged and later sexually assaulted her in a Brown University dormitory.[81] Months after the assault, Jane Doe contacted both Brown University and local law enforcement and attempted to file a complaint under Brown University's Title IX policy on sex discrimination.[82] Brown initially agreed to pursue an investigation into her complaint under the student code but refused to do so under Title IX.[83] As a result, Jane Doe filed a lawsuit, but was ultimately unsuccessful: the district court found in favor of Brown University.[84]

Because the question of non-student standing in a Title IX lawsuit was a question of first impression, the court looked to the legislative history of the act to determine whether a non-student can sue an institution.[85] According to the district court, "Congress intended Title IX to protect against discrimination of students *admitted* to the offending school."[86] Moreover, the court was persuaded by judicial precedent, which has generally reserved Title IX protection for enrolled students of the recipient school. Specifically, the court referenced *Davis v. Monroe County Board of Education,* in which the Supreme Court stated that a school may be liable when its institutional deliberate indifference subjects its students to sex discrimination.[87]

Though the district court acknowledged the seriousness of the allegations of sexual violence on the Brown University campus, the court stopped short of allowing the case to proceed. It reached this "difficult conclusion"

79. K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057 (8th Cir. 2017).

80. Doe v. Brown Univ., 270 F. Supp. 3d 556, 558 (D.R.I. 2017).

81. *Id.*

82. *Id.*

83. *Id.* ("Brown informed her that it never completed the inquiry concerning her assault and abandoned any disciplinary action against the three Brown students.").

84. *Id.* at 564.

85. *Id.* at 561.

86. *Id.*

87. *Id.*

because, in the court's view, "laws put into place to protect students from sexual discrimination in educational programs were not meant to address all instances of sexual assault occurring in the college environment."[88]

On appeal, the First Circuit Court of Appeals affirmed the lower court's ruling.[89] The appeals court was unwilling to consider the issue of standing and instead looked directly at the merits of the case. Here, the First Circuit reached a similar conclusion as did the Eight Circuit in *Culver-Stockton College,* holding that the plaintiff failed to establish a plausible Title IX claim.[90]

B. The Standing Problem

Throughout history, some judges have controversially used the standing doctrine to deny access to the courts to certain minority groups.[91] Victims of sexual violence represent a new addition to this cohort of excluded parties, and this trend should be taken up by other scholars. Unfortunately, federal district courts have barred these victims access based ostensibly on their "outsider" or "non-student" status,[92] and federal appellate courts have been reluctant to take a stand either way—punting the decision-making by refusing to address it head on.[93]

In this way, perhaps the lower court's decision in *Doe v. University of Kentucky* is not all that surprising, considering "the standing doctrine is one of the most widely theorized and criticized doctrines in U.S. law."[94] Scholars have studied the doctrine and expressed widespread critique of its application. One scholar, in particular, has posited that "the standing doctrine is so scattered, so full of divergent contrary opinions and noncommittal dicta, that it resembles less a legal guideline and more a

88. *Id.* at 564.

89. Doe v. Brown Univ., 896 F.3d 127, 128 (1st Cir. 2018).

90. *Id.* at 131. For a discussion on the procedural hurdles facing Title IX plaintiffs who do have standing, see generally Sarah L. Swan, *Procedural Discriminatory Dualism: Title IX and Campus Sexual Assault*, 73 OKLA. L. REV. 69, 76-81 (2020).

91. Coonfield, *supra* note 21, at 122.

92. Brenner, *supra* note 25, at 95 (citing Doe v. Brown Univ., 270 F. Supp. 3d 556, 560 (D.R.I. 2017); K.T. v. Culver-Stockton Coll., No. 4:16-CV-165 CAS, 2016 WL 4243965, at *1 (E.D. Mo. Aug. 11, 2016)).

93. *See, e.g.*, *Doe*, 896 F.3d at 131; *K.T.*, 865 F.3d at 1057. Perhaps the Sixth Circuit Court of Appeals in *Doe v. University of Kentucky* will finally resolve this conundrum.

94. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 591 (2010).

Published by University of Oklahoma College of Law Digital Commons, 2020

Jackson Pollock piece."[95] Consequently, the standing doctrine "means what the viewer brings to it,"[96] which leaves the doctrine vulnerable to far-reaching discretion.

Moreover, standing is relatively easy to define but more difficult to apply. Historically, courts did not use the modern language of standing. Instead, early cases used "common expressions" to determine standing, focusing on whether an injury was "direct" and "redress[able]," whether a party to the suit was "a party in interest," and whether the interest at issue was "'personal' to the plaintiff."[97] Now Article III standing requires an injury-in-fact that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[98] Because of this sprawling and inconsistent case law, what remains in the debate surrounding standing is the "animating principle of inclusion"[99] that lies in the justices' subjective notions as to what standing should govern. In other words, most justices agree on the definition but differ in the analysis, which continues to evolve over time.

As explained by Professor Re, as well as other scholars, standing often devolves into a relativistic inquiry.

> [S]tanding is often made available on a *relative* basis. The frequently critical variable, in other words, is where the particular plaintiff before the court stands as compared with the range of potential plaintiffs capable of raising the same claim for relief. This relativistic inquiry discloses "superior" plaintiffs—that is, plaintiffs with the greatest stake in obtaining the requested remedy. In short, the Court's standing decisions (but not its stated reasons) often adhere to what might be called a "most interested plaintiff rule."[100]

Although non-student victims of sexual assault were not contemplated by this legal scholar in his assessment of relative standing, the phenomenon is ever-present amongst this particular group of plaintiffs. To be sure, the most obvious individuals to bring a private right of action under Title IX

95. Coonfield, *supra* note 21, at 112.

96. *Id.*

97. Ho & Ross, *supra* note 94, at 625.

98. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (internal quotation omitted) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010)).

99. Ho & Ross, *supra* note 94, at 625.

100. Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195–96 (2014).

https://digitalcommons.law.ou.edu/olr/vol73/iss1/3

are enrolled students. But their obviousness does not mean they are the only group of possible plaintiffs. Indeed, college campuses consist of and benefit from a myriad of both insiders and outsiders. The fact that the judiciary prioritizes one group of rape victims over another for purposes of access to the courts suggests that there is an inherent superiority—one that should be dismantled.

Historically, victims of sexual violence have not been treated the same as other crime victims. Victims of sexual violence are routinely disbelieved and often blamed for what happened to them.[101] Indeed, many rape myths proliferate our discourse and culture.[102] Part of the reason why access to the legal system via Title IX or tort law is essential for rape victims stems from the abject failure of the criminal justice system to adequately respond to complaints.[103] Writing about how standing is used to deny access to the courts for other under-represented groups, one observer explains, "Sometimes, bias is harmful and must be pointed out in order for litigants to get a fair shake. The first step toward eliminating the problems caused by the doctrine is to recognize the doctrine is inherently flawed and untenable."[104]

This Article is an important preliminary step toward public recognition of how the denial of standing to non-student victims of sexual violence is not just unfair, but results in the creation of powerful, systemic impediments for victims of sexual violence seeking justice. If the judiciary fails to recognize that the standing doctrine is "[o]ne of the greatest tools at a judge's workbench that allows them to avoid issuing a controversial ruling on the merits" then its search for justice will be frustrated.[105] In order to effectively address the issues that plague modern society, courts must decide cases on their merits and overcome "political and personal

101. Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner.

102. *See, e.g.*, Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOL. WOMEN Q. 133, 134 (1994); Katie M. Edwards et al., *Rape Myths: History, Individual and Institution-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 763–68 (2011).

103. It is also true that the criminal law provides a limited remedy to victims of sexual violence and access to the civil system of justice opens up other avenues of redress (i.e., monetary and injunctive relief).

104. Coonfield, *supra* note 21, at 112.

105. *Id.* at 101.

Published by University of Oklahoma College of Law Digital Commons, 2020

pressures" preventing these important cases from "being decided unjustly—or not decided at all."[106]

Conclusion

Prisons and the military are quintessential examples of closed institutions. If colleges and universities were quintessential closed institutions, they would not depend on or invite outside participation to carry out their mission. As discussed in Part I, one of the significant characteristics of higher education that argues for its characterization as *quasi-closed* is the reliance on outsiders for it to thrive as designed.[107] Students benefit from guest lecturers, exchanges with students from other schools, and the expertise of visitors from other countries. Meanwhile, faculty members give presentations on their books and share their latest research to the broader community. Although colleges and universities are bound by their own unique rules and norms and exist somewhat like communities within a broader community, they require a steady stream of outsiders to meet their stated educational objectives.

One can only speculate why the University of Kentucky extended access to its residence halls to non-students. Perhaps the motivation was largely financial. If the university has dormitory rooms available that are not used by current students, it derives a financial benefit from renting them rather than letting them sit open. This is but one example of how financial considerations drive open the campus doors to outsiders.

There is also an additional consideration that the residence hall arrangement allows for a connection to the university from students enrolled in community college courses. Those students may be more likely to select UK as their four-year school of choice rather than transferring elsewhere. In fact, there exists a pipeline program from community college to UK that encourages this trajectory. Creating distinctions between students and non-students for purposes of the protections of Title IX amounts to nothing more than arbitrary line-drawing with no legitimate explanation other than to avoid liability. The line may well need to be drawn somewhere, but the student/non-student distinction does not adequately address the nexus between an individual and the institution. Is a community college student who lives in the UK dormitory with a roommate

106. *Id. See generally* Erin Sheley, *Victim Impact Statements and Corporate Sex Crimes*, 73 OKLA. L. REV. 209, 216–17 (2020).

107. *See supra* Part I.

who is officially enrolled at the school any less connected to the school for purposes of Title IX protection?

These judicial opinions reflect a larger, and more dangerous, trend of judges avoiding "politically controversial or inconvenient questions of law" by using the standing doctrine.[108] This trend in Title IX cases is continuing. In the days before this article went to press, yet another court dismissed a case brought by a non-student rape victim against a university on grounds that she lacked standing. In *Arocho v. Ohio University*, a high school student attended a "career day" program at her high school where she met an Ohio University police officer who was participating in the program.[109] The student alleged that following their introduction, the officer raped her on numerous occasions including on the Ohio University campus.[110] After the university refused to investigate or otherwise address the victim's complaint, she filed suit under Title IX, alleging the school acted with deliberate indifference toward her report of rape.[111] In the final part of its opinion, the court conceded that the plaintiff's allegations were "horrendous" but nonetheless dismissed the case, denying her standing based on her non-student status.[112] It is likely that similar cases involving non-students will continue to make their way through the courts as long as universities and colleges continue to include outsiders in campus life.

One of the goals of Title IX is to maintain safety on campuses and ensure that students are guaranteed access to education.[113] These goals, which are inherently intertwined, cannot effectively be met when schools arbitrarily choose whom they should and should not protect. A university educates students in the classroom, to be sure, but the reach and breadth of its educational mission goes far beyond those four walls, and so too should its protections. A student living in the residence halls, exercising in the facilities, and using student services can reasonably be construed to be participating in the "programs and activities" of the school. Perhaps rather than drawing a line between students and non-students, the courts should

108. Coonfield, *supra* note 21, at 102.

109. Arocho v. Ohio Univ., No. 2:19-CV-4766, 2020 WL 3469223, at *1 (S.D. Ohio June 25, 2020).

110. *Id.*

111. *Id.* at *1–2.

112. *Id.* at *5.

113. Even if broadly applied, Title IX is not a perfect solution to address the widespread problem of campus sexual assault and other options may better serve the desired end. *See, e.g.*, Corey Rayburn Yung, *Is Relying on Title IX a Mistake?*, 64 U. KAN. L. REV. 891, 911–12 (2016).

Published by University of Oklahoma College of Law Digital Commons, 2020

develop an objective test to evaluate whether and when a non-student is sufficiently engaged with a school to trigger the protections of Title IX.[114] Students may have an obvious nexus to the school but so too do other non-students who actively participate in aspects of campus life.

If on appeal the Sixth Circuit ultimately denies Jane Doe the opportunity to sue the University of Kentucky for mishandling her rape case under Title IX, the net effect will be to give schools a path to avoid liability whenever non-students are sexually assaulted. Protecting some of the people on campus but not all of those who are engaged in campus programs and activities does not lead to safer campus communities. It may also function in practice to give perpetrators a free pass to choose their sexual assault victims wisely since institutions will have little incentive to follow through with investigations related to sexual assaults perpetrated against non-students. An individual who assaults a non-student who happens to be living in the residence halls, or be attending a campus event may not face institutional accountability and will likely be free to continue on with their education without consequence. Meanwhile, the campus is no safer. Title IX jurisprudence should evolve to better respond to the realities of campus rape.

114. While beyond the scope of this Article, I will pursue this idea in a subsequent project.